

Case Notes

Is Assimilation Justiciable?

Lorna Cubillo & Peter Gunner v Commonwealth

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*The powers of the Director under the 1918 Ordinance were exceptionally wide.*¹

1. Introduction

The debate around the past treatment of Aboriginal children has come to occupy a central place in the post-*Mabo*² re-thinking of relations between Indigenous and non-Indigenous Australians.³ Justice O'Loughlin's recent judgment in *Cubillo & Gunner v Commonwealth*⁴ is a significant contribution to this political and moral engagement with the history and legacy of Australian settler-colonialism. In addition to charting out the battleground for subsequent legal strategies, the judgment is also an important watershed in the way the arenas of law, politics and society might relate to each other in addressing the ethical questions surrounding the current reassessment of Aboriginal child removal in particular and assimilation in general, as well as the pathways which relations between Indigenous and non-Indigenous Australians might take in the future.

Justice O'Loughlin's painstaking examination of a large body of historical material and oral testimony provides food for thought for the defenders as well as the critics of part-Aboriginal child removal.⁵ Critics of the removal policies have tended to locate the destructive impact of colonial social relations and a particular form of assimilationism in government policies and practices, at the expense of a

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1 *Cubillo & Onor v Commonwealth (No 2)* (2000) FCR 1 (*Cubillo*) at 52-53.

2 *Mabo and Ors v Queensland (No 2)* (1992) 175 CLR 1.

3 Tim Rowse, *After Mabo: Interpreting Indigenous Traditions* (1993) at 1; Paul Patton, 'After Mabo' (1994) 27(4) *Southern Review* 511; Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17(1) *Syd LR* 5; Duncan Ivison, 'Decolonizing the Rule of Law: *Mabo*'s Case and Postcolonial Constitutionalism' (1997) 17(2) *OJLS* 253; Robert van Krieken, 'From *Milirrpum* to *Mabo*: the High Court, *Terra Nullius* and Moral Entrepreneurship' (2000) 23(1) *UNSWLJ* 63; Haydie Gooder & Jane M Jacobs "'On the Border of the Unsayable": the Apology in Postcolonising Australia' (2000) 2(2) *Interventions* 229; Malcolm Fraser, 'The Past We Need to Understand' (2000) 11(4) *PLR* 265; Duncan Ivison, Paul Patton & Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (2000). More broadly, see Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000).

4 Above n1; currently under appeal to the Full Court of the Federal Court.

5 The policies and practices at issue in this case concentrated on what were referred to as 'half-caste' Aboriginal children; the term used by the court here is 'part Aboriginal'.

sensitivity to the significance of both non-government bodies, especially the churches, and the colonial character and effects of broader European social relations and structures themselves, to which government interventions were often responding, rather than being their authors.⁶ On the other hand, some observers have construed O'Loughlin J's finding that there is simply insufficient evidence to resolve many of the questions about the nature of governmental removal policies one way or the other, for this particular period in the Northern Territory, as support for their interpretations of part-Aboriginal child removal as benign and beyond criticism;⁷ but they would do well to look again. Justice O'Loughlin is clear that even if those who removed and detained Lorna Cubillo and Peter Gunner thought they were doing so 'in their best interests', they would 'stand condemned by today's standards',⁸ and 'subsequent events have shown that they were wrong'.⁹

However, rather than reflecting on the judgment's construction of the history of the removal of part-Aboriginal children,¹⁰ the discussion here concentrates on its findings of law, and the findings of fact will only be addressed to the extent that they affect the legal questions. If the current law of torts, equity and judicial review is unable to produce a recognisably just means of addressing the pain and suffering generated by this particular aspect of Australian settler-colonialism, one approach is clearly to pursue shifts in the authoritative interpretation in Australian law of vicarious liability of public bodies, statutory duty, duty of care and fiduciary duty. This would certainly be the aim of further litigation. At the same time, the term the 'stolen generations' is meant to refer to something broader than the conditions under which part-Aboriginal children were removed, the presence or absence of parental consent, or what proportion of the Aboriginal population was affected. The concept also aims to capture the 'theft' of part-Aboriginal children from their culture, their history and their community, which was undisputably the aim of the political rationality characterising Australian society and public discourse at the relevant times, of linking 'welfare' to assimilation and the disappearance of Aboriginal identity.¹¹ But to the extent that it is not possible to attribute legal responsibility to a 'society', a 'political rationality' or a 'discourse', and to the

6 For a development of this point in relation to the class-focused 'social control' critiques child welfare generally, see Robert van Krieken, *Children and the State: Social Control and the Formation of Australian Child Welfare* (1991).

7 For example, Bill Hayden's speech on 11 October 2000: 'Subtlety. Not Sabres, for Reconciliation' *Sydney Morning Herald* (12 October 2000) at 12.

8 *Cubillo* at 482.

9 *Id* at 483.

10 There is now an extensive literature, including Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (2000); Tony Austin, *Never Trust a Government Man: Northern Territory Aboriginal Policy 1911–1939* (1997); Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880–1939* (1997); Suzanne Parry, 'Identifying the Process: the Removal of 'half-caste' Children from Aboriginal Mothers' (1995) 19(2) *Aboriginal History* 141; Peter Read, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales, 1883 to 1969* (1983); Robert van Krieken, 'The "Stolen Generations": On the Removal of Australian Indigenous Children from their Families and its Implications for the Sociology of Childhood' (1999) 6(3) *Childhood* 297.

11 See Hal Wootten's explanation of this point in 'Letters to the Editor', *The Australian* (28 February 2001) at 12.

extent that assimilation and colonialism are not really justiciable, it may also be useful to remain alive to the possibilities of identifying additional or perhaps alternative approaches.¹²

The key dates, names and places in the case are as follows. Lorna Cubillo was born Lorna Nelson, with the tribal name of Napanangka, on 8 August 1939 on Banka Banka Cattle Station. She was taken from her grandmother's care in 1940 and placed with the Aboriginal community in the Ration Depot at Seven Mile Creek. The community was moved to Six Mile Creek in 1942 and to the Phillip Creek Settlement in 1945. In 1947 she was taken from Phillip Creek to the Retta Dixon home in Darwin, by Amelia Shankelton, the Superintendent of Retta Dixon, in a truck driven by Les Penhall, a cadet Native Affairs Branch Patrol Officer. She was officially committed to Retta Dixon by the Director of Native Affairs, Frank Moy, in 1953, where she stayed until her eighteenth birthday in 1956.

Peter Gunner was born on 19 September 1948 on Utopia Cattle Station. He was committed by the Director of Welfare, Harry Giese, to St Mary's Hostel in Alice Springs on 24 May 1956. The committal was approved on 15 January 1957 on receipt of his mother Topsy's consent form bearing her thumb print, and he was declared a ward under the new Welfare Ordinance on 13 May 1957. He left St Mary's in 1963.

