

WITNESSING WHITENESS: LAW AND NARRATIVE KNOWLEDGE

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Abstract

In this article, I interrogate the reception of testimonial evidence given by Lorna Cubillo in the trial of *Cubillo v Commonwealth* (2000) ('*Cubillo*'), the landmark action taken by members of the Stolen Generations. Drawing on Lyotard's account of the distinction between narrative knowledge and scientific knowledge, I argue that while law makes its claim to legitimacy through demonstrable proof, it must ultimately seek an appeal to narrative forms of knowledge. The relationship between law and narrative is key to a critical reading of the *Cubillo* decision, which provides an important site for an analysis of the function of whiteness in the treatment of evidence in Anglo-Australian law. I argue that through reliance on legal positivism as the method of judicial interpretation, the decision privileges forms of 'scientific' knowledge which most readily support dominant paradigms of historical truth. At the same time, the significance of 'narrative' knowledge to the arguments presented in the case, particularly that which does not support notions of white cultural memory, is discredited.

Introduction

When the newly-elected Prime Minister, Kevin Rudd, delivered the National Apology to the Stolen Generations on 13 February 2008 (Commonwealth of Australia 2008), thousands of people were present at Parliament House and gathered across the country to bear witness to the event. Members of the Stolen Generations and their families had travelled long distances to be in Canberra for the occasion. It was a day

characterised by strong emotion and there was a lot of crying. In his speech, Rudd re-told the story he had heard from Lorna Nanna Nungala Fejo, a member of the Stolen Generations whom he had met a few days earlier. Rudd acknowledged that Nanna Fejo's was just one story: 'There are thousands, tens of thousands of ... stories of forced separation of Aboriginal and Torres Strait Islander children from their mums and dads over the better part of a century'. Rudd said that these stories 'cry out to be heard', but that '[i]nstead, from the nation's parliament there has been a stony and stubborn and deafening silence for more than a decade'.

Lorna Cubillo was there in Parliament House, finally receiving the acknowledgement that she and Kwentenyay¹ Gunner had sought from the Commonwealth Government less than a decade earlier.² Cubillo and Gunner had told their stories in the Federal Court in the landmark case taken by members of the Stolen Generations.³ In the trial, Justice O'Loughlin bore witness to Cubillo's traumatic testimonial account of having been stolen from her family and community when she was only six years old. However, when O'Loughlin heard Cubillo's account of her forced removal and incarceration, he did not declare that it was crying out to be heard. Rather, O'Loughlin found Cubillo's story at times to be irrational, and described some of her testimony to be the product of 'subconscious reconstruction', having escalated into 'vitriol' (*Cubillo* [593]). He determined that she had not met the burden of proof.

In his decision, Justice O'Loughlin found that there was neither enough evidence to support a finding of a general policy of removal of 'part-Aboriginal' children, stating that 'if, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a finding that it was ever implemented as a matter of course in respect of these applicants' (*Cubillo* [1160]). Determining that there was a prima facie case of wrongful imprisonment of Lorna Cubillo, he nevertheless decided that the Commonwealth was not liable because the burden of proof had not been satisfied, highlighting what he regarded as the incompleteness of the history and the lack of documentary evidence, referring to it as a 'huge void' (*Cubillo* [9]).

There is a substantial body of literature concerning the use of narrative analysis in legal theoretical scholarship,⁴ but as Kennedy (2002: 70) points out, contemporary attention to narrative in the field of law and literature tends to focus on what she refers to as the 'high culture' end of appellate courts, at the expense of the 'low culture' end of trials, where evidence is actually presented and assessed. In a trial, judicial assessment of the veracity of witnesses' statements is performed on the basis of observance of their demeanour, manner of responding to questions, and the perceived congruence and credibility of accounts. Techniques of cross-examination are intended to elicit the truthful, or most convincingly infallible, account of events. The significance of visual perception—that is, witnessing—is itself the basis on which the witness is most commonly accorded the authority to testify in the trial. Witnesses are expected to testify to what they have seen or heard and to be able to separate such observation from other forms of perception and sensation.

