THE STOLEN GENERATION

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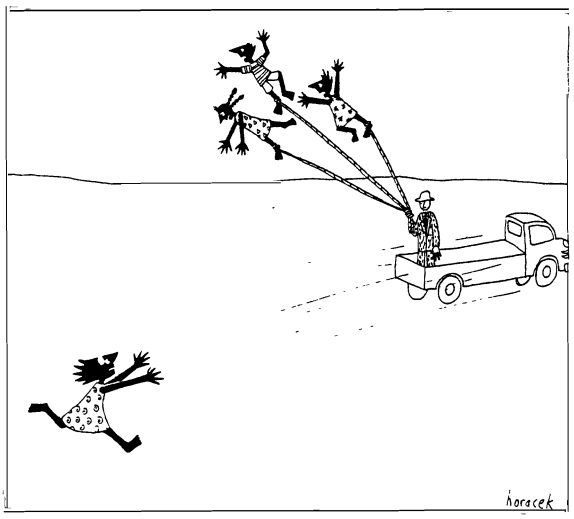
Can State governments be held responsible for reparation through the law of torts?



Imagine a person goes into a town, picks up a child from the street, places them in their car and leaves without telling the parents. That same person visits another family's home and tears the children, screaming, from their parent's arms. A mum and her kids walking down the street are also forced into this person's car ... down the road the mum is thrown out. The children are kept together in isolation from society. Some are abused, sexually, emotionally or physically. They are told that their parents are either dead or no longer care about them. The parents spend years mourning the loss of their children. Could this perpetrator be held responsible for the life-long anguish and suffering the children and their parents' experience?

The Human Rights and Equal Opportunity Commission's (HREOC) report into the Stolen Generation 'Bringing them Home' (the Report) unequivocally 'establishes that families and whole communities suffered grievously upon the forced removal of their children'.[1] The evidence shows that the mode of implementing late 19th century and early 20th century polices of separation and assimilation has had significant social and emotional repercussions for many Aboriginal individuals and communities. This article looks at the viability of holding the State governments responsible for redressing this harm through the law of torts.

Notwithstanding the statutory legitimacy of the States' actions, the principles within the torts of *intentional infliction of emotional distress* and *custodial interference* illustrate that torts law would not look kindly on the States' policies of separation and assimilation nor does it endorse their modes of implementing them. It is acceded that an action against the governments in tort law may not stand up to judicial process or scrutiny. However, on the strength of these torts principles the State and/or Commonwealth Government must acknowledge that harm has occurred as a consequence of their reprehensible past actions and make reparation.

The moral foundations and social function of torts law

Torts law is seen to have grounding in moral responsibility and social utility where moral responsibility is achieved through goals of moral justice and appeasement. In this context, the notion of morality implies a community standard of behaviour based on fundamental community values. Thus, where behaviour falls outside the accepted community boundaries, wrongdoers are made responsible for the retribution and compensation of those they harm in order to appease the sufferer's sense of privation. The social utility function of torts law therefore serves to both deter unlawful or immoral behaviour and to compensate the sufferer for loss.

The enforcement of obligations of responsibility and reparation on culpable behaviour are also grounded in communitarian ideals of maintaining community dynamics. Leger argues that in analogy to traditional small-scale societies, torts law was originally designed to prevent an upheaval of community harmony.[2] Giving aggrieved people remedy

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for wrongs done against them, gives them public recognition of their rights and 'public disapproval of the ...[defendant's] conduct'.[3] To ensure there is a sense of social justice in the finding of liability, Leger claims that the intentional torts purport a rights-based theoretical approach.[4] This essentially promotes a plaintiff's right to security above the right of a defendant so that, notwithstanding fault, the defendant will be liable if they infringe the plaintiff's right.

Arguably, this analysis permits the view that the social goals and functions of tort law fundamentally involve defending individual non-contractual rights and enforcing civil obligations in an effort to maintain community stability. These elements are emphasised in the intentional torts of infliction of emotional distress and custodial interference. An examination of the State governments' past acts will show that they were responsible for significant harm that remains manifest in contemporary Aboriginal communities and that morally they must make reparation in the tradition of this law.