2. *The Commonwealth's Vicarious Liability — The Independent Discretionary Function Principle*

Having survived the Commonwealth's strike-out application,¹³ one of the legal gateways that Mrs Cubillo and Mr Gunner had to pass through was to establish the Commonwealth's vicarious liability for both their initial removal and their subsequent detention in the Retta Dixon Home and St Mary's Hostel. There were two issues: the status of the Director of Native Affairs/Native Welfare under the *Aboriginals Ordinance* 1918 (NT) (later the *Welfare Ordinance* 1953 (NT)), and whether the Commonwealth was 'vicariously liable for their acts and omissions'.¹⁴

The underlying rule is that employers, including the Commonwealth,¹⁵ are vicariously liable for acts committed by their employees in the course of their employment, generally under the 'control' or authority of the employer. The important exception in relation to public bodies is 'if the tortfeasor was in the process of carrying out an independent duty cast upon him or her by the law', rendering their authority original rather than delegated.¹⁶ Justice Dixon outlined the principle in *Little v The Commonwealth*:¹⁷

12 For example, a reparations tribunal, which would not require the establishment of legal responsibility and liability: Chris Cunneen, 'One Way to Give Back to the Stolen Generations' *Sydney Morning Herald* (14 August 2000) at 14.

13 *Cubillo & Another v Commonwealth* [1999] 89 FCR 528.

14 *Cubillo* at 336.

15 *Groves v Commonwealth* (1982) 150 CLR 113.

16 Rosalie P Balkin & JLR Davis, *Law of Torts* (2nd ed, 1996) at 769–770.

17 (1947) 75 CLR 94 at 114 (Dixon J).

any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability.

The line of authority for the ‘independent discretionary function rule’, which Gibbs CJ explained is ‘firmly established as part of the common law of Australia’,¹⁸ runs from *Tobin v The Queen*,¹⁹ through a sequence of subsequent cases²⁰ to *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd*²¹ and *Attorney-General (NSW) v Perpetual Trustee Co Ltd*.²² The *Enever* decision²³ in particular, stated O’Loughlin J, is ‘authority for the proposition that any authority that is specifically granted by the legislature to a person is original authority’.²⁴ As Wilson J explained in *Oceanic Crest*:

it is the statutory authority possessed by the servant that renders the employer immune to vicarious responsibility for the conduct of the servant in the exercise of that authority and not the character of the employer. It is immaterial whether the employer be the Crown, as in *Fowles*, a statutory corporation, as in *Stanbury v Exeter Corporation*, or a private company, as in this case.²⁵

‘Therefore’, wrote O’Loughlin J, ‘any person acting under statutory authority may be exercising an independent discretionary function’.²⁶ The exemption is conditioned by a ‘control test’, so that it fails to apply if the employee is subject to the control of a Minister or the Executive in the exercise of the statutorily assigned discretion.²⁷

After examining those cases where the rule did not apply, O’Loughlin J concluded that ‘[i]n each of the cases where the Crown was held to be vicariously liable, it was because the Crown’s relationship to its officer either exhibited a measure of control or failed to exhibit that an independence of action was available to the officer’.²⁸ His Honour further observed that torts committed outside the discretion granted by statute do attract vicarious liability, and that the Court’s

18 *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 637 (Gibbs CJ).

19 (1864) 143 ER 1148.

20 *Stanbury v Exeter Corporation* [1905] 2 KB 838, *Enever v The King* (1906) 3 CLR 969; *Baume v The Commonwealth* (1906) 4 CLR 97; *Fowles v Eastern & Australian Steamship Co Ltd* [1916] 2 AC 556; *Field v Nott* (1939) 62 CLR 660; *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1951-1952) 85 CLR 237.

21 Above n18.

22 (1951-1952) 85 CLR 237. An overview is provided in Susan Kneebone, ‘The Independent Discretionary Function Principle and Public Officers’ (1990) 16(2) *Monash ULR* 184.

23 Above n20.

24 *Cubillo* at 339.

25 Above n18 at 650.

26 *Cubillo* at 339.

27 *Bennett v Minister for Community Welfare* (1988) Aust Torts Reports 80-210 at 68,089 (Nicholson J).

28 *Cubillo* at 344-345.

interpretation will depend on the construction of the statute as a whole, as well as of the statutory scheme of which it is part.²⁹

Here, s6 of the Ordinance³⁰ did not make the Director an ‘instrument’ of the Commonwealth. Mrs Cubillo and Mr Gunner submitted that ‘the Director exercised his powers and duties subject to executive control — the administration of the Ordinances was nothing more than the carrying into effect of activities peculiarly within the province of the Government,’³¹ but O’Loughlin J disagreed with this construction of the relationship between the Director and both the Administrator and the Minister. His Honour’s opinion was that ‘a Director was entitled and obliged to ignore an instruction from the Administrator or the Minister if he or she did not think it to be in the interests of the child to utilise his power under s6’.³² What this meant for Lorna and Peter was that if the Director’s removal and detention of them was either executed under s6 or, in Peter’s case, at the request of his mother, liability for any act or omission under s6 generated no vicarious liability for the Commonwealth.³³ However, later in the judgment O’Loughlin J qualified this by stating that he had ‘no way of knowing why Mr Moy participated in her removal and detention’, so that if he did so for some other reason, then ‘depending on what power he purported to use, the Commonwealth might be at risk of being vicariously responsible for the Director’s conduct’, and the same point applied to Peter.³⁴ A similar conclusion was reached in relation to the Commonwealth’s vicarious liability for their treatment in Retta Dixon and St Mary’s.³⁵

This ‘independent discretion’ immunity, as O’Loughlin J observed, ‘has been modified and abrogated by statute as well as being the subject of substantial criticism’,³⁶ particularly in relation to the torts of police officers. The problems include the fact that it is difficult to justify in policy terms and, as RP Balkin and JLR Davis point out, liability for the loss or damage suffered is transferred from the Crown, where it could be absorbed, to a party far less likely to be able to distribute the loss,³⁷ not to mention difficult to identify.³⁸ Indeed, the effect of O’Loughlin J’s findings on vicarious liability will no doubt serve well as a

29 *Id* at 343.

30 Section 6 (1) The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody. (2) Any person on whose premises any aboriginal or half-caste is, shall, on demand by the Chief Protector, or by any one acting on behalf of the Chief Protector on production of his authority, facilitate by all reasonable means in his power the taking into custody of the aboriginal or half-caste.

31 *Cubillo* at 348.

32 *Ibid*.

33 *Id* at 348-349.

34 *Id* at 360.

35 *Id* at 350-351.

36 *Id* at 343.

