

THE LEGAL IMPLICATIONS OF CHAPMAN v LUMINIS FOR ANTHROPOLOGICAL PRACTICE

By Paul Burke

Introduction

Along with the sense of relief felt by most anthropologists at the rejection of negligence claims against the anthropologist at the eye of the Hindmarsh maelstrom¹, there was some confusion and concern about the apparent characterisation of the anthropologist's role as one of advocate rather than a provider of independent professional advice. Professor Francesca Merlan, in particular, raised these concerns at the CAEPR forum on the judgment held at ANU on 31 October 2001. Dr Howard Morphy challenged her reading of the case on this point, but the lawyers present did not seem to offer a joint view one way or the other.

What follows is an attempt to formulate a considered legal analysis of the decision in relation to the advocacy issue and to draw out the more general implications of the decision for applied anthropology.²

The scope of the decision

Duty of care in negligence

In corridor discussion after the forum a few anthropologists, somewhat rattled by what Francesca Merlan had to say, wondered whether the decision had radically changed their relationship with organisations that regularly engage them as consulting anthropologists. Could they now be sued by such organisations if they gave opinions that did not advance the interests of the organisations concerned or their clients? In an ideal world the response to this question should be clear. But, in my view, an analysis of Justice von Doussa's reasoning does not lead to a neat answer.

First of all, Justice von Doussa makes a distinction between the obligations of an anthropologist appearing as an expert witness in court proceedings as opposed to an anthropologist being engaging by an organisation for other purposes. He states at paragraph 297:

Legal practitioners appearing as advocates before a court, and expert witnesses, (usually members of skilled professions), giving evidence, owe duties to the court in addition to duties owed by them to their clients under their retainers. Those additional duties may require them to bring matters adverse to the interests of their client to the attention of the court. Those duties, however, are owed to the court, not to the opposing side in the litigation. They arise because the legal practitioner is an officer of the court, and in the case of expert witnesses because the curial process, the oath and in some instances practice directions of courts, require that an expert witness owes a paramount duty to the court to assist in the elucidation of the true facts.

Accordingly, it is clear that von Doussa is not trying to change the accepted role and expectations of anthropologists as expert witnesses. His mentioning of practice directions is probably an oblique reference to the Federal Court's practice directions entitled "Guidelines for Expert Witnesses in

¹ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (21 August 2001). Note: all references to paragraph numbers are to the judgment of Justice von Doussa.

² The following discussion focuses on those parts of the judgment dealing with the position of the anthropologist, Dr Deane Fergie, rather than the position of Professor Cheryl Saunders, the reporter, or Robert Tickner, the Minister.

Proceedings in the Federal Court of Australia". Those guidelines explicitly state that an expert witness is not an advocate for a party (also see Keon-Cohen 2001). What is a little disconcerting about Justice von Doussa's decision, though, is whether a sharp distinction between the role of the anthropologist as expert witness and other non-court roles can be maintained in practice.

In the native title context, for example, an anthropologist may be initially employed to produce a connection report aimed at mediation. If the mediation is successful and leads to a consent determination or an Indigenous Land Use Agreement, the role of expert witness in a court does not arise. However, if the mediation fails, it is likely that the anthropologist will eventually be called upon to be an expert witness at the hearing of the claim. Further complexities seem to arise in trying to apply the distinction between court and non-court roles in relation to anthropologists involved in land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The working assumption in land claim preparation is that the anthropologist will have to give independent expert evidence at the hearing and respond to cross-examination. However, even though the Aboriginal Land Commissioner is a judge, the hearing of claims is not strictly a judicial process. It is an administrative inquiry. These considerations tend to cast doubt on the utility of a strict court/non-court distinction, but for the moment, keeping in mind that our purpose is to analyse the legal scope of the judgment, we can put that issue to one side. Suffice to say, this case is only about the engagement of consultant anthropologists for work that does not involve giving expert evidence in court.

Even when so confined, there are other indications that Justice von Doussa was not attempting to lay down a general rule about the characterisation of a consultant anthropologist's role in all circumstances of non-court work.

