CONTENTS

Articles
Defending Discretionary Remedialism . . . . . . Simon Evans 463
Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia. . . . . . . . Philip Lynch 501
Innovation, Myths and Equality: Constructing Drug Knowledge in Research and Advertising . . . . Patricia Peppin and Elaine Carty 543
More Than Sorry: Constructing a Legal Architecture for Practical Reconciliation . . . . . . James Cockayne 577

Before the High Court
When the Telephone Rings: Restating Negligence Liability for Psychiatric Illness Tame v Morgan and Annetts v Australian Stations Pty Ltd . . . . Peter Handford 597

Books
Indigenous Difference and the Constitution of Canada
by Patrick Macklem . . . . . . . . . . . . Shelley Wright 619

Gender in the Legal Profession: Fitting or Breaking the Mould
by Joan Brockman

Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status
by Hilary Sommerlad and Peter Sanderson . . . Margaret Thornton 625

Human Rights and Biomedicine
by George P Smith, II, . . . . . . . . . . Roger Magnusson 630
Defending Discretionary Remedialism

DR SIMON EVANS*

In a series of articles over the last 12 years, Professor Peter Birks has made a sustained and vigorous attempt to eradicate ‘discretionary remedialism’ from Commonwealth legal systems.1 In this article, I argue that his attempt to do so is misconceived and should be rejected.

Discretionary remedialism is the view that courts should have a discretion to award the ‘appropriate’ remedy in the circumstances of each individual case rather than being limited to specific (perhaps historically determined) remedies for each category of causative events. So, for example, a court adopting this view might decide that it was ‘appropriate’ in the circumstances of a particular case to impose a constructive trust as a response to a breach of contract rather than award damages as would ordinarily be the case.2 Discretionary remedialism draws on the tradition of discretionary remedies in equity3 and on the many modern discretionary regimes established by statute.4 It has been endorsed by the Supreme Court of Canada5 and, implicitly and in a more muted form, by the High Court of Australia.6 It has wide support from academic commentators7 but is vehemently opposed by Birks.

* BSc (Hons) (Sydney), LLB (Hons) (Sydney), PhD (Cantab). Lecturer, Faculty of Law, University of Melbourne. I am grateful for the comments of Michael Bryan, Melissa Conley Tyler, Craig Rotherham and two anonymous referees. I carried out some of the early research for parts of this article as a doctoral student at Gonville and Caius College, Cambridge, and am grateful to my supervisor A J Oakley for his comments at that stage.


2 Compare Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 125–126 (Deane J).

3 See Part 3.B.i (Discretion and Equitable Remedies) below.

4 See Part 3.B.ii (Weak Discretion and Strong Sense Proprietary Remedies) below.


Birks’ arguments against discretionary remedialism originally grew out of his concern with the remedial constructive trust. However, the arguments he has presented have implications that go beyond the narrow confines of the doctrinal debate on constructive trusts. In particular, he raises important questions about the nature of proprietary remedies; the distinction (if any) between ‘rights’, ‘liabilities’ and ‘remedies’; and the nature and place of discretion in judicial decision-making. Accordingly, I address Birks’ analysis in the context of these broader questions and argue as follows:

1. Birks’ critique of discretionary remedialism depends in part on a faulty taxonomy of remedies. There is a well-established and meaningful sense in which ‘right’ and ‘remedy’ are distinct and involve a judicial (weak) discretion.

2. Courts should openly analyse proprietary remedies as distributive phenomena. That is, courts should not analyse and justify proprietary remedies solely as a corrective response to some causative event occurring in the context of a relationship between a claimant and a defendant. They should acknowledge that proprietary remedies involve a judicial reallocation of proprietary rights and should justify such a response to the claimant’s grievance by reference to its effects and the reasons for which it is sought. In particular, in insolvency, courts should justify proprietary remedies by reference to their distributive consequences for the defendant’s creditors.

3. Most importantly for the purposes of this article, in doing so separating ‘liability’ and ‘remedy’, courts do not risk abandoning the rule of law in favour of the path of intuitive justice even if recognising a separation between ‘liability’ and ‘remedy’ means that the rules relating to remedies (and proprietary remedies in particular) involve a discretionary element. Discretion is a valid and valuable part of legal decision-making; and it is distinct from both (a) rule-based decision-making and (b) unconstrained and unaccountable discretionary decision-making.

In the remaining Parts of this article, I develop the nature and significance of my disagreement with Birks’ analysis, following this outline.

1. Birks’ Taxonomy of Remedies and His Critique of Discretionary Remedialism

As outlined above, discretionary remedialism is the view that courts should have a discretion to award the ‘appropriate’ remedy in the circumstances of each individual case rather than being limited to specific remedies for each category of causative events. Despite the support for discretionary remedialism from academic commentators, Birks argues that it is an unprincipled and unjustified departure...
from the rule of law and the requirements of certainty in legal decision-making. He also argues that it is an almost inevitable consequence of regarding liability and remedy as conceptually distinct. (It follows that he is adamantly opposed to separating analysis of liability and remedy, the argument of Part 2 below.)

In order to understand Birks’ argument fully, it is necessary to place it in the context of his efforts to define a taxonomy of remedies. In his earlier work this involves drawing a distinction between remedies in the ‘strong sense’ and remedies in the ‘weak sense’. Birks uses this distinction as the basis of his critique of the remedial constructive trust. I outline this part of Birks’ work in Part 1.A. In Part 1.B, I consider his more recent and more elaborate taxonomy of remedies which is the basis of his critique of discretionary remedialism. In my view Birks’ taxonomy overlooks important distinctions in the law of remedies and this affects his assessment of discretionary remedialism. Accordingly it is necessary to revise Birks’ taxonomy in order properly to assess the viability of discretionary remedialism in the remainder of this article.

A. Birks’ Critique of the Remedial Constructive Trust: Remedies in the Weak Sense and the Strong Sense

In his earlier work, Birks assumes that those who write about the remedial constructive trust and proprietary remedies generally are engaged in a meaningful discourse; that is, that it is possible to distinguish between the remedial constructive trust and other proprietary remedies in a meaningful way and that the distinction is encapsulated in the word ‘remedial’. He accepts that there is an uncontroversial sense in which some property rights may be said to be remedial: they are rights that arise by implication of law from the facts to help solve a problem or rectify a mischief. But such rights are only remedial in a weak sense:

[T]heir being so described does not change their nature as rights; it merely adds a functional comment: they are rights which, in contrast to those which are facilitative in the sense that they are recognized in order to give effect to what people want, are raised regardless of intent to help solve a problem or rectify a mischief.

In his view, there is no sensible distinction between ‘remedy’ understood in this weak sense and either ‘right’ or ‘institution’, the oppositions that those who argue for the existence of remedial proprietary rights usually seek to raise. And, for

---

10 See the works cited above n1.
11 He does not, of course, embrace the unhelpful terminology of the ‘remedial constructive trust’: Birks, ‘The End of the Remedial Constructive Trust?’, above n1.
12 Birks, ‘Proprietary Rights as Remedies’, above n1 at 216.
reasons explored most fully in his 1999 Blackstone Lecture, *Rights, Wrongs, and Remedies*, he argues that the language of ‘right’ should be preferred to that of ‘remedy’ where there is no sensible distinction between the two.\(^{13}\)

On the other hand, in Birks’ view, there is only one *strong sense* in which property rights may be said to be remedial, in opposition to ‘right’ or ‘institution’, namely, that they are ‘the creatures of a later judicial discretion to redress the grievance which the facts threw up’.\(^{14}\) There are two aspects of this *strong sense* of ‘proprietary remedy’ that render the proprietary right distinctively ‘remedial’. First, the right is not self-executing. The intervention of a court is required before it comes into being. Secondly, the right arises only as the result of the exercise of a discretion. The court’s order confers rights on an individual by its own force, not merely by declaring or realising a pre-existing entitlement.\(^{15}\)

Birks’ critique of this *strong sense* of ‘proprietary remedy’ may be put quite concisely: neither of the two essential incidents of any right meaningfully described as remedial (that is, remedial in a sense that cannot be conflated with rights generally) — that it be created by the order of a court and so created in the exercise of a judicial discretion — can legitimately be an incident of a proprietary right. In particular, he argues, a non-statutory discretion to vary property rights should be regarded as highly controversial.\(^{16}\) He contends that the common law has long been suspicious of such discretions, because of its tradition of the sanctity of property, its respect for the individual and for individual preferences and its fear of prejudicing third parties.\(^{17}\)

As a result, he argues, *strong sense* proprietary remedies are ‘noxious’\(^{18}\) and should not be accepted as part of the law. Only *weak sense* proprietary remedies should be accepted as part of the law; they should be analysed as the law’s response to causative events (rather than the court’s or any judge’s response to those events); they should arise when the causative events occur; and they should be defined by rules and not by discretion.

In other articles, Birks has generalised this critique and identified five further concerns:\(^{19}\)

\(^{13}\) Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 19–25. Weak sense proprietary remedies fall within the first four senses of remedy outlined by Birks in that article: see Part 1.B (Expanding Birks’ Taxonomy of Remedies and Rights) below.


\(^{15}\) Birks, ‘Proprietary Rights as Remedies’, above n1 at 217. See also Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 17.


\(^{17}\) Birks, ‘Proprietary Rights as Remedies’, above n1 at 223.

\(^{18}\) Ibid.

1. That discretionary remedialism has no historical legitimacy.
2. That the judges who would be called on to exercise such discretions need the insulation from personal criticism that can only be provided by objectively ascertainable rules and principles.
3. That discretionary remedialism is inconsistent with the judicial function and the rule of law. Accordingly, if assertions that liability must be ‘flexible’ or ‘malleable’ were taken ‘to exclude the formulation of intelligible rules and principles, it would spell the end of law as we know it’.20
4. That the law of remedies (proprietary and otherwise) demands certainty just as much as does the substantive law and that discretions cannot provide the necessary level of certainty. Put another way, law is ‘a rational and open science’ which cannot ‘take refuge in an inscrutable case to case empiricism’, ‘even in relation to remedies’.21
5. That discretionary remedialism depends on judges having direct access to, and acting on, ‘the community’s sense of justice’, which leaves no protection against ‘communal mood-swings’ and oppression of minorities.22

In Part 3.C (Objections to Discretionary Decision-Making) below I evaluate these concerns and argue that they are significantly overstated.

B. Expanding Birks’ Taxonomy of Remedies and Rights

It is necessary first to spell out in some detail Birks’ more recent taxonomy of remedies in which he now situates these concerns. In doing so, I argue that Birks’ taxonomy understates the extent to which discretion is an established element in judicial responses to the wrongs, grievances and injustices presented by claimants. An appropriately revised taxonomy of remedies leaves more room for discretionary remedialism than Birks would allow.

The issue arises in this way because Birks argues in his recent work that the institutional constructive trust and other weak sense proprietary remedies should not be referred to as remedies at all.23 This is a logical development of his early characterisation of these so-called remedies (‘they are rights which … are raised regardless of intent to help solve a problem or rectify a mischief’)24 and his view that, where ‘remedy’ and ‘right’ overlap, the language of ‘right’ should prevail.25 He asserts that ‘remedy’ and ‘right’ almost always do overlap in this way, except in the ‘noxious’ category of strong sense remedies, leaving little independent room for ‘remedy’ as an analytical concept and certainly making it inapt to refer to the institutional constructive trust and other weak sense proprietary remedies as ‘remedies’.

---

20 Birks, Restitution: The Future, above n1 at 33, n20.
21 Birks, ‘Civil Wrongs: A New World’, above n1 at 92.
23 Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 12.
24 Birks, ‘Proprietary Rights as Remedies’, above n1 at 216 [emphasis added]; see text above, n12.
25 Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 19–25
Obviously, if this stance is correct, then discretionary remedialism as a doctrine explicitly directed towards ‘remedies’ has a much narrower range of operation than it otherwise would have had. It is appropriate, therefore, to consider whether Birks is right to limit the range of judicial action that should be referred to and treated as ‘remedial’.

In my view Birks’ taxonomy of ‘remedy’ contains two significant errors. That taxonomy identifies five senses of ‘remedy’:

- In the first sense, ‘remedy’ is seen ‘as an action or the law’s configuration of actionability’, as in the lawyer’s advice, ‘Your remedy is conversion’. In this sense, ‘remedy’ has little analytical force and does not present particular problems of confusion between ‘right’ and ‘remedy’.
- The second and third senses of ‘remedy’ are more important. Here, ‘remedy’ is used to refer to a right ‘born of a wrong’ or of ‘a grievance or injustice’. In these senses ‘remedy’ is used in a way that overlaps with ‘right’: ‘one level of entitlement (right) is replaced by another (remedy)’.
- In the fourth sense, ‘remedy’ indicates the enforceable order or judgment of a court. Again here the ‘remedy’ is a ‘right’ and in Birks’ view should be referred to as such.
- In the fifth sense, however, ‘remedy’ can be distinguished from ‘right’, for in this sense ‘the court regards its order as strongly discretionary’ and it therefore cannot reflect an anterior right. This sense of ‘remedy’ corresponds with Birks’ earlier concept of strong sense proprietary remedies and is the sense in which ‘remedy’ is used in Birks’ conception of ‘discretionary remedialism’.

This taxonomy is generally useful as far as it goes, in particular in identifying the overlap between ‘right’ and ‘remedy’. In particular some fourth sense remedies (damages in particular) are only imperfectly distinguishable from the second or third sense remedy (or right) that they vindicate. The defendant’s ultimate legal position depends on the court, in the sense that his or her liability is contingent until the court pronounces its order. But the dependence or contingency is a mechanical one and the court has no significant independent power to withhold its fourth sense remedy once the second or third sense remedy (or right) is established.

---

26 Ibid.
27 Id at 12.
28 Id at 12–15.
30 Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 15.
31 Id at 16.
32 See Part 1.A (Birks’ Critique of the Remedial Constructive Trust: Remedies in the Weak Sense and the Strong Sense) above.
However the taxonomy overstates the overlap between ‘right’ and ‘remedy’. Birks overlooks an important sense in which ‘right’ and ‘remedy’ can be distinguished in his elaboration of the fourth sense of ‘remedy’. Birks grounds this sense of ‘remedy’ in Blackstone’s concept of a remedy as ‘the enforceable order or judgment of a court’:

Although Blackstone never uses the word “right” in this connection, it is very important to notice that if we could interrogate him he would almost certainly admit, not only that the judgment generated a right, but also that the judgment was obtained as a matter of right.33

Judgment certainly generates a right; that much is incontrovertible. And in many cases judgment of some kind is obtained as a matter of right. However Birks overlooks the court’s power (at least in equity) to determine the shape and content of that judgment. He writes:

The essential point is that Blackstone’s “remedy” — the court’s order — cannot be contrasted with “right” because, although he never says so, the order generates an enforceable right and, from the moment of the commission of wrong, the victim has, but only in our terms, a right to the award which the judgment makes.34

But the right generated at the moment of the commission of the wrong does not (again at least in equity)35 uniquely specify ‘the award which the judgment makes’. The court’s power to shape or mould its ultimate award produces a break between the right to a remedy and the remedy itself.36 It precludes Birks’ move to collapse the fourth sense of ‘remedy’ with ‘right’.

The error also appears in a slightly different form in Birks’ statement of his fifth sense of ‘remedy’, in particular when he distinguishes it from the fourth sense. Birks insists that it is only strongly discretionary remedies that are meaningfully distinct from rights:

If the court regards its order as strongly discretionary, its content cannot reflect an [anterior]37 right. The discretion which is interposed between the plaintiff and the order shows that he has no right to that which he wants ordered. The word “strongly” needs to be added.38

On the other hand,

33 Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 15.
34 Id at 16.
35 And on occasions even at law: see Attorney-General v Blake [2000] 3 WLR 635 especially at 639 (Lord Nicholls).
36 Birks sees this break only if the discretion is strong: ‘Rights, Wrongs, and Remedies’, above n1 at 17.
37 ‘Interior’ appears here in the published version of the article.
38 Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 16.
Many judicial orders are weakly discretionary. … The discretion has been settled over the centuries. To speak of a right to [many equitable remedies] is not a nonsense. We know on what facts a person is entitled to such orders.  

Here Birks argues, it seems, that any discretionary power in the court to refuse a remedy in the fourth sense is limited: at best it is weakly discretionary, it is most likely ‘settled’, and therefore it makes sense to speak of a right to the remedy.  

But this mischaracterises both the nature of discretionary powers and the way they have been exercised in equity. Weakly discretionary decision-making is distinct from rule-based decision-making; and the discretionary power to grant, withhold and shape equitable remedies have not collapsed into rule-based decision-making. I develop this point in Part 3.B (Senses and Purposes of Discretion) below. 

For now it is sufficient to observe, in short, that Birks’ account of the different senses of ‘remedy’ is incomplete. It overlooks those remedies that amount to ‘a right born of the order or judgment of a court’ where it can be said that the claimant had an anterior right to a remedy but where the court has a discretion (albeit a weak one) as to the form of the remedy. That category is meaningfully distinct from the other categories identified by Birks. 

It is especially significant because it is where many constructive trusts and other proprietary remedies are most aptly located. Birks cites judicial statements about constructive trusts: 

A remedial constructive trust is a trust imposed by the court as a remedy for a wrong. The entitlement to that remedy may be a matter of substantive law, but the trust itself is not created by the parties, or even by the obligation to make restitution, but by the order of the court. 

The second type of trust is merely the creation by the court by way of suitable remedy to meet the wrongdoing alleged. 

In an earlier article Birks quoted from the judgment of the majority of the New Zealand Court of Appeal in *Fortex Group Ltd v MacIntosh*: 

The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises on the happening of the events which bring it into being. Its existence is not dependent on any order of the Court. Such an order simply recognises that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. 

---

39 Ibid.  
40 Ibid.  
Birks may not endorse all these statements. But the approach they represent is widespread and longstanding.\(^\text{44}\)

For example, in many equitable estoppel cases, the approach is for the court to decide that an equity arises by estoppel from the facts to which the court then ‘gives effect’ by way of remedy.\(^\text{45}\) The court will give the claimant ‘such remedy as the equity of the case demands’.\(^\text{46}\) The remedy is such as to ‘satisfy’ the equity.\(^\text{47}\) Although a right to relief (characterised as an equity or bare equity) does arise on the happening of the facts,\(^\text{48}\) the proprietary entitlement is created by the court in response to that right.\(^\text{49}\) In that last stage, ‘equity is displayed at its most flexible’.\(^\text{50}\) Lord Browne-Wilkinson has spoken of the task of the court as being both prospective and discretionary: it must find ‘the right way to give effect to the estoppel’.\(^\text{51}\) In some cases the right created is proprietary; in some it is not. But the approach appears to be the same in both classes of cases.\(^\text{52}\)

So in Giumelli v Giumelli,\(^\text{53}\) the High Court held that the claimant did not establish ‘an immediate right to positive equitable relief as understood in the same sense that a right to recover damages may be seen as consequent upon a breach of contract’.\(^\text{54}\) Rather, the claimant’s grievance generated an equity and ‘the Court must look at the circumstances … to decide in what way the equity can be satisfied’,\(^\text{55}\) including by a constructive trust or lien securing payment of a money sum. This was no new approach: the High Court adopted language used more than

\(^{44}\) The phenomenon was analysed by Hammond J in Brown v Pourau [1995] 1 NZLR 352 at 368 (describing English legal theory and practice as ‘monistic’ in contrast with this ‘dualistic’ approach prevalent in the United States of America and increasingly in Canada and New Zealand). See Charles Rickett, ‘Where are we Going with Equitable Compensation?’ in A J Oakley (ed), Trends in Contemporary Trust Law (1996). The dualistic approach can be seen even in England: Lord Napier and Ettrick v Hunter [1993] AC 713 (HL) at 736–737 (Lord Templeman) and 744 (Lord Goff).

\(^{45}\) In re Basham, decd [1986] 1 WLR 1498 at 1510, citing Griffiths v Williams (1978) 248 EG 947 (CA) at 949 (Goff LJ).

\(^{46}\) Amalgamated Investment & Property Co Ltd v Liq v Texas Commerce International Bank Ltd [1982] QB 84 (CA) at 122 (Lord Denning MR), following the approach of Lord Goff at trial.

\(^{47}\) Greasley v Cooke [1980] 1 WLR 1306 (CA) at 1312 (Lord Denning MR).


\(^{49}\) Crabb v Arun District Council [1976] Ch 179 (CA) established that new rights are created by the estoppel.

\(^{50}\) Id at 189 (Lord Denning MR). See also Pascoe v Turner [1979] 1 WLR 431 (CA) at 438–439. The council’s high-handed conduct was relevant to the determination of the appropriate fulfilment of the equity: [1976] Ch 179 at 187–190 (Lord Denning MR) and 199 (Scarman LJ).

\(^{51}\) Lim v Ang [1992] 1 WLR 113 (PC) at 118 (recording counsel’s submissions with apparent approval). If the detriment or reliance of the plaintiff is such that justice cannot be done by any lesser order, the court will give effect to the representation, but it can never do more.

\(^{52}\) See for example, Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council (1980) 41 P & CR 179 at 197–198, where the remedy sought was personal.

a century earlier in by the Privy Council in Plimmer v Mayor, &c, of Wellington.56  

On this approach, the role of an appellate court in an estoppel case is to determine ‘whether the relief granted … was appropriate and whether sufficient weight was given … to the various factors to be taken into account, including the impact upon relevant third parties, in determining the nature and quantum of the equitable relief to be granted’. 57

Events occurring after the events that generated the claimant’s grievance are relevant to determining the appropriate relief.58 In short, the claimant’s grievance generates a right (an equity) which can be accommodated within Birks’ third sense of ‘remedy’. But although that equity ‘found[s]’ ‘the relief obtained’ (the ‘remedy’ in the fourth sense) it does not determine it.59 Rather, the ‘relief obtained’ is ‘a remedial response to the claim to equitable intervention made out by the plaintiff’.60

Of course, not all judges regard the constructive trusts and other equitable remedies they order in this way.61 For example Lord Templeman certainly did not regard the trust recognised in Attorney-General for Hong Kong v Reid62 as involving any judicial discretion. In Lord Templeman’s view from the time that Reid, a senior Hong Kong prosecutor, received bribes he held them and their proceeds on trust for the Crown. The trust arose as the facts happened and took its form from those facts. Similarly Lord Browne-Wilkinson regarded the claimants’ rights in Foskett v McKeown63 as non-remedial (and not even as arising under a constructive trust). Their claim to a share of the proceeds of a life insurance policy, two of the premiums for which were paid with trust funds to which they were entitled, was ‘based on the assertion … of their equitable proprietary interest in identified property’.64

However these statements cannot deny the pervasive element of discretion in shaping the court’s response. Consider first Foskett v McKeown. Lord Browne-Wilkinson insisted:

54 Id at 113 [9].
55 Id at 113 [10].
56 (1884) 9 App Cas 699, 714.
57 (1999) 196 CLR 101 at 113–114 [10].
58 Id at 113 [8], 113–114 [10], 125 [49].
59 Id at 112 [3].
60 Id at 112 [3].
61 Most recently, in Parsons v McBain [2001] FCA 376 (5 April 2001) the Full Court of the Federal Court overruled Re Osborn (1989) 25 FCR 547 and held that common intention constructive trusts do not first come into existence when declared to do so by the court and that the date on which such a trust comes into existence is not determined as a result of a discretionary ‘weighing process’: [2001] FCA 376 [13]-[15].
63 [2000] 2 WLR 1299 (HL).
64 Id at 1304.
This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.65

Quite. But to deny that an order is made on the basis of what is ‘fair, just and reasonable’ is not to deny that the order involves some measure of discretion.66

The next page and more of Lord Browne-Wilkinson’s speech is spent determining how a broadly stated set of principles (the principles of tracing) should be applied in the circumstances of this case and in particular which of two metaphorical tracing analogies was closer to the facts of this case. If the first analogy was appropriate, then the remedy was ‘normally … at the most a proprietary lien’; but if ‘to give such an interest would be unfair’ then there might be no remedy at all.67

If the other analogy was appropriate, it remained to identify, value and apportion various financial contributions to the life insurance policy; that process might omit ‘various factors’ that would complicate the process; although ‘there may be a case for applying some discount’ to some financial contributions.68

Lord Templeman’s advice in Attorney-General for Hong Kong v Reid adopts a comparable rhetorical tone that denies any choice to the court in determining its response to Reid’s conduct: from the time that the properties were acquired with the proceeds of the bribes paid to the fiduciary Reid they were held on trust for the Crown. But even in such an extreme case as this, there is a gap between the Crown’s entitlement to a response from the court and the form of that response.69

The three properties in which the Crown asserted an interest were subject to a trust in favour of the Crown only ‘so far as they represent[ed] bribes’ accepted by Reid.70 To the extent that the costs of acquiring the properties might not have been derived from bribes,

the courts have ample means of discovering by means of accounts and inquiries the amount (if any) of innocent money invested in the properties and the proportion of the present value of the properties attributable to innocent money.71

The taking of accounts is ‘notoriously difficult in practice’72 and what is required ‘will not be mathematical exactness but only a reasonable approximation’ that determines the amounts ‘as accurately as possible’.73 If Reid’s wife had an equitable interest in the properties, that too could be determined by the court called on to determine the extent of the Crown’s interest in the properties.74

65 Id at 1304–1305.
66 See Part 3.B (Senses and Purposes of Discretion) below.
67 [2000] 2 WLR 1299 (HL) at 1305 [emphasis added].
68 Id at 1305 (Lord Browne-Wilkinson) and 1311 (Lord Hoffmann).
69 And recall that the Privy Council was not required to determine the extent of the Crown’s interest in the properties, only that it had a sufficient interest to maintain the caveats.
71 Id at 330.
73 Id at 558.
extreme case of breach of duty, the court would presumably be able to assess an ‘equitable allowance’, perhaps even on a ‘liberal scale’, for the fiduciary’s time, skill and effort in deriving an unauthorised profit.\footnote{Boardman v Phipps [1967] 2 AC 46 (HL) at 104, 112; Warman International Limited v Dwyer (1995) 182 CLR 544; contrast Guinness plc v Saunders [1990] 2 AC 663 (HL).}

What follows from this review of Birks’ taxonomy of ‘remedy’? It is clear that Birks understates an important element of discretion in remedies. Even where a claimant acquires a right to a remedy (in the second or third sense) as a response to a wrong, injustice or other grievance, that ‘remedy’ does not necessarily determine the court’s ultimate response (the rights created by a ‘remedy’ in the fourth sense). The process of determining that response involves in many cases an element of discretion, but not discretion of the strong, non-judicial kind that draws the response within Birks’ fifth sense of ‘remedy’. It is difficult to see that this long- and well-established process can be rejected out of hand as a legitimate approach to remedies. Birks’ critique of discretionary remedialism must take into account the discretion involved in ‘remedies’ even outside the fifth sense.

2. **Separating Liability and Remedy: Aligning Remedies and the Reasons for Remedies**

This separation between the right to a remedy (in the second or third sense) as a response to a wrong, injustice or other grievance and the court’s ultimate response (the rights created by a ‘remedy’ in the fourth sense) is in accordance with the common analysis that separates ‘liability’ and ‘remedy’. In this Part I argue, independently of issues of discretion, that ‘liability’ should indeed be considered separately from ‘remedy’. Once again, my focus follows Birks’ and is largely on proprietary remedies. In short, I argue:

1. The reasons that it is appropriate to award a claimant a proprietary remedy are usually distinct from the reasons that it is appropriate to award a claimant some remedy, proprietary or not.
2. Proprietary remedies ought to be analysed and defended by reference to their consequences and the reasons for which the claimant seeks the particular advantages of a proprietary remedy (as distinct from the reasons for which he or she seeks a remedy for his or her grievance).

A. **Proprietary Remedies are Distributive Phenomena**

A claimant may wish to obtain a proprietary remedy rather than another type of remedy for any one of a number of reasons. These include the following:\footnote{A similar list appears in Robert Austin, *Trusts, Obligations and Property: Some Principles for the Development of the Law of Formation of Trusts*, DPhil Thesis, Oxford University, 1984, D 48357 at 330.}

1. He or she wishes to obtain a specific item of property that the defendant has.\footnote{I exclude cases where the claimant retains legal title to the item of property in dispute.} (The claimant’s motivation may be that the specific item of property has a\footnote{Boardman v Phipps [1967] 2 AC 46 (HL) at 104, 112; Warman International Limited v Dwyer (1995) 182 CLR 544; contrast Guinness plc v Saunders [1990] 2 AC 663 (HL).}
particular value for him or her; it may be that he or she would have difficulty in proving the value of the item if he or she were to seek to recover its value by way of damages, or it may be something else entirely.)

2. He or she wishes to prevent the defendant from dealing with the subject matter of his or her claim before it is litigated. (It may be simpler to obtain interlocutory relief if the claimant can show that he or she has a proprietary interest in the subject matter of the claim than to satisfy the requirements for the grant of a Mareva order. Moreover, in England at least, it is not possible to obtain a Mareva order against a foreign defendant in respect of a foreign cause of action, and accordingly in such cases it will be necessary to demonstrate a proprietary interest in some local asset in order to restrain the defendant from dealing with the asset. Equally, it will be necessary to demonstrate a proprietary interest if the claimant wants to lodge a caveat against dealing with Torrens land.

3. He or she claims to be the successor to the person whose property was originally lost.

4. Conversely, he or she wishes to assert a claim to property in the hands of a third party in priority to the third party’s interest in the property.

5. Some statutory rule treats the classification of his or her remedy as proprietary as relevant in some manner.

6. Some non-statutory rule treats the classification of his or her remedy as proprietary as relevant in some manner.

7. He or she wishes to share in the increased value of some asset connected with his or her claim.

8. Lastly and most importantly, he or she wishes to achieve priority in the insolvency of the defendant.

---

80 For example, Lister & Co v Stubbs (1890) 45 ChD 1 (CA).
81 See generally Cardile v LED Builders Pty Limited (1999) 198 CLR 380 on the availability of Mareva orders in Australia.
82 Mercedes Benz AG v Leiduck [1996] 1 AC 284 (PC), but note the powerful dissent of Lord Nicholls.
83 For example, Attorney-General for Hong Kong v Reid [1994] 1 AC 324 (PC).
84 For example, Stamp v Gaby (1852) 2 De G M & G 623 [42 ER 1015].
85 For example, Attorney-General for Hong Kong v Reid [1994] 1 AC 324 (PC).
86 For example, Plimmer v Mayor etc of Wellington (1884) 9 AppCas 699 (PC) (compulsory acquisition legislation); Zobory v FCT (1995) 129 ALR 484 (taxation legislation); Daly v Sydney Stock Exchange Limited (1986) 160 CLR 371 (financial compensation legislation).
87 For example, Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 (compound interest is not available to a claimant in restitution unless it can be shown that the defendant holds the payment sought to be recovered on trust for the claimant); contrast Hungerfords v Walker (1989) 171 CLR 125.
88 For example, Foskett v McKeown [2000] 2 WLR 1299 (HL).
89 For example, In re Goldcorp Exchange Ltd [1995] 1 AC 74 (PC).
In one sense, a proprietary response to many of these problems may be regarded as corrective in that it affects only the relationship and respective rights of the claimant and the defendant. But the responses to the problems of priority and insolvency have overtly distributive implications, simply because a response addressing them deals with multiple competing claims to necessarily limited resources. Deciding whether or not a proprietary remedy is available in these circumstances directly affects parties other than the defendant and claimant, most obviously the defendant’s general creditors but also those parties with security and other interests in the defendant’s assets. In these contexts, at least, a proprietary remedy is inescapably redistributive.

Moreover, proprietary responses to problems other than priority and insolvency are also redistributive, albeit in a slightly different sense. Such responses still involve courts in adjusting property rights, in reallocating the defendant’s assets to meet the claimant’s claim. The rules of tracing, constructive trusts and equitable liens depart from the general approach of the common law that takes property as a baseline and under which property rights change in response only to manifestations of intention and consent. As Craig Rotherham rightly observes:

The fact that these remedies involve judicial readjustment of property rights has tended to generate a good deal of unease among jurists, and the strange rhetoric found in the jurisprudence of this area owes much to an impulse to obscure the reality that sacred axioms of property are being contravened.90

The fact that this is occurring is obscured, as Rotherham observes, by the rhetoric of weak sense proprietary remedies (including the institutional constructive trust and resulting trust) and also by the animistic, self-effectuating qualities attributed to these legal devices.91 Nonetheless, even outside insolvency, such responses are redistributive and deciding whether or not a proprietary remedy is available in these circumstances should involve explicit consideration of these redistributive effects.

B. Proprietary Remedies Should be Analysed as Distributive Phenomena

However, adopting a distributive analysis of proprietary remedies and explicitly considering their redistributive impact is no small step.

1. If proprietary remedies are founded on distributive considerations, they differ from the greater part of the law of remedies in private law. A central concern of much of the law of remedies (as of private law in general) is with implementing a scheme of corrective justice, with achieving some measure of justice between claimant and defendant.92 The law of remedies does so

---

92 The extent to which corrective justice is (or ought to be) a (or even the) central concern of private law is the subject of intense debate. See for example, Emily Sherwin, ‘An Essay on Private Remedies’ (1993) 6 Canadian Journal of Law and Jurisprudence 89; Ernest Weinrib, ‘Corrective Justice’ (1992) 77 Iowa LR 403; Jules Coleman, ‘Tort Law and the Demands of Corrective Justice’ (1992) 67 Indiana LJ 349.
imperfectly and incompletely, often forced by the bilateral nature of private law adjudication and the lack of correlation between the claimant’s loss and the defendant’s gain either to overcompensate the claimant or to allow the defendant to retain part of the benefit of his or her conduct.\(^93\)

But the general pattern is clear: remedies are regarded as corrective responses that strip the defendant of his or her gain or compensate the claimant for his or her loss. A distributive analysis of proprietary remedies would be out of step with the analysis of other remedies available under the general law.

2. Even if proprietary remedies are redistributive, the common law is anti-redistributive (at least on the surface). That is, courts are committed to a rhetoric of non-interference with property holdings. Blackstone’s assessment, that ‘[s]o great … is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community’ and that it is for the legislature alone to sanction expropriation,\(^94\) has remained generally accurate throughout the major Commonwealth jurisdictions into the twenty-first century.

On this view, property is the means by which individuals secure a zone of freedom from the state;\(^95\) it is a pre-political baseline which political institutions should respect: as Richard Epstein writes, ‘the state [is] the protector of property rights but not … their source’.\(^96\) And in particular, it is for legislatures alone — and then rarely — to vary property rights.\(^97\)

This presents a challenge to strong sense proprietary remedies inside and outside insolvency. Judicial involvement in interfering with proprietary rights is anathema, whether it is to determine the distribution of an insolvent defendant’s assets among his or her creditors or simply to reallocate some part of a solvent defendant’s assets to the claimant. It is not surprising, therefore,
that the orthodox analysis of proprietary remedies takes two further steps. First, not only are weak sense proprietary remedies regarded as non-redistributive (as to which see point 3 below), only these proprietary remedies are regarded as non-redistributive. Secondly, only weak sense proprietary remedies are justifiable: strong sense proprietary remedies are anathema because they are redistributive. The orthodox analysis explicitly rejects the redistributive analysis of proprietary remedies.

3. Unsurprisingly, then, the non-redistributive analysis of proprietary remedies is widely accepted. Strong sense proprietary remedies are excoriated or fleetingly referred to as a possibility as yet unexplored. Weak sense proprietary remedies are analysed either as a part of the law of property or as a set of remedies that supplement the non-proprietary remedies that arise from transactions or exchanges. They are said to have no distributive impact and, in particular, no distributive impact on the defendant’s general creditors because any remedial proprietary interest arises at once when the defendant acquires the subject matter of the remedy so that, to the extent of the remedy, he or she never has a beneficial interest in the subject matter. As a result, his or her creditors have no cause for complaint when they are unable to look to it to satisfy their claims.

Despite the orthodoxy of the non-redistributive analysis and its apparently strong basis in common law traditions, it is unsound.

First, the judge-made law does not in fact give effect to the absolutism of Blackstone’s and the judges’ own rhetoric. The courts redistribute property when, for example, they vary the property rights of former domestic partners; when they recognise proprietary rights that arise by prescription; when they hold that an estoppel might be appropriately given effect by recognising the claimant as having acquired proprietary rights in the defendant’s property; and when (albeit

99 See for example, Roy Goode, ‘Ownership and Obligation in Commercial Transactions’ (1987) 103 LQR 433 at 439–440; Sarah Worthington, Proprietary Interests in Commercial Transactions (1996), especially Chapter 8 (a claimant can acquire a remedial interest in property that previously belonged to the defendant only if the defendant was under a mandatory and unconditional personal obligation to transfer identifiable property to the claimant: ibid 188). Compare Gbolahan Elias, Explaining Constructive Trusts (1990) at 35. Contrast Gerard MacCormack, Proprietary Claims and Insolvency (1997), especially Chapter 6.
100 In re Goldcorp Exchange Ltd [1995] 1 AC 74.
103 Goode, above n99 at 439–440.
104 As in Muschinski v Dodds (1985) 160 CLR 583.
105 As in Delohery v Permanent Trustee Co of NSW (1904) 1 CLR 283.
106 As in Giannelli v Giannelli (1999) 196 CLR 101.
rarely) they refuse to restrain tortious interference with the claimant’s property and instead require the defendant to compensate the claimant for the interference.\(^\text{107}\)

And secondly, it is quite erroneous to assert that weak sense proprietary remedies are non-redistributive. Proprietary responses to the problems of priority and insolvency are redistributive simply because any such response deals with multiple competing claims to necessarily limited resources, regardless of the form in which the rules are cast. Proprietary response to other problems, even when cast in the form of weak sense proprietary remedies, involve courts taking property from a defendant and reallocating it to a claimant.

I have argued elsewhere that the courts should avoid such obfuscation and should adopt an openly redistributive analysis of proprietary remedies.\(^\text{108}\) That is, they should acknowledge that proprietary remedies (whether remedial in the weak sense or the strong sense) involve creating new rights.

This is most important in insolvency. In that context, courts should justify proprietary remedies by distinguishing the claimant’s claim from those of the defendant’s general creditors. Only such a justification is sufficient to warrant the advantages a proprietary remedy confers on a claimant against an insolvent defendant’s general creditors. (As Professor RP Austin succinctly put it, ‘[p]rinciples which are adequate to justify imposing an obligation of some sort are not, except in rare instances, sufficient to justify recourse to a proprietary obligation of any sort’).\(^\text{109}\) If they do not, they simply do not address the fundamental question whether the claimant’s claim deserves priority over the claim of the insolvent defendant’s general creditors.

But it is also important to acknowledge the redistributive effects of proprietary remedies outside insolvency.

1. It is difficult to posit a workable distinction between insolvency and non-insolvency cases. A defendant may satisfy the triggers of the statutory insolvency processes but ultimately be able to pay its debts in full. Equally, a defendant may survive for a considerable time outside the statutory insolvency processes, relying on the assistance of related parties in meeting some but not all of its liabilities.

2. There are important reasons (including those identified by Birks)\(^\text{110}\) to respect

---

\(^{107}\) As considered in \textit{LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd} (1989) 24 NSWLR 490 at 496, 497 and \textit{Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd} [1965] NSWWR 581.

\(^{108}\) Id at 37–42.

\(^{109}\) Robert Austin, ‘The Melting Down of the Remedial Trust’ (1988) 11:1 UNSWLJ 66 at 85 (emphasis in original). (I have made this argument more fully in Evans, above n91.) This is not inconsistent with Professor Dan B Dobbs’ proper insistence that, as remedies are the means of carrying substantive rights into effect, they should reflect those rights or the policies behind those rights as precisely as possible: Dan B Dobbs, \textit{Dobbs Law of Remedies: Damages, Equity, Restitution} (Practitioner Treatise Series) (1993) vol 1 at 27, para 1-7. The imposition of additional limitations on the content of the secondary right to take into account the interests of other parties does not violate this principle.

\(^{110}\) Above n17.
property holdings and avoid redistributive remedies. There are also legitimate concerns about the expressive significance of courts redistributing property.\footnote{On the social meanings of legal rules, see Lawrence Lessig, ‘The Regulation of Social Meaning’ (1995) 62 University of Chicago LR 943. On the relationship between social meaning (or expressive concerns) and consequentialist concerns, see Cass R Sunstein, ‘Symposium: Law, Economics & Norms: On the Expressive Function of Law’ (1996) 144 University of Pennsylvania LR 2021 at 2045–2048.} Denying the redistributive effects of proprietary remedies is not an effective strategy for dealing with these concerns. Rather courts should explicitly acknowledge the redistributive effects of the proprietary remedies they grant and justify those effects in light of the legitimate concerns about such remedies. Doing so ought also reduce instrumental reliance on proprietary remedies to attract the adventitious operation of statutory or non-statutory rules that deal with some quite different subject-matter.\footnote{As in Westdeutsche Landesbank Girozentrale \textit{v} Islington London Borough Council [1996] AC 669. It is also difficult to see why it is not possible to capture the increased value of an asset in the defendant’s hands without a proprietary remedy: compare Souls\textit{v} Korkontzilas [1997] 2 SCR 217; (1997) 146 DLR (4th) 214; LAC Minerals \textit{v} International Corona Resources Ltd [1989] 2 SCR 574; (1989) 61 DLR (4th) 14; Foskett \textit{v} McKeown [2000] 2 WLR 1299. See also Birks, ‘The Remedies for Abuse of Confidential Information’, above n1.}

3. Even where the reasons for seeking a proprietary remedy do not directly raise distributive issues, the distinctive reasons for seeking such a remedy (rather than any remedy, proprietary or not) should figure in the court’s analysis. If they do not, and the courts persist in the current conceptualist approaches, they ‘encourage a quest for mitigation by the drawing of further fine distinctions and exceptions’\footnote{Nelson \textit{v} Nelson (1995) 184 CLR 538 at 558 (Deane and Gummow JJ) (in the different context of illegality and trusts).} because the underlying rationale for awarding a proprietary remedy is not reflected in the formal structure of the rules that give effect to the orthodox approach to these remedies.\footnote{On the formal structure of rules and mechanisms for avoiding the operation of rules, see Frederick Schauer, ‘Formalism’ (1988) 97 YLJ 509.}

Courts should, therefore, address the fundamental questions directly and not hide behind conceptual accounts that suppress these questions. It is necessary, then, to demonstrate that it is possible for them to do so. That is the object of the next Part.

3. \textit{Discretionary Remedialism is Not Noxious}

\textbf{A. A Discretionary Approach is Not Inevitable}

An important aspect of Professor Birks’ argument against separating liability from remedy is that he regards it as an inevitable consequence of doing so that the courts would then have a discretion in each case as to the appropriate remedy.\footnote{Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 23 (‘The core of discretionary remedialism is the separation of liability and remedy. Liability triggers the courts’ discretion in the matter of remedy.’)} He argues that ‘if [the existence of a proprietary remedy] were dictated by rules and principles it would arise as the relevant facts happened’. Accordingly a strong
sense proprietary remedy would involve ‘a second discretionary look at the same story’ after it had been determined that the ‘rules and principles’ relating to weak sense proprietary remedies dictated that there not be a proprietary remedy on those facts.\textsuperscript{116}

I have argued elsewhere that discretion is \textit{not} an inevitable consequence of recognising that the courts have a role in specifying the remedial consequences (proprietary or otherwise) of an already-established liability (or in Birks’ terminology in specifying the content of a fourth-sense remedy in giving effect to an already established second- or third-sense remedy).\textsuperscript{117} Jurists must decide whether breach of contract should be vindicated by awarding the innocent party his or her expectation or merely his or her reliance loss; whether a tortfeasor should make restitution of the profits he or she made in infringing the plaintiff’s right or merely pay compensation for the loss caused to the plaintiff; whether unjust enrichment should be reversed by restitution or whether the claimant should also be able to recover his or her consequential loss from the defendant.\textsuperscript{118} But it is possible (and indeed has generally been the case) that these issues are considered in formulating general rules that apply to large classes of cases.

This is true also of proprietary remedies. It is perfectly possible to separate liability from remedy and still have a rule-based approach to proprietary remedies under which the proprietary right does not arise until declared to do so by the court.\textsuperscript{119} Indeed, such remedies are recognised already when courts characterise (in a transparently instrumental manner) the claimant’s rights as a ‘mere equity’ that is subsequently ‘recognised’ or ‘given effect’ by the court as an equitable interest.\textsuperscript{120} The ‘mere equity’ is a place-holder. It is invoked in order to suggest that the proprietary interest that the claimant acquires is not created by the court but pre-dates the court’s determination, albeit in inchoate form.

Nonetheless, some commentators who support discretionary remedialism in general and the remedial constructive trust in particular do write in terms of discretion, most commonly a discretion as to the appropriate remedy in the circumstances of the individual case.\textsuperscript{121} In the remainder of this Part, I argue that such a discretionary approach to remedies (including proprietary remedies) is not ‘noxious’ even if it is compelled by a decision to separate liability and remedy.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{116} Birks, ‘The End of the Remedial Constructive Trust?’, above n1 at 206.
\item \textsuperscript{117} Evans, above n91.
\item \textsuperscript{118} Compare Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 34. Even if restitution is the only available response to unjust enrichment, the court must decide whether that response is proprietary or non-proprietary. See Part 1.B (Expanding Birks’ Taxonomy of Remedies and Rights) above.
\item \textsuperscript{119} Ibid. (Compare A J Oakley, ‘The Precise Effect of the Imposition of a Constructive Trust’ in Stephen Goldstein (ed), \textit{Equity and Contemporary Legal Developments} (1992). Oakley is no discretionary remedialist but argues that a constructive trust should not arise until declared to do so by a court.) Equally it is possible to have a discretionary approach to proprietary remedies under which the proprietary right is regarded as arising on the occurrence of some causative event.
\item \textsuperscript{120} On other occasions, mere equities are used instrumentally to reach desired conclusions about the priority of competing interests: \textit{Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)} (1965) 113 CLR 265 especially per Kitto J.
\item \textsuperscript{121} See the works cited below at n147 and following.
\end{itemize}
\end{footnotesize}
B. Senses and Purposes of Discretion

Discretion is primarily a technique (or rather a set of techniques) for contextualising legal decisions in a manner which experience reveals is impossible by the use of rules alone. As a legal technique, it enables decision-making that cannot be encapsulated in rules. Its virtue is its potential to produce morally sensitive and morally nuanced decisions and to mediate effectively between competing values. It is readily apparent that this is an important aspiration of those advocating a discretionary approach to proprietary remedies.

However, ‘discretion’ can be understood in several senses and it is as important to distinguish them as it is to distinguish the various senses of ‘remedy’. The first and most important point is that ‘discretion’ is not the same thing as power to decide in accordance with what is ‘fair, just and reasonable’. Such a broad and barely constrained decision-making power is certainly discretionary but it is hardly typical of the concept and it is certainly not typical of the discretion exercised by courts.

For present purposes, the most useful starting point in considering the concept is the distinction that Professor Ronald Dworkin draws between two weak senses and one strong sense of ‘discretion’:

- In the first weak sense, ‘we use “discretion” … simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment’.
- In the second weak sense, ‘we use the term … to say only that some official has final authority to make a decision and cannot be reviewed and reversed by any other official’.
- In the strong sense, ‘[w]e use “discretion” … not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question’.

These categories are problematic on a number of grounds, not least because the first weak sense of ‘discretion’ shades into the strong sense if the standards to be applied by the official are vague and open textured. A richer analysis recognises that discretionary decision-making forms part of the continuum of decision-making (as Kent Greenawalt puts it) from ‘simple factual judgment’ to ‘wide
freedom of choice or from rule-following to unconstrained choice. Nonetheless, ‘weak’ and ‘strong’ discretion remain useful shorthands for the two ends of the discretionary decision-making continuum.

In his recent writing, Birks also uses the language of weak and strong discretion and, although he does not refer explicitly to Dworkin, it appears likely that he is using the terms in the sense given currency by Dworkin. Birks first distinguishes rights from remedies that depend on a strong discretion:

If the court regards its order as strongly discretionary, its content cannot reflect an anterior right. The discretion which is interposed between the plaintiff and the order shows that he has no right to that which he wants ordered.

This must be right. Such a plaintiff only has a right to an exercise of the discretion, not to a favourable exercise of the discretion.

However, in Birks’ view, weakly discretionary remedies do reflect anterior rights:

Many judicial orders are weakly discretionary. Orders for specific performance and for injunctions and all others rooted in the Court of Chancery are weakly discretionary. The discretion has been settled over the centuries. To speak of a right to specific performance or injunction or an account is not nonsense. We know on what facts a person is entitled to such orders. … However, if the court has a strong discretion to give or to withhold, and to shape, the order which it will makes, clearly the order becomes a remedy which is not a right.

This is problematic in two ways.

1. It wrongly conflates weak discretion (and in particular, the discretion to award or withhold equitable remedies) with rule-based decision-making.
2. It wrongly characterises the discretion involved in discretionary remedialism and strong sense proprietary remedies as a strong discretion; it concludes therefore that discretionary remedialism and strong proprietary remedies are not an acceptable part of a legal system that adheres to the rule of law.

I consider these points in turn.