37 Above n16 at 769.

38 John G Fleming, *The Law of Torts*, (9th ed, 1998) at 418.

textbook illustration of precisely these points. Professor Finn also observes that it has been the rule rather than the exception throughout the history of Australian public administration 'to statutorily allocate functions directly to officials, not for reasons of constitutional principle, but rather for reasons of convenience, precedent and pragmatism',³⁹ an approach which has 'further enhanced the protected position of governments'.⁴⁰ Professor Finn suggests that this internal distribution of powers within the apparatus of government should be regarded as simply arbitrary, rather than as being founded in a defensible position on the larger question of the overall relationship between government and the governed. The fact remains that such supposedly independent discretion is in reality exercised with the full weight of the Crown's authority behind it, so that:

considered from the subject's standpoint this is surely the quintessential case of where the Crown (and the public purse) should provide redress: an injury has been occasioned by a person acting in or under colour of public office and while exercising the actual or apparent authority conferred by the State.⁴¹

However, the effect of the independent discretion immunity is precisely to erect a firewall against such a form of redress, doubtless leaving those individual citizens who have suffered at the hands of a public official experience unimpressed by the relationship between public power and public responsibility in Australian society.

The difficulty in law is, of course, that courts are bound by Parliament's intent, no matter what criticisms one might make of it from a political and moral perspective. It will only be possible to abrogate it in law if it can be shown to contradict either some other legislative purpose or a constitutional principle. None the less, despite the fact that it seems to have been the product of a particular strategy of governance on the part of Australian legislatures, the policy drawbacks of the concept of 'independent discretion' remain. It particularly generates a relationship between citizens and government officials which, by today's standards and values, distributes responsibility and liability in a deeply problematic way, leading to the statutory abolition of the immunity in most common law jurisdictions.

3. *Causes of Action*

Arguably the Court's finding on absence of vicarious liability essentially meant that Mrs Cubillo and Mr Gunner had the wrong respondents, but it was nevertheless necessary to apply that finding in detail to each of the four causes of action: wrongful imprisonment, breach of statutory duty, breach of common law duty of care, and breach of fiduciary duty.

39 Paul Finn, 'Claims Against Government Legislation' in Paul Finn (ed), *Essays on Law and Government Vol 2: The Citizen and the State in Court* (1996) 25-49 at 37.

40 Paul Finn & Kathryn Jane Smith, 'The Citizen, the Government and "Reasonable Expectations"' (1992) 66 *ALJ* 139 at 145.

41 Above n39 at 37.

A. *Wrongful Imprisonment*

Both Mrs Cubillo and Mr Gunner pleaded that their removal and detention by the Director of Native Affairs constituted wrongful imprisonment and deprivation of liberty. They did not challenge the Director's empowerment by the Ordinance to interfere with Aboriginal children's freedom of movement and liberty; the claim was rather that the Directors' regard to the Commonwealth's general policy of removing part-Aboriginal children, although itself not unlawful,⁴² had 'caused the Directors to refrain from acting in accordance with their own opinions' or 'to act without having regard to the interests of the children,'⁴³ contrary to the provisions of s6.

Justice O'Loughlin found, however, that the documentary evidence did not support the proposition that there was a 'general removal policy' without regard for Lorna's and Peter's best interests. The phrasing of s6, empowered the Director 'to undertake the care, custody, or control of any aboriginal or half caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half caste for him to do so'. This suggested that the legislature intended some discretion to be exercised, allowing for the possibility that a Director would *not* undertake care, custody and control if he decided that it was unnecessary or undesirable in their interests. The evidence supporting the concept of a 'general removal policy' disregarding the child's interests and welfare included the fact that familial consent to removal was sought but not required,⁴⁴ and the simple presumption, from the highest policy level of the Minister⁴⁵ down to individual Patrol Officers,⁴⁶ that the mere fact of part-Aboriginality dictated that it was in the child's best interest that they be removed.

However, these aspects of the policy and practice of part-Aboriginal child removal were counter-balanced in O'Loughlin J's reasoning by evidence of:

- the expression of concern for part-Aboriginal children's welfare by some patrol officers, administrators, and institution staff;
- the Commonwealth's lack of capacity actually to realise such a policy fully;
- the existence of cases where decisions had been taken not to remove part-Aboriginal children;
- the existence of categories of removals where there was familial consent or initiative, or where it was clear case of neglect or abuse.

This evidence lent support to the counter-argument that patrol officers did exercise at least some selectivity in the removal of part-Aboriginal children, and that this selectivity was based on a consideration of the individual circumstances of particular children and their 'best interests'. The conclusion reached by his Honour was 'that the evidence presented to this Court in these proceedings ... does

42 *Cubillo* at 97.

43 *Id* at 358.

44 *Id* at 88, 95.

45 *Id* at 86.

46 *Id* at 91.

not support a finding that there was any policy of removal of part Aboriginal children such as that alleged by the applicants'.⁴⁷

It is important to emphasise the extent to which this is a negative finding of 'not enough evidence to decide', rather than a positive finding of fact about the history of part-Aboriginal child removal. There was no evidence excluding the possibility that the expression of concern by administrators and patrol officers for the children's 'welfare' and 'best interests' was either old wine in new bottles⁴⁸ or the *linkage* of welfare concerns with the pursuit of the more or less gradual disappearance of a distinct Aboriginal society and culture, rather than the primacy of the former over the latter.⁴⁹ That there was no policy to remove *all* part-Aboriginal children borders, with respect, on being a distinction without a difference. Neither the lack of logistical capacity fully to implement a policy, nor the existence of situations which rendered its implementation unnecessary, say very much about its existence. No evidence ruled out the possibility that decisions not to remove children might have been the result of balancing the aims of the policy with pragmatic concerns. The mere selective application of a policy does not render its existence logically impossible.

But what is most decisive here is that even if one were to come to a different weighting of the evidence and conclude that there was a general policy pursuing, say, 'the removal of as many part-Aboriginal children as practicable with little regard for their individual best interests', O'Loughlin J also found that the evidence 'would not justify a finding that it was ever implemented as a matter of course in respect of *these* applicants' [emphasis added].⁵⁰ The applicants were thus faced with a double hurdle, establishing both: (a) a general removal policy disregarding their individual needs and welfare; and (b) its application in their particular cases. O'Loughlin J found that they fell at the first hurdle, but even if they had not, the lack of evidence meant that they would instead have fallen at the second.

This finding did not, however, conclude the question of wrongful imprisonment. Justice O'Loughlin found that the applicants' evidence could not be

47 *Id* at 358. This is, of course, not the same as finding that there was no such policy, contrary to the reading of a number of commentators.

48 Some of the supposed evidence of concern for 'welfare' seems, with respect, rather weak, and it is sometimes unclear why his Honour regarded it as such: eg, at 129-130, particularly when it is observed that this 'concerned approach' was none the less 'strongly flavoured with racial overtones' at 129.

49 The High Court operated with this opposition between welfare and non-welfare objectives in *Kruger v The Commonwealth of Australia* (1997) 190 CLR 1, where it acknowledged that 'No doubt it may be said with justification that the events in question did not promote the welfare of Aboriginals' (Dawson J at 62), but at the same time '[T]he responsibility for welfare cast upon the Chief Protector is at odds with the notion that the powers conferred by the Ordinance are of themselves punitive' (Toohey J at 85).