The action on the case for intentionally inflicting emotional distress

In America, the tort of intentionally inflicting emotional distress is well established. Although it has only been successfully applied in a few situations in Australia, this tort has been accepted as a valid cause of action.[5]

'Emotional distress' is a modern legal term used to describe lasting mental illness. From the 10th century the courts were unwilling to allow recovery for mental illness due to the fact that it was 'beyond the realm of human understanding'.[6] During the 19th century, mental injury was cautiously included in damages but was limited to the intangible suffering plaintiffs encountered corollary to some other physical or proprietary harm.

However, the courts came to realise that 'medical science is capable of satisfactorily establishing the existence, seriousness and ramifications of emotional harm'.[7] As such the tort was extended to encompass intentionally caused emotional harm alone. For, at least according to the American realists, denying liability could no longer be justified in the face of contemporary medical enlightenment.

In an effort to induce clarity to the common law in America, the Restatement (Second) of Torts[8] (the Restatement) described the tort of intentionally inflicting emotional distress as comprising three elements:

(i) the conduct must be extreme and outrageous;

(ii) it must be intentional or reckless; and

(iii) it must cause severe emotional distress or bodily harm.

It is suggested that the State governments' policies, and their agents' enforcement of separation and assimilation accords with these requirements and hence, proves their theoretical culpability.

'Extreme and outrageous conduct'

'Extreme and outrageous conduct' is the phrase used by the Restatement to describe the conduct that will be captured by the action for inflicting emotional distress. To use their words, outrageous conduct is that which is:

> to be regarded as atrocious, and utterly intolerable in a civilised community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his [sic] sentiment against the actor, and lead him [sic] to exclaim, 'Outrageous'.[9]

Obviously this tort requires an analysis of conduct in the light of the social climate in which it took place. This is an objective test, and as we are analysing the nature of the government's *conduct*, we must judge that conduct against the standards of the then dominant white society at the time it was carried out. Thus, the issue is whether the governments' conduct during the policies of separation would have been considered 'outrageous' by an ordinary member of the white community at that time if the act were perpetrated against another white family within that community.

There are three main reasons for characterising the State governments' conduct as outrageous. First, the tort of custodial interference provides evidence of the common law's contempt for interfering with the parent–child relationship without the court's consent. Second, the modes of actually implementing the policies of separation and assimilation were outrageous. And third, in the light of a fiduciary relationship between the State and Aboriginal people, the States' actions were outrageous.

Tort of custodial interference

The tort of custodial interference is a relatively new American doctrine. One of the many torts that protect relational interests, it is primarily concerned with upholding the natural and legal custodial rights of parents. Generally the tort has been invoked in the family context where one parent absconds with the child(ren) from the relationship. Nonetheless, it is instructive as to the emphasis that torts law has placed on the sanctity of the parent–child relationship.

Central to recovery in this tort is the idea that both the parent and their child[ren] will be severely distressed by an abduction. As one court stated: '[i]t is difficult to conceive of intentional conduct more calculated to cause severe emotional distress'[10] than the abduction of a child from its parent. Indeed, even the mere interference with visitation rights has been seen to provide recovery and at a minimum a parent will be compensated for their 'loss of the child's companionship and society ... [and any] mental anguish or emotional harm suffered'.[11]

An issue aligned with the theme of this tort is the denial to Aboriginal parents of the common law right to guardianship of their children unless a court orders otherwise in the interests of the child. For, despite the legitimacy of the legislation, there were no social issues inherent in Aboriginal communities that mandated the removal of Aboriginal children from their families for their welfare. However, the misconceived belief that the Aboriginal race was dying out became manifest in policies designed to protect Aboriginal children from the fate of their race by placing them into the white community. The mode of carrying out these policies of separation and assimilation was grossly in excess of what could be considered reasonable.

Separation and assimilation

The second factor warranting the characterisation of the governments' actions as outrageous is the reprehensible way that its policies were implemented by government agents. The Report explicitly illustrates many examples of insupportable behaviour when taking away Aboriginal children (such as brutal beatings of the parents) and the subhuman conditions of their institutionalisation.