The first reason for saying this is that the most problematic passages that seem to accept an advocacy role for anthropologists (paragraph 296-300), are found in the section of the judgment dealing with the legal issue of whether Dr Fergie owed a duty of care to the Chapmans and their company Binalong, considering that Dr Fergie was engaged to provide advice to ALRM. Here the use of the phrase "duty of care" is a technical legal usage (a term of art). Establishing such a legal duty of care is an essential element of the proof of negligence. It typically depends on a court assessment of whether the relevant person should have foreseen the possibility of damage to the plaintiff. Justice von Doussa, in effect, found that such a duty of care could have arisen but it did not do so in this case because of the terms of the contract between Dr Fergie and ALRM:

In these circumstances I think there was a sufficiently close relationship between Dr Fergie and Binalong to give rise to a duty of care if such a duty, and its contents, were coincident with the work to be done by her and the scope of the duty owed to the ALRM under its contract. The terms of that contract therefore become critical. (Para 285)

And in the following paragraphs (see especially para 292-295), Justice von Doussa emphasises the very limited scope of her instructions from ALRM.

The instructions sought an evaluation of information, the nature of which had already been put forward to Professor Saunders, and in part to Mr Tickner as the basis of the claim for protection. They did not invite Dr Fergie to investigate whether that information reflected a genuine traditional Aboriginal belief, or whether it was fabricated. For Dr Fergie to have embarked on such an exercise would have been contrary to the purpose and scope of her instructions. (Para 292)

This is of course a fine distinction and one wonders how an anthropological evaluation of the significance of the information (in terms of the criteria for heritage protection) could be done without some investigation of the reliability of information. However, in terms of assessing implications of the decision, Justice von Doussa's point seems to be that consultant anthropologists will only be accountable for what they are engaged to do. This is to be ascertained primarily by examining the terms of the contractual relationship between the parties and intended use of the report.

This seems to recognise that in an uncontentious situation an anthropologist may well be engaged to give a 'warts and all' anthropological assessment of a situation. But, in a contentious circumstance of opposing parties engaged in a legal process, it is acceptable for one of the parties to engage an anthropologist for the much narrower task of evaluating whether the currently available information meets certain statutory criteria. And in the latter situation, the analogy with a professional advocate, like a lawyer, is appropriate.

Thus, one implication could be that the advocacy analogy may only be appropriate to very limited circumstances, that is non-court, contentious situations involving opposing parties, where one side engages in anthropologist for the limited purpose of making an evaluation of specified information against statutory criteria. According to the same reasoning the advocacy analogy may not be appropriate if the consultant's terms of reference were drafted in a more general way and the situation did not involve an immediate, contentious issue.

Another reason for thinking that the references to advocacy in Justice von Doussa's judgment were not intended as a general characterisation of the relationship between a consultant anthropologist and her employer is that other passages in the judgment seem to take a more conventional view of what it is for an anthropologist to take a professional approach to the task at hand. For example:

Further, the issue before this court, even if the tradition [of secret women's business] were disproved, turns ultimately on whether the opinions expressed in the Fergie Report were honestly held and reasonably based upon the information available. (Para 444)

Even though the advocacy role may be confined to special circumstances, this still leaves the practical problem for anthropologists of assessing whether their particular situation falls within those special circumstances or not. There seem to be two major reasons why this distinction is important:

1. It will determine the extent of persons owed a duty of care. This will in turn have some implications for the appropriate level of professional indemnity insurance maintained by the consulting anthropologist. In the case of advocacy work of the kind contemplated in the judgment, the legal duty of care is confined to the organisation that engages the anthropologist. In other cases, the legal duty of care would also extend to others who may foreseeably be affected by the work.
2. It will determine the content of the duty of care that is to apply to the work, in particular such matters as:
 - whether a full appraisal of the relevant literature should be done;
 - whether and to what extent the veracity of information received should be tested;
 - whether the relevant matters that do not necessarily advance the interests of the clients should be raised.

The problem, of course, is the grey area -- those contractual situations that are clearly not court

work but are also not on all fours with the factual situation of this case. For those anthropologists who do not want to be engaged as advocates it means that the terms of the consultancy contract should explicitly cover the issues of:

- the right to do an independent review of the relevant literature;
- the right to test the veracity of information received;
- the right to raise matters that are relevant but do not necessarily advance the interests of the client; and
- arrangements for peer review. Note: the issue of peer review cuts across intellectual property issues. As Justice von Doussa states, submitting a commissioned report to a third party for comment would require express authorisation in the contract between the anthropologist and the commissioning organisation (see para 495).

Another consequence of insisting upon such terms would be that in assessing the appropriate level of professional indemnity insurance the full range of the people owed a duty of care would have to be taken into account.

On the other hand, if an anthropologist did wish to undertake work limited to an advocacy role the terms the contract would best exclude the rights listed above.

