

CAN THE COMMON LAW ADJUDICATE HISTORICAL SUFFERING?

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[The case of South Australia v Lampard-Trevorror opens up key questions about the capacity and willingness of the common law to adjudicate past acts of the state. This article considers the significance of the appeal decision by examining what distinguishes the case from past, unsuccessful claims and considers its implications for future claimants from the Stolen Generations. In addition, we consider what the case means in terms of the law's acceptance of a practice of historical and evidential interpretation that is different from previous cases, and how this is particularly important regarding the issue of parental consent. We argue that the role and interpretation of consent have broad ramifications for law's potential to adjudicate responsibility for historical harms. We also argue that the findings in relation to false imprisonment and fiduciary duty limit the potential of the Trevorror cases. In particular, we examine, and lament, the Full Court's more limited reading of false imprisonment in contrast to the trial judgment.]

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I INTRODUCTION

The case of *South Australia v Lampard-Trevorrow* ('*Lampard-Trevorrow*')¹ opens up key questions about the capacity and willingness of the common law to adjudicate past acts of the state. In *Lampard-Trevorrow*, the Full Court of the Supreme Court of South Australia dismissed the State's appeal against the decision of Gray J in *Trevorrow v South Australia [No 5]* ('*Trevorrow*'),² which awarded Bruce Trevorrow damages against the government for his removal from his family as an infant, making him the first member of the Stolen Generations to successfully claim.³ This article considers the significance of the appeal decision by examining what distinguishes the case from past, unsuccessful claims and considers too its implications for future claimants from the Stolen Generations. In addition, we consider what the case means in terms of the law's acceptance of a practice of historical and evidential interpretation that is different from previous cases and how this is particularly important regarding the issue of parental consent. We argue that the role and interpretation of consent have broad ramifications for law's potential to adjudicate responsibility for historical harms suffered by members of the Stolen Generations.

There has been significant criticism of the ways in which courts have interpreted the operation of state power in relation to the Stolen Generations, with courts essentially distancing specific acts of state actors from the context of Stolen Generations policy.⁴ This practice has arisen in a number of ways in

¹ (2010) 106 SASR 331.

² (2007) 98 SASR 136.

³ Note, however, that in *Lampard-Trevorrow* the Full Court reversed two of the trial judge's findings: first, it found there was no false imprisonment in the circumstances: (2010) 106 SASR 331, 396 [307] (Doyle CJ, Duggan and White JJ); and second, it found that no fiduciary duty was owed to Bruce Trevorrow: at 401–3 [335]–[347].

⁴ See, eg, Ann Genovese, 'Metaphor of Redemption, Myths of State: Historical Accountability in Lührmann's *Australia* and *Trevorrow v South Australia*' (2011) 20 *Griffith Law Review* 67, 71; Pam O'Connor, 'History on Trial: *Cubillo and Gunner v The Commonwealth of Australia*' (2001) 26 *Alternative Law Journal* 27, 30. See also 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); Robert van Krieken 'Is As-

the cases, through the courts' evaluation of both legal and factual issues. *Trevorrow* and *Lampard-Trevorrow* ('*Trevorrow* cases') signify a break in the law's seeming incapacity to adjudicate historical suffering. This break raises the possibility that the common law has now become a site available for the redress of historical injuries suffered by members of the Stolen Generations and gives rise to a number of important questions: How exceptional are the *Trevorrow* cases? To what degree does *Lampard-Trevorrow* open up hope for a new class of claimants? Is the common law now a significant site for the adjudication of these important, enduring harms? Here, we explore the implications of the case for the common law's role in the future adjudication of historical harms. We argue that, in some ways, *Lampard-Trevorrow* opens doors for claimants, given the Full Court's interpretation of the documentary record and its reading of the legislative framework under which Bruce Trevorrow was removed from his parents. In other ways, the case closes doors for claimants, first because of the Court's unwillingness to find false imprisonment or a breach of fiduciary duty arising from the facts, and second because, while the Court criticises the interpretation of parental consent in past cases, the success of the claim nevertheless relies on proof of the absence of consent.

The purpose of this article is to explore the *Trevorrow* cases and offer some insight into the implications for the common law's potential to adjudicate historical injuries. The article is divided into four substantive parts. Following the Introduction, Part II provides the context for the *Trevorrow* cases, including a summary of past cases, a description of the different statutory frameworks that were in issue, and consideration of the impact of these specificities on the outcomes in the *Trevorrow* cases. Part III provides a critical commentary on the appeal decision. Here, we consider the key findings of the appeal regarding liability for negligence and misfeasance in public office, the duty to accord procedural fairness, the discretion to grant an extension of time, and the tort of false imprisonment and breach of fiduciary duty. We argue that the findings in relation to false imprisonment and fiduciary duty limit the potential of the *Trevorrow* cases. In particular, we examine, and lament, the Full Court's more limited reading of false imprisonment in contrast to the trial judgment. We argue that this cause of action is, first, a more fitting analogy for claims that arise out of the circumstances of the Stolen Generations in comparison to other categories. Second, it is a category that would allow the law to adjudicate a wider range of claims, and so allow

the law a greater role in the adjudication of responsibility for historical injuries, since the evidentiary burden that make these claims so difficult for claimants in this area is reversed in the case of false imprisonment. We also critique the failure of the Full Court to find that there was a fiduciary duty on the part of the State, due to an overly strict interpretation of the scope of fiduciary duties. Part IV examines what we consider to be the key interventions of the *Trevorrow* cases in the history of the common law's adjudication of claims relating to the Stolen Generations. In this respect, the Court, at trial and on appeal, demonstrates a willingness to examine evidence critically and contextually (including a critical examination of standards in operation at the time the policies were administered) and a willingness to decide questions of responsibility regarding past acts of the state. Both these practices of interpretation signify a break from previous litigation in this area and augur some potential for an expansion of the common law's role in the future. Finally, Part V examines what we consider to be one of the main limitations of the adjudication of these historical injuries at common law, namely the presence of problematic 'myths' concerning parental consent, which not only determine the nature of 'good' and 'bad' litigants, but which also reinforce false and harmful narratives about the operation of power. As a result of Stolen Generations policy, and the courts' interpretation of the statutory regimes that gave effect to this policy, consent has become a 'myth of the state', one of the 'stories that ... normalised state intervention yet at the same time ignored the subjectivity and experience of Indigenous peoples altogether.'⁵

We conclude that there may be some capacity for the common law to redress historical harms, especially if courts in the future adopt the practices of interpretation from the *Trevorrow* cases regarding the significance of past policy and evidence. However, this potential needs to be balanced against the weight of precedent, where the law has distanced itself from the role of adjudicating historical wrongs of the state. In some ways, the key issue now concerns the willingness of the common law to adjudicate historical suffering, and how these possibilities are constrained by precedent. These points naturally raise the normative question of whether the law *should* become a dominant site for the adjudication of historical injuries — the injuries of colonisation. A number of people have commented on this question, one concluding that '[l]itigation is a poor forum for judging the big picture of history.'⁶ The Report of the National Inquiry into the Separation of Aboriginal

⁵ Genovese, above n 4, 74.

⁶ O'Connor, above n 4, 30. See also Cunneen and Grix, above n 4; van Krieken, above n 4.

and Torres Strait Islander Children from Their Families, *Bringing Them Home*, recommended that a reparations scheme be adopted to deal with compensation arising from harms suffered by the Stolen Generations.⁷ The advantage of the reparations approach is that it could respond not only by providing compensation that avoids the limitations and vagaries of litigation, thus administering a fairer form of redress and saving survivors from unnecessary further trauma, but also by including apologies, acknowledgements and guarantees that such policies will never be repeated⁸ — discursive responses that matter. Such a solution could also redress the problematic myths and narratives that are part of common law history regarding the Stolen Generations cases, including the narrative concerning parental consent. A reparations scheme would provide the opportunity for a freer narrative response to the harms, providing for compensation in conjunction with statements that acknowledge the harms of history, as well as the historical and contemporary complicity of law and society, without relying on the problematic myths that are still part of common law adjudication.

II THE CONTEXT OF *LAMPARD-TREVORROW* IN RELATION TO PREVIOUS STOLEN GENERATIONS LITIGATION

In many ways, Gray J's judgment in *Trevorrow* (and the appeal that followed it) signified a 'markedly different ... approach and outcome to what came before it'.⁹ At the same time, as Antonio Buti has pointed out, the distinctive nature of the factual and legal basis of the decision, including that it was based on an 'ideal plaintiff', may limit its potential.¹⁰ In this section, we briefly summarise the facts of the case, and compare them to earlier Stolen Generations litigation, as well as the relevant statutory frameworks considered in each case. The motivating questions of this section are: to what extent are the factual circumstances and statutory framework of *Trevorrow* exceptional? To what extent is the favourable outcome due to the case's specificities, as opposed to changes in the common law's approach to questions of law, fact

⁷ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 308–9 ('*Bringing Them Home Report*'). See also Andrea Durbach, 'Repairing the Damage: Achieving Reparations for the Stolen Generations' (2002) 27 *Alternative Law Journal* 262.

⁸ *Bringing Them Home Report*, above n 7, 282.

⁹ Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32 *Melbourne University Law Review* 382, 383.

¹⁰ *Ibid* 420.

and policy, to questions of responsibility for past actions, and acts of the state? And of particular pertinence to our organising question, what does this mean for the future capacity of the common law to redress these historical injuries?

In *Kruger v Commonwealth* ('*Kruger*'),¹¹ nine Aboriginal claimants argued the constitutional invalidity of the *Aboriginals Ordinance 1918* (NT), which purportedly authorised the removal of Aboriginal and 'half-caste' children, and also argued that this cause of action gave rise to damages for breach of express and implied constitutional rights.¹² The majority of the High Court held that the Ordinance did not contravene s 116 of the *Constitution* (freedom of religion),¹³ was valid under s 122 of the *Constitution*¹⁴ and did not breach any implied right to freedom of movement and association¹⁵ or equality.¹⁶ The High Court rejected claims that the Ordinance was enacted for the purposes of genocide, finding instead that the actions it authorised were to be performed in the best interests of the Aboriginal people concerned, rather than with an intent to destroy their racial group, in whole or in part.¹⁷ Further, the Ordinance did not violate any novel implied constitutional guarantees or prohibitions,¹⁸ and, regardless, breach of a constitutional right did not give rise to a novel cause of action in damages outside contract or tort.¹⁹ A majority did not consider whether the *Constitution* would allow genocidal

¹¹ (1997) 190 CLR 1.

