

Stolen

Johnson v Department of Community services

Chris Johnson was removed from his Aboriginal family in Wilcannia and made a ward of the State at the age of 4½. About ten months later he was placed in foster care and, at the age of 17 he was placed in an institution. He alleged that he suffered physical and verbal abuse and sexual assault as a ward of the state.

The time limit to commence an action for damages would have expired in 1992. Mr Johnson filed a Notice of Motion in the Supreme Court to have the limitation period extended so that he could sue the Department of Community Services for breaches of statutory duty and common law duty of care. He alleged that as a result of those breaches, he suffered psychiatric illness, loss of opportunity and economic loss.

In order to obtain an extension of time it was necessary to show:

- (a) lack of knowledge on the part of the plaintiff of material facts of a decisive character relating to the cause of action; and
- (b) a viable cause of action

Master Harrison rejected the application for extension of time. An appeal against that decision was heard by Mr Justice Rolfe of the Supreme Court of NSW.

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Rolfe J found it established that Mr Johnson's psychiatric illness was only recently brought to his attention as having been caused by the improper behaviour of the Department and/or his foster parents. This belated discovery of a material fact meant that the limitation period did not start running until the day when he acquired that knowledge.

His Honour was also satisfied that there was a viable cause of action.

Mr Johnson's case is regarded as a significant breakthrough for members of the Stolen Generation.

In the only other reported case in New South Wales dealing with the "Stolen Generation", *Williams v Minister, Aboriginal Land Rights Act 1983 & Anor.* (1999) 25 FamLR 86, Justice Aberdeen had held that there was no duty at common law, no duty pursuant to any relevant statute and no fiduciary duty.

In *Johnson v DOCS*, Rolfe J distinguished the *Williams* case and made the following important findings:

1. That the appellant had established a prima facie case at common law and that it was just and reasonable to allow the matter to proceed
2. That arguably there was a breach of the *Child Welfare Act*. His Honour made it clear that an ultimate finding in that regard would depend on the evidence to be given at the main trial and a consideration of policy and operational acts or omissions of the respondents.
3. That the Department and the foster parents owed a fiduciary duty to Mr Johnson. The question whether that duty had been breached would have to be determined at the trial.

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The importance of the finding that a fiduciary relationship existed cannot be overstated. A claim based on a breach of fiduciary duty would not be subject to the provisions of the Limitations Act

The *Williams* case is currently on appeal. The decision of the NSW Court of Appeal is awaited with great interest.

It is undeniable that the policies of past governments to forcibly remove Aboriginal children from their families, traditional lands and cultures have had devastating effects on those individuals as well as their communities. As plaintiff lawyers we should explore the avenues available through the legal system to seek justice for indigenous people of Australia at a time when attempts are being made to deny the mere existence of a "Stolen Generation". 