These proposals do not necessarily address the policy issue of what should be done in these circumstances. Justice von Doussa's judgment seems to have opened up the possibility of contracting out of an independent professional stance when writing anthropological reports in some limited circumstances. As Francesca Merlan pointed out, this was not something which Dr Fergie or any of parties to the litigation argued for. But the possibility would appear to arise from Justice von Doussa's reasoning. Referring to the various parts of the judgment in which Justice von Doussa uses the advocacy metaphor, Francesca Merlan stated:

But the opinion [that is Justice von Doussa's judgment] seems to accept the idea that the anthropology involved is mere facilitation and advocacy, and does not seem to expect critical investigation and assessment. I feel we must be concerned about these aspects of the present opinion as we should about any opinion that fails to attribute a more independent and analytical role for social research. (Merlan 2001: 7)

This view is suggestive of the need to close the door that Justice von Doussa has opened. On the above analysis, the only way to achieve this is through explicit contractual terms that will guarantee professional independence where there is any doubt about the legal interpretation of the contractual arrangement.

Statutory prohibitions against misleading or deceptive conduct

Another legal issue raised by the case is whether anthropologists are subject to section 52 of the *Trade Practices Act 1974* (Cth) and similarly worded State statutes that prohibit corporations involved in trade or commerce from engaging in conduct that is misleading or deceptive. This will not be an issue for most anthropologists working as sole traders, that is not working through a corporation. It was potentially an issue in this case because Dr Fergie was engaged through Luminis Pty Ltd, Adelaide University's consultancy vehicle for its staff. Luminis would have been vicariously liable for any misleading or deceptive conduct by Dr Fergie. Justice von Doussa concluded that in this case Dr Fergie was not engaged in trade or commerce merely by giving a professional opinion (see para 161-191). His reasoning involves what could be considered a fairly fine distinction between entering into a contractual relationship for the provision of consultancy services as opposed to the product of those services, being the actual report itself (para 187-190). Again, it is unclear whether the particular factual situation influenced this outcome. The wiser course for those anthropologists conducting an anthropological consulting business through a corporation would be to assume that section 52 of the Trade Practices Act and similar State statutes do apply to the corporation.

The finding about Dr Fergie not being engaged in trade or commerce was sufficient to dispose of the issue but the judge went on to consider whether the Fergie Report could be considered misleading or deceptive and whether in fact it did mislead the recipients of the report. He concluded that the claim of misleading or deceptive conduct could not succeed because of his finding that restricted women's knowledge was indeed part of a genuine Aboriginal tradition and that there was a reasonable basis for such statements in the Fergie Report (para 192-199).

Implications for the preparation of anthropological reports

In drawing conclusions from this case the initial caution must be that the decision is currently under appeal to the full Federal Court. Accordingly, while the decision states the law at the present time, it has an interim character until the appeal process has been exhausted. Anthropologists will have to reconsider their position in the light of subsequent decisions.

The second caution, as explained above, is that there is some uncertainty about whether the principles used to resolve this dispute can be generalised to other contexts in which anthropologists are engaged to provide professional services. On one view, this case turned on the narrow scope of the work specified in the contract between ALRM and the consulting company that employed Dr Fergie. In theory, this would mean that it would be open to subsequent courts to distinguish this case on its facts, particularly about whether the duty of care is owed to those whose business interests might be directly affected by a heritage declaration and the content of the duty of care.

Notwithstanding these cautions it is possible to glean some general guidance from the case about avoiding negligence claims. This is because the judge went on to consider in detail the particulars of negligence claimed even though he had found that there was no duty of care owed by Dr Fergie to the Chapman's company. The following propositions about the standard of care required in preparing an anthropological report are probably justified:

- In general, the opinions and conclusions expressed in the report should be honestly held and reasonably based on available information (see para 444, 486, 538).

Put in a negative way, the report should not be purely speculative, misleading or deceptive (even if the Trade Practices Act does not apply to the individual anthropologist).

- The report should set out the nature, aim and scope of the report.

Justice von Doussa was able to reject Professor Maddock's criticism that the Fergie Report should have been more qualified by referring to the difficult circumstances under which it was prepared, because the circumstances of the report's preparation were set out in the report (para 443-445). Another way of expressing this point could be that the report should include an account of the methodology used and, in particular, set out any constraints hampering proper investigation.

- The report should consider the relevant literature (in the sense of writings that would be considered relevant within the profession) in a fair and open way and draw attention to any conclusions arrived at that differ from the literature (see para 441, 478-482).