¹² *Aboriginals Ordinance 1918* (NT) s 6 gave power to the Chief Protector (and under regulations made pursuant to s 67, all Protectors) to undertake the care, custody or control of Aboriginal people where it was in their best interests. Section 7 made the Chief Protector the legal guardian of every Aboriginal person and every 'half-caste' child. Section 16 gave powers to the Chief Protector to remove any Aboriginal or 'half-caste' to an institution or Aboriginal reserve.

¹³ *Kruger* (1997) 190 CLR 1, 40 (Brennan CJ), 60–1 (Dawson J), 85–6 (Toohey J), 166–7 (Gummow J); cf at 134 (Gaudron J).

¹⁴ *Ibid* 41 (Brennan CJ), 53 (Dawson J), 79 (Toohey J), 104 (Gaudron J), 141 (McHugh J), 167 (Gummow J).

¹⁵ *Ibid* 45 (Brennan CJ), 70 (Dawson J), 142 (McHugh J), 157 (Gummow J); *contra* at 121, 126, 129–30 (Gaudron J); cf at 93 (Toohey J).

¹⁶ *Ibid* 44–5 (Brennan CJ), 68 (Dawson J), 114 (Gaudron J), 142 (McHugh J), 155 (Gummow J); cf at 97 (Toohey J).

¹⁷ *Ibid* 70–1 (Dawson J), 88 (Toohey J), 107 (Gaudron J), 144 (McHugh J), 159 (Gummow J).

¹⁸ See above nn 15–16.

¹⁹ *Ibid* 46 (Brennan CJ), 93 (Toohey J), 125–6 (Gaudron J). Justices Dawson, McHugh and Gummow did not decide the point.

legislation to be enacted, leaving this question open for future litigation.²⁰ The decision also left open the possibility for damages to be awarded for the misuse of powers under the Ordinance,²¹ the Court emphasising that such misuse must be judged by the standards of the time and not by contemporary standards.²²

This possibility was taken up by the applicants in *Cubillo v Commonwealth [No 2]* (*'Cubillo (Trial)'*).²³ Here, the Federal Court considered the same legislation as in *Kruger*. The applicants were Lorna Cubillo and Peter Gunner. Lorna Cubillo was born in 1938. At the age of nine she was forcibly removed by the Aborigines Inland Mission and the Native Affairs Branch to the Retta Dixon Home in Darwin, where she remained until she was 18 years old.²⁴ Peter Gunner was born in 1948 on a pastoral station and was removed in 1956 when he was about seven years old to St Mary's Church of England Hostel in Alice Springs. He remained there until he was 16 years of age.²⁵ Before Peter Gunner was removed, the trial judge described him as being part of 'a happy, healthy Aboriginal community and environment' at Utopia Station.²⁶ The applicants claimed that, in their removal, the Commonwealth (through its agent, the Director of Native Affairs, by virtue of the doctrine of vicarious liability) committed the torts of negligence, false imprisonment and breach of statutory duty, and also breached its fiduciary duties. The Federal Court rejected the Commonwealth's strike-out application,²⁷ but decided against the plaintiffs on the merits of the case.²⁸ Among other findings, O'Loughlin J held there was insufficient evidence of a policy or practice of indiscriminate removal,²⁹ and no genocidal intent in either the legislation or its implementation by the Director of Native Affairs and others.³⁰ The Full Court of the

²⁰ But see *ibid* 107, where Gaudron J suggested that the grant of legislative power in s 122 of the *Constitution* did not 'extend to laws authorising gross violations of human rights and dignity contrary to the established principles of the common law.'

²¹ *Ibid* 36 (Brennan CJ).

²² *Ibid* 36–7 (Brennan CJ), 52–3 (Dawson J).

²³ (2000) 103 FCR 1. A number of aspects favourable to the applicants were reversed on appeal, but all adverse findings were affirmed: *Cubillo v Commonwealth* (2001) 112 FCR 455 (*'Cubillo (Appeal)'*).

²⁴ *Cubillo (Trial)* (2002) 103 FCR 1, 13–14 [6]–[10] (O'Loughlin J).

²⁵ See generally *ibid* 14 [12]–[13].

²⁶ *Ibid* 239 [769].

²⁷ *Cubillo v Commonwealth* (1999) 89 FCR 528, 598–9 [203] (O'Loughlin J).

²⁸ *Cubillo (Trial)* (2000) 103 FCR 1, 483 [1563] (O'Loughlin J).

²⁹ *Ibid* 103–8 [301]–[321]; 358 [1159]–[1160].

³⁰ *Ibid* 483 [1561].

Federal Court dismissed the appeal,³¹ and the plaintiffs were denied leave to appeal to the High Court.³²

In *Williams v Minister, Aboriginal Land Rights Act 1983* ('*Williams (Trial)*')³³ Joy Williams was removed immediately after her mother had given birth to her and stayed in children's homes until she was 18 years old. She was removed under s 7(2) of the *Aborigines Protection Act 1909* (NSW), which gave the Aborigines Welfare Board ('AWB') the power to take a child under circumstances where the mother consented. Williams claimed that the removal caused her physical and psychological harm and she brought a number of claims, including breach of common law duty of care, breach of statutory duty, breach of fiduciary duty and false imprisonment.³⁴ The trial and appeal judgments of the Supreme Court of New South Wales found that Williams' removal was lawful given that her mother had given consent; the removal was in accordance with the AWB's statutory duty; the removal was for the purpose of improving the prospects of Williams;³⁵ and no common law duty of care arose because this would 'cut across the whole statutory system for the protection of Aboriginal children,' opening the gates of litigation too widely.³⁶

Questions of consent and negligence were examined again in the *Trevorrow* cases, with very different outcomes. On 25 December 1957, 13-month-old Bruce Trevorrow was taken to the Children's Hospital in Adelaide, suffering from a stomach complaint. Upon his discharge, and without the knowledge or consent of his parents, the Aborigines Protection Board ('APB') placed him with a foster family. For the following 10 years, he stayed with this family, during which time his mother unsuccessfully requested his return. In 1967, he returned to live with her, however, within one year he was placed in a boy's home, where he periodically remained until he turned 18.³⁷ Trevorrow claimed that this separation from his natural family and the manner in which he was returned to his mother contributed to mental and physical health

³¹ *Cubillo (Appeal)* (2001) 112 FCR 455, 579 [473] (Sackville, Weinberg and Hely JJ).

³² Transcript of Proceedings, *Cubillo v Commonwealth* (High Court of Australia, D10/2011 Gleeson CJ and McHugh J, 3 May 2002).

³³ (1999) 25 Fam LR 86.

³⁴ *Ibid* 87–90 [6]–[23] (Abadee J).

³⁵ *Ibid* 92 [32], *affd Williams v Minister Aboriginal Land Rights Act 1983* [2000] Aust Torts Reports ¶81-578, 64 147–8 [58] (Heydon JA) ('*Williams (Appeal)*').

³⁶ *Williams (Trial)* (1999) 25 Fam LR 86, 249 [775] (Abadee J); *Williams (Appeal)* [2000] Aust Torts Reports ¶81-578, 64 176 [160] (Heydon JA).

³⁷ *Trevorrow* (2007) SASR 136, 171–201 [92]–[259] (Gray J).

problems and a loss of cultural identity that continued throughout his adult life. He brought his case against the State of South Australia on the grounds of misfeasance in public office, negligence, false imprisonment and breach of fiduciary duties, causes of action in respect of which the State denied any liability.³⁸ Trevorrow also sought relief through damages and declarations.³⁹ At trial, Gray J awarded \$525 000 in damages. Of this amount, \$75 000 was awarded as exemplary damages in respect of misfeasance in public office and false imprisonment, the State having acted *ultra vires*, cognisant of the unlawfulness of Trevorrow's removal from his parents.⁴⁰

The trial judgment includes a detailed overview of the statutory framework applicable to Bruce Trevorrow's removal.⁴¹ Justice Gray found that the legislative scheme applicable, covering moments of the plaintiff's removal, placement and return, comprised the *Aborigines Act 1934–1939* (SA), the *Maintenance Act 1926–1937* (SA) and the *Children's Protection Act 1936* (SA). Central to the framework was s 10 of the *Aborigines Act*, which provided that the APB was the legal guardian of every Aboriginal child, notwithstanding that any such child had a living parent or other relative. The duties arising out of s 10 were set out in s 7. Justice Gray explained the key question as follows:

The question for determination in these proceedings is not whether such a policy [of removing Aboriginal children from their families] existed, nor whether such a policy was lawful. ... [It is whether] the State was bound to act in accordance with the terms of the relevant legislative scheme and in accordance with its fiduciary and other duties owed to the plaintiff and that, in breach of those requirements, it failed to do so.⁴²

Accordingly, the organising legal question in *Trevorrow* differed from those questions considered in earlier Stolen Generations litigation, as it did not raise questions about the existence or lawfulness of a wider policy — the relevant question was much more limited, 'more precise'.⁴³ One of the central issues was the nature of powers and duties that arose from the phrase 'legal guardian' — whether, as the State contended, the APB's role and responsibility as legal guardian of every child pursuant to s 10 of the *Aborigines Act* meant

³⁸ *Ibid* 335–6 [964].

³⁹ *Ibid* 374 [1141].

⁴⁰ *Ibid* 393 [1239].

⁴¹ See *ibid* 216–49 [331]–[492].

⁴² *Ibid* 239 [431].

⁴³ Genovese, above n 4, 82.

that the APB was empowered to take any steps necessary to execute its duties, including the unrestricted power to remove an Aboriginal child from their parents.⁴⁴ Justice Gray found that s 10 did not abrogate common law rights of parents, given the absence of the manifestation in express words by Parliament of a clear intention to do so.⁴⁵ Following an analysis of the purpose of the legislation, Gray J concluded that s 10 did not give the APB the power to foster an Aboriginal child without the consent of the child's parents.⁴⁶ Buti argues that the Court

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.⁴⁷

The significance of the specific legislative framework to the outcome leads Buti to argue that the decision may not have much impact beyond Bruce Trevorrow's individual circumstances.⁴⁸

Another significant distinction is the different characterisation of vicarious liability in *Trevorrow* from earlier cases. A threshold question in *Lampard-Trevorrow* and *Cubillo (Appeal)* was whether the State and Commonwealth respectively could be held liable for the acts of their officials. In terms of vicarious liability, in *Cubillo (Appeal)*, the Court approved trial judge O'Loughlin J's invocation of the 'independent discretion rule' to prohibit imputing legal liability to the Commonwealth or the responsible Minister for breaches of guardianship duties by the Chief Protector of Aborigines.⁴⁹ The Commonwealth was accordingly held not to be vicariously responsible and therefore not liable for the acts of its employees, who exercised independent discretion in fulfilling their public duties.⁵⁰ This approach to examining the liability of the Crown by reinforcing the 'protected position of governments' in litigation has been subject to criticism.⁵¹

⁴⁴ *Trevorrow* (2007) SASR 136, 239 [433] (Gray J).

