REFLECTIONS ON Tuckiar v the King 1934 52 CLR

This is Part 2 in a series. Part 1 was printed in the June 2000 edition of *Balance*.

President of the Criminal Lawyers Association, Mr John Lawrence

Last month, inspired by the question of why Fitzgerald breached his professional duties, led me to try and set Tuckiar's trial in historical context. There were similarities found between then and now, in particular the North-South relationship.

This month I will try to outline the substance of Fitzgerald's breaches and suggest some specific reasons why he so failed. My major discovery and proposition is that the most influential aspect of all was the all pervading racism which existed at the time. Further, the fact that CLANT's recent presentation and other earlier analysis and presentations of the Tuckiar case have largely omitted this all pervading factor is a good example of contemporary Australia's difficulty in accepting its whole history and in so doing severely handicaps any prospect of the reconciliation process being successful.

TUCKIAR'S TRIAL

Which brings us to the course of the trial and in particular the course of defence counsel William Joseph Pius Fitzgerald. Most of that would of course be known to readers. The evidence against Tuckiar was, in the main, his own confessions to two separate Aboriginal witnesses. P and H. P's confession was one of killing McColl without exculpatory circumstances. The confession to H was one with extenuating, if not exculpatory, circumstances, namely Tuckiar had seen McColl pulling his trousers up beside his wife suggesting interference with the same and thus the reason for the killing.

During the trial Mr Fitzgerald made several large gaffs leading him to basically betray his client.

1. After P's evidence of the non exculpatory confession Fitzgerald was most unusually invited by the trial Judge to take the court interpreter there and then with his client and get instructions about P's evidence. Mr Fitzgerald should have respectfully declined the invitation. He didn't and took up the offer.
2. After taking up the offer when it came to his cross examination of H (exculpatory confession) Fitzgerald got up and disclosed to all and sundry his: "terrible predicament" thus exposing to anyone with any nous that the non exculpatory confession was the correct one. He then further asked for a meeting with the trial Judge in Chambers to generally bleat and reveal all to no particular purpose except to receive an upbraiding from Wells. J.
3. His closing address was nothing short of disgraceful failing to mention either provocation, self defence, or manslaughter; all of which were open on the evidence.
4. Following the guilty verdict Fitzgerald then gets up in front of all, pre-sentence, and reveals that his client's instructions were that P's non exculpatory confession was the true one and that Tuckiar had made up the version to H impugning the late Constable McColl's character thus hopefully clearing the deceased's name.

It's interesting to note that, as it happens, the local press at the time deliberately declined to report the evidence of H so as to avoid such staining on McColl.

The question begged to me was how and why Mr Fitzgerald could conduct himself in such a way. Several possibilities came to mind:

(a) General incompetence and inexperience? Perhaps. He had only been practising in Darwin for three years although he had apparently done ten murder trials.

(b) Weariness? Perhaps. He had just done two murder trials the previous two days. His efforts from the day before earned acquittals so he may well have pushed the boat out a bit the night before?

(c) Acting in good faith towards the unfairly slurred name of Constable McColl? This seems to be a major reason motivating him.

(d) Selfish pragmatism? In the community of Darwin he associated with (white upper and middle, business, professional and public servants) he would probably find himself ostracised if Tuckiar was acquitted. Once again similar to (c) and a likely cause for the abrogation of his duties.

(e) Part of a general Northern establishment conspiracy to ensure that the "goody two shoes" from down South did not achieve their purpose which was to have the Aboriginals acquitted or if convicted dealt with leniently. Again seen in context there is a fair chance this is something that may have impacted on why Counsel did what he did.

(f) All in all an ethically disgraceful state of affairs which can be further and better explained by the all pervading backdrop to the entire case: racism.

The racial question of course lay at the heart of the North-South conflict; the benevolent approach argued by the Missionary Movement and others of the left both down South and in the North versus the racist view of the establishment in the North and elsewhere.

Basically Mr Fitzgerald gave little more than a tinker's cuss for his client and that attitude was assisted, if not caused, by the

fact that his client was Aboriginal, as in "native", "savage", "myall", "nigger", "nig", "black" to use the terminology of the day. And indeed much of Tuckiar's case reveals the rank and entrenched racism that people of the day had towards Aboriginal people.

Ted Egan's book *Justice All Their Own* provides evidence from some of the key players which assists with the then prevailing attitudes to Aboriginals.

The late Constable McColl himself in a letter to his brother opens a window on his views:

> I am not too keen on Darwin... The niggers have been cleaning up a few Japs around these coasts, we have a few nigs in jail waiting trial for the murder of a luggers crew...

Local and national media provide further evidence of people's views then on this.