It was important to Justice von Doussa that the Fergie Report expressly stated that the women's secret-sacred knowledge was not known by those involved in earlier evaluative work (para 486-487).

- The report should identify the source of information in the report and the circumstances in which it was obtained by the anthropologist (see para 488).

Other important issues not dealt with in this case

- Anthropologists' obligations in relation to secret/sacred information

At first sight it would seem to be curious that the judgment does not have anything new to say about this issue as the question of our legal system's ability to acknowledge and accommodate Aboriginal secret/sacred information has been at the heart of the whole Hindmarsh Island controversy. This absence is mainly attributable to the nature of the proceedings. There was no criticism of Dr Fergie's handling of sensitive information by the Ngarrindjeri women who believed in the existence of secret women's business. Presumably there was an acceptance that the disclosure of the confidential information to a limited number of people in various legal proceedings, including this case, was beyond Dr Fergie's control. The Chapmans' complaint was, of course, not that Dr Fergie had breached her informants' confidences but that she had not subjected the information she received from them to sufficient scrutiny.

This case repeats what other cases have established: there is no absolute immunity for Aboriginal secret/sacred information in legal proceedings. There is public interest immunity in relation to such information but this requires a balancing of the public interest in respecting Aboriginal beliefs and the public interest in the open and fair administration of justice. Typically, this balancing of interests by the judge leads to a limited disclosure of secret/sacred information to those directly involved in the hearing. In this case disclosure was limited to the judge and female counsel (see para 301-309, 852). This does raise many questions about what anthropologists should say to their informants about providing confidential information in the course of research conducted for use in legal proceedings. At a minimum, it suggests the need for some warning to be given to informants that the absolute confidentiality of such information cannot be guaranteed. Again, this is a major issue for debate within the AAS and is beyond the limited aims of this paper.

- Critical evaluation of informant's statements

Another key issue on which no guidance is given in the judgment is the degree to which information provided by Aboriginal informants should be tested, cross-checked or scrutinised as to its veracity. There is some suggestion that culturally inappropriate probing would not be required (see para 490), but, generally, the judge avoids the issue by referring back to the limited scope of the task given Dr Fergie by ALRM that, in effect, puts such inquiries outside the scope of the work she was engaged to do (see especially para 497). In the absence of guidance from the courts, this issue would seem ripe for discussion within the AAS. If such discussion does eventuate, it should be kept in mind that the above discussion on what might constitute negligence in anthropological reports focuses on what could be considered the minimum standards of professional conduct. What should be adopted as best professional practice could well be more onerous. The burden of Francesca Merlan's critique, for example, seems to be that the narrow focus on truth or falsity and the assertion of a professional duty of truthfulness, obscures the need to contextualise information received from informants, both in terms of its content and the social processes involved in its production.

- Peer review

The importance of peer review was not directly addressed in the judgment, again because of the nature of the contractual arrangement between Dr Fergie and ALRM. This is not just the question of the narrow focus of her terms of reference, there are more pervasive intellectual property issues alluded to above. It could be considered paradoxical that in his own assessment of the Fergie Report, Justice von Doussa seems to place a great deal of reliance upon the opinion of senior anthropologists who gave evidence in the case to the effect that the report was a good example of applied anthropology in difficult circumstances (para 441-445). One of the obvious implications of this from a completely practical and defensive perspective, is that peer review in contentious matters will be very helpful if things go wrong. In land claim work in the Northern Territory it is typically the land councils that insist upon peer review of draft claim books. However, in the absence of such insistence it will fall to the anthropologist to negotiate such conditions in the terms of their consulting contract.

Implications for very short-term/emergency anthropological consulting

A widespread problem in applied anthropology today is the unrealistically short timeframes being imposed by commissioning organisations. Of course, the Hindmarsh Island situation is an extreme

example of this. There are various passages in the judgment that seem to indicate a sympathetic approach to the predicament of anthropologists engaged in very short-term consultancies provided that there is a good reason for the tight timeframe. The other major proviso would seem to be that the limited expectations of very short-term consultancies must be reflected in the contractual arrangements and explicitly dealt with in any resulting anthropological report by clearly setting out the report's limitations.

Whether anthropologists should engage in such work is another matter for discussion within AAS. As in this case, the conflict between the ethical obligation to assist and the expectation to do work of a high professional standard can sometimes be excruciating.

Disclaimer: the opinions expressed in this article are provided for general information only and are not intended to be used as legal advice in a particular matter. If legal advice is required in relation to a particular situation appropriately qualified persons should be consulted.

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