> At the settlement at Barambah (later called Cherbourg), there were no cots or beds in the children's dormitories ... and the protectress described how children slept on a single blanket on the

> ground with another blanket for warmth. Clothing was allocated only twice a year and was too limited to keep clean. Children were underfed, and a recent scheme to provide one meal a day of soup and bread had been discontinued ... Normal sanitation facilities were non-existent on the settlement ... Indeed the facilities there were so bad that ... [the doctor there] considered the common usage of the bush as a toilet as the safest practice.[12]

Fiduciary relations

The Restatement states that the existence of a special (fiduciary-like) relationship between the plaintiff and the defendant is another factor that may be taken into account in determining whether the defendant's conduct is outrageous under the circumstances. This reasoning was adopted by the High Court in *Bunyan v Jorden* (1937) 57 CLR 1. The Court indicated that a defendant would be liable for intentionally causing emotional distress where they had knowledge of a particular sensitivity or the susceptible nature of the plaintiff (at 14).

The susceptibility and vulnerability of indigenous Australians to the rule of their colonial masters, created by a paternalistic assumption of control, may be seen as sufficient to impute an intention to inflict emotional distress to the respective State governments. Recent Australian cases[13] have demonstrated a development in the scope of the fiduciary concept to encompass relationships based on an element of undertaking by a fiduciary to act in the interests of their beneficiary. Particularly where there is implicit vulnerability of one party and an ability of the other party to exercise discretion in a way that could adversely affect the first party, the courts would be likely to find that a fiduciary relationship exists.

The significance of finding a fiduciary relationship between Aboriginal people and their respective State governments is in the duties that arise. Aside from the specific duties to avoid conflict of interests and accounting for profits made, the fiduciary owes a fundamental duty of loyalty towards the beneficiary. It has been suggested in the Canadian case *Frame v Smith* [1987] 2 SCR 99 that such a duty may 'serve to defend fundamental human and personal interests'. Clearly, behaviour that falls within the internationally accepted definition of genocide would be in breach of the governments' duty to act in the best interests of their Aboriginal constituents. Under this line of authority, it is argued that a fiduciary relationship implied between the State governments and their Aboriginal communities would make the total want of concern as to the repercussions of their actions even more outrageous under the circumstances.

'Intention' to inflict emotional distress

When claiming damages for emotional distress suffered corollary to intentionally caused physical injury there is no requirement that the defendant intended to cause emotional distress. However, to prove liability for intentionally causing emotional distress *per se*, a plaintiff must show that the defendant was consciously aware — and hence intended — that through their actions they would cause lasting (cf transitory) emotional distress.[14]

To circumvent this restriction, Trinidade argues, the courts have employed a technique of imputing the requisite intention to the defendant where there is obviously a reckless disregard for the consequences of their actions.[15] Townshend-Smith furthers this point, arguing that this essentially means that a defendant may be liable where it is a likely consequence that their action would invoke the harm that the plaintiff actually suffered.[16]

Chief Justice Brennan in *Kruger v Commonwealth of Australia; Bray v Commonwealth of Australia (1997)* 146 CLR 126 briefly mentioned in obiter that in separating and institutionalising Aboriginal families the State governments could not be seen to have intended to act in any way other than in the best interests of the Aboriginal children. However, the Report found that 'the experiences of forcibly removed children overwhelmingly contradict the view that it was in their "best interests" at the time'.[17] The conditions were harsh and impoverished and education was a facade preparing children for menial labour. There is evidence of excessive physical and sexual abuse due to a failure of authorities to protect their wards. In the face of this, the States' conduct undeniably shows a total disrespect for both the children and the parents' emotional wellbeing, and hence, it is argued that there exists the requisite intention to establish liability for harm that is characterised as emotional distress.

'Emotional distress'

The current status of the law allows recovery where the defendant's conduct leads to recognisable and physically manifest psychological injury.[18] The DSM IV (Diagnostic and Statistical Manual of Mental Disorders) prescribes symptoms as 'clinically significant' where they impair social, emotional or occupational functioning.[19] Clinically significant symptoms, in turn, are indicative of many psychological diagnoses. The findings of the report indicate that there may be a significant number of potential Aboriginal litigants who suffer sufficiently severe harm to allow recovery.