(i) Discretion and Equitable Remedies

Birks’ attempts to eradicate discretionary remedialism would be doomed to fail if the firmly established discretionary approach to equitable remedies were an instance of discretionary remedialism. Unsurprisingly, then, Birks contends that the discretionary approach to equitable remedies is not an instance of discretionary remedialism. He argues instead that the discretion in relation to equitable remedies has been ‘settled’ and apparently supplanted by rules. He observes that a

---

127 Id at 366.
128 Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 16 (see also the discussion in the text above n38).
129 Id at 16–17 (internal citations omitted).
130 Id at 16. In some contexts, of course, the discretion is more constrained by principle and precedent than in other areas.
detailed and extensive jurisprudence constrains the discretion in relation to equitable remedies and asserts that ‘[t]he discretion has been settled over the centuries’ so that it is meaningful to speak of a right to the remedy.\textsuperscript{131}

This is difficult to reconcile with the approach of the courts and commentators. As Millett LJ observed in \textit{Jaggard v Sawyer},\textsuperscript{132} the most that any decision on the exercise of discretion to award an equitable remedy can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way \textit{but it does not follow that it would be wrong to exercise it differently}. There is a discretion at work that precludes the full operation of the principles of \textit{stare decisis}. Loughlan put it as follows in her analysis of the remedial discretion in equity:

These rules for the guidance of a discretionary judgment are not, however, rules in the Dworkinian sense; they do not dictate a particular result. Even in those areas of equitable relief which have been so extensively litigated that a "settled practice" of granting or withholding the relief has emerged, courts of equity reserve to themselves what appears to be a "discretionary space" wherein they have authority to diverge from the practice.\textsuperscript{133}

The discretion is constrained and weak but nonetheless it is a real discretion. Birks argues, in effect, that any 'discretionary space' can and should be restated in terms of qualifications to a right that is remedial only in one of the weak senses.\textsuperscript{134} Once again, here, Birks appears to conflate discretion with strong discretion and weak discretion with rules. And there is a further difficulty. Birks would have equitable remedies determined by a rule with a set of exceptions. The rule and exceptions would be comprehensive — they would provide an answer to all problems within their domain\textsuperscript{135} — and they would be determined once and for all (subject of course to the ordinary evolutionary processes of the judge-made law). This formalist approach would eliminate the 'discretionary space' described by Loughlan in the current approach to equitable remedies. Would such a development be desirable?\textsuperscript{136} The distinctive features of the current approach are well captured in Frederick Schauer's description of an approach to decision-making he calls 'presumptive formalism':

Under such a theory … there would be a presumption in favor of the result generated by the literal and largely acontextual interpretation of the most locally

\textsuperscript{131} Ibid. Compare also the language of \textit{Warman International Limited v Dwyer} (1995) 182 CLR 544 at 559 but contrast below n136.

\textsuperscript{132} [1995] 1 WLR 269 (CA) at 288.

\textsuperscript{133} Patricia Loughlan, ‘No Right to the Remedy?: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies’ (1989) 17 MULR 132 at 135 (internal citation omitted).

\textsuperscript{134} Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 16.

\textsuperscript{135} Subject to problems of filling gaps left by the rules’ formulation: see Frederick Schauer, \textit{Playing by the Rules} (1992) at 222–228

\textsuperscript{136} It certainly does not reflect the approach in \textit{Warman International Limited v Dwyer} (1995) 182 CLR 544 where the High Court developed principles guiding, but not extinguishing, the discretionary remedy of an account of profits. (I am grateful to an anonymous referee for this observation.)
applicable rule. Yet that result would be presumptive only, subject to defeasibility when less locally applicable norms, including the purpose behind the particular norm, and including norms both within and without the decisional domain at issue, offered especially exigent reasons for avoiding the result generated by the presumptively applicable norm.137

Under the current approach, courts can 'temper the occasional unpleasant consequences of [a formal system of acontextual rule-following] with an escape route that allow[s] some results to be avoided when their consequences would be especially outrageous'138 by access to a wider set of norms than under the approach favoured by Birks. Obviously, the current approach is more consistent with the origin and historical purpose of equity as an institution that ameliorates the rigidity of the common law by contextualised decision-making based on general standards.139 Birks does not demonstrate that it is now desirable to depart from this approach and eliminate the discretionary space from the rules relating to equitable remedies.

(ii) Weak Discretion and Strong Sense Proprietary Remedies

It is important to bear in mind that the discretion involved in equitable remedies is not a strong discretion. In ameliorating the rigidity of the law by reference to general standards and discretions, equity has not become divorced from the idea of law. It has not replaced a law of rights with an arbitrary power to vary rights. Discretion has not become the dominant legal technique and corrosive of civic independence.140

Rather, the discretion in equity is constrained, girded and guided by principle.141 As Loughlan has demonstrated, in exercising the discretion to grant or withhold an equitable remedy, equity employs principles and standards in the same manner as they are employed in deciding hard cases at law.142 In exercising

---

137 Schauer, above n114 at 547.
138 Ibid. Compare Warman International Limited v Dwyer (1995) 182 CLR 544 at 561 (discussing the doctrine of unjust enrichment as a limiting — but not defining — principle on the defaulting fiduciary’s liability to account).
139 Thurman Arnold, ‘The Restatement of the Law of Trusts’ (1931) 31 Columbia LR 800 at 822–823. Arnold’s context was slightly different but the point remains sound.
140 MacCormick, above n122 at 36. Compare State of New York v United States 342 US 882 (1951) at 884 (Douglas J) (‘Absolute discretion, like corruption, marks the beginning of the end of liberty.’)
141 Finn, above n123 at 267.
142 Loughlan, above n133. Similarly, in applying its general standards, in particular the unconscionability standard, equity does not employ unstructured discretions but reasons as courts do in hard cases. See also Stephen M Waddams, ‘Judicial Discretion’ (2001) 1 Oxford University Commonwealth LJ at 59–63. Waddams argues that characterising a decision as ‘discretionary’ in order to signal a higher threshold before appellate intervention is possible misses the real reasons for imposing such a higher threshold. But he emphasises importantly that where a decision is described as ‘discretionary’ merely because it is based on rules that are open-textured, no particular deference is due from appellate courts to the judge at first instance: id at 60. He appears to agree that, even when the principles are open-textured, courts search for the right answer: id at 61.
this discretion the judges are employing an approach considered legitimate in other areas of law. They are engaged in the same way in a search for the right answer using legal and not extra-legal standards.\textsuperscript{143}

The aim of discretionary remedialism is not (as Birks would have it) ‘to arrive at something which is impossible for the human intellect to achieve, namely, perfectly flexible focus without sacrifice of stability and predictability’.\textsuperscript{144} It is not the case that discretionary remedialism ‘purports to be a strong discretion which must be kept fresh for each exercise’ rather than being ‘on its way to a weak, rule-based discretion’.\textsuperscript{145} It is not correct to assume that discretionary remedialism is meaningfully distinct from rule-based decision only if it is based on strong discretion.\textsuperscript{146} These propositions are supported by the approach of the leading advocates of discretionary remedialism to whose work Birks refers.

- Donovan W M Waters concludes that ‘the occasional rhetoric of judgments proclaiming with some fanfare the existence of judicial discretion does not necessarily reflect anything more than the desire that formulae and rules shall not settle upon the law before the formative age is clearly over’.\textsuperscript{147}

- J D Davies argues that ‘[e]lements of discretion are involved’ in developing an approach that separates liability and remedy but that the discretionary elements ‘can be made to add to rather than detract from the effectiveness of the law’.\textsuperscript{148} There is nothing in the works cited by Birks that suggests he is committed to strong discretion.

- Kit Barker is certainly a committed remedialist but is no supporter of strong discretion. He argues that discretionary remedies need not ‘signal the end of all certainty and stability in the law any more than a system of apparently stable rules guarantees it’.\textsuperscript{149} In his view, as in mine and those of the other commentators referred to by Birks, the impact of discretionary remedies depends upon the way in which discretions are structured and in particular ‘the extent to which factors operating within that structure are articulated’.\textsuperscript{150} An important element of discretionary remedialism is a commitment to candour about the basis on which remedies are awarded and withheld, in preference to the obfuscation of current approaches (particularly in relation to proprietary remedies).

\textsuperscript{143} Id at 138.
\textsuperscript{144} Birks, ‘Rights, Wrongs, and Remedies’, above n 1 at 23.
\textsuperscript{146} Ibid.
\textsuperscript{148} J D Davies, ‘Restitution and Equitable Wrongs: An Australian Analogue’ in Francis Rose (ed), \textit{Consensus Ad Idem: Essays on Contract in Honour of Guenter Treitel} (1996) at 158, 174 (see also id at 177–178 where again there is no suggestion that Davies supports a strong discretion).
\textsuperscript{149} Barker, above n29 at 317 [emphasis added].
\textsuperscript{150} Ibid. Compare DM Wright, \textit{The Remedial Constructive Trust} (1998) at 142–143 ([4.19]).
Grant Hammond, therefore, insists strongly that ‘the exercise of remedy allocation must be one of candour’.

Paul Finn endorses an approach that emphasises standards rather than rules and a ‘far more instance-specific evaluation of conduct’. He sees the jurisprudence of remedies as evolving, a process that requires comparison, evaluation and analysis, not intuitive solutions. And yet he directly rejects Birks’ contention that any discretion involved in equitable remedies is ‘an embarrassing discretion, inimical to legal certainty’; that contention ‘misconceives both the orientation of modern equity and the constraints which gird and guide such judicial discretion as there is in the matter’. Identifying the appropriate remedy is, as in Hammond’s analysis, something that involves principled reasoning and not judicial fiat.

Even if these commentators were to advocate that the availability of remedies (and in particular proprietary remedies) be determined by the exercise of a strong discretion, it is unthinkable that the courts would adopt such an approach. Discretions conferred on or held by courts are interpreted as judicial discretions, not arbitrary discretions. As Lord Mansfield said long ago in Rex v Wilkes:

”Discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule; not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular.”

Discretions are exercised throughout the judicial process, subject to the authority of law. Many examples are to be found in the exercise of judicial power of orders which alter the rights of the parties or are the source of new rights. Likewise, there are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised — nevertheless they have been accepted as involving the exercise of judicial power. It is no objection that the function entrusted to the Court is novel and that the Court cannot in exercising its discretion call in aid standards elaborated and refined in past decision; it is for the Court to develop and elaborate criteria regulating the discretion, having regard to

---


152 Ibid.

153 Finn, above n123 at 260.

154 Id at 262. See also the Hon Mr Justice Ipp, ‘Introduction’ in Robyn Carroll (ed), Civil Remedies: Issues and Developments (1996) at xvii, xxxi.


156 Finn, above n123 at 267–273.

157 (1770) 4 Burr 2527 at 2539 [98 ER 327 at 334].
the benefits which may be expected to flow from the making of an order … and the impact which such an order will have on the interests of persons who may be affected.158

It is not as if remedial discretions are a new phenomenon. To take only Australian examples, section 89 of the *Matrimonial Causes Act 1899* (NSW) gave the Supreme Court a discretionary power to vary marriage settlements following the dissolution of marriages; section 3 of the *Testator’s Family Maintenance and Guardianship of Infants Act 1916* (NSW) gave the Supreme Court a discretionary power to make such provision ‘as the court thinks fit’ out of the testator’s estate for the maintenance, education and advancement of his or her family. More recent examples include section 87 of the *Trade Practices Act 1974* (Cth), section 79 of the *Family Law Act 1975* (Cth), Part 5.7B (and in particular section 588FF) of the *Corporations Act 2001* (Cth) and sections 7 and 9 of the *Contracts Review Act 1980* (NSW). Their (weakly) discretionary nature is well established.159 They take their place with the equitable remedial discretions I have discussed above in the body of law administered by the courts.160 Even the most open textured of these discretions do not appear to excite controversy or to threaten the institutional legitimacy of Australian courts, provided only that the discretionary function conferred on the court does not ‘create a dangerous propinquity with the executive or legislature, so undermining public confidence in judicial independence’.161 And if the evil of such discretions lies in the threat to the institutional legitimacy of the courts, the source of the discretion in statute or the judge-made law is not directly relevant.162 At least under an entrenched system of separation of powers, the legislature cannot authorise the courts to exercise a function that threatens their institutional legitimacy just as the courts cannot assume such a function for themselves.163

158 (1976) 135 CLR 194 at 215–216. Contrast *Mallet v Mallett* (1984) 156 CLR 605. Of course to argue that a discretion should not be structured by adopting a presumption as to how it should be exercised is not the same as to argue that the discretion should not be structured at all: see generally Simon Gardner, ‘The Remedial Discretion in Proprietary Estoppel’ (1999) 115 LQR 438.


160 On the unified body of statute and common law, see Chapter I (The Common Law and Statute) of William M C Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999). (I am grateful to an anonymous referee for this reference.)


162 Subject, of course, to the proviso that any discretion deriving from judge-made law be developed in the ordinary incremental manner: see below text at n172 and following.

163 *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Yanner v Minister, Aboriginal & Torres Strait Islander Affairs* (2001) 181 ALR 490.
In short, if the discretion involved in the decision to grant proprietary remedies is of the same kind as the discretion in relation to equitable remedies, it is distinctly discretionary but is not amorphous, arbitrary or unstructured ‘strong’ discretion. As Deane J said in *Muschinski v Dodds*, ‘[n]otions of what is fair and just are relevant but only in the confined context of determining whether conduct should, by reference to legitimate processes of legal reasoning, be characterised as unconscionable for the purposes of a specific principle of equity’. 164 The equitable remedy ‘is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles’. 165 There is a clear difference between such an approach and the feared jurisdiction to alter property rights ‘whenever justice and good conscience require it’. 166

C. Objections to Discretionary Decision-Making

It remains necessary to examine more closely five further objections to a discretionary approach to proprietary remedies that Birks advances. 167

(i) Historical Legitimacy

Birks makes three points about the historical approach to remedies that he contends undermine the legitimacy of discretionary remedialism:

1. It is not possible to ‘revivify the old discretion surrounding [equitable remedies], which has long since withered away’ to provide a foundation for a wider doctrine of discretionary remedialism. 168

2. Historically it has been ‘the law [that] makes the choice’ of the appropriate response to causative events, ‘not the judge’. 169

164 (1985) 160 CLR 583 at 621.
165 Id at 615.
167 See text above n19. Some may see a further problem arising when a non-judicial decision-maker is required to determine the extent of a person’s assets as an element of their eligibility for a social welfare payment or in their liability to pay some tax. If proprietary remedies depend on the exercise of judicial discretion then the extent of the person’s assets will not be finally determinable until the discretion is exercised by a judge in appropriate proceedings. Until then statutory language requiring the decision-maker to determine a person’s assets will not encompass the subject-matter of a proprietary claim that person has or exclude the subject-matter of a proprietary claim against him or her. But statutory language can be changed and the decision-maker could be empowered to make his or her decision on the basis of his or her assessment of what a judge would ultimately decide on the facts presented. Of course even on current approaches to proprietary remedies a non-judicial decision-maker’s determination about a person’s assets is necessarily provisional: it is of the essence of the separation of powers that non-judicial decision-makers are incapable of making binding determinations of fact or law. Their determinations about a person’s proprietary rights are only data for their decisions and cannot amount to binding determinations of a person’s proprietary rights. Their determinations are always liable to be confounded by a subsequent judicial determinations. Discretionary remedialism does not present a problem of a different order.
169 Id at 9.
3. Where the law determines that there is more than one appropriate response, it is the claimant and not the judge that makes the ‘choice between them’.  

I have discussed the first point previously and do not repeat my comments here.

As to the second point, it does not take an extreme legal realist or sceptical post-modernist to recognise the mythic elements of the claim that it is the law that makes decisions about remedies, not judges. That myth, intimately connected with the declaratory theory of judicial decision-making, is long exploded. As Lord Browne-Wilkinson put it in *Kleinwort Benson Ltd v Lincoln City Council*, the ‘underlying myth [that judges do not make or change the law] has been rejected’. Judges make decisions about remedies just as they make decisions that make and change the law. But judges remain constrained. Kirby J, writing extra-judicially, developed the point in this way:

The problem of the past fifty years, as the declaratory theory has crumbled away as an explanation of depersonalised judicial reasoning and decision-making, is the lack of any agreement about what should take its place. No one (least of all the judges) suggests that a judge, in deciding the law, is a completely free agent, able to follow his or her whim, imposing this or that construction of the Constitution or the Acts of Parliament or this or that vision of the content of the common law. Such a view of the judicial role would be opposed to the conception of a judge as a person obliged to *apply* the law which pre-exists, as distinct from *inventing* it as the judge goes along.

In *Kleinwort Benson*, Lord Goff similarly saw the judge’s role as involving law-application, even though the judge does on occasions develop the law:

When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be. This he discovers from the applicable statutes, if any, and from precedents drawn from reports of previous judicial decisions .... In the course of deciding the case before him, he may, on occasion, develop the

---

170 Id at 10.
171 Above Part 3.B.i (Discretion and Equitable Remedies).
174 Ibid at 358; see also id at 377–379 (Lord Goff of Chieveley), 393–394 (Lord Lloyd of Berwick), 398–399 (Lord Hoffmann) and 410–411 (Lord Hope of Craighead). However, when judges make or change the law, their decisions have retrospective effect. The extent of that retrospective effect was the central issue and cause of disagreement in this case.
175 The Hon Justice Michael Kirby, AC CMG ‘Judging: Reflections on the Moment of Decision’ (1999) 18 *Australian Bar Review* 4 at 6–7. Compare The Hon Justice Kenneth Hayne, ‘Letting Justice Be Done Without the Heavens Falling’ (The Fourth Fiat Justitia Lecture, Monash University, 21 March 2001) <http://www.hcourt.gov.au/speeches/hayne/haynej_fo21301.htm>: ‘The search for results which are seen as giving a just result in the individual case, by using techniques which employ such apparently open-ended concepts as “unconscionability” or “discretion”, taken with the realisation that the common law is made by judges, not simply discovered, provides a heady cocktail for the unwary judge’.
common law in the perceived interests of justice, though as a general rule he does this “only interstitially”. … This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole.176

These substantive constraints on judicial decision-making are fundamental. But so too are the methodological constraints identified by Kirby J:

The grant of power … to decision-makers who hold judicial office, ought to be conditional upon the exercise of that power in a way which the people governed by it understand and generally accept. To keep in the dark those affected by the exercise of power and to disguise from them the true processes engaged in, is the way of autocracy which fears sharing the truth with the people. My thesis is that judicial candour, although perhaps initially unsettling to those who hanker for fairytales, is more appropriate to our times.177

We should, as Lord Goff put it in Kleinwort Benson, ’look at the declaratory theory of judicial decision with open eyes and reinterpret it in the light of the way in which all judges, common law and equity, actually decide cases today’.178 Acknowledging the role of judges in identifying the appropriate remedy in a particular case does not require any more than this.

Finally, Birk’s third point (that where the law determines that there is more than one appropriate response to the claimant’s claim it is the claimant and not the judge that makes the choice between those responses) depends for much of its normative power on Birks’ analysis of fourth-sense remedies (rights arising from the order of a court) as rights that proceed directly from second- and third-sense remedies (rights responding to wrongs, injustices and other grievances) without any significant role for the judge in shaping the remedy. I have argued above that that analysis is faulty and that courts already have a significant role in shaping remedies.179 Given this and given the analogical practice of judges selecting the appropriate remedy from a statutory remedial menu, it is difficult to see that it is beyond the legitimate evolutionary processes of the judge-made law to allow judges to select the appropriate response to a claimant’s claim when there is more than one appropriate response.

(ii) Insulating Judges

Birks’ next objection is that only objectively ascertainable rules can insulate decision makers from personal criticism; that employing ‘intuitive solutions’ derived from discretionary approaches demands that decision makers’ authority be unchallenged; and that demand is no longer met.180

177 Above n175 at 8.
Some empirical support for this objection may be found in the observation that, even when a statute provides for a discretion, courts are on occasion driven to ‘bright line’ tests to avoid decisions that will be perceived as subjectively based. Examples may also be found in judge-made law. In the common law, the best known example is the English rejection of liability for negligently inflicted pure economic loss. But that bright line has been rejected in Australia and in Canada. Similarly the bright line adopted for England and Wales in *Tinsley v Milligan* has been rejected by the High Court of Australia in *Nelson v Nelson* in favour of a substantive approach. These examples, and others can be found, demonstrate that the need for insulation and the fear of criticism does not deter the judiciary, at least outside England and Wales, from seeking to adopt and employ substantive open textured standards, confident that these are nonetheless legal standards to be employed accordingly. And if there be criticism, it is the duty of the judge to ignore it.

(iii) Discretion and The Judicial Function

Even if discretion is not problematic from the point of view of the judges who exercise it, it is problematic from the point of view of the parties affected by it to the extent that it constitutes an area of power unconstrained by legal rules. This objection follows the classical idea that only by divorcing legal decisions from their contexts — by abstract principles and rules — can neutral and apolitical law be achieved. As one strand of judicial thinking holds, making decisions based on discretionary factors ‘thrust[s] the Court inevitably “into the basic line-drawing process that is pre-eminently the province of the legislature” and produce[s] judgments that [are] no more than the visceral reactions of individual Justices’. A more sophisticated account of this fear is given by Professor George P Birks, ‘The Remedies for Abuse of Confidential Information’, above n1 at 465. See also Birks, ‘Civil Wrongs: A New World’, above n1 at 92–93; Compare, text above n 170 where Birks appears to assume that if a decision is not conceptualised as the law’s decision, it must be the unconstrained decision of the decision-maker.

180 Birks, ‘The Remedies for Abuse of Confidential Information’, above n1 at 465. See also Birks, ‘Civil Wrongs: A New World’, above n1 at 92–93; Compare, text above n 170 where Birks appears to assume that if a decision is not conceptualised as the law’s decision, it must be the unconstrained decision of the decision-maker.


182 Murphy v Brentwood DC [1991] 1 AC 398 (HL).


189 See for example, Kenneth Culp Davis, *Administrative Law Treatise* (2nd edn 1979) vol 2 at 165–166, para 8:3; Compare Christie, above n181 at 752, 754.

Fletcher. In the Western tradition, and in particular in the common law tradition, law is understood as a rational process. Judgments are regarded as legitimate if they are rationally supportable. They are legitimated externally by reference to sources of law and to reason, and not internally by reference to the personal judgement of the decision maker. So an appeal to discretion is a means of ‘backing out of the obligation to present a convincing reason’: the exercise of discretion is not a reason for judgment, but the denial of one; it cuts off justification short of rational persuasion. 

This would be a cogent objection to a discretionary approach to proprietary remedies if (contrary to my argument) the discretion was a strong discretion. Moreover, it is not only in discretionary decision-making that the reasons run out short of rational persuasion. The controversy surrounding the correctness of *Lister & Co v Stubbs*, and now of *Attorney-General for Hong Kong v Reid*, is ample evidence of this. Some jurists find reasons for the grant of a proprietary remedy persuasive; others find reasons for withholding one persuasive. Similarly, the reasons stop some way short of rational persuasion on Birks’ approach to proprietary remedies for mistaken payments: for example, how exactly is a mistake ‘sufficiently fundamental to prevent the property from passing’ to be identified? The reason that this is so is easily identified: as in most of the law concerning proprietary remedies, there are factors that suggest that a proprietary remedy is appropriate and factors that suggest that one is not. But the ultimate decision is no less legal in that it depends on a balancing of factors. In a deeper sense, it is inevitable that reasons should run out in this manner. Law, after all, is a normative exercise and normative premises cannot be established or defended analytically. Avoiding discretion does not and cannot overcome this fact.

(iv) Certainty

Birks’ fourth objection to a discretionary approach to proprietary remedies is based on the importance that the legal system attaches to certainty.

For reasons given above, Birks overreaches when he argues that the aim of discretionary remedialism and the discretionary approach to proprietary remedies

192 Fletcher, above n191 at 284, 285. See also Planned Parenthood of Southeastern PA v Casey 505 US 833 (1992) at 865 (O’Connor, Kennedy and Souter JJ): ‘[A] decision without a principled justification would be no judicial act at all’.
193 Dworkin, above n125 at 69.
194 (1890) 45 ChD 1 (CA).
196 There is a difference between the discretion involved in deciding between *Lister & Co v Stubbs* and *Attorney-General for Hong Kong v Reid* and the discretion involved in a case by case determination of the appropriate remedy. But it is a difference of degree rather than of kind and one which will inevitably diminish over time as the discretion becomes structured according to the decided cases.
is to achieve ‘perfectly flexible focus without sacrifice of stability and predictability’ and that is ‘impossible for the human intellect to achieve’. 198 Equally, his argument that ‘strong remedial discretion would make the management of litigation impossible, promoting unjust settlements based on guesswork as to the operation of the discretion’ 199 overstates the position in so far as he assumes that discretionary remedialism involves a strong discretion.

However, there is plainly merit in the argument that discretionary approaches to decision-making are less predictable and certain than approaches based on clear rules. Clear rules provide parties with the information they need to negotiate rational compromises of their disputes. The less predictability and certainty there is, the less likely it is that parties will be able to settle disputes without litigation. And the public interest in resolving disputes without incurring the financial costs and delays of litigation is particularly significant in the context of insolvency when litigation erodes the assets available for distribution among the defendant’s creditors and the delays finalisation of the insolvency process.

But even this argument raises important legal and empirical questions. Once again I focus on proprietary remedies. The questions include:

1. How predictable and certain are the current ostensibly rule-based approaches to proprietary remedies? How clear are the signals they send to future litigants about the likely outcome of their cases? Do those signals enable litigants to settle their cases prior to litigation on a rational basis? (The volume of academic commentary suggests that the current rules are far from certain and leave considerable room for argument in individual cases.)

2. How constrained (and therefore how predictable and certain) is any plausible discretionary approach to proprietary remedies likely to be? Can a discretionary approach be constrained and structured in a way that enables litigants to settle cases prior to litigation on a rational basis? (I have argued above that any plausible discretionary approach is likely to be substantially constrained and certainly will not be a strong or arbitrary discretion). 200

3. How significant is any additional uncertainty involved in a remedial discretion when compared with the usual forensic uncertainty about which facts can be proven to the necessary standard given the time and financial resources available to the litigating parties?

4. When a claimant seeks a proprietary remedy against the estate of an insolvent corporation, how significant is any additional uncertainty involved in a remedial discretion given the existing constraints on the liquidator’s ability to compromise doubtful claims? 201

5. When a liquidator seeks a proprietary remedy to augment the estate of an insolvent corporation, how significant is any additional uncertainty involved

---

198 Birks, ‘Rights, Wrongs, and Remedies’, above n1 at 23. See above, text at n145.
199 Ibid.
200 Evans, above n91; Part 3.B.ii (Weak Discretion and Strong Sense Proprietary Remedies) above.
201 Section 477 of the Corporations Act 2001 (Cth) subjects the power of the liquidator to compromise claims to the control of the Court, creditors and contributories.
in a remedial discretion when his or her more wide ranging statutory powers to avoid pre-insolvency transactions also depend on a remedial discretion (albeit one conferred by statute)?

These questions require empirical work, well beyond the scope of Birks’ work or this article, before the argument that discretionary approaches to decision-making are less predictable and certain than approaches based on rules can finally be assessed.

Beyond even these questions, there are questions of valuation: just how important is certainty? Birks is not alone in seeking certainty, stability and predictability in the law of proprietary remedies. Professor Goode has written of the need for certainty lest ‘the free flow of assets in the stream of trade’ be interrupted. Indeed he has written that ‘[p]rinciples of equity, however sophisticated, are … intrinsically unsuitable as a medium for resolving competing interests in commercial assets.’ Lord Millett has insisted that proprietary remedies ‘are not discretionary’:

They do not depend upon ideas of what is ‘fair, just and reasonable.’ Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.

Similarly, theorists who apply an economic analysis to law seek to promote certainty and stability and predictability in the law at the expense of discretionary approaches and open textured standards. The economic analysis presumes that private transactions between rational actors operate to maximise social wealth and that the law’s function is to uphold those transactions and to correct market imperfections. If the legal position of the parties in connection with a transaction can be determined after the event on the basis of a judge’s personal assessment of what is ‘just’ or ‘appropriate’, the parties cannot calculate in advance the costs and benefits of the proposed transaction. This lack of information deters parties from engaging in transactions and as a result social wealth is not maximised. In short, prospective rules enable prediction and valuation; retrospective external assessment and discretion undermine them.

The economic analysis is not uncontroversial. And although in this instance the economic analysis does conform to the traditional reluctance to incorporate equitable principles into commercial contexts, that reluctance is by no means

---

202 Section 588FF of the Corporations Act 2001 (Cth).
204 Foskett v McKeown [2000] 2 WLR 1299 at 1322–1323 (Lord Millett).
absolute nor is it as strong as it once was. As Professor R P Austin has pointed
out, there are objections to three groups of equitable doctrines intruding into
commercial dealings: those that set impractical standards of investigation, those
that invalidate agreements, and those that produce proprietary rights. But, as he
went on to argue, there is no reason to elevate any of these objections into a blanket
exclusion, counsel the courts have followed in recent years.

More generally, Sir Anthony Mason has argued persuasively that certainty
should not be the paramount concern at all stages in legal development. Writing
of the then emerging unconscionability standard as a unifying factor in Australian
equity, he noted that in the early stages of elaboration or re-working of existing
discipline by reference to general concepts in the search for substantive justice, the
principle will often lack definition and sharpness of focus, leading to some degree
of uncertainty. But, he continued, the search for greater certainty will yield a more
certain principle, until, in turn, the perceived inflexibility of that new principle
causes the process to begin again. He observed:

> There are some who, placing a lower value on certainty, see no fault in this
> because they lament the rigidity that is associated with sharp definition. What is
> happening is but one stage in a course of continuous cyclical development in the
> search for greater certainty. Eventually the search yields a principle more fixed in
> its application until a time is reached when dissatisfaction with the inflexibility of
> the principle in its application to new situations results in its giving way to another
> re-working of doctrine.

It is difficult to disagree with this dynamic vision of the law. Certainty is not the
only value pursued by the law. Throughout the law, certainty is but one element in
the search for justice. For example, in the law of penalties, whereas the common
law adopts the purely mechanical test of whether a contractual provision exceeds
the damages the innocent party could obtain for breach of contract, in equity, relief
may be obtained on a discretionary basis where the relationship between the
parties makes the contractual provision in question unconscionable. It is plain
that the former approach upholds the values of certainty and predictability, based
on a ‘bright line’ test, a prospective evaluation, and decontextualised enquiry,
whereas the latter is contextualised and normative, and based on a standard and not

---

208 See for example, Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 100 (Mason J), 122, 124 (Deane J); Quistclose Investments Ltd v Rolls Razor Ltd [1970] AC 567 (HL); Electrical Enterprises Retail Pty Ltd v Rodgers (1988) 15 NSWLR 473 at 492E–493C; Walker v Corboy (1990) 19 NSWLR 382 at 390C–D.


210 Id at 455; See for example, cases cited above, n208, and compare Cowan de Groot Properties Ltd v Eagle Trust plc [1992] 4 All ER Ch D 700 at 759–761; Anthony J Duggan has argued that equity is more efficient than commonly supposed: Anthony J Duggan, ‘Is Equity Efficient?’ (1997) 113 LQR 601.

211 The Hon Sir Anthony Mason, ‘Themes and Prospects’ in Paul Desmond Finn (ed), Essays in Equity (1985) at 242, 244.

212 Id at 244.
a rule. Similarly, the law of relief against forfeiture balances the certainty of upholding contractual exchanges with a contextualised equitable discretion to award or withhold relief against forfeiture when the circumstances have changed or a party’s behaviour warrants relief.214

A number of commentators have observed similar trends in other contexts. For example, Professor Paul Finn has identified a move away from regimes requiring that parties’ actions fit ‘some antecedently established template’ before legal consequences are triggered towards regulatory regimes based on standards rather than rules, and sensitive to actual interests, expectations and vulnerabilities.215 Sir Anthony Mason observed in 1994 that the principles of both statute and judge-made law were expressed, to a greater extent than before, in terms of standards rather than strict rules.216

None of this is to deprecate Birks’ concern with certainty. Excessive uncertainty is to be avoided. But determining what is excessive requires assessment of the extent of the likely uncertainty and an assessment of its significance in light of the other values that the law pursues.

(v) A New Concept of Law?

Birks presents the choice between his preferred approach to remedies on the one hand and discretionary remedialism on the other as a choice between ‘the rationality of the rule of law’ and decision-making by ‘direct access to the community’s sense of justice’.217 He argues:

It is all too evident that the community’s sense of justice is prone to pathological lapses. Communities are error-prone. Like individuals, they can lose their grip on right and wrong. …

Reasoned law does not provide guaranteed protection. If it could, the holocaust would never have happened. Yet ghastly failures do not make a good argument against trying to reduce the risk of a repetition. Nor for assuming that mega-oppressions are the only oppressions of which the community is capable. Precautions can be taken. It is possible to steer away from a style of law which has no in-built protection against communal mood-swings …. Given that the conscience of all the different social groups is volatile, the only hope for peace

213 P C Developments Pty Ltd v Revell (1991) 22 NSWLR 615 at 650G–651B; Contrast C J Rossiter & Margaret Stone, ‘The Chancellor’s New Shoe’ (1988) 11(1) UNSWLJ 11 at 34–37. Compare Troja v Troja (1994) 33 NSWLR 269, considering two approaches to the forfeiture rule whereby the law will not enforce rights accruing under the will of a testator in favour of the person who killed him or her; See now the Forfeiture Act 1995 (NSW) and compare the Forfeiture Act 1982 (UK).


and moderation in society is a legal system which insists on rationality, and law which … is obstinately committed to the restraining discipline of analytical interpretation. 218

I have argued in the previous Parts of this article that discretionary remedialism does not seek ‘direct access to the community’s sense of justice’ and does not break with the rationality of the rule of law. I do not repeat that argument here.

Nonetheless, Birks is right to draw attention to the fact that discretionary remedialism does embody a different concept of law from the formalist approach he prefers. The analysis in the previous Parts of this article suggests two different and competing legal traditions: one focusing on facts occurring in transactions between individuals and favouring certainty and predictability achieved through rules (as in Birks’ preferred approach); the other considering the situation more broadly and attempting to achieve substantive justice through contextualised and perhaps discretionary decision-making. Neither tradition is perfectly represented in any real legal system. Rather they are ideal types, identified here in somewhat stereotyped form.

Some years ago, Professors Eugene Kamenka and Alice Tay described two similar co-existing and competing legal traditions. 220 The Gesellschaft tradition ‘is oriented to the precise definition of the rights and duties of the individual through a sharpening of the point at issue’ and emphasises ‘impartiality, adjudicative justice, precise legal provisions and definitions and the rationality and predictability of legal administration’. 221 In the Gemeinschaft tradition, on the other hand, the emphasis is on substantive decision-making in the particular case, rather than the enunciation of general rules or precedents. 222 Building on this work, Christopher J Rossiter and Margaret Stone described the growing influence of the unconscionability standard in the 1980s as a shift from a Gesellschaft-type approach, which had achieved a dominant position after Lord Eldon’s Chancellorship, towards a more Gemeinschaft-type approach. 223 This, they argued, was the consequence of a recognition that relief from the effects of unconscionability can be expressed in the form of rules only at the cost of rigidity, and therefore of injustice.

What then is the explanation for this shift to a concept of law that favours broad standards and discretion? Rossiter and Stone argued: 224

In some measure this trend to Gemeinschaft evidences the judiciary’s, and the society’s, confidence, not only in its judges’ integrity but also in the community of their values. The attraction of formalism, of the Gesellschaft approach, is perhaps greatest in times of turbulence, when the values within a community are disparate and disputed both in content and intensity. … But when we can rely, not

219 This is not a term of disparagement; See Schauer, above n114.
221 Id at 137.
222 Id at 136.
223 Rossiter & Stone, above n213 at 23–24.
224 Id at 23–24.
only on a judge’s integrity, but also on our substantial common ground on fundamental principles of behaviour, then we are prepared to accept decisions that flow from the exercise of individual discretion and to allow the subjective judgment which would be excluded by precise rules.

Birks argues that this common ground is not present in modern pluralistic societies and it is one reason he favours the formalist Gesellschaft approach.225 By contrast, such common ground seems to have been assumed in Australia in the 1950s, yet that was the very era in which Sir Owen Dixon demanded (at least in his public writings) ‘strict and complete legalism’ as the only ‘safe guide to judicial decisions in great conflicts’ and also as the preferable approach to judicial decision-making in general.226

It appears, therefore, that a more complex explanation than that given by Rossiter and Stone is necessary to explain (and perhaps justify) the recent trend towards the Gemeinschaft approach to decision-making. Here it is possible only to speculate about some of the likely elements of any such explanation.

1. Rossiter and Stone suggest that Gemeinschaft-style decision-making will not be favoured when social values are disparate and disputed. Perhaps, instead, Gemeinschaft-style decision-making is most attractive to decision-makers in precisely these circumstances because it allows the courts to mediate those values in the context of individual cases and to seek the best accommodation of competing concepts of substantive justice.227

2. The trend towards Gemeinschaft-style decision-making has not occurred in isolation from other legal-administrative developments. The courts inhabit a legal culture that also includes legislatures and bureaucrats. It is most unlikely that some elements of the particularist and contextualised approach to decision-making that welfare state legislatures require of administrative decision-makers have not been transplanted into judicial decision-making.

3. Those legislative developments have not only provided a lead to the courts but have altered citizens’ expectations. As Gleeson CJ wrote extra-judicially in 1995:

The citizens of the late 20th Century have an attitude towards all forms of authority which is questioning, demanding and self-assertive. They seem to place less value on predictability than former generations, and are impatient of what they regard as mere formalism.228

Of course, these are possible explanations, not justifications, for the apparent trend towards the Gemeinschaft approach to decision-making. But whatever the

226 Swearing in of Sir Owen Dixon as Chief Justice [of the High Court of Australia], (1952) 85 CLR xi, xiv; Compare The Right Honourable Sir Owen Dixon, OM, GCMG, ‘Concerning Judicial Method’ in Jesting Pilate: and Other Papers and Addresses (1965) at 153, 154–156 (referring to ‘strict logic and high technique’).
227 Compare Professor Charles E F Rickett’s analysis of a substantive interest based approach: Rickett, above n 44. The accommodation is rational, external and legal: see text above, at n192 and following.
228 The Hon A Murray Gleeson, above n181 at 430.
explanation and whatever the justification, the tradition favouring substantive justice over certainty is more influential and accepted than Birks’ arguments against discretionary remedialism assume. The tradition favouring certainty is but one tradition and it does not have dispositive normative force against a discretionary approach to proprietary remedies.

D. A Discretionary Approach is Viable

In short, even if those who favour separating liability from remedy are necessarily discretionary remedialists, they do not abandon the rule of law in favour of arbitrary discretion; nor are they driven to the impossible dream of achieving ‘perfectly flexible focus without sacrifice of stability and predictability’. They aim, reasonably, to strike a different balance between flexible focus on the one hand and stability and predictability on the other.

4. Conclusion

Birks has raised significant issues in his efforts to eradicate discretionary remedialism and strong sense proprietary remedies (typified by the remedial constructive trust) from Commonwealth legal systems. He reminds us that it is important to distinguish different senses in which rights can be said to be remedial; that it is important to maintain continuity with the traditions of the common law; and that it is important to acknowledge the disadvantages of discretionary decision-making.

But it is also important to acknowledge the strengths of discretionary decision-making as a legal technique and the constraints that ensure that it does not depart from the rule of law. In particular, it can be a viable technique in reforming the orthodox approach to proprietary remedies. Weak sense proprietary remedies, cast as the law’s response to causative events (rather than the court’s response to those events) and regarded as arising when those causative events occur as the result of rules (rather than at the time of the court’s decision as the result of an exercise of discretion), are no less redistributive for the form in which they are cast. It is just that the orthodox approach relegates the interests of the defendant’s general creditors to a marginal role in shaping the available remedies and fails to acknowledge explicitly the factors that justify a proprietary response (rather than any other response) to the claimant’s grievance.

Strong sense proprietary remedies, cast as the creatures of a later judicial (and therefore weak) discretion to redress the claimant’s grievance, are not illegitimate because they explicitly acknowledge their distributive implications. They do not involve a strong discretion. They replace conceptualism and obscuring rhetoric with the candour that is the obligation of judicial decision-makers.

Accordingly, Birks’ efforts to eradicate discretionary remedialism and the remedial constructive trust should be rejected and jurists should concentrate their efforts on discussing candidly the circumstances in which it is appropriate that remedies (proprietary and otherwise) should be granted or withheld.

229 Birks, ‘Rights, Wrongs, and Remedies’, above n 1 at 23.
Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia

PHILIP LYNCH*

1. The Massacre at Wounded Knee and The Fate of the Sacred Tree

I did not know then how much was ended. When I look back now from this high hill of my old age, I can still see the butchered women and children lying heaped and scattered all along the crooked gulch as plain as when I saw them with eyes still young. And I can see that something else died there in the bloody mud and was buried in the blizzard. A people’s dream died there. It was a beautiful dream … the nation’s hoop is broken and scattered. There is no centre any longer and the sacred tree is dead — Black Elk.1

First Nations and Aboriginal communities in North America and Australia have been deprived of their children from the time of European invasion.2 During much of the 18th and 19th centuries, First Nations and Aboriginal children were victims of violent battles over land and resources. The Wounded Knee of more recent history is the removal or separation of First Nations and Aboriginal children from their communities. This continuing practice endangers both the children and the

* LLB (Hons) (Melb); Solicitor, Allens Arthur Robinson; Solicitor, Public Interest Law Clearing House (Vic) Inc. I am a non-Aboriginal Australian. As a child, I was raised by and lived in the custody and care of my biological parents. I speak to the subject of this article from within the limits of that experience.

This article was researched and written during a period of study in south-east Canada. I am indebted to Professor Shauna Van Praagh and certain members of the Kahnawake Mohawk community of Quebec with whom I studied and who provided the impetus and encouragement to write in this area. I do not purport to speak for these people, nor for any of the Indigenous peoples of Canada or Australia. The powerful and often poignant voices of many of those peoples do, however, speak through the direct quotes.

I am also indebted to the Sydney Law Review’s anonymous referees for their constructive and insightful comments. All errors and omissions remain my own.

1 Black Elk quoted in Dee Brown, Bury My Heart at Wounded Knee (1971) at 353.

2 Throughout this article I have used ‘First Nations’ to describe the Indigenous peoples of Canada and ‘Aboriginal’ to describe the Indigenous peoples of Australia. I accept that both of these terms have been conferred by non-Indigenous discourse and may connote a non-existent commonality of Indigenality. I too am guilty of this. However, as I am as yet unaware of an Indigenous word for all of the Indigenous peoples of Canada or Australia, I use ‘First Nations’ and ‘Aboriginal’ as generally accepted terms.
future of First Nations and Aboriginal communities themselves. This article will examine the role that child welfare law, policy and practice has played, and continues to play, in the removal of First Nations and Aboriginal children from their families and communities. It will examine, in particular, the application of the ‘best interests of the child’ test in the determination of placement decisions and custody disputes in Canada and Australia. Such focus is warranted as it seems that this test will remain the yardstick, notwithstanding that the history of its application to First Nations and Aboriginal children is broadly one of dispossession, dislocation and, ultimately, near destruction.

While acknowledging the plurality of cultures and experiences of Indigenous peoples in Canada and Australia, there has been a remarkable similarity in the application and effect of child welfare law and practice on Indigenous children in those nations. A Canadian report on First Nations adoptions and placements speaks in terms strikingly remnant of the experiences of many Aboriginal children in Australia:

For the past two hundred years the children of Indians have been the innocent victims of a cultural war waged against them by society. Christian missionaries, Indian Agents, school teachers, and politicians have all argued that Indian children must be taught to be something other than Indian, to be something they are not and never can be. These perceived pillars of society have tried, usually misguided, but nevertheless relentlessly, to indoctrinate in these children the belief that the customs, the values and traditions of their people must be discarded if Indians were ever to take their place in the majority community. To achieve this goal, children were removed from their homes and placed arbitrarily in residential schools with only brief continuing contact with their families. More recently, children have been removed and placed in non-aboriginal, middle class homes for adoption. While neither the literature nor the research into this issue is as yet extensive, indications are that children are subject to periods of identity crisis particularly during their teenage years. Over the past years, these collective efforts have profoundly scarred the hearts and minds of too many Indian people.

Although the customs, laws and traditions of Indigenous peoples in Canada and Australia are characterised by diversity and complexity, the effects of the application of general child welfare law to those peoples have been sufficiently similar to warrant comparative analysis. Even then, not all effects speak to all peoples and the reader must bear this in mind. However, in undertaking this analysis I am not attempting to impose or suggest some pan-Indigenous culture or prescribe some pan-Indigenous solution. The purpose of my comparative analysis is merely to draw on some of the experiences of Indigenous persons in each jurisdiction in order to inform the reader of the need for law reform therein. Crucially, the direction and shape of that law reform must be determined by the Indigenous peoples affected.

---

5 Manitoba Community Services, No Quiet Place: Interim Report of the Review Committee on Indian and Metis Adoptions and Placements (Manitoba: Manitoba Community Services, 1983).
Officially and ostensibly, the practice of removing First Nations and Aboriginal children from their homes in the interests of ‘merging’, ‘absorbing’ or ‘assimilating’ those children into the non-Indigenous population ceased in the 1970s. However, general child welfare law today continues to disproportionately separate First Nations and Aboriginal children from their families and peoples.

Whether we talk about the 1910s or 1940s or 1970s or even the 1980s, the tragic scenario is that Aboriginal children have, in large numbers, been separated from their families. In the past the dominating force was the assimilation policy. Now, it is contact with the child welfare and juvenile justice systems which leads to many Aboriginal children being removed from their families.

In 1983, a comprehensive report prepared for the Canadian Council on Social Development by Patrick Johnston estimated that, while First Nations peoples constitute approximately 3.5 per cent of the total population, First Nations children represent almost 20 per cent of the total number of child welfare placements. In 1980–81, 4.6 per cent of all First Nations children were in agency care, compared with less than 1 per cent of the general Canadian juvenile population. By 1992–93, this figure had only declined to 4.1 per cent, despite the enactment in most provinces of legislation requiring that courts and other decision makers consider the cultural identity of a First Nations child in the assessment of his or her best interests. During the same period, the percentage of non-First Nations children in agency care declined to 0.6 per cent. Once apprehended, it is unlikely that a

---

8 Aboriginal Legal Services of WA Inc, Submission 127, quoted in Bringing Them Home, above n6 at 425.
9 Patrick Johnston, Native Children and the Child Welfare System (Ottawa: Canadian Council on Social Development, 1983) at Chapter 2. See also H P Hepworth, Foster Care and Adoption in Canada (Ottawa: Canadian Council on Social Development, 1980) at Chapter 8. It should be noted that, as with many statistics concerning First Nations, Inuit and Metis peoples in Canada, Johnston’s statistics relate for the most part only to First Nations peoples ordinarily resident on reserves. Statistics on services rendered to off-reserve Indians, non-status Aboriginal persons, Metis persons, and Inuit persons outside the Northwest Territories and territories over which native title exists or has been negotiated, are not gathered separately from data on the general population. Some of Johnston’s statistics on those areas are based on estimates provided by service agencies. Given the methodological difficulties associated with collecting comprehensive data, the statistics in Johnston’s report are the most recent and recognised available: see generally Canadian Royal Commission on Aboriginal Peoples, Gathering Strength (vol 3): Final Report (Ottawa: Canadian Royal Commission on Aboriginal Peoples, 1996) at 2.2.
10 Johnston, id at 57. See also Royal Commission on Aboriginal Peoples, ibid.
12 Royal Commission on Aboriginal Peoples, above n9 at 2.3. See also Statistics Canada, Population Estimates Division, ibid.
First Nations child will be adopted or fostered by a First Nations home. In 1983, only 22 per cent of First Nations placements were into First Nations homes.\textsuperscript{13} The effects of such dispossession and dislocation are devastating. First Nations children, torn and secluded from their cultural identity and heritage, are five to six times more likely to commit suicide than the general Canadian populace.\textsuperscript{14} According to one commentator, in 1991 only 10 per cent of First Nations youth graduated from high school, whereas 35–40 per cent engaged in alcohol abuse and 20–25 per cent in substance abuse.\textsuperscript{15} These indictable statistics are similar in the United States,\textsuperscript{16} where it has been acknowledged that ‘[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.’\textsuperscript{17}

The situation in Australia is remarkably similar. While Aboriginal children comprise only 2.7 per cent of Australian children, they comprised 20 per cent of children in care in 1993.\textsuperscript{18} Aboriginal children are particularly over-represented in long-term foster care arrangements and a high percentage of Aboriginal children in long-term foster care live with non-Aboriginal carers.\textsuperscript{19} In May 2001, the Victorian Child Care Agency stated that although Aboriginal peoples make up 0.6 per cent of Victoria’s population, Aboriginal children comprise 8.3 per cent of children in the protection system. More than half of those Aboriginal children who had been permanently removed were placed with non-Aboriginal families.\textsuperscript{20} A February 2001 report on Aboriginal child welfare in Victoria found that Aboriginal children are up to 10 times more likely to become involved in the child protection system than non-Aboriginal children.\textsuperscript{21} For many Aboriginal children, the effects of separation or removal are multiple and damaging. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families accepted evidence that Aboriginal children removed in childhood are twice as likely as those who were raised by their families or communities to have been arrested or to report current use of illicit substances.\textsuperscript{22}

The situation is bleak and demands fundamental reform of Canadian and Australian law and practice. In this respect, it is crucial to situate the analysis in the context of the broader issue of First Nations and Aboriginal self-determination. Many First Nations and Aboriginal peoples argue that the only culturally appropriate approach to child placement and custody determination involves First

\begin{itemize}
\item \textsuperscript{13} Johnston, above n\textsuperscript{9} at 176. See also Royal Commission on Aboriginal Peoples, above n\textsuperscript{9} at 2.2.
\item \textsuperscript{14} Above n\textsuperscript{3} at 76.
\item \textsuperscript{15} Above n7 at 1202.
\item \textsuperscript{16} M C McMullen, ‘Preserving the Indian Family’ (1981) 2(6) Children’s Legal Rights Journal 32 at 34.
\item \textsuperscript{17} Ibid.
\item \textsuperscript{18} Above n6 at 430.
\item \textsuperscript{19} Id at 429.
\item \textsuperscript{20} J Davies, ‘Black Child Abuse Alarm’, \textit{The Age} (Melbourne) (9 May 2001) at 1 (hereinafter ‘Black Child Abuse Alarm’).
\item \textsuperscript{22} Above n6 at 13.
\end{itemize}
Nations and Aboriginal peoples making decisions for themselves from within their own legal, political, cultural and social frameworks.

