

CASE NOTE*

THE STOLEN GENERATION AND THE VICTIMS COMPENSATION TRIBUNAL: THE 'WRITING IN' OF ABORIGINALITY TO 'WRITE OUT' A RIGHT TO COMPENSATORY REDRESS FOR SEXUAL ASSAULT

I INTRODUCTION

Valerie Wenberg Linow, a member of the Stolen Generation, was recently denied compensation in the New South Wales Victims of Crime Compensation Tribunal ('Victims Compensation Tribunal'). Her application for compensatory redress was based on the sexual assaults she endured after being placed in a family as a domestic worker by the Aborigines Welfare Board ('Welfare Board'). In dismissing her claim, the Assessor of the Victims Compensation Tribunal does not appear to have applied the 'special' sexual assault provisions of the *Victims Support and Rehabilitation Act 1996* (NSW) ('*Victims Support Act*')¹ in line with the clearly stated legislative intent. Furthermore, the Assessor appears to have overlooked the umbrella of tort principles that oversees all compensatory frameworks for personal injury matters in Australia. The judicial precedents of all State jurisdictions, including New South Wales, that guide the application of causation principles in cases of sexual assault has been ignored. Moreover, it is uncomfortably apparent that it is the Aboriginality of Valerie Linow, and the contextual relevance of that to her lifelong experiences, that has provided the major obstacle to the success of her claim. The removal of the applicant from her family as a young child seems to have led, paradoxically, to the removal of her right to compensation for the harms she suffered from sexual abuse perpetrated as a direct result of that removal.

II FACTS: EVENTS PRECEDING THE CLAIM

Valerie Linow was taken from her mother at the age of two and placed in the Bombaderry Children's Home. In 1958, at age 16, she was placed by the Welfare Board with a family of four children as a domestic worker. During her six

* Christine Forster, Lecturer, University of New South Wales.

1 *Victims Support and Rehabilitation Act 1996* (NSW).

months in this placement, she was sexually assaulted and thrashed with barbed wire 'by a white man who ran the station' and who was a member of the household in which she now lived. The applicant ran away from the house and informed the authorities of the assaults. The police investigated the allegations but found insufficient evidence to pursue the matter. The matron of the Cootamundra Girls Home, where she was residing prior to the placement and to where she returned after the assaults, wrote to the Welfare Board saying that she had not made Linow return to the placement 'for fear' that her allegations were true. Some 44 years later, Valerie Linow lodged an application in the Victims Compensation Tribunal for compensation in relation to the sexual assaults. The Assessor accepted, on the balance of probabilities, 'that the applicant was subjected to a series of indecent and sexual assaults by the alleged offender'.² However, the applicant's claim was denied on the basis that the Assessor was not satisfied 'on the balance of probabilities that the injury was caused as a result of the sexual assaults'.³

III THE STATUTORY FRAMEWORK

Statutory schemes to compensate victims of crime began to emerge in many Western jurisdictions as an adjunct to the tort system during the late 1960s,⁴ acknowledging that the state held a moral obligation to compensate this particular group of victims.⁵ With the *Criminal Injuries Compensation Act 1967* (NSW), New South Wales became the first State in Australia to acknowledge this moral obligation. All the other States and Territories followed.⁶ Statutory schemes were adopted because the common law was perceived as an inadequate mechanism for facilitating the provision of compensation to victims of crime. Lengthy delays, the need for a pecunious perpetrator and the gruelling and public nature of the court process characterised actions in tort.⁷ However, the schemes are modelled on the common law and incorporate many principles and concepts from both the law of tort and the law of damages.

2 New South Wales Victims of Crime Compensation Tribunal, Notice of Determination: File Ref 73123, 15 February 2002. Copy consulted by the author with the permission of Valerie Linow.

3 Ibid.

4 New Zealand was the first jurisdiction to introduce such a scheme, with the *Criminal Injuries Compensation Act 1963* (NZ), followed by England in 1964, which introduced a non-statutory scheme administered by a Criminal Injuries Compensation Board.

