

FRAMEWORKS FOR INCLUDING INDIGENOUS ISSUES IN TORTS: STOLEN GENERATIONS CASE STUDY

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When we talk about tort law, we should start with the premise that it is designed to protect dignity and promote social equality and social justice. Our causes of action and remedies should be tailored to best achieve those ends.¹

Introduction

Tort Law subjects are well-known for their novel cases; snails in bottles,² ricocheting firecrackers³ and hundreds of thousands of dollars found in a household cupboard.⁴ These negligence and trespass cases push the boundaries of precedent, and are critical for understanding the opportunities that tort law provides. However, tort law is constantly opening up new avenues, including breach of statutory duty⁵ and misfeasance in public office. Stolen Generations litigation pushes some of these doctrinal boundaries. It signifies the potential for tort law to provide remedies for historical wrongs by the state. Stolen Generations cases also reveal how tort law provides not only compensation for physical and psychological harm but also for cultural loss. They reveal the unique loss that Indigenous people suffer at the hands of paternalist policy.

This paper will focus on the incorporation of Stolen Generations' cases into Tort Law subjects; especially the South Australian Supreme Court case of *Trevorrow v South Australia (No 5)*⁶ (hereafter '*Trevorrow*') and the South Australian Court of Appeal case of *State of South Australia v Lampard-Trevorrow*⁷ (hereafter '*Lampard-Trevorrow*'). The *Trevorrow* decisions represent a potential crossroads at which modern tort law may come to help protect those who have historically been most vulnerable.

Nature of Tort Law Subjects and Place of Indigenous Issues

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¹ Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 *Washburn Law Journal* 249, 257.

² *Donoghue v Stevenson* [1932] AC 562.

³ *Scott v Shepherd* (1773) 96 ER 525.

⁴ *Chairman, National Crime Authority v Flack* (1998) 156 ALR 501.

⁵ See Neil Foster, 'Breach of Statutory Duty and Risk Management in Occupational Health and Safety Law: New Wine in Old Wineskins?' (2006) 14 *Tort Law Review* 79.

⁶ *Trevorrow v South Australia (No 5)* [2007] SASC 285.

⁷ *State of South Australia v Lampard-Trevorrow* [2010] SASC 56.

Tort law is primarily concerned with providing compensation to an individual who has been wronged by a private entity. However, it can also address wrongs inflicted by the state. The main tort is negligence, involving an unintentional wrong. It requires proof of a duty of care, breach of duty and causation of damage. These basic elements of negligence constitute the substance of torts subjects. Tort law contrasts with criminal law, for example, which is premised on punishing individuals for intentional wrongs against the community. Crimes are prosecuted by the state because they are regarded as offending public morality and social order. Given that the state legislates criminal law, they are defined according to maintaining the institutional *status quo* rather than interrogating the acts of the state. However, Tort law offers an opening for litigants to hold the state to account.

All major parts of a torts subject (listed under the Priestley 11 requirements⁸) can be taught through an analysis of Stolen Generations cases. For example, Stolen Generations cases invoke a range of tort causes of action, including negligence, breach of statutory duty, false imprisonment, misfeasance in public office and the coverage of compensatory damages.⁹ Negligence takes up the great majority of Tort Law subjects and this article makes it clear how Stolen Generations cases can enhance the teaching of negligence principles in particular. There is value in teaching one set of cases across the subject because it clarifies the *links* between elements of proof of negligence. References in this paper are made to the tort principles and cases traditionally taught, and how the Trevorrow decisions can complement and, in some areas, substitute these cases. However, given the pressure to teach all the key cases that develop precedent in negligence, the discussion of Stolen Generations cases may be more appropriately placed in tutorials where students develop skills on applying the law to particular problems.

In discussing the *Trevorrow* cases there may be a need to provide some background to the policy, implementation and impact of Indigenous child removal. Students study Tort Law subjects early in their degree. In a combined Law degree, students will usually study Tort Law in second semester after completing a foundations of law subject in which they are taught about Indigenous legal issues, including Indigenous legal systems, the policy of assimilation and the experiences of the Stolen Generations. Students who study

⁸ In 1992 the Priestley 11 was set down as the national core curricula in a bachelor of laws and incorporated into the Legal Profession Admission Rules in all states and territories. To be eligible for legal practice, students have to fulfil requirements under those Rules. The Priestley 11 subjects are: Criminal law and procedure, Torts, Contracts, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Procedure, Evidence and Professional Conduct. Each subject area stipulates sub-topics.

