

## COMPENSATION FOR THE STOLEN CHILDREN: POLITICAL JUDGMENTS AND COMMUNITY VALUES

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Speaking at the launch of the New South Wales Premier's Literary Awards on 17 September 1997, author Drusilla Modjeska described the Human Rights and Equal Opportunity Commission (HREOC) report, *Bringing them Home*,<sup>1</sup> as the most important - if not the best - book that had been published "this cold and chilly winter".<sup>2</sup> Several months have passed since its release and the Commonwealth Government has not yet made a response of any substance, other than to dismiss the suggestion that compensation should be payable to those whose lives were destroyed or fragmented by the practice of taking Aboriginal children away from their families in the name of 'assimilation'. Condoned by governments of the time, this practice has been described by HREOC as constituting genocide.

A number of the recommendations of the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*<sup>3</sup> focused

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

2 Drusilla Modjeska, "A Bitter Wind Beyond the Tree Line", *Sydney Morning Herald*, 18 September 1997, p 19.

3 Hereafter referred to as the Inquiry.

on means of compensating for the harms done to those taken from their families.<sup>4</sup> Commonwealth Government responses have almost categorically rejected the payment of any compensation, and no apology has been forthcoming. In its submission to the Inquiry, the Commonwealth Government raised as a concern the difficulty in estimating the monetary value of losses, on the grounds that “[t]here is no comparable area of awards of compensation and no basis for arguing a quantum of damages from first principles”,<sup>5</sup> an argument echoed in an editorial in *The Australian*.<sup>6</sup>

In this comment, I want to address the argument that compensation is pointless either because there is no comparable area of compensation, or because “no amount of money can make up for the pain of the past”,<sup>7</sup> by drawing analogies between the wrongs perpetrated on the Stolen Children, and those that come before the courts on a daily basis for assessment. Even the most minimal familiarity with the legal frameworks used for compensating various sorts of injuries would make it clear that the Government’s argument is little more than a rhetorical device. What is, or is not, compensable at law is more a matter of political judgment and government policy than it is a matter of any inherent legal understanding of compensability.

Perhaps the most common form of compensation that courts deal with is the assessment of damages for personal injuries caused by negligence, such as in the negligent driving of a motor vehicle. Many tort scholars have pointed out that this process is little more than, as Ison called it, a “forensic lottery”.<sup>8</sup> Judges (and occasionally juries) are called upon to make assessments of both economic and non-economic losses, at common law, on a lump sum ‘once and for all’ basis. This, of necessity, involves speculation about a range of imponderables, the difficulty of which is occasionally acknowledged by those upon whom that task falls. For example, in one recent New South Wales case involving a young boy injured in an accident, the judge commented:

These disputes must of course be determined on a once and for all basis. Looking to the past is one thing; this causes no great difficulties. Looking to the future is an entirely different proposition ... [T]he Court is required to make a judgment about his future job prospects and earning capacity. The task needs only to be stated for it to be realised that this is not simply entering into an area of speculation, it is one of judicial guess-work.

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4 Note 1 *supra*, Recommendations 14-20.

5 *Ibid.*, p 306.

6 See Editorial, *The Australian*, 21 May 1997, in which the point was made that “there is a sense in which no amount of money can make up for the pain of the past”. Instead, it supported the establishment of a national charitable trust (to which all Australians would be invited to contribute) to provide educational scholarships for Aboriginal children. In its view, this would “have more national meaning than arguments over compensation”. This Editorial can be found via the internet at: <http://www.australian.aust.com/specials/newsspec/stolen/stolen4.htm>.

7 *Ibid.*

8 See T Ison, *The Forensic Lottery: A Critique of Tort Liability as a System of Personal Injury Compensation*, Staples Press (1967) and see more generally; P Cane, *Accidents, Compensation and the Law*, Butterworths (5th ed, 1993); H Luntz, *The Assessment of Damages for Personal Injuries*, Butterworths (3rd ed, 1990).