⁴⁵ *Ibid* 244 [455]–[457].

⁴⁶ *Ibid* 248 [483].

⁴⁷ Buti, above n 9, 413.

⁴⁸ *Ibid*.

⁴⁹ *Cubillo (Appeal)* (2001) 112 FCR 455, 529–31 [288]–[292] (Sackville, Weinberg and Hely JJ).

⁵⁰ *Ibid* 531 [294].

⁵¹ See, eg, Paul Finn and Kathryn Jane Smith, "The Citizen, the Government and "Reasonable Expectations"" (1992) 66 *Australian Law Journal* 139, 145. See also van Krieken, above n 4, 244.

In contrast, in *Trevorrow*, although the ‘independent discretion rule’ had been abrogated by statute, it has been noted that the tone of Gray J’s judgment would nonetheless indicate a strong judicial reluctance to countenance the State evading liability through the application of this rule.⁵² Justice Gray accordingly found that the State was liable for the conduct of the APB or its Secretary.⁵³ Similarly, in *Lampard-Trevorrow*, the Court found the APB to be an emanation of the State because it ‘acted for the benefit of the public and of the State’.⁵⁴ As the body that facilitated and funded the removal of Aboriginal children, the State was responsible for the acts of its officials in removing Trevorrow from his family. The Full Court accordingly upheld Gray J’s finding that the State is vicariously liable for the Secretary or APB’s tort of misfeasance in public office.⁵⁵

Furthermore, the evidence available worked in Bruce Trevorrow’s favour: legislation, as well as medical and departmental records, supported his claims of breach, and that there were limits to the State’s power.⁵⁶ At trial, Gray J made a number of findings based on the oral evidence of Trevorrow’s siblings and half-siblings and the State’s own medical and departmental records.⁵⁷ In contrast, much of the written record was missing by the time of the trials of *Cubillo* and *Williams*.⁵⁸ However, as Buti points out, it is not as though the plaintiffs in *Cubillo* and *Williams* did not have oral and documentary evidence to support their claims — rather, ‘the courts simply found the evidence presented by the state to be more persuasive’.⁵⁹

While it is true that there was a greater volume of evidence available for the Court to consider in *Trevorrow*, including a significant state archive, *Trevorrow* represents a change in judicial practices of interpreting historical evidence, as well as the ways in which this evidence is to be used in determining the various causes of action that arise. As we discuss below, these issues of law and interpretation of historical record are intimately linked, and these

⁵² Buti, above n 9, 397.

⁵³ *Trevorrow* (2007) 98 SASR 136, 257 [525].

⁵⁴ *Lampard-Trevorrow* (2010) 106 SASR 331, 390 [275] (Doyle CJ, Duggan and White JJ).

⁵⁵ *Ibid.*

⁵⁶ See *Trevorrow* (2007) 98 SASR 136, 216–39 [331]–[431] (legislation), 208 [292]–[295] (medical records), 336 [968]–[970] (departmental records). See also Buti, above n 9, 416.

⁵⁷ See *Trevorrow* (2007) 98 SASR 136, 304 [826]; Buti, above n 9, 406.

⁵⁸ *Cubillo (Trial)* (2000) 103 FCR 1, 148 [442] (O’Loughlin J); *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, 506–7 (Kirby P). See also Cunneen and Grix, above n 4, 27.

⁵⁹ Buti, above n 9, 416.

changes imply that *Trevorrow* has significance beyond its factual and legal specificities. First and most significantly, the Court had a different approach to the historical record. Second, the Court took a different approach to the legal categories involved in the claim as compared to earlier claims, interpreting them in the context of historical injuries arising out of the Stolen Generations. Third, the Court took a different, and critical, approach to the contemporary standards in place at the time of the implementation of the policy, in contrast to earlier cases; it also found that present standards were relevant in evaluating certain aspects of the case. We would argue that the case's innovations cannot be limited to its particular legal-factual matrix, primarily because they introduce methods of interpretation that open up new relationships between the law on one hand, and responsibility and the historical record on the other. In the following section, we examine each of the elements of the appeal, comparing it to the trial judgment and previous litigation in relation to the Stolen Generations. For each element, we pay particular attention to the interpretation of the historical record, the role of consent and the significance of the statutory regimes at issue.

III ISSUES ON APPEAL

A *The State's Liability for Misfeasance*

Trevorrow was the first case in which a Stolen Generations litigant argued the tort of misfeasance in public office.⁶⁰ The Full Court in *Lampard-Trevorrow* was required to re-examine whether the State was liable for this tort in respect of *Trevorrow's* removal. The authorities of *Northern Territory v Mengel*⁶¹ and *Sanders v Snell*⁶² define this tort to include acts by a public officer that he or she knows to be beyond his or her power and involve a foreseeable risk of harm.⁶³ For the purposes of the tort of misfeasance in public office, the APB and its Secretary were both found to be such officers exercising public powers pursuant to the public interest.⁶⁴ The APB had also been advised by the Crown Solicitor of the limits of its legal authority to remove Aboriginal

⁶⁰ *Ibid* 400.

⁶¹ (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

⁶² (1998) 196 CLR 329, 345 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁶³ *Trevorrow* (2007) 98 SASR 136, 338 [977], *affd Lampard-Trevorrow* (2010) 106 SASR 331, 388 [263] (Doyle CJ, Duggan and White JJ).

⁶⁴ *Lampard-Trevorrow* (2010) 106 SASR 331, 388 [265] (Doyle CJ, Duggan and White JJ). See *Trevorrow* (2007) 98 SASR 136, 338 [980] (Gray J).

children from their parents. In promoting its policy of removal, the APB was therefore found to have been generally cognisant that it was acting *ultra vires*. The Court accordingly found that the APB knew that it had no authority to remove Trevorrow without the necessary parental consent.⁶⁵

B False Imprisonment

False imprisonment is committed when someone ‘directly subjects another to total deprivation of freedom of movement without lawful justification’.⁶⁶ It is a powerful avenue for Stolen Generations litigants because it does not depend on the government acting negligently or breaching a statute. Rather, it arises because the plaintiff has had his or her liberty restricted. The potential for a successful claim in false imprisonment was demonstrated in the trial judgment of *Cubillo*, where the Court found that Lorna Cubillo had a prima facie case against the Director of Native Affairs for false imprisonment. However, the claim failed because the Commonwealth was held not to be vicariously liable for the Director’s actions.⁶⁷ Again in the trial judgment of *Trevorrow*, false imprisonment was made out based on a reading of the common law requirements in UK jurisprudence.⁶⁸

However, the Full Court of the South Australian Supreme Court in *Lampard-Trevorrow* overturned this finding through a narrow reading of ‘imprisonment’, in a way that was anomalous to the contextual approach it took to other aspects of its reasoning. To begin with, the Court held that, based on the cases of *Meering v Grahame-White Aviation Co Ltd*⁶⁹ and *Murray v Ministry of Defence*⁷⁰ it was not necessary to establish the detainee’s awareness of his or her detention, nor his or her physical capacity to exercise freedom of movement.⁷¹ To determine whether Trevorrow had been subjected to false imprisonment, the Court asked whether he was subject to a total deprivation of freedom of movement in the absence of lawful authority. The Court reasoned

⁶⁵ *Trevorrow* (2007) 98 SASR 135, 338 [978] (Gray J), affd *Lampard-Trevorrow* (2010) 106 SASR 331, 390 [275] (Doyle CJ, Duggan and White JJ).

⁶⁶ *Trevorrow* (2007) 98 SASR 135, 338–9 [982] (Gray J), affd *Lampard-Trevorrow* (2010) 106 SASR 331, 391 [277] (Doyle CJ, Duggan and White JJ).

⁶⁷ *Cubillo (Trial)* (2000) 103 FCR 1, 360 [1167] (O’Loughlin J).

⁶⁸ *Trevorrow* (2007) 98 SASR 136, 340–3 [987]–[993] (Gray J).

⁶⁹ (1920) 122 LT NS 44, 53–4 (Atkin LJ).

⁷⁰ [1988] 1 WLR 692, 701 (Lord Griffiths).

⁷¹ *Lampard-Trevorrow* (2010) 106 SASR 331, 392–3 [290]–[292] (Doyle CJ, Duggan and White JJ).

that the element of total restraint was not made out in the present case, as any restraint during Trevorrow's placement with the foster family was attributable to his young age and the family's ensuing obligation to care for him. While in foster care, Trevorrow experienced freedom of movement equal to that of other children of a like age, subject only to normal restrictions placed on children.⁷² The Court accordingly reversed Gray J's finding of liability for wrongful detention.

The Court found that the care and protection given by the carer of a child is not a deprivation of the child's liberty. The Full Court reasoned that Bruce Trevorrow 'was able to move about (once he reached a certain age) as he wished, subject only to the normal limits placed on children' and was 'not imprisoned within a defined area' by his foster parents beyond the normal control of parents.⁷³ The Bench stated:

It might be added that if this is a case of total restraint or total deprivation of freedom of movement, then all small children are, as a matter of fact, equally subject to the same restraint. ... Bruce Trevorrow, when fostered by Mrs Davies, had the same freedom of movement, or absence of freedom as the case may be, as other children of a like age.⁷⁴

However, this is a very narrow and artificial reading of freedom of movement — one in which the Court is not comparing like circumstances with like. The issue should not have been whether, once handed over to the foster parents, those parents restrained Bruce Trevorrow in a way that was unusual for a small child to be restrained. After all, a kidnapper could also set a child up in a house and treat them as any other child might be kept, but this does not take away from the fact that there has been an initial act of kidnapping, and a continuing act of restraint — it is the characterisation of the act of removal, and not the quality of after-care, which should matter to a legal interpretation. Rather, the issue should have been whether the removal itself could be interpreted as an act of restraint. The Court did not appreciate that non-Aboriginal children of Bruce Trevorrow's age would have had the freedom to be with their parents. The Court drew unfitting analogies with restraint in childcare centres, stating that '[m]ost childcare centres have substantial fences and a gate that children cannot open'.⁷⁵ In this acontextual

⁷² Ibid 392 [285].

⁷³ Ibid 391–2 [284].

⁷⁴ Ibid 392 [285].