50 *Cubillo* at 358. Earlier O'Loughlin J had outlined that 'although it may be proved that some policy existed, that does not thereby mean that the policy was implemented in respect of the young Lorna and the young Peter. A benign policy might have been harshly applied against the interests of a particular child by a public servant for whom the Commonwealth was responsible: a harsh policy might have been benignly applied in the best interests of the child' at 60.

raised to the level required to rebut the presumption that where statutory powers are based on the formation of particular opinions, those opinions have indeed been formed.⁵¹ However, it was also stated that where the applicants plead unlawful removal and detention, the onus was on the Commonwealth to rebut those allegations. The plaintiff only need establish imprisonment, whereupon the defendant is required 'to prove a lawful justification for the imprisonment either at common law or by statute'.⁵²

To establish imprisonment, it will be sufficient to prove that there was a constraint on the applicant's will that was so great as to induce him or her to submit to a deprivation of liberty; physical force need not be used. A mere taking and detaining will be sufficient and it can be effected as a result of the accumulation of the actions of two or more persons. Thus, it could be that the combined actions of Miss Shankelton and Mr Penhall might be the catalyst for the cause of action.⁵³

There was thus an onus placed on the Commonwealth to demonstrate that the applicants' removal and detention were lawful, pursuant to the provisions of the Ordinance. There was, his Honour found, no evidence sufficient to discharge this onus: 'there was no evidence before the Court that the Director used or intended to use his powers under s6 of the 1918 Ordinance',⁵⁴ namely that, in his opinion, it was 'necessary and desirable in the interests of the child to do so'. Justice O'Loughlin found, then, that Mrs Cubillo had established a prima facie cause of action for wrongful imprisonment against Les Penhall and the estates of Frank Moy and Amelia Shankelton.⁵⁵ However, his Honour had also found that the Commonwealth was not liable for any action taken by the Director under s6; a possible exception would be if it could be established that Lorna's removal took place under some other purported power.⁵⁶

For Peter Gunner, his Honour found that the Director 'did not have a legal involvement in Peter's removal from Utopia',⁵⁷ since there was insufficient evidence that his mother, Topsy, had *not* requested and consented to his removal. Her thumb print was present on the form requesting his removal, and there was no means of establishing whether or not the document had been explained to Topsy and whether or not the thumb print was indeed hers. In coming to the conclusion, on the balance of probabilities, that Topsy had given her informed consent to Peter's removal, O'Loughlin J added:

In coming to that conclusion, I am aware that there was no way of knowing whether the thumb mark on the "Form of Consent" was Topsy's; even on the assumption that it was, there was no way of knowing whether Topsy understood

51 *Id* at 357.

52 *Id* at 355. *Myer Stores v Soo* [1991] 2 VR 597; *Spautz v Butterworth* (1996) 41 NSWLR 1 at 26 (Clarke JA, with whom Priestly and Beazley JJA agreed).

53 *Cubillo* at 358.

54 *Id* at 359.

55 *Ibid*.

56 *Id* at 360.

57 *Id* at 359.

the contents of the document. But 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 Topsy the meaning and effect of the document. I have no mandate to assume that Topsy did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document.⁵⁸

In addition, following the rule in *Jones v Dunkel*⁵⁹ and the subsequent jurisprudence concerning the rule,⁶⁰ his Honour also found that Mr Gunner's failure to adduce the evidence of his aunts regarding the question of Topsy's consent 'suggested that their evidence would not support a finding of non-consensual removal', and that the inference that Topsy had consented to his removal is 'more readily acceptable'.⁶¹

Regarding Lorna and Peter's detention, O'Loughlin J's findings were that, for particular periods, both the Director and the Commonwealth were completely protected by s16 of the Ordinance granting unconditional discretionary power to the Director of Native Affairs to cause 'any aboriginal or half-caste' to be kept within an appropriate institution, with no requirement that the detention be based on assessment that it was in the child's best interests.⁶² These periods were, for Lorna, between 18 August 1953, when she was committed by the Director (Moy) and 18 August 1956 when she left Retta Dixon; for Peter, between 24 May 1956 when he was committed to St Mary's by the Director (Giese) and 15 January 1957 when Peter's committal was approved by the Administrator on receipt of his mother's thumb-printed consent form. Regarding Peter's subsequent detention, the Court's finding that his mother had consented to his removal meant that he was legally detained at her request, rather than pursuant to a power exercised by either the Director or the Commonwealth. In relation to the period of Lorna's detention between prior to 1953, there was no evidence allowing the Court to come to a conclusive finding on whether or not the Director was purporting to act pursuant to his statutory power and had formed an opinion that it was 'necessary or desirable, in Lorna's interests to do so'.⁶³

The applicants also sought to subject their removal and detention to the principles of judicial review, in particular the doctrines of 'Wednesbury unreasonableness' and inflexible application of policy. In relation to the former, judicial review of a decision which can be shown to be so unreasonable that no reasonable person could have reached it,⁶⁴ the court is not to substitute its own

58 Id at 245.

59 (1959) 101 CLR 298.

60 *Cubillo* at 118-120.

61 Id at 262.

62 Id at 356-357.

63 Id at 360.

64 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Council of the City of Parramatta v Pestell* (1972) 128 CLR 305 at 323 (Menzies J) and 327 (Gibbs J); *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379.

judgment for that of the decision-maker.⁶⁵ In this case, the decision concerned involved the balancing of a number of concerns, identified by his Honour as:

- the welfare of the child, especially its present and future care, and the desirability of an education so as to allow the child an opportunity to realise its potential;
- the interests of the parents and the extended family of the child; and
- the interests of the community generally, which would include the desirability of the education of all children so that on adulthood they may contribute to and participate in Australian society.⁶⁶

In relation to Frank Moy, there was simply no evidence of the concerns governing his decision to remove Lorna. In relation to Harry Giese, there was at least some evidence on the other side, indicating regard for his individual circumstances, such that his Honour was 'prepared to draw the inference ... that a view had been formed that it would be in Peter's best interests to go to St Mary's so that he could attend school'.⁶⁷ This also meant that there was no possibility of a finding of an inflexible application of policy, since this doctrine can be applied only 'when a court is able to review the evidence that related to the conduct of the decision-maker'. In the absence of any such evidence, 'the court cannot meaningfully engage in that exercise of review'.⁶⁸ Both of these grounds of judicial review failed.⁶⁹

B. Breach of Statutory Duty

Mrs Cubillo and Mr Gunner submitted that the Director should, as their legal guardian, have had regard to a consideration of their best interests, the possibility of injury resulting from removal, the possibility of an adverse effect on their families, their health and welfare, the suitability of the institution in which they were detained, and whether a European education would actually have a beneficial effect on them.⁷⁰ In relation to their detention, the duties proposed included: monitoring and supervision of the institutions to ensure satisfactory standards and care; their supervision within the institution to ensure their safety and well being; and removal from the institutions if they were failing to provide proper or adequate care.⁷¹

Neither the *Aboriginals Ordinance* 1918 (NT) nor the *Welfare Ordinance* 1953 (NT) conferred a right on injured persons to recover compensation for any breach of statutory duty,⁷² but such a right might arise by implication, if the inference of legislative intent for civil recovery for such breach can be shown.⁷³ Chief Justice

65 *Minister for Immigration & Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 221.