In this article, I interrogate the reception of key sites of testimonial evidence given by Lorna Cubillo and other witnesses in the trial, focussing on the role of race and gender in the construction of knowledge. I draw on Lyotard's (1979) distinction between two forms of knowledge, scientific knowledge and narrative knowledge,⁵ arguing that the relationship between law and narrative is crucial to a critical reading of the trial and judgment. In particular, I will argue that Cubillo's testimony reveals the significance of whiteness to the common knowledge she recounts, the truth of which she claims is verified by an oral tradition. However, this truth is effaced in the judgment, which I argue reveals white race blindness within the law.

Legal positivism, the dominant jurisprudential discourse of Anglo-Australian law, asserts that law is a system of pre-existing rules and conventions which are derived from observable facts and empirical sources—an autonomous phenomenon, exclusive of other areas of knowledge. Fundamental to the perspective of legal positivism is the belief that the social validity of a law must be strictly separated from questions of ethics and morality. Legal positivism also resists knowledge affirmed affectively, relegating it to the sphere of the irrational and deceptive. However, affectivity is a dominant feature of Stolen Generations narratives and should not be readily dismissed. I examine the reception of Cubillo's testimony concerning her loss of language, focussing on the court's rejection of her evidence on the grounds that it was irrational.

Knowing Law

The principles of evidence law operate on the basis of a series of rules which are said to guide the trial judge when

making decisions as to the admissibility of information presented by either party to a dispute. Evidentiary rules, which courts have both discretionary and mandatory powers to apply, are largely formulated around the principles of relevance and exclusion. One of the key paradigms for the evaluation of evidence is narrative coherence where an assessment is made on the basis of the formulation of a story which best concords with the evidence presented. Twining (1994: 71–4) points out that the rationalist model underlying the legal theory of evidence is characteristic of post-Enlightenment Western thought, where truth is seen to stand in direct relationship with reality and human subjects are able to acquire objective knowledge through processes of reason and empirical observation. Twining refers to this as the rationalist tradition of evidence scholarship. Feminist approaches to epistemology have revealed that the normative subject who is able to take this objective stance is inscribed as masculine—‘the all-perceiving, self-purposive subject of Cartesian logic’, a subject posited ‘*a priori* to the world, privileging *sight* as the yardstick to measure practico-empirical claims to truth’ (Williams 1994: 165).

While it has long been recognised that evidence law functions as an epistemology, and therefore as a site for theoretical investigation, it has received relatively little critical attention.⁶ Like other forms of post-Enlightenment Western knowledge, the legal conceptualisation of evidence and proof is based on an empiricist, scientific model (Davies 2008: 127). In one of the few deconstructive readings of the epistemology of evidence, Haldar argues that proof is the performance of the revelation of truth through ‘the perceptual capacity of sight’ (1991: 172). He points to the function of vision not only to documentary evidence, but also to the assessment of the veracity of

oral testimony, the preferred form for the delivery of evidence in trials (1999: 90).

In law, truth is accessed through language and evidence is seen as a way of mediating the relationship between words and truth. In a common law trial, it is oral testimony which provides the primary basis on which truth claims are verified. The assessment of evidence and its claim to truth is based on notions of narrative coherence and rationality. Evidence which is most readily regarded as veracious is that which is articulated by a sovereign subject. Such a subject is seen to speak the truth, producing truth as an effect of discourse. Yet it is truth which is regarded as the cause of the production of knowledge. If truth is produced in language, then it cannot pre-exist its own articulation; this substitution of effect for cause is therefore a *metalepsis* (Spivak 1987: 204).

In legal proceedings, the veracity of testimony is determined on the basis of an assessment of the demeanour of witnesses and the plausibility of their narration. As feminist and critical race theorists have argued, this assumes a normative model for the ideal testifying witness, namely the white, able-bodied, heterosexual, middle-class man (eg. Thornton 1990: 1). However, there is no universal standard for knowledge or truth. Our understandings of truth are complex constructions emanating from our subjective experiences; they are inevitably contextual and are produced in language. Nowhere is this more apparent than in the examination of testimony delivered in legal proceedings.

Interest in multidisciplinary studies of the testimonial form, in processes of witnessing and in the production of life writing has largely been generated in the wake of the Holocaust and other genocides, historical injustices,

colonialism and forced migrations.⁷ In Australia, the recent production of and interest in testimony studies, oral histories and life writing has overwhelmingly been propelled by the testimonial stories of members of the Stolen Generations. Overall, however, accounts of the testimonial form have focussed on textual representations and there has been minimal attention to the production of oral testimony in the courtroom. While in law, testimony is the preferred form for the delivery of evidence, I would argue that the testimonial voice serves as a challenge to legal positivism, by virtue of its subjective character; in legal proceedings, the tenor of the testimonial voice is highly constrained.