⁷⁵ Ibid 394 [298].

reading, the Court was not addressing the liberty denied to Bruce Trevorrow to be with his parents due to the policy of Aboriginal child removal. In other words, an Aboriginal child's forcible restraint from his or her parents and against his or her parents' wishes was regarded as the same as a non-Aboriginal child who lived with his or her parents and was not subject to the Stolen Generations policy. As discussed below, the Court in *Lampard-Trevorrow* explicitly acknowledged the problems with consent and this had legal effect. However, the Court stopped short of recognising that non-consent to removal might be a form of restraint on the child, that is, a restraint from being with his or her parents.

C Breach of Fiduciary Duty

The Court further considered whether the APB's failure to inform Trevorrow of the unlawfulness of his removal and provide him with access to legal advice constituted a breach of fiduciary duty. In previous Stolen Generations cases, arguments contending breaches of fiduciary duty had largely not been successful. In *Williams (Trial)*, Abadee J denied a fiduciary claim similar to that in *Lampard-Trevorrow*, reasoning that the protection of non-economic interests, such as duties of guardianship, could not be warranted under Australian fiduciary law.⁷⁶ In contrast to *Williams*, Gray J in *Trevorrow* imposed fiduciary duties, which encompassed an obligation to inform Trevorrow of the circumstances of his removal and facilitate access to legal advice regarding the State's conduct.⁷⁷

However, the Court in *Lampard-Trevorrow* closed the door opened in *Trevorrow* by a narrow reading of fiduciary obligations. It agreed with the trial judge that the APB was Trevorrow's legal guardian and Trevorrow was its ward, as provided for under s 10 of the *Aborigines Act 1934* (SA) ('1934 Act'), and that this relationship might lead to fiduciary obligations on the part of the APB.⁷⁸ But it held that the APB's relationship 'with Aboriginal children generally' did not give rise to a 'wide-reaching fiduciary duty'.⁷⁹ This would result in a duty being 'owed to all Aboriginal children' fostered by the APB, which would be inconsistent with the provisions of the *1934 Act*.⁸⁰ The Court

⁷⁶ *Williams (Trial)* (1999) 25 Fam LR 86, 239–40 [734].

⁷⁷ (2007) 98 SASR 136, 346 [1006].

⁷⁸ *Lampard-Trevorrow* (2010) 106 SASR 331, 399 [327] (Doyle CJ, Duggan and White JJ).

⁷⁹ *Ibid* 401 [333].

⁸⁰ *Ibid* 401 [337].

was persuaded by Brennan CJ's observation in *Breen v Williams* that 'it is erroneous to regard the duty owed by a fiduciary to his beneficiary as attaching to every aspect of the fiduciary's conduct'.⁸¹ The Court enunciated policy-based reasons for excluding a broad duty — that the APB was funded by parliamentary appropriation and 'could do only what its resources permitted'.⁸² Further, a wideranging duty was inconsistent with the purpose of the *1934 Act* and 'would transform its role, in a manner not contemplated by the *1934 Act*'.⁸³ The APB might be subject to a fiduciary duty to Trevorrow, but only where the 'particular situation was one that attracted one of the recognised fiduciary duties' and where this was consistent with the *1934 Act*.⁸⁴

Finding that not all circumstances arising from the relationship between the APB and Trevorrow 'are to be resolved in terms of a fiduciary duty',⁸⁵ the Court failed to deal effectively with any aspect of the relationship as one of fiduciary duty. The Court referred to Gaudron and McHugh JJ's point in *Breen v Williams* that a doctor does not have a fiduciary obligation to inform a patient of the doctor's negligence or breach of contract.⁸⁶ But again, this was a false comparison — in making this analogy, the Court ignored the distinguishing facts that Trevorrow was a minor and confined in state care without the resources or capacities to remove himself or even to be meaningfully aware of the legalities of his plight. The relationship he had with those who cared for him is not at all comparable to that between an adult patient and his or her doctor. The Court finally reasoned that imposing a fiduciary duty could have resulted in the 'oddity' that the APB would have discharged its duty by informing the plaintiff that it had acted unlawfully, and by assisting him to obtain legal advice, and then sitting back and leaving him in custody.⁸⁷ But this circuitous logic suggests that a fiduciary duty cannot arise because of the removal and that the removal is lawful because there is no duty. It would be akin to allowing a police officer to refuse a defendant the right to legal advice in relation to his or her custody, simply because his or her custody is at the hands of the police. In the same vein, the obligation to provide such advice to a removed child who would be detained for a decade would not appear to be

⁸¹ (1996) 186 CLR 71, 82.

⁸² *Lampard-Trevorrow* (2010) 106 SASR 331, 401 [337] (Doyle CJ, Duggan and White JJ).

⁸³ *Ibid* 402 [337].

⁸⁴ *Ibid* 401 [335].

⁸⁵ *Ibid* 401 [336].

⁸⁶ *Ibid* 402 [342], citing *Breen v Williams* (1996) 186 CLR 71, 113.

⁸⁷ *Lampard-Trevorrow* (2010) 106 SASR 331, 402 [343] (Doyle CJ, Duggan and White JJ).

an onerous burden. The Court, however, found that, in respect of failing to advise Trevorrow of the wrongfulness of his removal and provide him with legal advice, the State was not in breach of any fiduciary duties.⁸⁸

D Negligence

The Full Court further examined whether the APB owed Bruce Trevorrow a duty of care to avoid causing him psychiatric injury, and whether this duty was breached when it placed Trevorrow with a foster family, failed to adequately supervise this process and in due course returned him to his mother without due preparation.⁸⁹

In *Williams (Appeal)*, policy reasons, principally concerns regarding flood-gate litigation, militated against the imposition of a duty of care in such institution–child relationships.⁹⁰ The Court was particularly attuned to possible economic consequences that may result from a decision that rendered the government liable for acts committed against stolen generation litigants. However, in *Trevorrow*, Gray J rejected the argument that recognising a duty of care would expose the State to indeterminate liability.⁹¹ This analysis substantially deviates from the rather guarded reasoning in *Williams (Trial)* and *Cubillo (Trial)*.⁹² Applying the salient features test, Gray J found that the State owed Trevorrow a duty of care in relation to his removal, placement with a foster family and return to his natural mother, a duty that was breached.⁹³ Similarly, in *Lampard-Trevorrow*, the Court was also prepared to find against the State in negligence.⁹⁴ Following the underlying principle identified by McHugh J in *Crimmins v Stevedoring Industry Finance Committee* that '[n]o common law duty of care can be imposed on the statutory authority if to do so is ... forbidden by the relevant Act',⁹⁵ their Honours first considered whether the imposition of a common law duty of care to avoid causing harm to Trevorrow was inconsistent with the *1934 Act*. The Court concluded that the imposition of such a duty would not be inconsistent with

⁸⁸ Ibid 403 [347].

⁸⁹ Ibid 405 [362].

⁹⁰ [2000] Aust Torts Reports ¶81-578, 64 176–7 [160]–[162] (Heydon JA).

⁹¹ (2007) 98 SASR 136, 358–9 [1044].

⁹² Buti, above n 9, 406. See *Williams (Trial)* (1999) 25 Fam LR 86, 162–3 [367]–[374] (Abadee J); *Cubillo (Trial)* (2000) 103 FCR 1, 385 [1237] (O'Loughlin J).

⁹³ *Trevorrow* (2007) 98 SASR 136, 358–61 [1041]–[1063].

⁹⁴ (2010) 106 SASR 331, 417 [423] (Doyle CJ, Duggan and White JJ).

⁹⁵ (1999) 200 CLR 1, 46 [114] (McHugh J).

the obligations under this statutory scheme, as both duty and scheme promote the protection and welfare of Aborigines and Aboriginal children.⁹⁶ Section 10 of the *1934 Act* requires the APB to act in the best interests of Aboriginal children, reflecting the APB's role as the 'legal guardian' of these children.⁹⁷ This obligation does not impose duties that are contrary to the postulated common law duty to avoid causing Trevorrow foreseeable harm. The Full Court noted that '[t]o require that reasonable care be taken to avoid injury to the child ... is not opposed to or inconsistent with the statutory requirement. It complements it.'⁹⁸

Second, the Court considered whether the harm caused to Trevorrow was reasonably foreseeable.⁹⁹ The Court relied on the evidence adduced at trial, based on medical opinion, the oral evidence of welfare officers and a substantial body of literature, including publications available during the period of the plaintiff's removal. This evidence confirmed the risk of harm to a child deprived of maternal care and affection available during the 1950s and 1960s.¹⁰⁰ Their Honours concluded that as contemporaneous research indicated that this process may be detrimental to a child's wellbeing, the APB knew of the risk of separating a mother and child and that they should have informed their staff of this.¹⁰¹ Although welfare officers at the time may not have foreseen the specific harm caused by Trevorrow's removal, they possessed a general understanding that failure to maintain contact with Trevorrow's natural family might cause him harm.¹⁰² The Court concluded that a reasonable person would have examined the likelihood of such harm occurring and would have removed Trevorrow from his mother only if remaining in her custody would have presented a greater risk.¹⁰³ However, the APB failed to make reasonable enquiries into the circumstances of the Trevorrow family and the infant's physical state before placing him with foster parents. By failing to make these enquiries before removing him, the APB was found to be in breach of its duty of care.¹⁰⁴

⁹⁶ *Lampard-Trevorrow* (2010) 106 SASR 331 406 [366]–[367] (Doyle CJ, Duggan and White JJ).

⁹⁷ *1934 Act* s 10.

⁹⁸ *Lampard-Trevorrow* (2010) 106 SASR 331, 407 [370] (Doyle CJ, Duggan and White JJ).

⁹⁹ *Ibid* 410–11 [392].

¹⁰⁰ *Ibid* 411–12 [393]–[400].

¹⁰¹ *Ibid* 412–13 [401]–[404].

¹⁰² *Ibid* 413 [405]–[406].

¹⁰³ *Ibid* 415 [412].

¹⁰⁴ *Ibid* 415 [413].

E *Limitation Period*

As Trevorrow did not bring proceedings within the specified time limit, a further issue for the Full Court was to determine whether the discretion to extend the period of limitation under s 48 of the *Limitation of Actions Act 1936* (SA) should have been exercised. Under s 48(1), a court may extend the time prescribed for a particular cause of action ‘as the justice of the case may require.’ Under s 48(3)(b), an extension of time may only be granted where facts material to a plaintiff’s case are not ascertained by him or her within time, or the plaintiff’s failure to institute timely actions resulted from the representations or conduct of the defendant.