The Aboriginal right of self-government encompasses the right of Aboriginal nations to establish and administer their own systems of justice, including the power to make laws within the Aboriginal nation’s territory.

The right to establish a system of justice inheres in each Aboriginal nation. This does not preclude Aboriginal communities within the nation from sharing in the exercise of this authority. It will be for the people of each Aboriginal nation to determine the shape and form of their justice system and the allocation of responsibilities within the nation.23

I support the goal of eventual transfer of responsibility for child welfare law, policy and practice to the Aboriginal and First Nations communities to which such law, policy and practice relate.24 However, for as long as the dominant legal paradigm resists legal pluralism and First Nations and Aboriginal peoples are denied the right to self-determination — including the right and resources to apply their own child placement and protection principles and laws, and to manage their own child welfare agencies and services — there is a need to adapt the prevailing best interests principle. Moreover, this need will subsist for some time after the right to self-determination is meaningfully accorded:

Unless we are given the right and we are entrusted and given the opportunity to build up mechanisms within our community to deal with these issues there is no end in sight.

If we are going to break down [the dominant] system there has got to be a beginning where the Aboriginal community is able to build up the mechanisms.25

Even when the goal of self-determination is achieved, it is possible that First Nations and Aboriginal persons living in a context removed from customary principles, laws and services will continue to be dealt with in the mainstream legal system. In some instances, the exercise of the right to self-determination may

---


24 In the United States, the *Indian Child Welfare Act of 1978* (25 USC 1901 et seq) goes at least some way towards achieving that goal. For example, s1911(a) of the Act provides that ‘An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.’

25 Michael Mansell, Tasmanian Aboriginal Centre, evidence 325, quoted in *Bringing Them Home*, above n6 at 576.
involving First Nations or Aboriginal communities opting to submit child welfare law and practice to the mainstream legal system, as the level of responsibility for child welfare which First Nations and Aboriginal communities accept should be determined by those communities themselves. Indeed, it is arguable that the option to be dealt with by the mainstream legal system should remain available to all First Nations and Aboriginal persons regardless, including those with the capacity to be dealt with by a specifically First Nations or Aboriginal framework.

In light of the above, this article will examine whether the best interests principle can be adapted and applied by courts and decision makers so as to acknowledge the unique nature of Indigenous culture, identity and child care practices, and the concomitant conceptions of where a First Nations or Aboriginal child’s best interests may lie. I will suggest that, given the distinctive position of First Nations and Aboriginal peoples and their relationship with the child welfare system, the legal response should be similarly distinct. The standards and interests of the dominant paradigm have been applied to First Nations and Aboriginal peoples, particularly children, with insidious effect. I will contend that, given the extent to which culture is constitutive of Indigenous identity and the capacity of Indigenous peoples to be free to conceive and pursue meaningful lives, and given the fundamental importance of children to the survival of First Nations and Aboriginal culture, the ‘best interests of the community’ must inform the ‘best interests of the child’ in placement and custody decisions.

I will examine two approaches in this respect. The first approach articulates a separate ‘best interests of the community’ test to be balanced on the placement or custody determination scales with that of the ‘best interests of the child’. The danger here is that such an articulation may reinforce the notion that the interests of the First Nations or Aboriginal community and its children are somehow separate and distinct rather than interdependent and interrelated. The second approach incorporates the consideration of the ‘best interests of the community’ into that of the ‘best interests of the child’. This approach is cognisant of the ineluctable interdependence of First Nations and Aboriginal culture, identity and survival. However, existing jurisprudence demonstrates, it suffers from the problem that where community interests are not separately articulated and considered, they are likely to be subverted or ignored.

The article will then turn to focus on the broad dangers of using the ‘best interests of the community’ to inform the ‘best interests of the child’. Such dangers include: the obvious physical, emotional and psychological dangers of leaving a child in a potentially abusive environment; the danger of ‘freezing’ culture and community; the danger of elevating collective rights at the expense of denying individual rights; the danger to First Nations and Aboriginal communities of submitting their interests to the definitional power of the courts; the danger of removing a child from a family with which s/he has bonded and is comfortable; and the danger of imposing an identity on the child when the very role of rights and the ‘best interests of the child’ is to make space for people(s), particularly children, to conceive of and create their own identities. I will argue that these risks militate against community interests peremptorily dictating the outcome of First Nations
or Aboriginal child placement and custody decisions. The aim of meeting the best interests of both the child and the community may be better achieved through the incorporation of a ‘community’s best interests’ analysis into the ‘child’s best interests’ analysis.

The article will conclude that, while giving greater and more explicit consideration to ‘community interests’ may serve the purpose of protecting and promoting Indigenous identity, interests and rights, it does little to address the pressing problems underlying the disproportionate number of First Nations and Aboriginal children who come into contact with the child welfare system. Law and society must address the pressing issues of racism, cultural insensitivity and imperialism, poverty, unemployment, poor education, ill-health, and substance abuse afflicting First Nations and Aboriginal communities if the ‘sacred tree’ is to survive.

2. First Nations and Aboriginal Children and the ‘Best Interests of The Child’ Test

The primacy of the ‘best interests of the child’ principle in relation to all institutional, administrative, judicial and legislative responses to the care of children is recognised in the United Nations Convention on the Rights of the Child at Article 3(1) as follows:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 26

In the landmark case of King v Low, the Supreme Court of Canada articulated the ‘best interests of the child’ principle thus:

[T]he dominant consideration to which all other factors must remain subordinate must be the welfare of the child. That is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he [sic] will be equipped to face the problems of life as a mature adult. 27

Writing extra-curially, Justice Chisholm of the Family Court of Australia has explained the ‘best interests of the child’ as covering.

27 King v Low [1985] 1 SCR 87 at 101.
…a wide range of matters. It is not to be measured by money only, nor by physical comfort only … The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded … [It includes] all factors which affect the future of the child … It includes the child’s happiness … It includes both the immediate well-being of the child and matters relevant to the child’s healthy development.\(^{28}\)

On its face, this test appears to permit consideration of the constitutive importance to a First Nations or Aboriginal child of remaining within his or her own community. This is particularly so when, as in the Australian case of Re CP,\(^{29}\) judicial notice is taken of the myriad of spiritual and emotional disadvantages associated with not bringing up an Aboriginal child within his or her own community of kin. Such disadvantages might include:

\[
\text{...the loss of relations with a vast range of kin who will perform a wide variety of roles associated with social relations, emotional and physical support, educative knowledge, economic interactions and spiritual training ... loss of knowledge which stems from the social interactions mentioned above; ambiguities in or loss of identity with one’s own kin and country, features I understand as essential to identity from an Indigenous point of view.}\(^{30}\)
\]

The reality of the application of the test is, however, somewhat different:

There can be little argument that the “welfare principle” should apply in cases of Aboriginal children. The problem, however, is who decides what is in the best interests of an Aboriginal child and what standards are used in reaching this decision.\(^{31}\)

As Kline notes, the application of the test in the determination of placement decisions and custody disputes involving First Nations children has excluded wholesale any account of the child’s identity and culture; placed a heavy evidentiary burden on any applicant seeking to assert the relevance of First Nations identity and community; and conceptualised as wholly distinct the notions of culture, context and the child’s best interests.\(^{32}\)

To understand the necessity of reconceptualising the ‘best interests of the child’ test in respect of First Nations and Aboriginal children, it is appropriate to explore the fundamental links between culture and identity and the concomitant

---

\(^{28}\) Submission 645 at 5–6, quoted in Bringing Them Home, above n6 at 482. See also B and B [1997] FLC 84,171 at 84,197; AMS v AIF and AIF v AMS (1999) 199 CLR 160.
\(^{29}\) (1997) 21 Fam LR 486.
\(^{30}\) Id at 502 [emphasis added].
importance of family and community to the meaningful existence and survival of First Nations and Aboriginal children.

3. **Community, Culture and Indigenous Identity**

That people are bound in a definitive way to their own cultural community and that this community provides the normative spectacles through which we see the self and what it means for the self to be free, can be heard in the proud but poignant and pained words of Wadjularbinna Nulyarimma. She speaks as an Aboriginal Australian and a woman. She tells the story of the rape of her mother by white men as a result of which she was conceived — the only mixed ancestry child in an Aboriginal family. She tells the (not uncommon) story of how her mother rubbed goanna fat and charcoal into her skin to make her blacker but how, nonetheless, she was stolen from her family and put in a missionary home where she was forbidden to speak her own language. She tells how she came to marry:

I was just called in one day by the superintendent, “we’re marrying you off into a white family”. And I was absolutely shocked. “No, I don’t want to go”, I said, “I don’t want to go”. “This is the best thing for you. You are not a black person; you have white blood in you”. I came from a black woman’s womb. They are my family, my people and I have some white person, superintendent, telling me what is best for me and his best for me to marry into a white family was added stress, added pain, added trauma.33

People are bound — in a very essential way — to the constituents of their context, delineated in terms of, inter alia: race, gender, ethnicity, sexuality, class, physical and mental firmity, religious belief, and community and culture. The terms of a person’s context are a very constitutive part both of who that person is and the extent to which they are afforded the fundamental right of conception and choice of the good life. As Will Kymlicka has averred:

In deciding how to lead our lives we do not start de novo, but rather we examine “definite ideals and forms of life that have been developed and tested by innumerable individuals, sometimes for generations.” The decision about how to lead our lives must ultimately be ours alone, but this decision is always a matter of selecting what we believe to be the most valuable from the various options available, selecting from a context of choice which provides us with different ways of life.34

Jeremy Waldron has argued that, although choice takes place in a cultural context among options that have culturally defined meanings, this context can unproblematically derive from a variety of cosmopolitan cultural sources.35 The destructive experiences of the Stolen Generations in both Canada and Australia, however, testify otherwise:

---

34 Will Kymlicka, Liberalism, Community and Culture (1989) at 165 (citations omitted).
We can’t just transplant people from one culture to another, even if we provide the opportunity to learn the other language and culture. Someone’s upbringing isn’t something that can just be erased; it is, and will remain, a constitutive part of who that person is. Cultural membership affects our very sense of personal identity and capacity.36

Confidence in our identities and capacities, whether as individuals or members of a community, is largely contingent upon comprehension of ourselves in relation to our cultures:

[M]eaningful affiliations during childhood contribute to a personal sense of self … Those affiliations … interact with each other to create a complex web within which the child’s identity evolves … [C]onnections are crucial to developing a sense of self.37

As Webber contends, cutting peoples off from their cultures and histories has a devastating impact upon the self, dividing peoples from ‘the wealth of experience and reflection that constitutes the language in which we understand ourselves in the world’.38

This reality is of especial importance to First Nations and Aboriginal children, many of whom, although born into a biological family, are also born into a kinship network, clan or band.39 It is the extended family that can give true shape to the First Nations or Aboriginal child’s character and identity, both as an individual and as part of a community.

… [E]ven though I had a good education with [adoptive family] and I went to college, there was just this feeling that I did not belong there. The best day of my life was when I met my brothers because I felt like I belonged and I finally had a family.40

While clearly individuals are constitutive of their community, what is often ignored is the extent to which the First Nations or Aboriginal community may, at least partially, constitute the individual: ‘Indian children develop a strong sense of community because individual goals intertwine with the community goals.’41 It is for this reason that the well-being of the community and the well-being of the individual are so interdependent.42 Indeed, ‘failing to recognise extended family

40 Confidential submission 384, Tasmania, quoted in Bringing Them Home, above n6 at 13.
41 Above n39 at 252.
and extended-responsibility patterns might be the greatest failing of the child protection system, as its consequence has been the removal of children not merely from their natural parents but from the community altogether.43

Ironically, it is recognition, not ignorance, of the interdependence of First Nations and Aboriginal culture, community and identity that has shaped — and continues to shape — much Aboriginal child welfare policy. Policies of child removal evince ‘the way in which the state implicitly understood — and attacked — the significance of children’s membership to the continuation of the communities in question’ and, it might be added, to the continuation of the children themselves.44 Residential schools in both Canada and Australia aimed to sever the constitutive cultural ties between First Nations and Aboriginal children and their families, and by extension, their communities.45 No less was required to ‘kill the Indian in the child’ or to solve the ‘Indian problem’.46 Russell Means, an Oglala Lakota patriot, writes of the effect of such separation on his father and his community:

In the boarding schools, Indians were taught to abuse other Indians, a legacy of violence that is now firmly ingrained among Indians on reservations, where incest and child abuse, once unthinkable among my people, are rampant. Through such beatings and threats … a boarding school took away my father’s Lakota language skills, and with them, most of his identity.47

The residential school and missionary home experiences affected each First Nations and Aboriginal child differently. Each child experienced and coped with the varied abuses in his or her own way.48 What was, and remains, common to their experiences however, is that the children, the families, and their communities suffered. ‘The impact on the children and their families was no less than devastating. Of the children that survived, many were rendered dysfunctional.’49 In Australia, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families found that in most cases, the removal of Aboriginal children from their families had ongoing impacts and compounding effects causing a cycle of psychological and emotional damage from which it is extremely difficult to escape.50 This experience is consistent with Neil Bissoondath’s observation that a sense of one’s race and culture is essential to an

43 Above n3 at 77.
46 D Soroka, ‘Residential Schooling: Judicial Developments and Spiritual Healing’, address to the Aboriginal Law Student’s Association, McGill Faculty of Law, 15 November 1999.
48 See generally Bringing Them Home, above n6 at 178.
49 Above n46. See generally Stolen Generations Case, above n36.
50 Bringing Them Home, above n6 at 178.
individual sense of self.\textsuperscript{51} The violence, anger, alcoholism, substance abuse and self-destructive behaviour rife amongst First Nations survivors of the residential school holocaust in Canada are testimony to the assertion that ‘confusion over one’s ethnicity, the desperate search for a personal centre and a meaning to one’s life’\textsuperscript{52} leads to a kind of despair and low self-esteem.\textsuperscript{53} Contemporaneously, First Nations and Aboriginal children placed in non-First Nations or Aboriginal homes, even those cared for by ‘well intentioned foster or adoptive parents’ are too often similarly subject to ‘ethnic confusion and a pervasive sense of abandonment’.\textsuperscript{54}

I’ve got everything that could reasonably be expected: a good home environment, education, stuff like that, but that’s all material stuff. It’s all the non-material stuff that I didn’t have — the lineage. It’s like you’re the first human being at times. You know, you’ve just come out of nowhere; there you are. In terms of having a direction in life, how do you know where you’re going if you don’t know where you’ve come from.\textsuperscript{55}

Although devastating, the First Nations and Aboriginal experiences of residential schools, missionary homes and child removal and placement in non-Indigenous homes are, paradoxically, perhaps the most powerful and simplest exposition of the interdependence of First Nations and Aboriginal community, culture, identity and meaning. The natural state and right of peoples to be free is confirmed, according to Noam Chomsky, by ‘the fact that, despite all efforts to contain them, the rabble continue to fight for their fundamental human rights’.\textsuperscript{56} For at least one hundred years First Nations and Aboriginal children had their language and culture literally beaten out of them.\textsuperscript{57}

I got told my Aboriginality when I got whipped and they’d say, “You Abo, you nigger”. That was the only time I got told my Aboriginality.\textsuperscript{58}

All were victims, many perished,\textsuperscript{59} but some survived. And, with the surviving victims and the communities from which they were torn, many of the First Nations and Aboriginal cultures have lived on. Duclos is correct when she writes that, ‘[p]eople throughout history have fought successfully to preserve their cultures against all odds, in the face of the most unyielding oppression.’\textsuperscript{60} In no case has

\begin{flushleft}
\textsuperscript{51} Neil Bissoondath, \textit{Selling Illusions: The Cult of Multiculturalism in Canada} (1994) at 103.
\textsuperscript{52} Ibid.
\textsuperscript{53} Above n46.
\textsuperscript{54} \textit{Indian Child Welfare Act} of 1977: Hearing on s1214 before the Senate Select Committee on Indian Affairs, 95\textsuperscript{th} Congress, 1\textsuperscript{st} Session (1977) quoted in Russell Barsh, ‘The Indian Child Welfare Act of 1978: A Critical Analysis’ (1980) 31 \textit{Hastings LJ} 1287 at 1291. See also above n33 at 625.
\textsuperscript{55} Confidential submission 136, Victoria, quoted in \textit{Bringing Them Home}, above n6 at 157.
\textsuperscript{56} Confidential submission 136, Victoria, quoted in \textit{Bringing Them Home}, above n6 at 13.
\textsuperscript{57} Confidential evidence 139, Victoria, quoted in \textit{Bringing Them Home}, above n6 at 13.
\textsuperscript{58} Noam Chomsky, \textit{Deterring Democracy} (1992) at 398.
\textsuperscript{59} Soroka, above n46.
\textsuperscript{60} Noam Chomsky, \textit{Deterring Democracy} (1992) at 398.
the oppression been more systemic and sustained than in the case of First Nations and Aboriginal peoples. Yet, First Nations and Aboriginal peoples continue to assert their identity. Indeed, the very assertion of identity seems to me an assertion of dignity — a source of strength with which to face persistent discrimination by, and exclusion from, the dominant society.61 The positing of First Nations and Aboriginal identity and the tenacious survival of First Nations and Aboriginal cultures strongly demonstrates that culture is inseparable from the identity, vision and survival of First Nations and Aboriginal peoples. In the words of Mudrooroo, a leading Aboriginal writer, activist and commentator:

This is the unity which underlies the diversity of Us Mob — the family, the kinship patterns which I find in all the countries I have visited. This is the enduring structure of Us Mob which continues to survive, though it has been constantly under threat from the Master, who sought to destroy it and replace it with his own type of family in which he was the ruler, the father, the protector, the station owner, the missionary, the police sergeant, the premier, the prime minister, the king.62

Seen this way, the maintenance of familial and community links is absolutely fundamental if First Nations and Aboriginal children are to be allowed to ‘be who they are’.63

4. Raised White: The Experiences of Indigenous Children in Non-Indigenous Care

The fundamental roles played by culture and community membership in a First Nations or Aboriginal child’s conception of meaning and self-worth are particularly important when First Nations or Aboriginal identity, whether assumed by the child or not, is imposed from outside. Here, a First Nations or Aboriginal child will often be caught in a dislocating contest between normative spheres.64 Consider for example, the experience of an Aboriginal child who suffers from discrimination on the ground of his or her Aboriginality but does not identify with or receive support from his or her Aboriginal culture.65 Ms CMB, a First Nations woman from Bella Coola, was adopted as an infant by a non-First Nations couple in Dawson Creek. She had troubled teenage years resulting in drug and alcohol abuse:

The Ministry of Social Services took me from my mother at birth on the 9th day of March 1975 and sentenced me to a life without an identity. This is an identity...
that I searched for twenty years until I returned to my family 3 years ago … My daughter … like myself at one point in her life … will face racism as she is different than the others on the reserve. I have already faced prejudice in Bella Coola because I am different (I was raised white) … I am an apple, red on the outside but, pure white on the inside. 66

As Karst maintains, ‘the individual’s identification with cultural groups … plays a major part in the process of self-definition. In defining ourselves, we rely heavily on other’s views of us … and on our connections with others.’ 67 For First Nations and Aboriginal children — so often viewed as a group, treated as a group, and oppressed as a group — external identification may become both socially and legally constitutive. Some sense of culture and community is essential to a child if she is going to interpret herself in a world interpreting her. 68 Consider the tragic example of Cameron Kerley, a First Nations child removed from his family and community, who today languishes alone in a prison cell as punishment for the brutal murder of his adoptive father following years of sexual abuse:

On bad days he wishes he’d never been born. On good days he dreams of another life, “a house, a job, a car, some quiet place in the country.” He’s convinced that someday, somehow, he’ll find a place where he belongs. 69

Many children who know they are of First Nations or Aboriginal descent have ‘considerable difficulty in growing up in white society’. 70 An Aboriginal woman removed at eight years of age and placed in Cootamundra Girls’ Home reflects:

Most of us girls were thinking white in the head but were feeling black inside. We weren’t black or white. We were a very lonely, lost and sad displaced group of people. We were taught to think and act like a white person, but we didn’t know how to think and act like an Aboriginal …

We were completely brainwashed to think only like a white person. When they went to mix in white society, they found they were not accepted because they were Aboriginal. When they went and mixed with Aborigines, some found they couldn’t identify with them either, because they had too much white ways in them. So they were neither black nor white. They were simply a lost generation of children. I know. I was one of them. 71

70 Frank Bates, ‘Maintaining a Child’s Links with Native Parents as a Factor in Custody Decisions’ (1986) 35 ICLQ 461 at 462. See also above n54 at 1290–1291.
71 Confidential submission 617, New South Wales, above n6 at 152.
Zylberberg identifies two factors that may exacerbate the confusion of First Nations and Aboriginal children in non-First Nations or Aboriginal families and communities with respect to critical notions of self and belonging.72

First, racial prejudice against First Nations and Aboriginal peoples remains common. First Nations and Aboriginal children in non-First Nations or Aboriginal families must stand alone in the struggle against this prejudice. An adopted Aboriginal woman reflects:

Oh I got heaps at school. "Abo". "Black". It’s really hard if you don’t come from a black family, ’cause you can’t go home and say, ‘Mum, they called me an Abo’.

If you did she’d say “Oh the silly white bastards, don’t worry about them”. That would have made me feel proud of what I was. But if I went home and said “They called me an Abo today” my foster parents would either just say nothing or they’d say ‘You have to put up with it’. I used to think I was a real reject. I ended up doing bad at school just because of it.73

Absent similar life experience, ‘even the best intentioned foster or adoptive parents will be unable to offer more than sympathy’.74 Given the myriad forms in which people oppress and are oppressed, even those parents with experience of discrimination and oppression may not be able to respond adequately.75 Faced, however, with fundamental challenges to their senses of self, identity, worth and possibilities, First Nations and Aboriginal children in these abusive situations need more than sympathy; ‘they need the understanding and support that come from the ability to fully empathise, to truly know what the child is living through.’76

Second, despite a history of attempted co-option by, and assimilation into, the dominant paradigm, many First Nations and Aboriginal communities have retained distinctive ways of talking to and about themselves and society.77 These conversations are fundamental to First Nations and Aboriginal children both as ‘interpreters’ and ‘interpreted’. The extent to which First Nations and Aboriginal children who are unable to listen to or participate in these conversations experience solitude and dislocation must not be underestimated.78 The case of an Aboriginal man removed and placed in a Church of England boys’ home in the 1950s is illustrative:

When we left Port Augusta, when they took us away, we could only talk Aboriginal. We only knew one language and when we went down there, well we had to communicate somehow. Anyway, when I came back I couldn’t even speak my own language. And that really buggered my identity up. It took me 40 odd years before I became a man in my own people’s eyes, through Aboriginal law. Whereas I should’ve went through that when I was about 12 years of age.79

---

72 Above n3 at 78–79.
73 Adopted Aboriginal woman quoted in Read, above n45 at 41.
74 Above n3 at 78.
76 Above n3 at 78.
77 See generally, above n38.
78 Above n3 at 78–79.
79 Confidential evidence 179, South Australia, above n6 at 203.
As Shauna Van Praagh has written:

[C]ommunities, tangibly present in the lives of many children, may play a positive role in their growth, development, and self-perception. Severing ties between even very young children and other members of their … community or communities may cut off an important source of personal development and of intellectual, imaginative and social enrichment.80

On rare occasions, the courts have been sensitive to the ineluctable links between culture, self-identification and external identification. In *Re HI81*, the Court ordered that it was in the best interests of the First Nations child that the child’s mother and grandmother be granted access, notwithstanding a determination that the mother was not a fit parent, because the child needed exposure to the First Nations community:

The child is a member of a visible minority. He must, some day, adjust to that fact. It is a fair and respectable point of view that adjustment will be made easier if he has grown up in a happy acquaintance with the native community and the native culture.82

In *NH and DH v HM, MH and the Director of Child, Family and Community Services*, the Court of Appeal for British Columbia overturned the decision of a trial judge to award custody of a First Nations child to the child’s maternal adoptive grandparents rather than his First Nations biological grandfather. The Court of Appeal was of the view that ‘the trial judge placed undue emphasis on economic matters and underemphasised ties of blood and culture’.83 The Court of Appeal stated that:

While there are doubtless many successful instances of cross-cultural adoption and custody situations involving children of aboriginal descent and non-aboriginals, there also exists a very considerable history of unsuccessful outcomes.84

The Court of Appeal further stated that:

… the words of Scott CJM in the recent case of *EJT v PMVP and TVP*, (1996) 110 Man R (2d) 219 (Man CA) at 233, are apposite here:

… no authority is required to make a convincing argument that culture and heritage are significant factors in the development of a human being’s most fundamental and enduring attributes. For anyone, aboriginal or otherwise, they

80 Above n44 at 177. See also above n37 at 336, 357.
81 [1984] 3 WWR 223 (Alta CA).
82 Id at 234–235 (Kerans JA).
84 Id at [16].
are the stuff from which a young person’s identity and sense of self are developed.85

In *Sandy v Nootchai*,86 the Ontario Provincial Court, in awarding custody of a First Nations child to a maternal aunt rather than a foster mother who had cared for the child for over a year, took this analysis a step further:

> Familial relationships among kin are important for they consolidate a sense of identity which otherwise may be lacking in a child’s upbringing … Donna Nootchay [the maternal aunt] would ensure that the child would experience and be raised as best she is able in the proud tradition of a noble past with support of relatives and extended family. *His past will become part of self. That past struggles in the ferment of the present, but then do we not all? The Ojibway past is the present of all and the future of all.*87

A decision of the Full Court of the Family Court of Australia — *In the Marriage of Goudge*88 — expresses a similar reality:

> [T]he matters … are not to be seen as the remnants of a vanishing culture which will be obliterated in time by a process of assimilation. On the contrary they are to be seen as important in regard to the sense of identity and development of these children, as part of their links to an Aboriginal culture and heritage which has come to them through their mother.89

Applied in this way, the ‘best interests of the child’ test allows First Nations and Aboriginal conversations with past, present and future to continue. Unfortunately, however, these cases are exceptional rather than paradigmatic. Too often, as the cases discussed below illustrate, consideration of the welfare of the child is abstracted from consideration of the child’s community and culture. The common adverse (if not devastating) effects of the placement of First Nations and Aboriginal children in non-First Nations or Aboriginal homes demand that we ask the question as to whether the best interests of the child may actually lie in the promotion and protection of First Nations and Aboriginal rights, cultures and communities. I will suggest that our answer to this question will very much depend upon the extent to which we either celebrate and respect, or decry and subvert, culture and difference.

85 Id at [18]. See also above n47 at [19]; *In the Matter of the Children NP and BP; NP and SM v The Director of Child, Family and Community Services*, Supreme Court of British Columbia, Prince George Registry, Docket 03999 (5 February 1999); <http://www.courts.gov.bc.ca/jdb%2Dtxts/se99/03/s99%2D0318.txt> (5 November 2000) at [23] (hereinafter *In the Matter of the Children NP and BP*).
86 *Sandy v Nootchay* [1989] 3 CNLR 190.
87 Id at 196 [emphasis added].
88 [1984] FLC ¶91–534 (hereinafter *Goudge*).
89 Id at 79, 319 (Evatt CJ).
5. ‘Children are Our Heartbeat, Our Future’: First Nations and Aboriginal Community Welfare

Children are our heartbeat, our future. When our children are taken away we have our spirituality taken away, our self-esteem taken away, our belief in human nature and life itself taken away.90

Just as the future welfare of First Nations and Aboriginal children is, to a significant degree, dependent upon the future welfare of their communities and cultures, so too is the future welfare of such cultures and communities dependent upon that of their children.91 Children are the future of First Nations and Aboriginal communities — repositories and transmitters of culture and identity.92 Russell Means talks of the way in which his kin and community imbued him with a sense of identity and meaning:

Before I was six, my grandparents gave me a sense of my heritage, of my duties to my people and to my culture … Because of my extended family — especially Grandpa John Feather — there has always been a spiritual dimension to my life.93

As First Nations and Aboriginal communities are robbed of their children, both the children and the communities are robbed of their futures.94 When First Nations and Aboriginal children are removed from their homes and communities:

The traditional circle of life is broken. This leads to a breakdown of the family, the community and breaks the bonds of love between the parent and the child. To constructively set out to break the Circle of Life is destructive and is literally destroying native communities and Native cultures.95

The removal of First Nations and Aboriginal children from their homes has a devastating impact upon those who remain. The family unit, so often the primary vehicle for the transmission of identity, meaning, love and, ultimately, meaningful life, is destroyed.96 An Aboriginal woman removed in the late 1950s with her three siblings recalls:

---

90 A Delaronde of the Mohawk Nation, ‘Residential Schooling: Judicial Developments and Spiritual Healing’, address to the Aboriginal Law Student’s Association, McGill Faculty of Law, 15 November 1999.
91 Above n39 at 250.
92 Above n69 at 8, 12. See also Canadian Royal Commission on Aboriginal Peoples, above n9 at 2.2.
93 Above n47 at 535.
94 See above n37 at 336 for a more detailed exposition of the interdependence of the futures of children and (religious) communities:
‘For any given religious community — whether large, generally integrated, and liberal, or small, insulated, and traditional — ongoing existence and strength depend literally and rhetorically on “its” children. Accordingly, it is extremely important to each community that it be able to welcome and retain child members. At the same time, the affiliations that children have with their communities (for example, cultural, ethnic, and linguistic, as well as religious) have a significant impact on their development and sense of identity.’
95 J Hill, Remove the Child and the Circle is Broken (1983) at 55 (quoted in Monture, above n69 at 3).
96 I acknowledge also recent research that has clearly established the link between domestic violence and homicide, revealing the family relationship as potentially the most lethal in society: see generally Julie Stubbs & Alison Wallace, ‘Protecting Victims of Domestic Violence’ in Mark Findlay & Russell Hogg (eds), Understanding Crime and Criminal Justice (1998). See also above n44 at 178.
My parents were continually trying to get us back. Eventually they gave up and started drinking. They separated. My father ended up in jail. He died before my mother. On her death bed she called his name and all us kids. She died with a broken heart.97

Often, the factors and problems resulting in the removal are exacerbated.98 With children gone, the shared goal of raising children disintegrates. Parents give up: ‘if you lose your children you are dead.’99 As the family disintegrates, so too the community — that ‘meaningful space and touchstone for identity formation and personal network [which] depends on … the lives and development of its youngest members’100 — disintegrates. The net effect, felt both by those who are removed and those who remain, is a sense of instability, loss, confusion and abandonment.

Because the family is the most fundamental economic, education, health-care unit in society and the centre of an individual’s emotional life, assaults on Indian families help cause the conditions that characterise those cultures of poverty where large numbers of people feel hopeless, powerless and unworthy.101

Carasco discusses the impact on those First Nations and Aboriginal children who are removed:

[M]any … grow up being so dislocated in terms of their culture, their race and their family, that they have no clear sense of their identity and no home to which they can return: the circle has been broken.102

Russell Means talks of the impact on those who remain:

We are losing our roots. Nowadays, when I meet so-called traditional Indians and they share their culture, they always say their grandmothers or grandfathers told them this or that. Only a few years ago, the elders I met never felt the need to justify themselves by citing experts who were no longer around. They said, “This is the way it is. This is the way things are.” They knew who they were and what they were.103

First Nations and Aboriginal communities know what is at stake. They know that there is nothing more vital to their dignity, integrity and continued existence than their children.104 They know that a horrifying number of families and communities are broken by the removal of their children, and that an alarming proportion of these children are placed in non-First Nations or Aboriginal homes, thereby depriving the children of a constitutive part of their identity and the

---

97 Confidential submission 106, New South Wales, above n6 at 213.
98 Above n16 at 34.
99 Above n54 at 1292.
100 Above n44 at 174.
103 Above n47 at 539 [emphasis added].
104 See generally, above n6 at 212–221.
community of its fundamental right to self-determination and survival. They know that, historically, child removal policies were predicated on assimilation and cultural genocide and that, contemporaneously, the effect — if not the intention — is much the same.

The challenge for non-Indigenous persons, particularly non-Indigenous lawmakers, is to confront this knowledge. It must be recognised that the law — and its institutions — exercises an often insidious normative power. The ‘otherisation’ and consequent devaluation of First Nations and Aboriginal cultural and social standards — particularly as they relate to the care, education, protection and welfare of children — leads to the removal and devastation of First Nations and Aboriginal children and their communities. Non-Indigenous persons must recognise their role in the construction of the ‘other’ and the consequent destruction of traditional First Nations and Aboriginal cultures and conversations. We must acknowledge the difference that difference makes in formulating a response that reflects adequately the myriad unique ways in which First Nations and Aboriginal peoples understand and talk about life. As Chief Jake Swamp has stated:

Our cultures, our religions, our governments and our ways of life are all in danger. We are not simply individuals with individual groups. We are a peoples ... For these reasons we face unique problems. Special measures are required to meet these problems. If these measures are not taken, more and more Indigenous people may be destroyed their cultures vanished forever.

6. ‘Best Interests’ Ideology and the Abstraction of Indigenous Children, Community and Culture

If we are to survive as a people our future must be our past — rejoining the family circle. Return to our traditional clan system. Because it resolves conflict peacefully, the clan system also ensures individual liberty. The extended family and the core family unit ... are essential in building community self-determination, and it is the community that provides the only means for us to preserve the institutions that traditionally guided every aspect of our lives as human beings.

The dominant conceptualisation of best interests ideology as applied by the courts tends to construct the best interests of First Nations and Aboriginal children as separate, distinct and abstracted from their constitutive familial, cultural and racial contexts. The jurisprudence of First Nations and Aboriginal child custody

105 See for example, above n37 at 359.
106 See generally, above n69 at 6.
108 Above n47 at 542. This contention was also central to views expressed by many Aboriginal elders — including Isaac Brown, Theodora and Bill Harney — at ‘Where the Waters Meet: A Conference on Community Solutions to Indigenous Youth Justice’ (Mandorah, Northern Territory, 1–3 June 2001) [conference papers forthcoming].
109 See generally Kline, above n32.
determinations and placements overwhelmingly ‘privileges an understanding of children as decontextualized individuals whose interests are separate and distinct from those of their families, communities, and cultures’. As Kline notes, this conceptual construction of First Nations and Aboriginal children as separate from their cultures and communities may tend to deproblematise their actual removal. Hence, in Natural Parent v Superintendent of Child Welfare, the statement of the trial judge that the case ‘could only be resolved in the light of the best interests of the child himself … considered as an individual’ meant considering the child ‘not a part of a race or culture’. By decontextualising the First Nations child, the Court could blind itself to the probably devastating impact of removal on the sense of identity, stability and belonging of the child, his family and his community.

The abstraction of First Nations and Aboriginal children from their families and communities both reflects and reinforces the law’s normative construction of the ‘ideal environment’ for the upbringing of a child; namely, an environment involving two biological parents, a stable home, and financial security. By constructing First Nations and Aboriginal children as ‘not a part of a race or culture’, and by conceptualising custody disputes involving First Nations and Aboriginal children as having ‘nothing to do with race, absolutely nothing to do with culture … nothing to do with ethnic background’, the courts can deny distinctly First Nations and Aboriginal conceptions of kinship and child-rearing structures or practices. As Hudson and McKenzie argue, the child welfare system devalues Indigenous culture by not recognising and using traditional Indigenous systems of child protection, making judgments about child care based on dominant norms, and persistently using non-Indigenous foster and adoption placements.

A. Parenting Roles and Extended Familial and Kinship Obligations

In both First Nations and Aboriginal communities, responsibility for child welfare and nurturing often resides with an extended family or kinship network and the community as a whole. Parenting roles, and nurturing, teaching and socialising responsibilities are often widely shared in Indigenous communities. In the case of the Mohawk Nation, for example, the restriction of the term ‘mother’ to mean ‘biological mother’ does not reflect the reality that all mothers within a clan are mother

---

110 Id at 395–396.
111 Id at 396.
112 [1976] 2 SCR 751 at 768 (hereinafter Natural Parent).
113 See, for example, Canada (Attorney-General) v Mossop (1993), 100 DLR (4th) 658. See also NH and DH v HM, above note 83 at [50].
114 Above n112 at 768.
117 Above n6 at 451.
to all of the children of that clan. Similarly, in the case of the Nyungar mob in Australia, in which all communities are divided into Wardangmaat or Manitjamaat moieties, the dominant understanding of ‘mother’ or ‘father’ fails to recognise that a Manitjamaat woman with a Wardangmaat mother and a Manitjamaat father would accept all Wardangmaat women as ‘mother’ and all Manitjamaat men as ‘father’.

By privileging the dominant conception of ‘parent’, child welfare law and practice relegates the rights of other Indigenous family members and the community itself, and conflicts with many First Nations and Aboriginal laws and values. In Australia, for example, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families reported that, in reported cases, the Family Court of Australia has yet to prefer an Aboriginal child’s grandparent over that child’s biological, non-Aboriginal mother or father.

B. Mobility and Autonomy

In the case of many First Nations and Aboriginal nations in Canada and Australia, the privileging of stability of residence systemically entrenches a bias against the ‘Aboriginal practice of mobility of children amongst responsible adults and their households’. Thus, for example, in *DH and NH v HM and MH*, the trial judge awarded custody of Ishmael, whose mother was a member of the Swan Lake Band of Manitoba, to his adoptive non-First Nations grandparents (NH and DH) over his biological First Nations grandfather (HM). Justice Bauman held that:

In favour of DH and NH are the ties of adoption, their obvious love and affection for Ishmael, their desire and demonstrated willingness to encourage Ishmael in the appreciation of all facets of his heritage, the stability of their home and their apparent economic ability to provide Ishmael with many advantages.

... 

In favour of HM are ties of blood, his obvious love and affection for Ishmael, his Aboriginal heritage, his demonstrated ability to provide a home and care for his family. On the less positive side are his lack of employment, the potential unsettling move to Manitoba and the uncertainties attendant upon it, and the problems Amanda has lately experienced and HM’s response to them.

---


119 Above n42 at 23–26.

120 Above n6 at 486.

121 Id at 486. See also *Re CP*, above n29 at 502–503.

122 *DH and NH v HM and MH*, Supreme Court of British Columbia, Vancouver Registry, Docket F950814 (26 September 1997): <http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/97/13/s97%2D1357.txt> (5 Nov 2000) at [50] [emphasis added] (hereinafter *DH and NH v MH and HM*).

123 Id at [49] [emphasis added].
Justice Bauman had previously implicitly criticised HM’s ‘laissez-faire approach to parenting’ which could be viewed as too ‘hands off’. Criticism of inadequate supervision and excessive autonomy accorded to children has also been levelled at Yonglu communities in the Northern Territory. There is, again, a conflict of laws, lores and values. In broader Canadian and Australian society, lack of close parental supervision, a child’s absence from biological family and geographic mobility are considered symptomatic of problems in the family environment. In First Nations and Aboriginal communities such factors may be indicative of a ‘normal’ family environment in which the child is accorded all necessary care, comfort and affection.

C. The Application and Effect of Paradigmatic Norms

Having regard to the discussion above, it is difficult to resist the conclusion that much policy underlying even contemporary child welfare law and practice is aimed at ‘normafication’ — assimilation in a veiled guise as the values of the dominant group are imposed on First Nations and Aboriginal peoples. What should be a loud and telling clash between appropriate child-rearing and associated normative orders is, instead, muffled as the ‘best interests ideology’ listens to the dominant voice whilst it strangles the ‘other’.

Such cultural insensitivity and imposed norms manifest at two important levels in respect of First Nations and Aboriginal children.

First, cultural misunderstanding, combined with the powerful normative force of child welfare law, means that many First Nations and Aboriginal children have been — and continue to be — removed from their homes on the basis of paradigmatic findings of neglect or abandonment where, appropriately understood, none exists. The grounds of neglect ‘justified’ 40 per cent of Aboriginal children care and protection orders in Australia in 1992–93, compared with 23 per cent of care and protection orders in respect of all children. As the Bringing Them Home Report stated, definitions of neglect are more subjective, malleable and culturally particular than definitions of abuse, particularly where cultural difference is not understood and does not inform policy development and implementation. The normative model has been, and remains, insensitive to the types of parenting practices referred to by Russell Means of the Oglala Lakota Nation:

Once, we all lived among our kin in communities of people that raised their own children and set their own standards of conduct. We knew everyone and everyone knew us, so we behaved with respect toward one another.

124 Id at [36].
125 Above n6 at 451–452.
126 Id at 545.
127 Above n44 at 186.
128 Above n6 at 431–432.
129 Id at 453, 545.
130 Above n47 at 536. See also Kline, above n32 at 411; above n69 at 6.
Typically applied and (mis)understood, the ‘best interests of the child’ ideology does not make space for the cultural differences of the ‘other’. Hence, in *Tom v Winnipeg Children’s Aid Society*, the Big Grassy Band was refused standing in its application for guardianship of a child member of the band who was found to have been neglected by his mother.131 The child was instead retained in a ward of the Children’s Aid Society of Winnipeg. The crucial issue here is not so much that the child was separated from his mother, but that he was cut off from a community that could not only have cared for him but may have provided him with the space and meaning to rightfully realise a sense of self, identity and belonging.

The second level at which cultural insensitivity and imposed norms manifest involves those occasional cases in which the welfare and protection of First Nations and Aboriginal children does actually require removal from their families — whether temporarily or, more rarely, permanently. In determining what should be done with the child, cultural misunderstanding often results in wholly inappropriate placement. Hence, for example, in *In the Matter of the Children NP and BP*, continuing custody of the abused children was granted to a non-First Nations couple rather than their First Nations aunt and uncle.132 In its decision, the Supreme Court of British Columbia afforded significant weight to the ‘greater understanding’ of the non-First Nations couple of the special educational needs of children suffering learning disorders.133 Comparatively little consideration was accorded to the presumably far greater understanding of the First Nations aunt and uncle of the special cultural needs of First Nations children. In another paradigm example, Wilson J stated in *Racine* that:

> In my view, when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time. *The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes.* 134

As with the residential schools and missionary homes, the underlying notion is that, with time, First Nations and Aboriginal peoples can somehow become less Indigenous; that, with time, Indigeneity somehow becomes less constitutive and important; that, with time, if First Nations and Aboriginal children are separated from their families and communities, they can be ‘successfully assimilated’.135 Madame Justice Wilson then went on to say:

> I believe that interracial adoption, like interracial marriage, is now an accepted phenomenon in our pluralist society. The implications of it may have been overly dramatized by the respondent in this case.136

The jurisprudence is not, however, entirely bleak.

---

131 [1982] 2 WWR 212. See also *In the Matter of the Family and Child Service Act* (1982) (unreported, Prov Ct BC); above n102 at 128.
132 Above n85 at [46].
133 Id at [34].
134 Above n155 at 188 [emphasis added].
135 See also *Hoskins v Boyd*, above n32 at [11–14].
136 Above n115 at 188. See also id at [12].
D. Sensitive Deployment of ‘Best Interests’ Ideology: A Step in The Right(s) Direction

In Evatt CJ’s dissenting judgment in Goudge, Her Honour considered that a number of factors need to be weighed in determinations of whether to remove an Aboriginal child and what to do with him or her if a decision to remove is made:

These include the effects of loss of contact with an Aboriginal parent’s traditions and culture, the Aboriginal origins of the child, the extent of discrimination in a particular situation and the difficulties encountered by part-Aboriginal children in integrating into the society of a European parent … 137

Her Honour concluded that the trial judge had given insufficient weight to these aspects and ordered a re-trial.

In Sanders, Evatt CJ and Watson J, the judges in the majority, said, ‘it would be wrong to fall into the trap of concluding that white Australian suburban values are to be preferred’,138 whilst in Torrens v Fleming, the trial judge stated that ‘the child should be afforded the opportunity of enjoying the culture of her race through being placed in the care and control of her [Aboriginal] mother’.139

Following the decision of the Full Court of the Family Court of Australia in In the Marriage of B and R,140 it is to be hoped that the Aboriginality of a child, and the recognition of the profound difficulties so often faced in adolescence and later life by Aboriginal children raised in non-Aboriginal families, will more properly inform child placement and custody decisions. In that case, which considered custody applications by both the child’s Aboriginal mother and non-Aboriginal father, the following exchange occurred between the trial judge and counsel for the mother:

His Honour: [S]he has a white father, has she not?
Mrs Mandelert: Yes, she does.
His Honour: And she has a black mother?
Mrs Mandelert: Yes …
His Honour: … Again, I repeat, this is a normal custody case between two parents, both of whom are Australian citizens … There is nothing special about it [Aboriginality].141

Ordering a re-trial, the Full Court of the Family Court criticised this view as ‘factually incorrect’.142 After summarising a number of factors which they considered ‘so notorious that it would be expected that a trial judge would take

137 Above n88 at 79, 320. But see Hoskins v Boyd, above n32 at [12].
138 In the Marriage of Sanders (1976) FLC ¶90-078 at 75, 374.
140 Above n4.
141 Id at [15].
142 Id at [144].
judicial notice of them” (including: that racism remains a marked aspect of Australian society; that the removal of an Aboriginal child from his or her community to a white environment is likely to have a devastating effect on self-esteem and identity; and that generally an Aboriginal child is better able to cope in an Aboriginal community). Their Honours held that the Aboriginality of a child is a matter which is deep, unique, and very relevant to the best interests of that child. However, although the Court concluded that this fact should require the appointment of a ‘separate representative’ for every Aboriginal child in a parenting dispute, the Court refused to import a presumption that an Aboriginal child should, all other things being equal, be placed with an Aboriginal parent. Thus, evidence establishing the relevance and importance of Aboriginality in each case still needs to be adduced.

In Canada, in the cases of Fitzgerald v Sagiatook and Re DAA, both of which awarded custody of children to First Nations parents, the courts seemed to be swayed by the ‘Indigenous factor’. In the latter case, the Court stated: ‘In my view the child’s interests will be better served, albeit marginally, by allowing the child to live and grow with her own relatives, who wish to have her so much.’ Similarly, in cases such as Re HIR, Sandy v Nootchai and NH and DH v HM, Canadian courts have deployed the best interests principle with relative sensitivity to the interdependence of community, culture and the best interests of a First Nations child.

Sadly, however, these cases are the exception rather than the norm, and, just as commonly, the ‘Indigenous factor’ militates against granting custody to the First Nations or Aboriginal parent on the basis of pervasive racist ethnocentric stereotypes such as ‘drunkenness’ and ‘tolerance to violence’.

Clearly, the prevailing ‘best interests of the child’ ideology is not in the best interests of either First Nations or Aboriginal children, or their families and communities. It is simply not enough that the judiciary express ‘regret’ with respect to the removal of First Nations and Aboriginal children or ‘compassion and sympathy’ for the First Nations and Aboriginal parents and communities from

143 Id at [150].
144 Id at [38].
145 Id at [150–151]. See also Director-General, Department of Families, Youth and Community Care & Bennett (2000) 26 Fam LR 71 in which the Full Court of the Family Court of Australia held that, in most cases, Aboriginality is not so important as to import a presumption that an Australian court is better equipped than a foreign court to determine custody of an Aboriginal child.
146 (1979) 4 CNLR 17.
147 (1980) 31 NBR (2d) 676.
148 Id at 678.
149 [1982] 3 WWR 223.
150 Above n86.
151 Above n83.
152 Re Eliza [1982] 2 CNLR 53 at 54. See also John v Superintendent of Child Welfare [1982] 1 CNLR 47 at 49; above n85 at [34–37].
153 See, for example, Tom v Children’s Aid Society, [1982] 1 CNLR 172.
whom the children (and, with them, so much more) are stolen. In the context of Indigenous children, at the least, the arguably Orwellian child welfare paradigm must be re-envisioned and re-thought. The normative power of the law places this onus fairly on those who make and adjudicate the law. For, what is at stake here is not ‘merely’ the best interests of each individual Indigenous child coming before the courts. What is at stake here is the fundamental human right of First Nations and Aboriginal peoples and cultures to regeneration and self-determination. What is at stake here is the space and respect that the state accords to diverse normative approaches to life for both children and their communities. Even more, what is at stake here is the future each of us imagines for ourselves, and the space that each of us affords others to do the same. In the sage words of Duclos:

[The way to begin to resolve issues of difference without oppressing those who are labelled different is to notice them. The challenge is not to see our own reflections in their eyes, or to imagine what we would want if we were they, but actually to pay attention to what they are saying about who they are.]