The Epistemology of Proof

In his influential work, *The Postmodern Condition*, Lyotard uses the term 'modern' to designate any science that legitimises itself with reference to a metadiscourse, and seeks truth through 'an explicit appeal to some grand narrative' (1979: xxiii). Pointing out that 'scientific knowledge does not represent the totality of knowledge', Lyotard argues that 'it has always existed in addition to, and in competition and conflict with, another kind of knowledge' (1979: 7) which he refers to as narrative knowledge.

Within Lyotard's framework, law can be seen as a form of scientific knowledge. As Davies (2008: 332) points out, Lyotard's central concern with the legitimisation of knowledge, with the question 'who proves the proof?', is clearly a legal question because it concerns the justificatory foundations for knowledge and points to its inextricable interconnection with power. Such issues are fundamental to postmodern interrogations, which as Lyotard elaborates, can be characterised as providing a challenge to the

dominance of metanarratives, proposing a more fragmentary and interconnected conceptualisation of knowledge.

Law legitimises its claims to knowledge through the use of evidentiary techniques which require propositions to be susceptible to proof. In particular, in positivist jurisprudence, laws are derived from facts and other observable phenomena. Within law, the principle of adversarialism, involving contestation between competing claims, is believed to *produce* a verifiable 'truth'. Rules governing legal procedure are designed to ensure that truth will emerge at the end of the day. Lyotard's analysis of claims to legitimacy highlights the correspondence between science and law and the interrelatedness of these discourses with power and knowledge in western discourse. In particular, he points to the 'strict interlinkage between the kind of language called science and the kind called ethics and politics', pointing out that they both stem from the perspective of the Occident (1979: 8).

Lyotard's 'Occidental perspective' can be interrogated as the site of whiteness, which, while universalising certain forms of knowledge and truth, disguises the racialised position from which it is produced. The invisibility of the whiteness of dominant epistemologies produced in post-Enlightenment thought is effectively achieved through the racialisation of its object. As Moreton-Robinson elaborates, whiteness functions as an 'ontological and epistemological *a priori*', constitutive of what can be known and who can know, 'producing the assumption of a racially neutral mind and an invisible detached white body' (2004: 81).

While law, like science, makes its claims to legitimacy through demonstrable proof, I would argue that it must

ultimately seek an appeal to narrative forms of knowledge. Law is a discourse in which the world is presented in a narrativised form, emerging from a desire for order and coherence (Douzinas et al 1991: 107). Chronology is central to legal evaluation, as is concordance between different witnesses' accounts of the sequence of events. Adjudication specifically entails the choice of one party's story over another, delivered by legal advocates using rhetorical strategies. One of the key paradigms for the evaluation of evidence is narrative coherence where an assessment is made on the basis of the formulation of a story which best concords with all of the evidence presented. In the discourse of law, there is the belief in the possibility of the reconstruction of the past through testimony and documents, as if these somehow exist outside language and signification.

Common Knowledge and Whiteness

An analysis of the treatment of evidence in the *Cubillo* trial highlights how law's regard for truth is seen to authorise its claim to knowledge. One of the ways the desire for narrative coherence is pursued in the trial is through well-established techniques of cross-examination, whereby a witness' memory of events is 'tested'. During the *Cubillo* trial, the veracity of the applicants' evidence was repeatedly challenged on the basis of its consistency. This involved intense cross-examination in relation to the specific details of witnesses' memories of events which occurred up to 50 years ago—events which often bore little direct relationship to the issues raised in the trial and were *not actually contested* by the Commonwealth. Clearly, the purpose of this questioning was to point to the possibility that the witnesses' evidence was unreliable; but it also highlights the way certain narratives are considered

acceptable in legal discourse because they conform to notions of pre-existent truth.

During cross-examination, Cubillo was questioned in relation to her removal from Banka Banka station to Seven Mile Creek. This was the first of a number of occasions on which Cubillo claimed she was removed from her family and community without warning or permission. On this occasion, Cubillo remembered that she was with her grandmother, who hid her when two men approached. She said that the men took her from the care of her grandmother on a horse to Seven Mile Creek. During cross-examination, Cubillo was asked detailed questions about the appearance of the two men, specifically in relation to their height and hair, and also about how she knew who they were. I have reproduced a detailed extract from the transcript of trial in order to demonstrate my argument.