⁹ Indigenous cases based on historic wrongs have also raised legal arguments in equity. See Prue Vines' article in this edition on how these cases may be discussed in an Equity subject.

a law degree on its own will often undertake Tort Law in their first semester and without necessarily the same prior knowledge of Indigenous legal issues. This will mean that teaching Stolen Generations case law may be improved by directing students to extra reading such as the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing them Home*.¹⁰

Students' attention may also be drawn to possible tort claims for Indigenous people beyond those concerning the Stolen Generations, such as claims for withheld Indigenous wages,¹¹ deaths in custody, loss of land, removal of cultural heritage and artifacts, and battery that attracts aggravated and exemplary damages for racist conduct.¹² Again, except for the damages example which is typically incorporated in a Torts subject, these issues may be best placed in the teaching of skills for hypothetical problem questions. After all, compensation in these instances, according to Jane Stapleton, is mostly hypothetical given Australia's poor record of protecting Indigenous rights within the strictures of the common law.¹³ This was also the case for Stolen Generations litigants until the 2007 *Trevorrow* decision,¹⁴ which brought into sharp relief that tort law is *not* a static mechanism and is capable of protecting those subject to social injustice.

Enlivening Context for Tort Law

Incorporating Indigenous issues into the torts curricula is not simply a matter of *sprinkle in a few cases and stir*. Nor is it a matter of changing the identity of the plaintiffs to Indigenous. Rather, it requires a systematic approach that develops students' appreciation of government policies towards Indigenous people and the systematic disadvantage that these have created. The wrongs are directed to Indigenous people based on their Indigeneity and often to remove their cultural identity in line with a policy of assimilation. Without an understanding of the policy agenda, it is difficult for students to understand the wrong and the loss to Indigenous people. The removal of Indigenous children has complex cultural and familial ramifications that contrast with other torts where the wrong is individualised (for example, car collisions and recreational accidents).

¹⁰ National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing them Home* (Human Rights and Equal Opportunity Commission, 1997).

¹¹ See Thalia Anthony, 'Unmapped Territory: Wage Compensation for Indigenous Cattle Stations' Workers' (2007) 11 *Australian Indigenous Law Review* 1, 4.

¹² See for example, *Henry v Thompson* [1989] 2 QdR 412.

¹³ Jane Stapleton, 'The golden thread at the heart of tort law: Protection of the vulnerable' (2003) 24 *Australian Bar Review* 135, 145.

¹⁴ See: *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86; *Cubillo v Commonwealth* (2000) 174 ALR 97.

In addressing the issue of how to incorporate theory into Tort Law subjects, Reg Graycar notes:

There will always be disagreements about whether ‘theory’ should be separated out and taught or illustrated as a distinct ‘stand-alone’ phenomenon, or whether, for example, theoretical approaches to legal issues are more effectively demonstrated by being integrated, and discussed and explored where issues arise, in context.¹⁵

This dilemma also arises in trying to engage Indigenous issues in a Tort Law subject that includes Indigenous cases. On the one hand, there is a need to provide a holistic and integrated commentary on colonial Indigenous policy and its historical-political underpinnings to make Indigenous torts cases come alive.¹⁶ Some of this context is apparent in the facts and issues of the cases, but a broader reference to Indigenous perspectives¹⁷ is necessary to balance the potentially skewed interpretation of evidence.¹⁸ On the other hand, the teaching of Indigenous torts cases warrants consideration of Indigenous issues in determining developments and applications of torts principles. This dual approach should accommodate a deeper learning of Tort Law principles, their possibilities and limitations, as well as an enhanced understanding of Indigenous culture and past wrongs of the state.

Introductory and Contextual Issues for Teaching Stolen Generations’ Tort Claims

In order for students to recognise whether the state breached its duty of care or committed a trespass, it is necessary for them to gain an understanding of the applicable policy of Aboriginal child removal; the ideology of assimilation that informed the policy and targeted Indigenous children; and the ensuing damage.

Firstly, the nature of the government policy and legislation will have a direct impact on the claim. For example, if the legislation had broad provisions with wide discretion for officers to remove children it may be harder to establish a breach of a duty of care. Alternatively, where the legislation is more prescriptive (such as requiring parental consent), it is more likely that a breach will be proven. Also, where the Government or Welfare/Native Affairs Board

¹⁵ Reg Graycar, ‘Teaching Torts as if the world really existed: reflections on Harold Luntz’s contribution to Australian law school classrooms’ (2003) 27(3) *Melbourne University Law Review* 677, 682.

¹⁶ A Foundations of Law first year subject is probably the best place for a comprehensive discussion on Indigenous policy, dispossession of Indigenous legal systems, assimilation and the imposition of the common law. See discussion in first year textbook: Michelle Sanson, Thalia Anthony and David Worswick, *Connecting with Law* (2nd ed, 2010) chs 8-9.

¹⁷ These may be found in National Inquiry, above n 10, or through inviting guest speakers (see below).