In a diverse society in which different faiths and cultures can flourish in co-existence, and in which individuals can grow and develop partly through connections and affiliations … claims on behalf of communities may deserve recognition.

In the context of child welfare and the determination of placement decisions and custody disputes, it seems that the ‘best interests of the child’ test is, and will foreseeably remain, the yardstick. The dislocating and often destructive history of the application of this test to First Nations and Aboriginal children demonstrates, however, that the ‘best interests of the child’ are not necessarily the ‘best interests of the First Nations or Aboriginal child’, far less those of his or her family and community. The challenge is thus to adapt and apply ‘best interests ideology’ so as to acknowledge the unique nature of Indigenous culture, identity and child care practices, and the concomitant conceptions of where a First Nations or Aboriginal child’s best interests may lie.

It seems to me that, given the extent to which culture is so often constitutive of an Indigenous child’s identity, esteem and possibilities, and, given the obvious importance of children to the survival of First Nations and Aboriginal culture and communities, the ‘best interests of the Indigenous child’s community’ must inform the best interests of that child and any associated placement or custody decisions. Recognition must be afforded to the fact that ‘the best interests of the child and the

155 See generally, above n36.
156 Above n37 at 314.
157 Above n60 at 380 [emphasis added].
158 Above n37 at 338.
community are profoundly intertwined and inseparable’. 159 Two approaches to the promotion of legislative and judicial recognition of the inextricable link between the interests of Indigenous children and their communities present themselves.

The first approach is the articulation of a separate ‘best interests of the Indigenous community’ test to be balanced on the placement or custody determination scales alongside the ‘best interests of the Indigenous child’ test. Such an approach assumes a significant coincidence between the best interests of the First Nations or Aboriginal community and that of the child. It suggests that the determination of a First Nations or Aboriginal child’s best interests be based on: an appreciation of diverse approaches to child-rearing and upbringing;160 an understanding of the importance of community and cultural membership to a child’s identity growth and development;161 and, importantly, a recognition of the rights of First Nations and Aboriginal communities (not just individuals) to protection. However, while this approach may ensure consideration of Indigenous communities and contextualisation of Indigenous children in placement decisions and custody determinations, it suffers from the danger that it may reinforce the notion that the interests of the Indigenous community and the interests of the children thereof are somehow distinct rather than interrelated. Moreover, the articulation of what is effectively a ‘collective rights’ or ‘collective interests’ test runs counter to the paradigmatic predilection of the western legal tradition to ‘individual rights’ and ‘individual interests’.162 In a society and tradition in which the ‘trumping’ of ‘collective rights’ by ‘individual rights’ is systemically and systematically entrenched,163 the legislature and judiciary may be reluctant to attach any sort of weight to the consideration of community interests. For example, in Racine, Wilson J, writing for the Supreme Court of Canada, suggested that the rights of the ‘parent’ and, by extension, the ‘community’ are largely irrelevant: ‘the law no longer treats children as the property of those who gave them birth but focuses on what is in their best interests.’164 Certainly, children must not be seen as property. To ignore the rights of the collective is, however, to invalidate the structure of many First Nations and Aboriginal societies which are based on cooperation and consensus and in which ‘the collective’s rights are the focus’.165 To ignore the rights and interests of the First Nations and Aboriginal communities may, moreover, culturally destabilise the community in such a way as to further impede the growth of individual rights. Perhaps most importantly, to ignore Indigenous collective rights on the grounds of the protection of individual liberty

160 Above n37 at 339.
161 Ibid.
162 Duclos suggests that the law’s emphasis on individual rights may be a strategy by which the dominant group maintains its dominance: ‘If only individuals have rights and not groups, power is so dispersed that no significant threat can be posed to the hegemonic power of the dominant group’: Duclos, above n60 at 350.
163 See, for example, Universal Declaration of Human Rights, GA Res 217(III), UN GAOR, 3d Sess, Supp. No 13, UN Doc A/810 (1948).
164 Above n115 at 174.
165 Above n69 at 6.
is to ignore the extent to which the fundamental liberty of First Nations and Aboriginal children to imagine and make themselves is so bound up in the fundamental liberty of Indigenous communities to do the same.

The second approach to legislative and judicial recognition of the link between the best interests of First Nations and Aboriginal children and their communities is to incorporate consideration of the ‘best interests of the Indigenous community’ into that of the ‘best interests of the Indigenous child’ him or her self. To the extent that this model makes space for the consideration of community in the sense of the rights of the Indigenous child to his or her community rather than the rights of that community to the child, it resists succumbing to the intractable debate between liberalism and communitarianism, and between individual and collective rights. (One must ask, however, whether, by giving up the struggle for collective rights, we give up the struggle for the tools with which it may be possible to implement instrumental change.) Further, this approach, by considering the interests of the First Nations or Aboriginal child and his or her community together, encourages cognisance of the interdependence of Indigenous culture, identity and survival. As the discussed jurisprudence demonstrates, however, where ‘community interests’ are not separately articulated and considered they are likely to be subverted, if not ignored.166

Before considering which of the two approaches may be the preferable, it is perhaps appropriate to examine some of the potential difficulties — both for the children and their communities — associated with the use of the ‘best interests of the Indigenous community’ to inform the ‘best interests of the Indigenous child’.

A. The Danger of Exposing a First Nations or Aboriginal Child to an Abusive Situation

Perhaps the most pressing of these problems is the very real danger that where consideration of the best interests of the child as an abstracted individual is supplemented by consideration of not only the interests of the child as part of a community but the interests of the community itself in that child, the child may be exposed to or remain in a potentially abusive situation. While the importance of community and cultural membership to a First Nations or Aboriginal child can not be overstated, neither can the critical issue of protecting children from physical, emotional or psychological harm.167 As Razack states, ‘[t]he risks of talking culture are immense. What is too easily denied and suppressed in this discussion is power.’168 Power and voice are things that most children, especially First Nations and Aboriginal children, lack.169 Some children, Indigenous and non-Indigenous, do need protection from their families or communities and they need it now. For, even as families, communities and cultures provide space and

166 See, for example, above n70 at 469.
167 Above n37 at 317.
168 S Razack, ‘What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence’ (1994) 19 Signs 894 at 918. See generally, above n44 at 197–199.
169 But see above n37 at 344–348 for an encouraging discussion as to how children may be given a voice in the articulation and determination of their own best interests.
identifiers for definition and development of the self, they may threaten and damage that very self. As Van Praagh states:

The same ties that have been sketched as worthy of recognition, may need to be readjusted or even severed in the name of protecting the integrity, needs and interests of children.170

The ‘integrity’ of the child must be non-derogable. For, the integrity and identity of the child are interdependent: ‘[T]he child’s development thrives on connections that enrich her identity and, at the same time, depends on protection from damage or harm.’171 Hence, even where complex issues such as First Nations and Aboriginal sovereignty, values and the right to self-determination are involved, the rights of the child in such circumstances must remain paramount. As Van Praagh correctly elucidates, that state must not abdicate its interest in and responsibility to children:

Autonomous aboriginal tribunals may be desirable, and greater understanding of the beliefs and practices of religious communities may be necessary, but abdication to communal jurisdictions without adequate insurance for members, especially women and children, is irresponsible.172

In considering community interests and standards, there must be no scope for leaving children in potentially abusive situations or relationships. Where there is a real apprehension of harm, then the paramount concerns of safety and security should generally override concerns for the preservation of cultural links, affiliation and identity.173 I agree that:

[R]elationships that damage the integrity of a child cannot be justified by a child’s identity interests: membership in a community, or involvement in identity-related practices or beliefs, does not eliminate a concern for the dignity of the child.174

I also maintain, however, that once a child is removed, urgent work must be done to safely repatriate the child and put the family back together. The courts, in considering and applying community interests, must not lower the minimum level of protection and care afforded to First Nations and Aboriginal children.175 Minimum — albeit culturally sensitive — standards need to be met.176 As will be

170 Above n44 at 178.
171 Above n37 at 360.
173 In the Matter of the Children NP and BP, above n85 at [43].
174 Above n37 at 360.
175 See generally, above n102 at 131–132. See also Razack, above n168, for a discussion of cases in which the courts have, arguably inappropriately, effectively lowered the standard of protection afforded to Aboriginal women in respect of sexual violence.
176 See W Michael Reisman, ‘Autonomy, Interdependence, and Responsibility’ (1993) 103 Yale LJ 401 at 413–417 for a more detailed discussion of this assertion in respect of ‘Gypsy’ or Roma children. I acknowledge the critical need to undertake any ‘minimum standards analysis’ in a rigorous, disciplined and culturally sensitive manner such as to ensure it does not become an exercise in inappropriate paternalism, imperialism or intrusion.
discussed below, however, the abuse of any First Nations or Aboriginal child must invite two fundamental questions. First, what factors — whether individual, familial, societal or structural — underlie the abuse of the child? For, in most cases of child abuse in First Nations and Aboriginal communities, the abuser is also a victim and the abuse is not a function of Indigenous culture but of the structural context of Indigenous life. Second, what can be done to alleviate or eradicate the identified factors?

B. The Danger of ‘Freezing’ First Nations and Aboriginal Culture and Reinforcing the Status Quo

A further danger associated with the consideration of Indigenous community and cultural interests is that, where the courts have invoked First Nations or Aboriginal culture as a relevant consideration, they have often done so in such a way as to ‘freeze’ that culture as it existed ‘pre-contact’. In R v Van der Peet,177 for example, the Supreme Court of Canada limited the First Nations rights to be recognised and protected under section 35(1) of the Charter178 as those deriving from ‘the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.’179 In CJK v Children’s Aid Society of Metropolitan Toronto,180 the Court, in affirming the removal by the Society of a child from a First Nations grandmother, dismissed the importance of racial origins and heritage to the child. It stated, of the position that the First Nations grandmother would best ensure the retention and respect for First Nations culture that the child deserved, that:

That argument is attractive on its face but is not borne out by the evidence. It seems to me that there is very little in the life of Mrs K which recognizes or maintains a native tradition, beyond her knowing some words of her native tongue.181

In In the Marriage of R,182 the Federal Court of Australia awarded custody to an Aboriginal mother on the condition that she and the child live on the remote Aboriginal settlement on which the mother had been born, reared and educated. Indeed, the Court stated that, were it not for the mother’s promised return, the decision may have been otherwise.183

The legal tendency to conceive culture in static rather than dynamic and fluid terms may hence militate against advocacy of the explicit consideration of the interests of First Nations and Aboriginal cultures and communities given the

179 Above n177 at 539 (per Full Court).
180 [1989] 4 CNLR 75.
181 [1989] 4 CNLR 75.
182 Id at 81 (Vopelsang PCJ).
183 Id at 79.978 (Haese J). See also Re W: R v W (1982) 32 RFL (2d) 153 at 168, 180 (Man CA) (Matas JA).
importance of adapting child-rearing and child-protection policies to change. Cultures, traditions, norms, and customs come from — and are positioned by and within — histories.\textsuperscript{184} They are also, however, ‘manifestly dynamic’.\textsuperscript{185} The invocation of culture as a consideration in the determination of First Nations and Aboriginal child custody disputes must not submit to the essentialisation of First Nations or Aboriginal children and their communities.

\section*{C. The Danger of Submitting the Determination of Indigenous Community Interests to the Definitional Power of the Courts}

Just as the law has the power to freeze and stultify culture and identity, so too it has the power to construct.\textsuperscript{186} Unfortunately, the effect of the legal consideration of First Nations and Aboriginal culture is, too commonly, the construction of that culture as the dominant culture interprets it, rather than the provision of space for the culture to construct and interpret itself. For Patricia Williams, the promise of rights resides in their capacity to accord us the space to be who and what we want to be. To a group of young white males who afforded her no room to pass on the footpath, she exhorted ‘Don’t I exist for you? See me! And deflect, dammit! … I have my rights!’\textsuperscript{187} Minority groups are granted rights, however, not on the basis that there might be something problematic with prevailing roles, relationships, powers and hierarchies,

but on the basis that they constitute a fixed group of “others” who need and deserve protection. Arguably, then, human rights frameworks thus regulate new identities in ways that constrain their challenge to dominant social relations.\textsuperscript{188}

To claim rights in a court is to submit those rights to the definitional power of that court. For example, in \textit{Mashpee Tribe v Town of Mashpee},\textsuperscript{189} a US Federal District Court held that a group of peoples who self-identified — and were in turn identified — as Indian, were not, in legal terms, an ‘Indian tribe’. As Torres and Milun aver, the definitions of ‘Indian’ relied upon by the Court not only devalued the lived experience of the Mashpee peoples to the extent that it did not conform, but, by arguing that the Mashpee had renounced their Indian identity by adopting some forms of the dominant culture, denied the right of the Mashpee peoples to evolve, even where such change may have been necessary for their very cultural survival.\textsuperscript{190} For First Nations and Aboriginal communities to submit culture and

\begin{footnotesize}
\begin{enumerate}
\item[184] Leti Volpp, ‘(Mis)Identifying Culture: Asian Women and the “Cultural Defense”’ (1994) 17 \textit{Harvard Women’s LJ} 57 at 100.
\item[185] Above n38 at 274.
\item[186] See, for example, above n37 at 359.
\item[187] Patricia Williams, \textit{The Alchemy of Race and Rights} (1991) at 235–236. See also Martha Minow, \textit{Making All the Difference} (1990) at 382–383, 389.
\item[189] 447 F Supp 940 (D Mass 1978).
\item[190] G Torres & K Milun, ‘Stories and Standing: The Legal Meaning of Identity’ in Danielson & Engels (eds), \textit{After Identity: A Reader in Law and Culture} (1995) at 137.
\end{enumerate}
\end{footnotesize}
identity to the definitional power of the law, as, indeed, they would be doing by inviting the courts to consider the best interests of the community in their assessment of the best interests of the Indigenous child, is, at best, problematic. First Nations and Aboriginal communities seeking to have their interests considered on the court’s child custody or placement scales will have to strategically navigate the treacherous legal waters constructing (and closing) identity and the interests of Indigenous communities.

D. The Danger of Breaking Established Bonds

In both Natural Parents and Racine, the bond established between the First Nations children and their adoptive parents, and the separation of the First Nations children from their cultural heritage, combined to tip the scales in favour of the adoptive parents. What impact would the consideration of the best interests of the First Nations or Aboriginal community have upon those children already established in non-First Nations or Aboriginal homes? On the one hand, a First Nations or Aboriginal child torn from his or her own Indigenous family and community may suffer from ‘a sense of abandonment and confusion’. On the other hand, the severance of an established bond between a First Nations or Aboriginal child and his or her substitute parent may inflict ‘irreparable psychological harm and damage upon the child’. It is crucial that community interests proponents hear and heed the warning of Louis La Rose, chairperson of the Winnebago Tribe:

I think that the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to a nebulous family … in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think … they destroy him.

However, the advocacy of community interests considerations need not have as a concomitant the advocacy of a policy of repatriation whereby Indigenous children already ‘established in white homes [are] suddenly uprooted and returned to a native culture that has become alien to them’. In such cases, the First Nations or Aboriginal child him or herself must be given the voice and space to articulate his or her own identity, affiliations, hopes, fears and best interests. Instead, the consideration of community interests has as a concomitant the result that many

---

191 See also DH and NH v HM and MH, above n122; CMB v Ministry for Children and Families, above n66.
192 Barsh, above n54 at 1290.
193 Above n39 at 251.
194 Mississippi Choctaw v Holyfield 104 L Ed 2d 29 (1989) at 47 (quoted in judgment of Brennan J). See also above n66 at [4].
195 Above n7 at 1212. See, for example, Jane Doe v Awasis Agency of Northern Alberta (1990) 72 DLR (4th) 738 (Man QB).
196 But see above n75.
First Nations and Aboriginal children stolen from their families and communities under existing child welfare law would not be removed in the first place. Moreover, consideration of the interests of the culture and community in the child — in addition to consideration of those of the child in the culture and community — may encourage the courts to adopt a longer term view of the best interests of First Nations and Aboriginal children. For, even in a paradigm in which permanency and stability are deemed essential to the welfare of the child, there is still scope for recognition that the benefits of a stable non-First Nations or Aboriginal home in the short term may be offset by the destabilising long-term impact of removing First Nations and Aboriginal children from a context and culture which allows for the meaningful formation of identity and the liberal imagination of possibility.

8. Law, Culture and the ‘Difference That Difference Makes’

Once we see that light reflect our various colours; when we feel complexity clear as an orange sun moving into the morning maybe we can sit here in the shade and talk meeting each other’s eyes with a sparkle …

Existing child welfare laws are clearly not in the best interests of First Nations and Aboriginal children. Indeed, as one author puts it, ‘[c]hild welfare practices have been a major factor in the deterioration of aboriginal cultures’. However, although all too often the law is used as a tool of the empowered, it is also a repository of liberty, containing values that can be used by all. We must not forget the role that law, especially child welfare law, has played in the oppression, both historic and contemporary, of First Nations and Aboriginal peoples, communities and cultures. Yet, as Bruce Kercher writes, ‘law is not merely a bludgeon for beating people; it is a two-edged sword.’ I agree with the observation that: ‘[t]he law which has often been an instrument of injustice to Aboriginal [peoples] can also, in proper cases, be an instrument of justice in the vindication of their legal rights.’

Placement decisions and custody dispute determinations concerning First Nations and Aboriginal children raise questions concerning perhaps the most fundamental and inalienable rights of all: the right to life, liberty and security of person; the rights of children; the right to a language, culture and identity; the right

---

197 Elizabeth Bartholet, ‘Race Matching in Adoption: An American Perspective’ in Ivor Gaber & Jane Aldridge (eds), In the Best Interests of the Child: Culture, Identity and Transracial Adoption (1994) at 164.
200 Diane Kirkby, Sex, Power and Justice: Historical Perspectives of Law in Australia (1995) at xi.
202 Thorpe v The Commonwealth (No 3) (1997) 71 ALJR 767 at 775 (Kuby J).
to self-determination; the right and freedom to be and choose who and what you are. Hence, as First Nations and Aboriginal peoples increasingly turn to the law for the vindication of their rights, much will depend upon the legislature and judiciary and their recognition of the inextricable intersection between law, culture and the ‘difference that difference makes’. It is thus crucial that we agitate and struggle for the aspirations, enunciated by Dickson CJ in *R v Oakes*, that:

The [law] … be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, *respect for the inherent dignity of the human person*, *commitment to social justice and equality*, *accommodation of a wide variety of beliefs* [and] *respect for cultural and group identity*.203

What is clear from the impact of child welfare law on First Nations and Aboriginal children is the imperative that each First Nations and Aboriginal community be accorded its right to self-determination and empowered to make decisions in its own, and its children’s, best interests. As discussed above, however, even when such rights and resources are fully accorded, there will subsist a need to reform the application of the best interests principle by mainstream courts to First Nations and Aboriginal children.

In my view, the malleability of the best interests principle and its space for the potential invocation of cultural and community interests make it a possible vehicle for the vindication of First Nations and Aboriginal rights, particularly as they pertain to children. Whilst the previously discussed dangers of the slide into cultural relativism should be avoided, as Dewar writes, ‘[d]eployed sensitively, and with a consciousness of Indigenous child-rearing practices, it [the best interests principle] can avoid the imposition of one set of values on another.’204

9. Assessing the Best Interests of Indigenous Children and Their Communities

The sensitive and efficacious application of best interests ideology so as to promote both the best interests of First Nations and Aboriginal children and their communities and cultures will depend upon a number of factors.

A. Consideration of Indigenous Community Interests and Rights

First, any consideration of the best interests of a First Nations or Aboriginal child should involve a consideration both of the rights and interests of the child in his or her community and culture, and the rights and interests of the First Nations or Aboriginal community and culture in its children. Whether the change is effected through legislative amendment or common law adjudication, judicial consideration of these factors should be compulsory in any case involving a First Nations or Aboriginal child. Recent legislative amendments in both Australia and

203 [1986] 1 SCR 103 at 136 [emphasis added].
Canada go some way towards satisfying the first limb of this submission; namely, that the courts should consider the rights and interests of a First Nations or Aboriginal child in his or her community. In Australia, section 68F(2)(f) of the *Family Law Act* 1975 (Cth), which governs the placement and care of Aboriginal children when parenting disputes come before the Family Court, provides that, in determining what is in a child’s best interests, ‘the court must consider the child’s maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant.’ In Ontario, the *Child and Family Services Act* requires recognition of ‘Indian’ or ‘Native’ status as a ‘best interests’ category which is separate and paramount to the obligation to consider cultural background.205 Legislation in Alberta requires that a First Nations child be informed of his or her status and that the chief and council of the child’s community be consulted prior to any permanent wardship hearings.206 The *Youth Protection Act* in Quebec stipulates that:

> Every person having responsibilities towards a child under [the] Act, and every person called upon to make decisions with respect to a child under [the] Act shall, in their interventions, take into account the necessity … of opting for measures in respect of the child and the child’s parents … which take into consideration … the characteristics of Native communities.207

British Columbia has enacted arguably the most extensive provisions in its *Child, Family and Community Service Act*.208 Section 2 of that Act provides that it must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the principles that, inter alia, ‘kinship ties and a child’s attachment to the extended family should be preserved if possible’209 and ‘the cultural identity of aboriginal children should be preserved’.210 Section 4 of the Act applies these guiding principles to the determination of ‘best interests of the child’:

4(1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child’s best interests, including for example:

> …
> 
> (e) the child’s cultural, racial, linguistic and religious heritage;
> 
> …

4(2) If the child is an aboriginal child, the importance of preserving the child’s cultural identity must be considered in determining the child’s best interests.

---

207 *Youth Protection Act*, RSQ, cP–34.1, s2.4 (5o)(c).
208 *Child, Family and Community Service Act* RSBC 1996, c46.
209 Id at s2(e).
210 Id at s2(f).
In my view, these legislative amendments, while a step in the right direction, do not go far enough. The lists of matters to be taken into account merely require the courts to ‘consider’ how Indigenality may be relevant to a custody, placement or care determination. In no instance is Indigenality considered peremptory or presumptive, contrary to the fundamental right of a child to enjoy his or her own culture in community with other members of his or her group. Further, with the arguable exceptions of Alberta and Quebec, the various Acts considered require only that the courts consider the rights and interests of a First Nations or Aboriginal child in his or her community, but not the rights and interests of a First Nations or Aboriginal community in its children. This fails to recognise the intertwining relationship between the rights of Indigenous children and their communities.

This situation may be contrasted with that prevailing in the United States under the Indian Child Welfare Act of 1978, pursuant to which it is recognised that ‘there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest … in protecting Indian children who are members of or are eligible for membership in an Indian tribe.’ Further to this recognition, section 1902 of the Act evinces a policy to ‘protect the best interests of Indian children and to promote the stability and security of Indian tribes and families’. While each of the Australian and Canadian Acts considered requires the court or decision maker to merely ‘consider’ or ‘take into account’ the child’s First Nations or Aboriginal heritage or identity, the practical effect of the United States legislation is to require meaningful recognition and application of the rights and interests of an Indian child in his or her community, and vice versa.

An unacceptably high percentage of First Nations and Aboriginal families and communities are broken up by the removal, often unwarranted, of their children. An alarmingly high percentage of such children are placed in non-First Nations or Aboriginal foster or adoptive homes and institutions. Subject to my comments below, it is crucial that both the interests of First Nations and Aboriginal children in retaining a connection with their families and cultures, and the interests of the families and communities in retaining their children, be substantially determinative in any adoptive, preadoptive, foster care or custody placement. No less is required to ensure the survival and future of First Nations and Aboriginal cultures and communities and the control of such communities over their own membership and identity.

**B. Sensitivity to Customary Traditions, Laws and Practices**

Second, in any consideration of alleged neglect or abandonment of a First Nations or Aboriginal child, the courts should, while adhering to minimum standards and practices, be culturally sensitive to Indigenous child-raising practices. The

---

211 Above n26, Article 30.
initial presumption should be that the best interests of the First Nations or Aboriginal child is to remain with his or her own family and kin. Too many First Nations and Aboriginal children have been stolen from their homes by consequence of the ignorance of social workers and judges who determined that the child was ‘neglected’, without regard to alternative — yet manifestly acceptable — cultural differences and practices. Extensive education of decision-makers is imperative if their reaction to ‘benign difference’ is not to attack and erode First Nations and Aboriginal cultures and to separate First Nations and Aboriginal children from the peoples and communities that provide the spaces and signifiers in and from which they develop.

Most often the First Nations or Aboriginal community itself will be best positioned to determine whether a child has been neglected, especially when that community is cognisant of the dependence of its own future on that of the child. This requires a legislative or judicial prerogative that no placement of a First Nations or Aboriginal take place except on the advice, recommendation and instruction of that child’s Indigenous community. The meaningful involvement of First Nations and Aboriginal communities in this decision-making process is imperative once it is recognised that only Indigenous people are qualified to determine how best to confront problems confronting them, drawing on customary law and lore, and that only Indigenous people have the right to make decisions concerning their own lives and communities. It is not enough that, as under the Child Welfare Amendment Act 1985 (Alta), the Children (Care and Protection) Act 1987 (Cth) or the Children and Young Person’s Act 1989 (Vic), welfare departments ‘involve’ or ‘consult’ members of an Indigenous child’s community. Nor is it satisfactory that, where Indigenous communities are actually involved, Indigenous agencies are inadequately funded and equipped to properly attract, assess and train alternative First Nations or Aboriginal carers. As Kline asserts, Indigenous communities must ‘be empowered, financially, politically, and otherwise, to develop their own child welfare services outside the framework of existing … schemes’. This is part of the project of self-government and self-determination.

C. Consideration of Long-Term Interests in Permanency Planning

Third, the courts, in making a placement or custody determination, must look beyond the immediate interests of the First Nations or Aboriginal child, and take into account both the long-term interest of the child in maintaining a meaningful

---

214 Above n16 at 32. See generally, above n44 at 196–197. See also s1901(5) of the Indian Child Welfare Act of 1978 25 USC 1901 et seq which refers to the failure of decision makers to recognise the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. See also s1915(d) of the Act which, in relation to placement preference requirements, stipulates that the standards to be applied are the social and cultural standards prevailing in the Indian community in which the parent or extended family member resides or with which the parent or extended family members maintain social and cultural ties.

215 Above n204 at 230. See also, above n6 at 487.

216 Kline, above n32 at 424.
connection with his or her culture, and the probable long-term impact on the child of being deprived of his or her culture, and with it, signifiers, identity and heritage. The decision of the Ontario Supreme Court in *Re SD* provides some hope here:

> Although permanency is important, cultural heritage is also important. In fact there is good reason to infer that without cultural heritage being recognized as integral to human growth, permanency will never succeed. One cannot deny what one is; we cannot deny what these children are. They are Ojibway, and unless that is an integral part of our decision making, there is little hope that permanency planning will succeed.  

The legislatures and judiciaries must explicitly recognise that every First Nations and Aboriginal child has a need to maintain a connection with his or her culture and community; that, for individuals, a strong connection with one’s Indigenous community is crucial and that, for communities, the ability to converse with and renew through the next generation is fundamental. This requires legislative and judicial action to ensure that placements and orders provide for the child to remain in contact with his or her family and kin. His or her spiritual and emotional well-being will generally demand no less.

### D. Entrenchment of the Indigenous Child Placement Principle

Fourth, the removal of Aboriginal children from their homes should be a last resort. When removal is essential for the safety and protection of the child, every effort should be made to place the child within his or her extended family, kin, clan or tribe. This requires that all child welfare legislation stipulate that, where it is necessary that a First Nations or Aboriginal child be removed, placement is to be made, having regard to customary law and practice: first, with the child’s extended family; second, with members of the child’s Indigenous community; and, third, with another Indigenous caregiver. While this Indigenous child placement principle has been legislatively enshrined in some jurisdictions, it is mere policy in others. Further, Indigenous communities and organisations are often not empowered or enabled to participate in its application. Their empowerment and involvement is crucial if the Indigenous child placement principle is to be applied ‘respecting law’ and ‘keeping law strong’ by making correct placements and recognising ties and responsibilities in defining extended family and caregivers.

---

218 Above n 6 at 589–590.
219 See, for example, *Child and Family Services Act* RSO 1990, c. C–11, s57(5) which requires that an Aboriginal child be placed: first, with the extended family; second, with Aboriginal members of the community with the same cultural and linguistic identification; third, with other alternative Aboriginal caregivers; and, as a last resort, with a non-Aboriginal caregiver. See also *Children (Care and Protection) Act 1987* (NSW) s87; *Indian Child Welfare Act of 1978* 25 USC 1901 et seq. s1915(a)–(b).
220 For example, the Indigenous child placement principle is not legislatively recognised in Tasmania, Western Australia, Queensland or the Australian Capital Territory.
221 Above n6 at 588.
persons and groups be given standing in respect of custody or placement applications concerning their children.222 Where possible and appropriate, First Nations and Aboriginal children removed from their families must be repatriated, at least with their communities and kin, as soon as is safely possible.223

E. Addressing Underlying Causes

Finally, and perhaps most importantly, any and every case of alleged neglect or abandonment of a First Nations or Aboriginal child must act as an invitation to the courts and the broader community to examine underlying causes. For, the scope of the law to vindicate the rights of First Nations and Aboriginal children should not be overestimated. Didi Herman is correct when she writes that ‘courts are not “neutral arbiters”’; rather, they exist within a state structure and operate with all of the constraints and functions appropriate to their role — namely, facilitating the reproduction, rather than the subversion, of the status quo.224 The status quo in Canada includes: an infant mortality rate four times higher for First Nations than non-First Nations children; a life expectancy at least 10 years shorter for a First Nations than a non-First Nations child; and a likelihood of dying from curable disease that is 10 times higher for First Nations than non-First Nations children.225 The status quo in Australia is strikingly similar. Numerous studies confirm a close correlation between poverty and child neglect.226 Thus, to advocate only piecemeal legislative or judicial changes, ‘is to effectively accept that the lives of First Nations [or Aboriginal] individuals who fall prey to the instruments of the child welfare system will not substantially change … The inevitable consequence will be the genocide of First Nations [or Aboriginal] people.’227

222 See Pitzel and Pitzel v Children’s Aid Society of Winnipeg [1984] 5 WWR 474 for an example of a case in which a band, the Little Saskatchewan Indian Reserve Band, was vested with standing in respect of a custody application. See also Indian Child Welfare Act of 1978 25 USC 1901 et seq. s1911(c) which stipulates that, ‘[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.’

223 See, for example, Sandy v Nootchai, above n86; JTK v Kenora-Patricia Child and Family Services [1985] 4 CNLR 76 (Ont Prov Ct Fam Div). See also Indian Child Welfare Act of 1978, 25 USC 1901 et seq. s1922 of which requires any authority, official or agency involved in an emergency removal to ensure that the removal or placement terminates immediately when it is no longer necessary to prevent imminent physical damage or harm to the child. The obligation thereafter is to expeditiously initiate a child custody proceeding, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodians, as may be appropriate.


225 Above n7 at 1201–1202.


227 Above n69 at 6–7.
The challenge, as Audre Lord so compellingly puts it, is to acknowledge and act upon the role that the mainstream legal system and its advocates have played — and continue to play — in the affirmation and maintenance of prevailing conditions and structures:

For, we have, built into all of us, old blueprints of expectation and response, old structures of oppression, and these must be altered at the same time as we alter the living conditions which are a result of those structures. For the master’s tools will never dismantle the master’s house.228

For this reason, if child welfare law and practice is to address the needs and rights of First Nations and Aboriginal children and communities, it needs to be fundamentally overhauled. And this overhaul needs to have regard to broader social, economic, political, historical and cultural issues including health, employment, housing, education, alcohol and substance abuse, marginalisation, dislocation and disenfranchisement. As the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families found, ‘unless these conditions are altered and living conditions improved, social and familial disruption will continue.’229

Crucially, this overhaul needs to have regard to First Nations and Aboriginal conversations and aspirations. As a Nyungar Elder reflects:

What I’m saying, you listen. You’ll feel your strength, you feel your body, you’ll feel yourself. Might be morning, you feeling … Arrh, I want to understand that. I want to listen. 230

The only appropriate reform will be built on the right to self-determination231 — on First Nations and Aboriginal peoples seeing things with their own eyes, thinking their own thoughts, and doing things their way.232 The words of Larissa Behrendt are apposite here:

A community must always decide for itself what is best for its members. Only the community knows what is best for the community. 233

Grounding a right for First Nations and Aboriginal peoples to exercise control over matters affecting their children, families and communities, is the only response consistent with the best interests of First Nations and Aboriginal children.

---

229 Above n6 at 557.
230Unnamed Nyungar Elder quoted in above n42 at 237.
231 Above n6 at 557.
232 Above n42 at 3.
233 Larissa Behrendt, Aboriginal Dispute Resolution (1995) at 108.
10. First Nations and Aboriginal Children and the Regeneration of the Sacred Tree

Following the massacre at Wounded Knee over one hundred years ago, Black Elk despairingly wrote that ‘the sacred tree is dead.’ More recently and optimistically, however, Russell Means has written that:

In the first half of this century, Black Elk was led down the path blazed by Red Cloud, Crow Dog, Crazy Horse, Sitting Bull, and others of their generation. I feel that Black Elk’s purpose was to save our nation’s sacred tree of life. He was partly successful … I believe the last root of our tree still lives — just enough to regenerate the tree, and with it, our people’s spiritual survival.

I believe that the last root to which Means was referring are today’s First Nations and Aboriginal children. In the words of the Opaskwayak Elders of the Cree Nation: ‘A child is a gift or loan from the Great Spirit, and one is given the responsibility to raise and care for that child. Since a child is a gift from the Great Spirit, the child is sacred and must be treated with dignity and respect.’ Much depends upon children. First Nations and Aboriginal cultures and communities have the fundamental right to raise their own children and First Nations and Aboriginal children have the fundamental right to be brought up in their own cultures and communities. And much depends upon us. As lawyers and individuals, we have the fundamental duty to advocate the promotion and protection of these rights. We must obey the ‘duty to lift our voices’.

234 Black Elk quoted in Brown, above n1 at 353.
235 Above n47 at 543 [emphasis added].
236 ‘We need healthy children if we are to have healthy families, healthy communities and healthy nations. My people want a healthy nation.’: above n90.
237 Quoted by The Hon Lloyd Axworthy, ‘Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, to the Conference on Children’s Rights in the New Millennium’, address to the Conference on Children’s Rights in the New Millennium, McGill Faculty of Law, 24 November 1999.
Innovation, Myths and Equality: Constructing Drug Knowledge in Research and Advertising

PATRICIA PEPPIN AND ELAINE CARTY

Myths fascinate us because their surface simplicity invites exploration of more complex messages, promising universal truths. Myths are the representation of an ‘active and communal process’, in which worlds have been built out of words. They ‘explain the unfamiliar in terms of the familiar’. Myths, or signs as they are also known in semiotic theory, are a language that we use to state and understand content. It is a form that directs us to particular meanings. What is denoted and appears to be the case in any representation rests in fact upon myths that reflect values in the viewer’s community, drawing upon the values and limits of acceptability in the political culture, in a form that masks the means of production of these connotations, making them appear natural. ‘The myths which suffuse our lives are insidious precisely because they appear so natural. They call out for the detailed analysis which semiotics can deliver’. Pharmaceutical advertisers use these processes in the construction of knowledge and value about their products, in a way that we will consider using semiotic theory, the theory of signs.

We argue in this paper that the advertisements created by pharmaceutical advertisers draw upon social stereotypes to promote their products to physicians. Advertisers create signs or myths that draw upon underlying social perceptions of groups and on attitudes among the medical profession to disease, cure, and the doctor-patient relationship. These stereotypes are based upon and visibly represent

---

* This research has been funded by the Hampton Fund of the University of British Columbia and by the Law Foundation of Ontario. Portions of this paper were presented at the American Society of Law, Medicine & Ethics Health Law Teachers Conference, Cleveland, Ohio, June 2000 and at the XXVth Anniversary Congress of the International Academy of Law and Mental Health, Siena, Italy, July 2000; the authors are grateful to conference participants whose comments benefited the research. The authors would like to thank Louise Collins, Alla Sotnikova, Christine Tier, Sara Guild, Edward Hopkins and Joe Howlett for their important contributions to this research.

† Patricia Peppin is Associate Professor, Faculty of Law and Assistant Professor, School of Medicine, Queen’s University, Kingston, Ontario, Canada; Elaine Carty is Professor, School of Nursing, University of British Columbia, Vancouver, BC, Canada.


6 Barthes, above n4.
the inferior status experienced by particular groups in society, as well as medical attitudes to patients and cures. Advertisers, who are well versed in these techniques, use the insights of semiotic theorists to create and power their ads.

New drug products are tested through the methodology of clinical trials. Through most of the last two decades, clinical trials in Canada and the United States were structured and analyzed in such a way that safety and efficacy data were available for only part of the population on which the drug would eventually be used.7 Drug analyses were conducted primarily on men, but the drugs were prescribed to women without sufficient knowledge of the possible risks. Identification of the effects of these omissions from clinical trials and analyses has led to attempts to remedy this problem, and both omissions have been significant features of the past decade of writing on women’s health issues.

Kuhn’s work on the processes of scientific discovery shows how paradigms contain implicit assumptions that remain unquestioned, unexamined and unchallenged while the paradigm operates successfully on its own terms.8 Paradigms determine the legitimacy of problems, removing problems that do not require solution. They prefigure solutions,9 as they provide boundaries limiting the solutions. Our analysis of the drug research process demonstrates how this blinkering process has worked with respect to women. Law has contributed to this problem and has also been sought as a solution to it.

Drug advertising has replicated this paradigm of inequality and drawn upon it for commercial purposes. The under-representation of women and other sub-populations in some clinical trials and under-analysis of sub-population data where it existed have increased the risk of health problems for these groups. These problems are reified and amplified by the stereotypes used in drug advertising. Advertisements also have their own effects, creating an image of the doctor-patient relationship and the nature of cure that emphasises traditional models of practice and a heroic role for drug interactions.

The first section of this paper outlines the relationship between innovation and equality. Approaching pharmaceutical product innovation from an equality perspective makes apparent problems in the process of product development, problems with real health consequences. Innovation has had a disparate impact on women. During the last decade, attention has been focused on defects in research that have left particular groups of patients with inadequate information about the safety and efficacy of the products they use.

8 Thomas S Kuhn, The Structure of Scientific Revolutions (1962).
In the second section, we explore the efforts made in the United States and Canada to create research standards that are more responsive to all groups in society, changes whose effects are only beginning to be felt. These problems of injustice form the background within which the industry created advertising for drug products.

In the third section of the paper, we will use the theory of signs to analyse the process by which drug advertisements construct knowledge, and to define ways in which stereotypes are extended through the advertising process. Understanding the way advertisers engage viewers and call upon social perceptions can help us to guard against their capacity to create adverse health consequences. As we will demonstrate, advertising replicates the injustice observed in the creation of drugs and creates stereotypical perceptions that can undermine the doctor-patient relationship and may contribute to inappropriate prescribing. In both research and advertising, drug companies construct knowledge in ways that are detrimental to women.

1. Innovation and Equality

The Belmont Report in 1978 identified justice as a principle that should guide human subject research, along with respect for persons and beneficence. Gradually, feminist scholars and policy-makers began to examine drug product innovation from an equality perspective, asking whether human subject research had been conducted in a non-discriminatory manner that achieved justice for women. An examination of the literature reveals an increasing awareness of the differential social effects of medical innovation. In the period prior to the 1990s, feminist scholars had been concerned that women’s reproductive systems had been made the subject of much attention and research experimentation, as contraceptive products such as the early birth control pills, the Dalkon Shield, Depo-Provera and Norplant were approved for distribution. Because these products were used exclusively by women, only women were subjected to the physical and psychological harms arising from the corporate failures and intentional acts that caused these reproductive products to be on the market without adequate testing, monitoring and information. As Lucinda Finley has expressed it:

Medical science has long sought to control women’s reproductive capacity and to surgically manipulate or technologically “improve on” women’s bodies. Normal female attributes, such as small breasts or menopause, have been classified as disease conditions requiring treatment. It is women exclusively who have faced the risks of iatrogenic injuries and disease from drugs and devices designed to alter the natural processes or shape of their healthy bodies.

10 Institute of Medicine, Women and Health Research, Ethical and Legal Issues of Including Women in Clinical Studies, Vol 1 (1994) at 42.
Feminist jurisprudence has focused equality jurisprudence increasingly on the substantive outcomes of discriminatory conduct rather than simply on access to procedural justice and equality of opportunity. This concept of substantive justice is exemplified in the equality rights jurisprudence of the Supreme Court of Canada. Madam Justice Wilson, for the unanimous Court, described the purpose of the equality section of the Canadian Charter of Rights and Freedoms (section 15) as being ‘to remedy or prevent discrimination against groups suffering social, political and legal disadvantage in our society’. Groups that have been historically disadvantaged, ‘discrete and insular minorit[ies]’, have suffered from prejudice, stereotyping and discrimination — the indicia of inequality. Inequality is a condition of disadvantage experienced by individual members of groups and it is experienced and amplified through discriminatory conduct.

This broad conception of substantive justice has been developed and theorised in academic health law literature informed by feminist analyses. Debra Debruin used Iris Marion Young’s work on equality as a conceptual framework for her work on including women in clinical trials, for the Institute of Medicine study, *Women and Health Research*:

… not all of the concerns of justice are matters of the distribution of benefits and burdens. Oppression qualifies as a concern of justice — indeed, justice requires that we eliminate oppression — but some important aspects of oppression are not purely matters of distribution…. In the second place, Young notes, the distributive paradigm considers only how social arrangements affect individuals as such. She argues that such an exclusive focus on individuals fails to capture important aspects of justice. After all, people are oppressed not as individuals, but as members of groups.

Debruin made the argument that women suffer harms because of the practices that apply to inclusion in clinical trials, because of the failure to include women’s health in the research agenda. The oppressed position occupied by women in society derives from these failures, reflecting the situation of women in relation to exclusionary norms. The Committee on the Ethical and Legal Issues Relating to the Inclusion of Women in Clinical Studies based the Institute of Medicine Report on the principles of justice, noting that, ‘Justice is not served when the nation’s

---

17 Id at 132–134.
research agenda ignores important questions regarding the health of one gender when one gender does not participate in clinical studies, and when one gender is treated with interventions that have not been adequately tested in that gender'.18

The Committee recommended three general principles: that scientific advances benefit all and that the national research agenda ensure this; that preferential treatment in resource allocation may be needed to remedy past injustice and to avoid perpetuating it; and that enrolment in studies ensure generalizable results that apply to both women and men.

In Canada, the Strategic Research Network on Feminist Health Care Ethics made a submission to the Tri-Council Working Group on Guidelines for Research with Human Subjects about the nature of oppression:

Drawing on the work of Iris Young, we understand oppression to be a state that effects (sic) groups and can be characterised as involving some or all of the following five conditions: exploitation, marginalisation, powerlessness, cultural imperialism, and violence.19

The Network went on to say that they made the further assumption that human subject research can significantly affect patterns of oppression, by focusing on health needs of the privileged rather than disadvantaged groups or by providing data of difference to support discriminatory treatment of groups, but that research may also play a significant role in achieving the dismantling of oppressive systems.20

If we look at the analysis of medical innovation over the past decade, we see that the debates about social effects have been informed by a concern for human dignity,21 for equality and social justice, for the preservation of democracy,22 and

---

18 Above n10 (vol 1) at 5.
19 Strategic Research Network on Feminist Health Care Ethics (Susan Sherwin, Principal Investigator), Submission to the Tri-Council Working Group on Guidelines for Research with Human Subjects (March 1995) at 1.
20 Ibid.
22 Maxwell Mehlman & Jeffrey Botkin, Access to the Genome: The Challenge to Equality (1998). They argue that genetic disparity will be increased by economic inequality and that this may have destabilising effects on democracy.
increasing concern about commodification, geneticisation, objectification, and eugenics. Each of these concerns has a relationship to the existence of oppression and injustice.

Inequality has been demonstrated in the way innovation has been conceptualised, in the oppressive effects of stereotyping and discrimination, in the distribution of benefits and risks of innovation, and in the way the imbalance of power has affected women’s lives. For example, Alta Charo, one author of the workshop and commissioned papers for the Institute of Medicine analysis of Ethical and Legal Issues of Including Women in Clinical Studies, concluded that, the exclusion of fertile women from the protocols burdens the fundamental liberty and right to life of fertile women, and functionally burdens the right to life of all women, who are thereby denied the benefits of research on women prior to marketing new drugs and interventions.

Unequal access to benefits by women has been documented in many areas, including diagnosis (cardiovascular disease, HIV/AIDS), treatment (inadequate funding of breast cancer research), and testing (testing of oral contraceptives using dummy pills without consent in a way that also raised race and class issues). Unequal distribution of risks between groups has been documented in the application of untested and unapproved products (thalidomide, DES, and the

---

25 Margaret Atwood, *The Handmaid’s Tale* (1985). Techniques of objectification facilitate treating women as vessels of reproduction or providers of reproductive materials, and undermine respect for women as humans.
28 R Alta Charo, ‘Brief Overview of Constitutional Issues Raised by the Exclusion of Women from Research Trials’, in Institute of Medicine, above n16 at 90.
30 DES (diethylstilbestrol) is a synthetic hormone that was marketed and prescribed between 1941 and 1971 to prevent miscarriage, although no clinical evidence existed of its efficacy for this purpose. When the children grew up, DES was found to have caused a rare form of vaginal cancer, infertility and pregnancy problems in DES daughters, and genital abnormalities in DES sons. It was the subject of significant litigation in the US. See for instance, Harriet Simand, ‘The Iatrogenic Effects of DES’ in *Misconceptions*, vol 2 above n24 at 82-85; the National Film Board (Canada) Studio D video, Bonnie Andrukaitis and Sidonie Kerr (directors) ‘DES: An Uncertain Legacy’ (1985).
Dalkon Shield, where risks were borne disproportionately by women and children, the application of untested therapy (in vitro fertilisation), and the prescribing of products tested only on other populations (drug testing affecting women, older people, non-white racial groups, children). Women use prescription drugs at a higher rate than men, and elderly people, who are disproportionately female, use more prescription drugs, and this means that elderly women are affected disproportionately by drugs. The pharmaceutical industry has been ranked as one of the three industries most disposed to criminal activities (along with the auto industry and oil industry), and as a result women run a higher risk of victimisation.

Concern about the structuring of research extends beyond the unequal distribution of risks and benefits. The Strategic Research Network on Feminist Health Care Ethics in Canada identified, in addition to ‘the exclusion of (some) women from clinical studies’, four other concerns:

- the inappropriate use of women, … the need for clear distinctions and norms governing therapy … innovative practice and research, … a research agenda sensitive to the actual needs of oppressed groups, … and rethinking of the process of setting research agendas and conducting research.

Writing through this period has also pointed to the ways in which society’s views of women as unequal have been incorporated into conceptualisation of women’s bodily processes, such as menstruation, menopause, and conception, and the conceptualisation of certain diseases, such as osteoporosis. Human embodiment has been identified as a site for the generation of meaning and values.

Barbara Duden has written in *Disembodying Women* of how the capacity to visualise the unborn has transformed the experience of pregnancy into a public and accessible process and the foetus into a public idol, representing life. Just as the first photo from space of the ‘Blue Planet’ removed us finally from the flat-earth view that had guided our daily lives, so visual imagery changes the

33 Snider, ibid.
34 Above n19 at 2–3.
conceptualisation of this most intimate and invisible experience. The recognition
that images constrain meanings and reflect social stereotypes is a particularly
important notion to keep in mind as we consider the construction of images in drug
advertising.

2. Innovation, Law and Equality

A. Identification of Equality Problems in Drug Research

Medical innovation in Canada is governed by a variety of legal devices, including
federal regulation of pharmaceutical products; tort law; professional regulation;
intellectual property law; legislative control of institutional service providers; state
funding of, and any limitations on access to, treatments; criminal law; international
covenants concerning research on human subjects and bioethics; and funding
council guidelines applying to research on human subjects.

Prescription drug and device innovation is affected by general laws governing
experimentation in Canada and by the particular laws applying to the drug and
device development. The federal Food and Drugs Act is a criminal statute that
applies to drugs and devices, food and biologics. Products liability law, in the area
of tort law, is a matter of provincial jurisdiction as is professional regulation, while
patent legislation is also a matter of federal jurisdiction. In this section, we shall
examine the structure of law and guidelines affecting this area and consider the
operation of the value of equality as a guiding principle for change.

