

# TREVORROW V STATE OF SOUTH AUSTRALIA (NO 5)

---

Supreme Court of South Australia (Gray J)  
1 August 2007  
[2007] SASC 285

**TORTS – Negligence – Malicious Procedure – False Imprisonment – Breach of Statutory Duties – Misfeasance in Public Office – Liability of the Crown for the actions of its agencies.**

**EQUITY – Fiduciary obligations.**

---

## **Facts:**

In 1957 the plaintiff, Bruce Allan Trevorrow, an Aboriginal child of 13 months, was sent by his parents to hospital with stomach problems. Two weeks later the plaintiff was removed from hospital and placed in the care of a foster family. This procedure was authorised and arranged by an officer of the Aborigines Department on behalf of the Aborigines Protection Board of South Australia ('APB').

The plaintiff continued to live with his foster family until the age of 10, in spite of frequent requests by his natural mother to the APB that he be returned. The plaintiff then returned to live with his Aboriginal family. However, the plaintiff suffered a range of emotional and physical problems and only remained with his family for 14 months. He spent the remainder of his childhood life 'in and out of State institutions'.

The plaintiff claimed that his removal and ongoing separation from his family for more than a decade led to loss of family and community identity, a loss of cultural identity, depression, alcoholism, poor health, poor domestic relations and an erratic employment history.

The plaintiff contended that the State of South Australia ('State'), through the APB, was at various times his legal guardian and therefore owed him both an ordinary and fiduciary duty of care, both of which were breached. Moreover, the plaintiff contended that these breaches were committed with actual knowledge, given that in both 1949 and 1954 the State received legal advice that it did not have the authority

to remove Aboriginal children unless certain procedures were complied with.

The defendant contended that the plaintiff was not unlawfully removed from his parents, that the APB was the plaintiff's legal guardian and that no liability should flow from any actions relating to the plaintiff.

The defendant also contended that section 35 of the *Limitations of Actions Act 1936* (SA) ('*Limitations Act*') barred the plaintiff from bringing a claim in tort more than six years after the occurrence of the subject event. The State also rejected the plaintiff's submission that it should be allowed a statutory extension of time under section 48 of the *Limitations Act*. In respect of the non-statutory claims made by the plaintiff, the defendant claimed the defence of laches.

## **Held, that the APB was an emanation of the State:**

1. At all times, the APB's function, management, objectives and affairs were tied to and controlled by the State. The APB was therefore an emanation of the State and liabilities that flow to the APB by their nature also flow to the State: [525].

## **Held, that the State's removal of the plaintiff from his parents was ultra vires:**

2. The State was the guardian of all Aboriginal children from 1934 by virtue of the *Aborigines Act 1934-1939* (SA). Guardianship reverted to the parents of Aboriginal children in 1962 by virtue of the *Aboriginal Affairs Act 1962* (SA).

3. 'Guardianship' is a fluid concept at common law and gives rise to no specific rights on its own terms. Rather, it encompasses a bundle of rights, the content of which can be established by the relevant statutory context in which guardianship is granted: [440], [445].

4. Parents have the right, at common law, to exercise care and control over their children. In order for this common law presumption to be displaced, the statutory intention of Parliament must be evident in the legislation: [454].

5. There was no intention evinced by Parliament to grant sweeping powers of guardianship to the State (and its emanations) that would allow it to remove children without due process. The legislative framework, encompassing the *State Children Act 1895* (SA), the *Aborigines Act 1911* (SA), the *Aborigines (Half-Caste Children) Bill 1921* (SA), the *Aborigines (Training of Children) Act 1923* (SA), the *Maintenance Act 1926-1937* (SA), the *Children's Protection Act 1936* (SA) and the *Aborigines Act 1934-1939* (SA) reveal that State guardianship was only relevant for the actual protection of Indigenous children, not for their removal.

**Held, rejecting a finding that statutory and equitable limitations of action exist:**

6. Section 43(b)(ii) of the *Limitations Act* vests the Court with power to grant an extension of the time in which an action can be brought if it is persuaded that the plaintiff's failure to bring a prior action can be attributed to the actions or conduct of the defendant: [894].

7. The State had a fiduciary duty to disclose to the plaintiff that it had acted ultra vires. It failed in this duty until it disclosed certain documents to the plaintiff's solicitor in 1997. This finding was sufficient to enliven the section 43(b)(ii) discretion for a statutory extension to the limitation period: [911].

8. The discretion to allow an extension of time should be exercised in favour of the plaintiff given that the wrongful actions of the State not only caused damage to the plaintiff but also prevented him from bringing action: [932]; *Hawkins v Clayton* 164 CLR 539 considered.

9. Where the equitable and legal claims before a court are of sufficient similarity and statutory limitations exist, the defence of laches will allow a corresponding bar on equitable remedies. However, the delay in the plaintiff's claim being

brought was also due to the conduct of the State, meaning it would be unjust to allow the defence of laches to succeed: [963]; *Barker v Duke Group* [2005] ALMD 4893 considered.

**Held, that the defendant's conduct constituted misfeasance in public office:**

10. Public officials may be liable for injuries that are caused by acts that they know to be unlawful and that involved a foreseeable risk of harm. Liability is strict and can arise where there is no negligence or intention to cause harm: [977].