¹⁸ On evidential issues in Stolen Generations litigation: Trish Luker, ‘Intention and Iterability in *Cubillo v Commonwealth*’ (2005) 84 *Journal of Australian Studies* 35.

had more control and knowledge of the breach, the Government is more likely to be responsible.

Secondly, although the legislation often specified that it was directed at Aboriginal children ‘in need’ or who were being ‘neglected’, a great number of Aboriginal children who did not fall into these categories were subjected to removal. This was due to perceptions of the Aboriginal family as innately backward because it was at odds with western family structures. The ideology was that Aboriginal children would advance through assimilation in white society and family structures. Therefore, when considering damage caused to plaintiffs from the Stolen Generations, it should not be assumed that the plaintiff would otherwise have faced physical and psychological harm if the child stayed in the Aboriginal family. The legislation was rarely invoked where there was actual harm and mostly applied when based on a subjective view of the Aboriginal family and the need for assimilation.¹⁹

Finally, students need to understand the nature of Indigenous plaintiffs’ loss for the assessment of damages. It is not that Indigenous people simply sustained physical or psychological damage. Damages additionally include loss of family, language, kinship, community and cultural ties, as well as an inability to develop connections to their country. For students to conceptualise these types of damage, they need to grasp the importance of land, culture and community to Indigenous identity, laws and well-being. One technique for conveying this is to invite survivors of the Stolen Generations to speak in class or by prescribing readings from *Bringing Them Home*.²⁰ Contacting the non-government organisation *Link-Up New South Wales* may be one avenue for getting in touch with such guest speakers.²¹ Guest speakers can engage students and humanise the implications of the policy. However, it is necessary for the speaker to have adequate time to convey their experiences. In my experience, two hours has been a minimum amount of time for the stories to be shared. There is a risk that the speaker will find the experience wrenching. The lecturer needs to communicate to the students beforehand the sensitivity required in hearing the stories, as well as to the speaker that they can stop at any time.

Also in terms of damages, students need to be made aware that the loss is often inter-generational. Therefore, the potential class of plaintiffs is not limited to those directly removed, but also to their parents, children and grandchildren. Stolen Generations cases could push the boundaries of precedent in many ways, but especially through how the courts deal with intergenerational damage, new heads of damage and the possibility of seeking damages on behalf of a community rather than an individual. Students should be invited to

¹⁹ National Inquiry, above n 10, 7-8.

²⁰ Ibid.

²¹ See: *Link-up NSW* <<http://www.linkupnsw.org.au/link-up-nsw/>>.

consider the unique features of Stolen Generations litigation and the extent to which these have been embraced by the courts to date.

Case Law

It was not until 2007 that the courts compensated a member of the Stolen Generations. This was based, *inter alia*, on findings of the state as a tortfeasor.²² However, the courts had previously signaled possibilities in this direction in the case of *Cubillo v Commonwealth* (hereafter ‘*Cubillo*’).²³ The Federal Court in *Cubillo* accepted that such a duty of care existed towards Indigenous children.²⁴ However, the Federal Court reasoned that a breach of statutory duty could not be found where the Director’s duty was broadly ‘protection’. Commentators have argued that due to the narrow treatment of evidence in that litigation, the claims were unsuccessful.²⁵ A lack of evidence was also an issue in *Williams v Minister, Aboriginal Land Rights Act 1983* (hereafter ‘*Williams*’).²⁶ However, *Cubillo* remains relevant and is cited on a number of occasions in the case law and in the popular Tort Law textbook, Luntz et al’s *Torts: cases and commentary*.²⁷ Other cases also identify potential tort arguments for Stolen Generations’ litigants.²⁸

Given the success of the plaintiff in *Trevorrow*, it is a key case for teaching tort principles in Indigenous litigation. *Trevorrow* involved a claim for damages by South Australian Ngarrindjeri man, Bruce Trevorrow, who was removed from his parents at the age of 13 months. He was placed in non-Indigenous ‘care’ for ten years. After litigation lasting for more than a decade and costing millions of dollars, the Supreme Court determined at first instance against the state of South Australia. It found a breach of duty of care to the plaintiff, breach of statutory duty, false imprisonment and misfeasance in public office.²⁹ The South Australian government appealed against the legal decision to the South Australian Court of Appeal after Bruce Trevorrow passed away, although it did not seek to reclaim the compensation. The Court of Appeal in *Lampard-Trevorrow* upheld the Supreme Court’s judgment in favour of Trevorrow, although it did not accept all the causes of action. It also raised a number of

²² *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136.

²³ *Cubillo v Commonwealth* (2000) 174 ALR 97.

²⁴ *Ibid* 281 (O’Loughlin J).

²⁵ See Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (2008), 136.

