

**I-Witnessing I the Witness:  
Courtly Truth and Native Title Anthropology**

**John Morton  
Sociology & Anthropology  
School of Social Sciences  
La Trobe University  
Bundoora, Vic 3086**

**Email: [J.Morton@latrobe.edu.au](mailto:J.Morton@latrobe.edu.au)**

**Paper prepared for the Native Title conference:**

**Expert Evidence in Native Title Court Cases:  
Issues of Truth, Objectivity and Expertise**

**Adelaide University  
6-7 July 2001**

**FINAL DRAFT – 15 July 2001**

I should probably begin by explaining my title, part of which which will no doubt appear a bit mysterious to non-anthropologists (as well as to some anthropologists). 'I-witnessing' is a phrased coined by one famous anthropologist, Clifford Geertz (1988:73-101), in relation to the ethnography of another famous anthropologist, Bronislaw Malinowski. Malinowski is well known in anthropology for raising the profile of ethnographic research in a very particular way, since it is he, more than anyone, who popularised the idea that an anthropologist must, in order to do his or her job properly, conduct long term fieldwork (see Malinowski 1922:1-25; also 1967). I-witnessing, therefore, refers to the anthropological subject 'being there' (Geertz 1988:1-24), which Geertz interprets less in terms of fieldwork experience and data collection, and more in terms of the projection of authority. In other words, I-witnessing is about convincing people that one holds and speaks the truth – or, as Geertz puts it: 'To become a convincing "I-witness," one must ... first become a convincing "I"' (1988:79). While this characterisation of ethnographic authority (Clifford 1983) refers principally to the profile of anthropological writing in the academy, and perhaps also to the profile of the anthropologist in the popular imagination, I think that the account has clear relevance for the understanding of the anthropologist's role in legal cases. Indeed, the anthropologist perhaps needs to be convincing in these cases more than any others. The question is: do we need to be convincing in a different way?

In Geertz's estimation, Malinowski's strategy for being convincing is:

to project in his ethnographical writings two radically antithetical images of what he variously refers to ... as 'the competent and experienced ethnographer,' 'the modern anthropological explorer,' [and] the fully professional 'specialized

field-worker' ... On the one side, there is the Absolute Cosmopolite, a figure of such enlarged capacities for adaptability and fellow feeling, for insinuating himself into practically any situation, as to be able to see as [others]<sup>1</sup> see, think as [others] think, speak as [others] speak, and on occasion even feel as they feel and believe as they believe. On the other, there is the Complete Investigator, a figure so rigorously objective, dispassionate, thorough, exact, and disciplined, so dedicated to wintry truth as to make Laplace look self-indulgent. High Romance and High Science, seizing immediacy with the zeal of a poet and abstracting from it with the zeal of an anatomist, uneasily yoked (1988:79).

Notwithstanding the baroque prose, this characterisation is still largely adequate to a contemporary understanding of the ethnographic method known as 'participant observation' – which, as is often said, can appear as something of an oxymoron. To what extent is the fellow feeling of participation consistent with the objectivity of observation? And to what extent does any contradiction between them interfere with the role of the anthropologist as expert witness? My experience as a researcher and witness in relation to one Native Title case (the Alice Springs Arrernte Native Title Determination Application) and several other legal cases leads me to believe that the contradiction is much more apparent than real.

Let me pursue this by addressing the problem as it has been recently laid out by Ken Maddock (1999). Courts are places which, amongst other things, seek to discover the truth. As institutions with specific kinds of ritual forms and idealised frameworks they are worthy of anthropological analysis. Unfortunately, most of us are too busy complying with the demands of courts as part of their ritual unfolding to undertake

---

<sup>1</sup> The original reads 'savages' rather than 'others'. I have changed the quote here for better effect, without (I think) being entirely unfaithful to the original.

this analysis. Consequently, we focus on the demands themselves rather than on an analysis of their deeper logic. Maddock is no exception to the rule. His paper, 'Bearing Witness', is an account of the implications of the Federal Court's recently issued 'Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia.' Probably most of us are familiar with this document. It is the one that states that expert witnesses have 'an overriding duty to assist the Court on matters relevant to [their] expertise'; that expert witnesses are not advocates for any party; and that their 'paramount duty is to the Court' and not to the clients who retain them (Maddock 1999:23-24). It is also the document that forces anthropologists (and others) to declare in their written evidence: 'I have made all the inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Court' (cf. Maddock 1999:24).