Each of these exercises - the determination of the loss of earning capacity and awarding a monetary sum to look after his future care - requires the Court to assess the unassessable, to pronounce on the unpronounceable, to judge the unjudgeable. But that is what I am required by law to do, and what, to the best of my abilities, I will do.<sup>9</sup>

Of particular relevance in this context is the assessment of non-economic losses: damages for pain and suffering, damages for loss of the amenities of life, and damages for loss of expectation of life. There is no pretence that economic or actuarial processes are involved: instead, there is said to be a 'tariff' that guides these assessments.<sup>10</sup>

Interestingly, Australian courts have sometimes been called upon, as part of their consideration of a claim for loss of amenities, to assess the loss to an indigenous accident victim of their ability to participate fully in cultural life. In *Napaluma v Baker*,<sup>11</sup> Zelling J found that as a result of the plaintiff sustaining a head injury in an accident, his ability to participate in the cultural life of the community had been impaired: though he had been "through the ceremonies of the Aboriginal community up to date",<sup>12</sup> he would not be able to go further in that respect. Justice Zelling commented:

It is extremely difficult to put a monetary value on this special loss of amenity of position within the tribe ... Doing the best I can on this head and conscious that I look at the problem with European eyes and not with the eyes of those in the community, I allow \$10,000 for loss of amenities on this head alone.<sup>13</sup>

In the same year, O'Leary J in the Supreme Court of the Northern Territory was faced with assessing damages for a young indigenous man, injured in a road accident at the age of five. Unlike the plaintiff in *Napaluma*, the plaintiff in *Dixon v Davies*<sup>14</sup> had not yet gone through any stage of initiation and the evidence was that even if he was able to take part in the early parts of that process, he was likely to remain 'wiyai' or 'young boy' as a result of his injuries, and therefore be denied access, inter alia, to tribal secrets. Given his age, O'Leary J held that this loss was more severe than that in *Napaluma v Baker* and awarded him \$20,000 for this aspect of his loss.

Most recently, in *Namala v Northern Territory of Australia*,<sup>15</sup> an indigenous woman had suffered injuries as a result of medical negligence in the course of having her first child. The woman's husband had left her after she told him, upon returning from the hospital with her son, that because of these injuries she was unable to bear any more children. The court noted:

9 *Mundy (by his Tutor Mundy) v Government Insurance Office of New South Wales* (unreported, NSW SC, Spender AJ, 5 June 1995).

10 See Luntz, note 8 *supra*, pp 161-4, and compare *Sharman v Evans* (1977) 138 CLR 563 at 571-2. Of course, in the context of 'tariffs', statutory schemes such as workers' compensation actually attribute monetary amounts to losses of particular body parts: for example, under the *Workers Compensation Act* 1987 (NSW), loss of a little finger is worth \$11 000; and a penis \$47 000: see s 66 and Table 5.

11 (1982) 29 SASR 192.

12 *Ibid* at 194.

13 *Ibid* at 194-5.

14 (1982) 17 NTR 31.

15 (Unreported, NT SC, Kearney J, 14 May 1996).

[The plaintiff] gave evidence as to the importance of children in Aboriginal families in that vicinity ... [She] also testified that it was important for Aboriginal women in that community to have daughters, so that they are able to fully participate in ceremonial women's business.<sup>16</sup>

An anthropologist who gave evidence also described the importance of children in that community, both as an aspect of personal protection and because - as there was such a paucity of employment opportunities - "women's economic empowerment is only through the receipt of child endowment funds".<sup>17</sup> By the time of trial, the plaintiff had remarried, but the anthropologist also stated that her relationship with her new husband could be in jeopardy. The trial judge awarded her a total of \$15 000 for past and future loss of cultural fulfilment.

There are a number of other contexts in which damages are awarded, either under statutory compensation schemes,<sup>18</sup> or through other common law recognitions of loss. Dissatisfaction with ascribing a monetary amount to an intangible loss, such as the loss of reputation in the law of defamation, has been somewhat more muted than it has in the area of personal injury.<sup>19</sup> Nevertheless, these damages do occasionally prompt comment and comparison with the compensation available for various other injuries.

In 1991, well known New South Wales footballer Andrew Ettingshausen instigated defamation proceedings against Australian Consolidated Press after one of the company's magazines published a photograph of him in which an outline of his (unclad) penis was visible.<sup>20</sup> In 1993, a jury awarded him \$350 000. On appeal, this amount was reduced to \$100 000.<sup>21</sup> The amount of \$100 000 is greater than the maximum amount available to victims of sexual assault, for example, under most states' criminal injuries compensation legislation. And

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16 *Ibid* at 5.

