

Supreme court notes

*Reporters for this month are:
Mary Adam, Alistair Shields, Anita
Kneebone.*

Aboriginal Land Rights - Right of Land Councils in Determining Identity of Traditional Aboriginal Owners

*Tapgnuk v Northern Land Council
and Ors*

No 137 of 1995

Judgement of Angel J delivered
15 May 1996

The plaintiffs, who claimed to represent traditional Aboriginal owners identified by the Aboriginal Land Commissioner in his report which led to the grant of Aboriginal Land to the Daly River (Malak Malak) Land Trust, sought a declaration that the first defendant was bound by the Land Commissioner's findings concerning the identity of the Aboriginal traditional owners of the land.

The second defendants challenged the finding of the Land Commissioner that their descent group was not capable of being identified as Aboriginal traditional owners of the land.

The question for his Honour's consideration was whether findings concerning identity of Aboriginal traditional owners made by the Land Commissioner preclude the relevant Land Council from undertaking its own investigations subsequent to the grant of the land.

Held:

1. that because Parliament has recognised that through succession new Aboriginal traditional owners may emerge over time, and because the Aboriginal Land Rights (Northern Territory) Act ("ALRA") enables Land Councils to form an opinion as to the identity of Aboriginal traditional owners, the Land Council's power to determine Aboriginal traditional owners is not fettered by the decision of the Land Commissioner - it is, however, subject to the provisions of the ALRA; and
2. the doctrines of res judicata and issue estoppel do not apply to the conclusions of a Land Commissioner.

His Honour also made a useful analysis of the powers and functions of Land Councils established under ALRA.

G Flick instructed by Cridlands for

the plaintiff

R Levy of the Northern Land Council
for the first defendants

M Hardie of Ward Keller for the second defendants.

AS

*Ross, Kali and Leslie Anne Ross v
Public Trustee for the Northern
Territory as Executor for the Estate of
Bruce Andrew Ross.*

No 9 of 1995 and 74 of 1995

Judgement of Angel J delivered on
15 May 1996

The claimants were the estranged daughters, and the only 2 children of the testator. In his will made shortly before his death the testator had left most of his considerable estate (\$553,000) to "those of my grandchildren who survive me and attain 21 years". At the time of his death each of the claimants had one young child. Each of the claimants were left \$25,000.

In considering whether the claimants were entitled to a redistribution of the estate the court applied the 2 stage test required by section 8 (1) of the Family Provision Act. The first stage is a question of whether the Court has jurisdiction, for the purposes of which it determined whether the \$25,000 legacy was adequate "for what, in all the circumstances (that existed at the time of the testator's death), is the proper level of maintenance, education and advancement in life etc, appropriate for each of the plaintiffs, having regard, inter alia, to their respective financial positions, the size of the deceased's estate and other claims on it: *Singer*: A special need is not necessary to found a successful claim.

In addressing the question of proper maintenance of the first claimant the court considered it relevant that the child's needs would be alleviated by the advancement from the child's legacy. However, at the time of the testator's death the first claimant was a single unemployed mother of a child with cystic fibrosis who required her full-time care. Because she could not seek any kind of paid employment this severely restricted her ability to properly maintain herself.

The circumstances of the second plaintiff at the time of the testator's death were that she was married, with a share in a business with her husband, as well as

some savings which were intended for use as a deposit on a home loan. She was studying full-time with the prospect of becoming a teacher. The Court held that it can consider circumstances that can reasonably be foreseen by the testator. The prospect of monthly mortgage repayments and tertiary education expenses, as well as the possibility of more children and the subsequent need for a larger car were just such circumstances.

In the second stage of the test the court exercised its discretion, having regard to all the circumstances at the time of the application to "order such provision as the Court thinks fit be made out of the estate of the deceased person". *White v Baron*. It was held that it is appropriate to consider the grandchildren's interests when determining what amount is to be apportioned to the plaintiffs, as well as considering the size of the estate and other demands upon it and the testator's wishes.

The plaintiffs' circumstances at the time of application had considerably worsened since the testator's death. The first was living with her mother and suffering stress as a result of caring for her severely ill child.

The Court considered that provision for a home would be proper provision for for the first plaintiff's maintenance, etc. The fact that the grandchild might die, which would deprive the plaintiff of almost all the advantage of the estate, was also considered relevant.

The second plaintiff had separated from her husband and was considerably in debt. but had 3 sources of income and good prospects once her studies were completed. The Court awarded \$125,000 and \$90,000 respectively.

Using figures supplied during argument the Court found that a substantial capital sum would remain for the residual beneficiaries, the grandchildren. Costs of both plaintiffs and the trustee were ordered to be paid out of the estate of the deceased.