66 *Cubillo* at 362.

67 *Ibid.*

68 *Id* at 363.

69 *Ibid.*

70 *Id* at 363-364.

71 *Id* at 364.

72 The established requirement for a cause of action for breach of statutory duty: *Northern Territory v Mengel* (1995) 186 CLR 307.

Brennan, writing extra-judicially, outlined that the cause of action arises only when a statute creates a duty to be performed for the benefit of the plaintiff or, more usually, of a class of which the plaintiff is a member and only when, on its true construction, it confers on the plaintiff or on members of that class a right to recover damages for loss occasioned by the breach.⁷⁴

Following the point made by Lord Brown-Wilkinson in *X (Minors) v Bedfordshire County Council*,⁷⁵ O'Loughlin J added the observation that welfare legislation should be understood in terms of the benefit it is intended to confer on society as a whole, in addition to the limited class with which it is directly concerned.⁷⁶

It is an essential element of the separation of powers doctrine that, as O'Loughlin J explained, 'a statutory authority cannot be liable in damages for doing that which Parliament has authorised',⁷⁷ so that:

This Court has no jurisdiction to review the desirability of policies underlying Acts of the Parliament. It is therefore not open to this Court to review those policies that were enacted in the Ordinances and embodied in the powers conferred by the Ordinances. Those provisions, being valid laws, bind this Court and bind the applicants.⁷⁸

The Director's action could only be regarded as beyond power if it was 'exercised for a malicious purpose or for an objective that was foreign to the mandates of the legislation'.⁷⁹ Another possible ground for a cause of action would be negligence in the performance of a statutory duty.⁸⁰

Justice O'Loughlin found that in arranging for Lorna to continue to be detained at Retta Dixon and for Peter to be admitted to St Mary's, the Directors' actions 'reflected the policy that was expressly embodied in the duties imposed upon the Directors under the Ordinances and pursuant to which they were required to exercise their power under the Ordinances',⁸¹ and in the absence of evidence of malicious or alien purpose, abuse of power or lack of reasonable care, there could be no breach of statutory duty.

C. Breach of Duty of Care

The core elements of the tort of negligence are the establishment of a duty care, negligence in breach of that duty, and damage that was not, in law, too remote a consequence of that negligence.⁸² After considering particular English,⁸³ New

73 *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 53 (Webb J).

74 The Honourable Sir Gerard Brennan, 'Liability and Negligence of Public Authorities: the Divergent Views' (1991) 7 *Aust Bar Review* 183 at 185.

75 (1995) 2 AC 633 at 731-732.

76 *Cubillo* at 365.

77 *Ibid.*

78 *Id* at 367.

79 *Ibid.*

80 Above n74 at 187; *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430.

81 *Cubillo* at 367.

Zealand⁸⁴ and Australian⁸⁵ authorities, O'Loughlin J, applying the key elements of common law liability of public bodies identified by McHugh J in *Crimmins v Stevedoring Industry Finance Committee*,⁸⁶ reiterated the points made in the earlier discussion of vicarious liability and statutory duty to conclude that the Commonwealth could not be held to have a duty of care towards Lorna and Peter nor, if that was incorrect, was there any evidence that such a duty had been breached.⁸⁷ The power of removal and detention lay in the Director, not the Commonwealth, so there was no act or omission on the Commonwealth's part, nor was there evidence that the Commonwealth was aware of any risk of harm to either Lorna or Peter. Justice O'Loughlin also found that the imposition of a liability on either the Director or the Commonwealth in regard to the discretionary powers under s6 of the 1918 Ordinance 'would arguably challenge the "core policy-making" function of the legislation':

The Welfare nature of the policy as found in the Aboriginals Ordinance, the difficulties through distance, remoteness, language and contrasting cultures in implementing the policy together with the subjective views of a Director in forming an opinion about what was necessary or desirable in the interests of a particular child do not favour the imposition of any duty.⁸⁸

His Honour did nevertheless examine whether the Directors had a common law duty of care to Lorna and Peter and, on the side of finding such a duty, said:

The guardianship, the power to undertake the care, custody and control of a child, the power to keep the child in an Aboriginal institution and the statutory obligations in s5 to advance the welfare of the child could all be said to be compatible with the existence of a duty of care. Furthermore, there was nothing in the legislation that would exclude a common law duty of care nor was there anything in the legislation that provided a remedy for any breach of an alleged statutory duty.⁸⁹

However, there were a number of counter-considerations deriving from Lord Browne-Wilkinson's judgment in *X (Minors)*.⁹⁰

82 *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

83 *X (Minors) v Bedfordshire County Council* (1995) 2 AC 633; *Barrett v Enfield London Borough Council* [1999] 3 All ER 193.

84 *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262; *B v Attorney-General* [1999] 2 NZLR 296; *W v Attorney-General* [1999] 2 NZLR 709.

85 *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

86 (1999) 167 ALR 1.

87 *Cubillo* at 384 & 395.

88 *Id* at 382-383; see *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1 at 21 (McHugh J) at 9-10 (Gaudron J) and at 3 (Gleeson CJ).

89 *Cubillo* at 384-385.

90 Above n83.

The first was the fact that the Ordinance placed a heavy and broad responsibility on the Director such that it was likely that some mistakes would be made, but they would none the less be made 'with the interests of the child in the forefront of the Director's consideration'. Second, removal was a delicate task and his Honour was impressed by 'the interest and concern that some patrol officers took when they were required to consider the welfare of a child'. Third, the risk of litigation is likely to have a problematic impact on the day-to-day operations of welfare authorities. Taking these considerations into account, O'Loughlin J concluded generally that 'a decision to take a child into care is one that courts are not fitted to assess',⁹¹ and in particular that Mrs Cubillo and Mr Gunner had 'failed to satisfy the Court that, when (or if) the Director removed and detained them, he did not have the necessary opinion about their interests'.⁹²

In relation to Lorna and Peter's detention, although O'Loughlin J did not doubt that they had 'suffered severely' during their detention, he found, firstly, that there was an insufficient relationship between the conditions in the two institutions and the loss and damage for which they were seeking compensation. It was, his Honour found, 'the removal and the detention — more than the conditions of the detention — that were the cause of their sufferings'.⁹³ His Honour felt that Mrs Cubillo's and Mr Gunner's sense of loss would have been very similar even if the conditions at Retta Dixon and St Mary's had been excellent. 'I do not think,' wrote O'Loughlin J, 'that overcrowding or unsatisfactory aspects of hygiene caused or contributed to her sense of loss. That loss came from the severing of her ties with her family and the loss of her language, culture and her relationship with the land'.⁹⁴ The same observation applied to Mr Gunner.