17 *Ibid* at 7.

18 These include schemes for workers' compensation, criminal injuries (or victims' compensation); in some states, transport or motor accidents compensation, and in NSW, sporting injuries compensation. For an overview of relevant legislation, see CCH, *Australian Torts Reporter*.

19 This is not to suggest that there has been no recognition of the difficulties of assessing damages for loss of reputation: see for example, New South Wales Law Reform Commission Report No 75, *Defamation*, 1995, at 22-5. Note also the 1994 amendment to the *Defamation Act* 1974 (NSW) which inserted s 46A. Section 46A(1) exhorts courts (in cases commenced since February 1995, juries are no longer responsible for awarding damages) to ensure that there is an "appropriate and rational relationship between the relevant harm and the amount of damages awarded". And, by s 46A(2), courts are to take into account, in assessing non-economic losses for defamation, "the general range of damages for non-economic loss in personal injury awards" in New South Wales. See also M Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA" (1995) 18 *UNSWLJ* 300 and see in particular the discussion of male values in defamation law at 316-17.

20 He claimed that the magazine implied that he deliberately permitted the inclusion of the photograph and that he was held up to ridicule by its inclusion; see *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 *NSWLR* 443, in which Hunt J ruled that the matter could go before a jury.

21 An account of the trial can be found in "Latest Developments" (1993) 18 *Gazette of Law and Journalism* 16 at 18. On 11 March 1993, Hunt J granted a stay of execution of the jury verdict pending an appeal on matters of damages. This appeal went before the New South Wales Court of Appeal (*Australian Consolidated Press Limited v Ettingshausen*, (unreported, NSW CA, Gleeson CJ; Kirby P; Clarke JA, 13 October 1993) and was successful with a new trial limited to the question of damages. Upon retrial, the jury, on 1 February 1995, awarded damages in the sum of \$100 000.

in some states, most notably Victoria, legislative amendments have removed recovery for all non-economic losses in cases of victims' compensation.<sup>22</sup>

One singular Australian statutory scheme for compensation is that which deals with claims by war veterans for injuries or illness caused by war service.<sup>23</sup> From 1977 to 1985, the onus was explicitly on the *respondent*, (that is, the government), to prove, *beyond reasonable doubt* (the criminal, not civil, standard of proof) that an injury was *not* caused by war in order for a veteran to be refused compensation.<sup>24</sup> Clearly, this unique burden and standard of proof for a compensation statute existed because a political decision was made that war veterans are 'deserving' of compensation. It is not my purpose to criticise that political choice, but rather to suggest that statutory frameworks that govern what is, and what is not, compensable and who is, and who is not, deserving of compensation are just that: political choices - choices that supposedly reflect assumed community values.

At the same time as the Commonwealth Government has steadfastly maintained that to apologise to the Stolen Children would be an admission of liability and therefore lead to an obligation to pay compensation, there has been a world wide phenomenon of governments recognising that wrongs had been perpetrated and apologising for the sins of their predecessors. Almost contemporaneous with the release of the HREOC Report came the apology from United States President, Bill Clinton, to those who had been subjected to medical experimentation in Tuskegee in the earlier part of this century.<sup>25</sup> More recently, stories have emerged from Sweden and France about the widespread practice of eugenic sterilisations of women not considered to be suitable for motherhood.<sup>26</sup> *Muir v Alberta*, a case arising out of those eugenic practices, was decided last year by the Alberta Court of Queen's Bench in Canada.<sup>27</sup>

Leilani Muir was admitted to the province's training school for 'mental defectives' in 1955 and remained there for 10 years. The Government failed to follow its own legislation and procedures and, after only the most cursory medical tests, labelled her a 'mentally defective moron' and had her surgically sterilised. This procedure was approved by the provincial eugenics board, operating pursuant to the *Sexual Sterilisation Act* RSA 1955, c 311. It later emerged that her problems were emotional rather than mental and she had not

22 See *Victims of Crime Assistance Act* 1996 (Vic). The increasing abolition of forms of damages for non-economic losses has particular significance for women: see, for example, R Graycar, "Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages" (1997) 31 *University of British Columbia Law Review* 17 at 26-31 (forthcoming).