²⁶ *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86, 140–3, 213 (Abadee J).

²⁷ Harold Luntz and David Hambly, *Torts: cases and commentary* (Lexis Nexis Butterworths, 2006).

²⁸ See for example *Kruger v Commonwealth*, *Bray v Commonwealth* (1997) 190 CLR 1.

²⁹ The Supreme Court in the first instance found that the state breached its fiduciary duties towards the plaintiff. I would encourage teachers to mention in anticipation of the subject of Equity and as a means of showing students how claims in tort and equity co-exist.

new points with regard to both duty of care and breach of duty, which will be discussed in relation to the teaching of the *Trevorrow* cases in accordance with the doctrinal requirements of a Tort Law subject.

Step By Step Teaching of Case Law

The Priestley 11 requirements for Tort Law are that it covers ‘Negligence’ and ‘A representative range of other torts, Damages, Concurrent liability and Compensation schemes’.³⁰ For most Tort Law subjects, negligence receives the greatest attention. It is taught in a logical step by step manner for each proof element: duty of care; breach of duty; causation and remoteness of damage; and lack of defences. With this approach, Indigenous issues can be incorporated at every phase. Professor Prue Vines at the University of New South Wales has trialed successfully this approach by referring to the *Trevorrow* decisions as illustrative of not only the stages in negligence, but also intentional torts and damages. I have taught *Trevorrow* with particular regard to its dicta on negligence and false imprisonment, as explicated below. Students are also encouraged to refer to the other torts relied on in *Trevorrow* — breach of statutory duty and misfeasance in public office — to understand these principles and the breadth of tort claims in this case.

A Negligence

(a) Duty of care

The initial issue in teaching negligence is whether the defendant owes the plaintiff a duty of care. The parameters for a duty of care have been widening since the famous case of *Donoghue v Stevenson* — which broadened the duty to beyond immediate relationships.³¹ The *Trevorrow* decisions also follow a line of High Court decisions in which a duty of care was imposed on statutory authorities³² — namely in *Pyrenees Shire Council v Day*³³, *Crimmins v Stevedoring Industry Finance Committee*³⁴ and *Brodie v Singleton Shire Council*³⁵. The statutory objective must be compatible with the imposition of a duty of care. In Stolen Generations cases, for a duty of care to arise the statutes must seek to ensure the wellbeing of the children.

Although different tests have been established for different relationships or forms of harm, the common requirement for establishing a duty of care is

³⁰ ‘Torts’, *Legal Profession Admission Rules 2005 (NSW)*, Fifth Schedule Synopsis of areas of knowledge. The same requirement applies in other states.

³¹ [1932] AC 562.

³² Stapleton, above n 13, 142.

³³ (1998) 192 CLR 330.

³⁴ (1999) 200 CLR 1.

³⁵ (2001) 206 CLR 512.

reasonable foreseeability. Often, however, in cases other than those involving physical and consequential harm, there are requirements additional to reasonable foreseeability. This can be explained through Bruce Trevorrow's case. Because he suffered *inter alia* psychiatric illness, cultural loss and loss of employment opportunities, the Supreme Court identified the 'salient features test' as relevant to a finding that the South Australian Government owed Bruce Trevorrow a duty of care.³⁶ The test has the following criteria:

- a. *Legislative scheme* — there were no conflicting duties that would exclude a duty of care from arising³⁷ (this is a point that could also be raised when teaching defences to negligence — if there had been a conflict with other duties it would have provided the state with a defence).
- b. *Foreseeability* — it was reasonably foreseeable that the removal and long term separation of an Aboriginal child from his/her natural parents would give rise to the risk of harm. This was evidenced by wide recognition (including in academic publications and psychology text books) of the importance of the bond and attachment between mother and child.³⁸
- c. *Vulnerability* — the Aboriginal plaintiff was vulnerable to harm in the absence of the state and its various emanations and agents exercising their powers to prevent that harm. The state defendant had placed the plaintiff in that vulnerable position.³⁹ The various emanations of the state included the State of South Australia, the Aborigines Protection Board, the Children's Welfare and Public Relief Board, relevant Ministers and officers of the Aborigines Department and the Children's Welfare Department. Vulnerability is an increasingly important element of duty of care and provides opportunities for plaintiffs from the Stolen Generations because they are vulnerable as wards under the total care and control of relevant statutory authorities.⁴⁰ As Heydon J recognised: 'it is a commonplace that children have a "special vulnerability"'.⁴¹
- d. *Control* — the state defendant had a degree of control by reason of its position as legal guardian of Aboriginal people. The state therefore had control over Bruce Trevorrow's parents. However,

³⁶ This test was used by the High Court of Australia in the unanimous decision of *Sullivan v Moody* (2001) 207 CLR 562.

