

STATE OF SOUTH AUSTRALIA V LAMPARD-TREVORROW

Supreme Court of South Australia (Doyle CJ, Duggan and White JJ)
22 March 2010
[2010] SASC 56

Administrative law – Torts – Equity – Constitutional law – Aborigines Protection Board’s power under s 10 of the *Aborigines Act 1934* (SA) to foster an Aboriginal child without the consent of the parents – Aboriginal Affairs Board – procedural fairness – liability of the Crown in tort for acts of servants or agents – liability for misfeasance in public office – malicious procedure and false imprisonment – breach of fiduciary duty – negligent breach of the duty of care – whether an extension of time should have been granted under s 48 of the *Limitation of Actions Act 1936* (SA)

Facts:

This appeal by the State of South Australia concerned an award of damages by the trial judge in relation to the injuries suffered by the removal of an Aboriginal child, Bruce Trevorrow, from his natural parents into foster care, without their consent, in 1957. The State of South Australia challenged a number of findings of fact by the trial judge, and that the respective causes of action were made out against persons and entities for which the State was legally responsible. The State did not challenge the trial judge’s findings on causation, or the assessment of damages. Bruce Trevorrow died after the initial judgment was entered. His widow, Mrs Lampard-Trevorrow, as executrix of his estate, was the respondent.

Section 10 of the *Aborigines Act 1934* (SA) (‘the *1934 Act*’) provided that the Aborigines Protection Board (APB) was the ‘legal guardian’ of every Aboriginal child, notwithstanding that any such child had a living parent or other relative. Bruce Trevorrow was taken to Adelaide Children’s Hospital (ACH) on Christmas Day 1957 when he was 13 months old, suffering from severe stomach pain and diarrhoea. He recovered and was discharged by the APB into the care of Mr and Mrs Davies on 6 January 1958. His parents were not told about, nor did they consent to, Bruce Trevorrow’s placement in foster care. For many years they did not know where Bruce Trevorrow was, despite the fact that they were in contact with officers of the APB. In 1966 the Aboriginal Affairs Board (AAB), which replaced the APB, took steps to reunite Bruce Trevorrow and his family. However, from 11 years of age Bruce Trevorrow

was in and out of institutions. In his adult life Bruce Trevorrow suffered from depression and alcoholism. He claimed that his separation from his family, and the manner in which he was returned, all contributed to a loss of cultural identity, depression, alcoholism, poor health, poor relationships and erratic employment history.

The first issue for the Supreme Court to decide was whether, on the proper construction of s 10 of the *Aborigines Act 1934* (SA), the APB had the right to foster an Aboriginal Child without the consent of the parents and, if that right existed, whether it was validly exercised. The second issue was whether the APB foresaw the risk of harm sufficiently enough to establish the tort of misfeasance in public office and, following on from that, whether the State was liable for the acts of the APB, due to the fact that it was its agent or servant. The third issue for the Court to determine was whether Bruce Trevorrow was subject to the ‘total restraint’ necessary to make out the claim of false imprisonment whilst in foster care. The fourth issue on appeal was whether the APB and Bruce Trevorrow were in a fiduciary relationship of guardian and ward, and, if that fiduciary relationship was found to exist, whether it had been breached due to the failure to advise Bruce Trevorrow that he had been removed without legal authority and of his rights arising from that removal. The fifth issue on appeal was whether the imposition of a common law duty of care was forbidden by the statutory scheme of the *Aborigines Act 1934* (SA) and, if it was not, whether the APB owed a duty of care in negligence that was subsequently breached by the placement of Bruce Trevorrow in foster care. The final issue

for the Court to determine was whether the discretion to extend time under s 48 of the *Limitations of Actions Act 1936* (SA) should have been exercised in favour of an extension of time.

Held, per curiam, dismissing the appeal concerning the APB's power under s 10 *Aborigines Act 1934* (SA):

1. A consideration of the meaning of s 10 of the *1934 Act* will include a consideration of the context and purpose of the *1934 Act*. Consistently with contemporary approaches to statutory interpretation, s 22 of the *Acts Interpretation Act 1915* (SA) can and should be read as permitting a consideration of the purpose of the legislation from the outset of the process of statutory construction, not only if the relevant provision is open to more than one construction. Nevertheless, the meaning s 10 is reasonably open to more than one construction: [206], [207]; *CIC Insurance Limited v Blacktown Football Club Limited* (1997) 187 CLR 384, followed.