Maddock asks the question: 'Are there aspects of [anthropological] practice which fit awkwardly with what the Federal Court now expects?' (1999:24). His first observation is that one 'anthropological role which fits badly with the guidelines is that of advocate or handmaid for the community or interest group retaining the anthropologist's services' (1999:24). This, of course, is a variation on the Malinowskian theme that Geertz calls 'High Romance'. If the anthropologist identifies with 'the people' (or the organisation that represents them), then he or she arguably might be prone to commit what Maddock calls 'sins of omission', if not actual 'sins of commission' (1999:24). Yet the Federal Court's guidelines are explicit on this matter. It is interested in that somewhat obsessive-compulsive phrase 'the truth, the whole truth, and nothing but the truth'. In Maddock's estimation, the so called "'committed" or "concerned" anthropologist' can only solve the problem of potentially committing

sins of omission by not taking on the role of expert, even though this has the drawback of lessening their potential to put their professional expertise to good use.

Maddock almost makes this into a prescription, since he thinks 'there is room for doubting whether anthropologists invariably do their jobs with accuracy and objectivity' (1999:25). Of course, one is left wondering what proportion of, and indeed which, anthropologists he thinks might not measure up to the Federal Court's demands – especially in view of the fact that the Australian Anthropological Association's Code of Ethics explicitly states:

Where a conflict of views or interests arises among ... parties ..., the views and interests of those studied should be placed first, *except where this would compromise a member's conscience of [sic] commitment to truthfulness* (AAS 3.1, my emphasis)

Maddock does name three anthropologists in this context – Peter Sutton, Nicolas Peterson and Mary Edmunds, but only charges two of them with possibly overestimating the 'absolute accuracy' of anthropological material in the context of work relevant to land claims and Native Title research (1999:24-25). So one is still left wondering just who those anthropologists are who might not 'do their jobs with accuracy and objectivity'. No doubt he is wise to 'keep shtoom'.

But one also wonders what all the fuss is about. Maddock suggests that those who have 'faith in the profession' of anthropology in terms of its scholarship and credibility could not possibly object to the Federal Court's practice direction (1999:25). But who would seriously suggest that they might? Certainly, AAS's Code of Ethics suggests that they should not and would not. Yet Maddock actually states: 'it is likely that some

anthropologists will be ill at ease with the guidelines because of the clash with the demands their clients make' (1999:25). But why is it likely? The AAS Code of Ethics is actually very clear on the point that the demands of clients must take a back seat if they compromise perceived truth.

But in order to follow Maddock's line of thought further, let us suppose that there is a clash in some particular context. Suppose, say, that an anthropologist comes to know or suppose, through the agency (direct or oblique) of Aboriginal claimants, a representative body or legal representatives, that certain information which is true and relevant to a case might also be damaging to that case. What are the options? One option, I suppose, is not to tell 'the truth, the whole truth and nothing but the truth' – but this, of course, is both unethical and against the law. So, it is a dangerous option for an anthropologist to take – too dangerous for most to even consider. This means that the only viable option is to admit that one has to tell 'the truth, the whole truth and nothing but the truth'; but then there are further options that arise.

One is the option mentioned by Maddock; feeling personally compromised, the expert refuses to have any more to do with the case. But the anthropologist might also decide to go ahead with the job, in which case others then have to decide whether that is a good idea or not. In other words, the clients may decide that what the anthropologist knows is too damaging for him or her to be engaged any further. Alternatively, they may decide that damaging knowledge is offset by other considerations that continue to make the case strong overall, in which case the anthropologist might be retained. But these, of course, are decisions the anthropologist does *not* make. They arise as an aspect of the complex dialogue that the researcher has with claimants and their legal

or other representatives. So Maddock does not tell the complete story here. Options and outcomes are more varied than he allows for. And, at the end of the day, assuming that the anthropologist ends up in court, there is no reason to suppose that anthropologists would have any explicit or implicit problems with the Federal Court's practice direction, which demands no more and no less than anthropologists would demand of themselves.

Once in the courtroom itself – whether in the shape of the person or embodied in a written document – the anthropologist can only be what Geertz calls the 'Complete Investigator' – 'rigorously objective, dispassionate, thorough, exact, ... disciplined, [and] dedicated to wintry truth'. This is not to say that the anthropologist might not also be an 'Absolute Cosmopolite' with 'fellow feeling' for 'the people'. Indeed, this may remain a key element of the anthropologist's general craft and expertise. It is simply that he cannot play that role in court, any more than one would play Hamlet in King Lear. But it is also not to say that the anthropologist will inevitably reveal all the strengths or weaknesses in a case, because this, too, is a function of a kind of dialogue: the expert only responds to the questions put by the court. Perhaps, as an aspect of 'fellow feeling' for clients, the anthropologist goes into court hoping that certain questions will not be asked. But, if they are asked, there is no viable option but to answer them truthfully.