Following the successful appeal by Tuckiar in the High Court *The Bulletin* of 14 November 1934 stated this:

> So Tuckiar goes free, the chief duty of the Darwin Judge continues to be the trial after trial of abo [sic] murderers, and in the outlands settlers become less and less safe, while laws framed by Barristers out of experience in city chambers continue to govern people who understand only Stone Age law and custom. Nothing brings home the weaknesses of our labyrinthine legal system like a face-to-face encounter with a naked and spear-armed savage.

Another reflection of this ethos was displayed by a contributor to the Darwin paper *Northern Standard* (as it happens a paper of the left) in the letters column; a Mr Gaunt from Pine Creek:

> "95% of the people consider this affair a dirty, disgusting, missionary ridden affair....When General Gordon of Khartoum was massacred by a lot of savages, no better than the abo, did the English government send a Methodist missionary out to parlay with them, the only weapon a bible in his hand? Not on your life. They pelted lead medicine at them - the only message that a savage race understands - and cleaned them up"

Further evidence of the general ethos at that time was reported by Fred Grey when meeting the ultimate victims Fagan and Traynor at Millingimbi, prior to their comeuppance. Their boat had broken down, they were in for repairs and Grey offered to tow them. While giving them assistance and advice Grey suggested they avoid contact with the Aboriginals due to the killing of the five Japanese the previous year. Mr Traynor said he was not unduly concerned:

"One white man is worth any sixty niggers." he said

And of course, we are given some insight into the then attitude towards Aboriginals by the Trial Judge himself in his lament that hanging was the best thing for the three accused convicted of killing the Japanese.

Back to Mr Fitzgerald. What was his attitude in these matters? The best source of evidence on this is his lengthy affidavit used in the High Court appeal. However it's interesting to note that during the course of his lamentable closing address he let slip, while complaining about the lack of evidence:

> Not even a black man should be convicted on it.

In his sworn affidavit Mr Fitzgerald stated the following:

> I have practised in the Northern Territory as a Barrister and Solicitor for nearly three years last past [sic] and have had much experience in Aboriginal cases before the Courts and have appeared to defend murder charges against Aboriginals in about ten cases involving the examining [sic] members of numerous tribes from many parts of Northern Territory....I am sincerely interested in the Aboriginals generally and have endeavoured to get an understanding of their mentality and psychology....By numerous contacts and conversations with them both as a Lawyer and as a humanist, and they have spoken freely to me and given me much information of themselves because they know I am in friendly sympathy with them.
>
> From my knowledge of the Aboriginal I say that the following is substantially true characteristics of the average Aboriginal who has come under my notice:
>
> (a) The Aboriginal is first and foremost a liar to the white man. He will rarely tell the truth at all. Their answer to any and every question is nearly always a lie for a start...He can fairly be called a natural and habitual liar and he seems to love lying so much that in my opinion no value whatever should be placed on Aboriginal testimony in the witness box.
>
> (b) The Aboriginal has the mind of a child, is child like in most of his thoughts and actions, though he is also possessed of much cunning.
>
> (c) His language is not capable of expressing anything but the simplest ideas, and he really has no ideas except those of the simplest kind.

Out of fairness to Mr Fitzgerald he also complained about the inherent difficulties and inadequacies of the interpreters used at that time. However, the remarks as quoted above clearly outline and display the classic racist views of that period. They are the views of a then prevailing intellectual view; racially based Darwinian social science. That view treated full blood Aboriginals with almost ambivalence. They were regarded with sentimental, albeit almost invariably condescending sympathy: sometimes the "noble savage" or as members of a "child race". At this time it was also still the general view that full blood Aboriginals over time would inevitably cease to exist in Australia ie, they would die out.

All of this is important in finding the answer to my questions how and why Mr Fitzgerald could so blatantly breach his professional responsibility to his client, Mr Tuckiar.

CONCLUSION

The trial of Tuckiar has in many ways been done to death by our local profession, at least by CLANT. Five years ago Martin CJ presented a workshop seminar at the Bali Conference comparing various legal questions from the case and discussing how they would have been dealt with today. Questions like the admissibility of the confession, the legality of bringing the Aboriginal defendants into Darwin, the question of interpreters and others. The Law Week performance was really spawned by the Director of Public Prosecutions, Mr Rex Wild QC, at the last Bali Conference presenting essentially the same reading in order mainly to address the much vexed question of interpreters.

In my examination of this case it struck me that very little had been brought up in these other instances regarding the racist attitudes which really lie at the heart of most of what happened before and during the trial.

Continued over

REFLECTIONS ON TUCKIAR V THE KING 1934 52 CLR

Continued from page 7.

I think this is significant and relevant generally to contemporary Australia.