11. The State and its relevant agencies pursued a policy of removal that they were aware was ultra vires: [88].

12. It was reasonably foreseeable that the separation of a 13 month old Aboriginal child from his family and placement of that child with a non-Indigenous family would create real risks for that child's long-term health. The State (and its emanations) had actual or constructive knowledge of that risk: [885].

13. The plaintiff did in fact suffer harm, including a range of health problems throughout his life that can be directly attributed to his separation from his Aboriginal family: [850].

14. The plaintiff is entitled to damages for misfeasance in public office: [981].

**Held, that the plaintiff was wrongly imprisoned:**

15. The tort of wrongful imprisonment occurs when an individual is subject to total deprivation of freedom of movement without lawful justification; it is a tort of strict liability. If the imprisonment is proven as a question of fact it is for the defendant to prove that there was a lawful justification for it: [983].

16. By placing the plaintiff with his foster family and refusing to return him to his parents for 10 years, the will of the plaintiff and his parents was overborne. Neither the plaintiff nor his parents consented to his removal. The plaintiff was imprisoned and the State and its emanations caused that imprisonment: [991].

17. The removal of the plaintiff that led to his imprisonment was unlawful. Therefore, the imprisonment itself was also unlawful: [992].

**Held, that the State breached its fiduciary duty to the plaintiff:**

18. As the legal guardian of the plaintiff, the State and its emanations owed the plaintiff a duty to: look after the plaintiff's best interests; to protect and assert the plaintiff's proprietary rights and interests; to ensure that the plaintiff was given full information as to the removal from his parents; and to ensure the provision of professional legal advice in respect of his rights of action against the State: [1001]-[1002].

19. The State breached its fiduciary obligation to the plaintiff by its removal of the plaintiff from his natural family, by its failure to make the plaintiff aware of the circumstances of his removal and by its failure to make the plaintiff aware of his legal remedies against the State: [1006].

**Held, that the State is liable to the plaintiff in negligence:**

20. Where the State owes a duty of care the starting point for the content of that duty is the legislation, which in this case gave the State a range of discretionary powers as guardian of the plaintiff: [1013].

21. These discretionary powers will not, on their own, give rise to a duty of care; rather, the test is one of 'salient features' – the way in which the terms, scope and relevant purpose of an Act were carried out by the State: [1039]; *Graham Barclay Oysters Pty Ltd v Ryan* 211 CLR 540 referred to.

22. Since the object of the legislative scheme was to support and protect Aboriginal children, the imposition of a duty of care would not 'cut across' legislative intent, but rather support it: [1041]-[1043].

23. The 'salient features' test is fulfilled. It was reasonably foreseeable that: removal would cause harm; the plaintiff was vulnerable; the State had a high degree of control over the plaintiff; there was sufficient proximity between the APB and the plaintiff; and the APB had the powers and abilities to obviate the harm: [1046]-[1062].

24. The removal of the plaintiff from his family placed him in a position where there was a substantial risk of him experiencing harm. This constitutes a breach of duty: [1076].

25. Even if the plaintiff had needed to be removed from

his family, no action was taken by the State to inquire about the circumstances of that removal or their relative benefit to the plaintiff. This failure to investigate constitutes a breach of duty: [1077].

26. While in foster care, the State made no enquiries about the suitability of his care. This was detrimental to the plaintiff's physical and mental health and constitutes a breach of duty: [1081].

27. The selection of a foster mother for the plaintiff without appropriate monitoring or inquiry, as well as the failure to allow the plaintiff's natural mother to have contact with him, constitute breaches of the duty of care: [1084].

28. The manner in which the plaintiff was returned to his natural family fell well short of the appropriate standard of care. Ongoing treatment should have been provided to ensure the family's reconciliation. The State's actions (or lack thereof) constitute a breach of the duty of care: [1090].

29. As a matter of probability, there are multiple causes of the plaintiff's injuries and losses. Nevertheless, his ongoing depression has directly impacted upon his ability to maintain family identity, cultural identity and personal relationships. This has led to trauma, ill-health and alcoholism: [1098].

30. Application of the 'commonsense' test of causation demonstrates that breaches of duty by the State caused damage and loss to the plaintiff: [1139]; *March v E & MH Stramare* 171 CLR 506 referred to.

**Held, that the plaintiff should be awarded damages:**

31. While the plaintiff has lost earning capacity it is difficult to quantify in economic terms because of the way in which the separation has affected his employment history throughout his life. Therefore, the award of general damages is discretionary in nature: [1188].

32. Cultural loss is a compensable head of damage. The plaintiff is to be compensated for the suffering brought about by the loss of his Aboriginal identity and his ongoing distress as to the effects of his separation: [1201]; *Cubillo v Commonwealth (No 2)* 174 ALR 97 applied.

33. Exemplary damages are to penalise a defendant for consciously disregarding another's rights, to mark the court's

disapproval of a defendant's conduct or to provide redress to the grievances of the plaintiff: [1205]-[1206].

34. The conduct of the State in this case was voluntary, deliberate and carried out in spite of legal advice that it was acting ultra vires. A grant of exemplary damages is warranted: [1215].

-