2. The purposes of the *1934 Act* are the protection of Aboriginal people by, when appropriate, confining them to reserves, protecting them from harm, making provision for financial and other assistance, and making provision for their education and employment. The meaning of 'legal guardian' in s 10 of the *1934 Act* is uncertain in its scope. Yet, considering the purposes of the *1934 Act*, nothing would call for the APB to have and to exercise legal control over Aboriginal children of the scope and kind the State contends, in that the State would have all the legal powers usually vested in the parents. It is consistent with the purposes of the Act to give to s 10 the limited meaning that the trial judge gave it, in that it did not convey rights of custody or power to remove Aboriginal children from their parents: [196], [216], [222]; *Potter v Minahan* (1908) 7 CLR 277, followed.

3. The State was not authorised under s 10 to place Bruce Trevorrow with Mrs Davies without the consent of his parents, as such an interpretation would have deprived all Aboriginal parents of the rights to the custody, control and upbringing of their children. Legislation should not abrogate these rights unless there is a clear intention to do so; there is no clear intention to do so in the *1934 Act*: [223].

4. In agreeing in substance with what the trial judge held, s 10 means that the APB was established and obliged to

act as a guardian in the sense of one who watches over the welfare of others. It was to provide for Aboriginal children financially, and in other ways, when it was desirable to do so, and when the resources of the APB permitted; to exercise powers under s 38 of the *1934 Act* to remove them into the control of the State when necessary; to support the parents of the children when appropriate and when the APB had the resources to do so; and to generally to act in a protective capacity: [226].

Held, per curiam, dismissing the appeal in consideration of procedural fairness:

5. The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations. This principle is subject only to a clear manifestation of a contrary statutory intention. This principle had not been identified when the APB removed Bruce Trevorrow, but as part of the law today it must be applied: [227], [229]; *Kioa v West* [1985] HCA 8, followed.

6. In the interest of procedural fairness, if the APB had the statutory power to remove Bruce Trevorrow from the de facto custody of his parents, we consider that each of them had a sufficient right or interest to require, before the APB or its officer should terminate that de facto custody, that they be given notice of the intended removal and of the reason, and an opportunity to respond. Their parenthood and de facto custody gave rise to a legitimate expectation that they would be heard, or given a chance to protest: [230]; *Annetts v McCann* [1990] HCA 57, applied.

7. This right to be heard arises from their rights and interests as parents of Bruce Trevorrow, and from the interests of Bruce Trevorrow in them retaining custody. Accordingly, there is no objection to the vindication of this right to be heard on behalf of Bruce Trevorrow in these proceedings: [237]–[239].

8. The opportunity to be heard need not be formal. The parents of Bruce Trevorrow just needed to be notified and their responses conveyed to the APB. This, however, was not done. The APB was obliged to hear Bruce Trevorrow's parents, and failed to do so: [246].

Held, per curiam, dismissing the appeal in consideration of the issue of misfeasance in public office:

9. The tort of misfeasance in public office is concerned with the misuse of public power. It extends to acts by public officers that are beyond power, including acts that are invalid for want of procedural fairness. It involves an act that the public official knows is beyond power and that involves a foreseeable risk of harm: [258]; *Sanderson v Snell* [1998] HCA 64, followed.

10. On the evidence provided, the APB, on the advice of its Secretary, fostered Bruce Trevorrow knowing it had no power to do so. Alternatively, the Secretary did so. If the Secretary is the tortfeasor, he had the de facto authority of the APB to act as he did. The evidence supports a finding that the APB was aware that the Secretary would remove children from their parents without parental consent. If the tortfeasor is the APB, it had de facto authority from the Minister as its chair. The evidence supports that the Minister was aware of the limit on the power of the APB, and that the Secretary would disregard that limit. The State of South Australia is vicariously liable for the conduct of the tortfeasor, whether it was the Secretary of the APB or the APB: [257], [265], [273]–[275].

Held, per curiam, overturning the trial judge’s finding on wrongful detention:

11. The tort of wrongful detention consists of the ‘total deprivation of freedom of movement’ or ‘total restraint’ in the absence of lawful authority. Whether there has been imprisonment in that sense is a question of fact. The person need not be aware that he or she was imprisoned at the time, or that the imprisonment took place: [277], [299].

12. The fostering of Bruce Trevorrow does not readily fall under the heading of false imprisonment. The required element of restraint is not made out. Any restraint of Bruce Trevorrow is attributable to the obligation of Mrs Davies to care for him, and attributable to his immaturity. The trial judge took the notion of restraint too far; there is potential for the tort to expand into previously untouched areas and situations, with unpredictable consequences: [307].

Held, per curiam, overturning the trial judge’s finding concerning a breach of fiduciary duty:

13. The relationship of guardian and ward is one which ordinarily gives rise to fiduciary obligations. However, this does not lead to the conclusion that everything done by the guardian is the subject of a fiduciary duty or obligation: [327], [329]; *Clay v Clay* [2001] HCA 9, applied; *Paramasivam v Flynn* [1998] FCA 1711, cited; *Breen v Williams* (1995–1996) 186 CLR 1, cited.

