What Do William James and Franz Boas Have to do with Compensation Claims?: An Exploration of Emotion and Culture in Indigenous Compensation Claim Research

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The working title for my presentation today is, 'What do William James and Franz Boas have to do with compensation? In 1884, the philosopher and one of the forefathers of psychology, William James, developed a hypothesis on the origin and nature of emotions, in which he defined emotions as the feeling or perception of bodily changes as they occur (James 1884), in other words, emotions are subjective psycho-somatic experiences, a view which, in various forms, continues to dominate our commonsense and some scientific understandings of emotions. While some ten or so years later, Franz Boas, the father of anthropological concepts relating to culture, proposed understanding differences between humans in terms of differences in culture, rather than in terms of race (Boas [1898] 1982).

To return to my original question, it would seem from the 2016 and 2019 Timber Creek decisions that the ideological legacies of William James and Franz Boas have quite a lot to do with compensation.

Today I want to explore the significance of what I regard as two of the key themes relating to the anthropology of compensation claims. One, emerging from the 2016 Timber Creek decision, is the concept of 'emotions', expressed in the form of hurt feelings. The other is the notion of 'culture', as conveyed in the High Court's expression, 'cultural loss', which, as I'll explain later, renders the focus on emotions as immaterial in terms of the methodological approach employed by anthropologists in compensation claims.

As evident from the 2016 judgment, the award of a 'solatium payment' was informed and influenced by the reported emotional impact, upon Ngaliwurru and Nungali people, of the effects of legal extinguishment, identified in the judgment, and expressed by the lay witnesses in the trial, in terms of 'pain and suffering', 'reputational damage', 'hurt feelings', gut-wrenching pain', 'grief', and 'anxiety' (cited in Pannell 2018:267). As Pamela McGrath concluded, based upon the 2016 Timber Creek decision, anthropologists "would do well to focus more on individuals rather than societies, and upon the articulation of 'embodied emotions' (McGrath 2017:3). This was also the view of Kingsley Palmer, one of the expert anthropologists involved in the Timber Creek case who, in his 2018 book on native title anthropology, stated that "compensation for non-economic loss is about emotional pain and suffering ('damages for distress and anguish')" (Palmer 2018:234).

In the discipline of anthropology, the consideration of emotions can be characterized as a tension between, universalist and positivist approaches, where emotions are regarded as psycho-biological states, on the one hand, and relativist and interpretative approaches, where emotions are regarded as cultural concepts, "socially shaped and socially shaping" (Lutz and White 1986:417). In Australia, the work of Fred Myers is illustrative of this latter approach (Myers 1979, 1986, 1988). In his research among Pintupi Aboriginal people of Central Australia, Myers found that emotion words, such as 'anger', 'fear', or 'compassion', could only be understood within the social structure and cultural context that determined the meaning and content of these emotions (Myers 1988:591).

To some extent, the anthropologists involved in researching the Timber Creek case, like Myers, focused upon understanding the cultural and social construction of emotion. In their attempts to explore concepts expressed in the language of the claimants, Kingsley Palmer and Wendy Asche, identified key words in the local language, Ngaliwuru, which conveyed concepts relating to loss and alienation (Palmer 2018:235). With a focus upon these 'emotion words', Palmer and Asche explained how the claimants' response to the loss of land had adversely affected their feelings and their emotions (loc. cit.). I should add here that Myers (1979:344), and other anthropologists engaged in cross-cultural research on emotions, have cautioned against assuming that words provide an entrée into the conceptualisations of other people (see Schieffelin 1985), and that the

meaning of emotion-words can simply be derived from the words themselves (Burbank 1994: 47-48).

In the Timber Creek case, Mansfield J repeatedly referred to the 'pain and suffering' of individual witnesses, and the lay evidence presented in the trial established that the emotional impacts of extinguishment were clearly experienced and expressed by individuals, and not collectively, by the claim group *per se*, leading Pamela McGrath to suggest that, 'compensation cases would do well to focus more on individuals rather than societies' (McGrath 2017:3). However, as Justice Mansfield also observed in his 2016 judgment, native title is a communal title (*Griffiths* at 175, 178, 219).