Now let us look to a related issue. Following Maddock, I have said that anthropologists might sometimes want to make themselves unavailable for particular kinds of jobs – ones where they might feel compromised in relation to the interests of the clients. Of course, this works both ways, which is why Maddock asks the

following question: 'why if anthropologists are as professional, credible and scholarly as all that, [do] they make themselves so selectively available?' He evidently does not think much of Peterson's argument that this is largely to do with gaining informed consent from the Indigenous communities directly affected by proposed research. Mining companies and other organisations that might wish to employ anthropologists are very often thwarted in their attempts to engage anthropologists because the latter are bound by ethical considerations that make them unable to work against community interests (Peterson 1995:viii). Note that this is the same principle that would be invoked if anthropologists took Maddock's advice and did not 'take on the role of expert' in circumstances where they might find themselves having to tell difficult truths. But Maddock finds it problematic.

While it is easy to see that individuals might wish to discriminate when it comes to spending time and energy providing advice, the result at the collective level of the profession must be to foster doubt about its credentials. As a parallel one might think of a lawyer who prefers not to defend people accused of unsavoury crimes ... Well and good, you might say, as an individual's choice. But what if no lawyer will take such cases? There would then be reason to doubt the credentials of the legal profession (1995:24-25).

Notwithstanding that there are severe limitations to this parallel – anthropologists are not lawyers and lawyers are not expert witnesses – the credentials of anthropologists as expert witnesses is not in the least affected by the collective skewing of their choices of work. Indeed, I see no reason whatsoever to suggest that, in this case, 'monopoly tends to corrupt and absolute monopoly corrupts absolutely' (Maddock

1995:25), because any tendency towards corruption is explicitly countered by the principles and rules that bind anthropologists to the court. And as I have suggested, there is nothing remarkable or inconsistent about these rules in relation to anthropological practice. Indeed, given the realities of community and organisational politics in Indigenous Australia, one might argue that the kind of system Maddock evidently wishes to see operating could well see the end of anthropological involvement in court. After all, it is no secret that anthropologists can get their fingers burned severely by working for, say, a mining company or a state government opposing a land claim, because certain organisations might blackball them. If anthropologists were to become, as they say, 'hired guns' (people who ply their trade for anyone), one might find the applied section of the profession having no Indigenous constituency!<sup>2</sup>

I can only speak for myself in terms of these sorts of decisions. I am one who clearly fits Maddock's bill in terms of the alleged collective skewing. I have taken on consultancies for organisations that work on Aboriginal people's behalf – in a Northern Territory land rights claim; in a Native Title claim; and in the so called Stolen Generations case. But there was also one notable occasion when I refused work for the Victorian Government Solicitor's Office in relation to the Yorta Yorta Native Title claim – a story which is worth telling more fully. A representative from the Office rang me, as I recall, on three separate occasions, trying to persuade me to undertake work. The conversations moved from gentle exchanges to animated debate

---

<sup>2</sup> I am overstating the case here, but it is worth mentioning how Maddock *understates* a related issue. The amount of anthropological work required by organisations representing Aboriginal people outstrips anthropological work required by other relevant parties. For example, while representative bodies regularly employ anthropologists to undertake work with a large fieldwork component, documenting extant bodies of law and custom, other parties are likely to require research of lesser scope. There is certainly no oversupply of well-qualified anthropologists working for representative bodies.

which included my interlocutor claiming Victoria's right to obtain the best possible anthropological advice in relation to the Yorta Yorta case. For my part, I offered three key statements: 1) I was too busy to do the work; 2) I could recommend others who might do it; and 3) I was not about to commit professional suicide compounded by broken relationships, given that a) I would be widely seen, however wrongly, as someone who worked against Indigenous interests, and b) that I had several Yorta Yorta friends and personal acquaintances. Some anthropologists who do undertake work in such circumstances have profiled themselves as heroic individuals stepping outside of the herd. Well, I don't mind a little heroism, so long as it isn't too tragic; but in this case I have to say that the reasoning was *pragmatic*. However, I was also aware that someone else would probably do the job, since there is as yet no monopoly of the kind referred to by Maddock.

Maddock (1999:25) ends his short paper by saying, after Trigger *et al* (1998:10), that there might be some tension between the demands of 'the anthropological expertise sought by clients' and the 'vibrant public discussion and debate' that happen among anthropologists in other contexts. If I read him correctly, he suggests that there *is* such tension - that 'anthropological expertise sought by clients' tends towards a kind of stultifying closure that is unfortunately becoming part of the normal practice of anthropology, even though it is antithetical to the open environment of the academy in which anthropologists are trained. I think it is also true to say that Maddock would add that the open environment of the academy is analogous to the openness of the court in its attempt to arrive at truthful evidence. Both are scenes of rational objectivity and both are opposed to the conditions that tend to be imposed by Aboriginal organisations and the like.