Mrs Cubillo, I want to ask you some questions about what you say about your removal from Banka Banka. You've identified two people who you say were involved in your removal, Barney McGuinness and Bill Harney; is that right? --- That's right.

What did Bill Harney look like? --- He was a European man.

Was he tall, was he short? --- He wasn't tall.

Sorry, he wasn't tall? --- He didn't appear to be tall.

Would you say he was taller or shorter than I am? --- He was a medium sized person. Now, I wasn't going to take a - a tape and measure him. I'm just trying to tell you my visions from my childhood.

I'm not asking you to tell me how many inches? --- Well, you're asking me to ---

I'm just trying to get a sense of what the man looked like, Mrs Cubillo? --- He was a European man.

What was his hair colour? --- As far as I know, he wore a hat.

So you don't know what his hair colour is, is that what you're saying? --- He would be a normal Australian, but he didn't have blonde hair.

Did he have black hair, brown hair? --- Not black hair, probably in between.

In between what? --- Well, it wasn't blonde and wasn't black - in between.

Is it what you've previously described as sandy hair? --- That's a possibility.

You didn't really get a good look at Mr Harney's hair, is that really what you're saying, because he wore this hat? --- I would have had to be very close to the person to really know what he was - he was just a person who removed me and I will just remember him as such.

Did he have a moustache? --- He was a European man.

Do you remember whether he had a moustache or not? --- I remember him from the day he removed me.

Do I take it that that's a no, you don't remember whether he had a moustache or not? --- I didn't look at his face; I just knew that he was a white man and that he drove around the community where I lived and I recognised the car.

What do you say he was wearing on the day he came to Banka Banka? --- He wore the same clothes like everybody else - trousers and shirt and a hat.

There was nothing unusual about his clothing? --- I don't think he was in uniform but he wasn't a policeman.

Do you say that you have always known that it was Mr Harney and Mr McGuinness who were involved in your

removal? --- My grandmother told me who those people were.

So she was the person who told you it was Harney and McGuinness? --- I mean, she was the adult and I was the child.

You got their names from your grandmother? --- That's a common knowledge in the community.

So it's both your grandmother and common knowledge? --- Everybody in the community knew who these people were.

But there was nobody else present apart from your grandmother and the two men who you've described as Harney and McGuinness on the occasion of your alleged removal from Banka Banka? --- Barney McGuinness was the only half-caste male, when he removed me and I saw him in Phillip Creek, there was nobody else during that time.

Yes. I just want to be certain. This incident you've described, when you and your grandmother were sitting down in the creek, there were no other members of your family with you at that time of your removal, were there? --- We were hiding out away from the main station but still within the bounds.

Yes. But when you say 'we were hiding out', you're just talking about you and your grandmother, is that right? --- That's right.

Yes. And your grandmother, you agree, died before you left Phillip Creek. So you've known for more than 50 years that Mr McGuinness is the man, you say, who was involved in your removal. Is that your evidence? -- - I will always remember that, Ms Hollingsworth.

Mm mm. And Mr Harney was involved; you've known that for the last 50 years,

haven't you? --- Yes, I do (Transcript 13 August 1999: 1324–6).

During cross-examination, Cubillo was asked questions about an event which occurred more than 50 years ago, when she was about six years old. By focussing on the detail of Cubillo's memory of the event, specifically the identity of the individuals in question, the cross-examiner, Ms Hollingworth, attempted to elicit evidence which conforms to a model of scientific knowledge where, in order for something to be true, it must be susceptible to proof. The use of a scientific model for proof serves to efface the significance of the effluxion of time to the substance of memory and also fails to take account of the complexities, and significance, of childhood memories. The assumption underpinning cross-examination is that the failure to provide a comprehensive account of an event or a description that identified an individual provided the basis to render the evidence unconvincing; that is, any inconsistency or contradiction in the information recalled by the witness brings into question the reliability of the witness' memory.