23 See now *Veterans Entitlements Act* 1986 (Cth).

24 A detailed legislative history of this singular scheme of compensation under what was formerly the *Repatriation Act* 1920 (Cth) is provided by the Full Court of the Federal Court in *East v Repatriation Commission* (1987) 16 FCR 517 at 518-24. See also the earlier decision of the High Court of Australia in *Repatriation Commission v O'Brien* (1985) 155 CLR 422.

25 See "Survivors of Tuskegee Study Get Apology from Clinton", *New York Times*, 17 May 1997; "Remarks in Apology to African Americans on Tuskegee Experiment", Weekly Compilation of Presidential Documents, 19 May 1997, 33(20), p 718.

26 See for example "Swedish Sterilisations Revive Nazi Ghosts", *The Australian*, 27 August 1997, p 12.

27 *Muir v Alberta* (1996) 132 DLR (4th) 695.

had access to the services of psychologists and social workers who might have assisted her.

The court held that both the sterilisation and the detention were unlawful and she was awarded damages of over \$625 000, which included aggravated damages in relation to the sterilisation. Ms Muir had also claimed punitive damages, but the court held:

Punitive damages ... would certainly have been ordered had it not been for the fact that the government allowed Ms Muir to bring this action. It could have put an end to her claim; her claim was made too late, and the government could have used this delay as a complete answer to all of Ms Muir's claims. This deliberate abandonment of a complete defence is in the nature of an apology. Indeed, it is more than an apology: it is an amendment - a real effort to make things right. As a matter of public policy, this *and other governments* should be encouraged to recognize historical wrongs and to make fair amends for them. They should not be punished for doing so.<sup>28</sup>

Another issue considered by the Court in *Muir v Alberta* was whether the assessment of damages should be governed by 1996 standards, or by 1959 standards. It was held that the current approach should be used, even though the court acknowledged that had the government admitted liability in 1959, there may have been only a nominal award of damages, and she was awarded the maximum amount available for damages for pain and suffering (just over CAD\$250 000).<sup>29</sup>

Governments in the United States, Canada, New Zealand<sup>30</sup> and Western Europe are increasingly scrutinising the practices of their predecessors and acknowledging the need for reparation to be made today to the victims and their families when those practices violated fundamental human rights.<sup>31</sup> There is no doubt that HREOC has documented perhaps the most widespread abuse of human rights that this country has experienced. Ostensibly in the name of protection, three generations of Australian children were permanently removed from their families. Not only are they still waiting for an apology,<sup>32</sup> but it is entirely appropriate that some national scheme of compensation be established to try, as best as money can, to make up for some of the consequences of their losses. To argue, as the Commonwealth Government has, that this is not possible as there is no framework by which to assess damages, is disingenuous and ignores the many political choices that are routinely made in deciding which interests, and whose interests, we value in our community.

28 *Ibid* at 735 (emphasis added).

29 *Ibid* at 729-31. This setting of a maximum flows from the decisions of the Supreme Court of Canada in the 'trilogy' of cases: *Andrews v Grand & Toy Alberta* [1978] 2 SCR 229; *Thornton v Board of School Trustees of School District No 57* [1978] 2 SCR 267 and *Arnold v Teno* [1978] 2 SCR 287 (and compare the Australian position, note 10 *supra*).

30 See discussions in; J Dunbar, "Hanson: A Land Rights Decoy, claims Maori Chief", *The Australian*, 24 September 1997 and D Barber, "Apology and \$150M settle 'longest' land claim", *The Sydney Morning Herald*, 24 September 1997.

31 For a detailed discussion of the concept of 'reparation' see the discussion in note 1 *supra*, in particular, part 4, chapters 13 and 14, and see appendix 8 for the Van Boven principles.

32 This is not intended to gloss over the significance of apologies by all State Governments and the ACT. Rather, the focus of this discussion is on the Commonwealth Government; the Government to whom the report was written and whose responsibility it is to implement recommendations of the Inquiry.