I have to say in relation to this that I don't actually feel much like an anthropologist when I'm in court, although I must admit that this is partly due to the unfamiliarity of the role. As an anthropological researcher in the field or in the archives I usually have free reign to negotiate my way with people and written evidence. As an academic in the classroom or seminar room, or in journals and books, I have relatively free reign to write about, talk about, debate, discuss and argue anthropological issues. I have some of these freedoms in relation to my role as an anthropological expert in the service of the court, but when it comes to the crunch I have very little freedom. As the practice direction says, I cannot speak from a passionate position – I am not an advocate for anything or anybody, just a mouthpiece for information or 'expert opinion'. My agency is pared to a minimum: I speak only when I'm spoken to, and even before that I work to a brief that is not at all my own. I cannot speculate, nor can I appear as a critic of the court's procedure. For however many moments that I work to a brief and sit in the appropriate chair, I am indeed a servant of the court – an instrument played by opposing interests and a referee. Anything that could get in the way of such service is put in abeyance. I am a model of detachment: and that is precisely how I feel – strangely disengaged, eerily focused, thinking almost mechanically, my truths flowing forth to take their part in the larger 'truth' that, thanks to the agency of the judge, will be the outcome of the case. How alien these ritual sentiments seem when compared with the rough and tumble of independent research, teaching and debate, where the construction of truth and knowledge allows the anthropologist to live and breath. The similarity between the court and the academy is in that sense quite limited.

Being an anthropologist is more than being one thing; and being what Geertz calls a 'convincing I' is not the same in all circumstances. I am one kind of anthropologist in court; another in the field; another in the archives; another in a seminar; another in a first year lecture theatre; and so on. A court demands that, to be convincing, I must be a certain kind of person – so I become that person for the purposes of the court. I need not, and would not want to, be that person all the time. I dwell in a discipline that is both a science and an art; a discipline that is about the discovery of facts, but also about the discovery and re-discovery of age-old human questions that admit of no ultimate answers. I am part of a discipline that was once (and best) described as holding an 'intellectual poaching license', one whose boundaries expand and contract depending largely on the personal preoccupations of each anthropologist. My discipline has methods that bring results, but only some of these are of interest to a court. If I want others to emerge, I must take my trade elsewhere. Why, then, is there all this discussion about the role of the anthropologist as expert witness in a context that suggests that this role might be alien or somehow fundamentally different from others undertaken by anthropologists? Shape shifting is part of most anthropologists' stock-in-trade.

Geertz refers to Malinowski's 'two radically antithetical images' of 'High Romance' and 'High Science', but it isn't at all clear that Malinowski found these hard to reconcile. Likewise, I do not think that most anthropologists find it that hard to reconcile the roles they must play in relation to courtly truth telling with the roles they might play elsewhere. Some anthropologists like to be detached everywhere, in and out of court; but most probably do not. Those who like to dabble most in some approximation of 'High Science' do not occupy moral ground higher than that

occupied by those who dabble least. But at least we can be sure that, in relation to the court, all anthropologists occupy the same space and abide by the same rules – as any structuralist would know.

## **Bibliography**

AAS. Code of Ethics. [http://anthropology.anu.edu.au/aas/AAS\\_Code\\_of\\_Ethics.pdf](http://anthropology.anu.edu.au/aas/AAS_Code_of_Ethics.pdf)

Visited 4 July 2001.

Clifford, James. 1983. 'On Ethnographic Authority'. *Representations* 1(2):118-146.

Geertz, Clifford. 1988. *Works and Lives: the Anthropologist as Author*. Cambridge: Polity Press.

Maddock, Kenneth. 1999. 'Bearing Witness'. *AAS Newsletter* 75:23-25.

Malinowski, Bronislaw. 1922. *Argonauts of the Western Pacific: an Account of Native Enterprise and Adventure in the Archipelago of Melanesian New Guinea*. London: Routledge & Kegan Paul.

Malinowski, Bronislaw. 1967. *A Diary in the Strict Sense of the Term*. London: Routledge & Kegan Paul.

Peterson, Nicolas. 1995. 'Foreword.' to Peter Sutton, *Country: Aboriginal Boundaries and Land Ownership in Australia*. Aboriginal History Monograph 3. Canberra: Aboriginal History Inc.

Trigger, David, Michael Robinson and Laura Gladstone. 1998. 'Anthropology and Consultancy Contracts in the 1990s: Who Owns Your Brain?' *AAS Newsletter* 74:5-10.