5 See Peter Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed, 1993) 256.

6 Early legislative reform included: *Criminal Code Amendment Act 1968* (Qld); *Criminal Injuries Compensation Act 1969* (SA); *Criminal Injuries Compensation Act 1970* (WA); *Criminal Injuries Compensation Act 1983* (ACT); *Criminal Injuries Compensation Act 1972* (Vic). Current legislation includes: *Criminal Offence Victims Act 1995* (Qld); *Criminal Injuries Compensation Act 1985* (WA); *Criminal Injuries Compensation Act 1976* (Tas); *Crimes (Assistance) Act 1989* (NT); *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victims of Crime Assistance Act 1996* (Vic); *Victims of Crime Act 2001* (SA).

7 See David R Miers, *Compensation for Criminal Injuries* (1990) 2; Cane, above n 5, 172–7; Reynolds J describes the schemes as providing some measure of justice to victims of crime 'without the delay, expense and formality of a civil action': *R v Bowen* (1969) 90 WN (NSW) 82, 84.

In New South Wales, statutory compensation for victims of crime is now governed by a single mechanism, the *Victims Support Act*, which replaced the *Victims Compensation Act 1987* (NSW). The *Victims Support Act* governs all applications for compensation by victims of crime regardless of whether the events causing the injuries for which compensation is sought occurred before or after the date of assent. The only exception is when proceedings have begun under the *Victims Compensation Act 1987* (NSW) but have not yet concluded, in which case the earlier Act provides the relevant statutory framework.⁸

Compensation is payable to a primary victim for 'compensable injuries received by the victim as a direct result of the act of violence'⁹ and for 'financial loss incurred by the victim as a direct result of any such compensable injury'.¹⁰ An 'act of violence' is defined as an act or a series of related acts, committed by one or more persons that has apparently occurred in the course of the commission of an offence;¹¹ that has involved violent conduct against one or more persons;¹² and that has resulted in injury or death to one or more of those persons.¹³ Injury is separately defined as 'actual physical bodily harm or psychological or psychiatric disorder'.¹⁴ A tariff governs both aspects of injury with a list of physical harms and two levels of compensation for psychological and psychiatric disorders.¹⁵

The removal of Indigenous children from their families and communities is unlikely to constitute such 'an act of violence'. No 'Stolen Generation' litigation has yet successfully established that the removal of children was in breach of the legislation that authorised the removals.¹⁶ It is therefore unlikely to constitute an 'offence' within the meaning of the *Victims Support Act*. Valerie Linow's claim therefore focused on the series of sexual assaults she endured subsequent to and as a consequence of that removal. The *Victims Support Act* expressly states that a sexual assault does constitute an 'act of violence'.¹⁷

IV SPECIAL PROVISION FOR SEXUAL ASSAULT IN THE VICTIMS SUPPORT ACT

The *Victims Support Act* introduced a special category for victims of sexual assault, recognising the specific needs of this particular group of victims. New

8 *Victims Support and Rehabilitation Act 1996* (NSW) sch 3, pt 2, cl 3(1).

9 *Victims Support and Rehabilitation Act 1996* (NSW) s 14(1)(b).

10 *Victims Support and Rehabilitation Act 1996* (NSW) s 14 (1)(a).

11 *Victims Support and Rehabilitation Act 1996* (NSW) s 5(1)(a).

12 *Victims Support and Rehabilitation Act 1996* (NSW) s 5(1)(b).

13 *Victims Support and Rehabilitation Act 1996* (NSW) s 5(1)(c).

14 *Victims Support and Rehabilitation Act 1996* (NSW) sch 1.

15 *Victims Support and Rehabilitation Act 1996* (NSW) sch 1. Category 1 includes chronic psychological or psychiatric disorder that is moderately disabling with an award range of A\$7500 to A\$15 000. Category 2 includes chronic psychological or psychiatric disorder that is severely disabling with an award range of A\$30 000 to A\$50 000.

16 See *Kruger v Commonwealth* (1997) 190 CLR 1; *Cubillo v Commonwealth* (1999) 89 FCR 528; *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86.

17 *Victims Support and Rehabilitation Act 1996* (NSW) s 5(2).