Statutory limitation periods applying to claims in negligence and wrongful imprisonment may present a substantial obstacle to the success of Stolen Generations litigation. In *Cubillo (Trial)*, despite finding that the plaintiff established the requisite conditions for a time extension to be granted, the Federal Court ultimately considered that there would be overwhelming prejudice to the Commonwealth’s case if this discretion were to be exercised.¹⁰⁵ In this case, the ‘effluxion of time had so prejudiced the defence of the Commonwealth that it could not obtain a fair trial.’¹⁰⁶ This conclusion was reached even though the Court made positive findings of fact regarding much of Cubillo’s claim.¹⁰⁷ The insufficiency of documentary evidence and testimony due to the passing of time was particularly determinative in reaching this decision.¹⁰⁸

In contrast, the Court in *Lampard-Trevorrow* upheld the decision to grant an extension of time under s 48(1) of the *Limitations of Actions Act 1936* (SA).¹⁰⁹ In considering the discretion to grant an extension, the Court considered the High Court’s observation in *Sola Optical Australia Pty Ltd v Mills* that the purpose of exercising such discretion is primarily ‘to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced.’¹¹⁰ The Court was persuaded that any prejudice caused to the State by virtue of the inability

¹⁰⁵ (2000) 103 FCR 1, 443 [1421] (O’Loughlin J). See also *Cubillo (Appeal)* (2000) 112 FCR 455, 531 [295] (Sackville, Weinberg and Hely JJ).

¹⁰⁶ John T Rush, ‘*Cubillo* and *Gunner* Revisited: A Question of National Character’ (2008) 12(SE) *Australian Indigenous Law Review* 25, 29.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Cubillo (Trial)* (2000) 103 FCR 1, 437 [1400] (O’Loughlin J).

¹⁰⁹ *Lampard-Trevorrow* (2010) 106 SASR 331, 426 [463] (Doyle CJ, Duggan and White JJ).

¹¹⁰ (1987) 163 CLR 628, 635 (Wilson, Deane, Dawson, Toohey and Gaudron JJ), quoted in *ibid* 418 [426].

of criticised individuals to defend themselves would be outbalanced by the injustice that the plaintiff would experience if the claim were to be time-barred. A significant factor in this reasoning was that, as early as 1977, the APB's successor had information that the APB removed Trevorrow without statutory authority. Without the disclosure of this information, the Court regarded Trevorrow's failure to institute his action within the time limit as understandable, the APB having contributed to this delay.¹¹¹ The Court further considered it to be in the wider public interest that members of the stolen generation are able to have their claims decided by the judiciary and stressed the importance of taking judicial notice of this 'matter of national concern and controversy'.¹¹² It was this final consideration that ultimately 'tilt[ed] the scales in favour of the discretion being exercised to grant an extension of time'.¹¹³

F Procedural Fairness

Although the doctrine of procedural fairness had not been identified when the APB removed Trevorrow, the Full Court held that it should nevertheless be applied to the current case.¹¹⁴ In *Kioa v West*, Mason J articulated the authoritative statement of this doctrine:

there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.¹¹⁵

Trevorrow's parents possessed a common law right to be heard prior to the APB making any adverse findings affecting their son. This right stemmed from their status as Trevorrow's natural parents as well as the significant interest they possessed in continuing to maintain custody of him.¹¹⁶ As was the case in *Annetts v McCann*¹¹⁷ and *J v Lieschke*,¹¹⁸ the Court in *Lampard-Trevorrow* considered that the obligation to afford procedural fairness to

¹¹¹ *Lampard-Trevorrow* (2010) 106 SASR 331, 422 [442] (Doyle CJ, Duggan and White JJ).

¹¹² *Ibid* 426 [460].

¹¹³ *Ibid* 426 [462].

¹¹⁴ *Ibid* 379 [227]–[228].

¹¹⁵ (1985) 159 CLR 550, 584, quoted in *ibid* 379 [227].

¹¹⁶ *Lampard-Trevorrow* (2010) 106 SASR 331, 380 [230] (Doyle CJ, Duggan and White JJ).

¹¹⁷ (1990) 170 CLR 596.

¹¹⁸ (1987) 162 CLR 447.

parents of a child arises not only from their rights and interests as parents, but also from their child's interests.¹¹⁹ In recognising the importance of providing a hearing in such circumstances, the Court referred to Brennan J's statement in *J v Lieschke* that '[i]t would offend the deepest human sentiments as well as a basic legal principle to permit a court to take a child from its parents without hearing the parents'.¹²⁰

In the present case, there was neither urgency that required the APB to act before contacting Trevorrow's parents, nor was there substantial difficulty in locating them to conduct a hearing. Therefore, although no formal hearing was required, the Court found that the APB did not fulfil its obligation to notify Trevorrow's parents of its intended arrangements and failed to provide an adequate opportunity for them to respond to the APB's proposed course of action, ultimately denying them their right to procedural fairness.¹²¹

IV IMPLICATIONS: THE INTERPRETATION OF EVIDENCE AND A NEW RELATIONSHIP TO HISTORY

In their book, *Rights and Redemption: History, Law and Indigenous People*, Curthoys, Genovese and Reilly discuss the increasing role of historians as experts in Indigenous litigation involving historical wrongs. They point to the importance of the disciplines of law and history to talk to one another in these cases.¹²² The expertise of historians was drawn on in each of the Stolen Generations cases discussed, but it is only in the *Trevorrow* cases that a contextualised understanding of the historical evidence has had a legal effect. Previously, for instance, in *Cubillo (Trial)* the Federal Court pointed to evidence that 'showed that there were people in the 1940s and 1950s who cared for the Aboriginal people', and who 'thought they were acting in the best interests of the child'.¹²³ It held:

the evidence does not deny the existence of the stolen generation and there was some evidence that some part Aboriginal children were taken into institutions against the wishes of their parents. However, I am limited to making findings on ... the evidence that was presented to this Court in these proceedings; that

¹¹⁹ *Lampard-Trevorrow* (2010) 106 SASR 331, 383 [238] (Doyle CJ, Duggan and White JJ).

¹²⁰ (1987) 162 CLR 447, 458, quoted in *ibid* 380 [233].

¹²¹ *Lampard-Trevorrow* (2010) 106 SASR 33, 384 [246] (Doyle CJ, Duggan and White JJ).

¹²² Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (University of New South Wales Press, 2008) 223–4.

¹²³ *Cubillo (Trial)* (2000) 112 FCR 1, 483 [1561]–[1562] (O'Loughlin J).

evidence does not support a finding that there was any policy of removal of part Aboriginal children such as that alleged by the applicants: and if, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a finding that it was ever implemented as a matter of course in respect of these applicants.¹²⁴

The Federal Court's reading of the legal archive did not result in a finding of the non-existence of the Stolen Generations but led it to the evidentiary problem of 'not enough evidence to decide'.¹²⁵ This problem was compounded by the presumption in favour of the State's own archive — that is, when confronted with choosing between evidence produced through the State's documentation of removal, and the testimony of claimants, the courts have tended to favour the archive, despite evidence that the State's archives are often flawed.¹²⁶ Further, the finding of insufficient evidence was not clearly justified. For example, van Krieken is critical of the Court using the fact that there was no policy to remove all children, and the lack of capacity to fully implement the policy, as being grounds for denying the existence of the policy. He argues that '[t]he mere selective application of a policy does not render its existence logically impossible'.¹²⁷

The decontextualised reading of the evidence is brought into sharp relief in relation to the issue of consent to the child removals in *Cubillo (Trial)*. On this issue, the Court construed a thumb print, purportedly that of Gunner's mother, on a document as evidence of parental consent to the removal of her son. In referring to consent in his construction of compliance with s 6 of the *Aboriginals Ordinance 1918* (NT), O'Loughlin J noted that

there was no way of knowing whether the thumb mark on the 'Form of Consent' was [Mr Gunner's mother's]; even on the assumption that it was, there was no way of knowing whether [she] understood the contents of the document.¹²⁸

However, O'Loughlin J gave the government officers the benefit of doubt:

it is not beyond the realms of imagination to find that it was possible for a dedicated, well-meaning patrol officer to explain to a tribal Aboriginal such as [Mr Gunner's mother] the meaning and effect of the document. I have no mandate

¹²⁴ Ibid 358 [1160].

¹²⁵ van Krieken, above n 4, 246.

¹²⁶ Ibid 245–6.

¹²⁷ Ibid 246.

¹²⁸ *Cubillo (Trial)* (2000) 103 FCR 1, 245 [788].

to assume that [Mr Gunner's mother] did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document.¹²⁹

Therefore, the documentary record was found to prevail. This is surprising given that, on its way to finding that the issue of consent did not go 'to the heart' of the trial,¹³⁰ the judge made a number of findings regarding the ways in which parental consent was used to assist in, and was even produced by, removal policies. He rejected submissions made on behalf of the Commonwealth that some or all of the parents had initiated their children's removal by asking the Native Affairs Branch or Aborigines Inland Mission to provide their children with a better education and better standard of living.¹³¹ He found that evidence did not establish that consent was generally obtained by the Native Affairs Branch in the removal of the children at Phillip Creek, of whom Mr Gunner was one.¹³² Although he made no formal finding on the matter, O'Loughlin J found that the evidence (including the behaviour of the mothers, the evidence of three of the elderly Tennant Creek women who knew Gunner as a child and the limited time available to explain the process of removal) suggested that 'some, if not all, of the children may well have been taken without their mothers' consent.'¹³³ In fact, O'Loughlin J was 'unable to make a finding that *any* of the mothers gave their informed consents to the removal of their children'.¹³⁴ Therefore, he rejected the Commonwealth's argument that consent had been generally given. However, where there was documentary evidence of a thumb print he favoured the assumption that consent was informed.¹³⁵ Although the Court demonstrated an appreciation of historical context, it was not applied to interpreting legal sources.

It is significant that the Federal Court examined the operation of consent more generally than the circumstances surrounding the particular plaintiffs, and demonstrated that 'consent' was not an untroubled concept. Justice O'Loughlin questioned the nature and quality of consent and the power relationship that produced consent by referring to evidence that showed that the practices of the Director in obtaining consent included processes of

¹²⁹ Ibid.

¹³⁰ Ibid 164 [503].

¹³¹ Ibid 163–4 [503].

¹³² Ibid 152 [457].

¹³³ Ibid 165 [507].

¹³⁴ Ibid 152 [457] (emphasis added).

¹³⁵ Ibid 245 [788].