The goals of safety and efficacy were established gradually through the
twentieth century as standards for the evaluation of prescription drugs. It is hard to
believe that the adulteration of medicines, with such products as plaster of Paris,
cocaine and heroin, had only been brought under regulatory control with the first
drug legislation in 1860 in Britain and 1874 in Canada. Patent medicines were
also brought under control in 1908 in Canada, two years after the United States, in
response to increasing public awareness, developed in part through campaigns in
The Ladies Home Journal and Colliers magazines, of the problems of
unrestricted use of alcohol, narcotics and coal-tar derivatives, and of the excessive
claims made for the products. It wasn’t until later that food and drug legislation in
the United States and Canada focused on the issue of demonstrable safety prior to

38 Ibid.
40 For an analysis of the history of Canadian regulation, see Lynne Kimiko Kamibayashi,
‘Regulation of Biomedical Research with Human Subjects’ LLM Thesis, Queen’s University
41 Food and Drugs Act, RSC 1985 c F–27.
42 The first drug law was enacted in Britain only after a pharmacist’s assistant, making up
peppermint lozenges, mistakenly added arsenic instead of plaster of Paris and poisoned 200
people, killing 17 and causing horrible suffering. The standard initially adopted was purity of
the product, which meant adherence to a pharmaceutical standard or manufacturer’s description
of what the product was claimed to be, in a form unadulterated by prohibited substances.
43 Li Pugsley, ‘The Administration and Development of Federal Statutes on Foods and Drugs in
44 Id at 400.
marketing. The 1938 Food, Drug and Cosmetic Act\textsuperscript{45} in the United States attempted to create better pre-marketing safety and tougher labelling requirements, following the use by the Massengill Company of diethylene glycol (anti-freeze) as a solvent in a sulfa preparation, poisoning more than 100 children.\textsuperscript{46} Successive pharmaceutical disasters — thalidomide, DES, the Dalkon Shield, disproportionately affecting women — led to increased stringency in the regulatory regimes over drugs and devices in both countries.\textsuperscript{47} The crisis of AIDS, in contrast, led to a loosening of regulatory control to achieve earlier release of experimental drugs.\textsuperscript{48} Following on this successful consumer campaign to change drug research processes, the industry campaigned successfully to secure more expeditious approval processes in Canada and the United States and a longer patent protection period in Canada.

At the enforcement stage, the current system of drug regulation in Canada emphasises voluntary compliance by the industry, rather than using a more traditional criminal law enforcement model, even though the Food and Drugs Act is framed as criminal law. Cutbacks by the federal government through the 1990s significantly weakened the power of the regulator over the industry, as inspection staff were significantly reduced and the research laboratories in the Bureau of Drug Research closed, resulting in increasing government reliance on industry reports.\textsuperscript{49} Laureen Snider has argued that there has been ‘virtual abandonment of attempts to proscribe or sanction [corporate] crime’.\textsuperscript{50} The disappearance of corporate crime enforcement means the symbolic effect of crime disappears and data about the events become unavailable; since no one is monitoring it, there is no one to report it to, and there are no data for people to see. Health Canada has conducted an internal reorganisation resulting in the Therapeutic Products Programme (TPP). It was developed as a response to industry criticisms of the lengthy approval process, the Krever Commission’s identification of departmental failures in regulation of the blood supply,\textsuperscript{51} public concerns about Health Protection Branch management, and global forces producing a centrifugal force in assessment and reporting.\textsuperscript{52} In the United States, industry demands for faster approval processes have produced

\textsuperscript{48} Steven Epstein, Impure Science: AIDS, Activism, and the Politics of Knowledge (1996). Epstein argues that AIDS activism also led to significant changes in our understanding of the process by which knowledge was constructed and given credibility, based on power and trustworthiness.
\textsuperscript{49} Laura Eggerton, ‘Federal Labs to be Shut Down. Ottawa Closing Facilities that did Independent Tests on Pharmaceuticals, Food Safety’ Toronto Globe and Mail (11 July 1997) at A1.
\textsuperscript{51} The Honourable Mr Justice Horace Krever, Chair, Commission of Inquiry on the Blood System in Canada, Final Report (1997).
\textsuperscript{52} G Bruce Doern, ‘The Therapeutic Products Programme: From Traditional Science-Based Regulator to Science-Based Risk-Benefit Manager?’ in G Bruce Doern & Ted Reed (eds), Risky Business: Canada’s Changing Science-Based Policy and Regulatory Regime (2000) at 185–207.
significantly decreased approval times. More rapid review takes place, according to Robert Temple, FDA Director of the Office of Drug Evaluation, not only because of increased staffing, in part resulting from legislated industry fees, but also because of an internal change in FDA culture to the attitude that it is ‘possible and necessary to be both timely and good’. 53 FDA has recently withdrawn approvals for drugs associated with serious health risks and death, 54 and the withdrawals have been linked to the faster reviews, in the Pulitzer Prize-winning series by the Los Angeles Times. Withdrawn drugs have been shown to have increased health risks to women. 55

By the beginning of the 1990s, the groundwork had been laid for the changes in the direction of equality that took place in that decade. Particular problems in the drug industry in Canada and the United States had been identified through mass tort and individual litigation and research; the exclusionary limitations in clinical trials and research had been identified and further research on that topic had begun; and the women’s health movement had begun to have a political impact. In 1985, the US Public Health Service Task Force on Women’s Health Issues found that the quality of health information and health care available to women were compromised by the lack of emphasis on women’s health in research. 56 Identification of the problem of women’s exclusion led the National Institutes of Health (NIH) in 1986 to create a policy urging the inclusion of women in clinical research. 57 Vanessa Merton has noted that the policy sounded very promising but that it ‘went unenforced and essentially disregarded for the first five years of its existence’, as was documented in Congressional testimony and the GAO Report. 58 The Congressional Caucus for Women’s Issues asked the General Accounting Office to investigate the implementation of this NIH Guideline for the inclusion of women. The failure to include women in sufficient numbers to carry out subsample analyses and the failure to carry out gender analyses were substantiated in the report of the United States General Accounting Office in 1990, which found that the sex analysis had been done for only 50 per cent of Phase 2 and 3 clinical trials for drugs approved in the period 1988–1991. 59 A subsequent US Food and

56 IOM, vol 1, above n10 at 43; Regina M Vidaver, Bonnie LaFleur, Cynthia Tong, Robynne Bradshaw, & Sherry A Marts, ‘Women Subjects in NIH-Funded Clinical Research Literature: Lack of Progress in Both Representation and Analysis by Sex’ (2000) 9 J Women’s Health & Gender-Based Medicine 495.
Drug Administration survey of 1991–92 new drug applications, after the 1988 guideline changes, found that about two-thirds of safety analyses and just over half of efficacy analyses broke the analysis down by gender.

As noted above, analysts had noted that women were regularly excluded from, under-represented in and/or under-analysed in clinical trials and research. At the same time it was becoming apparent that particular groups of women — elderly, women with disabilities, racial groups — and their male counterparts was inadequate. While not all studies fit this pattern of exclusion or under-representation, and the IOM Committee concluded, ironically, that data were not available to determine whether women participated to the same extent, it was most clear that research in the areas of cardiovascular research and AIDS suffered from this deficiency. Where women were included in samples, sub-sample analyses of gender effects were insufficiently undertaken. Non-inclusive research took place intentionally, sometimes in accordance with legal requirements that precluded pregnant women from participation and, as Vanessa Merton expressed it in the title to her detailed study, led to ‘the exclusion of pregnant, pregnable, and once-pregnant people — a.k.a. women’. Michelle Oberman pointed out that,

One of the ironies of women’s underrepresentation in clinical trials is that the federal regulations limiting women’s participation as subjects in drug trials were promulgated not in the nineteenth or early twentieth centuries but as recently as 1977 … Historically, women were popular subjects of medical research for precisely the same reasons that render them problematic subjects today. Specifically, women’s reproductive capacity has always intrigued scientists.

Such exclusionary research also took place inadvertently, through failure to advert, to undertake to conduct sub-sample analysis or to increase sample sizes to permit such analyses.

Johnston and Fee have noted that we need to remember that the problems are ones both of exclusion and of inclusion. As Francoise Baylis, Jocelyn Downie and Susan Sherwin have noted, the concerns identified by many feminists are exclusion and under-representation, the risk of exploitation, and the setting of research priorities. The systematic exclusion of women from trials took place, Sue Rosser demonstrated, on the basis of difference (men’s bodies are the norm

---

60 Kinney; GAO; Merton; Dresser, all above n7; Institute of Medicine, above n16.
61 Institute of Medicine, above n10, vol 1.
63 Merton, above n7.
64 Michelle Oberman, ‘Real and Perceived Legal Barriers to the Inclusion of Women in Clinical Trials’ in Alice J Dan (ed), Reframing Women’s Health: Multidisciplinary Research and Practice (1994) 266 at 267.
and women’s bodies are too complicated having all those pesky hormones to mess up the research sample) and on the basis of sameness (women are the same as men and so we don’t need them in the research sample). Debra Debruin refers to this second factor as ‘false universalism’, noting that it has the two consequences of making women invisible and, to the extent that women are different from men, sub-standard and deviant. Michelle Oberman described it as not simply garden-variety gender bias but a more complex reincarnation of the age-old phenomena of male normativity, complemented by the somewhat more modern obsession with potential legal liability … two factors [that] have joined to perpetuate a system that not only neglects to develop safe and effective medical treatments for women but neglects to do so in the name of protecting women from harm.

The protective approach to regulation grew directly out of the massive harm created by thalidomide and subsequent mass harms. More recently, the protective approach has been challenged — ironically — by the claim to the benefits forming part of participation in clinical trials; these benefits include not only access to experimental technology, but also to the increased monitoring and attention provided in a clinical trial, and access to health care that is otherwise unavailable in a country like the United States that lacks universal health care.

B. United States Changes

Because changes made in the United States are so influential in Canada, it is worth examining the responses of the National Institutes of Health and the Food and Drug Administration before examining changes made to Canadian regulation of clinical trials and human subject research. Changes in the National Institutes of Health (NIH) guidelines were designed to promote greater inclusion of women and minorities in clinical trials and research. The NIH legislation requires valid sub-sample analysis, allowing some exemptions, and mandates data collection. The

---

68 Debruin, above n16 at 133.
69 Oberman, above n64 at 266.
70 For a useful outline of the development of protectionist and inclusionary policies, see Institute of Medicine, above n16 at 37–43. In 1974, the United States Department of Health, Education and Welfare put into place regulations for federally funded research, based on this protective approach to women and the Kefauver-Harris amendments to the 1938 legislation added efficacy to the safety standard in the drug approval process. The 1977 guideline for research ‘virtually banned participation of women with childbearing potential from entry into the early phases of clinical trials’, based more on gender stereotyping than on science: Johnson & Fee, above n65 at 34, citing Kinney, above n7.
71 The changes were incorporated into the 1993 NIH Revitalization Act and the 1994 guidelines in accordance with the Act and supported by the NIH Outreach Notebook: above n29 at 534–538.
NIH Office of Research on Women’s Health (ORWH) held sessions with Institutional Review Boards, the local boards that assess clinical trials and other forms of research on human subjects, and created a database to analyse the results of the inclusive measures. It is important to note, however, that the 1994 NIH Guidelines were not applicable if gender differences were not indicated by current research or if the disease affected only one group.\(^72\) Vanessa Merton has argued that the linking of the appropriateness standard to ‘known incidence/prevalence’ of a condition among women is problematic because of the ‘enormous gaps in knowledge about the epidemiology of many conditions in women’ because of the exclusion of women from research.\(^73\) She advocated more research on women’s health and gender comparisons, evaluation of all research to determine whether gender analyses can be conducted, pharmacokinetic screens of all new drugs in both genders and animal studies including females as well as males.\(^74\)

Recent research suggests that women’s participation in research and clinical trials is still insufficiently analysed and that it is not possible to say that the law and guidelines have succeeded in changing this problem. In 2000, a GAO study concluded that researchers receiving federal funding failed to analyze the effects of the drugs and treatments of women, as required under federal law.\(^75\) The GAO Report indicated that inadequate sub-sample sizes continued to be a problem, although women were included. The Report also found that ‘significant progress’ had been made by NIH to implement its inclusion policy, including treating the participation of women and minorities as an issue of scientific merit.\(^76\) The GAO recommended moving beyond inclusion to enrolment and analysis in order to learn whether differences exist between the genders, and recommended ensuring that studies be designed to allow for valid analysis unless they are exempt. GAO recommendations about sub-sample analysis and education led NIH to restate its requirement of design and conduct of Phase III clinical trials to enable sub-sample analysis.\(^77\)

Regina Vidaver and co-authors found that in research published from 1993 to 1998 in four leading medical journals, very few researchers analysed the results by sex.\(^78\) This was the case in spite of the inclusion of women in about 80 per cent of the studies. The 2000 GAO report, ‘Women’s Health’, comments that analyses showing no difference between the sexes might not be published, even when carried out.\(^79\) An editorial by Greenberger and Marts urged change in research design and analysis plans at the grant application stage, review of recruitment and


\(^73\) Vanessa Merton, above n58 at 73–74.

\(^74\) Id at 75.


\(^76\) United States, General Accounting Office, ‘Women’s Health: NIH Has Increased its Efforts to Include Women in Research’ GAO/HEHS–00–96 (2 May 2000).

\(^77\) Above n57.

\(^78\) Vidaver et al, above n56.

\(^79\) Above n76 at 8.
retention data during the grant and at grant renewal, and a requirement by journals that authors include reports of gender analysis or an explanation for its absence.\textsuperscript{80} Another study showed that fewer than 15 per cent of published research did gender analysis.\textsuperscript{81} They concluded that this results in doctors failing to recognise dangerous drug combinations, giving as an example the disproportionate number of women who had life-threatening heart rhythm abnormalities as a result of taking Seldane, the antihistamine, in combination with either erythromycin or the antifungal agent, ketoconazole. Stephen Fried reported in his book, \textit{Bitter Pills}, that Seldane was bringing in $700 million in sales annually and was just about to go over-the-counter when the FDA was alerted to the interaction data, which had been reported to the FDA only as drug overdoses, for which the individuals themselves would have been considered responsible. Doctors had made reports of 30–40 deaths from these interactions.\textsuperscript{82}

The US Food and Drug Administration issued new guidelines in 1993, lifting the ban on inclusion of women of child-bearing potential, stating that the clinical sample should represent the population that would receive the drug, for comparison purposes, and indicating that they expected a full range of patients in all phases of trials and analysis of gender differences on efficacy and adverse effects.\textsuperscript{83} Karen Baird has argued that although these are only guidelines and women of childbearing potential were not required to be included, making these weaker than the NIH changes,\textsuperscript{84} the FDA didn’t have as far to go in creating representative samples; they were reacting against the considerable pressure to deregulate, and they have, in fact, carried out educational activities and used persuasion with the industry, working to define the presentation of gender data in new drug applications, sponsoring educational sessions, and creating a gender analysis working group within the agency.\textsuperscript{85} A 1997 legislative change has required the Secretary, in consultation with the NIH Director and industry representatives, ‘to review and develop guidance, as appropriate, on the inclusion of women and minorities in clinical trials’.\textsuperscript{86}

In 1998 a Final Rule on Investigational New Drug Applications and New Drug Applications issued by the FDA clearly defined for companies the requirement to tabulate analyses of safety and effectiveness for important subgroups (gender, age

\textsuperscript{81} Carol Hansen Montgomery & Katherine Sherif, ‘The Information Problem in Women’s Health: A Piece of the Solution’ (2000) 9 J Women’s Health & Gender-Based Med 529.
\textsuperscript{83} United States, Food and Drug Administration (1992) ‘Guideline for the Study and Evaluation of Gender Differences in Clinical Evaluation of Drugs’; above n29 at 539.
\textsuperscript{84} Baird, id at 539–540.
\textsuperscript{85} Id at 562.
and racial subgroups) for new drug applications (applications for approval to market) and required that enrolments in clinical trials be tabulated by important subgroups (age, gender and race) for investigational new drug annual reports, to enable early identification of any enrolment deficiencies that could lead to problems in the NDA submission.\footnote{Food and Drug Administration, Final Rule on Investigational New Drug Applications and New Drug Applications Federal Register, 11 February 1998; effective 10 August 1998.} This rule is intended to deal with the critical problem of analysis of sub-population data. As the FDA noted in its comment,

Despite repeated agency encouragement in both regulations and guidance, FDA and GAO have found that the analysis of effectiveness and safety data in relevant population subgroups, including age, gender, and racial subgroups, is not being carried out consistently. This rule makes the need for these subgroup analyses completely clear.\footnote{Id at 3.}

Under the clinical hold rule created as a Final Rule on June 1, 2000, FDA is empowered to put a clinical hold on certain investigational new drug applications if men or women of reproductive potential who have the disease or condition and were otherwise eligible have been ‘categorically excluded’ solely on the basis of the perceived risk or fetotoxic potential.\footnote{United States, FDA, Final Rule, ‘Investigational New Drug-Applications; Amendment to Clinical Hold Regulations for Products Intended for Life-Threatening Diseases and Conditions’, Fed. Reg. June 1, 2000, 65 at 106.}

The picture of inclusion and exclusion from clinical research is multi-faceted. The proportion of women in clinical trials has sometimes been found to be similar to their representation in the patient population for the disease, as the FDA noted.\footnote{Above n87 at 2.} As we analyse later, however, diagnosis of disease is affected by perception of the typical patient for that disease, and women with the disease may be under-diagnosed. Vivian Pinn has said,

Rather than think of diseases as specifically male or female, we’ve come to a realisation that the same disease may have different manifestations that are gender specific and that these manifestations may provide important clues in the effort to improve disease diagnosis, treatment, and prevention … For instance, we know that women are more vulnerable to auto-immune diseases than men, but we don’t know why.\footnote{Vivian Pinn, NIH Associate Director for Research on Women’s Health, Interview, ‘Women’s Health at NIH: Catalyst for Change’ (Fall 1997): <http://www.nih.gov/news/nf/womenshealth/1.html>.

Given this, a comparison of the research sample with the patient population may simply replicate the problem. It is essential to design and conduct studies with sub-samples large enough to carry out these sub-sample analyses, so that scientific discoveries benefiting both genders can result\footnote{Ibid.} and any differential effects of the
drug can be identified. The FDA rule is a further step in the direction of remedying these problems.

C. Canadian Changes

Changes in Canada have been much less extensive. They have taken the form of guidelines for funded research, in the Tri-Council Policy Statement (TCPS), ‘Ethical Conduct for Research Involving Humans’. The three federally funded granting councils in Canada adopted the TCPS after an extensive period of development and consultation. The TCPS is being implemented by universities for federally funded research and, at the discretion of the universities and other institutions, for other forms of research on human subjects. The content of the guidelines moves the governance of research into a more complex analysis of the effects and nature of such research by setting out a set of values to guide decision-making and by pointing out the combination of values changed by the context. The Research Ethics Boards are considered the ‘cornerstones’ of the policy, and the National Council on Ethics in Human Research has carried out an analysis of how to increase their effectiveness and improve support for them. These Canadian changes have taken the form of a policy statement, and so their primary force comes through funding availability and institutional application to broader forms of human subject research.

Paragraph 5.2 of the TCPS provides that: ‘Women shall not automatically be excluded from research solely on the basis of sex or reproductive capacity.’ Paragraph 5.1 provides that, where research is of a generic nature, and not specific to a group, researchers shall not exclude prospective or actual subjects on the basis of attributes, including sex, race and age, ‘unless there is a valid reason for doing so’. Focused research on a particular individual or group is permissible (Par 5.1 (b)). This comparatively weak statement focuses on non-exclusion rather than required inclusion, provides a potentially broad and vague exception, and does not require analysis of sub-samples.

In April 1997, Health Canada issued a guideline for inclusion of women in clinical trials, applying to all drug trials. The general principle of the guideline is the important one that, ‘Drugs should be studied prior to approval in subjects representing the full range of patients likely to receive the drug once it is marketed.’ Recognising the potential differences in dose-response, maximum size of effect or risk of an adverse effect, the guideline states its intent as encouragement of the inclusion of women, especially women of child-bearing potential at the earliest stages of drug development, to ensure that gender differences are identified and taken into account in the Phase III trials and to

---

95 The website for CIHR is <www.cihr.ca>.
generate data to inform physicians and patients about gender-related qualities of a new drug. Since it is only a guideline, it lacks the force and reach of a regulation. This guideline is put into effect by clinical reviewers of New Drug Submissions who check data affected by the guideline to identify any gender differences that would require dosage variations.

We know that the exclusion of women from some drug trials and limited subsample analysis has led to a situation where drugs used during pregnancy have been untested on pregnant women. The guideline simply states that enrolment of pregnant or lactating women must be individualised and assessed on a risk-benefit basis taking into consideration the nature and severity of the disease, the availability and results of preclinical animal data, the availability and risks associated with alternative therapy, the stage of pregnancy and the potential for harm to the foetus or infant. It further specifies methods to minimise foetal exposure. Leaving issues of risk and benefit to be decided on an individual basis has clear advantages, although Research Ethics Boards need to have explicit guidelines to assist in their decision-making process. The guideline further states that pharmacokinetic studies for both genders should be carried out and that, for women, they should consider the effects of the menstrual cycle, supplementary estrogen and oral contraceptives in relation to the drug’s nature. Gender influences should be assessed in individual studies and in the overall integrated analysis of efficacy and safety, the guideline states.

These inclusion principles are also to be followed within the context of the International Conference on Harmonisation of Technical Requirements for the Registration of Pharmaceuticals for Human Use/Therapeutic Products Programme guideline, ‘Timing of Non-Clinical Safety Studies for the Conduct of Human Clinical Trials for Pharmaceuticals’. The TPP guideline on inclusion of women in clinical trials contains useful starting points for the development of stronger measures to support the inclusion of women in clinical research and to require analyses for sub-populations. Creating a regulation with fully developed design and conduct criteria should be given high priority by Health Canada.

The Tri-Council Policy Statement is being implemented by the research ethics boards (REBs) in local institutions such as universities and hospitals across the country. Canada has also adopted the TPP Guidelines/ICH Harmonised Tripartite Guideline, ‘Good Clinical Practice: Consolidated Guideline’, and this guideline includes responsibilities of institutional review boards and ethics committees. Research Ethics Boards, like their United States counterparts, the Institutional Review Boards, are responsible for assessing protocols for research on human

---

subjects for conformity to the ethical principles and legal standards in effect in the jurisdiction. REBs should also be engaged in assessing the implementation of the federal guideline on inclusion of women in clinical trials.

The debate that led up to the TCPS and the considerably expanded understanding of ethical questions contained in it are likely to have a useful influence on the overall quality of decision-making at the local level, where numerous decision-makers had already developed significant expertise. The responsible agencies need to ensure that standards are applied consistently by the Research Ethics Boards across the country and need to provide education and continuing support. REBs are usually under-funded and generally lack the capacity to monitor adherence to the standards during the clinical trial. Continuing review becomes increasingly important as it forms part of the Good Clinical Practice Guideline adopted in 1997. REBs operate in universities, where there is powerful motivation to support researchers in obtaining and maintaining funding. This potential conflict of interest was noted, but discounted in the TCPS. Research Ethics Boards themselves are subject to liability where a court determines that the board has failed to fulfil its responsibilities with respect to the protocol. In Weiss v Solomon, a hospital ethics board shared responsibility for the death of a patient in a research study after it failed to require that the protocol exclude this patient on the basis of his existing health problem, to emphasise the risks on the comment form and to be adequately prepared for such an adverse reaction.

D. Further Problems

The pharmaceutical industry’s concern for litigation resulting from injury through clinical trials on fertile women needs to be taken into account in any guidelines, if manufacturers are to include fertile women in clinical trials. A further point developed by Ellen Flannery and Sanford Greenberg is of some assistance in this respect: ‘Inclusion of women in clinical studies is unlikely to significantly increase the risk of liability for harm to subjects participating in the clinical trials, while exclusion of women could lead to liability for injuries to women after the product is marketed.’ Similarly, Ellen Wright Clayton noted in her study of paediatric effects of clinical trials that,

101 Above n99 at s3.1.4.
104 Oberman, above n64 at 274–275.
105 Ellen Flannery & Sanford N Greenberg, ‘Liability Exposure for Exclusion and Inclusion of Women as Subjects in Clinical Studies’ in Institute of Medicine, above n16 vol 2 at 97.
From the perspective of investigators and particularly of the manufacturers whose interventions are being tested, the risk of incurring liability during the early stages of drug investigation is actually quite small whereas the potential for substantial liability is much greater once a fetotoxic drug enters widespread use.\footnote{Ellen Wright Clayton, ‘Liability Exposure When Offspring Are Injured Because of Their Parents’ Participation in Clinical Trials’ in Institute of Medicine, id at 103.}

Post-marketing surveillance is not carried out in a systematic way under the Canadian system and this serious deficiency has been repeatedly drawn to the attention of the federal government.\footnote{Denis Gagnon, et al, ‘Gagnon Report’, \textit{Working in Partnerships: Drug Review for the Future: Review of the Canadian Drug Approval System} (1992) at 113; see discussion in Patricia Peppin, ‘Drug/Vaccine Risks: Patient Decision-Making and Harm Reduction in the Pharmaceutical Company Duty to Warn Action’ (1991) 70 \textit{Can Bar R} 473 at 494; Krista Foss, ‘Loosening the Cap on Drug Approvals: the Slow Pace of Canada’s System for Ensuring the Safety of New Drugs is Under Fire from Patients, Academics and Manufacturers’ \textit{Toronto Globe and Mail} (30 May 2000) at R7.} An effective post-marketing surveillance system would be able to pick up adverse effects that were not apparent in the Phase III clinical trials, either because of sample size or sample composition. If adverse effects are not being reported effectively and accurately, then data for sub-populations are unavailable. Reporting of adverse effects is mandatory for the pharmaceutical industry but reporting by other groups, including doctors and hospitals, is done only on a voluntary basis. This hit-and-miss system leads to insufficient information about adverse effects being available for physicians, regulators and patients who are trying to participate in making informed decisions.\footnote{Linda T Kohn, Janet M Corrigan & Molla S Donaldson (eds), \textit{To Err is Human: Building A Safer Health System} (2000).} Identification of adverse effects is particularly important for vulnerable populations and for groups inadequately assessed at the clinical trial stage.

Current regulation in Canada, as in the United States, permits unapproved, or off-label, uses of drugs approved for other purposes. For example, the hazardous diet drug combination ‘fen-phen’ was an off-label long-term combination of a drug, fenfluramine, approved for short-term use, in combination with a second appetite suppressant, phentermine.\footnote{GAO, ‘Drug Safety: Most Drugs Withdrawn in Recent Years Had Greater Health Risks for Women’ GAO–01–286R (19 January 2001) at 5.} The approval of thalidomide by the FDA in 1998, in spite of negative reviews by the three scientific reviewers, has created the possibility of off-label uses beyond its approved use for leprosy treatment.\footnote{David Willman, ‘A Long-Fears Drug Gets the Green Light’ \textit{Los Angeles Times} (20 December 2000) at A27.} The \textit{Los Angeles Times} has reported that it has already been marketed for other uses, cancer and AIDS, and that thalidomide has been reported as a suspected cause in 16 deaths in the two years since approval, although these were among very sick patients. Off-label use creates a further problem for the tracking of gender-based consequences. Further, such a practice creates a disincentive to drug research.\footnote{Fried, quoting Raymond Woosley, above n82 at 101.} From the company’s perspective, there are advantages in ensuring that physicians

\footnotetext[106]{Ellen Wright Clayton, ‘Liability Exposure When Offspring Are Injured Because of Their Parents’ Participation in Clinical Trials’ in Institute of Medicine, id at 103.}
\footnotetext[108]{Linda T Kohn, Janet M Corrigan & Molla S Donaldson (eds), \textit{To Err is Human: Building A Safer Health System} (2000).}
\footnotetext[109]{GAO, ‘Drug Safety: Most Drugs Withdrawn in Recent Years Had Greater Health Risks for Women’ GAO–01–286R (19 January 2001) at 5.}
\footnotetext[110]{David Willman, ‘A Long-Fears Drug Gets the Green Light’ \textit{Los Angeles Times} (20 December 2000) at A27.}
\footnotetext[111]{Fried, quoting Raymond Woosley, above n82 at 101.}
become aware of the new use for the product, without advertising it formally. The law of negligence applies to off-label prescription and doctors need to be wary of prescribing for uses that might not meet the standard of care.

Even some drugs that have gone through recent approval processes have the potential to create serious and in some cases life-threatening adverse effects unobserved during the three phases of clinical trials. The GAO found that 51 per cent of the 198 drugs approved between 1976 and 1985 caused serious adverse effects, basing their conclusion on changes in labels and withdrawals from the market.112 Until recently, drugs were infrequently removed from the market. For example, Omniflox, a so-called ‘me-too’ antibiotic that added no therapeutic benefit for consumers, was withdrawn from the market by Abbott Laboratories in 1992, only the ninth drug to be withdrawn in ‘modern FDA history’. It had been on the market for 16 weeks, during which the adverse effects included renal failure, hemolytic anaemia (blood cell destruction), anaphylactic shock, severe hypoglycaemia, and some cases of multiple organ failure resulting in death.113

A 2001 GAO study found that health risks to women were greater among the drugs withdrawn from the US market over the past three years.114 Four of the ten withdrawn drugs posed greater health risks for women, even though they were widely prescribed for both genders, while another four posed greater health risks for women that might reflect the higher level of usage among women. A Pulitzer Prize winning series in the Los Angeles Times demonstrates how Congressional and Presidential demands for faster approval times for new drugs has led to speeded-up processes of approvals, FDA approval decisions that disregarded internal warnings in some cases, and ultimately the withdrawal of seven drugs after reports of serious adverse effects, including deaths.115 They reported that these seven drugs were reported as the leading or primary suspects as causes of death in 1002 adverse event reports filed with the FDA. While the drugs may not have been the actual cause in each case, it is also true that adverse event reports significantly underestimate incidence. Six of the seven withdrawn drugs were prescribed for conditions that were not life-threatening — heartburn, appetite suppression and pain relief.

One important feature of tort litigation is its provision of a forum for the examination of corporate and government activities. The forensic potential of tort litigation should not be underestimated, as it provides information to guide policymakers who can craft legislation to prevent similar occurrences and motivates regulators to take stronger action. Its indirect ability to identify publicly the wrongs needing remedy is one of tort law’s important contributions to the law of innovation in the 20th Century and mass tort litigation was a significant force in changing the nature of drug regulation.

112 Lucinda Finley, ‘Female Trouble: The Implications of Tort Reform for Women’ (1997) 64 Tenn LR 847 at 869.
113 Above n82 at 170–171.
114 Above n109.
115 Above n54.
Many of the drug and vaccine innovations in the past century have produced immense health and social benefits, and it is in this context that mass harms created by the products appear so shocking. To avoid this consequence, any health regulatory system needs to have the means to ensure safe and efficacious products, tested on the populations on which they are being used, tested for the purpose for which they are being prescribed, and assessed through surveillance after marketing. In this section we have discussed how the knowledge constructed about women’s health through the drug development process was identified as a significant problem. As political pressure mounted, government agencies and research councils sought better analyses of the problem and solutions to it. At the same time, advertisers were creating portrayals that drew upon and reinforced social and medical stereotypes. In the next section we analyse this myth-making process and its detrimental effects.

3. Constructing Images in Drug Advertising

Advertisers construct knowledge about their products and the value to be attributed to them. This is done in a context in which the value attached to their product is always positive. Advertising in professional journals is a primary means of communicating with prescribing professionals. Marketing of prescription drugs is subject to certain limitations, incorporated into federal legislation and regulations in Canada. Apart from these requirements prohibiting direct-to-consumer advertising, prohibiting claims of cure for particular treatments, and accepting delegation of Broadcasting Act authority to preclear advertisements, limits are not imposed on the drug’s conceptualisation in advertising.\footnote{Food and Drugs Act and Regulations, above n41. For an overview of US drug regulation at the beginning of the 1990s see David Kessler, ‘The Federal Regulation of Prescription Drug Advertising and Promotion’ (1990) 264 JAMA 2409.}

We argue that drug advertising needs to be transformed to incorporate greater respect for disadvantaged populations and that readers of drug advertisements — prescribing physicians in particular — need to be educated about the means by which messages are transmitted so that they can guard against the construction of hidden motivators. Advertising draws on aspects in the political culture, including stereotypical representations of particular groups to power the advertisement. These ideological characterisations have the potential to create distortions in the diagnosis and treatment of disease, and to reinforce biases in perceptions of women and other under-analysed groups.

Semiotic theory provides concepts to analyse the construction of advertising messages and to uncover the hidden values. The theory of signs is drawn from the theories of Barthes, Lévi-Strauss, Saussure,\footnote{For example, Roland Barthes, The Semiotic Challenge (trans Richard Howard, 1988); Claude Lévi-Strauss, Structural Anthropology 1 (trans Claire Jacobson & Brooke Grundfest Schoepf, 1977); Ferdinand de Saussure, Course in General Linguistics (trans Wade Baskin, 1974).} and modern analysts Williamson and Goldman\footnote{Judith Williamson, Decoding Advertisements: Ideology and Meaning in Advertising (1978); Robert Goldman, Reading Ads Socially (1992).} who have examined myths and theorised about the construction of knowledge and value. The essential concepts in the theory of signs are:
• The sign, which is the material object plus its meaning
• Signification, which is the process of attributing meaning to an object. 119

Judith Williamson has demonstrated how the drug advertisement process works through a Chanel No. 5™ advertisement, made up of a close-up of Catherine Deneuve with a bottle of Chanel No. 5™ superimposed in the bottom right-hand corner. The advertisement is designed to engage the viewer in generating the meaning of Catherine Deneuve, the sign, and then transferring this meaning to the product. As a result, the perfume is seen as something chic, elegant and sensual. In the final step, we transfer the meanings to ourselves: we will be beautiful if we use the product.

Advertisements are designed to draw the reader into the process of identification and attribution — identification of meanings derived from one myth system and attribution of those meanings to the product. 120 Advertisements engage the viewer through a process of calling the reader forward into the advertisement, to participate, produce meaning, give value, and identify. This process is an active one, involving identification and transfer of meanings, even though the process may occur without the reader’s awareness and even though the initial object or person and the product being sold may be dissimilar. 121 Robert Goldman has provided this description of the process: ‘Advertising is a system for producing a currency of signs … a dialogue which is the site for interpretive exchanges.’ 122

The viewer creates the meaning in the ad, on the basis of what the viewer already knows. The source of the significance in our own belief systems is called the referent system in semiotic theory. 123 The qualities signified by the person or object, beauty in the Chanel No.5™ case, have their source in the referent system. The referent system is a system of meaning operating within that cultural context, 124 which provides the meaning that will be attributed to the sign and transferred to the product. This prior knowledge of the viewer is drawn out by the advertiser based on the ideological assumptions that the advertiser anticipates will be successful for that group of viewers. The meaning that the viewer constructs for the object is combined with the object to create the sign. Barthes talks about myths as combinations of the sign, signified and referent system. ‘Myth has a double function: it points out and it notifies, it makes us understand something and it imposes it on us.’ 125 That meaning is then carried over, in an unconscious way, to

---

119 Judith Williamson has described the elements in this way: ‘A sign is quite simply a thing — whether object, word or picture, which has a particular meaning to a person or group of people. It is neither the thing nor the meaning alone, but the two together. The sign consists of the Signifier, the material object, and the Signified, which is its meaning. These are only divided for analytical purposes: in practice a sign is always thing-plus-meaning’: id at 17.
120 Goldman, above n118 at 143.
121 Williamson, above n118 at 30.
122 Goldman, above n118 at 174. The ad process is ‘powered’ by a desire for meaning and self-actualisation on the part of the viewer, and this makes the transition across the space between the viewer and the object: Williamson, above n118 at 60, 66.
123 Id at 26.
the object to be marketed — the perfume, the blue jeans, the soft drink or the drug.\textsuperscript{126}

Consumer advertising has become more sophisticated since viewers became conscious and ‘knowing’ about their own participation in the process. Advertisers have made use of this awareness by incorporating playful self-referential elements into consumer advertisements, and by creating advertisements specifically for the aware viewer to deconstruct.\textsuperscript{127} Medical advertising has not reached this stage and the techniques used in drug advertising can still be understood using the basic tools of semiotic analysis. As the audience for drug advertising changes with a new media-literate and more diverse generation of medical students and practitioners, however, drug advertisers may find themselves caught between two very different kinds of viewers.\textsuperscript{128}

The advertiser appropriates the system of meaning from a segment of society for the purpose of targeting that group.\textsuperscript{129} Medical advertising is constructed to draw upon two referent systems: first, the assumptions doctors will make about their practices, their professional self-images, patients, doctor-patient relationships, and the nature and expression of diseases, and second, the social attitudes to groups in the society to which the drug is targeted. Advertisements also call upon views about the doctor-patient relationship that include heroic and interventionist roles for doctors and passive and compliant roles for patients. Because of the values depicted in the advertisements, discriminatory portrayals are reinforced, and practices encouraged that are ultimately harmful to health. The process by which advertising values are created takes place unconsciously, with the active participation of the viewer and yet is designed by the advertiser to make the connotation appear natural. Williamson has said that,

Images, ideas or feelings, then, become attached to certain products, by being transformed from signs out of other systems (things or people with ‘images’) to the products, rather than originating in them. This intermediary object or person is bypassed in our perception …. So a product and an image/emotion become linked in our minds, while the process of this linking is unconscious.\textsuperscript{130}

Later, she notes that, ‘The obvious ideological function of this is to make the subject feel knowing but deprive him of knowledge.’\textsuperscript{131}

\textsuperscript{126} Goldman, above n118.
\textsuperscript{128} Medical students at some medical schools, including Queen’s University and Albany Medical College have received education in the evaluation of the claims made in drug advertising: Solomon Garb, ‘Teaching Medical Students to Evaluate Drug Advertising’ (1960) \textit{35 J Med Educ} 729. See also Jacqueline N Glasgow, ‘Teaching Visual Literacy for the 21\textsuperscript{st} Century’ (1994) \textit{37 J of Reading} 494. A good starting point would be Michael S Wilkes, Bruce H Doblin & Martin F Shapiro, ‘Pharmaceutical Advertisements in Leading Medical Journals: Experts’ Assessments’ (1992) \textit{116 Annals of Internal Med} 912.
\textsuperscript{129} Goldman & Papson, above n127 at 9.
\textsuperscript{130} Williamson, above n118 at 30.
\textsuperscript{131} Id at 116.
The advertisements we have selected to demonstrate this process appeared in the *Canadian Journal of Psychiatry*, the *Canadian Medical Association Journal* and the *American Journal of Psychiatry* over the period between 1996 and 2001. They show some common approaches to the depiction of mental illness, patients, doctors and cures. They also illustrate stereotypical representations found in drug advertising generally. We have chosen mental illness as a disease prototype as there is a significant literature that indicates that women are over-represented in the advertisements for drugs to treat such illnesses as depression, schizophrenia, anxiety disorder, obsessive-compulsive disorder and panic disorder. These advertisements provide illustrations of our theoretical perspective on innovation, equality and myths.

Astra Zeneca Pharmaceuticals offers a triptic of ads for its drug Seroquel,™ a drug used for the treatment of schizophrenia. 132 The first ad is of a young woman, the second of a young man and the third of an older man. Each ad has the same structure: a half-face photo on the right side of the ad showing pale faces on an even paler background, with text in a font that appears hand written. The messages in the text indicate key differences among the three people. The first ad depicts the young woman looking sad, with her eyes wide open and staring into space with a dazed look that is stereotypically associated with individuals with mental illness. In large print beside the picture are the words, Will I gain weight?, graphically presented, as in all the ads of this triptic, to give the impression that she has written the words by hand. There is great personal appeal in this ad, with the questioning face and the handwritten question designed to draw in the doctor. The drug company provides the doctor with the answer to the young woman’s question in scientific terminology just under the question. The answer, however, says two different things depending on how far you read. In larger print the reader is told that the drug was rarely associated with weight gain in patients, while in very small print it states that in phase III trials, the mean weight gain at one year was 5.6 kg.

A young woman, experiencing the serious illness of schizophrenia, primarily concerned with weight gain, perpetuates the stereotype that girls and women have excessive concerns about their weight. The overall message of the ad, if viewed quickly, is that she doesn’t have to worry — that is, if you don’t think that a mean weight gain of 5.6 kg. is significant. The stereotypes continue in the remaining two ads of the series. The second ad in the same journal depicts a young man. He appears to be in his twenties, and he too looks sad and unwell. His question is, Will it affect my sex life? In the third ad, a sad older man is asking, Will I be able to sit through a movie? Under the name of the drug in each ad is the phrase, ‘As good to the body as it is to the mind.’ The stereotypes are obvious and concerning.

132 The Seroquel™ ads were published in *Canadian Journal of Psychiatry* 46(1) (2001). The Zoloft™ ‘pentimento’ ad may be seen in a number of versions. One of these was published in *Canadian Journal of Psychiatry* 45(1) (2000). The Paxil™ man imprisoned in stone ad was also published in several versions, one of which was printed in *Canadian Journal of Psychiatry* 46(5) (2001), while the Paxil™ labyrinth ad appeared in *Canadian Journal of Psychiatry* 44(4) (1999). These ads have also been published elsewhere.
The next ad to be considered is for the drug Paxil™ which is intended to treat depression, generalized social anxiety disorder, panic disorder and obsessive-compulsive disorder. The photograph in this ad is intended to represent the labyrinth of King Minos on the island of Crete. The image is very detailed, consisting of stone columns and multiple stairwells. The labyrinth is dark and has an ominous feeling about it even though it is lit by torches on the walls. There are no people in this ad, but we are drawn to a thread that winds from the bottom of the labyrinth, up through the stairs and out an open door to the sunlight. This ad depicts mental illness as a labyrinth. The mythological elements of the sign are clearly presented. Theseus has left the thread to follow back out of the labyrinth, the text tells us. While unseen, the Minotaur’s threatening presence is read into the ad. We begin in the middle of the labyrinth but are led out of it by the visual thread.

The depiction of the labyrinth owes something to MC Escher, as we wonder whether it is his perspective-altering continuously joined stairs that we are viewing. The threatening Minotaur of more serious illness adds a dimension of emotion to the ad, while the thread provides relief from the immediate experience of the illness. The ad’s text explains that 60-90 per cent of depressed patients experience anxiety connected with depression, that Paxil treats both, and that the drug is the thread that leads back to the world they lost. The sign for the patient, Theseus, is someone lost and threatened. In the Greek myth, Theseus sought out the Minotaur to kill it so that he could rescue the Athenian victims about to be offered to the Minotaur. Theseus acted with the assistance of Ariadne, who provided the magic thread that unrolled in front of him. The magic power of the thread in the myth is left unspoken in the ad. The sign for the patient Theseus is portrayed not as the hero he was in the myth but instead as a victim who can be rescued.

In further ads in this Paxil™ series, we find that the patient has become a woman. Layered over the labyrinth is the following text, ‘She trembled every time she met someone. Felt embarrassed by her shaky voice and sweaty palms. She avoided people. Abused alcohol. And eventually fell into the depression so common with generalized social anxiety disorder.’ In this case the ad strategy includes starting a text with a complete sentence and gradually reducing the words to sentence fragments to catch the attention of the reader and to make the meaning have more impact. The reader can almost feel the trajectory of the fall to depression. An important feature of the campaign to sell this drug is the patient compliance program. The pharmaceutical company, SmithKline Beecham has developed ‘The Aurora Program’ designed to help patients on Paxil™ see compliance in a new light. Aurora, the goddess of the dawn, can lead to ‘the dawn of a new day in patient compliance’. No doubt she is in the light at the end of the thread leading out of the labyrinth. The patronizing language in the ads for the compliance program suggests that the patients, mostly women, do not do what they are told and when experiencing side effects, often decide to discontinue the drug. Given that Paxil™ has over 1.9 billion dollars in sales, and ranks 9th in prescriptions in the US market, it is in the interests of the pharmaceutical company to maintain patients on this drug.
Another ad for Paxil™ uses rescue imagery, a common motif in pharmaceutical advertising. This ad shows a statue of a man carved out of a cliff. The image is located on the left side of the ad while the text is on the right side. In script at the top of the ad is written ‘The imprisoned patient’. That text helps the physician reader to understand the intent of the sign in case it isn’t obvious. The sign includes the patient who is the man carved in stone and the need for rescue from the stone face of mental illness. Although we don’t see the doctor in this ad, we sense the doctor’s presence because the text reads, ‘You can use a different medication for each condition (depression, anxiety, panic disorder, obsessive compulsive disorder) or you can use one’. When the doctor is portrayed as a rescuer, the ad draws upon heroic and interventionist models of medicine that have had particular salience for doctors in traditional medicine. The heroic imagery appeals to beneficent and altruistic motives. It is also a macho form of medicine — aggressive, doctor-centered, and reductionist.134

Interventionist medicine requires active physicians, who must do things and be seen to be active. Both interventionist and heroic forms of medicine have legitimacy in a culture that places a high value on activity.135 We see in the imprisonment ad the idea that a patient with this illness is unable to act. The active intervention of the drug releases a whole person. Technology saves the day! Significantly, the medicine itself supplants the doctor in this version of the heroic model and it is the drug that is the knight in shining armour. In one version of this imprisoned patient ad, we find on the page overleaf a free man who has used Paxil™ to carve his way out. In contrast to the imprisoned patient ad, this patient throws off the stone, the weight of the disease, and carries on with his life.

We might expect to find physicians portrayed in ads but in fact doctors are largely missing from contemporary advertising. Patients, in contrast, are shown in a high proportion of ads. For example, the drug’s effect may be illustrated in an obvious way such as before-and-after shots of the same patient, a popular format in psychotropic drug advertising. Neill136 and Lupton137 have found that doctors are portrayed relatively infrequently in current ads, and that the incidence has declined. For instance, earlier ads commonly showed doctors, in white coats and stethoscopes, interacting with patients. The disappearance of doctors might have several explanations. Deborah Lupton observed that the doctor’s role had been

134 It is also worth noting that the idea of a woman rescuer is a virtual oxymoron. The rescue imagery of childhood stories is replete with male princes and needy maidens, and it is against this norm that The Paper-Bag Princess plays with such fine irony. Robert Munsch, The Paper Bag Princess. Toronto: Annick Press, 1982, illustrations by Michael Martchenko.
135 Social preference attaches to youth, physical activity, and individual assertion — all qualities shown in the well-known Coca-Cola ads run during the winter Olympics — shown by the polar bears and the Olympians — and Coke? Activity’s antithesis is the forced inactivity of disease. Infirmity, disability and weakness are connected and disparaged. Equation of a disease with the person leads to construction of the disabled or sick person as undesirable.
transformed to that of only a mediator between patient and drug and this notion of a change in the active agent seems correct. Neill’s study showed the power of cure being attributed to the drugs rather than, as previously, to the doctors, as we have seen in the rescue ad. The drug itself has assumed the central role of healer. If this interpretation is correct, drug advertising should be seen as deeply subversive by the medical profession.

Semiotic theory suggests a further explanation for absent doctors. Doctors are present in the ads as the viewers, the essential creators of meaning in the ad process. The doctor is ‘hailed’ into the ad to participate in creating and attributing meaning, becoming ‘the transformational space’. This is where we find the doctor then — not portrayed within the ad but acting within the ad process. Because this process of linkage between sign and product occurs largely without consciousness, doctors are unaware of their own roles. This too can be seen as a subversive process.

The final ad for discussion shows a painting of a woman suffering from depression. The woman has a quality of Renaissance beauty and mystery. She has long dark hair, parted in the centre, pulled back from her face with soft tendrils falling in front of her ears. Her eyelids are heavy as she stares downward in sadness. She is wearing a demure scooped neck dress made with cloth of a diaphanous quality. The painting is dark except for the portion over her face that looks as if it has had the surface layer removed, like pentimento, to allow the reappearance of the painting underneath. The text at the top of the ad says, ‘When panic disorder, OCD or depression darken a patient’s profile — Choose Zoloft First.’ The word Zoloft is written in thick font to make it stand out. Depression is depicted as a dirty covering on the surface of the painting. Mental illness exists only on the surface and may be wiped clean by using the drug. Underneath the surface is the original painting. Depression covers up the real person, who is there to be restored. This ‘pentimento ad’ implies that mental disease exists only on the surface and that the drug can remove that surface layer to reveal the real person underneath. The gauzy clothing replicates the idea of the surface and removing it to see the original self. It is perhaps meant to be seductive although the woman’s persona is more suggestive of a Renaissance beauty. We would like to believe this simple myth about drug efficacy, and willingly acquiesce in its hopeful message.

A paternalistic and hierarchical model of decision-making envisages the doctor in control, responsible for treatment and decision-making. Beneficence on the part of the doctor is to be reciprocated by deference and reliance by the patient. This type of relationship, which typified medical practice historically, was reflective of

138 Id at 897, 816.
139 Williamson, above n118 at 43–45.
140 The structural disparity based on knowledge was heightened when accompanied by professional scepticism about the reliability and validity of patients’ information about their own bodies and by mistrust of their abilities to understand and act responsibly on the basis of medical information. A paternalistic model of medicine is based on a hierarchy of power between the health professional and the patient. Trust — by the patient of the doctor — has been a key factor in the paternalistic model of health care.
the patriarchal culture in which it developed. Cultural norms about gender, race and class have formed a prism through which a male-dominated, white upper-middle class profession viewed patients. The ‘pentimento ad’ illustrates a patient who is so far from a participatory model that she is static. She is the ideal woman of the Renaissance past. She is incapable of efficacious behaviour. And when she is restored, she will be on an easel.