Counsel for first plaintiff: *TS Lee*

Counsel for second plaintiff: *J McCormack*
instructed by Close & Carter

Counsel for defendant: *J Kelly, instructed
by Philip & Mitaros*

MA

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Supreme Court Notes

Negligence - Damages - Principles Applicable to Assessment of Damages - Interest

Julie Namals v Northern Territory of Australia

No 377 of 1987

Judgment of Kearney, J delivered
14 May 1996

The plaintiff was a 23 year old Aboriginal woman bearing her first child. Throughout most of her pregnancy the plaintiff was cared for at Daly River. About 24 days prior to commencing labour she was transferred to Royal Darwin Hospital for further management and delivery. Due to complications a caesarean section was subsequently undertaken. During this operation the plaintiff's uterus was damaged and as a result, a total abdominal hysterectomy had to be performed to save the plaintiff's life.

The plaintiff sued the defendant for damages, claiming that her uterus was

damaged to the point where a total hysterectomy was necessitated.

At the commencement of the second day's hearing the defendant conceded liability and the sole remaining issue before the court was the question of the quantum of damages and interest thereon.

Held, (1) The High Court's decision in *Carson v John Fairfax & Sons Ltd* (1992-3) 178 CLR 44 does not permit the court now to consider comparable verdicts in personal injury damages awards.

(2) The problems associated with making separate awards of damages under separate headings are notorious and in this case it was neither necessary nor desirable to adopt such an approach.

(3) That the greater bulk of the damages was created at the time of the operation and accordingly interest thereon should be at the rate of 4% for the entire pretrial period. Where the damages accrued gradually (the loss of cultural fulfilment

through the plaintiff's inability to fully participate in traditional ceremonies with her children) interest should be calculated at the rate of 4% for half the pretrial period.

His Honour made a global award of damages in the amount of \$80,000. Interest on the award was calculated to be \$32,119.67.

Factors His Honour took in to account in reaching his decision as to the quantum of damages included:

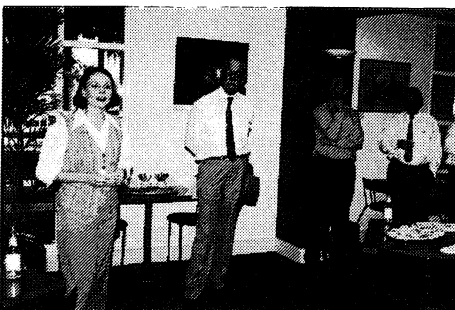
(a) the aggravation of the plaintiff's subjective suffering by virtue of the cultural importance of having a large number of children within her community and
(b) the plaintiff's subjective suffering, resulting from a loss of cultural fulfilment through inability to fully participate in traditional cultural ceremonies and activities.

Mr JE Reeves, instructed by Cridlands, for the plaintiff.

Mr PM Barr, instructed by the Solicitor for the Northern Territory for the defendant.

AK

NT Young Lawyers Articles Handbook Launch



Samantha Miles, the Hon Austin Asche, Prof Ned Aughterson and Chief Justice Brian Martin at the launch

The NTYL Inc Articles Handbook was launched on April 19 1996 by the Administrator, the Honourable Austin Asche at *Rumpole's* in the Supreme Court.

The Handbook is a guide to undertaking and enjoying Articles in the Northern Territory and was compiled by Samantha Miles.

It provides a useful guide to graduates who realise that their university degree has not fully prepared them for their new professional life. As the Administrator

pointed out in his speech, it is a guide and not exhaustive. The Handbook should be used with common sense and in consultation with the clerk's principal.

It includes information on the legal requirements of entering articles and seeking admission together with precedents and as such provides a welcome aid to students in their transition to clerk and ultimately practitioner.

In addition, the Handbook can assist clerks in familiarising themselves with office procedures, often a more complex subject than the law itself.

A series of checklists has been included to assist clerks in ascertaining which areas of law they should be exposed to to ensure fulfilling and well-rounded articles.

The Handbook is available free of charge, thanks to the sponsorship of Clayton Utz, De Silva Hebron, Elston & Gilchrist, Halfpenny's, James Noonan & Associates, Mildrens, Ward Keller, Withnall Cavenagh and Morgan Buckley. Copies may be obtained from Andrew Farr and Heather Bedson at Clayton Utz.

NT Young Lawyers AGM

Following the launch of the Articles Handbook, the NTYL held their Annual General Meeting. Special thanks were given to Samantha Miles, who was instrumental in forming the NTYL and the dedicated outgoing committee.

The new committee is as follows:

President:	Sue Porter
Vice-President:	Andrew Farr
Secretary:	Teegan Lindsay
Treasurer:	Heather Bedson
Public Officer:	Angela Smith
Social Convenor:	Jodie Truman

Anyone with any queries about the Northern Territory Young Lawyers is invited to call any of the above committee members.

BALANCE

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