While asking questions about the visible appearance of individuals is standard practice in cross-examination in attempting to establish identity, such forms of interrogation belie the complexities and specificities attendant on the way in which subjects remember events and people. To take one simple but fairly obvious point, for example, by asking: 'What did Bill Harney look like? ... Was he tall or short?', Hollingworth failed to acknowledge that a six-year old child is unlikely to make an assessment of adults on the basis of their height, invariably a relative phenomena. As she attempted to answer the question by explaining her dilemma, 'He didn't appear to be tall ... I'm just trying to tell you my visions from my childhood', the

cross-examiner characterised Cubillo as an evasive witness, because it was assumed that height is an objective fact—a form of scientific knowledge—and that Cubillo's inability to identify Harney on the basis of height indicates her unreliable memory.

However, what the cross-examination does elicit is of far greater relevance to the claim than Harney's height, because significantly, what Cubillo does remember is that Harney was a white man. While she is unable to identify the colour of his hair and whether or not he had a moustache, Cubillo poignantly responds to Hollingworth's questions by pointing out that her memory is founded in the occasion being that of her removal from her grandmother. She said she could remember Harney because he was a white man, later pointing out that he was the *only* white man who drove the car in which she was removed. By pointing to the way in which she is able to recall the identity of Harney, Cubillo highlights a key characteristic about which she was not questioned, but which identifies him most effectively. Harney's racial identity would appear to be his distinguishing feature, as the only white man known in the community to drive the car in which Cubillo was taken. Hollingworth's failure to question Cubillo on racial identity is characteristic of the pervasiveness of white race blindness within the law, and hegemonic white culture more generally.

But Cubillo's evidence points to more than Harney's racial identity, for what she highlights is the importance of the racialisation of the context of her removal—the colonialist and assimilationist regimes of power which facilitated her kidnapping. An examination of the testimonial process reveals the way these racialised regimes of power and discourse are replicated in the courtroom when Cubillo is cross-

examined. When questioned about how she knew it was Harney, Cubillo said that her grandmother had told her, that it was 'common knowledge' and that '[e]verybody in the community knew who these people were' (Transcript 13 August 1999: 1324–6). However, during cross-examination, there is a clear attempt to highlight an absence of verification for Cubillo's evidence in the form of 'proof', such as the presence of other witnesses.

Cubillo's evidence, however, clearly identified the existence of a well-established narrative of Indigenous child removal by white men in her community. Such knowledge does not require recourse to methods of proof; indeed, as 'common knowledge' it cannot be verified in this way. How many witnesses would be required to testify to the existence of 'common knowledge' for the claim to fulfill the requirement of legal proof? Would the presence of another family member at the time of the removal have provided the verification necessary? Significantly, the eye-witness accounts of other witnesses did not result in evidence sufficient to convince O'Loughlin of the veracity of her claim. Jimmy Anderson, who lived at Banka Banka as a child and was also removed to Six Mile Creek, gave evidence that it was 'welfare', specifically naming Mr Sweeney and 'old Bill Harney' as the men who removed him (Transcript 16 August 1999: 1420–1). Kathleen Napananka, who lived at Banka Banka, also gave evidence that her mother had three children with white fathers, all of whom were removed (Transcript 26 August 1999: 1864–5).

The question of Cubillo's memory of Harney was discussed by Justice O'Loughlin in his decision. He highlighted the fact that amendments were made to her statement of claim which called into question whether or not she was

able to reliably identify Harney as one of the two men who removed her on this occasion. While O'Loughlin did not consider there to be anything 'sinister' in the occasion of errors, he did see such inconsistency as evidence of the difficulties experienced by witnesses in attempting to remember events which occurred so long ago (*Cubillo* [405]). However, the unscientific nature of Cubillo's memory was used against her and O'Loughlin rejected her evidence, describing it as an 'exercise of reconstruction' (*Cubillo* [406]).

O'Loughlin's appraisal of Cubillo's evidence failed to recognise the significance of the common knowledge of which she spoke so clearly. Contrary to his conclusion, the importance of Cubillo's evidence lay not so much in a claim that she, individually, had 'known for the last fifty years or more' of the identity of the men who removed her—this was, in fact, not her expression, but that of the cross-examiner. The significance of her evidence lay in the importance of racial identity as an aspect of common knowledge, and particularly of white male racial identity as a signifier for the potential danger of theft of children. It is the racialised regime of colonial power and the economy of assimilation which was crucial to her claim, not her individual memory of an event which occurred half a century previously—an event which was not actually contested by the Commonwealth.