The HREOC saw the experiences of Aboriginal parents who lost their children as mirroring findings relating to bereaved and relinquishing parents. Their experiences included lasting and intense feelings of grief (often somatic), despair, powerlessness, fear, anxiety and depression. According to Van Keppel and Winkler's analysis, the ability of Aboriginal parents to adjust to the loss of a child was mitigated by lack of extra-community support, no opportunity for free expression, the presence of life stressors such as exclusion and control, racism and poverty and an inability to find meaning in the forcible removal.[20] Aboriginal children (and their children) that were subjected to separation and institutionalisation also suffered significantly.

The Report further identified five areas of intergenerational impact from the implementation of policies of separation and assimilation:

- Aboriginal people denied nurturing and love during their early years were unable to reciprocate these parenting skills for their own children;
- their children were often prone to behavioural problems including personality disorders, juvenile delinquency and substance abuse;
- Aboriginal people were prone to high rates of violence and self-harm;
- they exhibited unresolved grief and trauma manifest in emotional numbing, anxiety and fear of involvement in mainstream services;
- they displayed high rates of depression and other mental illnesses and consequently subjected their own children to significant risk of anxiety, depressive symptoms,

physical illness and difficulties with school, discipline and relating to peers.

The DSM IV places an emphasis on conditions that impair social, emotional and occupational functioning. The Report provides clear evidence of the losses suffered by Aboriginal people and communities, including privation of culture and heritage, perpetuation of family dysfunction and reminiscent anger. These conditions are undeniably bound to impair an individual's social and emotional functioning such as maintenance of relationships and participation in the community. Arguably, the powerless and disadvantaged status that Aboriginal people were left with after the discontinuance of the policies also shows an inability to become successful actors within the workforce.

There may be an even greater rate of successful claims if, as many authors suggest, the tort was broadened to encompass less severe but equally significant forms of emotional and psychological harm. Indeed, as Townshend-Smith argues, if it has already been established that the defendant's conduct is both outrageous and reckless, there can be no justification for denying liability simply because the harm suffered does not fall into any recognisable category.[21]

Is an action in tort appropriate?

Challenging the State governments' policies and the way that they implemented them is wrought with social welfare and procedural problems. For while compensation might restore Aboriginal people's sense of self-value and ease their outrage, it is not an appropriate mechanism for achieving redistributive goals on a societal level. Indeed, the adversarial nature of the legal system means that there can only be two outcomes, to win or to lose. As mentioned above, neither option is desirable.

Despite the inadequacy of tort remedies, pursuing a claim in tort may be one of the only ways of forcing the State and/or Commonwealth governments to address the pervasive societal issues that exist in Aboriginal communities resulting from the action of prior governments. There are no current statutory regimes aimed at redressing wrongs such as this, and as Kaspiew argues,[22] Aboriginal citizens have few avenues for mounting pressure on the government except through the courts as for them the processes of participatory democracy are limited. However, the court process itself has been shown to have considerable procedural constraints for actions such as this.

The first major barrier for plaintiffs would be the *Limitation of Actions Acts* which generally specify that an action in tort may only be brought within six years from when the cause of action accrued. Usually, a cause of action will accrue at the time that the harm is inflicted on the plaintiff, in which case, the limitation period would have expired many years ago, thus preventing Aboriginal parents or children from bringing an action in the court. Recent authority has held that a cause of action accrues to a plaintiff when there is a clear appreciation of the nature and extent of the damage that has been suffered.[23] In some jurisdictions the court may also grant an extension to the limitation period where they consider it just and reasonable to do so,[24] or alternatively the relevant government may choose to waive the limitation period.