‘educating and preparing mothers’ for separation.¹³⁶ The implication here, of course, is that any final and formal consent can be seen as an end-effect of these processes of coercive ‘education’. The judge also questioned whether sufficient consent can be deemed to have been given by parents, considering the stringent time constraints under which the information was purportedly provided.¹³⁷

Ultimately, however, O’Loughlin J found that the documents reflected Gunner’s mother’s informed consent. He took for granted both that the relevant information was given in the correct language and that the effectiveness of a government education program in relation to removals.¹³⁸ By contrast, in the *Trevorrow* cases, the South Australian courts expressed a distrust of the documentary record relating to consent. They adopted a practice of interpretation that considered general practices relating to consent (and its documentation) in evaluating the particular document at issue.¹³⁹

The principle of consent, particularly in relation to its authenticity, is problematic; this has been noted by the courts, although these observations had no legal effect prior to *Trevorrow*.¹⁴⁰ The courts’ approach to interpreting documentary evidence in the *Cubillo* cases failed to adequately acknowledge the power disparity between the APB and Aboriginal persons as well as the wider historical and social context in which removals took place. This approach also failed to recognise that many Aboriginal parents, including Gunner’s mother, were not literate in English¹⁴¹ and were therefore unlikely to have understood the content and implications of relevant documentation.

In contrast, in the *Trevorrow* cases, the courts demonstrated different views of history and the role of state power, issues which are bound up with the interpretation of evidence. In determining the issue of consent, the Full Court agreed with the trial judge and interpreted the continued requests of *Trevorrow*’s mother that her son be returned as an indication that the requisite

¹³⁶ Ibid 77–8 [218].

¹³⁷ Ibid 165 [507].

¹³⁸ Ibid 245 [788].

¹³⁹ *Trevorrow* (2007) 98 SASR 136, 327 [918] (Gray J); *Lampard-Trevorrow* (2010) 106 SASR 33, 362 [133]–[134] (Doyle CJ, Duggan and White JJ).

¹⁴⁰ These problems have also been recorded by legal historians. Trish Luker researched the processes by which problematic evidence was accepted in support of parental consent in the *Cubillo* case — the choice and shaping of facts and the interpretation of evidence: Trish Luker, ‘Intention and Iterability in *Cubillo v Commonwealth*’ (2005) 28(84) *Journal of Australian Studies* 35.

¹⁴¹ See Cunneen and Grix, above n 4, 14; Buti, above n 9, 416.

parental consent was absent.¹⁴² The State of South Australia submitted that the trial judge was wrong to find that neither parent consented to Bruce Trevorror's placement with Mrs Davies, and here it relied mainly on missing documentation concerning the removal. The Full Court acknowledged that documents were missing, but found that consent had not been given — significantly, in doing so, it relied on evidence concerning general practices concerning consent, as well as evidence concerning Trevorror's particular case.¹⁴³ While the Court in *Cubillo* referred to similar general practices, its finding in relation to Peter Gunner's mother's consent was based on the documentary evidence alone.¹⁴⁴ The significance of the Court's interpretation in *Lampard-Trevorror* is that it is an acknowledgement of the importance of context in the historical operation and legal interpretation of consent. It is significant that the Full Court was willing to look critically at documents presented as evidence, and did not interpret the absence of documents as necessarily favouring the State's position. The Court rejected the State's submission that a missing file may have contained the records of the almoner testifying to the consensual removal of the plaintiff, arguing, through an evaluation of the context of the records, that the time constraints and role of the almoner made it unlikely that the records would include a document concerning consent.¹⁴⁵ Of greater significance was the Court's questioning of the role of documentary evidence. The Court found that this evidence should not necessarily be privileged:

There is no reason why, in principle, the documentary records should be preferred to the oral evidence. Everything depends upon the facts of the case. In the present case it needs to be borne in mind that documentary records are not to be assumed to be reliable.¹⁴⁶

This is of great significance in *Stolen Generations* cases where the archives contain gaps, and where those documents that *do* exist need to be interpreted in the context in which they were produced.

¹⁴² *Lampard-Trevorror* (2010) 106 SASR 33, 344 [47], 362 [133]–[134] (Doyle CJ, Duggan and White JJ).

¹⁴³ *Ibid* 362 [133] (Doyle CJ, Duggan and White JJ).

¹⁴⁴ *Cubillo (Trial)* (2000) 103 FCR 1, 245 [788] (O'Loughlin J).

¹⁴⁵ *Lampard-Trevorror* (2010) 106 SASR 331, 353–4 [88], 358 [115] (Doyle CJ, Duggan and White JJ).

¹⁴⁶ *Ibid* 353 [84]. Here, as in excerpts discussed below, the Court was relying on findings of fact at first instance.

The Court in *Lampard-Trevorrow* took into account historical context when interpreting the facts at hand. Based on an analysis of correspondence concerning other cases, the Court found that ‘the requirement to obtain parental consent was not always observed.’¹⁴⁷ The Court based this conclusion on a number of documents. A letter dated 12 August 1958 from the Secretary of the APB to the officer in charge at the Oodnadatta Police Station stated:

If the parents of these children have not already consented in writing for the United Aborigines Mission to care and control the children until a certain age, then I suggest that you endeavour to obtain the consent of the parents on the forms enclosed.

In confidence, you will certainly realise that in any case this consent form is not a legal document, and should it be that the parents remove the children from the care of the Mission or the Board, no legal action could be taken to regain control of the children.¹⁴⁸

Another document, a letter of 16 October 1958 written by the Secretary of the APB to the Superintendent of Aborigines Welfare in Victoria, stated: ‘Again in confidence, for some years without legal authority, the Board have taken charge of many aboriginal children’.¹⁴⁹ In a letter dated 19 May 1960 to Pastor Eckermann, the Secretary of the APB stated:

For your information only I have to inform you that legally, I have no right to remove a child from its parents. However, in such cases I do so and where deemed necessary we refuse to allow the child to be returned to its’ [sic] parents without my consent.

If you so desire you can inform the mother of the child that it has been placed in your Children’s Home at my direction and cannot be released to the mother without my written consent. You should add that I will not likely consent to the children being released until such time as the mother is properly accommodated and able and willing to care for the child in a proper manner.¹⁵⁰

Here the Court concluded:

the Secretary of the APB is informing Pastor Eckermann, ‘off the record’ that on occasions he has removed and will remove a child from its parents, without parental consent, and will subsequently refuse to allow the child to be returned

¹⁴⁷ Ibid 360 [126].

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 361 [127].

¹⁵⁰ Ibid 361–2 [128].

to the parents, unless satisfied that the proposed living arrangements are suitable.¹⁵¹

According to the Court, the last paragraph of the letter quoted above ‘contemplates a bluff being used to enable the APB to keep the child in question under its control.’¹⁵²

It is in the context of this understanding that the Full Court read a letter the APB sent to Trevororrow’s mother Thora Karpany in 1958, which was sent in response to her inquiry about Bruce. The letter stated that Bruce was still undergoing medical treatment, and the Court found this statement, and the implication that Bruce could therefore not be returned to her, ‘dissembling’.¹⁵³ Even if Thora Karpany *had* consented to Bruce Trevororrow being fostered, such consent did not legally authorise Bruce’s permanent removal — the Secretary of the Board in fact knew of Thora’s entitlement to have Bruce returned to her. Here the Court explicitly acknowledged the problematic role of consent in the practice of removal, problems that were intimated in *Cubillo*, but which in *Lampard-Trevorrow* were clearly named as ‘a pretence of power’.¹⁵⁴

Although the Full Court acknowledged the possibility that consent was obtained ‘by one of the now unavailable witnesses, and ... placed in one of the missing files’,¹⁵⁵ the Court found that the trial judge’s conclusion of non-consent was supported by significant evidence.¹⁵⁶ First, there was no documentation of consent in Bruce Trevororrow’s file. Second, there was no reliable reference to consent being given in other documents. Third, there was evidence that:

when necessary, in the perceived interests of a child, the APB would place a child in an institution or with a foster family without parental consent, using a pretence of power (which undoubtedly would have been effective) and, if appropriate, using an element of bluff or deception.¹⁵⁷

This last point is significant since here the Full Court of the South Australian Supreme Court referred to the general context of practices and policies in which consent was given. This was a very different approach to interpretation

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid 361 [126].

¹⁵⁴ Ibid 362 [133].

¹⁵⁵ Ibid 362 [132].

¹⁵⁶ Ibid 362 [133].

¹⁵⁷ Ibid.

from that used in *Cubillo (Trial)*, where O’Loughlin J noted the evidence of general policies but in making his findings insisted on narrowing his focus to the particular circumstances of the applicants.¹⁵⁸ In contrast, the Court in *Lampard-Trevorrow* found that, ‘[t]he reliance on medical advice in response to Thora Karpany’s letter to the APB of 25 July 1958 is consistent with the use of a bluff to deflect her request.’¹⁵⁹

The Court’s response to these technical questions regarding the significance and weight of evidence has wide implications regarding the capacity of the common law to adjudicate claims relating to the Stolen Generations. The Stolen Generations cases challenge the courts to interpret doctrines of tort and equity so that they recognise the historical harms arising out of past policies and practices.¹⁶⁰ This process or conceptual rethinking needs to occur in context — as *Lampard-Trevorrow* demonstrates, it requires interpretive practices on the part of the courts that involve a new relationship to evidence, history and the significance of contemporary standards. These practices have consequences for law’s role in determining responsibility for historical harms. Australian critical historiography has been central to the reframing of key narratives in law and the public sphere, especially concerning the centrality of violence to the formation of the Australian nation-state. These practices, it has been argued, reveal that ‘nation-building was inseparable from genocidal intent’.¹⁶¹ Genovese positions Australian critical historiography as ‘a conceptual “redemption”’,¹⁶² a concept that was developed by Curthoys, Genovese and Reilly.¹⁶³ Key to redemption is first, the recognition by the public sphere of a different role of the state in regard to past violence and dispossession of Indigenous Australians, from that which had previously been accepted; and second, commitments by the public to engagement, ‘reparative action and acceptance of moral culpability — on questions of accountability for the past in the present’.¹⁶⁴

In *Cubillo (Trial)*, following a ‘painstaking examination of a large body of historical material and oral testimony’,¹⁶⁵ O’Loughlin J asked whether the Commonwealth had acted unreasonably or otherwise through the APB and

¹⁵⁸ *Cubillo (Trial)* (2000) 103 FCR 1, 353–7 [1149]–[1156].

¹⁵⁹ *Lampard-Trevorrow* (2010) 106 SASR 33, 362 [133] (Doyle CJ, Duggan and White JJ).

¹⁶⁰ See Cunneen and Grix, above n 4, 5.

¹⁶¹ Genovese, above n 4, 71.

¹⁶² *Ibid* 72.

¹⁶³ Curthoys, Genovese and Reilly, above n 122.

¹⁶⁴ Genovese, above n 4, 72.