The broad contours of his Honour's understanding here appears to resonate to a large extent from the way in which the plaintiffs' arguments were framed, which suggests that attacking the 'whether' of assimilationist policies tends to undermine the strategic capacity to simultaneously deal with the 'how' of abusive subsequent treatment. The comparison with the Canadian experience is instructive; Pamela O'Connor suggests that Canada's Indigenous peoples have had more success in court 'because the legal challenge to the residential schools has been spearheaded by sexual assault claims'.⁹⁵ It will be a subsequent wave of litigation which will aim to address the underlying assimilationist aims of the residential school system, the reverse of the order of events in the Australian context.

Although the Court accepted both that Lorna been subjected to physical assault while at Retta Dixon, and Peter to sexual assault while at St Mary's, neither the

91 *Cubillo* at 385.

92 *Id* at 387; also 395-396. See also *Williams v Minister, Aboriginal Land Rights Act 1983 & Anor [No 2]* [1999] NSWSC 843; 25 Fam LR 86; (1999) Aust Torts R 81-526 (Abadee J); and *Williams v The Minister Aboriginal Land Rights Act 1983 and The State of New South Wales* [2000] NSWCA 255 (Heydon JA).

93 *Cubillo* at 388.

94 *Ibid*; also at 389.

95 Pamela O'Connor, 'Squaring the Circle: How Canada is Dealing With the Legacy of its Indian Residential Schools Experiment' (2000) 6(1) *AJHR* 188 at 215.

Director nor the Commonwealth knew of these assaults, and no one in authority was told at the time, so that there was neither actual knowledge nor a situation 'such that it could be said that either the Director or Commonwealth ought to have known of the assaults or of the assailants' propensities to commit the assaults'.⁹⁶ The finding in favour of Mr Gunner was that the Director 'did not take appropriate action about the condition of St Mary's',⁹⁷ but that the breach of the duty of care was on the part of the Director, for which the Commonwealth was not vicariously liable.⁹⁸

D. Breach of Fiduciary Duty

The final claim was of breach of fiduciary duty, based on (1) the existence of a fiduciary relationship with the Commonwealth, (2) the existence of a fiduciary relationship with the Directors, for which the Commonwealth had a vicarious liability, and (3) the Commonwealth's knowing participation in the Directors' breaches of those fiduciary duties.⁹⁹

A fiduciary relationship 'is said to arise where one party reposes confidence in another who is expected to act in the interests of the first party rather than in his own interests'.¹⁰⁰ The circumstances giving rise to a fiduciary relationship 'include such matters as inequality of bargaining power, an undertaking to act in the interests of another person, an ability to exercise a power or a discretion that may affect the rights of another and issues of dependency and vulnerability' as well as relationships created by statute.¹⁰¹ The existence of a fiduciary relationship is also 'a question of fact to be resolved at trial'.¹⁰² However, in Australian law it has been restricted to situations of economic loss, and there is extreme reluctance to expand the range of fiduciary obligations to arenas with no economic aspect, largely on the argument that such conflicts of interests are more appropriately dealt with by tort law.

The applicants' attempted utilisation of the jurisprudence of *Bennett v Minister for Community Welfare*¹⁰³ was quickly dispatched with the observation that there had been no proof of any rights being infringed.¹⁰⁴ However, there remained the question of whether the Court should exercise its equitable jurisdiction to identify the particular relationships of guardian and ward as fiduciary relationships. In *Paramasivam v Flynn*,¹⁰⁵ the Full Federal Court had determined that such a

96 *Cubillo* at 390.

97 *Id* at 388; O'Loughlin J's conclusions regarded duty of care are summed up at 397.

98 *TC v State of New South Wales* [1997] NSWSC 31 (Studdert J) was distinguished, because of 'the relevant statutory provisions which created a mandatory obligation on the Department of Youth Services to act upon a complaint': at 393.

99 *Cubillo* at 397.

100 John Dyson Heydon & Patricia Louise Loughlan, *Cases and Materials on Equity and Trusts* (5th ed, 1997) at 207.

101 *Cubillo* at 400.

102 *Id* at 400-401; *Northern Land Council v Commonwealth* (1986) 161 CLR 1.

103 [1992] 176 CLR 408.

104 *Cubillo* at 403.

relationship ‘may give rise to duties typically characterised as fiduciary’ [emphasis added], but disagreed, when it was a matter of non-economic loss, ‘that “fiduciary” is the right label for it, still less that equitable intervention is necessary, appropriate or justified by any principled development of equity’s doctrines’.¹⁰⁶ Without denying that the law of fiduciary duties may be extended to encompass novel situations,

Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, are to be compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity’s entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in terms of conventional legal reasoning.¹⁰⁷

In arriving at this decision, the Full Federal Court declined to follow the inclination of the Canadian courts to apply equitable principles regarding fiduciary duties to non-economic losses within parental relationships,¹⁰⁸ relying in part on the authority of the High Court’s decision in *Breen v Williams*.¹⁰⁹ Overall, O’Loughlin J felt that it would be ‘inappropriate for a judge at first instance, to expand the range of the fiduciary relationship ... where the conflict did not include an economic aspect’.¹¹⁰

4. *Extension of Time and Laches*

In principle the action was in any case statute-barred by the *Limitation Act* 1981 (NT), and an integral part of the action was an application for the Court to exercise its discretion to grant an extension of time. The Court has to be satisfied that the preconditions in s44(3)(b) of the *Limitation Act* have been met before it has discretion to grant extension of time.¹¹¹ Then it is necessary to establish ‘that in all the circumstances of the case, it is just to grant the extension of time’: s 44(3)(b). In this case, the Court had to be satisfied that the applicants had commenced their action within 12 months after the ascertainment of facts material to their case (s44(3)(b)(i)), and that their failure to commence action ‘resulted from representations or conduct of the defendant, or a person whom the plaintiff

¹⁰⁵ (1998) 90 FCR 489 at 504.

¹⁰⁶ *Paramasivam v Flynn* (1998) 90 FCR 489 at 506; see the discussion in Nicholas J Mullany, ‘Civil Actions for Childhood Abuse in Australia’ (1999) 115 *LQR* 565, and also Rolfe J’s rejection in *Johnson v DOCS* [1999] NSWSC 1156 (2 December 1999, unreported) at para 135, of the proposition that there cannot be a fiduciary relationship between guardian and ward (following McHugh J’s observations in *Secretary, Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218 at 317).

¹⁰⁷ *Paramasivam v Flynn*, *id* at 505.

¹⁰⁸ *M(K) v M(H)* (1992) 96 DLR (4th) 289 at 327.

¹⁰⁹ (1996) 186 CLR 71.

¹¹⁰ *Cubillo* at 408; see also *Williams v Minister, Aboriginal Land Rights Act* (1983) & *Anor* [No 2], above n92.