The courts have taken the view that it is against the doctrine of the separation of powers to judicially consider legitimate government policy. The distinction has been made between 'policy' decisions and 'operational' decisions in that only the latter may attract liability in tort.[25] Thus, in *Commonwealth of Australia v Eland* (1992) ATR 81 the Supreme Court of NSW struck out the plaintiff's claim holding that:

> [i]t was not for the courts to determine whether the policies of the Commonwealth are appropriate and to reflect disapproval of the Commonwealth's failure to act in an area of policy by extending liability in tort into such an area.[26]

The areas of government culpability contemplated by this article are their policies and their unreasonable methods of enforcing them. The inactionability of government policy and the fact their corollary statutes were constitutionally valid, however, does not denigrate the argument that the State government policy contravened principles of tort law that according to Leger are founded on and aimed at meeting the needs of society.[27]

Although it is beyond the scope of this article, comment must be briefly made about the validity of applying morality to determine valid laws. Especially from a jurisprudential perspective, it is important that we question those aspects of legal doctrine that may be validly constructed under law yet are morally reprehensible to the community. Although this sort of challenge is generally only accepted in the realm of jurisprudence, especially when dealing with matters of fundamental importance to human interests, there are instances where the courts have chosen to import morality into the determination of legal issues. For example, in determining culpability for War Crimes in World War Two, the Tribunal came to the conclusion that Hitler's officers could be prosecuted for their involvement, because, despite the fact that they were acting under validly enacted laws, the legislation was so abhorrent that it could not be considered real law.

Conclusion

The aim of this article has not been to show the viability of a court action against the State governments so much as it has been to demonstrate that the principles of torts law and its social and moral foundations point to their culpability. The *responsibility* of the State governments for harm suffered within Aboriginal communities centres around the outrageous way their policies of separation and assimilation were implemented and the fact that they could not be said *not* to have intended to cause emotional distress due to their blatant disregard for the consequences. The fact that Aboriginal people and communities have continually suffered from loss of their culture and healthy family dynamics and consequently have struggled to assert a functional role in the post-assimilation society mandates *reparation* by the government as the culpable party.

In the light of the limitations of a remedy in tort, it is suggested that an appropriate response would be either State or Commonwealth government initiative to implement the recommendations of the 'Bringing them Home' report. This would provide systematic and comprehensive reparation to Aboriginal communities that have suffered alone for too long.

References

1. Human Rights and Equal Opportunity Commission, 'Bringing them Home — The Report', 1997, p.21 <http://www.austlii.edu.au>.
2. Leger, L., 'The Culture of the Common Law in the 21st Century: Tort Law's Response to the Needs of a Pluralist Society', in K & E Cooper-Stephenson, Gibson (eds.), *Tort Theory*, York, Ontario, 1993, pp.164-5.
3. Leger, L., above, p.166.

Continued on p.180.

acting as a 'gate-keeper'. The adviser does not seek to explain every aspect of the document but simply expresses a judgment as to whether or not the client should enter into the contract. To carry out this task, the adviser must know the client's circumstances and be experienced with such contracts. To provide such 'comprehension agency' services, the adviser needs a point of reference for what are the usual or acceptable terms in similar contracts. The adviser will only highlight the contract's unusual or directly relevant aspects. At the end of this process, comprehension of the contract is shared between the adviser and the client.

The optimal mix of these agency services depends on their lowest cost. Interpreting services would generally be more expensive because of the greater time involved. This cost is the sum of the agent's services (fees) and the client's time taken in that process. Comprehension services, however, could be expected to be less than interpretation services because of the reduced time taken to provide them. For this to be so, the adviser would ideally be familiar with the client. Before considering the role of plain English, it is worth considering another market mechanism for reducing information overload, namely, standardisation of terms.

Where a producer supplies a consumer good or service, efficiency considerations suggest that the supplier would rely on a uniform set of supply terms. Because the supplier will seek to cover all possible circumstances in the one document, it will contain information which to any one transaction is irrelevant. From the client's perspective, however, standard-form contracts may have conflicting consequences for comprehension. Where the client uses agency services, the cost of such services could be anticipated to be less when a standard-form is used as opposed to a one-off document. This is because, the adviser will usually be familiar with the standard-form and so the cost of providing those services is reduced. However, where the client seeks to master the document without advice, the costs of comprehension would be greater because time would be wasted in understanding terms irrelevant to the client's particular circumstances. There remains a question of whether the standard-form settled by suppliers is satisfactory. This can be handled by a consultative process involving relevant stakeholders failing which Parliament retains the ultimate option to correct what might be considered 'market failures'.