14. In relation to Aboriginal children, the APB had statutory powers, duties and obligations to protect Aboriginal children and to advance their welfare. There is no need for a wide reaching fiduciary duty owed to Aboriginal children generally. As guardian the APB might in certain circumstances owe a fiduciary duty to Bruce Trevorrow, but only if the particular situation attracted one of the recognised fiduciary duties, and if the imposition of the duty is not inconsistent with the provisions of the *1934 Act*. Furthermore, it does not follow that all circumstances arising from the relationship of guardian are to be resolved in terms of a fiduciary duty: [333], [335], [336].

15. The trial judge imposed wide ranging and generalised fiduciary duties, which cannot be supported. The breach of any recognised fiduciary duty does not arise in the situation. If the APB acted wrongly, its wrong was in acting without statutory power, and not in failing to observe a fiduciary relationship: [337], [342].

Held, per curiam, dismissing the appeal in relation to negligent breach of the duty of care:

16. The duty, under consideration, attaches to the process in deciding on the exercise of the powers and functions under the *1934 Act* to remove Bruce Trevorrow from the custody of his parents, and to place him with a foster mother, and then supervising the fostering, and in due course returning him to his mother. The duty postulated is a duty to take reasonable care to avoid foreseeable harm being caused to a child by the making and implementation of a decision which is, in any event, to be made in the interests of the child: [349], [380].

17. The imposition of a duty is not forbidden by the *1934 Act*, or inconsistent with the statutory scheme. Section 10 required the APB to pay particular attention to the needs of Aboriginal children. It cannot be said that the duty to protect Aboriginal children generally is in conflict with a duty to

pay particular attention to the needs of Aboriginal children, reflecting the description of the APB as 'legal guardian' of the children. The *1934 Act* does not impose any competing duties. The duty is owed to the Aboriginal child in relation to whom the APB is considering an exercise of its statutory powers, or in relation to whom the APB has exercised those powers. The interests of the child must be the ultimate test for the exercise of power, or purported power: [366]–[367], [369], [379], [380], [381].

18. It is reasonably foreseeable that the APB knew of the risks of separating a mother and child. Professionals at the time were aware of the importance of the process of attachment between a child and its mother, and were aware of the risk of psychiatric injury as a result of the termination of that process of attachment. The staff of the APB should have been made aware of the known risk: [401], [404].

19. A reasonable person, in the position of the APB, would have made a reasonable effort to enquire into the circumstances of the Trevorrow family and into the reason for Bruce Trevorrow having been taken to hospital, before arranging a permanent foster parent. A reasonable person would have weighed up the risk of psychiatric harm to Bruce Trevorrow, as a result of removing him from his mother, against the risk of harm through leaving him with his mother. In not making these enquiries and contacting the family, the APB is in breach of its duty of care: [412], [413], [414].

20. When the *Aboriginal Affairs Act 1962* (SA) came into force the APB, or its successor the AAB, should have considered whether Bruce Trevorrow should be returned to his mother. Whether that duty was a duty of care, as distinct from a public duty flowing from the changed regime, is another matter. If, as the trial judge found, there was a relevant duty of care, we agree that that duty was breached, because no consideration appears to have been given to the matter: [422].

Held, per curiam, dismissing the appeal in relation to an extension of time:

21. An extension of time may only be granted under s 48(3b) of the *Limitation of Actions Act 1936* (SA) where (i) facts material to the plaintiff's case were not ascertained by him until some point of time occurring within twelve months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted

within 12 months after the ascertainment of those facts by the plaintiff; or (ii) the plaintiff's failure to institute the action within the period of the limitation resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and any other relevant circumstances; and in all the circumstances of the case it is just to grant the extension of time: [425].

22. Bruce Trevorrow was told on 3 July 1997 that a search of his complete file disclosed no court order authorising his removal. This was a significant and material fact: [432], [434].

23. As at November 1977, the APB had had, and the AAB had, a considerable amount of relevant information about the possibility that the APB had acted without statutory authority. Its conduct in failing to disclose relevant information to Bruce Trevorrow falls within the reach of the statutory provision, s 48(3b) of the *Limitation of Actions Act 1936* (SA). Without disclosure of the circumstances of his particular case, or without disclosure in a general way of doubts about the legality of the actions of the APB in such cases, the failure of Bruce Trevorrow to institute the action by 1977 is understandable: [442], [445].

24. There is a risk of prejudice to the State in this case, as the conduct of the individuals criticised are no longer able to defend themselves. However, considering the APB and the AAB contributed to the lengthy delay, and the public interest in persons like Bruce Trevorrow being able to have their claims decided by a court, the scales tilt in favour of the discretion under s 48(1) *Limitation of Actions Act 1936* (SA) of the being exercised in favour of granting an extension of time: [455], [461]–[462].