³⁷ *Trevorrow* at [1045].

³⁸ *Trevorrow* at [1046]-[1047].

³⁹ *Trevorrow* at [1048]-[1051].

⁴⁰ Stapleton, above n 13, 145.

⁴¹ *Cattanach v Melchior* (2003) 199 ALR 131, [492].

when the state took physical control of the plaintiff as an infant, it had complete control over the plaintiff's well-being⁴² because he was a child.

- e. *Proximity* — this was demonstrated by the state acting as a legal guardian and the plaintiff as its ward.⁴³

The Supreme Court also pointed to the case authority that supported the proposition that government authorities may owe common law duties to children in the exercise of their child protection duties.⁴⁴

In terms of the content of the duty of care, the Supreme Court found that the state through its boards, departments and officers, had a duty to take reasonable steps to protect the Aboriginal plaintiff by:

- Informing parents of the removal and allowing the plaintiff to continue to bond with the natural mother;
- Providing appropriate support when returning the child to the mother, including preparation of the plaintiff, the foster family and the natural family, for the return;
- Assisting with the plaintiff's medication after the plaintiff suffered depression, mild epileptic conditions and mild brain damage while in state care; and
- Facilitating the plaintiff's transition generally, which was ongoing throughout adolescence.⁴⁵

The Court of Appeal in *Lampard-Trevorrow* examined potentially conflicting duties — between the duty of the Aborigines Protection Board [APB] as a statutory authority to protect 'Aborigines generally' and to 'pay particular attention to the needs of Aboriginal children' — in determining whether a duty may be found.⁴⁶ Conflicting duties may preclude a duty of care from arising in certain circumstances. The Court referred to *Sullivan v Moody* — a case commonly taught in Tort Law — in which the suggested duty 'owed to persons under suspicion of mistreating children' conflicted with the paramount duty of the authorities, namely the protection of children.⁴⁷ However, by contrast, the Court in *Lampard-Trevorrow* found that the aim of the *Aborigines Protection Act 1934* (SA) was the 'protection and welfare of Aborigines and Aboriginal children'.⁴⁸ These duties were complementary rather than in conflict.⁴⁹ The

⁴² *Trevorrow* at [1052]-[1053].

⁴³ *Trevorrow* at [1056].

⁴⁴ *Trevorrow* at [1024]-[1027].

⁴⁵ *Trevorrow* at [1063]-[1070].

⁴⁶ *Lampard-Trevorrow* at [367].

⁴⁷ Cited in *Lampard-Trevorrow* at [380].

⁴⁸ *Lampard-Trevorrow* at [367] (emphasis added).

Court stressed that ‘the duty is to take reasonable care to avoid foreseeable harm being caused to a child by the making and implementation of a decision which is, in any event, to be made in the interests of the child’.⁵⁰ This duty is not in conflict with the discharge of the APB’s statutory functions.⁵¹ Rather, there is a ‘coincidence of approach between the duty and the manner in which the APB should exercise the relevant statutory powers’.⁵²

(b) *Breach of duty of care*

A breach of duty of care is assessed by weighing up the magnitude of risk and probability of occurrence, with the expense, difficulty and inconvenience of alleviating the harm and other conflicting responsibilities.⁵³ This is known as the negligence calculus. Both the magnitude and probability of risk eventuating was found to be substantial in *Trevorrow*.⁵⁴ The State, through its emanations, departments and departmental officers were either aware or ought to have been aware of the risks associated with the rupture of the attachment between mother and young child. This is reflected in contemporary literature, in particular the widely-known attachment theory of psychiatrist John Bowlby in the 1950s.⁵⁵ This significant risk, according to the Supreme Court ‘was compounded because the removal was from an indigenous family, with the long-term fostering to a non-indigenous family apparently the only option being considered’.⁵⁶

The State, through its departments and departmental officers, acted in breach of its duty of care by not following statutory procedures and thereby availing the plaintiff of the protection offered by those procedures. If *Trevorrow*’s removal was to be undertaken, it should have been undertaken in accordance with the statutory processes. In addition, a breach of duty resulted from the manner in which the return took place, which involved circumstances that fell below the standard of care required *and* involved lies told to the parents that exacerbated the problems. The Court of Appeal in *Lampard-Trevorrow* drew on the ‘negligence calculus’ from *Wyong Shire Council v Shirt* — a case that is taught in relation to breach of duty.⁵⁷ *Lampard-Trevorrow* would acquaint students on some of the applications of this leading case for Indigenous rights.

(c) *Causation and remoteness of damage*

⁴⁹ *Lampard-Trevorrow* at [372].

⁵⁰ *Lampard-Trevorrow* at [380].

⁵¹ *Lampard-Trevorrow* at [380].