¹⁶⁵ van Krieken, above n 4, 239.

concluded that there was no evidence that it had done so.¹⁶⁶ In arriving at this decision, the judge rejected evidence that there was social criticism of the practice of child removal, instead preferring the evidence of the State's own archive.¹⁶⁷ Significantly, community standards were explicitly rejected as a source of authority for this finding. Despite establishing that those who removed the children would 'stand condemned on today's standards,'¹⁶⁸ and that '[s]ubsequent events have shown that they were wrong',¹⁶⁹ the Court held these contemporary standards were not relevant to deciding liability, as 'it would be erroneous to hold that a step taken in purported exercise of a statutory discretionary power was taken unreasonably ... if the unreasonableness appears only from a change in community standards.'¹⁷⁰ Ultimately, the Court found that there was insufficient evidence to determine a number of questions about the removal policies.¹⁷¹

In contrast, as discussed above, in *Lampard-Trevorrow* the Court relied on evidence adduced at trial concerning research available at the time of removal, which they found indicated that removal may be detrimental to a child's wellbeing. This evidence confirmed the risk of harm caused by removal. The Court found that the APB knew of the risk of separating a mother and child, and that they should have informed their staff of this. Although welfare officers at the time may not have foreseen the specific harm caused by Trevorrow's removal, they possessed a general understanding that failure to maintain contact with Trevorrow's natural family might cause him harm. The APB had failed to make reasonable enquiries into the circumstances of the Trevorrow family and the infant's physical state before placing him with foster parents and was therefore in breach of its duty of care.¹⁷²

Further, the trial judge in *Trevorrow* found that contemporary standards of evaluation were relevant to deciding the issue of damages. He noted, as courts had in earlier cases, the following:

The existence of the policy of removing Aboriginal children from their families and the detrimental long-term effects of that policy on both those removed and

¹⁶⁶ *Cubillo (Trial)* (2000) 103 FCR 1, 361 [1169], 363 [1174].

¹⁶⁷ See also Curthoys, Genovese and Reilly, above n 122, ch 6.

¹⁶⁸ *Cubillo (Trial)* (2000) 103 FCR 1, 482 [1560] (O'Loughlin J).

¹⁶⁹ *Ibid* 483 [1562].

¹⁷⁰ *Ibid* 39 [96], quoting *Kruger* (1997) 190 CLR 1, 36–7 (Brennan CJ).

¹⁷¹ *Cubillo (Trial)* (2000) 103 FCR 1, 103 [301] (O'Loughlin J).

¹⁷² See above nn 99–104 and the accompanying text.

on the wider Aboriginal community, is now widely recognised in the community and has previously been the subject of judicial recognition.¹⁷³

Justice Gray found that Trevorrow's case gave rise to an award of exemplary damages, based on the initial act of removal, the failure to return Trevorrow to his mother, and the State's failure to inform Trevorrow both of the circumstances of his removal and the rights arising from that fact.¹⁷⁴ The Full Court, in upholding the trial decision to grant Bruce Trevorrow an extension of time to bring his claim, held that 'there is a definite public interest in persons like Bruce Trevorrow being able to have their claims decided by a court' and that 'public interest, in this context, is an interest of justice.'¹⁷⁵

V THE 'MYTH OF CONSENT'

Consent has been a significant issue in Stolen Generations cases, but the courts in the *Trevorrow* cases not only made consent central to their findings but also raised questions about the problematic nature of consent itself, problems that had been flagged in earlier cases but which had never before affected the legal outcome. In the *Williams* cases, consent was key to whether Joy Williams' removal at birth constituted false imprisonment. Justice Abadee emphasised Williams' mother's consent to removal at the time of the birth of her daughter (although the fact of this consent was contested by Joy) and ruled against false imprisonment on that basis.¹⁷⁶ The Court stated that there was no false imprisonment because the AWB 'had lawful control over the plaintiff' due to the consent of her mother.¹⁷⁷ In reviewing the case, the Full Court adverted to the problematic nature of consent but chose to treat

¹⁷³ *Trevorrow* (2007) 98 SASR 136, 239 [431] (Gray J). Justice Gray was referring to the judicial recognition in *Kruger*, although it had no legal effect in that case: (1997) 190 CLR 1, 40 (Brennan CJ).

¹⁷⁴ *Trevorrow* (2007) 98 SASR 136, 393 [1234]–[1239].

¹⁷⁵ *Lampard-Trevorrow* (2010) 106 SASR 331, 426 [461] (Doyle CJ, Duggan and White JJ).

¹⁷⁶ Justice Abadee relied on s 7(2) of the *Aborigines Protection Act 1909* (NSW), which provided that '[t]he board may on the application of the parent or guardian of any child admit such child to the control of the board': *Williams (Trial)* (1999) 25 Fam LR 86, 91 [26].

¹⁷⁷ *Ibid* 116 [142]. Justice Abadee stated, 'My finding is that the AWB considered the mother's application to give up control of the plaintiff to its control, and having done so, admitted the child to its control. I find that there was not any removal by the Board to the plaintiff, in the sense of taking the child against the will of the mother. The plaintiff was taken into the AWB's control because the mother did not want the child, could not keep the child and asked the AWB to take control of her': at 91 [26].

consent as proven by virtue of the documentary evidence of the application. The Court held:

One part of the plaintiff's case at trial depended on the proposition that she had been removed from her mother without her mother's consent. It was this which underlay the claims of false imprisonment ... This part of the case failed because ... the plaintiff was lawfully admitted to the control of the Board on the application of her mother ...¹⁷⁸

In *Cubillo (Trial)*, consent was not determinative to claims in negligence due to the broad scope of the statute granting the AWB powers to remove children, but consent was nonetheless argued in defence by the government and found to be significant as a factor in determining the proper use of statutory power. Finally, in the *Trevorrow* cases, consent was discussed both in relation to negligence and false imprisonment. Consent has been a central issue in Stolen Generations cases for two main reasons: first, it formed part of the factual archive due to the widespread practice of officials seeking parental consent to expedite the process of removal; and second, the State has used parental consent to bar actions in trespass or false imprisonment. Therefore, the procurement of consent has had a doubly wicked effect because it was used to both justify expedient removals and then subsequently put as a legal justification to deny compensation on the basis that the mother had given away her child.

In *Cubillo (Trial)* O'Loughlin J displayed an approach to identifying consent that was less favourable to the plaintiff. As discussed above, he interpreted the evidence in ways that failed to acknowledge the historical operation of consent (and the associated creation of documents) in the context of the removal of children. The issue of consent to removal was at the heart of the Commonwealth's legal argument against *Cubillo* and *Gunner*. Essentially, the Commonwealth sought to re-characterise the act of removal as consensual and thereby authorised by the parents. In *Cubillo's* case, the Court found that the issue determining legislative authority to remove her under s 6 of the *Aboriginals Ordinance 1918* (NT) was not one of consent. Rather, it was whether the Director of Native Affairs held the opinion that it was 'necessary or desirable' to undertake her 'care, custody or control'.¹⁷⁹ Ultimately, the Court acknowledged that the Director properly used his authority under the legislation. In *Peter Gunner's* case, it was found that questions relating to

¹⁷⁸ *Williams (Appeal)* [2000] Aust Torts Reports ¶81-578, 64 147-8 [58] (Heydon JA).

¹⁷⁹ *Cubillo (Trial)* (2000) 103 FCR 1, 164 [504] (O'Loughlin J).

consent were not the ‘correct question[s] to ask’ in legally characterising the act of removal — rather, the key question was ‘the reason for his removal’ — so that, ‘it would not matter by what persons or by what means that removal was effected, if his removal was effected within the terms of ss 6 or 16 of the *Aboriginals Ordinance*.¹⁸⁰ Nonetheless, parental consent was one matter that was taken into account in assessing whether the legislation had been properly applied.

In *Lampard-Trevorrow*, parental non-consent was important to both the factual and legal findings. Factually, the court found no consent had been given. Legally, non-consent became central to the Court’s interpretation of the State’s failure to properly execute its statutory authority and assume control of Trevorrow. The Court considered whether s 10 of the *1934 Act* conferred upon the APB the power to foster Aboriginal children without parental consent and, if that right existed, whether it was validly exercised in the present case. The State contended that, by virtue of its role under s 10 as ‘the legal guardian of every Aboriginal child’,¹⁸¹ the APB was authorised to remove Aboriginal children from their parents to protect the children’s interests. The Court was persuaded that the purpose of the *1934 Act* was to protect Indigenous people and provide them with financial and educational assistance.¹⁸² However, in considering Gleeson CJ’s rationale in *Plaintiff S157/2000 v Commonwealth* that ‘courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language’,¹⁸³ the Full Court concluded that s 10 did not imbue the APB with the lawful authority to remove Aboriginal children from their parents without consent.¹⁸⁴ Giving s 10 such a wide interpretation would deprive Aboriginal parents of their right to the custody of their children.

The Full Court found that it was the State’s failure to acknowledge the parents’ authority (and therefore the lack of consent to Trevorrow’s removal) that led, in part, to the State’s liability. The Court found that s 10 of the *1934 Act*, which provided that the APB was ‘the legal guardian of every Aboriginal child’ was ambiguous.¹⁸⁵ It found that the legislation did not abrogate funda-

¹⁸⁰ *Ibid* 253 [808].

¹⁸¹ *1934 Act* s 10.

¹⁸² *Lampard-Trevorrow* (2010) 106 SASR 331, 377 [216] (Doyle CJ, Duggan and White JJ).

¹⁸³ (2003) 211 CLR 476, 492 [30].

¹⁸⁴ *Lampard-Trevorrow* (2010) 106 SASR 331, 377 [216] (Doyle CJ, Duggan and White JJ).

¹⁸⁵ *Ibid* 378 [222].

mental rights in the absence of the manifestation of a clear intention to do so.¹⁸⁶ Therefore, s 10 did not give the APB the power to foster an Aboriginal child without the consent of the child's parents. This finding of non-consent was fundamental: it enabled the Court to convey that the removal was forced and provided a basis for finding a breach of law. Therefore, not only was there forcible removal, a fact that had been established in earlier cases,¹⁸⁷ but this removal was legally wrong.

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families revealed the hollow meaning of parental consent in child removal. Consent was a veil for the forced removal of Aboriginal children and was uninformed if not coerced. In the *Bringing Them Home Report*, a Tasmanian Stolen Generations survivor described his mother's capacity to consent in the following way: '[Mum] could not read or write, and obviously would not have understood the implications of what she was signing.'¹⁸⁸ The Report found that '[m]others who had just given birth were coerced to relinquish their newborn babies.'¹⁸⁹ The Report identified that acquiring consent operated to circumvent official proof of neglect. The *Bringing Them Home Report* noted, '[i]f parents could be "persuaded" to consent to the removal of their children the Board did not have to show that a child was neglected or uncontrollable.'¹⁹⁰ When Indigenous parents refused to consent, the Aboriginal and Welfare Boards overpowered their agency. Parents 'were told they would have to leave the stations and would be denied rations.'¹⁹¹ Police officers told young mothers that 'if they did not consent to the adoption of their babies the father of the child would be prosecuted for carnal knowledge.'¹⁹² Alongside this was an ideological campaign to make parents feel guilty that they could not offer them the opportunities of the 'outside world'.¹⁹³ This is despite contemporary evidence and theory that children who were not removed performed much better in life than those who were removed.¹⁹⁴

¹⁸⁶ Ibid 378 [223].