Plain English contributes to reduce the cost of comprehension in a number of ways. To the extent that the client seeks to directly understand the contract, plain English drafting would reduce the required time. Where the client seeks agency services, plain English drafting allows the client greater scope in determining which aspects of the contract are comprehensible, leaving the less to be explained by the adviser. Even where the client relies purely on 'comprehension agency' services, plain English drafting would reduce the cost of these services because it could be expected to reduce the adviser's time in providing them.

Conclusion

A number of conclusions can be drawn from the foregoing. First, it is important to remember that the 'devil is in the detail' and that greater insights would be expected when examining a particular transaction. Second, there is little room to deny the benefits of plain English in promoting comprehension. The residual criticism focuses more on the over-optimistic assertions of what plain English could achieve than on its inherent utility. Third, economic analysis assists in understanding what people actually do, why they do it, and how mechanisms may develop to reduce the problems of information overload. Fourth, the idea that economic analysis seeks to eliminate the role of collectivist intervention is mistaken. Finally, when courts consider issues of comprehension, the 'reasonable' level of comprehension should be that one would expect of a rational person as suggested above.

Ignorance of the law is no excuse, but neither is it a command to attempt the impossible — to be fully informed about all things. The implication that ignorance may be rational may at first glance seem confronting. However, this is not to suggest a preference for or promotion of ignorance. The point of the analysis is that it recognises the reality of human behaviour under the constraint of time. It also provides a model by which those wishing to promote comprehension can achieve their goal.

Decle references continued from p.171.

4. Leger, L., above, p.166.
5. *Bunyan v Jordan* (1937) 57 CLR 1; *Mt Isa Mines v Pusey* (1971) 125 CLR 383.
6. Abeyratne, R.I.R., 'The Human Stress Factor and Mental Injury in American Tort Law — A Patchwork Quilt?' (1986) 15 *Anglo-American Law Review*, 338 at 341.
7. Comment, 'Negligently Inflicted Mental Distress: The Case for an Independent Tort', (1971) 59 *Georgia Law Journal*, 1253.
8. The American Law Institute, 'The Restatement of the Law (Second) Torts 2d', The American Law Institute, para. 46, Comment (d), 1965.
9. The American Law Institute, above.
10. *Kajtazi v Kajtazi* (1978) 48 F. Supp. 15 at 20.
11. Campbell, R.A., 'The Tort of Custodial Interference — Toward a More Complete Remedy to Parental Kidnappings', (1983) *University of Illinois Law Review* 245.
12. Kidd 1994, p.304, quoted in Human Rights and Equal Opportunity Commission, above.
13. *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41 and *UDC v Brian* (1985) 157 CLR 1. In *Hospital Products* at 68, Justice Gibbs indicated that the categories of fiduciary relationship are not exclusive.
14. *Wilkinson v Downton* [1897] 2 QB 57.
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16. Townshend-Smith, R., 'Harassment as a Tort in English and American Law: The Boundaries of *Wilkinson v Downton*', (1995) 24 *Anglo-American Law Review* 321.
17. Human Rights and Equal Opportunity Commission, above, p.19.]
18. *Wilkinson v Downton* [1897] 2 QB 57.
19. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Washington DC: American Psychiatric Association, 1994.
20. Human Rights and Equal Opportunity Commission, above.
21. Townshend-Smith, R., above, p.323.
22. Kaspiew, R., 'Does the Commonwealth Owe a Duty of Care to Aborigines to Protect them from Alcohol?', 1994 2 *Torts Law Journal* 32.
23. In *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 both the court at first instance and on appeal held that the cause of action accrued to Joy Williams not when she merely had a suspicion of the damage, but when she had a clear appreciation of the nature and extent of the damage.
24. In *Williams v Minister*, Joy Williams was granted an extension to the limitation period to allow to continue her claim in the courts because the Court of Appeal felt she had acted as promptly as could reasonably be expected in bringing the action.
25. The traditional distinction was made by Lord Wilberforce in *Anns v Merton London Borough Council* (1978) AC 728 and was applied in Australia in *Council of Shire of Sutherland v Heyman* (1985) 157 CLR 424.
26. per Studdert J at 61,211.
27. Leger, L., above, p.177.