Mitigation for both Tuckiar and the three Aboriginals found guilty of the Japanese murders was presented in the main by Dr Cecil Cooke the NT Protector of Aboriginals. He forcefully pleaded all four men's causes with no little passion and in Tuckiar's case to no avail. However, Dr Cooke will not go down in Australian history for his role in the Tuckiar case. Dr Cooke will go down in Australian history as a very important player in the formulation of the philosophy and practise of child removal by Australian Governments. That policy developed by state and territory Governments since the end of the nineteenth century and continued right up to the 60s was a way of dealing with the then perceived "problem" of the "half-caste". Associated with the prevailing thought of these times that the full blood Aboriginal would inevitably drift into extinction was the opposite demographic "problem" that the "half-caste" numbers were increasing. In those days "half-castes" were seen as a "pathetic sinister race" and a "danger". Dr Cooke was a big player in all of what occurred. His solution, based on the then available intellectual view was to breed the Aboriginal out of the "half-caste" and his method was the Stolen Generation: Take the "half-caste", bring it up then inter-breed it with whites and to quote Dr Cooke: "Generally by the fifth and invariably by the sixth generation, all native characteristics of the Australian Aboriginal are eradicated. *The problem of our half-castes will quickly be eliminated by the complete disappearance of the black race, and the swift submergence of their progeny in the white."* (writer's emphasis)

And so this was Australia in the 30s: Depression, Bodyline, the opening of the Sydney Harbour Bridge, the White Australia Policy and the racism and attendant policies, including stealing "half-caste" Aboriginal children from their families and country.

Contemporary Australians don't mind talking about Bodyline. And we lawyers don't mind talking about the great story of Tuckiar. We don't seem to like talking so much about the racism that pervaded in those times. The racism that influenced so much of our history. Surely Tuckiar's trial and Mr Fitzgerald's conduct cannot be properly viewed without that backdrop of racism.

The attitudes and consequential policies of Dr Cooke which lasted 70 years and affected at least tens of thousands of Aboriginal children and their families are a fact. For reasons only known to the Australian community and the Australian Federal Government, upon which it was voted in and reciprocally relies, this nation does not seem able to take on board that part of its history. I was born and brought up overseas. Like, I'm sure, many Australians it baffles and frustrates me how this country just cannot look over its shoulder and acknowledge in its entirety, without fudging, the dreadful dreadful things that were done to Aboriginal people. Things done, based on what racism is based on, ignorance.

Our local legal profession can analyse and present a case based on counsel's duties with a view to exposing and displaying various things; perhaps the fact that little directly went to the racist backdrop seems to corroborate why our national Government insists on refusing to apologise for what was described by Sir Ronald Wilson's report on the Stolen Generation as "the forcible removal of children....for the purpose of raising them separately from and in ignorance of their culture and people, could properly be labelled 'genocide'".

POSTSCRIPT

The history of Tuckiar's appeal is interesting. The Communist Party, who followed his case and were highly critical of the treatment of the accused, indicated after Tuckiar's death sentence was pronounced that they would provide Counsel to prosecute his appeal. It was only when the "establishment" learnt of this that they then moved, including, guess who, Mr Fitzgerald, to prosecute his appeal. And so it was Mr Fitzgerald and team who prosecuted the appeal. This was clearly done to cut the Communists off at the pass and avoid the greater political damage an appeal run by them could create.

ANIMATED VIDEO EXPLAINS TERRITORY SENTENCING

An animated video explaining mandatory sentencing in Warlpiri, Arrernte and Luritja Aboriginal languages has been distributed throughout the Territory by Mr Blair McFarland.

The video targets all ages and uses a simple story telling format to show what happens to some people who get caught for committing crimes.

"I wrote the script in collaboration with representatives from the Law Society to ensure the story was legally correct. It is a factual, non-judgement piece which doesn't push any political line," the coordinator of the project Mr Blair McFarland told *Balance*.

"I usually do one-off illustrations and had mixed feelings about doing the complicated animation process. The drawings took ages and I had to learn a whole lot of new skills. The feedback I have had from the communities and people who have watched it has been a buzz and I feel really pleased with the outcome."

Mr Bill Munro from Correctional Services has taken the video with him to Aboriginal communities in his role as Diversionary Programs Coordinator.

"I have found that once people watch the video, lots of questions come from it. It's really simple to understand, it's clever and has got humour in it," said Mr Munro.

"I took the English and Warlpiri version with me to Lajamanu and it really seems to have provoked some debate there. Aboriginal people understand the video very well."

Copyright of the video has been waived to ensure wide distribution throughout the Territory. Already it has been played on the local television BRACS system in some communities. The video was produced with funding from the Law Society Public Purposes Trust.