South Wales is the only Australian jurisdiction, other than Queensland,¹⁸ to make special provisions for victims of sexual assault. There are three levels of compensation. The first level includes indecent assault or assault with violence in the course of attempted unlawful sexual intercourse. The award range is A\$2400 to A\$10 000.¹⁹ The second level includes unlawful sexual intercourse or the infliction of serious bodily injury in the course of attempted unlawful intercourse. The award range is A\$10 000 to A\$25 000.²⁰ The third level includes a pattern of abuse involving category one or two sexual assault; unlawful sexual intercourse in which serious bodily injury is inflicted; unlawful sexual intercourse in which two or more offenders are involved; or unlawful sexual intercourse in which the offender uses an offensive weapon. The award range is A\$25 000 to A\$50 000.²¹ The approach is best described as 'offence-based' as each level accords with offences in the criminal law, increasing the level of compensation as the offence becomes more 'serious'. The focus is therefore more on community perceptions of culpability than on the harm suffered by the claimant. Such harm may bear little relationship to the seriousness of the offence under the criminal law.

The special category for victims of sexual assault was introduced in response to criticisms of the judicial application of common law principles in respect of psychological injuries in cases of sexual assault. In 1994, the Chair of the Victims Compensation Tribunal commented that the legislation (as it then operated) inappropriately forced victims of sexual assault 'to prove that something is wrong with them ... To my mind this is a classic case where compensation should be awarded for the traumatic experience itself rather than having to prove to a difficult standard the results of that experience'.²² In December 1997 (after the changes were introduced) the Joint Select Committee on Victims Compensation ('Select Committee') stated that 'sexual assault is divided into three categories and an award range is provided for victims which is determined according to the nature and pattern of offence. There is no requirement to provide proof of a certain level of psychological injury'.²³ In 1998, the Select Committee reiterated the change, stating that victims of sexual assault are not required 'to prove that they have a psychological injury in terms

18 In 1997, Queensland introduced a special provision to compensate victims of particular sexual offences occurring after 18 December 1995. The 'adverse impact' clause includes sexual offences within the definition of injury and lists a diverse and inclusive description of the form of harm that can be compensated within that category. The totality of the adverse impact of a sexual offence includes: a sense of violation; reduced self-worth or perception; post-traumatic stress disorder; disease; lost or reduced physical capacity; increased fear or increased feelings of insecurity; adverse effect of the reaction of others; adverse impact on lawful sexual relations; adverse impact of feelings; or anything the court considers is an adverse impact of a sexual offence: *Criminal Offence Victims Regulation 1995* (Qld) reg 1A.

19 *Victims Support and Rehabilitation Act 1996* (NSW) sch 1, cl 6(a).

20 *Victims Support and Rehabilitation Act 1996* (NSW) sch 1, cl 6(b).

21 *Victims Support and Rehabilitation Act 1996* (NSW) sch 1, cl 6(c).

22 Dr E Elms, cited in Joint Select Committee on Victims Compensation, Parliament of New South Wales, *Report: Inquiry into Psychological Injury – Shock* (1998) 16.

23 Joint Select Committee on Victims Compensation, Parliament of New South Wales, *Second Interim Report: The Long Term Financial Viability of the Victims Compensation Fund* (1997) 44.

of nervous shock or mental illness'.²⁴ Indeed, the sexual assault provision in the *Victims Support Act* states that the three levels of award apply 'to the compensable injury of sexual assault'.²⁵ The requirement for a 'proved' injury is therefore satisfied by the very act of sexual assault. This accords with the common law approach to sexual assault where victims commonly pursue tort actions in battery. In the trespass tort of battery, the essence of the action is the infringement of a right to personal integrity and does not require any harm other than the act itself in order to establish liability.

In sum, the special provisions for sexual assault victims introduced in the *Victims Support Act* remove the requirement to prove on the balance of probabilities that the harm suffered by the victim was 'caused' by the sexual assaults. In the case of Valerie Linow, since the Assessor accepted on the balance of probabilities that the sexual assaults occurred, it appears that she or he erred in her or his finding. The applicant was subjected to 'a series of indecent and sexual assaults' which automatically entitles her to an award in the third tier of injury, between A\$25 000 and A\$50 000, without proof of injury.