The context within which an individual’s illness is precipitated is not often evident in the advertisements. Instead advertisements more typically show women being returned to their social roles as providers of family support. If she is given the drug, then she can go back to the family where she’s needed.141 Gendered stereotypes of grandmotherly women baking cookies and women who need to be cured so that they can resume their roles as caregivers are in sharp contrast to sportsmen grandfathers, playing at hunting and gathering in the woods.142

Drug advertising plays a role in depicting the causes of disease as well as their cure. Kleinman and Cohen have found in their research that advertisements for psychotropic drugs individualise responsibility by portraying ‘normality and the ability to adapt to the mainstream as attributes of individuals’.143 Kleinman and Cohen characterise this process as decontextualisation, a process in which social factors contributing to health and recovery are ignored and the individual is held totally responsible. Accountability is located in the individual, who becomes responsible to friends, family and workplace for the illness and for finding a cure.144

Advertisements that individualise diseases over-simplify both the disease process and the process of cure. If diseases occur within the individual, the cure may be established within these same boundaries. This conceptualisation makes disease appear more amenable to cure, and particularly to an individualised cure. This simplification assists the selling of drugs as we have seen in the ‘pentimento ad’ where the product is depicted as capable of gently acting to restore what is underneath the surface. Goldman and Montagne have made a similar observation in their analysis of antidepressant medication, noting that depression is represented as a universal human condition apart from any particular social context but always amenable to the solution presented by the drug.145

142 Scandinavian journals showed some differences in this respect. Riska and Hägglund’s content analysis of psychotropic drug advertising in Finland, Sweden and Denmark showed an increasing number of men represented, although women still predominated in Sweden and Denmark. Finnish journals emphasised women in professional roles, a finding that they interpreted as fitting the stereotypes of the professional woman under stress and of professionals as needing to be in control. Elianne Riska & Ulrica Hägglund, ‘Advertising for Psychotropic Drugs in the Nordic Countries: Metaphors, Gender and Life Situations’ (1991) 32 Soc Sci Med 465 at 470.
Decontextualisation ignores important aspects of life and health, including inequalities that people experience in their own lives. The patients simply need to take the drugs in order to return to their social roles — without any acknowledgement that these roles contribute to the condition — along with ‘poverty, sexism, social inequality, employment status, domestic violence, eating disorders and sexual, physical and substance abuse.’

Nikelly also argues that disclosing these social determinants of psychiatric health is contrary to the drug companies’ economic interests, and those of the journals from whom they purchase advertising space. Similarly, stereotyping and attribution of roles based on group characteristics such as aboriginal status or age affect the ability to lead lives of dignity and fulfilment. Such factors are being recognised as important determinants of health by health researchers and policy-makers but they are not part of the decontextualised approach to disease depicted in drug advertising.

The semiotic method of analysis points to the referent system as the source of meaning upon which the advertiser calls. We argue that drug advertising draws on social stereotypes as one referent system. Drug advertising draws on social stereotypes in several ways.

First, advertisements use commonly accepted characterisations to signify qualities to be associated with the product. The community values constituting the reference system activate myths or signs. For example, activity has a gendered aspect, as men are stereotypically perceived as active in this culture, while women are seen as passive or, if active, as dangerous.

This may be one reason why the male body has appeared more often in advertising. When shown engaged in activities such as sports, the signification of activity by the male body is transferred to the drug, which is endowed with the active quality. Because of the cultural association of passivity with the female body, this transfer of meanings can’t be accomplished for the female body without dissonance. In the advertisements presented in this paper, we find the man, although carved in stone, potentially having the strength to free himself, not just with the strength of Paxil™, but also with the strength we see in his ‘abs’, while the woman in the ‘pentimeno ad’ is the serene Mona Lisa.

---

148 Nature and science are two powerful and authoritative referent systems operating in advertising: Williamson, above n118. In its benign and pastoral expression, nature is used as a feature with which viewers will identify positively. There is, however, an implicit opposition between drug intervention, which is constructed and inherently non-natural, and the natural processes of the body, which must include disease. Drug intervention is not natural, and the sick body, which is natural, is not benign. The attempt to construct drug therapy as equivalent to the natural is achieved through semiotic methods in which the transfer of meaning is meant to occur unnoticed.
149 For example, one advertisement shows a man looking through a frame showing him riding the horse. An advertisement for oral contraceptives, a selectively active drug, makes use of a tranquil scene of walking, next to a waterfall, showing a selectively active woman next to a temporarily inactive man.
Second, stereotyping is used to determine what will be shown and what will be omitted from advertisements. For example, physical disabilities are rarely depicted, and when they are, the portrayal relates to prosthetic devices and other forms of treatment rather than as an incidental feature of a person. The literature on drug advertising has often focused on issues of representation. Much of the early literature used quantitative methodology, examining the representation of groups, and particularly women’s as opposed to men’s representation. This literature, developed through 20 years of examination of European, North American and Australian journals, found men outnumbering women represented in drug advertising in a ratio of 2:1.\footnote{151} The exception to this gender rule, in addition to the obstetrical/gynaecological area, is found in psychiatric advertisements. Women’s incidence ratio for psychiatric illness is 2:1 in relation to men.\footnote{152} Psychiatric disability in women is displayed in psychotropic drug advertisements in a manner disproportionate to this relatively higher rate of diagnosis in the population.\footnote{153} One early study, by Mant and Darroch, analysed gender portrayals in 500 drug advertisements for mood-altering drugs in two Australian medical journals, the \textit{Medical Journal of Australia} and \textit{Australian Family Physician}, from 1969 to 1975, concluding that women were over-represented, a pattern that they thought reflected and might reinforce prescribing

\textsuperscript{150} An early example is found in the use of notions of modern womanhood and empowerment by the industry to create the stereotype that women are solely responsible for birth control. Andrea Tone shows how the pharmaceutical industry in the 1930s marketed birth control they knew to be completely ineffective, and even dangerous in certain cases, and did so as ‘feminine hygiene’ products, in order to get around the prohibition on contraception. This was a convenient marketing device since the ostensible purpose was well-recognised but the marketing as something else prevented regulation of its false claims. What was most insidious, Tone has argued, was the marketing of birth control as a separate sphere under the control of women, through stereotyping women and creating sole responsibility for family planning: Andrea Tone, ‘Contraceptive Consumers: Gender and the Political Economy of Birth Control in the 1930s’ (1996) 29 \textit{J Soc Hist} 485.

\textsuperscript{151} Deborah Lupton, above n137.


\textsuperscript{153} Finy Josephine Hansen & Dawn Osborne, ‘Portrayal of Women and Elderly Patients in Psychotropic Drug Advertisements’ (1995) 16 \textit{Women & Therapy} 129. Hansen and Osborne found this disproportion in psychotropic drug advertisements of the 1960s and 1970s continuing into the 1980s, and also found that the rate in the psychiatric journal remained at 80\% while in the primary care journal women made up 100\% of the patients. They found that elderly people were more often shown in the journal addressed to family physicians. Jelley and Owen’s study of the \textit{British Journal of Psychiatry} showed that while women were portrayed in numbers that reflected incidence rates, the portrayals drew on stereotypes about men’s roles at work and women’s roles at home or with children: Matthew Jelley & John Owen, ‘Letter: Portrayal of women in advertisements’ (1991) 159 \textit{British J of Psychiatry} 586. In the most extensive study, King found that women appeared in 81\% of the advertisements for psychoactive drugs in the \textit{American Journal of Psychiatry} between 1959 and 1975, and that the portrayals of women indicated helplessness and anxiety while the portrayals of men indicated physical illness or work-related stress. Ellie King, ‘Sex Bias in Psychoactive Drug Advertisements’ (1980) 43 \textit{Psychiatry} 129.
patterns for these drugs. Mant and Darroch found that the advertisements overall were ‘highly stereotyped as to sexual and social roles, notwithstanding the professional and clinical context in which they appeared’. Beginning their article with studies that showed women were stereotyped in drug advertising as in commercial advertisements, as ‘temptress, wife, mother and sex object’, they observed that people come to doctors with needs and, in order to meet the needs, doctors must be able to move beyond stereotypical perceptions, and ‘[a]nything which reinforces the doctor’s understandable tendency to accept a stereotyped view of patients interferes with the capacity to perform these functions.’

One study, by Hansen and Osborne, that examined representation by race in addition to other factors, found that too few advertisements depicted members of racial groups other than white to include race as a study variable. Racially mixed advertisements were beginning to appear in the mid-1990s, using a framing technique with portrayals of people from a variety of racial groups, age groups, and both men and women or a diverse group of people (for example, the ‘broad spectrum’ anti-depressant drug Effexor). Third, advertisers draw on perceptions of the typical patient for a particular disease, such as middle-aged to older white males with cardiovascular disease. Diseases, once recognised — another process subject to incorporation of social values, as discussed above — are organised into categories, which have certain physical attributes associated with them. Doctors are taught to diagnose disease through a process of comparing physical conditions with the disease category characteristics, through pattern recognition. Barbara Bates, the author of the leading text on diagnosis, has described how she based her system on Roger Tory Peterson’s *Field Guide to the Birds*. The paradigm for a particular disease will have classic attributes, not all of which would be present in an atypical presentation. When one part of the diagnostic category has been based on research that has examined only one part of the population and has been silent on other parts, or when the category has been associated with stereotypes in society, then the category itself contains fundamental flaws.

Stimson indicated that companies try to create ‘diagnostic images’ by associating age and lifestyles with a condition and its cure. These images are intended to provide a shortcut to the drug for the practitioner in the diagnostic setting. In this way advertising creates a prescribing image in the minds of doctors and one that is intended to act as a diagnostic tool. Stimson’s conclusion was this:

---

155 Id at 617.
156 Id at 613.
157 Hansen & Osborne, above n153 at 134–135. Deborah Lupton, in her study of a weekly Australian medical journal, found that non-Anglo-Celtic ethnic groups were not depicted as doctors or patients: above n137 at 81.
‘To the extent that doctors accept the images in the advertisements, they have lost control over their diagnoses.’ The diagnostic profile suggested by Stimson adds another layer to the medical symptoms that combine to provide a profile for diagnosis, and provides linkages that may be partial or otherwise flawed. The fact that such linkages are made without being perceived by the viewer means that the control of medical expertise that might otherwise operate will not do so.

In our opinion, the diagnostic image can be extended to include these associations of disease with a particular group when it is prevalent in many groups, in this way both creating and perpetuating stereotypical associations. The omission of groups from advertisements, and their under-representation may have an effect on health professionals, creating and reinforcing the image that certain diseases occur only or predominantly in certain groups. If this association is made, then diagnostic hints may be missed and prescribing practices affected. These include the possibility of overlooking the condition in one group, the risk of pursuing it more zealously in the other group, and missing the disease when it manifests differently in various social groups. While our study is unable to reach a definitive conclusion on the process by which prescribing patterns are affected, we believe that the stereotypes and exclusions replicated in drug advertisements have a significant effect on physician attitudes. By combining the insights of semiotic analysts with those of drug advertisement researchers and feminist analysts, we have shown how the process of creating meaning works, through reinforcement of the inequalities present in the broader area of drug research.

Inequalities are not limited to portrayals in drug advertisements for psychological illnesses such as depression. For example, the over-representation of men in cardiovascular drug advertising replicates and reinforces the association of heart disease with men. Cardiac disease is the leading cause of death in women. Yet it continues to be under-diagnosed and untreated, not only in women but also in specific ethno-cultural groups. Inequality is also evident in the way women are portrayed in advertisements promoting hormone replacement therapy. The images depict women suffering from the symptoms of an estrogen deficiency disease and risking a life crippled by osteoporosis, heart disease and Alzheimer’s unless treated with hormones. This representation creates the impression for obstetrician/gynaecologists that all women need hormones. There is no room to see menopause as a normal physiologic process that does not require treatment. As long as the diagnostic profile replays stereotypes generated in the culture, the doctor-patient relationship and women’s health care will suffer.

160 Id at 160.
4. Conclusion

Pharmaceutical advertising expenditure in Canada has been estimated at close to a billion dollars for 1995,\textsuperscript{163} while the US drug advertising budget has been described as approximating the budget for the NIH.\textsuperscript{164} Pharmaceutical product retail sales for 1999 totalled $111.3 billion, an amount two and a half times greater than the 1991 figure of $42.7 billion.\textsuperscript{165} An expenditure of this magnitude is unimaginable without strong evidence of its effectiveness.\textsuperscript{166} Research indicates prescribing practices are affected by exposure to advertising.\textsuperscript{167} Controls on advertising, to the extent that they exist, fail to address the advertising content with which we are concerned.\textsuperscript{168}

These types of stereotyping show us how existing paradigms of social worth can be used by the drug industry to create other perceptions of their products, with the intention of promoting sales. The pharmaceutical company anticipates the values that will be attributed by physicians, basing its expectations on social values and on the political culture of medicine. As the medical profession changes, with younger, more representative and media-wise practitioners, advertisers must find it harder to create resonance with stereotypical, paternalistic and heroic imagery. This may explain why we have begun to see a change to more representative forms of patient imagery, with multiple patients depicted in the advertisement or in the frame around it.

Doctors and patients need to be aware of the processes used by the advertisers to create these perceptions and to insulate themselves from them. These advertisements are profoundly undermining of a healthy and participatory relationship between patient and doctor, individualising responsibility for disease, reinforcing social stereotypes about women’s roles, reifying drug intervention and creating diagnostic images of the particular patients for diseases. The under-

\textsuperscript{165} Above n133 at 21.
\textsuperscript{167} One survey of physicians’ attitudes to drug advertising showed that the group most favourable to advertising and most influenced by it were the younger, less experienced and urban doctors. The authors suggest that older doctors are more ad-resistant, but the more obvious explanation is that younger doctors are less discriminating about the information coming from sources with strong economic incentives to persuade, and that the younger doctors are more vulnerable: Susan M Petroshius, Philip A Titus & Kathryn J Hatch, ‘Physician Attitudes Toward Pharmaceutical Drug Advertising’ (1995) 35 J of Advertising Research 41.
\textsuperscript{168} The industry itself has adopted guidelines for content: above n163. The industry participates in the pre-clearance of ads conducted by the external Pharmaceutical Advertising Advisory Board, which has the industry organizations as board members. See www.paab.ca.
representation of particular patients in the advertisements and their social stereotyping should be vigorously resisted by viewers. By educating health professionals, legal academics and the public about the process of drug advertisement creation and by revealing the stereotypes used to power the advertisements, we intend to strip the advertisements of some of their power and to increase the power of patients and doctors to insulate themselves from the destructive messages as a way of achieving a participatory and well-informed dialogue. The myth-creating process for drug innovation should itself respond to the fundamental value of equality.

Drug companies construct knowledge of their products through the design and conduct of clinical trials and through their promotional activities. Through the past decade increasing attention was drawn to inequalities in representation and analysis in the clinical research process. Regulators and funding councils in Canada and the United States responded to varying degrees, by removing limitations on participation, by encouraging representation of women and, in some cases, by promoting sub-group analysis. The same inequalities have been demonstrated in the construction of drug advertising — stereotyping by gender, targeting for particular drugs and exclusion from others, and creation of health stereotypes of typical patients for diseases. Drug advertising further promotes views of the doctor-patient relationship that impede effective decision-making and subverts the roles of doctors and patients in the healing process. In each case the purpose is generation of industry profits. The power and legitimacy conferred by myths in the construction of drug knowledge needs to be challenged through an understanding of the myth-making processes in research and advertising.
Reconciliation is an obligation of justice, not a manifestation of benevolence …
As reconciliation is a matter for the heart as well as the head, the law cannot
achieve reconciliation of and by itself. But it has an important role to play.¹

1. Introduction: Making Reconciliation Practical

It is now well over a year and a half since the ‘People’s Walk for Reconciliation’,
a day which saw around a quarter of a million Australians walk quietly and
peacefully over Sydney Harbour Bridge to show their support for reconciliation
between indigenous and non-indigenous Australians.² Despite similar mass
demonstrations of support for reconciliation around Australia, no significant
governmental action has been taken to create a legal framework to house the
formal process of reconciliation. With the mandate of the Council for Aboriginal
Reconciliation having expired,³ reconciliation is increasingly perceived as a
‘people’s movement’,⁴ best left to individuals in their daily lives, and not a matter
for governmental initiative.⁵

---

² See, for example, Debra Jopson & Tony Stephens, ‘Long Walk to Freedom’, The Sydney
000529/pageone/>.
³ The mandate of the Council expired on 1 January 2001, under s32 of the Council for Aboriginal
Reconciliation Act 1991 (Cth).
⁴ See, for example, Council for Aboriginal Reconciliation, Reconciliation: Australia’s
www.austlii.edu.au/au/orgs/car/finalreport> (1 October 2001) at ch 6, Appendix 1 (hereinafter
CAR Final Report).
⁵ Reconciliation Australia, an independent, non-profit body established by the Council for
Aboriginal Reconciliation to provide a continuing national focus for reconciliation after the
expiry of the Council’s mandate, is a private body, with no formal public role in the
reconciliation process.
A number of elements for a public legal architecture designed to foster the reconciliation process are, however, emerging. Three reports discussing some of these elements have, in the time since the People’s Walk, been presented to the Commonwealth Parliament: the Report of the Senate Inquiry into the Stolen Generation,6 the Final Report of the Council for Aboriginal Reconciliation,7 and the 2000 Social Justice Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner.8 These elements have not, however, been synthesised into a comprehensive proposal for a home for reconciliation.9 No comprehensive, officially-sanctioned architecture has emerged which will provide the spaces needed to nurture practical measures for reconciliation.

In this piece, I propose a design for an institutional home for the reconciliation process. As my primary building materials, I use three legal-institutional forms discussed in these reports: tribunals, truth commissions and treaties. I argue that each of these legal-institutional forms identifies and addresses a particular problematic — responsibility, truth and sovereignty — dictating a particular practice to achieve reconciliation. Each practice mandates a unique praxiological space. I suggest that these three spaces — Reparations, Healing and Treaty Chambers — should together constitute a Reconciliation Commission, providing a home for reconciliation.

By creating these spaces, we foster a reconciliation through practice, a practical reconciliation. In writing of practical reconciliation in this way, I am attempting to subvert current notions of ‘Practical Reconciliation’. The term, made popular by the Howard Government,10 focuses on practical — as opposed to symbolic — measures of reconciliation between indigenous and non-indigenous Australians. Proponents of ‘Practical Reconciliation’ aim to make a ‘real difference’ (as

---

7 CAR Final Report, above n4. The Draft Legislation contained in Appendix 3 of the CAR Final Report has since become the Reconciliation Bill 2001 (Cth) (Second Reading) (hereinafter ‘Reconciliation Bill 2001’) tabled as a private member’s bill by Senator Aden Ridgeway. At the time of writing, this Bill had completed a first reading in the Senate.
9 The proposals in the CAR Final Report Draft Legislation and the Reconciliation Bill 2001 (see above n7) leave the process of designing institutions for the practice of reconciliation to later consultation at a National Reconciliation Convention. See Reconciliation Bill 2001, draft s6.
opposed to a symbolic gesture) in the improvement of indigenous lives.\textsuperscript{11} They seek to achieve reconciliation by providing ‘practical’ measures such as improved service provision. This ‘Practical Reconciliation’ approach denies the utility of practising reconciliation by treating indigenes as a distinct group with specific rights distinct from other Australians; to accept such distinct rights, to accept this difference, is perceived as tantamount to accepting the division of Australian ‘unity’.\textsuperscript{12} Practical Reconciliation becomes a way of denying indigenous difference and its social and legal consequences. In contrast, proposals attempt to construct a practice of reconciliation which deals with the differences between indigenous and non-indigenous Australians, and to transform those differences from sources of division into assets.\textsuperscript{13} The central question I address is: what legal spaces are needed to foster those practices?

2. **Dealing with Responsibility: From Tribunal to Reparations Chamber**

In November 2000, the Senate Legal and Constitutional References Committee, in which non-government Senators were in the majority, reported on its inquiry into the Howard Government’s (non)implementation of the recommendations in HREOC’s 1997 *Bringing Them Home* Report\textsuperscript{14} (‘BTH’). This ‘Stolen Generations Inquiry’ inquired into the practical and symbolic measures taken by the Howard Government to address the results of past governmental practices of forcible removal of indigenous children. While the Inquiry addressed a wide range of potential and existing measures, I am going to focus on the Committee’s call for ‘the establishment of a “Reparations Tribunal” to address the need for an effective process of reparation, including the provision of individual monetary compensation’ to members of the stolen generations.\textsuperscript{15} In this section, I focus on the practical implications of such a Tribunal, examining how it identifies the issue of responsibility as a central problematic of reconciliation, and the extent to which a Tribunal would provide a space for the fostering of new practices of reconciliation which could resolve that problematic.

The question of the adequacy of the government’s response to the BTH Recommendations is really a derivative of the larger question of governmental responsibility for past practices of forcible removal. The perceived nature and extent of present-day governmental responsibility for past governmental practices


\textsuperscript{12} Compare 2000 Social Justice Report, above n\textsuperscript{8} at 18.


\textsuperscript{14} Human Rights and Equal Opportunity Commission, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Canberra: Commonwealth of Australia, 1997) (hereinafter ‘BTH’).

\textsuperscript{15} *Healing*, above n\textsuperscript{6}, Recommendation 7. See also Recommendation 8.
will shape what is perceived to be adequate to discharge that responsibility. The Howard Government’s approach of ‘Practical Reconciliation’ suggests that present-day responsibility for past practices, or for their present-day effects, may be wholly denied:

Now of course we treated Aborigines very badly in the past, but to tell our children whose parents were no part of that mistreatment, to tell children who themselves have no part of it, that we are all part of a racist, bigoted history is something that Australians reject.16

This approach suggests that the past is past, and does not create any special rights — such as to compensation — in the present, either for victims of past practices, or for their relatives or communities. Any ill effects from the past which linger in the present should be treated by improved service provision, such as by providing family reunion services, and do not give rise to distinct rights or responsibilities.

This denial of responsibility has a number of important implications for the kinds of practices which are seen as appropriate to develop reconciliation, and for the choices of spaces in which those practices flourish. First, the denial of responsibility mandates a reliance on a strict legal positivism denying liability for practices undertaken pursuant to prior, formally valid laws. Second, it validates a strategy minimising access to legal remedies for past governmental conduct. Accordingly, the Howard Government argues that the taxonomy of potential claimants suggested in BTH17 and in submissions to the Stolen Generations Inquiry18 raises the question of ‘who, if anyone, is not entitled to compensation’.19 It argues that to establish a statutory reparations scheme would only open the floodgates to demands for compensation for other historical injustices or perceived

---

16 Prime Minister Howard, Radio 2UE, 1996, quoted in Sue Stanton, ‘Time for Truth: Speaking the Unspeakable — Genocide and Apartheid in the “Lucky” Country’ (1999) July Australian Humanities Review: <http://www.lib.latrobe.edu.au/AHR/archive/Issue-July-1999/stanton.html> (1 October 2001). It is interesting to note that the same forebears that Mr Howard disowns also used this same argument: ‘The raking up of atrocities that may have occurred in the early days of settlement in Australia and the featuring of them as an indication of the state of affairs existing today is not only unfair to the Governments of to-day, but is extremely detrimental to the good name of Australia.’ (Prime Minister Lyons quoted in The Sydney Morning Herald (20 July 1933) quoted in Andrew Markus, Governing Savages (1990) at 141–142.)

17 BTH, above n14 at 304–305. Those proposed to be eligible included: individuals who were forcibly removed as children; family members who suffered as a result of their removal; communities which, as a result of the forcible removal of children, suffered cultural and community disintegration; and descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land.

18 Healing, above n6 at 251; Submission 68, Public Interest Advocacy Centre at 1499, 1505 (hereinafter all references to Submission refer to submissions to the Stolen Generations Inquiry, as numbered by the Inquiry Secretariat; all references to Transcript of evidence refer to evidence given before the Stolen Generations Inquiry).
Above all, this approach rejects the need for new, specially-designed spaces like a Reparations Tribunal, instead relying on the existing spaces of common law litigation as the appropriate forum for the determination of issues of responsibility.

The Stolen Generations Inquiry Report identifies a number of ways in which this reliance on common law spaces places obstacles in the path of stolen generations claimants. Recent cases such as Cubillo highlight how these obstacles work to minimise governmental liability for past practices of forcible removal, but also how they work to ensure that the wounds of the stolen generations go unhealed. These cases demonstrate that modern Australian court processes require individuals to take on the entire body of the law alone, with their outsiders’ knowledge and their limited resources. They demonstrate how heavy the onus of proof on stolen generations claimants can be, demanding the provision of evidence as to the consent and intentions of individuals in times now far removed, in cases where records are often scant. They show how difficult it is for claimants to establish causal connections between their removal and detriments suffered. Many claims are barred outright by limitations periods, which otherwise have the effect of squeezing claims into suits they plainly do not fit. All of these difficulties often lead to what appear, from claimants’ perspectives, to be

---

19 Healing, above n6 at 250; Submission 36, Minister for Aboriginal and Torres Strait Islander Affairs at 617. PIAC numbered potential claimants under its proposal at 17,000. (See Alexis Goodstone, ‘Redressing Harm: A Proposal for the Establishment of a Stolen Generations Reparations Tribunal’ (2000) 4 Indigenous Law Bulletin 10 at 12 n12.) The dispute over numbers of potential claimants is closely related to the question of the cost of such a Tribunal. The Government has estimated that Tribunal would cost $3.9 billion (see Healing, above n6 at 233; Submission 36, Minister for Aboriginal and Torres Strait Islander Affairs at 570, 622–623). Others have suggested the costs would be much lower (see Healing, above n6 at 253–254; Transcript of evidence, Sir Ronald Wilson at 748–750; Transcript of evidence, Senator Rudgeway, Croker Island Association at 513–515; Transcript of evidence, Mrs Rene Powell at 387–388; Submission 56, Victorian Aboriginal Legal Service at 1101). The cost of defending

20 Healing, above n6 at 250; Submission 36, Minister for Aboriginal and Torres Strait Islander Affairs at 617.

21 Submission 36, Minister for Aboriginal and Torres Strait Islander Affairs at 612.


23 Healing, above n6 at 230.

24 Minority Report by the Australian Democrats in Healing, above n6 at 305 (hereinafter Democrats’ Minority Report).

25 Healing, above n6 at 231; Democrats’ Minority Report, id at 305; Submission 56, Victorian Aboriginal Legal Service at 1101; Submission 68, Public Interest Advocacy Centre at 1503.
‘arbitrary’ and ‘inequitable’ results.26 As a result, the reliance on common law spaces is seen as a perpetuation of a practice of more than two centuries, using common law spaces to disempower, dispossess, disenfranchise and colonise indigenous Australians.27

A just resolution of the claims of the stolen generations requires the adoption of practices which do not perpetuate, or even appear to perpetuate, the practices of the past, but instead create a discontinuity between past practices and present ones. The appropriate forum to hear these claims is a forum which fosters new practices, and does not recall and validate old ones.

Australian legal practice provides a number of examples of the creation of such forums, which, moreover, have attempted to overcome the same types of practical difficulties the stolen generations face. These spaces include the Commonwealth War Veterans’ Tribunal and tribunals in each State providing compensation to victims of violent crime.28 In these Tribunals, Australian legislatures have created altered legal practices intended to overcome practical difficulties and to provide compensation in the absence of common law liability. The schemes involve strict liability and lowered (or even reversed)29 burdens of proof, all construed to the benefit of claimants, down to standing and the establishment of causation.30

These Tribunals accommodate the acceptance of responsibility even where that is not demanded by law, even where the Government could rely on the legal positivism it relies on in relation to responsibility for the stolen generations. As Regina Graycar has noted ‘[w]hat is, or is not, compensable at law is more a matter of political judgment and government policy than it is a matter of any inherent legal understanding of compensability.’31 As manifestations of a political choice to accept legal responsibility, these Tribunals create a discontinuity between previous and present policies, present and past practices. They act as a ‘public recognition of the event and of society’s obligation to rectify the injury’.32 They

26 Submission 68, Public Interest Advocacy Centre at 1495; Transcript of evidence, Catholic Commission for Justice, Development and Peace at 241–242; Democrats’ Minority Report, above n24 at 305.
28 Submission 59, Human Rights Committee of the Law Society of New South Wales at 1131; Submission 68, Public Interest Advocacy Centre at 1503; Submission 4, Women’s Legal Centre at 29–30; Democrats’ Minority Report, above n24 at 316–320.
30 Democrats’ Minority Report, above n24 at 318–319.
31 Graycar, above n29 at 254.
32 Healing, above n6 at 239; Submission 4, Women’s Legal Centre at 30.
provide not merely symbolic, but practical apologies which, through careful
design, ensure that legal forms and technicalities do not obstruct the provision of
substantial justice.33

Unless we create a similar space for the reparation of members of the stolen
generations, we will not be able to heal the injustices wrought by these past
practices of forcible removal. Without such a space, there will be no home for
reconciliation.34

The proposed Stolen Generations Reparations Tribunal attempts to provide
such a space, and to resolve issues of responsibility in a number of ways: by
ensuring that all those affected by the practices of forcible removal receive a share
of limited funds; by providing a scheme for financing a range of reparation
measures; by creating finality and certainty by containing the potential for
litigation; and by offering an effective mechanism for providing social justice.35 In
its form and design, it would contain a number of distinct breaks with past,
common law legal practice. As in common law litigation, successful claimants
would receive a lump sum payment; but claimants would also be eligible to receive
other forms of reparation, where they could establish that, in addition to being
forcibly removed, they suffered particular specified types of harm or loss.36
Reparation would extend to acknowledgement and apology, guarantees against
repetition, measures of restitution, and measures of rehabilitation.37 Claimants,
rather than an adjudicative authority, would identify for themselves which mode of
reparation was most appropriate.38 The Tribunal would adopt relaxed rules of
evidence,39 including accepting both oral and written evidence, both individual
and group evidence,40 and evidence in the claimant’s own language,41 all
modifications which aim at overcoming inherent barriers to stolen generations
participation in common law litigation. Both as an administrative aid, and as a
symbolic acceptance of responsibility, in certain categories of removal claimants

33 Democrats’ Minority Report, above n24 at 318–319; compare Veterans’ Entitlement Act 1986
(Cth) s119.
34 See 2000 Social Justice Report, above n8 at 133; Robert Manne, ‘Right and Wrong’, Sydney
Morning Herald (31 March 31 2001) at 1, 10s.
35 Healing, above n6 at 240; Submission 68, Public Interest Advocacy Centre at 1496. For a brief
but comprehensive overview of the PIAC proposal by one of its authors see Goodstone, above
n19.
36 Goodstone, above n19.
37 Submission 68, Public Interest Advocacy Centre at 1506–1510. See also Healing, above n6 at
240–245; Submission 56, Victorian Aboriginal Legal Service at 1100; Transcript of evidence,
Catholic Commission for Justice, Development and Peace at 241–242; Transcript of evidence,
Liberty Victoria at 282; Submission 54A, North Australian Stolen Generation Aboriginal
Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation at
2740.
38 Healing, above n6 at 256; Transcript of evidence, Public Interest Advocacy Centre at 121–124.
39 Healing, above n6 at 242; Submission 68, Public Interest Advocacy Centre at 1511.
40 Healing, above n6 at 241; Submission 68, Public Interest Advocacy Centre at 1511. See also
Submission 6, Jiljia Nappaljarri Jones at 42; Submission 11, Retta Dixon Home Aboriginal
Corporation at 188.
41 Healing, above n6 at 242; Submission 68, Public Interest Advocacy Centre at 1511–1512.
would be required to present only specific types of evidence to establish liability.42 In order to give victims the chance to weigh for themselves the pain of public testimony against its utility, there would be the option in each case for public hearing or assessment on the papers.43

The space this proposed Tribunal would provide is not an antithesis of common law spaces, but a space within it. Accordingly, the practices and institutions which constitute the space draw from the common law system, and also maintain important links to it. Formal legal representation would sometimes be permissible;44 there would be a right of appeal to the Federal Court on questions of law45 and a time limit for bringing claims after the establishment of the space in question;46 and any success in common law litigation would foreclose Tribunal proceedings on the same matter.47

The space this proposed Tribunal would provide for the reparation of members of the stolen generation is crucial to the provision of reconciliation; but reconciliation itself is a larger project, a project with problematics not all best resolved by the adjudicative practices envisaged for this Tribunal. Accordingly, the Tribunal proposal should form the basis of only one Reparations Chamber of a larger home for reconciliation, a Reconciliation Commission. Moreover, because the arguments above relating to the obstacles encountered in common law litigation apply not only to the reparation of the stolen generations, but also to dealing with other indigenous victims of human rights abuses allegedly perpetrated by public authorities in Australia, this Reparations Chamber should provide a space in which all these alleged victims can bring their claims. It should be empowered to hear all such claims using the modified practice outlined above.

3. *Dealing with Truth: from Truth Commission to Healing Chamber*

The Reparations Chamber would offer a space with modified adversarial practice for victims of governmental human rights abuses to bring their claims. My proposed Reconciliation Commission also incorporates another space, a Healing Chamber, empowered to resolve indigenous claims relating not to human rights abuses, but to claimants’ status and rights as indigenous people and as original occupiers of the land, through a process based on truth commission practices.48 In

---

42 Healing, above n6 at 242.
43 Healing, above n6 at 242–243; Submission 68, Public Interest Advocacy Centre at 1511–1512.
44 Healing, above n6 at 243.
45 Ibid; Submission 68, Public Interest Advocacy Centre at 1512; see also Submission 54A, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation at 2741.
46 Healing, above n6 at 244; Submission 68, Public Interest Advocacy Centre at 1513; Transcript of evidence, Public Interest Advocacy Centre at 133.
47 Healing, above n6 at 255–256.
this section I discuss the usefulness of a space based on the experiences of overseas truth commissions, and attempt to explore how this space addresses the problematic of truth as a central dynamic of the practice of reconciliation.

Both BTH and the Stolen Generations Inquiry considered overseas truth commissions as a source of experience for dealing with the issue of the reparation of the stolen generations. 49 However, neither report dealt in any great depth with the complexities and consequences of the wide diversity of truth commission experience 50 in the broader context of Australian reconciliation. 51 Both reports emphasised the cathartic nature of ‘truth-telling’, the opportunity truth commission practices provide for victims to tell their own stories in their own words in a non-threatening, validating environment. 52 Truth commission spaces provide useful forums for healing the victims of human rights abuses not only because they provide an opportunity for truth-telling, but also because they provide the opportunity for victims to have their truth acknowledged by both the state and society generally. 53 They provide a space inside the law where victims and outsiders can “go and say, ‘This is my story. Please listen to it’” 54 a space for their truth to be acknowledged and their identity affirmed.

In Australia, a truth commission space could sense as a space free from the colonising practices of the law discussed earlier, a space in which indigenous Australians could practise self-determination, telling their own stories, in their own way, validating their aboriginality. By authorising indigenous voices to speak

48 This proposal draws on the discussions in Healing of overseas truth commissions (above n6 at 262–274, 411–416), as well as the Submission of the National Sorry Day Committee (Submission 25 at 427), and the proposal in Healing for a ‘clearing-house’ providing a whole-of-government approach to reparations issues (Healing, above n6 at 277).
49 Healing, above n6 at 256–257. See also Submission 31, Anyinginyi Congress Aboriginal Corporation at 496; Transcript of evidence, Central and Northern Land Councils at 487; Submission 68, Public Interest Advocacy Centre; Transcript of evidence, Anglican Social Responsibilities Commission at 319.
52 Healing, above n6 at 257, 271; Submission 25, National Sorry Day Committee at 429; Submission 30, Conflict Resolution Network Mediation Services at 487.
54 Transcript of evidence, Anglican Social Responsibilities Commission at 319.
directly for themselves, a truth commission space could offer the possibility of overcoming the oppressive practices of 'speaking for' that have underpinned removals, 'welfare', 'protection' and other colonial paternalisms. That such a space would be useful for indigenous Australians is perhaps evident in the support that the BTH inquiry itself received, given that it exhibited many of the characteristics of a truth commission space.

While BTH highlighted the utility of such a space, it should also serve to indicate that truth commission spaces contain hidden dangers not identified in either the BTH or Stolen Generations Inquiry reports. Although, like other truth commission spaces, BTH provided a healing process at the ‘molecular, individual level’, it did this by providing an opportunity for reworking public discourse, public practice. In this approach, healing becomes an outcome of ‘careful honest listening … and negotiation of mutually accepted settlements’: a function of the shared truths created within the truth commission. There are dangers in this process: dangers of the creation of a mercenary truth, dangers that truths become political resources, and the danger that only one, official, monadic truth will be sanctioned. The violent reactions of many commentators to the process BTH process indicate that these dangers are already being felt in Australia.

In designing truth commission spaces, we must be particularly careful to guard against assuming that the stories told in the space are acknowledged as true by all. Even in adopting the metaphor of a truth commission space as a ‘healing’ space, we run the risk of privileging one truth, of assuming that ‘a nation has one psyche, not many; that the truth is one, not many; that the truth is certain, not contestable; and that when it is known by all, it has the capacity to heal and reconcile.’

If we do permit truth commission processes to become monolithic and unquestionable in this way, we may end up undermining reconciliation. We will fall into the same trap that some commissions have in the past, permitting old institutions and practices to continue ‘with their legitimacy undermined but their power intact’, enabling societies to ‘indulge in the illusion that they [have] put the past behind them’. If, as Ignatieff suggests, ‘the function of truth commissions …

56 See above n14.
58 Submission 25, National Sorry Day Committee at 428–429.
59 For an overview and critique of these reactions see Robert Manne, In Denial: The Stolen Generations and the Right (2001).
61 Above n57 at 111.
62 Ibid.
is … to narrow the range of permissible lies.\textsuperscript{63} Then the only way to guard into the future against the re-emergence of old lies is to ensure that the lies are disbelieved by many, and not simply suppressed by a few. Reconciliation must, indeed, be a ‘people’s movement’, in the sense that it must be owned by the people that must live it. Healing occurs organically, from inside; it cannot be imposed. The truth commission spaces we design must not foster autocratic truth-telling practices, but place a premium on participatory practices and democratic narratives.

In the context of Australian reconciliation, we can contemplate such a space. It would be a space valued not for the opportunity it provided for the creation of privileged histories,\textsuperscript{64} but for the intrusion of non- and under-privileged histories into the official record. It would be a space for the practice of reconciliation, where ‘ordinary’ Australians — and not government officials — were brought together to share in a process of transformation through dialogue. That such a transformation amongst ‘ordinary’ Australians is a real, practical possibility is highlighted by the recent three day forum held in Old Parliament House, Canberra, led by Issues Deliberation Australia. A random sample of over 300 ‘Representative Australians’ were polled on their attitudes to reconciliation before and after engaging in discussion and sharing experiences with a panel including members of the stolen generations. The perception amongst these ‘Representative Australians’ of reconciliation as an important issue facing the nation rose dramatically from 31 per cent to 60 per cent. Similarly, perception of the disadvantage of indigenous Australians in relation to other Australians rose from 52 per cent to 80 per cent. Attitudes to the appropriate way to move forward also appeared to change markedly. Those in favour of formal acknowledgement that Australia was occupied without the consent of indigenous Australians rose from 68 per cent to 81 per cent; and, strikingly, those in favour of an apology to the stolen generation rose dramatically from 46 per cent to 68 per cent.\textsuperscript{65}

What this suggests is that a dialectic, participatory truth commission space could generate not only shared truths, but shared solutions. It would provide an architecture for not only attitudinal, but also social transformation. This social transformation must be at the heart of any project of practical (as opposed to symbolic or theoretical) reconciliation. As President Thabo Mbeki of South Africa has noted, ‘true reconciliation can only take place if we succeed in our objective of social transformation. Reconciliation and transformation should be viewed as an interdependent part of one unique process of building a new society.’\textsuperscript{66}

\textsuperscript{63} Id at 113.
\textsuperscript{66} Above n13 at 167.
The truth commission space we design must recognise that the importance of truth, as a problematic of reconciliation, lies in the basis it provides for individual and collective transformation. It must be a space which provides a forum for the negotiation of both new truths and new outcomes, new identities and new institutions. It must be a space which fosters ‘empowerment, confrontation, pain, dialogue, exchange, experimentation, risk-taking, the building of common values and identity transformation’. At the same time, that space must not become the sole site and symbol of reconciliation, the arbiter of official truths. It must be a space for Australians, indigenous and non-indigenous, to negotiate their own truths.

The Reparations Chamber, based on adjudicative practice, does not provide that space. What is needed is a forum which addresses issues far beyond the reparation of the stolen generations, far beyond past human rights abuses, into the fundamental issues which divide indigenous and non-indigenous Australians, issues of identity and difference. It must be a forum which addresses these issues not through an adversarial process, but through a process of dialogue, the sharing of (hi)stories, and the negotiation, between the relevant parties, of new practices. This role would be played, within my proposed Reconciliation Commission, by a Healing Chamber.

The Healing Chamber would be empowered by statute to resolve all indigenous claims relating to the central legal elements of indigenous truth and identity: claimants’ status and rights as indigenous people and original occupiers of the land, including the right to self-determination. Where the Reparations Chamber sought only to deal with past injustices, the Healing Chamber attempts to create new practices in the present, recognising rights flowing not from...
historical interactions between indigenous and non-indigenous Australians, but from indigenous identity. By empowering the Healing Chamber to deal with all rights issuing from the central features of indigenous identity, we create a space for dealing with our common and different truths — a central problematic of reconciliation — by negotiation and consent.  

Matters as diverse as ceremonial protocol and criminal sanctions, adoption practices and indigenous intellectual property would all fall within the Healing Chamber’s jurisdiction, and could all form the basis of truth-telling and negotiated outcomes. The Healing Chamber would be designed to foster participatory, dialectic practices. Indigenous claimants would bring an application to the Chamber, setting out their claim and nominating potential respondents, providing reasons for those nominations. Claimants could include natural persons, corporations, and representatives of groups. Respondents would include these same persons, as well as any association, statutory body, government agency or department, or other person, as determined by the Chamber. The Chamber would review this claim and determine whether it fell within its terms of reference or jurisdiction. If it so determined, the Chamber would then review the list of nominated respondents, and amend the list as it saw fit, giving reasons. Next, it would invite respondents from this amended list to attend a hearing at a later date, in an appropriate setting. If possible the Healing Chamber should travel throughout Australia, as the South African Truth and Reconciliation Commission travelled throughout South Africa conducting hearings. Where necessary, the Chamber could compel attendance or representation by respondents, providing reasonable travel costs. Non-attendance in such cases would incur a fine. At this hearing, claimants would tell their stories in a non-adversarial setting, in their own language, assisted and perhaps questioned by the Chamber, and respondents would be called upon (but not compelled) to respond. Hearings would be public, unless claimants (but not respondents) requested otherwise, and that request was approved by the Chamber. If, through this process of truth-telling, common ground was found and both parties consented, the Chamber would begin a private, in camera, negotiation process between the parties aiming at facilitating negotiations for shared outcomes. Settlements negotiated under its auspices would then be endorsed by an Order of the Chamber in the same way as settlements out of court are given the force of law.

The Chamber would be made up of equal numbers of indigenous and non-indigenous commissioners. Its terms of reference would be broad enough to provide ‘a holistic and robust approach’ to the negotiation of settlements. Both the Reparations Chamber and the Healing Chamber could refer claims to each other. No claim could be brought in both Chambers; in the event of overlapping claims, the Reparations Chamber would determine finally in which Chamber the claim should be heard.

71 See above n48.
72 Submission 25, National Sorry Day Committee at 427. Compare BTH, above n14 Recommendation 16b.
73 Above n51 at 121.
4. Dealing with Sovereignty: from Makaratta to Treaty Chamber

In this final section, I deal with the third Chamber of the Reconciliation Commission, the Treaty Chamber, which complements the Reparations and Healing Chambers. The Reparations Chamber provides a space for dealing with the consequences, in the present, of indigenous and non-indigenous Australians’ common past. The Healing Chamber provides a space for the negotiation of the practical meaning of indigenous differences, in the present. In the Treaty Chamber, this process of negotiation is turned towards the future, learning from the lessons of the past in the Reparations Chamber, and the present in the Healing Chamber.

A formal ‘treaty’, compact, agreement or makaratta74 between indigenous peoples and the Commonwealth of Australia has been considered, for over 20 years, as a possible form for the settlement of the future of indigenous/non-indigenous relations.75 The Prime Ministership of John Howard has seen the proposal fall out of favour, but it has recently been revived, particularly through the Council for Aboriginal Reconciliation’s call for ‘a process which will unite Australians by way of an agreement or treaty through which the unresolved issues for reconciliation can be resolved’,76 and, more recently, Recommendation 11 of the 2000 Social Justice Report.77

The central problematic the treaty proposal seeks to address is the question of the ongoing relationship between indigenous and non-indigenous Australians, and the question of the legal implications, into the future, of the differences between them. The use of the ‘treaty’ signifier immediately suggests a particular type of legal relationship, based on the difference between two sovereign entities, which many Australians find profoundly disturbing. At best, these people suggest, ‘treaty’ is a misnomer, since it is not a treaty in international law which is contemplated, but ‘an umbrella document providing direction and perspective to all areas of policy, including land rights, self-management, customary laws and

74 A Yolngu word signifying the end of a dispute and the resumption of normal relations.
76 Above n4 at ch 10: Recommendations, Recommendation 6, and Appendix II, Reconciliation Bill 2001 Draft Section 8(1).
recognition of Aboriginal culture and religion … a national declaration of shared principles and common commitments’. 78 At worst, the use of the term is seen as a deliberate ‘recipe for separatism’, 79 a ploy to be ‘used internationally to suggest that there are within Australia the seeds of a separate nation state’. 80

By including a space for the consideration of a treaty in our legal architecture for reconciliation, we create a space to address one of the central legal problematics of indigenous difference: sovereignty. To understand what role such a space might play in nurturing new practices of reconciliation we must address the relationship between the treaty proposal and the problematic of sovereignty.

It is important to acknowledge that the absence of treaties between the British Crown and Australia’s indigenous inhabitants is an anomaly within not only British but broader contemporaneous European colonial practice. 81 While history offers an explanation for this absence in the absence of European competition for possession of Australia, 82 the law struggles to provide a justification. The orthodox legal justification has asserted that there was no need for treaty making, because there was no sovereign in Australia. 83 However, early authorities, including both the first NSW Attorney-General, Saxe Bannister, and later Governor Arthur of Tasmania, argued there was a need for treaty negotiation. 84 In 1837 the British House of Commons Select Committee on Aborigines intimated similar sentiments, noting the absurdity of treating Australian aborigines as British subjects. 85 In R v Bonjon in 1841, 86 Willis J held that a group of Port Jackson aborigines had ‘not surrendered’ their legal capacity and, adopting the language of the United States Supreme Court when it recognised native American Indian

---

82 European colonial powers often used treaties to legitimise their overseas claims vis-à-vis other European sovereigns according to European legal standards. See Miguel Alfonso Martinez, Study on Treaties, Agreements and other Constructive Agreements Between States and Indigenous Populations: First Progress Report (Geneva: UN, 1992) at 23.
83 See R v Murrell (1836) Legge 72; Cooper v Stuart (1889) 14 AC 286 at 291 (Lord Watson); Coe v Commonwealth (1979) 53 ALJR 403 at 408 (Gibbs J); Coe v Commonwealth (1993) 118 ALR 193 at 206 (Mason CJ).
85 House of Commons Parliamentary Paper No 425, 1837 at 84, quoted in Crawford, above n75 at 393.
86 Port Phillip Gazette, 18 September 1841.
sovereignty a decade earlier, It remains arguable that, under both the British and international law of the time, indigenous Australians exhibited the characteristics of sovereignty: ownership of a defined territory; a distinct, permanent population; the capacity for international relations; and identifiable forms of government.

This does not, however, mean that indigenous sovereignty continues to exist, particularly as indigenous groups appear now to have been deprived of the characteristics that underpinned their putative original sovereignty. Nor, more fundamentally, does it mean that any Australian court will — or can — recognise that sovereignty. While Australian courts might challenge the orthodoxy that there was no indigenous sovereign in Australia at the time of ‘settlement’, they have consistently ruled that the process of colonisation was effected by non-justiciable ‘acts of state’, rendering the question of the continuing existence of indigenous sovereignty unanswerable.

It is this non-justiciability of indigenous sovereignty which makes a space for a negotiated, political settlement so fundamental to the larger achievement of reconciliation. Without such a space, the central question of the legal status of indigenous groups in the past, and the effects of that status into the future, will remain unanswered.

The arguments for this space are not, however, only pragmatic ones. There are two legal arguments suggesting that even the possibility of original indigenous sovereignty has important contemporary ramifications. First, a UN Special Rapporteur has recently suggested that if there was original indigenous sovereignty...
sovereignty, any deprivation of that sovereignty not consented to must be unlawful.\textsuperscript{93} If this is correct, a treaty space nurturing a negotiated settlement will belong at the heart of an architecture of reconciliation, since it will provide a forum for the seeking and giving of the hitherto absent indigenous consent to co-exist within the sovereignty of the Commonwealth of Australia. Without such consent, the moral and legal integrity of modern Australian sovereignty must continue to be doubted. Second, recent developments in Australian land law also point to a notion of indigenous difference which must, some argue, be tantamount to a vestigial form of sovereignty. This argument points to the recognition of native title in \textit{Mabo No 2}\textsuperscript{94} and demands that the logical conclusion be drawn: if the common law can recognise the legal systems of land tenure which existed prior to British ‘settlement’, it must also be able to recognise the sovereign authority from which that tenure issued.\textsuperscript{95} Legal title — including native title — cannot exist in a vacuum of sovereignty. Henry Reynolds has asked rhetorically, ‘Why should property and sovereignty be treated so differently and can such inconsistency be maintained? Can the retreat from injustice be halted halfway along the track?’\textsuperscript{96}

A space for a negotiated treaty settlement permits us to answer these questions; it acknowledges in practice that while property rights may be justiciable before courts whose authority issues from the Crown, indigenous sovereignty is itself an inherently political problematic which can only be resolved by negotiation.

