

individual circumstances and in particular his/her relationship with his/her mother, family and community

- Failing to have any or any proper system to enable the plaintiff and his/her mother to maintain contact with each other following the removal and detention of the plaintiff
- Further permitting the institution in which the plaintiff was detained to maltreat him/her and to treat him/her in a cruel, demeaning and degrading manner
- Failing to make reasonable attempts to ensure that the plaintiff would enjoy equal opportunity compared to non-aboriginal and non half-caste children in the society which the defendant intended the plaintiff to become a part of being the non-aboriginal community of Australia
- Failing to have any proper regard for prevailing domestic and international principles concerning the advancement and protection of human rights in the discharge of the Director's rights and obligations

To establish these breaches of duty and the injuries caused by them, extensive

evidence will undoubtedly be called by the plaintiffs at the trial of their actions. This evidence will detail the circumstances surrounding individual takings and detentions, and the effect these experiences have had both physically and psychologically. Expert evidence defining the nature and extent of the plaintiffs' injuries will be called as well as anthropological evidence explaining the loss of cultural standing and fulfilment within the plaintiffs' indigenous community. Such a head of damage has received judicial recognition as relevant when assessing general damages for loss of enjoyment or amenities of life (14).

Such evidential matters were not considered by the court in *Kruger*. In fact, the Court refused to consider them: "... the plaintiffs sought to supply a factual substratum showing the intention of the Commonwealth to commit 'genocide'. Issues of fact are presented. They are not assumed, before trial, in the proceedings presently before the Full Court" (15). Whilst the niceties of constitutional law may prevent assessment of the gritty reality behind the Commonwealth practice of child removal and detention, no doubt the trial of fact in the Stolen Generations common law claims will reveal the shocking

effect of such a practice on innocent Australian children, their families and communities. So be it. ■

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Footnotes:

- (1) (1997) 71 ALJR 991
- (2) As noted by Dawson J at 1007
- (3) Per Toohey J at 1021
- (4) (1957) 95 CLR 529
- (5) (1957) 95 CLR 529 at 545
- (6) Per Dawson J at 1008
- (7) Per Toohey J at 1029
- (8) Per Toohey J at 1025
- (9) Per Toohey J at 1025
- (10) Per Brennan CJ at 1003
- (11) Per Brennan CJ at 997
- (12) Per Toohey J at 1020
- (13) Per Gaudron J at 1037
- (14) *Napaluma v Baker* (1982) 29 SASR 192
- (15) Per Gummow J at 1066

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