V MULTIPLE POSSIBLE CAUSES OF HARM

The Assessor did not refer to the sexual assault provisions of the *Victims Support Act* in her or his determination. Instead, she or he relied upon s 5, which provides that the act of violence must have resulted in injury to, or the death of, one or more persons. In doing so, the Assessor adopted the formula for injuries other than sexual assault and assumed that a legal causative link must be established between the applicant's injuries and the sexual assaults. The Assessor stated that the injury 'must have been the result of the violent conduct'.²⁶ However, in concluding that the applicant did not 'prove' the injury was caused by the sexual assaults, the Assessor did not draw upon the extensive case law that exists generally in relation to multiple possible causes of harm in tort law. Specifically, the Assessor ignored the approach of the judiciary to claims by victims of sexual assault under the victims of crime statutes in all other Australian jurisdictions where there are no special provisions removing the causation requirements.

Valerie Linow has suffered extensive harm from the combined effects of the trauma of her removal from her family and the traumatic events that occurred subsequent to that removal. The Assessor accepted the medical reports that 'clearly indicate that the applicant suffers from a psychiatric disorder'.²⁷ Although it is always difficult for the judiciary to distinguish between particular events as causative of particular harm, multiple possible causes of injury are a common obstacle in all personal injury cases in tort law and under related

24 Joint Select Committee on Victims Compensation, *Inquiry into Psychological Injury*, above n 22, 8.

25 *Victims Support and Rehabilitation Act 1996* (NSW) sch 1, cl 6.

26 New South Wales Victims of Crime Compensation Tribunal, Notice of Determination: File Ref 73123, 15 February 2002.

27 *Ibid.*

statutory schemes. The complexity of human lives and interaction with others always makes it problematic to pinpoint with certainty a causal relationship between a tortious event and subsequent harm. Principles based on 'commonsense' have emerged to avoid 'absurdity' or 'injustice' in instances where trauma both before and after the events in question might also have caused or contributed to the injury.²⁸ Neither situation will relieve a culpable actor of liability nor deny compensation to a victim.²⁹

Like other victims of personal injury, many victims of sexual abuse who make claims for compensation face difficult obstacles in 'proving' their harm is linked to the acts of abuse they have endured. The dysfunctional circumstances that promote and perpetuate the occurrence of sexual abuse are often manifested in other abuses and trauma in the victims' lives. The relationship between causation principles in tort law and how causation should be determined under the statutory frameworks dealing with victims of crime is unclear. It is accepted, however, that these are pieces of 'remedial legislation which should be interpreted liberally and beneficially in accordance with common law principles',³⁰ suggesting that the common law approach should be generally and generously followed.

There have been numerous applications by victims of sexual assault, under the various statutory schemes throughout Australia dealing with victims of crime, where there are multiple possible causes of harm other than the particular events relied upon by the applicant. Principles, closely aligned with tort law principles, which adopt a flexible approach regarding the particular circumstances of sexual abuse claims have been applied in all Australian jurisdictions. Courts and tribunals appear to have been willing to take judicial notice of the fact that sexual assault causes harm. 'To hold otherwise', states Judge Burnett 'offends common sense and common knowledge'.³¹ Rather, the pertinent issue in the eyes of the judiciary is how to 'carve up' the harm amongst the potential multiple causes. The general approach is to make a global assessment based on the totality of the harm and then apply a deduction for other possible causes that are not part of the claim. In an early Australian Capital Territory case, in which the Applicant was sexually abused by both her brother and her father, the applicant's claim was grounded only on the assaults committed by her father. Master Hogan stated 'all that can be done is to adopt a broad and commonsense approach, often starting with a total sum that represents full compensation, and dividing roughly according to the responsibility of each tortious act in contributing to the total loss'.³²

28 See *March v Stramare Pty Ltd* (1991) 171 CLR 506.

29 See Harold Luntz and David Hamblly, *Torts: Cases and Commentary* (4th ed, 1995) 286–97, where it is suggested that 'there seems to be no sound reason of policy why we should not attribute responsibility to someone whose negligence would have caused harm if it had not already happened': [4.2.7].

30 *LMP v Lennis Collins* (1993) 112 FLR 289, 309.

31 *Matthews v South Australia* [1999] SADC 95 (Unreported, Judge Burnett, 16 July 1999) [69].