While O'Loughlin acknowledged the tenuous nature of memory as knowledge, in requiring evidence to support an 'important finding of fact' (*Cubillo* [405]), he sought a form of scientific knowledge—knowledge which lacked contradiction and was supported by empirical verification. In requiring evidence which complied with a positivist framework of jurisprudence, O'Loughlin attempted to submit

Cubillo's evidence to the rules required to legitimate scientific knowledge. However, as Lyotard points out, it is not possible to 'judge the existence or validity of narrative knowledge on the basis of scientific knowledge' or *visa versa*, because the relevant criteria are different (1979: 26).

When Cubillo was cross-examined in relation to the occasion of her removal from Banka Banka station, a traumatic event which occurred over 50 years ago when she was a small child, she attempted to answer the questions on the basis of her memory and what she had been told. However, O'Loughlin was unconvinced that Cubillo remembers this occasion accurately, that 'perhaps, over the years, what Mrs Cubillo remembers has become mixed with what she has been told', concluding that she had 'engaged in an exercise of reconstruction', possibly 'subconsciously' (Cubillo [405–6]).

Speaking of the Mother Tongue

According to Lyotard's framework, notions of truth and rationality function, within post-Enlightenment conceptual paradigms, as metadiscourses. Such paradigms rely principally upon binary constructions, where, as one in a series of oppositions, rationality is posited *contra* affectivity. Rationality is seen to provide objective and incontestable truth, whereas affectivity is regarded as irrational, tenuous, unstable and impossible to quantify. Feminist epistemologies provide critiques of the juxtaposition of rationality and affectivity, revealing how rationality is equated with knowledge, cognition, authority, masculinity and the public realm, whereas affectivity is aligned with irrationality, feelings, corporeality, femininity and the private world of the individual (eg. See Alcoff & Potter (eds) 1993). Constructions of rationality and affectivity are also historically and

culturally specific, for the distinction between reason and emotion emerged in European philosophy in the context of the rise of modern science and positivism, coinciding with the expansion of colonialism and of the dominance of Western European colonial power throughout the world. The racialised, non-white subject—the 'other' of western discourse—is also aligned within this paradigm to the realm of affectivity and irrationality.

The evidence given by Cubillo in relation to her loss of language and its discussion by O'Loughlin provide interesting sites for an examination of the law's resistance to affectivity. Loss of language was one of the key issues in the case. Cubillo and Gunner both gave evidence that they were forcibly prohibited from speaking their own languages in the institutions in which they were placed and that this resulted not only in the children's difficulties communicating with each other in the homes, but also meant that they were unable to communicate with their families when they later had contact with them. This experience was most poignantly described in relation to their reunions with their mothers—occasions, which for each of them, occurred only once. Loss of language was also highly significant to their claims of loss of cultural, social and spiritual life and was particularly relevant to decisions they each made about ongoing contact with their families and communities.

Cubillo's language groups are Walpiri and Warumunga. She gave evidence that these were the languages she spoke as a child before she was removed. While it is unclear how old she was when she was taken to the Retta Dixon Home, she was possibly only eight years old. When giving evidence in relation to her loss of language and in response to a series of questions in cross-examination, Cubillo clearly became

frustrated and angry. While this did not prevent her from answering the questions articulately, her evidence was not accepted by O'Loughlin because it displayed emotion.

During cross-examination, Cubillo was questioned in detail as to whether she had previously learned any English at the mission school at Phillip Creek before being taken to the Retta Dixon Home and whether she used English as the primary form of communication with the other children and the missionaries. Cubillo gave evidence that the children attended school only for about one hour per day, and that their lessons consisted of recitals of simple words and songs; she said that she spoke a little pidgin English (Transcript 13 August 1999: 1301–2). At the Retta Dixon Home, Cubillo gave evidence that the children were forced to stop using their languages and that they were 'flogged' when they did so. Counsel for the respondent challenged Cubillo's claim:

And I put it to you that you did not cease to use your traditional language at Retta Dixon because you were flogged; rather you ceased to use your traditional language out of necessity of learning English—you understand the question? --- Miss Hollingsworth, I was flogged. I was flogged. Our language was flogged out of us. I know what happened to me (Transcript 13 August 1999: 1301–2).

When citing this exchange in his judgment, O'Loughlin again identifies Cubillo's testimony as an 'example of subconscious reconstruction', this time, describing it as having escalated into 'vitriol' (Cubillo [593]).