¹⁸⁷ See, eg, *Cubillo (Trial)* (2000) 103 FCR 1.

¹⁸⁸ *Bringing Them Home Report*, above n 7, 100.

¹⁸⁹ Ibid 48.

¹⁹⁰ Ibid 47.

¹⁹¹ Ibid 59.

¹⁹² Ibid 64.

¹⁹³ Ibid 8–9.

¹⁹⁴ Ibid 13–16.

The significance of narratives of consent to the achievement of legal and social justice goes beyond the success of any single claim, as important as such a claim may be. Writing about the legal context of racial subjugation during slavery and its aftermath in the United States of America, Saidiya Hartman suggests that there is a relationship between consent and subjection and that the use of consent in dealing with the subjected may act to disguise the 'condition of violent domination' that actually operates between subjector and subjected.¹⁹⁵ Hartman argues that consent became 'intelligible only as submission'.¹⁹⁶ In the Australian context, non-'Whiteness' has historically been a point of reference for structural inferiority in Australia, according to Ghassan Hage.¹⁹⁷ But the historical impossibility of consent in the context of forced subjection is usually not disentangled, explored, or even 'seen' by the courts.

In Stolen Generations cases, assumptions that 'whites' could better care for children underlie the implication of parental complicity in the removal of children. These assumptions were taught to and at times appropriated by Aboriginal parents, who were then seen as succumbing to the system's logic. As Hartman suggests, power can become defined by these manipulations to present a picture of reciprocation, rather than domination.¹⁹⁸ It allows the state to be presented as a benevolent institution rather than a terrorising one. But there is a further sinister side to the domination, which is always revealed when manipulations falter. When parents failed to comply with the removal of their children, they would attract reprisals from state agents, with consequences that included being reported to police, losing employment or experiencing physical violence.¹⁹⁹

Although courts surveyed and sometimes accepted evidence of the problematic operation of consent in Stolen Generations cases, prior to the *Trevorrow* cases they essentially treated consent as an individual act freely and voluntarily given. The use of consent in this way turned the state's act of

¹⁹⁵ Saidiya V Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (Oxford University Press, 1997) 85.

¹⁹⁶ *Ibid.*

¹⁹⁷ Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Pluto Press, 1998) 59. 'Whiteness' is a cultural historical construct: at 58. The history of the construction of 'Whiteness' into a racial category involved 'both a European monopolisation of "civilised humanity" and a parallel monopolisation of Whiteness as its marker': Ghassan Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society* (Pluto Press, 2003) 49–50.

¹⁹⁸ Hartman, above n 195, 89.

¹⁹⁹ *Bringing Them Home Report*, above n 7, 5, 9, 64.

removal into a parental act, thereby transforming 'relations of violence and domination into those of affinity'.²⁰⁰ The fiction of consent suggests that the powerless had agency and strength, and that there is an 'ostensible equality between the dominant and the dominated',²⁰¹ while at the same time concealing the actual powerlessness of the subjected. These judicial narratives further impute that Indigenous peoples were unwilling to care for their own children and reaffirms the fiction that the caring and nurturing of children is the domain of 'whites', thereby undermining the role of the Indigenous family.

The nature of the evidence of consent and how consent was acquired have been questioned by academics and legal practitioners. Anna Cody, who was a solicitor on the *Williams* case, commented that Joy Williams 'was taken away from her mother when she was a few hours old. Any mother who's had a baby would question exactly how much she could consent to giving a baby away when she's just a few hours old'.²⁰² Chris Cunneen and Julia Grix argue that the comment by Abadee J that Williams' mother may have forgotten whether she had consented reveals an 'extraordinary lack of insight into the issues of consent and the power of the AWB over Aboriginal persons'.²⁰³ Another issue that was raised by the judge to implicate Williams' mother in the removal was that her mother did not attempt to release her from foster care. This presumes that she knew that she had this option available to her, had the material means to pursue such a course and was sufficiently uncowed by the system to act in such a way. It discounts the power of the state over Aboriginal people. Justice Abadee stated:

I further find as a fact that the plaintiff's mother at no time between 1942 and 1960 made application to the AWB or, otherwise sought to have the plaintiff released from the AWB's control, or sought her restoration to her care within the meaning of ... the Act, nor was any discharge of the plaintiff sought at any time pursuant to ... the Act. ...

[This] is consistent with a view that she did not wish the child's status or relationship vis-à-vis the Board to change ... nor did she wish to have the child returned to her care.²⁰⁴

²⁰⁰ Hartman, above n 195, 88.

²⁰¹ Ibid.

²⁰² ABC Local Radio, 'Joy Williams Loses Her Stolen Generations Case', *The World Today*, 26 August 1999 <<http://www.abc.net.au/worldtoday/stories/s46829.htm>>.

²⁰³ Cunneen and Grix, above n 4, 24.

²⁰⁴ *Williams Trial* (1999) 25 Fam LR 86, 92 [30], 125 [179].

In contrast, the Supreme Court of South Australia at trial accepted Bruce Trevorrow's claim of false imprisonment on the basis that there was no parental or child consent. The Court held:

By being placed with [his foster mother], the plaintiff's will was completely overborne. Given the plaintiff's age at the time of the removal, he did not consent; neither did his parents. The plaintiff was imprisoned, and the State, through its agents and emanations, caused the imprisonment.²⁰⁵

The *Trevorrow* cases challenge the operation of consent in practice by demonstrating that consent was frequently quite meaningless and that the documentary record concerning consent should not necessarily be trusted. However, the framework of liability still relies on consent, with its attendant problems regarding agency and good or bad parenting, in determining the success of the claim. Because of the nature of removal policies, as well as the legal categories under consideration, consent remains as one of the 'stories that ... normalised state intervention yet at the same time ignored the subjectivity and experience of indigenous peoples altogether.'²⁰⁶ This means that claimants must still contend with this myth and may have difficulty establishing claims where the documentary record does not demonstrate protests or the absence of consent on the part of their parents; or where the record demonstrates formal consent, claimants may have difficulty demonstrating problems with the meaningfulness of such formal consent. The presence of such myths is a key reason why the common law may continue to be a problematic site for the determination of responsibility for historical harms. One great advantage of a reparations scheme would be the provision of a new framework and a new language of responsibility, which take account of these tangled myths and histories and the law's own complicity with these.

VI CONCLUSION: FUTURE DIRECTIONS IN STOLEN GENERATIONS LITIGATION

The *Trevorrow* cases embody a new judicial reading of history and evidence in the Stolen Generations litigation. Although the findings made may open the door to compensation in future claims, it must be kept in mind that in many ways, Bruce Trevorrow was an 'ideal plaintiff'.²⁰⁷ Although Julian Burnside

²⁰⁵ *Trevorrow* (2007) 98 SASR 136, 342–3 [991] (Gray J) (citation omitted).

²⁰⁶ Genovese, above n 4, 74.

²⁰⁷ See Buti, above n 9, 420.

QC (counsel for Bruce Trevorrow) emphasised that the outcome was not dependent upon the particular facts of the case, but is of relevance to future stolen generation litigation generally,²⁰⁸ a significant factor contributing to the success of this particular case lay in counsel's ability to produce substantial evidence regarding Trevorrow's removal. For many Indigenous claimants, as was notably the case in *Cubillo* and *Williams*, the establishment of documented evidence often presents a considerable challenge to the courts' ability to determine critical findings of fact in their favour. Cockayne notes that Stolen Generations litigation 'demand[s] the provision of evidence as to the consent and intentions of individuals in times now far removed, in cases where records are often scant.'²⁰⁹

Nonetheless, the contextual reading of the legal archive and understandings of general practice were key to the judiciary's treatment of consent in the *Trevorrow* cases. In previous cases, difficulties stemmed not only from lapses in time since the occurrence of the harms, but also from courts' preference for written documentary evidence, which is alien to the oral tradition in Aboriginal cultures.²¹⁰ The *Trevorrow* cases may signal a shift away from this onerous evidentiary burden and open the door to success for future litigation. The real test will be whether courts apply the *Trevorrow* cases to cases where formal consent is present. Would a post-*Lampard-Trevorrow* Federal Court treat a mother's thumb print as a product of state control, or would it once again take it on face value and take *Lampard-Trevorrow* as an exception to the rule? Would a post-*Lampard-Trevorrow* Supreme Court of New South Wales now recognise Joy Williams as a member of the Stolen Generations, notwithstanding her mother's consent noted in the documentary record?²¹¹ If the effect of *Lampard-Trevorrow* in future cases is to acknowledge the difficulties around meaningful consent in the context of Stolen Generations removals, this would go a long way in providing meaningful legal outcomes for Indigenous plaintiffs. Under such an approach, the formal consent of a mother's thumb print would be interpreted in the context of its historical production and doubted as evidence of meaningful consent.

It is yet to be seen whether the more contextualised understanding of the removal of children in the *Trevorrow* cases is of significant precedential value

²⁰⁸ Julian Burnside, 'Stolen Generation: Time for a Change' (2007) 32 *Alternative Law Journal* 131, 131.

²⁰⁹ James Cockayne, 'More than Sorry: Constructing a Legal Architecture for Practical Reconciliation' (2001) 23 *Sydney Law Review* 577, 581. See also Buti, above n 9, 415.

²¹⁰ Cunneen and Grix, above n 4, 27.

²¹¹ Such recognition was refused in *Williams (Trial)* (1999) 25 Fam LR 86, 87 [5] (Abadee J).

or merely symbolic importance for potential Stolen Generations litigants. Either way, the *Trevorrow* cases present opportunities for new judicial narratives on the Stolen Generations, narratives that involve Aboriginal child policies being recognised as more than the sum of documentary evidence and thumb prints. The common law will be best positioned to adjudicate the historical suffering of the Stolen Generations where judicial imaginings fully capture the removal of Aboriginal children ‘from their culture, their history and their community’ at the hands of a colonising policy.²¹² Such adjudication will provide closure for Stolen Generations litigants and an opening for the healing process.

²¹² van Krieken, above n 4, 240.