⁵² *Lampard-Trevorrow* at [382].

⁵³ *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

⁵⁴ *Trevorrow* at [1076].

⁵⁵ *Trevorrow* at [1073].

⁵⁶ *Trevorrow* at [1074].

⁵⁷ (1980) 146 CLR 40, cited in *Lampard-Trevorrow* at [410]-[411].

Trevorrow depicts how causation may be established. The Supreme Court relies on *March v Stramere*'s⁵⁸ common sense approach⁵⁹ — a case widely taught to students as establishing the key test for causation. In terms of the remoteness issue, the Court applies the foreseeability principle to 'prevent an endless chain of consequences'.⁶⁰ The removal of Bruce Trevorrow from his family at a young age and the ensuing decade of separation, particularly from his mother, caused him to suffer ongoing depression from early childhood, according to the Court. As a consequence of that depression he was unable to cope with the problems he has faced in life, including the loss of family identity, an inability to develop personal relationships, the consequences of trauma and injury, general ill health and alcoholism.⁶¹ The removal also meant Trevorrow was unable to rejoin his community or take part in their cultural activities. The proof that the removal caused the cultural losses was that Trevorrow's siblings, who were *not* removed, developed strong cultural links and became leaders of the Ngarrindjeri community.⁶²

B Damages

Trevorrow provides a useful case study for teaching about the calculation of damages. Its facts are unique because of the time lapse between the wrong and the claim, and by virtue of the cultural loss endured by Bruce Trevorrow due to the separation. The compensatory damages in *Trevorrow* amounted to \$450,000. In a subsequent trial, an additional \$250,000 in interest was awarded to take account for the intervening fifty years since the initial loss.⁶³ Compensatory damages were awarded for ongoing distress and a major depressive disorder as a result of his separation.⁶⁴ The mental illness also led to a loss of earning capacity but this was not quantified because Bruce Trevorrow could not accurately recall his employment history. The Supreme Court therefore made a 'discretionary allowance' for these losses.

Damages were also awarded for loss of Aboriginal identity and culture. The Supreme Court referred to cases where cultural losses sounded in damages.⁶⁵

⁵⁸ *March v E & MH Stramare* (1991) 171 CLR 506.

⁵⁹ *Trevorrow* at [1097].

⁶⁰ *Trevorrow* at [1099].

⁶¹ *Trevorrow* at [1098].

⁶² *Trevorrow* at [1125].

⁶³ The court exercised its discretion in calculating the amount of interest: *Trevorrow v State of South Australia (No 6)* [2008] SASC 4.

⁶⁴ *Trevorrow* at [1201].

⁶⁵ Reference was made to *Napaluma v Baker* (1982) 29 SASR 192; *Dixon v Davies* (1982) 17 NTR 31 and *Weston v Woodroffe* (1985) 36 NTR 34, which were all cases where the plaintiff, an Aboriginal person, was injured in a road accident. In each case, the nature of the injuries detrimentally affected the plaintiffs' Aboriginal culture. Causation was established in those cases and the cultural loss was accounted for in damages.

These are ‘novel’ damages and reveal to students the willingness of courts to account for losses unique to Indigenous identity.⁶⁶ To come to this conclusion, as discussed above, the Court used Trevorrow’s siblings as a benchmark. The removal resulted in Trevorrow, in contrast with his siblings, demonstrating an inability to rejoin his community or participate in their cultural activities and ‘enjoy membership of his Indigenous community’.⁶⁷

C Other torts: false/wrongful imprisonment

The tort of false imprisonment involves a restriction on the plaintiff’s liberty and is actionable *per se* without proof of damage. It seeks to protect the plaintiff’s freedom of movement. It is frequently taught as an example of torts other than negligence, as required by the Priestley 11. As a teaching tool, *Trevorrow* is an important authority on the features of the tort of false imprisonment. However, the finding of the Supreme Court that Bruce Trevorrow was falsely imprisoned was overturned by the Court of Appeal in *Lampard-Trevorrow*. Notwithstanding the factual finding that there was no total restraint because an ordinary child of his age would not otherwise have the freedom to move around, the Court of Appeal accepted the legal principles that the Supreme Court set down (see below).⁶⁸ Students should be encouraged to think critically about the factual finding. Should children have the freedom to be with their parents? Could a child ever be falsely imprisoned in light of the Court’s assertion that children do not have any freedom of movement? Does the Court’s finding preclude children from the protection of the law?