It is difficult to establish the grounds upon which O'Loughlin refused to accept Cubillo's claim that the children were flogged for speaking their languages. When giving evidence

about his treatment at St Mary's Hostel, Gunner also used the term 'flogged' to describe the punishment he received when he spoke his own language, in addition to other occasions, for example when he ate food with his fingers (Transcript 16 August 1999: 1510). Other witnesses, including Jimmy Anderson, who had also been an inmate at the Retta Dixon Home, said the children got strapped around their legs if they spoke in their own languages (Transcript 16 August 1999: 1426). The implementation of the policy of assimilation through the refusal of language and culture has been well documented (eg. Human Rights and Equal Opportunity Commission 1997: 202).

However, in his decision O'Loughlin posited 'practicality' as the reason for the missionaries' discouragement of 'the children speaking their native tongue' (Cubillo [593])—the practical necessity of communication by means of a common language. Practicality accords more with the discourse of rationality than the 'vitriolic' anger and trauma of a person who is asked to recall and describe the experience, as a child, of being punished simply for speaking. It suggests an understanding of a choice to speak English as a second language, for example spoken outside the home environment, but where the first language is used with family and community. However, this is not the context described by Cubillo of the loss of her language; rather, she is describing the trauma experienced as a result of the theft of her mother tongue. Cubillo did not give evidence that the children were punished for speaking on the grounds of practicality, she said that the children's language was flogged out of them. It is O'Loughlin's interpretation of Cubillo's evidence which assumed the notion of practicality. In superimposing the rational discourse of practicality, O'Loughlin effectively erased and

dismissed the powerful evidence of anger and resentment.

Loss of language was fundamental to the plaintiffs' evidence in relation to their reunions with their families. Cubillo's testimony about the experience of seeing her mother was a moving description of the extraordinary pain and frustration she experienced when unable to communicate with her mother:

Were you able to speak with her when you got to Phillip Creek? --- *It was very difficult because mum only spoke limited English and I spoke to her through other relatives like an interpreter and it was very difficult to let her know how I felt and to understand what she was saying to me. We just cried and hugged.*

...

What did you think, Mrs Cubillo, about seeing your mother again?---I was confused. I wanted to be with her, but I felt that my life had been severed from the time I was removed from Phillip Creek and I could not communicate adequately with my mother.

Did you see your mother again after that visit?---No, I didn't (Transcript 11 August 1999: 1137).

Cubillo said that while she wanted to be with her mother, she felt that the way she had been dissociated from her family and the impossibility of speaking with her made contact painful. In evaluating this evidence in his judgment, however, O'Loughlin points out that while Cubillo knew where to find her mother, Maisie, she did not visit her again. He saw this as inconsistent with her claim of forced separation.

Cubillo was completely separated from her family and community when she was

about eight years old; she is now unable to speak her own language; she is unfamiliar with many aspects of her traditional culture; she did not see her family or community for the remainder of her childhood; and when she did see her mother, she could not speak to her. In the trial she expressed feelings of loss, loneliness, alienation, anxiety and depression—all of which she has continued to experience throughout her adult life. Nevertheless, O'Loughlin determined that this was inconsistent with her decision not to return to her community. In doing so, he elevated the discourse of 'rational' behaviour, suggesting that she was not motivated sufficiently to have contact with her mother—a woman she had not seen since she was a small child and with whom she could not speak.

Over-writing Cubillo's narrative of loss and alienation, O'Loughlin diminished her evidence of pain and trauma and replaced it with an alternative story of resentment, bitterness and vengeance which, he suggested, she has mistakenly directed against the Commonwealth. He determined that she was unhappy because she could not 'adapt' at the Retta Dixon Home and that she has subsequently had a very difficult life (Cubillo [730]). O'Loughlin expressed empathy for Cubillo, and went on to highlight specific details of the suffering and hardship she has experienced throughout her life. In doing so, he contradicts the assertion that his judgment by necessity be 'devoid of emotion' ([79]). However, this expression of affectivity is accorded rational status, whereas Cubillo was said to have 'lashed out', having an irrational sense of grievance towards the Commonwealth ([730]). What O'Loughlin failed to recognise is the significance of Cubillo's experience of the loss of her language and of her inability to speak to her mother. He also failed to hear the voice in which she

now speaks. As Cubillo had previously pointed out, as a child she lived in an oral culture, a culture in which knowledge would have been communicated verbally, in conversation and other narrative forms. Her inability to speak to her mother, and to other people in her community, indicates much more than linguistic frustration, it points to the unspeakability of the pain she has suffered and its unrepresentability in Western legal discourse.