Historically, treaties have provided particularly effective legal forms for documenting such negotiations, both securing indigenous rights and establishing practical mechanisms for implementing those rights.\textsuperscript{97} But they are by no means a cure-all. Similarly, just as the Reparations and Healing Chambers had pitfalls which only careful construction could avoid, so too a Treaty Chamber must be carefully fashioned. A Treaty Chamber risks becoming an enclave for political

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{92} \textit{R v Murrell}, above n83; \textit{Cooper v Stuart}, above n83; \textit{Milirrpum v Nabalco} (1971) 17 FLR 141; \textit{New South Wales v Cth} (1975) 135 CLR 337 at 388 (Gibbs J); \textit{Coe v Commonwealth} (1979), above n83; \textit{Mabo No 2} (1992) 175 CLR 1 at 15 (Mason CJ & McHugh J), 31–32, 69 (Brennan J), 78–79 (Deane & Gaudron JJ), 122 (Dawson J), 179–180 (Toohey J); \textit{Coe v Commonwealth} (1993), above n83 at 207 (Mason CJ). See generally Henry Reynolds, \textit{Aboriginal Sovereignty: Reflections on State, Race and Nation} (1996); see also Michael Mansell, ‘The Court Gives an Inch But Takes Another Mile’ (1992) 2(57) \textit{Aboriginal Law Bulletin} 4 at 5. The question of indigenous Australian sovereignty in fact has no forum in which it is justiciable, since it is almost certainly non-justiciable before the ICJ (see Frank Brennan, ‘Mabo and Its Implications for Aborigines and Torres Strait Islanders’ in Margaret Stephenson & Suri Ratnapala (eds), \textit{Mabo: A Judicial Revolution} (1993) at 25–27).
\item \textsuperscript{93} Above n91 at paras 194, 288.
\item \textsuperscript{94} Above n92.
\item \textsuperscript{95} See Reynolds, above n89.
\item \textsuperscript{96} Ibid.
\item \textsuperscript{97} Above n82 at 57.
\end{enumerate}
\end{footnotesize}
posturing and factionalism; it risks presupposing a European framework insensitive to indigenous modalities of dispute resolution; and it risks essentialising the plurality of indigenous voices.

Perhaps the best way to circumvent these difficulties is to create a space based on the Canadian model. The Canadian Federal government is involved in negotiating more than 70 comprehensive claims settlements, or ‘modern treaties’, with indigenous groups. These treaties, dealing with outstanding claims to land rights, access to resources and protection of aboriginal rights, are negotiated by representatives of indigenous groups, provincial governments, and the federal government, in a neutral commission. The Treaty Chamber of my proposed Reconciliation Commission would provide a space for the negotiation of such a ‘modern treaty’, by acting as an independent body facilitating this negotiation process. First, it would provide resources for indigenous groups to negotiate and prepare amongst themselves common negotiating positions, and, importantly, to determine the role the treaty would play in their own law(s). In this way, the plurality of indigenous voices is represented, and room is made for indigenous dispute resolution techniques. Having reached these common positions, indigenous groups would then enter into negotiations with relevant parties (including State governments), facilitated by the Chamber, to achieve regional sub-agreements. On the completion of these regional sub-agreements, the Chamber would facilitate the negotiation of an over-arching Treaty, binding together these regional sub-agreements, between indigenous representatives and the Commonwealth. Ultimately, the Treaty itself could be entrenched through the creation of a Constitutional power similar to s105A, which permits the Commonwealth to negotiate binding public debt agreements with the States.

This negotiation process itself should not be held to any pre-ordained timetable.

---


99 Compare Brennan, above n75 at 68.

100 See Crawford, above n75 at 401-402.

101 These regional sub-agreements would include, and supersede, current Regional Agreements such as the Cape York Regional Land Use Heads of Agreement agreed on 5 February 1996. If necessary, these negotiation processes may need to be co-ordinated with National Native Title Tribunal processes. See also above n70.
This Treaty Chamber would be at home alongside Reparations and Healing Chambers. The Treaty Chamber would play the essential role of providing an opportunity for the re-negotiation of the practice(s) of Australian sovereignty, to find space for a vestigial indigenous sovereignty. Those practices will, in turn, grow from shared experience and the processes of negotiation envisaged for the Healing Chamber. Both the Reparations and Healing Chambers have the potential to tarnish the authority of Australia’s public institutions; a treaty would provide a new foundational document, renewing the authority of these institutions, with an enlarged mandate that would include those who, in the past, have been deliberately excluded. Without such new foundations, there is no new identity, no new practice, and the past ‘is not past at all’. The Treaty Chamber is an integral part of a legal architecture for reconciliation.

These three Chambers — for Reparations, Healing and the negotiation of a Treaty — should be united within one administrative structure, a Reconciliation Commission overseen by two Reconciliation Commissioners, one indigenous and one non-indigenous. These Commissioners would report annually to Federal Parliament on behalf of the Commission, to ensure the accountability of the process.


104 Compare Ignatieff, above n57 at 112.

105 See in particular the Constitution Preamble, ss24, 25, 127. A more radical proposal by far would be to consider granting a form of non-territorial statehood to indigenous Australians, and thus to include them in the Federal makeup of the Commonwealth. This approach would have parallels in (though also differences to) the US situation, where the Constitution recognises three sovereign species of: the Union, the States, and the Indian Nations. More immediately, contemplating the place for any vestigial indigenous sovereignty in Australia’s constitution makes us recognise that the process of reconciliation is, in many ways, a process of unification as profound as that of Federation. (See 2000 Social Justice Report, above n8 at 5.)

106 Ignatieff, above n57 at 121.
5. Conclusions

Practical reconciliation is a matter for the people, individually and collectively; but the initial impetus for this transformation must come from above, from government action. Without the appropriate architecture, practices of reconciliation are only stifled by existing practices, which deny responsibility, truth and sovereignty. New spaces are needed for new practices to flourish. Together, the three Chambers of the Reconciliation Commission provide these spaces. By creating spaces designed to deal with central problematics of reconciliation — responsibility, truth, and sovereignty — we create opportunities for the development of practices which embrace the differences between indigenous and non-indigenous Australians, transforming these differences from sources of division into shared assets.

This is the sort of practical reconciliation which ultimately matters: a transformed practice of individuals, and a transformed collective practice. A practical reconciliation which recognises that we are sorry, but which reflects that, to be reconciled, we must be more than sorry. Only by creating a home for reconciliation with spaces which foster new practices embracing indigenous difference can we transform the sorry of our words into a practical reconciliation.

Before the High Court

When the Telephone Rings: Restating Negligence Liability for Psychiatric Illness

_Tame v Morgan_ and _Annetts v Australian Stations Pty Ltd_

PETER HANDFORD*

The suggested rule is … hopelessly out of contact with the modern world of telecommunications. If any judge has doubts about this, he or she should wander through the city streets and see the large number of persons linked by mobile telephones to the world about them. Inevitably such telephones may bring, on occasion, shocking news, as immediate to the senses of the recipient as actual sight and sound of the catastrophe would be. This is the reality of the world in which the law of nervous shock must now operate.1

In December 2001, the High Court of Australia will hear two cases which raise many fundamental issues relating to liability in negligence for causing psychiatric illness — or nervous shock, for the traditionalists. This will be the first opportunity the Court has had to review this area of law since its ground-breaking decision in _Jaensch v Coffey_2 seventeen years ago. The two cases — _Tame v Morgan_3 and _Annetts v Australian Stations Pty Ltd_4 — involve very different fact situations, but the link between them is that the psychiatric injury for which the plaintiffs are claiming damages was caused, so it is alleged, by news communicated by telephone. In days gone by, when most people lived in small communities, relatives were usually close at hand and came swiftly to the accident scene: but as Kirby P so graphically demonstrates, the present reality is often very different.

_Annetts_, in point of time the second of the two cases to reach the High Court, provides the perfect illustration. Sixteen-year-old James Annetts had left his

---

1 _Coates v Government Insurance Office of New South Wales_ (1995) 36 NSWLR 1 at 11 (Kirby P) (hereinafter _Coates_).
3 Sub nom _Morgan v Tame_ (2000) 49 NSWLR 21 (CA), on appeal from _Tame v Morgan_ (1998) Aust Torts Reports 65,199 (Garling DCJ) (hereinafter _Tame_). References are to the Court of Appeal report unless the contrary is stated. The High Court granted special leave on 6 April 2001: _Tame v Morgan_ S120/2000 (6 April 2001).
4 (2000) 23 WAR 35, on appeal from [2000] WASC 104 (Heenan J, 28 April 2000) (hereinafter _Annetts_). References are to the Full Court report unless the contrary is stated. The High Court heard the application for special leave on 1 June 2001, and referred it to the Full Bench to be heard at the same time as _Tame v Morgan; Annetts v Australian Stations Pty Ltd_ P97/2000 (1 June 2001).
family home in Binya in New South Wales to go and work as a jackaroo on the
defendant’s cattle station in Flora Valley, about 40 kilometres south-east of Halls
Creek, in the Kimberley District in the far north of Western Australia. Before he
left home, his mother telephoned the wife of the defendant’s station manager for
information about the conditions under which he would be living, and was told that
he would be working under constant supervision, that he would be sharing a room
with other men, and that his meals would be cooked for him and he would be well
looked after. But after only seven weeks, James was sent to work alone as a
caretaker at a remote location 100 kilometres away from Flora Valley. After seven
weeks of this, it appears that he could stand it no more. On 3 December 1986, his
employers learnt that he and Simon Amos, another teenager employed by them on
another station, were missing. Three days later, a police officer in Griffith, New
South Wales, telephoned James’ parents and told them the news. Mr Annetts
collapsed and Mrs Annetts had to take over the telephone conversation. In January
1987 James’ parents visited Halls Creek and were shown some of their son’s
belongings, including a hat covered in blood. In the months that followed, they
telephoned police at Halls Creek on a number of occasions, and made several
further visits there in an effort to obtain more information. On 26 April 1987, Mr
Annetts received another fateful telephone call. The vehicle driven by James had
been found bogged in the desert. Later the same day, he was told that two sets of
remains had been discovered. He flew back to Halls Creek and identified James’
skeleton from a photograph. James had died on or about 4 December 1986 from
dehydration, exhaustion and hypothermia, but his parents did not learn of this until
nearly five months later.

Annetts is thus the classic secondary victim case — one where the plaintiff’s
psychiatric injury stems from witnessing, or in this case hearing about, the death
or injury of another. On the assumption that some facts pleaded by the plaintiffs
were true and the defendant had admitted others, the court was asked to determine
whether the defendant owed the plaintiffs a duty of care. Difficulties with the
pleaded facts loom large in the Full Court judgments of Malcolm CJ and Ipp J: in
particular, they found it impossible to decide whether the psychiatric injury was
alleged to have been caused by the initial news of James’ disappearance, or the
news of his death five months later coupled with all that had happened in the
intervening period, and so decided to examine both hypotheses. At first instance
Heenan J found that psychiatric injury was foreseeable but the requirements of
proximity were not satisfied. On appeal the Full Court was not prepared to go as
far. In its view, though grief and distress were foreseeable in the circumstances
(whichever hypothesis was adopted), psychiatric injury was not.

Tame is in many ways very different — in particular, despite some puzzling
statements made in argument during the special leave hearing, it is clearly a
primary victim case — but one factor that provides a link with Annetts is that the
psychotic depressive illness suffered by Mrs Tame allegedly stemmed from a
telephone call informing her that a police officer had recorded on a P4 road
accident report form that she had a blood alcohol reading of 0.14, almost three
times the legal limit.\textsuperscript{5} The accident was not her fault, and she eventually received compensation from the other driver’s insurance company for the personal injury she suffered. She had not been drinking: indeed, she had hardly touched alcohol for many years and had an abhorrence of drinking and driving. It was the other driver’s blood alcohol reading which had been mistakenly entered against her name. Mrs Tame learnt of her alleged blood alcohol reading during a phone conversation with her solicitor, whom she had consulted to voice her concern about the non-payment of medical accounts for counselling and therapy following the accident. The solicitor, having obtained a copy of the P4 from the insurance company, rang her to ask if she had been drinking at the time of the accident. She was horrified, and indignantly denied it. She immediately phoned the police and Constable Morgan told her that it was a mistake and had already been corrected — though not, unfortunately, in time to prevent the insurance company getting an uncorrected copy. But, in her solicitor’s words, from that time onwards she seemed to change. She became obsessed by the mistake, feeling shame and guilt, and thought the entry on the P4 was the reason behind the delays in bill payments. Doctors who gave evidence diagnosed her as suffering from a psychotic depressive illness stemming from the impact of the police mistake on a vulnerable personality.

Mrs Tame sued Constable Morgan and the State of New South Wales, alleging that it was vicariously liable for the police officer’s negligence. She succeeded before Garling DCJ, but the Court of Appeal held unanimously that the defendants did not owe her a duty of care, inter alia because such harm would not have been foreseeable to a person of normal fortitude. Mrs Tame therefore applied for special leave to appeal to the High Court. In April 2001 the High Court granted special leave, and two months later referred the special leave application in \textit{Annetts} to the Full Bench to be heard at the same time. These two cases give Australia’s final appeal court a perfect opportunity to review many of the fundamental issues involved in the law of liability for psychiatric damage as it affects both primary and secondary victims.\textsuperscript{6}

\textsuperscript{5} The police officer concerned was in fact Acting Sergeant Beardsley, not Constable Morgan, a fact which became clear during the trial. ‘Despite the reasoning of the trial judge, it remains unclear whether a verdict was entered in Constable Morgan’s favour, as it should have been. Surprisingly, Morgan became an appellant. He remains one, destined perhaps to enter the law reports in relation to something that never involved him directly’: \textit{Tame}, above n3 at 36 (Mason P).

\textsuperscript{6} For comment on these and other recent cases see Des Butler, ‘Voyages in Uncertain Seas with Dated Maps: Recent Developments in Liability for Psychiatric Injury in Australia’ (2001) 9 \textit{TLJ} 14.
1. The World of Psychiatric Damage: Some Jurisdictional Differences

At the time of the High Court’s previous leading decision in *Jaensch v Coffey* in 1984, English and Australian approaches to such cases were substantially in harmony. Though in earlier times Australia was perhaps slower to expand the limits of liability,8 by the 1980s it had clearly caught up. The twin cases of *McLoughlin v O’Brian*9 and *Jaensch v Coffey* each recognised that the aftermath principle, under which courts had held that secondary victims who suffered shock through viewing the aftermath of an accident to a close relative could recover damages, extended not only to the accident scene itself but also to the hospital during the period of immediate post-accident treatment. This development suggested that the closeness of the relationship played a greater part than geographical proximity in findings that psychiatric injury was foreseeable and that a duty of care was owed. These cases were also important in recognising that foresight of psychiatric harm alone was not enough. Other ‘proximity factors’ were also involved.

Since that time the English courts, faced with a series of cases arising out of mass disasters, and in particular the Hillsborough soccer tragedy of 1989, in which 95 people were crushed to death and several hundred injured at the FA Cup semi-final as the result of a police decision to open a barrier to speed up admission to the ground, have moved to hold the line against further expansion. ‘Thus far and no further’ is the current catchcry.11 Fears of unlimited liability have led the House of Lords to refuse compensation both to relatives of the dead and injured and to police officers on duty on the day. In the relatives’ case, *Alcock v Chief Constable of South Yorkshire Police*,12 while the House of Lords showed an encouraging willingness to consider the closeness of the actual relationship, rather than limit recovery to parents and spouses, it ruled out any question of a duty being owed to those who saw it as it happened on television or learnt of it by any other means than personal perception at the accident scene or its aftermath. Further, it placed a narrow interpretation on the aftermath concept by holding that anyone who did not arrive at the accident scene or the hospital bed within two hours of the accident was too late — this, according to Lord Wilberforce in *McLoughlin v O’Brian*, being ‘upon the margin of what the process of logical progression would allow’.13 Two first instance decisions allowing recovery to parents told of the deaths of their sons

---

7 Above n2.
8 For example, compare *Chester v Waverley Corporation* (1939) 62 CLR 1 with *Hambrook v Stokes Bros* [1925] 1 KB 141.
10 Note also *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1 and *Hegarty v EE Caledonia Ltd* [1997] 2 Lloyd’s Rep 259, arising out of the Piper Alpha disaster in 1988, in which 164 men were killed in an explosion on a North Sea oil rig.
13 Above n9 at 419.
were repudiated. Having refused the claims of the relatives, the House of Lords felt that it would not be just to admit those of the police officers. In *White v Chief Constable of South Yorkshire Police*, the majority rejected arguments that some of the plaintiffs were owed a duty as rescuers, and refused to recognise that the duty of employers to provide a safe working environment for employees extended to psychiatric as well as physical injury. Lords Steyn and Hoffmann were both clearly concerned with the problem of expanding liability any further. Lord Steyn said that we do not live in Utopia: we live in a practical world where the tort system imposes limits to the classes of claims that rank for consideration and that the only sensible general strategy for the courts is to say thus far and no further, leaving any expansion or development to Parliament. For Lord Hoffmann, in this area of the law, the search for principle was called off in *Alcock*, and their Lordships were ‘now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as a system of rules which is fair between one citizen and another’.

In between these two cases, the House of Lords considered a rather different case involving a primary victim. In *Page v Smith*, the plaintiff was involved in a very minor road accident. Though he suffered no personal injury, it aggravated the chronic fatigue syndrome from which he had periodically suffered and as a result he was unable to work again. On an orthodox approach to the case, the fact that psychiatric injury was not foreseeable would seem to rule out any duty of care being owed, and this was the approach taken by the Court of Appeal. In the House of Lords, however, Lord Lloyd of Berwick, with the concurrence of two other members of the court, held that the law imposed a less onerous test on primary victims — those who were ‘directly involved in the accident, and well within the range of foreseeable physical injury’. In such cases, foreseeability of any form of physical injury was enough to establish a duty of care. Moreover, rules which limited the ambit of secondary victim liability, such as the presumption that the plaintiff was a person of ordinary fortitude, and the requirement to view the circumstances of the accident with hindsight, were inapplicable. This was a somewhat surprising development, in view of the lack of previous authority for some of the propositions advanced. Though it might be seen as a well-meaning

---

15 Above n11. The later pages of the Appeal Cases report, but not the title page, refer to the case as *Frost v Chief Constable of South Yorkshire Police*, by which name it was known in the Court of Appeal: see [1998] QB 254. Mr Frost was not one of the six police plaintiffs by the time the case came to trial. Perhaps, like Mr Morgan, his name is destined to be linked in the law reports with legal developments in which he played only a very minor role: see n5 above.
16 Id at 491.
17 Id at 500.
18 Id at 511.
20 Id at 184.
21 See, for example, Peter Handford ‘A New Chapter in the Foresight Saga: Psychiatric Damage in the House of Lords’ (1996) 4 *Tort L Rev* 5.
attempt to extend liability to deserving persons who had actually been within the area of personal danger, the definition of primary victims in such terms had the potential to narrow the law. In *Alcock*, Lord Oliver of Aylmerton had classified other kinds of participants, such as rescuers and involuntary participants, as primary victims.22 Lord Lloyd made no mention of rescuers, but in *White* the majority held that they were owed no duty unless they too were within the area of physical danger — a much narrower approach than that adopted in previous lower court cases.23 Lord Goff of Chieveley, dissenting in *White*, provided a detailed exposure of the flaws in Lord Lloyd’s analysis.24 In his view, anything Lord Lloyd said about secondary victim liability was obiter only, and the judgment should be regarded merely as an attempt to open the door a little wider to primary victims.

Lord Lloyd’s version of the distinction between primary and secondary victims caused much controversy in subsequent lower court cases.25 It has probably survived *White*, but only just. Lord Griffiths, dissenting, referred shortly to *Page v Smith* as ‘a sensible development of the law’.26 Of the majority judges, Lord Steyn also endorsed it,27 but Lord Hoffmann, who had supported a more orthodox view of the law in the Court of Appeal in *Page v Smith*, refused to commit himself. Lord Browne-Wilkinson simply agreed with the majority judgments, so his view is not clear. Some encouragement that the issue is not finally resolved may be derived from the Lords’ latest consideration of the matter, in the context of a strikeout application, in *W v Essex County Council*,28 a claim by parents of young children abused by a fifteen year old boy placed with them in foster care by the local authority. Lord Slynn of Hadley, giving the judgment of the court, said that the categorisation of those claiming to be primary and secondary victims is not finally closed and remains to be developed in different factual situations.29

The generally conservative approach of the English courts is mirrored in Scotland. In *Robertson v Forth Road Bridge Joint Board*,30 for example, the Court of Session, anticipating the decision in *White*, refused to open up a new category of duty not to cause psychiatric injury owed by employers to their employees. Canadian courts also have maintained a generally cautious attitude to invitations to widen the ambit of the duty of care to accommodate new kinds of claim.31 In a recent intermediate appeal court decision, *Devji v District of Burnaby*,32 the

---

22 Above n12 at 407–408.
23 For example, *Chadwick v British Railways Board* [1967] 1 WLR 912.
24 Above n11 at 468–481.
26 *White*, above n11 at 463.
27 Id at 497.
29 Id at 607.
parents and sisters of a young man who died in a motor cycle accident suffered psychiatric injury on learning of the death and attending hospital to view the body. The British Columbia Court of Appeal refused to extend the aftermath principle beyond the previously accepted limits, or to recognise claims based on the receipt of shocking news where direct perception was lacking. The court placed much stress on the maintenance of the existing limits as determined by earlier precedents. The Supreme Court of Canada has not yet had to consider the issue of psychiatric damage.

In other parts of the world, however, courts have maintained a much more positive attitude to such claims. Australia is at the forefront. The leading judgment of Deane J in *Jaensch v Coffey* has set the standard for subsequent cases, and in a number of respects seems rather more enlightened than the recent English authorities. So, for example, the aftermath is the period of ‘immediate post-accident treatment’, but is not necessarily to be measured by hours or minutes. Causal proximity is the preferred rationale, rather than physical proximity in the sense of space and time. A Queensland first instance judge suggested that if the aftermath had no temporal connotation, shock suffered by a mother as the result of her daughter’s death, after three years in a coma, was compensable, but the Full Court held that the aftermath concept as outlined by Deane J did not extend to cases where there was a significant time lapse. Even so, there are cases which show that the aftermath of the accident clearly extends beyond the limits set by the English cases.

Perhaps even more significantly, Deane J was not prepared to insist on direct perception at the accident scene or its aftermath as the only possible indicator of sufficient proximity. He refused to rule out the possibility that psychiatric injury induced by being told of an accident to a close relative might be enough to found a duty of care:

> [T]he question whether the requirement of proximity precludes recovery in a case where reasonably foreseeable psychiatric injury is sustained as a consequence of being told about the death or accident remains, in my view, an open one. It is somewhat difficult to discern an acceptable reason why a rule based on public policy should preclude recovery for psychiatric injury sustained by a wife and mother who...
is so devastated by being told on the telephone that her husband and children have all been killed that she is unable to attend at the scene while permitting recovery for the reasonably, but perhaps less readily, foreseeable psychiatric injury sustained by a wife who attends at the scene of the accident or its aftermath at the hospital when her husband has suffered serious but not fatal injuries.37

Though Brennan J expressed a narrower view,38 it was Deane J’s view that has influenced a line of decisions holding that there can be recovery for psychiatric injury caused by distressing news of an accident to a loved one, even in the absence of direct perception at the accident scene or its aftermath. Queensland primary judges have recognised a duty to a mother told of her daughter’s death by a nurse at the hospital to which she had been taken,39 and to a wife told that her husband had been run over by a bus at the bus depot where he worked,40 and a New South Wales District Court judge has held that family members could recover for shock suffered following an Aboriginal death in custody,41 though the judgment does not really consider the issues involved. More recently, several appellate courts have pronounced in favour of recognising a duty of care in a ‘told only’ situation. The South Australian Full Court and the Queensland Court of Appeal have both granted recovery to fathers told of their children’s death in road accidents.42 On the other hand, in Annetts, Ipp J of the Western Australian Full Court insisted on direct perception,43 influenced by Brennan J, the English Hillsborough cases and an obiter dictum of Windeyer J in an older High Court case, Mount Isa Mines Ltd v Pusey.44 The New South Wales Court of Appeal has considered the matter on several occasions. In Coates v Government Insurance Office of New South Wales,45 where two children suffered psychiatric injury solely as a result of receiving news of their father’s death in a car crash, Kirby P said that the rule was out of date,46 as the passage quoted at the head of this article shows. His views were obiter, because the court held that the plaintiffs could recover under the New South Wales nervous shock statute47 — but are nevertheless significant. The other members of the court said that the question remained an open one,48 a view repeated by the court more than once since,49 but in its latest decision the influence of Annetts has produced a more cautious response.50

37 Jaensch v Coffey, above n2 at 608–609.
38 Id at 567.
40 Reeve v Brisbane City Council [1995] 2 Qd R 661.
43 Above n4 at 61.
44 (1970) 125 CLR 383 at 407
45 Above n1.
46 Id at 8–11.
48 Coates, above n1 at 5 (Gleeson CJ) and 23 (Clarke JA).
49 See Knight v Pedersen [1999] NSWCA 333 at [24] (the Court); Tame, above n3 at 30–31 (Spigelman CJ).
50 See Gifford v Strang Patrick Stevedoring Pty Ltd [2001] NSWCA 175 at [40] (Hodgson JA). Ipp AJA (visiting from Western Australia), was one of the members of the court.
In these and other ways, the Australian courts have shown themselves much more prepared than their counterparts in England to recognise the existence of a duty not to cause psychiatric injury in novel situations. But the Australians are by no means alone in this respect. The Irish courts, for example, have provided a similarly progressive response to the need to develop the law. It is often forgotten that it was an Irish judge who was the first to repudiate the old rule of non-recovery for nervous shock, and modern judges have followed in his footsteps. The Irish courts have adopted a more rational approach to the aftermath problem than the English courts, they have granted recovery to a mother informed by telephone of an accident to her children (though she subsequently went to the hospital), and they have recognised that employers owe their employees a duty to protect them from psychiatric injury, something the House of Lords refused to do in White.

The last of these decisions, though only at Circuit Court level, was arrived at after a full examination of the authorities by a judge who, in another capacity, is the joint author of Ireland’s leading torts text. Judge McMahon commented that the divergence in approach between Ireland and England was becoming increasingly obvious and was perhaps inevitable. Another Irish author suggests that the Irish and Australian decisions are broadly in line, with the Irish judges prepared to decide cases on broad principles of foreseeability in the spirit of Lord Bridge’s judgment in McLoughlin v O’Brian, a judgment which it appears is now not representative of English law.

No less important is the recent decision of South Africa’s highest court, the Supreme Court of Appeal, in Barnard v Santam Bpk. As in Annetts, the news that caused psychiatric injury was imparted by means of a telephone call. Following the death of a young teenager in a road accident, a doctor at the hospital telephoned the child’s father with the sad news, and the father told the child’s mother, who suffered psychiatric injury. There was no question of aftermath: the mental injury suffered by the mother was occasioned purely and simply as a result of communication of the news from the doctor via her husband. Yet the court did not

---

52 Bell v Great Northern Railway Co of Ireland (1890) 26 LR Ir 428, rejecting the decision of the Privy Council in Victorian Railways Commissioners v Coultas (1888) 13 App Cas 222. The Irish Court of Appeal had anticipated Bell in Byrne v Great Southern & Western Railway Co of Ireland (1884) unfortunately unreported but cited in Bell by Palles CB.
56 Above n11.
58 Curran v Cadbury (Ireland) Ltd, above n55 at 360.
60 Above n9.
find the lack of direct perception an impediment. Departing from earlier case law denying compensation to what it labelled ‘hearsay victims’, the court unanimously held that in the circumstances the injury was foreseeable. This finding depended primarily on the closeness of the relationship between the primary victim and the traumatised person. The court was influenced by Australian authorities, particularly the statements of Kirby P in *Coates v Government Insurance Office of New South Wales*, and it carefully examined but ultimately discarded all the standard policy objections. In *Annetts*, Ipp J downplayed the significance of the decision, saying that in South Africa the law of negligence was based on the Roman *Lex Aquilia*, under which foreseeability was limited only by causation and public policy and proximity played no role. The views of a judge trained in the South African system are entitled to great respect; and yet the *Barnard* decision relies heavily on Australian authorities and seems perfectly in tune with developments in various parts of the common law world. Nor is it only in relation to means of communication that some courts have been prepared to break down the barriers. In Singapore, for example, the High Court has rejected the alleged requirement of sudden shock, granting recovery to a plaintiff for the consequences of watching her daughter linger on in hospital after negligent surgery until she died three months later. There is a little-known decision from the Isle of Man to the same effect. Such cases would receive short shrift in England in the post-*Alcock* era, but this may simply be another reason for not paying too much heed to the English authorities.

Finally, we should note an important decision from New Zealand. Though it was once thought that the no-fault accident compensation scheme left no room for common law nervous shock claims, it has now been established that this is not so, and both primary and secondary victim claims have arisen phoenix-like from the ashes. Though New Zealand courts have not yet dealt with some of the novel situations encountered by courts in Australia, Ireland, South Africa and elsewhere, the recent decision of the Court of Appeal in *Van Soest v Residual Health Management Unit* is of great interest. The majority held that it was not enough to show that mental suffering to a secondary victim was reasonably foreseeable, in the absence of other proximity requirements, but this provoked a strongly worded dissent from Thomas J, who echoed the words of Lord Oliver in *Alcock* that the present state of the law is neither satisfactory nor logically defensible, and suggested that many past plaintiffs had failed where they deserved to succeed. He

63 Above n1.
64 Above n4 at 60.
65 *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317.
67 Above n12.
68 Note however *Kralj v McGrath* [1986] 1 All ER 54.
69 For the current legislation, see *Accident Insurance Act 1998* (NZ).
70 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549.
71 [2000] 1 NZLR 179.
72 Above n12 at 418.
was in favour of abandoning rules dependent on the geographical, temporal and relational proximity of the plaintiff to the accident and accepting reasonable foreseeability as the sole test of liability for psychiatric injury.

2. A New Approach?

There are many others who would argue that the present state of the law of psychiatric damage is accurately described in the words of Lord Oliver. This criticism could certainly be levelled at the current English law, and the comments of Lords Steyn and Hoffmann in White, quoted above, show that they are acutely aware of this. In the wake of the first Hillsborough case, the English Law Commission undertook an intensive inquiry, and their report, published in 1998, recommended a statutory scheme removing most of the current impediments to recovery in cases where there are close ties of relationship between the primary and the secondary victim. However, the House of Lords decision in the second Hillsborough case set limits to the common law that were almost certainly not anticipated by the Law Commission.

In Australia, as shown above, many of the rules have been much less restrictively interpreted, and Lord Oliver’s sentiments may therefore not command such ready acceptance. However, should the High Court decide that the time is ripe for a restatement of the basis of Australian psychiatric damage law, there are a number of possible alternative positions that could be adopted. Two proposals, each widely differing from the other, are now well documented. What they share is a conviction that the distinctions made by current doctrines are indefensible. Where they diverge is in what they propose should be done. Professor Jane Stapleton has suggested that the only possible solution is to abolish recovery for psychiatric injury altogether. The alternative proposal advocates the stripping out of most of the current proximity restrictions, relying instead on foreseeability of psychiatric harm as the major criterion of whether a duty of care should be recognised, but (a qualification sometimes not sufficiently appreciated) subject to policy limitations in appropriate cases.

---


74 Text to nn16–18.

75 Alcock, above n12.


77 White, above n11.


79 Mullany & Handford, Tort Liability for Psychiatric Damage (1993) at 64, 84, 312. See also Mullany & Handford, above n31, especially at 389–390.
Professor Stapleton’s conclusion is one to which she has been driven by the unsatisfactory state of the current law, especially in England, and the lack of acceptable alternatives, but it seems most unlikely that any court of final appeal, after a century of advances in psychiatric medicine, as a result of which we have come to accept much more readily that certain traumatic events can have serious consequences for the human psyche, will put the clock back to 1888 and hold that damage arising from mere sudden terror unaccompanied by physical injury, but occasioning only a nervous or mental shock, is to be non-compensable. The same might be said of the slightly less extreme alternative of abolishing secondary victim compensation and requiring all successful plaintiffs to be in the zone of physical danger and in fear for their own safety, which would only take the law back as far as 1925. A minority of United States jurisdictions are still prepared to endorse this alternative, and it has been strongly advocated in more than one recent decision, but this goes against the trend in favour of increasing recognition of secondary victim recovery.

The case for proceeding in the opposite direction and removing unsatisfactory control mechanisms is that foreseeability can very often produce a satisfactory outcome without all the additional rules. It has to be remembered that no plaintiff can recover damages without establishing that some recognisable psychiatric illness has been suffered, and showing that it was caused by the defendant’s breach of duty. The courts then have to make a determination whether psychiatric injury was foreseeable in the circumstances of the case. Annetts is really a very good illustration of how this can work to produce the result the judges consider to be correct. In the Full Court, both Malcolm CJ and Ipp J came to the conclusion that,

80 Victorian Railways Commissioner v Coultas, above n52.
81 Note however that the Coultas-based ‘impact rule’ has been retained in four United States jurisdictions (Arkansas, Georgia, Kentucky and Oregon), and retained subject to modifications in two others (Florida and Indiana): see Wood v National Computer Systems Inc 814 F 2d 544 (Ark 1987); OB-GYN Associates of Albany v Littleton 386 SE 2d 146 (Ga 1989); Wilhoite v Cohb 761 SW 2d 625 (Ky 1989); Hammond v Central Lane Communications Center 816 P 2d 593 (Or 1991); RJ v Humana of Florida Inc 652 So 2d 360 (Fla 1995); Shuamber v Henderson 579 NE 2d 452 (Ind 1991).
82 See Mullany & Handford, above n79 at 102.
83 That is, prior to the decision in Hambrook v Stokes Bros, above n8.
85 For recent examples of jurisdictions affirming the zone of danger rule in preference to full bystander recovery, see Johnson v Rogers 763 P 2d 771 (Utah 1988); Williams v Baker 572 A 2d 1062 (DC 1990); Asaro v Cardinal Glennon Memorial Hospital 799 SW 2d 595 (Mo 1990), discussed in J Matye, ‘Bystander Recovery for Negligent Infliction of Emotional Distress in Missouri’ (1991) 60 UMCK L Rev 169; Carlson v Illinois Farmers Insurance Co 520 NW 2d 534 (Minn 1994); Leo v Hillman 665 A 2d 572 (VT 1995); Nielsen v AT & T Corporation 597 NW 2d 434 (SD 1999). See also Consolidated Rail Corporation v Gottshall 512 US 532 (1994), affirming this rule for the purposes of the Federal Employers Liability Act. According to the reporter, the majority reasoned that this rule was ‘the only common-law test that exhibits both significant historical support and continuing vitality sufficient to inform the Court’s determination of the federal question of what constitutes FELA “negligence” in this context’: (1994) 129 L Ed 2d 427 at 434.
though it was possible to foresee that the initial telephone call (according to the first scenario) or the whole sequence of events leading up to the communication of the news of James’ death (the alternative interpretation) would cause distress and a deep sense of loss and grief, it was not reasonably foreseeable that the plaintiffs would suffer a psychiatric illness. The same goes for -- adopting the ‘normal fortitude’ test as part of the foreseeability issue, the Court of Appeal came to the conclusion that it was not reasonably foreseeable that the mistake on the form would cause psychiatric illness to Mrs Tame. In each case, the additional proximity requirements ratified by the two courts buttressed this conclusion, but it would have been the same without them.

The above approach now has the reasoned support of Thomas J of the New Zealand Court of Appeal, and the thinking of the South African Supreme Court of Appeal is very similar, to judge from its most recent decision. It is not very different from the statutory scheme proposed by the English Law Commission for those with ‘a close tie of love and affection’: according to the Commission’s draft bill:

A person (the defendant) owes a duty to take reasonable care to avoid causing another person (the plaintiff) to suffer a recognisable psychiatric illness as a result of the death, injury or imperilment of a third person (the immediate victim) if it is reasonably foreseeable that the defendant’s act or omission might cause the plaintiff to suffer such an illness.

The defendant must not be taken to have owed the duty unless the requirements of causation and close ties are satisfied.

---

86 By 2000, 27 states had adopted the bystander principle (Alaska, California, Connecticut, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, West Virginia, Wisconsin and Wyoming). For the most recent recognitions, see Lejeune v Rayne Branch Hospital 556 So 2d 559 (La 1990); Johnson v Roark Obstetrics and Gynecology Associates PA 395 SE 2d 85 (NC 1990); Heldref v Mars 425 SE 2d 157 (WVa 1992); Bowen v Lumbermen’s Mutual Casualty Co 517 NW 2d 432 (Wis 1992) (especially significant, since it marks the abandonment of the zone of danger rule by the first jurisdiction to adopt it); Clohessy v Bachelor 675 A 2d 852 (Conn 1996); Ramsey v Beavers 931 SW 2d 527 (Tenn 1996).
87 Above n4.
88 Id at 40–41 (Malcolm CJ), 54–56 (Ipp J).
89 Above n3.
90 Id at 28 (Spigelman CJ), 46 (Mason P).
91 Van Soest v Residual Health Management Unit, above n71.
92 Barnard v Santam Bpk, above n61.
93 Above n76 at 128 (cl 2(2)).
94 Id at cl 2(3). The duty is not imposed if the court is satisfied that its imposition would not be just and reasonable because of any factor by which the defendant owed no duty of care to the immediate victim, voluntary assumption of risk by the immediate victim, or involvement by the plaintiff in conduct illegal or contrary to public policy: cl 2(4).
whether the close relative is at the scene of the accident or how he or she learns of it.\textsuperscript{95} In general terms, the message of the nervous shock statutes of New South Wales and the two Territories\textsuperscript{96} is very similar: given an act, neglect or default by which any other person is killed, injured or put in peril, mental or nervous shock sustained by a very close relative such as a parent or spouse is compensable. There are no other restrictions. It is as though Parliament accepted, more than 50 years ago, that in such cases psychiatric injury is clearly foreseeable.

3. The Major Issues

The High Court may well be reluctant to accept foreseeability of psychiatric injury as the only or substantially the only control on liability for damage to the mind, preferring instead to provide a restatement of the control mechanisms that are to apply in such cases in addition to the foreseeability test. If this is the route taken, there are still many positive outcomes that can be hoped for. There is a sense in which the overall results of the two cases do not matter — except of course to the parties — providing the court takes this golden opportunity to outline a rational approach to act as a basis for the future.

A. Tame v Morgan

Dealing first with issues chiefly relevant to the appeal in Tame,\textsuperscript{97} given that this is a primary victim case it would be highly desirable for the court to issue a resounding declaration that Page v Smith\textsuperscript{98} is no part of Australian law, and that in all psychiatric injury cases the ultimate test is whether or not psychiatric injury was foreseeable in the circumstances. Lord Lloyd may have been trying to soften the hurdle to be surmounted by those within the sphere of physical danger (though it is questionable whether this was the appropriate case in which to do it, or even whether chronic fatigue syndrome is properly classifiable as a psychiatric injury);\textsuperscript{99} but his rigid exclusion from the more favourable primary victim regime of anyone not within the zone of physical danger has had unfortunate consequences for rescuers, involuntary participants, employees and others.\textsuperscript{100} As Spigelman CJ firmly stated,\textsuperscript{101} it is the Court of Appeal in Page v Smith, the minority judgments in the House of Lords in that case, and the dissenting judgment of Lord Goff in White\textsuperscript{102} that should be taken as representative of Australian law.

\textsuperscript{95} Jaensch v Coffey, above n2 at 600.
\textsuperscript{97} Above n3.
\textsuperscript{98} Above n19.
\textsuperscript{100} See above text to nn19–24. As an example of the dangerous consequences of flirtation with the English approach, see Cleary v Congregation of the Sisters of the Holy Family at Nazareth (Qld Supreme Court, Lee J, 23 December 1996). Note also the ambiguous statements of the same judge in FAI General Insurance Co Ltd v Curtin (1997) Aust Torts Reports 64,479 at 64,499 (Lee J).
\textsuperscript{101} Tame, above n3 at 24–25.
This said, the outcome is likely to turn on whether it remains appropriate in psychiatric injury cases to apply the normal fortitude test. Leading judges have said on many occasions that what it is proper for the reasonable person to foresee must depend on a normal standard of susceptibility, unless the defendant knows different. ‘The test of a plaintiff’s extraordinary susceptibility, if unknown to the defendant, would in effect make him an insurer.’ Although Windeyer J has objected that ‘the idea of a man of normal emotional fibre, as distinct from a man sensitive, susceptible and more easily disturbed emotionally and mentally, is I think imprecise and scientifically inexact’, this view has not generally found favour. Unless Australian courts are prepared to endorse Lord Lloyd’s view that there is no need to apply this test in the case of a primary victim — so applying an alternative test for primary victims which, it has just been suggested, is most undesirable — the ordinary fortitude test is likely to defeat Mrs Tame’s claim, as it did in the Court of Appeal. Though it could perhaps be argued that the law does not adopt the same attitude in ordinary personal injury cases — the rule being that you take the plaintiff as you find him, or her — if the law regards psychiatric injury cases as different from personal injury cases it is difficult to pick and choose among the consequences of this categorisation process. Otherwise, the only possible arguments for Mrs Tame would seem to be that Garling DCJ in fact applied the correct test (though there is no real evidence in the judgment to support this), or that the Court of Appeal’s finding to the contrary did not give proper weight to the expert medical evidence.

B. Annetts v Australian Stations

Lord Wilberforce suggested 20 years ago that three elements were inherent in any secondary victim nervous shock claim: the class of persons who could recover, proximity to the accident, and the means of communication. The first of these is unlikely to be controversial, since there could be no closer family relationship than that between parents and children. Moreover, Jaensch v Coffey shows that the Australian approach to this issue, which emphasises the strength of the individual relationship rather than listing relationships by category, is satisfactory, and the House of Lords in Alcock has now adopted a generally similar stance. But the other two elements are central to the Annetts case.

102 Above n11.
103 See Mullany & Handford, above n31 at 402 n324.
104 Bourhill v Young [1943] AC 92 at 110 (Lord Wright). See also Jaensch v Coffey, above n2 at 556 (Gibbs CJ), 568 (Brennan CJ).
105 Mount Isa Mines Ltd v Pusey (1970), above n44 at 405.
106 Page v Smith, above n19 at 189.
109 McLothlin v O’Brian, above n9 at 422.
110 Above n2, especially at 600 (Deane J).
111 Above n12.
Ipp J’s second possible scenario was that psychiatric damage resulted not from the initial telephone call but from the cumulative effect of five months of uncertainty, several visits to Halls Creek, numerous telephone calls, and the final discovery and identification of the remains. If this is the correct interpretation, some sort of case could perhaps be made for extending the aftermath principle to cover it. However, this argument is probably unlikely to succeed. Although the leading judgment of Deane J in *Jaensch v Coffey*,112 suggests that causal proximity, rather than physical proximity in space and time, was the preferred rationale, the aftermath concept is still limited to the period of ‘immediate post-accident treatment’. It is to be hoped that the High Court will disclaim the inflexible approach of the English courts, which seemingly require the plaintiff to appear at the scene or the hospital within two hours of the accident,113 and instead apply the notion of ‘immediate post-accident treatment’ in the more flexible manner exemplified by *Jaensch v Coffey* itself and the Irish decision of *Mullally v Bus Eirann*.114 However, it is hard to see how cases where there is a ‘significant time lapse’ can rationally be brought within the aftermath principle as so defined. In cases such as *Annetts*, where the accident happens in a remote location, the time problem is compounded by distance and uncertainty. The situation resembles the Canadian case of *Rhodes v Canadian National Railway*,115 where the plaintiff’s son was killed in a train crash in Alberta. The plaintiff, who heard about the crash in British Columbia, endured many hours of anxiety before learning that her son was among the victims, and as the result of a chapter of accidents it took her eight days to get to the scene of the accident. The British Columbia Court of Appeal held that the concept of causal proximity ought to be taken to exclude indirect injury such as that caused by visiting the scene eight days later. While this court undoubtedly took a narrow approach to the concept of causal proximity, it is going to be hard for the High Court to stretch the aftermath concept far enough to accommodate the facts of *Annetts*.

The real problem with the aftermath concept is that the courts have been trying to make it do too much.116 Over and over again, they have strained to make it accommodate deserving fact situations, in the belief that this was the only road to recovery. This is because of the traditional authorities which have ruled that shock caused by hearing about an accident, as opposed to perceiving it with one’s own senses, is irrecoverable.117 Deane J’s seminal judgment in *Jaensch v Coffey*118 marked the beginning of the end of this as an inflexible rule. Deane J showed how the requirement of personal perception had not in fact enjoyed unqualified support.

---

112 Above n2 at 606–608.
113 *McLoughlin v O’Brien*, above n9 at 419 (Lord Wilberforce); *Alcock*, above n12 at 397 (Lord Keith of Kinkel), 405 (Lord Ackner), 417 (Lord Oliver of Aynmerton).
114 Above n33.
115 Above n33.
116 See Mullany & Handford, above n79 at 149–152.
117 For example, *Hambrook v Stokes Brothers*, above n8 at 152 (Bankes LJ), 159 (Atkin LJ), 165 (Sargent LJ); *King v Phillips* [1953] 1 QB 429 at 441 (Denning LJ); *McLoughlin v O’Brien*, above n9 at 422–423 (Lord Wilberforce); *Mount Isa Mines Ltd v Pusey*, above n44 at 407 (Windeyer J).
118 Above n2.
and refused to bar recovery where shock was suffered due to the combined effect of what was told and what was seen. He concluded that the question whether recovery for reasonably foreseeable psychiatric injury sustained as a result of being told about an accident to another remained open. Since then, a number of Australian cases have taken the bold step and recognised liability for communication-caused nervous shock — something that three Australian legislatures in effect accepted 50 years ago. The same proposition is now supported by the important decision of the highest South African appeal court in *Barnard v Santam Bpk*. It is true that the Full Court in *Annetts* adopted a more conservative stance, but it was mindful of its role as an intermediate appeal court dealing with an unusual set of facts, and was quite clearly passing the baton to the High Court to take the lead in this matter. It is submitted that the court should accept that opportunity and, by adopting the logic of Kirby P in the case quoted at the head of this article, recognise that in the 21st century shocking news is likely to travel quickly far and wide, and that if psychiatric damage is reasonably foreseeable in the circumstances, the fact that it is communicated by word of mouth, telephone or some other modern means should be no barrier.

If this is accepted, we can examine the cases anew. Aftermath cases are not all the same. Some involve relatives who know of the accident coming to the scene or the hospital within a very short time. Some involve the identification of the body of a person already known to be dead, or the ongoing stresses of caring for the grievously injured — though the law has not generally recognised a duty in these two classes of case. And then there are the uncertainty cases — cases

---

119 Id at 608, quoted above text to n37.
120 See *Petrie v Dowling*, above n39; *Reeve v Brisbane City Council*, above n40; *Pham v Lawson*, above n42; *Hancock v Wallace*, above n42; note also *Coutes*, above n1 at 8–11 (Kirby P).
121 Above n96. Liability for communication-caused shock to parents or spouses is clearly recognised: see, for example, *State Rail Authority of New South Wales v Sharp* [1981] 1 NSWLR 240; *Coutes*, above n1. Note also *Hanley v Keary* (ACT Supreme Court, Master Hogan, 28 January 1992), where a wife informed of her husband’s death recovered under the ACT statute, but their children were not entitled to recover at common law. It is not clear why Mr and Mrs Annetts were not advised to proceed under the New South Wales statute. The action was begun in New South Wales, but transferred to Western Australia under the cross-vesting legislation on the application of the defendant with the plaintiffs’ consent. The plaintiffs sustained mental or nervous shock in New South Wales, and there is nothing in the statutory provisions to suggest that the accident had to happen there rather than elsewhere. However, it could perhaps be argued that the statutory claim is parasitic on a finding of liability to the immediate victim and that as far as any claim by James was concerned the breach of duty and resulting damage took place in Western Australia.
122 Above n61.
123 Above n4 at 63.
124 *Coutes*, above n1.
126 For example, *Buchar v Motor Accidents Board* (1984) Victorian Motor Accidents Cases 83,138; *Hivicin v Ruane*, above n14; *Pippes v Craig* [1993] 1 VR 603; *Taylor v Somerset Health Authority* [1993] 4 Med LR 34; *Devji v District of Barnaby*, above n32. Compare cases where the plaintiff was not permitted to see the body: *Chapman v Lear* (Qld Supreme Court, Williams J, 8 April 1988); *Ravenscroft v Rederiaktiebolaget Transatlantic*, above n14.
where the scale of the disaster, or the remote location (as in Annett), or some other factor means that relatives endure for hours, days or months the agony of not knowing what has happened to a loved one: whether they were involved or escaped injury, whether they are alive or dead. Hitherto, the law has not dealt well with such cases.