¹¹¹ *Braedon v Hynes* (24 July 1986 NT Supreme Court, unreported) (Maurice J); at para 1311.

reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances' (s44(3)(b)(ii)). After a detailed discussion of the time-frame within which both Lorna and Peter became aware of the loss and damage they had suffered, particularly psychiatric damage, his Honour came to the conclusion that they had both passed this threshold test. In relation to Mrs Cubillo, his Honour identified the following arguments in favour of granting an extension:

- refusal would mean she had no other remedy at law;
- it is understandable that Mrs Cubillo would not have understood that she had a cause of action;
- someone in her position would have required significant assistance to commence such an action; and
- the proceedings 'are entering a new domain where social welfare legislation and its implementation is being challenged'.¹¹²

However, these considerations had to be weighed against the absence of material witnesses, the infirmities of others, and the absence of a large amount of documentary evidence. The mere fact of prejudice to the respondent does not dictate refusal of an extension of time.¹¹³ The Court's decision will depend on all the circumstances of the case. Here O'Loughlin J was 'very concerned by the absences of the Directors and Acting Directors of Native Affairs and Directors of Welfare and, to a lesser extent, the Administrators of the Territory',¹¹⁴ and felt that these restrictions on the Commonwealth's capacity fairly to present its case were 'irremediable'. His Honour concluded:

The strength of the Commonwealth's claims, based on the decisions in *Brisbane South Regional Health Authority v Taylor* and *Paramasivam v Flynn*, is, in my opinion, overwhelming. I have come to the conclusion that its defence, based on prejudice, must prevail.¹¹⁵

The example of the cause of action for false imprisonment was used to illustrate the point. The Commonwealth had an onus to show that Lorna's taking was lawful, but how was it do that?

Every person who was in authority, such as Mr Moy, is dead; no writings on the removal of the children have been located. The Commonwealth has no chance whatsoever of defending the actions of the Director of Native Affairs in 1947.¹¹⁶

Similarly in relation to questions of fiduciary duty and the equitable defence of laches, his Honour found that the absence of material witnesses and other evidence meant that 'it would be grossly unfair to proceed'.¹¹⁷ Even if there had been a relationship of fiduciary duty between the applicants and the Directors, there had

112 *Cubillo* at 443.

113 *Id* at 431-432, 434.

114 *Id* at 437.

115 *Id* at 443.

116 *Id* at 444.

117 *Id* at 447.

been breach of that duty, and the Commonwealth was vicariously liable for that breach, the Court would nevertheless not have exercised its discretion regarding extension of time in the applicants favour. The claims for equitable relief for breaches of fiduciary duty would also have been barred.¹¹⁸

In assessing notional damages, the claims for exemplary damages were rejected outright, since the facts did not support any argument that the Commonwealth had acting either with ‘contumelious disregard’ of their interests or a ‘wanton cruel and reckless indifference’ to their welfare and their rights.¹¹⁹ Justice O’Loughlin calculated damages for the breaches of duty, with interest, at \$126,800 for Mrs Cubillo and \$144,100 for Mr Gunner.

5. *Conclusion: ‘Well-meaning Callousness’¹²⁰ and Australian Law*

The legal and evidential obstacles facing Lorna Cubillo and Peter Gunner were multiple and many-sided, but we can identify four of the major ones: the evidential problems generated by the passage of time; the Australian jurisprudence surrounding fiduciary duties; the protection provided to the Commonwealth by the relevant legislation in respect of its vicarious liability for the actions of its officers; and, the problems posed by the discursive construction of policies of assimilation in terms of Aboriginal ‘welfare’ and ‘the best interests of the child’, as well as the non-justiciability of the policies of an Australian Parliament.

First, the applicants overcame most of the hurdles to obtaining extensions of time, bar one: in the interests of justice, the Court will seek to ensure that both parties have a more or less equivalent capacity to argue their case. Justice O’Loughlin found that the proceedings suffered from the absence of the testimony of significantly relevant witnesses — particularly Frank Moy, RK McCaffrey, Harry Giese and Amelia Shankelton — concerning the rationale behind the removal of these *particular* children, which made it impossible for the Commonwealth reasonably to argue its case and, accordingly, for there to be a fair trial. In effect, the extension of time was rejected for more or less the same reasons that the substantive aspects of Mrs Cubillo’s and Mr Gunner’s legal arguments were refused: just as the ‘huge void’¹²¹ in the evidence made it impossible to determine questions of legal responsibility and liability one way or the other, it also undermined the possibility of a fair trial. Justice O’Loughlin’s explanation for this decision is cogent and convincing, and the only way it might be overcome on appeal is by seeking to demonstrate that the evidence of the absent central witnesses is somehow not as crucial to the Commonwealth’s side of the story as his Honour believed.

Second, the question of finding a breach of fiduciary duty in relation to the removal of part-Aboriginal children essentially revolves around the willingness of

118 Id at 448.

119 Id at 462.

120 Colin Macleod, *Patrol in the Dreamtime* (1997) at 167.

121 Justice O’Loughlin, ‘Summary of reasons for Judgment given on 11 August 2000’, <http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/1084.html> at para 9.

Australian courts to move towards the approach of the Canadian courts¹²² and apply the equitable principles of fiduciaries to non-economic losses suffered within guardian-ward relationships.¹²³ Justice O'Loughlin was reluctant, as a Judge at first instance, to bring about such a major change in Australian law in the face of the authority of the High Court's decisions in *Oceanic Crest* and *Breen v Williams*, so that this question is only likely to be resolved by the High Court itself.

Third, a similar problem characterises the question of vicarious liability: the authorities appear to be firmly on the side of the 'independent discretionary function' rule, which constructs a firewall around the Commonwealth's liability wherever the legislation at issue charges particular public officials with the relevant discretion and responsibility. The fact is that the statutory assignment of duties and responsibilities to particular officers, rather than the Executive as a whole, is one of the more effective obstacles which Australian governments have developed, either deliberately or by accident, to protect the Commonwealth being held legally responsible for adverse effects of its administrative arrangements on its citizens, not least its Indigenous subjects. In this case, then, the wording of the statute compels those who have suffered loss and damage while under the power of the Director of Native Welfare to sue the estate of whoever was Director at the time, or particular individual officers. This clearly remains problematic; O'Loughlin J still recognised the practices as being questionable by contemporary standards, and as Father Frank Brennan has argued:

... it would seem to me that the big moral and political challenge for the country is to say, "[i]f there are wrongs which have been committed, and those wrongs according to law should be satisfied, then to say that it should be done out of the estates of deceased persons, or of churches which were under-resourced at that time, is I think a betrayal of a national, moral, political commitment."¹²⁴

As Professor Fleming has also remarked, finding vicarious liability may be what is needed to 'serve the cause of deterrence'.¹²⁵ Again, this will need to be resolved either in a superior court or by legislation, unless there is a fact situation in which removal and detention took place, for some reason other than the exercise of the statutorily assigned discretion of s6, which is what would generate Commonwealth vicarious liability.