Conclusion

It has been argued (Evans 2002: 131) that in Australian courts, Indigenous narrative knowledge is regarded as a form of 'writing', on the basis that it does not privilege the presence of the speaking subject and '[t]he original subject who handed down the laws or rules or narratives that are recited (as much as they can be) in the courts is regarded *in absentia*'. Evans argues that this produces a 'schism'—that is, what Lyotard might include within the *differend* (Lyotard 1988: 9): 'when the "regulation" of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom'. Indeed, Lyotard (1988: 9) uses the juridical context to discuss his concept of the *differend*, where he highlights the paradox produced in law when a victim of a wrong:

is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized, everything takes place as if there were no damages.⁸

When I interviewed Cubillo about her experience of giving evidence in the trial, she highlighted the paradoxical position of the witness giving testimonial evidence. She expressed her frustrated

desire to reverse the speaking position, to ask the questions of counsel for the Commonwealth, the institutional representative responsible for her removal. Cubillo proposes an inversion of the interrogative model of cross-examination which reveals the relationship between subjectivity and underlying structure of the testimonial form:

When I was being questioned by the Commonwealth lawyer, I didn't know if I could reply in the way I wanted to. I just sort of said 'yes' and 'no' about a few things, but I would've liked to ask questions myself, and ask the reason why I was taken. I would have liked some answers from the Commonwealth and to say: 'Have you got any proof that my mother and my family neglected me?' I was taken because of the colour of my skin—the fact that my mother was an Indigenous woman and my father was an Anglo-Saxon—for no other reason but that.⁹

Author Note

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Cubillo v Commonwealth [2000] FCA 1084 (Action Nos 14 and 21 of 1996), 174 ALR 97.

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Williams v Minister, Aboriginal Land Rights Act 1983 (1999) 25 Fam LR 86; [2000] Aust Torts Reports P81-578, 64,136.

Notes

¹ Sadly, in April 2005, Mr Gunner passed away. He was a man of courage and dignity, whose struggle, along with Lorna Cubillo, in seeking justice for members of the Stolen Generations was of great significance. In accordance with Central Australian Aboriginal law, I have used Kwementyay as the substitute for his first name in this article.

² *Cubillo v Commonwealth* (2000) (hereafter *Cubillo*). This decision has attracted critical attention from a range of perspectives. For a detailed case note, see Clark (2001).

³ The other cases were *Alec Kruger & Ors v The Commonwealth of Australia; George Ernest Bray & Ors v The Commonwealth of Australia* (1997); and *Williams v Minister, Aboriginal Land Rights Act 1983* (1999). All claims were unsuccessful. Significantly, in August 2007, in the first, and to date, only successful action by a member of the Stolen Generations, Bruce Trevorrow succeeded in his claim against the South Australian government, winning \$525,000 in compensation for having been removed from his mother's care in 1957 when he was 13 months old: *Trevorrow v State of South Australia (No. 5)* (2007). Tragically, Trevorrow died in June 2008, aged 51.

⁴ See, for example, contributions to Brooks and Gewirtz (eds) (1996) and Thornton (ed) (2002). In Australia, the emergence of

evidence of the Stolen Generations within white Australian popular discourse generally has contributed to a renewed interest in narrative analyses of testimonial forms. See, for example, Schaffer and Smith (2004). There has also been attention to the reception of historical evidence, including oral history, in the courtroom, largely as a result of claims brought by Indigenous people in relation to native title, heritage and Stolen Generations: Curthoys, Genovese & Reilly (2008).

⁵ This distinction, Davies (2008: 331) suggests, reflects the two main approaches to the evaluation of evidence, according either to the probability of events or to narrative coherence.

⁶ However, see Pardo (2005); Haldar (1991; 1999).

⁷ Eg., see, Sanders (2007).

⁸ Neville (2005) draws on Lyotard's notion of the *differend* in her fine reading of the *Cubillo* decision to reveal underlying classificatory hierarchies within genres of legal discourse.

⁹ Interview with Lorna Cubillo, Darwin, 25 September 2004.