It is suggested that a more desirable approach would be to consider the individual situation, and to ask whether in the circumstances psychiatric injury was foreseeable, keeping artificial exclusionary rules to a minimum. In the traditional aftermath cases where plaintiffs suffer psychiatric injury as a result of what they see at the scene or the hospital, the courts are likely to continue to make the same sorts of distinctions that they presently do by reference to the concept of ‘immediate post-accident treatment’. Likewise, they may well continue to rule out any question of a duty in cases where mental damage is caused by having to identify the body of someone already known to be dead. They may adopt the same attitude in cases of suffering caused by later events, away from the accident and the aftermath, such as caring for the victim, but again these should be seen as a separate problem. Cases where psychiatric injury results solely from being told about the happening of an accident — such as Reeve v Brisbane City Council or Annett — are different again. Australian courts have shown that foreseeability can provide rational answers in such circumstances, and Annett itself indicates that the answer will not always be the recognition of a duty. Finally, there are the uncertainty cases, such as Alcock, Rhodes v Canadian National Railway and Annett itself, assuming the parents’ psychiatric injury resulted from the cumulative effect of all that happened between December 1986 and April 1987. Surely, there is little that is more likely to disturb the balance of the mind and possibly cause long-term psychiatric consequences than uncertainty about the fate of a loved one, continuing over an extended period. If the medical and other evidence testifies that such injury has been suffered, and that this was how it was caused, cannot the situation be recognised for what it is, and the principles of foreseeability be applied?

127 For example, Pratt and Goldsmith v Pratt [1975] VR 378; Spence v Percy, above n35.
128 Note however the cases cited above nn65–66 and 68.
129 For example, Alcock, above n12; note also Singh v London Underground Ltd (English Queen’s Bench Division, John Peppitt QC, 24 April 1990) (King’s Cross underground station fire). Even these important examples pale into insignificance when compared with recent events in New York and Washington, where on 11 September 2001 commercial airliners hijacked by terrorists were flown into the World Trade Centre Towers and the Pentagon, causing the collapse of the former and major damage to the latter: as I write, thousands of relatives and loved ones are enduring the agony of not knowing the fate of those caught up in these disasters.
129 Above n4. See also the example discussed by Mullany & Handford, above n79 at 151.
130 For example, Rhodes v Canadian National Railway, above n33; Tranmore v T E Scudder Ltd [1998] EWCA 1895.
131 See also below text to nn143–145.
132 Above n40.
133 Above n4.
134 Above n4.
135 Above n12.
136 Above n33.
C. Sudden Shock

Judgments in each of the cases rely on the principle that there must be a ‘sudden shock’ as a criterion of the existence of a duty in psychiatric injury cases. It is remarkable how this requirement has crept into the law over recent years. In Australia, there is hardly any authority before Brennan J in *Jaensch v Coffey* suggested that psychiatric injury had to be ‘shock-induced’, rather than one ‘induced by mere knowledge of a distressing fact’. This judgment undoubtedly influenced the House of Lords in *Alcock*. Prior to this, no English case had identified sudden shock as a separate ingredient of liability. It is not at all clear that Brennan J’s limitation was supported by other members of the court, and it does not sit comfortably with the facts of the case itself — Deane J tells us that ‘[f]or a few days Mrs Coffey coped well’, and that the first symptoms of her illness did not begin to emerge until about a week later.

It seems that the situation which caused Brennan J to impose this limitation was one where psychiatric injury resulted from events subsequent to the accident, such as a spouse worn down by caring for a tortiously injured husband or wife, or a parent made distraught by the wayward conduct of a child. English and Australian cases have hardly ever recognised a duty of care in this situation, and Deane J too was careful to exclude it, at least ‘on the present state of the law’. But it seems unwarranted to elevate this rather special situation into a general rule. Unfortunately, this is what has happened: a number of recent authorities involving other kinds of facts deny recovery on this ground, and Mason P in *Tame* and Ipp J in *Annetts* can now be added to their number.

---

137 *Tame*, above n3 at 46–49 (Mason P); *Annetts*, above n4 at 40 (Malcolm CJ), 52–54 (Ipp J). Note also AMP General Insurance Co v Roads and Traffic Authority of New South Wales, above n107 at [158] (Heydon JA), [188] (Davies JA).
138 Above n2 at 564–567 (Brennan J).
139 Above n12 at 396 (Lord Keith), 401 (Lord Ackner), 416–417 (Lord Oliver).
141 Deane J, in the course of a long judgment, does not impose any requirement that psychiatric injury must be shock-induced. Gibbs CJ, Murphy and Dawson JJ do not deal with the issue.
142 *Jaensch v Coffey*, above n2 at 588.
143 Id at 565.
144 See, for example, *Pratt and Goldsmith v Pratt*, above n127; *Spence v Percy*, above n35; *Andrewartha v Andrewartha* (1987) 44 SASR 1; *Anderson v Smith* (1990) 101 FLR 34; see also *Beecham v Haghes* (1988) 52 DLR (4th) 625. Compare the cases cited above nn 65–66 and 68.
145 *Jaensch v Coffey*, above n2 at 606. He had earlier referred to psychiatric literature suggesting that psychiatric illness could result from mental stress during a period of constant association with and care of a badly injured spouse or other relative: id at 601.
147 See above n137. In *Annetts* at first instance (above n2), Heenan J refers to the sudden shock rule but does not succeed in disentangling it from other rules such as communication and aftermath.
However, not all judges have been prepared to go along with this. Once again, Kirby P is in the forefront. In *Campbelltown City Council v Mackay*,148 it was argued that a long catalogue of sad consequences, including psychiatric illness, the birth of a stillborn child and marriage breakdown, all flowed from the events of a particular night when the walls of the plaintiffs’ ‘dream home’ began to crack. Kirby P emphasised the importance of recognising the reality of how psychiatric disorders occur:

> [P]sychiatric injury … is very unlikely to result from the single impact upon the psyche of the claimant of an isolated event. Since the tort of nervous shock was fashioned, there have been substantial advances in the understanding of human psychology. It is highly artificial to imprison the legal cause of action for psychiatric injury in an outmoded scientific view about the nature of its origins. The causes of action at common law should, in my opinion, be released from subservience to 19th century science. … [P]sychological injury is a … complex process. It is rarely (if ever) explicable as the result of an isolated shock.

Similar statements were made by Henry LJ when *White* was in the English Court of Appeal,150 and in the House of Lords the requirement was expressly rejected by Lord Goff,151 the only member of the court to deal with the issue. The English Law Commission had earlier presented detailed arguments for abandoning the requirement,152 and the South African Supreme Court of Appeal has now rejected it as ‘outmoded and misleading’.153 Further evidence of the undesirability of this rule is that there seems to be no consistency in its application. It has been affirmed in some kinds of psychiatric damage cases154 but not required in others.155

---

148 Above n146.
149 Id at 503–504. Note also *Buljabasic v Ah Lam* (NSW Court of Appeal, Mason P, Priestley & Powell JJ, 3 September 1997).
151 *White*, above n11 at 489.
152 Above n76 at paras 5.28–5.33.
153 *Barnard v Santam Bpk*, above n61 at 205 (English version of headnote). See also at 208–209 (Van Heerden AHR).
154 See *Alcock*, above n12; *Palmer v Tees Health Authority* [1999] Lloyd’s Rep Med 351 at 360 (Stuart-Smith LJJ) (secondary victim); *Hegarty v EE Caledonia Ltd*, above n10 (plaintiff in fear for own safety); *Frost v Chief Constable*, above n15 at 270 (Henry LJ), but contrast White, above n11 at 489 (Lord Goff) (rescuers and employees); *Campbelltown City Council v Mackay*, above n146 (damage to property); *Chiavertini v Hockey*, above n146 (statutory liability).
It is noteworthy that while Mason P in *Tame* affirmed the previous line of authorities requiring a ‘sudden sensory perception’, 156 Spigelman CJ refused to decide the appeal on this ground. Though there was intermediate appellate authority, both in New South Wales and elsewhere, which could be followed, there was no binding authoritative pronouncement by the High Court. His judgment clearly indicates that it is for the High Court now to rule on the issue. 157 Likewise, in *Annetts*, Ipp J adopted a generally conservative attitude to the sudden shock issue and affirmed the case law upholding this requirement. 158 Malcolm CJ’s short judgment also affirms the sudden shock authorities, though without going into the matter in any detail. 159 Like Spigelman CJ, he was clearly of the view that the outstanding issues should be settled by Australia’s highest tribunal: ‘Given the current state of authorities it is not for this Court as an intermediate appellate court to extend the scope of the liabilities for psychiatric injury or nervous shock any further than the authorities to date have indicated.’ 160 It is to be hoped that the High Court takes up the challenge, and adopts the enlightened and medically aware view already championed by Kirby J.

**D. Other Issues**

Some issues of psychiatric damage law, like the duty to rescuers and employees, are not directly involved in the present appeals — though it is not beyond possibility that they may be the subject of comment. It is not unknown for leading judgments in this area to contain obiter dicta on particular issues which have proved valuable — or sometimes inconvenient — in later cases. 161 In addition, the courts below have raised what might be called characterisation issues, such as whether the ordinary fortitude test is relevant only to foreseeability 162 or also to proximity, 163 and whether sudden shock is a matter of duty or an aspect of causation. 164 As to the latter, the matter could be easily settled by abandoning the requirement, but if this is not to happen it would be good to have an authoritative view.

**4. Duty of Care Generally — A New Era?**

Enough has been said to show that these two appeals raise issues of crucial importance, and might settle not only the details but also the basis on which psychiatric damage law is now to rest. But it is quite possible that they might be the occasion for a much more fundamental reassessment of the law of negligence generally. It is never easy to predict such developments: for example, when

156 *Tame*, above n3 at 46–49.
157 *Id* at 29–32.
158 Above n4 at 52–54.
159 *Id* at 40.
160 *Ibid*.
161 For example, Windeyer J in *Mount Isa Mines Ltd v Pusey*, above n44; Deane J in *Jaensch v Coffey*, above n2; Lords Keith, Ackner and Oliver in *Alcock*, above n12.
162 *Annetts*, above n4 at 51–52 (Ipp J).
163 *Tame*, above n3 at 25 (Spigelman CJ).
164 *Annetts*, above n4 at 54 (Ipp J).
proceedings were initiated in *Donoghue v Stevenson* \(^{165}\) it is unlikely that anyone could have forecast that May Donoghue’s adventures with a snail would usher in the modern era of negligence law. Nearer our own time, I N Duncan Wallace,\(^ {166}\) writing shortly before the House of Lords decision in *Anns v Merton London Borough Council*,\(^ {167}\) forecast that it might be the occasion for the English courts to recognise liability for pure financial loss, but this prophecy was confounded by Lord Wilberforce’s classification of the defective building as ‘material physical damage’.\(^ {168}\) These caveats notwithstanding, it is suggested that the High Court may be poised to recognise a new phase of development in negligence law. It has recently abandoned proximity as the unifying conception of duty of care,\(^ {169}\) and currently adheres to no united theory.\(^ {170}\) Some of its members have adopted general tests of their own,\(^ {171}\) others pursue the path of incrementalism.\(^ {172}\) Canadian and New Zealand courts still retain the *Anns* two-stage test of duty;\(^ {173}\) the English courts have abandoned it,\(^ {174}\) but have replaced it with the threefold *Caparo* test\(^ {175}\) which expressly recognises not only foreseeability and proximity but also policy elements — the *Anns* two-step has become the *Caparo* waltz. Will the forthcoming appeals be the occasion for the High Court to adopt some new initiative — hopefully, one concurred in by all or most members of the court, rather than another collection of individual approaches seemingly lacking much in the way of common ground? We will soon know.

\(^{165}\) [1932] AC 562.

\(^{166}\) I N Duncan Wallace, ‘From Babylon to Babel, or a New Path for Negligence?’ (1977) 93 LQR 16.

\(^{167}\) [1978] AC 728.

\(^{168}\) Id at 759. It could be argued that Duncan Wallace merely saw further into his crystal ball than most people. Thirteen years later the House of Lords recognised that the loss in such cases was indeed economic — but firmly denied any duty of care in such cases other than that already accepted under *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465: see *Murphy v Brentwood District Council* [1991] 1 AC 398.


\(^{171}\) Id at 198, 200–201 (‘protection of legal rights’) (Gaudron J); id at 275, 284–286 (the three-stage *Caparo* test: see below n175) (Kirby J).

\(^{172}\) Id at 193–194 (Gleeson CJ); id at 208–218 (McHugh J); id at 252–254 (Gummow J); id at 300–303 (Hayne J); id at 325–326 (Callinan J).

\(^{173}\) See *Hercules Managements Ltd v Ernst & Young* (1997) 146 DLR (4th) 577 at 586–587 (La Forest J); *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 294 (Cooke P); see also S Todd (ed), *The Law of Torts in New Zealand* (2nd ed, 1997) at 154–158.

\(^{174}\) See *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 at 240 (Lord Keith); *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 815 (Lord Brandon of Oakbrook); *Curran v Northern Ireland Co–ownership Housing Association Ltd* [1987] AC 718 at 724 (Lord Bridge); *Yuen Kun–Yeu v Attorney-General of Hong Kong* [1988] AC 175 at 190–194 (Lord Keith).

\(^{175}\) *Caparo v Industries plc v Dickman* [1990] 2 AC 605.
Patrick Macklem’s important new contribution to the examination of Aboriginal rights raises issues of Indigenous difference, the Canadian constitution and the redefinition of justice between Indigenous and non-Indigenous Canadians. These issues have importance beyond the context of North America. Although the legal and constitutional recognition of Aboriginal difference is not entrenched in the Australian constitution, negotiations over the meaning of Indigenous rights within a revised Australian national consciousness are of the highest importance in this country. There is a growing momentum in Australia towards widespread legal reform including the recognition of Aboriginal and Torres Strait Island peoples as the first nations of Australia, the negotiation of a treaty or treaties between Indigenous and non-Indigenous Australians and the possible entrenchment of Aboriginal rights in the Australian constitution. Renewed discussions over a Bill of Rights for Australians must also address issues of Aboriginal rights. More and more often Canada is looked to as a potential model for reform in Australia.

Macklem highlights what he describes as ‘four complex social facts’ that ‘lie at the heart of the relationship between Aboriginal people and the Canadian state’.1 These are:

1. Aboriginal people belong to distinctive cultures that were and continue to be threatened by non-Aboriginal beliefs, philosophies, and ways of life.

2. Prior to European contact, Aboriginal people lived in and occupied vast portions of North America.

3. Before European contact, Aboriginal people not only occupied North America, they exercised sovereign authority over persons and territory.

4. Aboriginal people participated and continue to participate in a treaty process with the Crown.2

From these four ‘facts’, which for Macklem constitute Indigenous difference, the author builds a compelling case that equality, including the just distribution of constitutional power, is enhanced by the construction and support of this difference.3

Three of Macklem’s four ‘facts’ are undeniable given even the most cursory examination of Canadian history and current debates over Indigenous rights (as in

---

2 Ibid.
3 Id at 5.
for example the ongoing treaty process in British Columbia). However, his ‘fact’ of Indigenous sovereignty over territory and persons in North America prior to European contact is a more difficult and complex argument relying on a reinterpretation of the legal invention and development of ‘sovereign authority’.

In Chapter 4 the author correctly compares and contrasts the idea of sovereignty as an external concept (from international law) and as an internal matter (in the distribution of authority within a nation-state). Sovereignty in international law has tended to be defined in a way inimical to Indigenous interests. This is a product of both colonial history and the exigencies of a relatively sparse legal discussion on the meaning of sovereignty within international law. The contribution of Indigenous international scholars has more recently forced a fuller inclusion of Indigenous perspectives. As Macklem points out, internal sovereignty has historically been examined in a much more complex and interesting way. This is particularly so in a federal context such as Canada where sovereignty is constitutionally distributed between at least eleven different ‘authorities’ (the ten provinces and the federal government) and arguably on an even wider basis, including the constitutional recognition of Indigenous ‘self-government’. A similar complexity exists in Australia.

But it is difficult to see sovereignty as a ‘fact’ in the sense that Macklem seems to be suggesting. Rather, sovereignty is a legal construct based on social ‘facts’ of greater or lesser acceptability at different periods of time. For example, Antony Anghie argues that the creation of concepts of sovereignty in international law depended on pre-existing sociological perspectives, or ‘facts’, gradually accepted by Europeans from the 15th to the early 20th Century. These ‘facts’ gradually consigned almost all the non-European world to a zone of ‘non-sovereignty’ in a legal sense by the height of the colonial period before and after the First World War. These social understandings were based on European ideas about religion, political and social organisation, culture, land use, agricultural and industrial productivity, etiquette and behaviour. European sociological perspectives would seem to have preceded the application of principles of sovereign authority as a matter of international law. As Anghie points out however the definition itself is a result of self-serving preconceptions about the nature of non-European and European societies that justified and furthered the colonial project. The most important distinction was the significance given to agricultural land use as opposed to hunter-gatherer or pastoral ways of life. The colonial project was ‘in fact’ a means of denying the ‘fact’ of sovereign authority to all but a few European centres of power from the 15th to the 20th Century.

The recognition of sovereignty for Indigenous peoples in Canada has largely come out of the treaty process, both in the creation of treaties between European

---


5 Anghie, id.
governmental institutions (the Crown) and Indigenous nations, and in their continuing interpretation. This is perhaps the most interesting aspect of Macklem’s study for Australians. Canada consists of a complex web of treaties between Indigenous peoples and Europeans dating back to the 17th Century. This process is ongoing, as Macklem points out. By continuing to engage in tripartite discussions between the federal government, the provinces (where necessary as in British Columbia or Quebec) and individual Indigenous nations, an implicit recognition of Aboriginal sovereignty remains a feature of Canadian national and constitutional identity. This is something that Australia has yet to embrace.

But the treaty process is itself fraught with difficulties. Most recently, a change of government in British Columbia has put the treaty process in that province into some doubt as the newly elected provincial government pursues a policy of a referendum on the treaty-process to be put to all British Columbians. Depending on the question put, and the outcome of this referendum, the tripartite discussions may well be in danger of collapse. Some Aboriginal groups have chosen not to engage in the treaty process, while others have pursued policies denying the acceptance of a self-government model based on a delegated municipal authority. There is a strong argument among some Aboriginal groups in Canada that any negotiation or acceptance of European authority is a denial of Aboriginal rights.6

One of the most interesting examples of the recognition of Aboriginal difference within the Canadian constitutional context, based on a long and complex treaty negotiation process, is the formation of the new Canadian territory of Nunavut.7 Macklem unfortunately says almost nothing about this.8 ‘Nunavut’ is an Inuktitut word (the language of the Inuit people of the far North) meaning ‘Our Land’. It is both a major land rights settlement treaty between the Inuit people and the Crown (in right of Canada) signed on May 25 1993, and a new Territory carved out of the existing Northwest Territories.

The new territory of Nunavut came into existence on April 1 1999.9 It covers the northern 20% of Canada’s land and sea mass, including the island archipelago of the Canadian High Arctic. The treaty provides for the recognition of Inuit control over land and resources; priority rights over wildlife; a share of royalties

---

7 As in Australia, a ‘territory’ consists of a geographical region in which legislative authority is delegated from the federal to the territorial government. This is different from the ten Canadian provinces which, like states under the Australian constitution, have separate constitutionally-protected sovereign authority. Nunavut is different however from other territories in both Canada and Australia in that it is based on the Nunavut Land Claims Agreement which is a treaty recognised under s.35 of the Canadian Constitution. Nunavut therefore does have ‘sovereignty’ in the form of constitutionally protected treaty rights to self-government. This makes Nunavut unique and distinct from (in Canada) either the Northwest Territories or the Yukon, or (in Australia) the Northern Territory or the ACT.
8 See at 270.
from oil, gas and mineral development on Crown lands; large capital transfers; and a major trust fund set aside for training and development. In this sense it is not dissimilar to other modern treaty settlements in Canada from the James Bay Cree in northern Quebec in 1975 to the Nisga’a settlement in British Columbia in 1998. What is new about this agreement is that it also stipulated for the formation of a self-governing territory to be administered by the people of Nunavut (both Inuit and non-Inuit) based on the models already existing in the Northwest Territories (which remained after Nunavut’s separation) and the Yukon. This self-government is based on the delegation of legislative authority from the federal Parliament in Ottawa to territorial legislative, executive and judicial branches of authority in Nunavut itself. The new capital is Iqaluit (formerly Frobisher Bay) on eastern Baffin Island.

Since April 1999 the people of Nunavut have elected a legislative body, created an effective territorial civil service, enacted legislation and regulations specific to Nunavut, created a unified court system based in Iqaluit (with regular ‘circuits’ to outlying communities) and begun the process of change to the political, economic and social infrastructure necessary for the people of Nunavut to function as a self-governing entity within the Canadian Confederation. It is the first significant change to the distribution of constitutional power in Canada since the incorporation of the province of Newfoundland in 1949, and the first full Canadian experiment in Indigenous self-government. It is in fact unique, the closest parallel being the administration of Greenland (under Danish authority), Nunavut’s nearest neighbour.

What is most challenging for this newest centre of territorial and political sovereignty in Canada is the marriage between a Parliamentary and judicial system based very much on the English common law model, and the uniquely northern way of adapting this model to suit the needs of the majority of the population, 85% of which is Inuit. The traditional Inuit world-view is known in Inuktitut as Inuit Qaujimajatuqangit, usually shortened (for the benefit of non-Inuktitut speakers) to ‘IQ’. IQ has been summarised as follows:

- It is practical common sense based on teachings and experience passed on from generation to generation.
- It is knowing the country; it covers knowledge of environment (snow, ice, weather, resources) and the relationship between things.
- It is holistic — it cannot be compartmentalised and cannot be separated from the people who hold it. It is rooted in the spiritual health, culture, and language of the people. It is a way of life.
- Inuit Qaujimajatuqangit is an authority system. It sets out the rules governing the use of resources; respect; an obligation to share. It is dynamic, cumulative and stable. It is truth.
- Inuit Qaujimajatuqangit is a way of life — wisdom is using knowledge in good ways. It is using the heart and the head together. It comes from the spirit in order to survive.
- It gives credibility to people.
• Inuit Qaujimajatuqangit comes from a wide diversity of experience in nature, ranging from teaching and apprenticeship, to hunting and gathering, to absorbing the feel of wild animals and plants, and listening to legends and stories. To begin to understand Inuit Qaujimajatuqangit, a non-Inuk person is required to stop, listen, re-think, and be prepared to encounter an entirely different way of perceiving nature and social structure.

In a sense Macklem’s thesis on the acceptance of Indigenous difference as constitutionally significant is being tested most acutely in Nunavut where Euro-Canadian and Inuit understandings of governance, law, authority, justice and good relations between individuals and communities are being created in an uneasy co-existence. There is no clear consensus on the meaning or incorporation of ‘IQ’ in Nunavut, even among Inuit people. ‘Difference’ is a contested site involving real and often painful choices made by individuals and groups on a day-to-day basis. The legal and constitutional significance of difference involves the deepest challenges possible to Euro-Canadian and Inuit concepts of sovereignty, law, power and social relations. Macklem’s book, although providing an excellent discussion of these issues, seems often to have difficulty escaping from its own inevitable Euro-Canadian bias.

An excellent companion to Macklem’s book that focuses on the reflections of an English author with a long experience among Indigenous peoples in Canada and elsewhere is Hugh Brody’s The Other Side of Eden: Hunters, Farmers and the Shaping of the World. Brody proposes a deep and fundamental distinction between Indigenous and non-Indigenous cultures with a particular reference to Inuit ways of living on ‘the land’. He examines the central myth of Genesis in Judeo-Christianity as the foundation of Euro-Canadian culture — a culture of agricultural land use and urbanisation, patriarchal control, expansion, and the abstraction of legal and other concepts to suit aggressively mobile social structures. Indigenous cultures on the other hand focus on very specific and detailed knowledge of the land within an indefinite and cyclical conception of time. Inuit culture, for example, has been relatively stable over long periods of time and also remarkably successful in providing a subsistence life for the people who live in the High Arctic. The basis of this success is a close attention to the particularities of land, weather, animals, plants, the sea and the spirit-world. Survival depends on patience, humility, sharing and co-operation. Although apparently ‘nomadic’, Brody argues forcefully that Indigenous cultures are not normally expansionist and are closely attached to a specific land or country. It is agricultural and industrial societies like those of Western Europe, Canada and Australia that are truly ‘nomadic’, restlessly shifting from one continent to another. Inuit society traditionally bears little resemblance either in governance, language or social relations to the farming and industrial peoples of ‘the South’. Although linguistic translatability is possible (according to Brody) cultural differences are profound.

10 Nunavut Social Development Council, Inuit Qaujimajatuqangit, Appendix III (Nunavut, 2000).
This brings us back to the central problem of sovereignty. The meaning of this concept both internally in Canadian (and Australian) constitutional law, and externally in international law, is based on Brody’s Genesis model — of an expansionist, mobile, agricultural society based on war and the appropriation and settlement of land. Its fundamental component is territory and the settlement and control of territory by agricultural and industrial societies. ‘Sovereignty’ as a legal concept must move beyond this model to incorporate the ‘other side of Eden’ — the Indigenous side. Macklem, in his definition of difference, does not adequately account for the profound challenge that this difference presents to Canadian constitutionality. In a sense the Canadian constitution is based on a model of sovereignty inimical to Inuit and Indigenous ‘difference’ of any kind. Macklem proposes what is essentially a liberal democratic pluralist model of accommodating difference that may in fact be not that far removed from the more assimilationist constitutional models of the past — models that still operate to full effect in Australia. Unless ‘difference’ as a legal concept is capable of bridging the fundamental social and cultural ‘facts’ of Indigenous and non-Indigenous history on a basis of mutual respect, then its constitutional significance will remain debatable and perhaps of little real effectiveness. Nunavut is perhaps the most acutely interesting example of how this difference might be negotiated and reclaimed in a process that could transform and enrich both Inuit and non-Inuit participants. This example, so far to the north, is one that should be of most compelling interest to Australians as they debate these issues in the coming years.

SHELLEY WRIGHT
Senior Lecturer, University of Sydney
Law is resistant to looking at itself. It prefers to direct its gaze elsewhere but, even then, it is selective about its choice of lens. Legal positivism, which attempts to draw a line of demarcation between law and morality, law and history, law and sociology, and law and other sites of intellectual inquiry, encourages a technocratic approach. The myths of objectivity and neutrality that underpin this approach to legal interpretation have deluded the profession into believing that the same descriptors apply to its own practices. A major focus of feminist legal scholarship has involved the deconstruction of law’s claims to objectivity in respect of all aspects of legal culture, including professional practices. The dramatic increase in women law students and practitioners over the last two decades has compelled scrutiny of the profession’s partiality for ‘Benchmark Man’, the normative lawyer, who is white, heterosexual, able-bodied, middle class and, of course, male.

When I began my study of women and the legal profession in Australia¹ there was a dearth of scholarship on the topic, not only in Australia, but also in the United Kingdom and Canada, although some notable work had been done in the United States.² A number of studies have since emerged from both the UK and Canada³ in addition to the books under review.

Strictly speaking, both ‘the UK’ and ‘Canada’ are geographical overstatements, as Sommerlad and Sanderson’s study focuses on one region in the North of England, while Brockman’s study is confined to British Columbia. The ‘legal profession’ must also be qualified. Sommerlad and Sanderson deal with solicitors generally, whereas Brockman restricts herself to a population of 50 men and 50 women lawyers who were called to the Bar between 1986 and 1990, and who were still members in 1993. The rationale for Brockman’s selective focus is that decisions regarding career advancement, child bearing and raising all occur in the early years when attrition rates are at their highest.

¹ Margaret Thornton, Dissonance and Distrust: Women in the Legal Profession (1996).
² For example, Cynthia F Epstein, Women in Law (1983).
While both books feature ‘gender’ in their titles, their respective ‘blurbs’ make it clear that they are about the practices of exclusion experienced by women. The transition from ‘women’ to ‘gender’ in feminist discourse reflects the discomfort associated with the category ‘women’, which has been attacked as an essentialist version of ‘Benchmark Men’ because it fails to take cognisance of differences between women, including race, class, sexual preference, disability, and age. On its face, ‘gender’ has little to say about dimensions of identity either, but it does signal the inclusion of men. For this reason, ‘gender’ is perceived to be less partial as a category of analysis. In both studies, the male interviewees represent a control group against which the experiences of women are tested. Brockman is sensitive to questions of race, ethnicity, sexual orientation, and disability, but indicates that her sample was not sufficiently large to address these characteristics properly, although a number of her respondents did comment within the general rubric of discrimination (p16). While Sommerlad and Sanderson acknowledge the importance of race and class, they are of the opinion that gender overwhelmingly remains the principal factor in the career trajectories of women lawyers (p4).

Both Brockman and Sanderson have been trained in sociological methods and are conscious of the epistemological significance of standpoint, perception and interpretation; in other words, they recognise that ‘facts’ are always constructed and therefore contestable. Nevertheless, they are assiduous in ensuring a sound empirical basis for their findings through questionnaires and other data, as well as through interviews. The critical and theoretical orientation of both books is signalled by the series in which they appear: Gender, Choice and Commitment was published in the Socio-Legal Studies Series, edited by Philip Thomas in the UK, whereas Gender in the Legal Profession inaugurates a new Canadian Law and Society Series, edited by Wesley Pue.

Gender, Choice and Commitment pays particular attention to a range of labour market theories to problematise the issue of gender in relation to the legal profession, which considers the historical struggle of women to be ‘let in’ and their subsequent alienation. Sommerlad and Sanderson invoke Bourdieu’s concept of habitus in order to capture the distinctive milieu of the legal profession. Habitus refers to the absorption of values, which occurs in the process of acculturation into a particular field so as to enable the perpetuation of that culture. Sommerlad and Sanderson argue that a legal habitus ‘involving depoliticisation and the marginalisation of women’s perspective, begins in the law schools’ (p103). In support, they cite the concept of ‘technocentrism’: ‘the centripetal pull of rules rationality and the way it disqualifies other forms of knowledge’ (p98) as an example of the way in which the law student is acculturated into the legal profession and permanently immunised against questioning the gender of law.

On its face, the ‘letting in’ story is one of success, as women now constitute half of those admitted. Despite performing at least as well as men at law school and

---

4 For example, Pierre Bourdieu & Jean-Claude Passeron, Reproduction in Education, Society and Culture (1990 at 31 et passim).
5 Above n1 at 76–77.
in practice, they are nevertheless paid less than their male counterparts and find public sector employment more congenial than private firms, where they are less likely to be promoted to partnerships, certainly equity partnerships. (According to one respondent in *Gender, Choice and Commitment*, salary partnerships ‘had virtually been “invented” to accommodate women’ (p112)). The explanation for the failure to reward women practitioners in the light of demonstrated achievement is the conundrum with which the authors of these studies, like others before them, seek to wrestle.

Paralleling *Dissonance and Distrust*, Sommerlad and Sanderson show how cultural capital is constructed through family relationships, sport, coarse humour, drinking and other ritualistic practices, which are designed to facilitate camaraderie and generate business, but to exclude women. Within the *habitus* of the professional legal culture, membership in the ‘boys club’, or what Sommerlad and Sanderson term ‘laddishness’, seems to be generally more important than competence. Far from ‘feminisation’ of the legal profession, a prospect widely feared once the tipping point is imminent, Sommerlad and Sanderson query whether it is not the ‘masculinisation’ of the profession that we are witnessing instead (p149). Thus, far from being a thing of the past, new incarnations of the boys’ club are being created. Some of Brockman’s respondents even referred to young male lawyers as ‘baby dinosaurs’ (p200). Like *Dissonance and Distrust*, these studies show that numerosity is not in itself transformative.

Women are tolerated if they are prepared to put up with the prevailing masculinist norms and accept secondary positions, despite the expectation that they should also be super-competent. Qualified assimilation comes at a high price, for it necessitates acceptance of the status quo, including sexually discriminatory practices, such as having to accept eroticisation to please clients. Both books show that sexual disparagement, as well as high rates of harassment, operate to diminish the authority of women as legal knowers. Thirty-six per cent of Brockman’s women interviewees reported having experienced sexual harassment since entering the workforce (pp114–15).

The other dimension of the gendered *habitus* that continues to be perennially intractable is child bearing and raising. Far from being perceived as social goods that ought to be accommodated, these activities are deemed to be antipathetic to legal practice where the professional ‘has to be 100% on call’ (Sommerlad and Sanderson, p241). However, it is only women with families, not men, who are constructed as evincing a personal choice to have children. This ‘choice’ averredly demonstrates women’s lack of commitment to the workforce, which is then used to justify less favourable treatment. Sommerlad and Sanderson argue that it is the ascription of women as unreliable and uncommitted, rather than classical human capital theory, which explains women’s distinct career trajectories. These gendered constructions of choice and commitment are underpinned by the separation between public and private spheres, which law itself sustains. This leaves intact a

---

6 Above n1.
7 Ibid.
gendered dichotomy in which women are assumed to be available for domestic responsibilities, thereby enabling men to monopolise the ‘ideal worker’ role.  

The caring explanation for women’s fringe dweller status is nevertheless not a complete answer, as women lawyers are still less likely to have children than male lawyers, although this is changing for younger women. Regardless as to whether women lawyers are mothers or not, the most authoritative positions remain elusive. As Brockman notes: ‘What is surprising is the clear interaction between gender and seniority, in a group that differs so little in seniority’ (p60). The ubiquitous ‘glass ceiling’ is not a phenomenon encountered only at the pinnacle of women lawyers’ careers, for it seems to hover over them from the moment they enter the profession. While it might be thought that the mega-firms would encourage the development of formal non-discriminatory practices, bureaucratisation and hierarchisation would seem to be antipathetic towards the feminine. Indeed, Sommerlad and Sanderson found that ‘the most supportive and least discriminatory employers in [their] sample were represented by some of the smallest firms’ (p277). In light of the pressure within corporate firms to maximise profits by billing more and more hours, Brockman asks provocatively, ‘Are hours of work increasing as women enter the workforce, in order to exclude them from full participation’ (p206)? Her solution to this phenomenon is also provocative, for she suggests, perhaps facetiously, the creation of incentives to discourage overwork, such as medicare premiums.

By and large, both studies perceive the construction of the private sphere to be the nub of the problem. In other words, the work/family conflict needs to be reconceptualised as a public sphere responsibility, rather than relegated to the realm of private choice. Brockman argues that we cannot consider equality in the paid workforce without equality in the unpaid workforce (p213). Rather than compel women to conform to an unreal model of unencumbered masculinity at work, she suggests that the site of equality has to shift so that men also have to ‘fit the mould’ at home. Out of a similarly reconceptualised world, Sommerlad and Sanderson hope that ‘a new type of humanised civil society’ would emerge ‘in which the current apartheid between the private and public spheres is destroyed and, consequently, caring and homemaking work ceases to be privatised and devalued’ (p287).

In terms of strategies, Sommerlad and Sanderson acknowledge that there can be no single solution, particularly one that can be delivered by the state in light of the profession’s hostility towards state intervention. They suggest a multi-pronged approach, including childcare measures, appointing women to the judiciary, and codes of practice with procedures for monitoring and enforcement. Given the intractability of the habitus they describe, these suggestions appear to be a trifle tepid. While changing the discourse at least exposes the private sphere to public scrutiny, we know that changing the habitus would virtually require a revolution.

---

9 Compare Thornton, above n1 at 171–72.
particularly in a neoliberal climate that favours individual choice and profit maximisation at the expense of social justice and common good.

Changing the discourse as to what constitutes good lawyering is also problematic. The hope that the presence of women lawyers would make a difference to the aggressive practices of corporate law through the affective values of the private sphere has not come to pass. Indeed, Brockman puts paid to the theory that there might be an homology between women lawyers and a more caring, softer style of practice: ‘Only 38% of the women, and a mere 6% of the men, thought that women lawyers were more conciliatory than men lawyers’ (pp154–55). Twenty-six per cent (of both men and women) thought that women were more adversarial than men (p157). What is more, the majority of Brockman’s respondents, men as well as women, identified themselves as cooperative and conciliatory, rather than adversarial, believing that the interests of clients were best served by avoiding an adversarial approach altogether. Evidence of this kind is invaluable because it confounds the familiar essentialist assumptions about male and female behaviour.

The two books reviewed present insightful accounts of the careers of men and women lawyers, and the obstacles encountered by them, supported by sound scholarship and perceptive analyses. Both studies nevertheless present compelling evidence that women remain fringe dwellers of the jurisprudential community. In this respect, they endorse the findings of Dissonance and Distrust. Indeed, there is a remarkable congruence between the various studies on women in the legal profession in different parts of the world.

Both books are very accessible, with the authors relying extensively on quotations from their interviewees to enliven the texts and highlight the subjective experiences of individual men and women. These stories will resonate with lawyers in Australia, thereby strengthening the case for persevering with endeavours to change the skewed gendered practices of the legal workplace.

MARGARET THORNTON*
George P Smith II has been professor of law at The Catholic University of America for twenty-five years. He is well known in Australia and Britain, as well as in North America, for his scholarship into the challenges law faces in responding to science and biotechnology. Justice Michael Kirby has described him as combining ‘the highest of scholarly rigour with deliberate intellectual provocation’. A central theme of Professor Smith’s scholarship is that law should neither shrink from the unknown landscape that science leads us into, nor limp so far in the rear of science that it is unable to influence and contribute to emerging debates. Like Galileo (who was only pardoned by the Vatican on 31 October 1992, for his Copernican transgressions), Smith advocates a culture of scientific research and free discussion, reminding us that ‘ignorance, not knowledge assures misery; and that the employment of science for inhumane reasons, not science in and of itself, threatens global survival’ (p31). The role of law, argues Smith, is to inform itself, and from best available knowledge, to seek to maximise social good, while minimising human suffering.

Balancing the economic costs and benefits of the law’s responses to biomedical challenges is undoubtedly a major focus for Professor Smith. At the same time, commentators have pointed out that the values of love and compassion play a central role. Smith writes:

Since the binding force of life is love, then it can be argued that men should endeavour to maximise a response to love in whatever life situations man finds himself [sic]. If an act renders more harm than good to the individual concerned, and to those around him, the act would properly be viewed as unloving. The crucial point of understanding is that a basic cost/benefit analysis is almost always undertaken – consciously or unconsciously. Of course, the methodology utilized in this assessment will be situational and incapable of absolute determination. Of necessity, the basic norm or standard to be used will be love (pp91–92).

A ‘costs versus benefits’ analysis, tempered by compassion, might sound benign. The devil, however, is in the detail, and how one identifies and weighs relevant costs and benefits is all-important. Libertarians are likely to react against the emphasis upon public benefit, rather than individual liberties, in the book. In a recurrent theme, Smith emphasises the social costs of unrestricted reproductive
freedom and argues that ‘[t]he right to procreate may not include a right to breed without restrictions’ (p118). Moral conservatives, for their part, are likely to question Professor Smith’s upbeat assessment of the diagnostic and research technologies of biomedicine. Professor Smith sharply distinguishes himself from those commentators for whom ‘bioethics’ equates with earnest caution, a tendency towards prohibition, and deep pessimism about the capacity for science ever to help make the world a better place. He challenges readers:

Genetic experimentation and planning, in conjunction with eugenic programming, are more rational and humane than alternatives to population regulation through death, famine and war or an abdication of genetic autonomy to the countervailing doctrines of gene sovereignty and biological determinism’ (p53).

In Chapter 2, Smith considers scientific freedom and the role of law in regulating foetal experimentation. Countering the dystopian visions of genetic disasters and cataclysms, he argues that experimentation in human embryology and reproductive biology advances the goal of minimising suffering by reducing inherited genetic disabilities (p53). Smith equates the ‘social good’ that is the goal of such research with a policy that ‘lessens the financial burden on citizens to support and maintain genetically defective citizens’ (p27). Genetically healthy individuals, in turn, have a better opportunity ‘for pursuing and achieving the “good life” and making a significant contribution to society’s greater well being’ (p35).

Clearing a legal space for genetic engineering, however, is another matter. Smith notes the contrast between the restrictive regulation of federally funded IVF research in America, and the lack of regulation of privately funded research (pp32–33). This disjunction is mirrored in Australia, where legislation exists in three States, with NHMRC guidelines applying elsewhere to Commonwealth-funded research, but otherwise having only ethical force.4 In a series of well-known decisions, the United States Supreme Court recognised a right of privacy extending to marriage, procreation and contraception as an aspect of ‘liberty’ in the Due Process Clause of the Fourteenth Amendment (p41, 48).5 However, whether the right to privacy extends to receiving IVF treatment is untested (and unlikely). While Britain permits limited research on embryos (pp46–47), Smith believes that no consensus on the question is likely in Congress, leading to a variety of restrictive State laws (p49). Drawing on Justice Stevens’ judgment in Webster v Reproductive Health Services,6 he argues that while extracorporeal embryos

---

5 See Griswold v Connecticut 381 US 479 (1965); Eisenstadt v Baird 405 US 438 (1972); Roe v Wade 410 US 113 (1973); Carey v Population Services International 431 US 678 (1977) at 685; Planned Parenthood v Casey, 120 L Ed 2d 674 (1992) at 698. The Due Process Clause provides that no State shall ‘deprive any person of life, liberty or property, without due process of law’.
deserve respect as a ‘symbol of life’, they should not be granted the moral status of ‘persons’ until they are transferred to a uterus (p51). This view benefits society by helping to circumvent infertility, and to reduce the risk of genetic diseases (e.g., Down syndrome). It also provides a source of embryos for infertility, genetic and cancer research, as well as a source of embryonic tissue and foetal cells (see p38).

Professor Smith is likely to be disappointed by the recent guidelines from President George Bush which restrict federal funding to embryonic stem cell research using existing cell lines. In Australia, a recent Federal parliamentary inquiry recommended a national licensing body to regulate ‘therapeutic cloning’ (embryonic stem cell research), but also recommended a three year moratorium on the practice.

If IVF and other reproductive technologies carry the promise of healthier (happier) babies, with follow-on economic benefits for society generally, how far would Smith go to make these benefits mandatory? Given the infancy of genetic therapies, most defective genes cannot yet be cured. Harm minimisation therefore requires a ‘negative eugenics’ program that will reduce the number of newborns with genetic defects (p113). In Chapter 5, Professor Smith advocates mandatory premarital genetic screening, arguing that the benefits to society justify the infringement of civil liberties. The assumption is that through counselling, abortion and genetic engineering technologies, parents will choose to minimise the burden of disease upon future generations. Quoting the Episcopalian theologian and ethicist Joseph Fletcher, Professor Smith underscores the moral imperative for genetic screening: ‘To go right ahead with coital reproduction in many couples’ cases is like walking down a line of children blindfolded and maiming every fourth child’ (p153).

Smith clearly expects individuals to make ‘responsible’ reproductive choices in the light of genetic knowledge, their own economic capacities, and societal interests. ‘Responsible’ parenthood is an underlying, yet crucial, theme in the book. It emerges in Chapter 3, where Professor Smith tackles the problem of fetal abuse and ‘crack babies’, criticising the view that parents should be immune from civil suits and criminal penalties. In Chapter 5, Professor Smith goes on to support the right of Arizona and Nebraska to prohibit increases in welfare payments for women who have additional babies while on public assistance, noting that New Jersey, Wisconsin and Georgia have even made continued receipt of benefits conditional upon use of a contraceptive, NORPLANT (see pp129–130 & 77–79). Noting that the children of intellectually handicapped parents may themselves

---

9 Smith asks, ‘If a child may seek recovery for injuries inflicted upon it by a third person as a fetus because such injuries interfere with its “legal right to begin life with a sound mind and body”’, why should a fetus be prohibited from recovering against its mother for negligently inflicted prenatal injuries? (p72). Compare, in the Australian context, Lynch v Lynch (1991) 25 NSWLR 411 at 425.
become ‘grid-locked into mediocrity’, he explores whether mentally retarded individuals should be limited in their procreative freedoms’ (p121).

Smith doubts the value of courts (and judicial guidelines) as a procedural safeguard, citing one American case where it took a mother seven years to secure authority to sterilise her twenty-four year old mute daughter who had a mental age of 3–5 years, an IQ of 30–50 and who neither understood her sexual and reproductive functions, nor the difference between a man and a woman (pp123–4). Instead of blanket prohibitions either for or against sterilisation, Smith argues that parents should be the primary decision-makers, taking social circumstances and economic factors into account on a case by case basis (p131).

If Professor Smith does not shy from sterilisation (‘negative eugenics’), nor does he baulk from the ‘positive eugenics’ of genetic engineering. Ever conscious of the social and economic costs of ‘letting nature decide’, he speculates that ‘[i]f the rate of pollution of the human gene pool continues to increase through uncontrolled sexual reproduction’, an argument might be made in favour of cloning, as a way of compensating for the number of people afflicted with genetic diseases (p127). He points out that 30% of all hospitalised children in the United States have genetic diseases and that 6% of the population has some genetic abnormality, leading to ‘twenty-nine million future years lost, or several times as much as from heart disease, cancer, and stroke’ (p120). He admits, however, that legislation permitting only those with ‘superior genetic traits’ to clone may well fail on an equal protection challenge, and that science may well be unable to ‘provide a rational basis for classification of individuals based on genetic traits’ (p128). Professor Smith’s concern with the future deterioration of the gene pool stands in curious contrast to other commentators, whose ‘slippery slope’ rhetoric attaches not to the consequences of doing nothing, but of trying to genetically enhance future generations. Smith is refreshingly free, however, of the ‘heuristics of fear’ (p148) that characterises many discussions of cloning, and he would presumably agree with a policy that viewed cloning, like IVF, as a fertility issue. However, in Australia (as in some American States), the ‘cloning of a whole human being’ is prohibited by statute.

Given Professor Smith’s emphasis upon genetic health, and upon minimising the economic burdens that ill-health place upon society, what is his attitude towards the genetic inevitability of aging and death? In Chapter 4, discussing gravely disabled neonates, he admits that while a person’s life is of ‘incalculable worth’, there are situations where ‘continued physical existence offers no benefits’ (p92). Life is not an end in itself, but is valuable because it provides the context for the development of human relationships (p91). Smith devotes considerable

10 Compare, in the Australian context, Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218.
11 The Equal Protection Clause within the Fourteenth Amendment provides, relevantly, that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws’.
13 Gene Technology Act 2000 (Cth) s192B.
attention to ‘standards of salvageability’ and ‘indicators of quality living’, and he supports the principle of triage in the paediatric context (p102). He returns to this theme in Chapter 7, recognising that physicians are increasingly ‘gatekeepers’ in an environment of resource constraints, and that the focus of health care should be a reasonable level of public health rather than the ‘special, cumulative needs of an individual’ (p176). More controversially, he notes that the extent to which a person has cared for their own health should be relevant to the basic level of health care they are entitled to receive.

Unlike commentators such as Callahan, Smith does not advocate age-based rationing determined on a ‘natural lifespan’ view. He argues that this would be contrary to the ‘egalitarian nature of society and the principle that all human life is sacred and equally deserving of protection’ (p182). Instead, and somewhat vaguely, Smith puts his faith in the capacity of the medical profession to make the necessary resource allocation decisions, assessing each patient’s clinical circumstances and arriving at workable standards for deciding when further treatment is appropriate, assisted by health outcomes research (pp100, 184–185).

The theme that life is a means to an end, rather than an end in itself, suffuses the final chapter, where Professor Smith confronts the need for a working definition of ‘medical futility’ in end-of-life care. Adopting a well-known proposal by Schneiderman and Jecker, he argues that life-prolonging treatment should not only be regarded as futile when its record of success falls below a minimum threshold (‘quantitative futility’), but also where treatment ‘merely preserves permanent unconsciousness or … fails to end total dependence on intensive medical care’ (‘qualitative futility’) (p200). Similar values underlie the discussion of pain. ‘Not everyone’, Smith points out, ‘finds a “salvific meaning” in suffering’ (p204). Noting that up to 40% of dying patients in the United States die in pain, he advocates the greater use of sedation to induce coma in those suffering terminal, incurable and irreversible conditions. For moral, political and legal reasons, Professor Smith is keen to distinguish the practice of ‘terminal sedation’ from physician-assisted suicide. Nevertheless, terminal sedation has been called ‘slow euthanasia’, particularly where comatose patients do not receive hydration and subsequently die of renal failure.

---


Human Rights and Biomedicine is a provocative book that covers substantial ground. In Chapter 1, Professor Smith wonders whether ‘contemporary norms for global bioethical decision making are beginning to take shape and be recognized under the very dynamic concept of transnational human rights’ (pp13–14). If transnational norms that engage specifically (rather than vaguely) with the challenges of biomedicine do emerge, they are unlikely to reflect any real, underlying consensus within societies themselves. Agreement over these issues may be too much to hope for. Nevertheless, Professor Smith brings home the point that the challenges of biomedicine are truly global, and cannot be ignored. His book is an impressive contribution to this transnational debate.

ROGER MAGNUSSON
Senior Lecturer, University of Sydney