It is conceivable, as Professor Finn suggests, that 'the High Court may be induced to reconsider this matter — and overrule a significant number of its own decisions',¹²⁶ or at least, to distinguish its approach to shipping pilots¹²⁷ from its approach to welfare officials. It may also be possible to develop a jurisprudential

122 Above n108 at 327.

123 This line of argument appears in Paul Batley, 'The State's Fiduciary Duty to the Stolen Children' (1996) 2 *AJHR* 177.

124 The Law Report, ABC Radio (15 August 2000) <www.abc.net.au/rn/talks/8.30/lawrpt/stories/s163676.htm>.

125 Above n38 at 418.

126 Above n39 at 37.

127 Above n18.

approach in which the concerns outlined by the High Court in *Oceanic Crest*, particularly the question of where the statutory power has actually been allocated, are *balanced* against the policy disadvantages of allowing the Crown to escape from liability for actions which were still, in the final analysis, done in its name and backed with the full force of its legal authority.

Finally, even if the Commonwealth *were* vicariously liable for the actions of the Directors, the fact that these Aboriginal child removal practices were, more or less, exactly what Parliament intended in realising the aims of assimilation narrows significantly the range of possible strategies in law. It would be an unfortunate reading of O'Loughlin J's judgment to say, as Robert Manne has, that it is 'blind to the racist assumptions that conditioned what, for 40 years, the administrators regarded as being, self-evidently, in the best interests of the child'.¹²⁸ On the contrary, O'Loughlin J insisted that the 'belief that it was in the best interests of part Aboriginal children to assimilate them into the European mainstream, and that the best way to do that was through a western style education' was qualified by the fact that:

Having made the decision to remove the child, there was a total disregard of the fact that the child was also part Aboriginal, of the fact that the child's mother or family with whom the child was living was or were Aboriginal, and of the fact that the child had been brought up only aware of Aboriginal culture and unaware of European culture.¹²⁹

It was in this respect that 'those in authority stand condemned on today's standards'.¹³⁰ Rather than *failing* to recognise the 'racist assumptions' underlying dominant conceptions of Indigenous welfare, O'Loughlin J's reasoning was more a matter of addressing precisely the legal consequences of the fact that those assumptions concerning the worth of Aboriginal culture *were* dominant at that time, part of 'the mainstream thinking of people in earlier times'.¹³¹ Justice O'Loughlin agreed that Lorna Cubillo and Peter Gunner had suffered severely 'as a result of the actions of many men and women who thought of themselves as well-meaning and well-intentioned but who today would be characterised by many as badly misguided politicians and bureaucrats'.¹³² The problem in law was demonstrating that they were not acting pursuant to statutorily-assigned powers or beyond those powers.

It is true that both sides have tended to reason in terms of a simple opposition between the pursuit of either 'welfare' or European mono-culturalism.¹³³ But it is precisely because of the experience of their *intersection*, and the fact that governmental policies and practices concerning Aboriginal 'welfare' and 'best

128 Robert Manne, 'The Child's Interests Must Come First' *Sydney Morning Herald* (14 August 2000) at 14.

129 *Cubillo* at 482.

130 *Ibid.*

131 *Id* at 483.

132 *Ibid.*

interests' also had these more problematic purposes embedded within them, that Lorna and Peter pursued their actions in the first place: this was a central focus of the testimony to the *Bringing Them Home* report,¹³⁴ and the conceptualisation of Aboriginal child removal in terms of 'genocide'. The contours of the debate, so far, have obscured the fact that what was being said was not really that policies destructive of Aboriginal society and culture were pursued instead of welfare policies, but that what went under the name of the latter should be regarded in substance as equivalent to the former. As the anthropologist Professor W E H Stanner observed as late as 1964, '[o]ur intentions are now so benevolent that we find it difficult to see that they are still fundamentally dictatorial'.¹³⁵

Once we get to the point of recognising that conceptions of Aboriginal 'welfare' and the pursuit of the effective dissolution of a distinct Aboriginal cultural identity were inter-woven with each other, rather than mutually exclusive, this has important consequences with respect to law. It means that whatever problematic aspects of government Aboriginal welfare policy a litigant might be trying to address, since it will both have been wrapped up in the language of 'welfare' and 'best interests', and will generally have constituted the express intentions of the relevant Parliament, there will only be a relatively narrow window of opportunity for mounting a legal challenge, restricted to those fact situations where there is sufficient evidence to indicate — in that particular case — that actions were taken beyond the powers which Parliament had granted.

In this sense, O'Loughin J's judgment takes some important steps towards clarifying the role that law might actually play in addressing the question of the stolen generations. Essentially that role is a relatively precise and confined one: the evidential problems are not easy to surmount, the Australian law surrounding vicarious liability and fiduciary duty does not currently favour resolution in court,¹³⁶ and the practices associated with assimilation are only justiciable to the extent that it can be shown that they were pursued beyond the power assigned to

133 In *Kruger*, above n49, for example, NHM Forsyth QC argued for the applicants that '[t]he removal and detention powers conferred by the Ordinance and regulations did not bear a welfare or protective character' (at 8) and '[a]ny argument that the welfare and protection of Aboriginal or half-caste people provided a compelling justification for the removal and detention provisions of the Ordinance and regulations is insupportable in the light of their terms and of other provisions of the legislation' (at 10). Whereas for the Commonwealth, the argument by G Griffith QC was that '[i]t is apparent from the Ordinance that the purpose of the relevant sections was welfare and protection. They had no punitive object ... [and] they did not go beyond what, by the standards of the time, was reasonably capable of being seen as necessary for the purpose of looking after the welfare and protection of Aboriginal children' (at 20–21).

134 Human Rights & Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: Sterling Press, 1997): <www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/index.html>.

135 WEH Stanner, 'Foreword' in Marie Reay (ed), *Aborigines Now: New Perspectives in the Study of Aboriginal Communities* (1964) vii at ix.

136 Martin Flynn & Sue Stanton have also noted the psychological damage to the applicants caused by the processes of litigation themselves: 'Trial By Ordeal; The Stolen Generation in Court' (2000) 25(2) *Alternative Law Journal* 75.

the relevant administrators by the legislature. More broadly, Father Frank Brennan has noted parallels between this judgment and that of Blackburn J's in *Milirrpum v Nabalco Pty Ltd* about which he said:¹³⁷

a very painstaking decision written once again by an Adelaide-based judge, looking at the situation in the Northern Territory but saying with deep regret, '[I]ook, the evidence and the law doesn't carry.' But saying, '[t]here is an extraordinary moral wrong here that needs to be rectified, and it's up to politicians to do something.'¹³⁸

In relation to native title, the subsequent political developments were, of course, the passage of the *Aboriginal Land Rights (NT) Act 1976* (Cth) after the election of the Whitlam Government in 1972, and the introduction of the *Native Title Act 1993* (Cth) in the wake of the 1992 *Mabo* decision.¹³⁹ It seems likely that similar developments will need to take place in the fields of Australian politics and social life before the ethical and political issues raised by the current re-assessments of Aboriginal child removal are adequately addressed.

137 (1971) 17 FLR 141.

138 Above n124.

139 Above n3.