Elements

Given the scant Australian case law on false imprisonment, some of its key elements are explicated by an Australian appellate court for the first time in *Trevorrow*. These include that there is restraint on the liberty of the plaintiff⁶⁹ and there is no requirement of contemporaneous knowledge of the imprisonment by the plaintiff.⁷⁰ In Trevorrow’s case, he was removed and unable to return to his home and parents, despite requests from his family. At the time he was too young — being only 13 months — to appreciate the forcible removal. The Court of Appeal in *Lampard-Trevorrow* agreed with the Supreme Court that the weight of authority indicated that ‘the fact that a

⁶⁶ In class you may compare *Kavanagh v Akhtar* (1998) 45 NSWLR 588, where a Muslim woman suffered psychiatric illness after she had to cut off her culturally significant hair as a result of injury to head and shoulder suffered due to defendant’s negligence.

⁶⁷ *Trevorrow* at [1177], [1195].

⁶⁸ *Lampard-Trevorrow* at [307].

⁶⁹ *Trevorrow* at [990], [993].

⁷⁰ This had been foreshadowed in England, but not yet been adopted in Australia. *Trevorrow* could replace or supplement the teaching of English cases that hold that the plaintiff need not be aware of the imprisonment at the time of imprisonment: *Meering v Grahame-White Aviation Co* (1919) 122 LT 44; *Murray v Ministry of Defence* [1988] 1 WLR 692.

plaintiff is not aware of a restraint on him or here, or is not physically able to exercise his or her freedom of movement, does not mean that wrongful imprisonment cannot be made out'.⁷¹ The Court supported this view by considering the factual scenarios of a prisoner kept in gaol beyond his or her release date, and a child kept in childcare until his or her parents paid fees outstanding⁷² — these scenarios are similar to English cases discussed in Tort Law subjects.⁷³ In either case, the claimant could still make out wrongful imprisonment despite lacking knowledge of the wrongfulness of the imprisonment at the time. However, Trevorrow's claim was not made out because the Court of Appeal could not accept that other children of his age would have had the choice to be free.⁷⁴

Statute-Based Compensation Schemes

The teaching of government compensation schemes typically accompanies a discussion of the weaknesses of litigation in protecting a broad class of plaintiffs. The compensation scheme in New Zealand — which protects almost anyone physically injured without the need to prove fault — is usually referred to in class.⁷⁵ It allows students to consider the utility of a system where everyone has a right to compensation. Straddling this discussion could be a consideration of Stolen Generations and Stolen Wages compensation schemes in Australia, and how they may circumvent difficulties of complying with the common law rules on evidence,⁷⁶ but also present new proof challenges (see below in relation to Stolen Wages).

A scheme for the Stolen Generations was established in Tasmania.⁷⁷ The government provided Indigenous people who could prove they were removed under *Tasmanian Aboriginal Acts* a standard amount of money (\$58 333.33) in the form of *an ex gratia* payment (rather than compensation for loss). Their children could claim a further \$5000, with a maximum of \$20 000 per family.⁷⁸

⁷¹ *Lampard-Trevorrow* at [289].

⁷² *Lampard-Trevorrow* at [289].

⁷³ *Meering v Grahame-White Aviation Co* (1919) 122 LT 44; *Murray v Ministry of Defence* [1988] 1 WLR 692; *Herring v Boyle* (1834) 1 Cr M&R 377. Note however that the South Australian Court of Appeal indicates it would take a different position to *Herring v Boyle* in which the child's lack of knowledge was a factor in finding there was no false imprisonment. This is an example of the divergent position of Australian case law founded in *Lampard-Trevorrow*.

⁷⁴ *Lampard-Trevorrow* at [307].

⁷⁵ See: Stephen Todd, 'Negligence liability for personal injury: a perspective from New Zealand' (2002) 25 *University of New South Wales Law Journal* 3, 895.

⁷⁶ See Luker, above n 18.

⁷⁷ See *Stolen Generations of Aboriginal Children Act 2006* (Tas).

⁷⁸ See *Stolen Generations of Aboriginal Children Act 2006* (Tas) ss5, 11; The Stolen Generations Assessor, *Report on the Stolen Generations of Aboriginal Children Act 2006*, Department of Premier and Cabinet, February 2008.

While this is the most generous Stolen Generations scheme in Australia to date, students may be alerted to some of its shortcomings. These include that it did not recognise additional loss from physical or sexual abuse while in 'care', it was a relatively small amount compared to that awarded in *Trevorrow*, and it did not provide for a broader range of reparations such as healing programs. Nonetheless, the Tasmanian scheme provided an important avenue for Indigenous people to claim some recompense without going through the court system.