32 *Re Application for Criminal Injuries Compensation (No 69 of 1989)* (1991) 103 FLR 297, 301.

This approach has been followed throughout Australia.³³ The assessment should be made without reference to the statutory limit and based on the damages that would be awarded in a common law action in tort. If it exceeds the maximum, then the maximum should be awarded.³⁴

The failure of the Assessor to apply the sexual assault provisions and her or his alternate reliance on the general provisions of the *Victims Support Act* that apply to other forms of injury do not therefore lead to the conclusion that Valerie Linow's injuries are not causatively linked to the sexual assaults. The application of the principles of causation as they apply to personal injury in general and to sexual assault in particular suggest that the key issue is how to apportion the harm between the multiple potential causes of harm in the applicant's life rather than a finding that none of her injuries are compensable.

VI THE 'WRITING IN' OF VALERIE LINOW'S ABORIGINALITY

The dismissal of the applicant's claim is extraordinary in that it appears to have failed on the grounds that the devastating effects of her removal were so extreme that the subsequent events of abuse did not, on the balance of probabilities, cause harm. In coming to this conclusion, the Assessor relied heavily upon the report of the consultant psychiatrist which stated that 'it is likely that had Mrs Wenberg had the opportunity to be reared in a loving family, she would have been a capable parent and would not have suffered from Dysthymic Disorder, Alcoholism or Mixed Anxiety Disorder'.³⁵ The psychiatrist, presumably familiar with the extensive body of literature and research that

33 In New South Wales, see *R v Field* [1982] 1 NSWLR 487; *R v Fraser* [1975] 2 NSWLR 521. In *Criminal Injuries Compensation Act 1983 (ACT)* and *SS* [1993] ACTSC 45 (Unreported, Master Hogan, 23 April 1993) [21] the ACT Supreme Court accepted that although the applicant 'was a disturbed and troubled adolescent prior to the attacks', the sexual assaults caused harm. For the Northern Territory, see *Northern Territory v Woodruffe* (1999) 152 FLR 264. In Western Australia, see '*J*' v *Raymond Pettersson* (1994) (Unreported, Supreme Court of Western Australia, Scott J, 20 September 1994), where the applicant was abused by both a family friend and her grandfather. In *Patorniti v Silvestro* (Unreported, Supreme Court of Western Australia, Templeman J, 22 May 1997), the applicant's father committed suicide after discovering the sexual abuse suffered by her daughter. Templeman J accepted that the applicant's injury was in part caused by this and events other than the sexual assaults. In Victoria, see *Hards, Budds and Elliot v Crimes Compensation Tribunal* [1997] 1 VR 608, where an applicant was sexually assaulted by both her uncle and her father; and *Thomas v CCT* (Unreported, Administrative Appeals Tribunal of Victoria, Presiding Member Davis, 1 February 1995). In Queensland, see *Bird v Bool* (Unreported, Supreme Court of Queensland, Derrington J, 16 October 1997) 1, where the court held that the treatment of the applicant by her mother and the sexual abuse of the applicant by her brother 'contributed in a significant part' to her problems in addition to the abuse by her stepfather. In South Australia, see *Matthews v South Australia* [1999] SADC 95 (Unreported, Judge Burnett, 16 July 1999) where the applicant suffered numerous abuses other than the rapes that were the subject of the claim. In all of these cases, causation was established on the assumption that sexual abuse inevitably causes harm. The key issue for the courts was how to apportion the award in relation to the multiple possible causes.

34 See *R v Forsythe* [1972] 2 NSWLR 951, 955.

35 New South Wales Victims of Crime Compensation Tribunal, Notice of Determination: File Ref 73123, 15 February 2002.

substantiates the devastating effects of sexual abuse,³⁶ is unlikely to have meant that had Valerie Linow been sexually abused while being reared in a loving family she would not have suffered harm. It is much more likely that the psychiatrist meant that the harm of the sexual assaults could not be reliably separated from the harm of being taken from her family. However, an inability to separate out and apportion the harm from multiple traumas is substantively different to the conclusion that a particular act or series of acts did not cause harm.