Another example of compensation schemes is in relation to unpaid Indigenous wages until the 1970s. The wages were kept in government trust funds and not paid out to Aboriginal workers. Students can identify the costs and benefits of various schemes through a comparison of the experiences of New South Wales and Queensland, where the governments sought to repay some or all of the wages. The Aboriginal Trust Funds Repayment Scheme Unit in New South Wales was available from 2005 to 2010 to those who had their money taken by the government and, if deceased, to their families. A panel could provide a full reimbursement of stolen wages at prevailing rates.⁷⁹ Claimants retained their rights to litigate. In the absence of documentary evidence, claimants could submit oral testimony to support their claim. The Queensland system was limited to living unpaid individuals who had documentary evidentiary proof of their stolen wages. It was only open for three years between 2003 and 2006 with a total budget of \$55.6 million (of which only \$34.5m was spent).⁸⁰ Indigenous people were given a nominal payment between \$2000 and \$4000, which is often only a fraction of what is owed.⁸¹ They were also made to sign an indemnity agreement waiving the right to recovery of full entitlements.

Other Pedagogical Techniques

Following are a set of tasks that may be set as assessment. They allow students to consider a range of circumstances where Indigenous people may claim compensation based on tort principles:

- Set an essay that critically compares the Stolen Generations cases of *Tevorrow*, *Cubillo* and *Williams*;
- Ask students to write a paper comparing the Tasmanian Compensation Scheme for the Stolen Generations with the Canadian reparations scheme

⁷⁹ Aileen Teo, 'Stolen Wages Update: Establishment of the NSW Aboriginal Trust Fund Repayment Scheme' (2005) 6(9) *Indigenous Law Bulletin* 12, 13.

⁸⁰ Robin Banks 'Stolen Wages: Settling the Debt' (2008) 12 (Special edition) *Indigenous Law Review* 55.

⁸¹ Anthony, above n 11, 20.

for a similar class of plaintiffs (Aboriginal children placed in boarding schools);⁸²

- Provide problem questions where the facts are at variance to *Trevorrow*, eg:
 - Child forcibly removed at the age of 12;
 - Child has fond memories of experience;
 - Parental consent to removal due to limited knowledge or choice;
 - The authorities told the child he could leave;
 - *Trevorrow* has no siblings; and
 - There was additional physical abuse.

- An interesting class discussion would be to consider how *Trevorrow* may be handled if children were wrongfully removed from non-Indigenous families. Recent judicial criticisms of the Department of Community Services' unnecessary removal of children would be a context for this discussion.⁸³ Another example would be the British child migration (where British children were removed from their families based on class), which occurred at about the same time as the operation of the Aboriginal protection policies.⁸⁴

Conclusion

In my experience as a teacher of Tort Law and Indigenous People and the Law, I have found that students readily engage with torts issues related to the Stolen Generations. Students who may tune out when English case law or abstract principles are taught, frequently tune in when the Australian context of the Stolen Generations and their legal redress are discussed. I taught the *Trevorrow* case in the aftermath of the 2007 case and the lead-up to the 2010 appeal. Students drew on their understandings of negligence to contemplate the alternative avenues that the Court of Appeal may traverse. After the 2010 decision, however, while the discussion on negligence continued to be lively, students were often frustrated with the closing of the door to the avenue of false imprisonment. It is important to discuss the Court of Appeal's reasoning in this respect because it elucidates the law in Australia and provides a controversial factual interpretation.

⁸² On the Canadian scheme see, Andrea Durbach "The Cost of a Wounded Society": Reparations and the Illusion and Reconciliation' [2008] *University of NSW Law Research Series* 4; Linda Popic, 'Compensating Canada's "Stolen Generations"' (2008) 7(2) *Indigenous Law Bulletin* 14.

⁸³ See for example: *DP v Cth Central Authority*; *JLM v Director-General NSW Department of Community Services* (2001) 206 CLR 401. Thanks to Prue Vines for her suggestion of this point.

⁸⁴ See Andrew Murray & Marilyn Rock, 'Child Migration Schemes to Australia: A Dark and Hidden Chapter of Australia's History Revealed' (2003) 38 *Australian Journal of Social Issues* 2, 149.

The *Trevorrow* decisions illustrate for students how the scope of duty of care and interpretation of damages have been expanded. Against the background of the High Court's broadening scope of the duty of care in relation to statutory authorities, the *Trevorrow* decisions provide another form of statutory responsibility. While the doctrinal analysis of the causes of action in *Trevorrow* was 'orthodox',⁸⁵ it nonetheless demonstrates how established tort principles can provide remedies for Indigenous people on a case by case basis. The challenge for students is to consider how tort law as a 'tool for social justice'⁸⁶ can be further developed in the courts. If students are left contemplating how the doctrinal boundaries may be stretched to provide redress for a broader class of Indigenous plaintiffs, then the teaching of Tort Law may be the beginning of the undoing of some of the historical wrongs.

⁸⁵ Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32 *Melbourne University Law Review* 382, 413.

⁸⁶ Bender, above n 1, 251.