In a legal system that declares itself neutral, it is antipathetic to conclude that Valerie Linow's Aboriginality has operated to deny her compensation. However, her Aboriginality led to her removal in accordance with the discriminatory laws that facilitated the removal of 'neglected' or 'uncontrollable' Indigenous children for their own protection.³⁷ The devastating effects of that removal have overshadowed and cancelled out, in the eyes of the Assessor, any possible further harm from the trauma of the sexual assaults. Inevitably, the failure of the Victims Compensation Tribunal to acknowledge those acts as harmful to the applicant legitimates and trivialises the sexual assault of an Aboriginal woman by a white offender. Although it is legally and morally incomprehensible that the discriminatory laws that led to the applicant's removal should act to remove her right to compensation for abuses endured as a result of that removal, it is fair to acknowledge that this is a situation far beyond that envisaged by the legislature. The policy of removals, as illustrated so powerfully in *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*,³⁸ has impacted upon Indigenous families and communities like the shocking aftermath of war. In wrestling with the issues of causation, the Victims Compensation Tribunal is faced with a tragedy that the legislation and its administrators are ill equipped to handle.

VII CONCLUSION

Valerie Linow is likely to win her case on appeal. The sexual assault provisions of the *Victims Compensation Act* are clear in their meaning and intent. Her claim is plainly situated in the highest of the three available bands of award, although the amount of compensation she receives within this range will depend upon how the court navigates the troublesome issues of causation. Since the

36 See generally Judith Lewis Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror* (1992). See also Paul E Mullen and Jillian Fleming, *Long Term Effects of Child Sexual Abuse*, National Child Protection Clearing House, Issues in Child Abuse Prevention Paper No 9 (1998); Paul E Mullen et al, 'The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life' (1994) 165 *British Journal of Psychiatry* 38; Laura Whitmore Johnson and Lisa L Harlow, 'Childhood Sexual Abuse Linked with Adult Substance Use, Victimization and AIDS-Risk' (1996) 8 *AIDS Education and Prevention* 44; Amy B Silverman, Helen Z Reinherz and Rose M Giaconia, 'The Long Term Sequelae of Child Adolescent Abuse: A Longitudinal Community Study' (1996) 20 *Child Abuse and Neglect* 709.

37 *Aborigines Protection Act 1909* (NSW).

38 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).

'problem' of multiple causes is common in cases of sexual abuse, and since the the judiciary in all the Australian jurisdictions, including New South Wales have a history of flexibility and understanding in their approach to this issue, Valerie Linow should receive the maximum award.

The inadequacies of the current legal framework to compensate those Indigenous Australians who were removed from their families and communities, many of whom suffered abuses subsequent to and as a consequence of that removal, are graphically highlighted in this case. The failure of all 'Stolen Generation' cases so far; the absence of a Reparations Tribunal to acknowledge and provide compensation for the grave wrongs committed against all Indigenous Australians as a result of the discriminatory practices of earlier governments; and the difficulties that all victims of sexual abuse encounter in pursuing civil litigation, leaves the Victims Compensation Tribunal as the only viable avenue of compensatory redress. Although New South Wales has one of the most progressive approaches of any State to compensating victims of sexual assault, it appears to have faltered when confronted with the complex issues raised by the Stolen Generation. Valerie Linow has suffered greatly from the combined effects of her removal from her family and community and the acts of neglect and abuse that she subsequently experienced. That she, and others similarly situated, should now have to proceed through an appeal process is contrary to the recent claim of the Joint Select Committee that waiving the requirement for sexual assault victims to show proof of injury will 'expedite claims through the administrative process therefore not unnecessarily prolonging victims' suffering'.³⁹ 'It hurts', concludes Valerie Linow, '[a]fter 44 years I just want justice'.⁴⁰ It leaves us to question, along with the applicant herself, how justice can be achieved in a nation unwilling to face up to the wrongs of the past and the ongoing repercussions of those past wrongs on the present lives of Indigenous Australians.

39 Joint Select Committee on Victims Compensation, Parliament of New South Wales, *Report: Ongoing Issues Concerning the NSW Victims Compensation Scheme* (2000) 9.

40 Debra Jopson, 'Claim Knockback Reflects Frustration of Stolen Children', *Sydney Morning Herald* (Sydney), 9 March 2002, 9.