Herein lies one of the problems with focusing upon individual emotional responses to extinguishment, articulated within the paradigm of solatium, as was the case in the Timber Creek claim. As the High Court found, if the non-economic component of compensation was truly a solatium for pain and suffering then the award ought to differ according to the particular pain, suffering and distress endured by individual claim group members (*Northern Territory v Mr A, Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7, para 323), and not be assessed on an 'in globo basis', which did not require a focus on the pain and suffering of particular members.

Thus, contrary to the primary judge, in the Obiter to the High Court judgment, Justice Edelman explicitly stated that, "compensation for loss of cultural value is not solatium" (ibid: 312). As pointed out by his Honour, in relying upon the concept of solatium, the "Claim Group" conflated and confused two different concepts, that of, (i) "loss of cultural value" or 'cultural loss', and, (ii) "loss arising from the compulsory manner of extinguishment" (loc. cit.).

Thus, at a number of levels, and for a range of reasons, the concept of solatium appears to be an inappropriate framework for the consideration of Indigenous non-economic loss, even though as Justice Edelman pointed out in his commentary, the parties involved in the Timber Creek claim "used the language of solatium" (ibid: 273). The High Court acknowledged this limitation by choosing to speak of 'cultural loss', and not in terms of 'hurt feelings'.

Initially, upon reading the March 2019 High Court judgment I understood the reference to 'cultural loss' to also be a reference to the 'loss of culture'. In the face of the 1998 Yorta Yorta decision, the fact that State governments often object to native title claims on the basis of what they regard as the loss of laws and customs, and given that the preparation of a connection report is basically an exercise in proving that a group has not lost its culture, this would appear to be a reasonable interpretation.

However, it is clear from the 2019 High Court judgment, that 'cultural loss' in the Timber Creek case does not refer to the loss of traditional laws and customs, to the loss of traditional beliefs and practices or to the wholesale loss of the claim group's attachment to country (*Northern Territory v A. Griffiths* 2019:195). And, even though the physical manifestation of some Dreaming sites, such as the Dingo-related sites, were altered, even destroyed, by public works, the Dreamings themselves were said by the lay witnesses to persist (ibid:189).

In my view, in focusing upon 'cultural loss', the High Court has made it quite clear that they are not speaking about the loss of culture, as a thing or in E.B. Tylor's view, as a set of traits (Tylor 1871), but of loss, or 'a sense of loss', because of culture. In other words, while the idea of 'hurt feelings' suggests an individual psychobiological feeling state, independent of culture, 'cultural loss', on the other hand, conveys a 'sense of loss' based on cultural concepts and beliefs, being those acknowledged and observed by all of the members of the claim group.

As Justice Edelman explicitly stated in the Obiter, 'cultural loss' is based upon the 'cultural value' of the group's native title rights and upon the cultural significance of the land (*Northern Territory v A. Griffiths* 2019:271). As stated by his Honour, compensation for the loss of that cultural value or significance is not "dependent upon the particular subjective distress or mental suffering" arising from the deprivation of rights (loc. cit.). Moreover, as stated in the Obiter, Justice Edleman made it quite clear that, although the primary judge spoke of the compensation to the claim group for "hurt feeling", he understood this expression to be "a description of an injustice" rather than a reference to the mental state of the claimants after extinguishment (ibid:313). As Justice Edleman explained, "the loss of cultural value is not a measure of a mental state" (ibid:314).

In stating that compensation "is not about hurt feelings" (ibid:154), and in characterizing these feelings as a form of "subjective mental suffering" (ibid:273), the High Court has made it quite clear that they not only regard these feelings as legally immaterial to the issue of compensation for cultural loss, but that they also viewed emotions, in somewhat Jamesian terms, as referring to "pre-social subjective and private states" (see Myers 1988), rather than seeing them as cultural concepts, as indicated by the work of Fred Myers, and as discussed by the expert anthropologists in the Timber Creek case. The High Court's views about 'feelings', as relating to the inner, private and subjective world of an individual, clearly signals to anthropologists that we have some way to go to influence commonsense ideas about emotions as universal, and overcome traditional mind-body dualisms.

Thus, contrary to the suggestion by some anthropologists that, post 2016, we should focus our research on the emotional impacts of compensable acts, the 2019 High Court judgment has sent a very clear message to practioners that, in future compensation claims, the focus of our investigations should be upon the cultural value accorded rights and the cultural significance ascribed to land, by Indigenous people. The High Court has provided us with some idea as to what cultural value and its loss means for anthropologists researching compensation claims. As stated in the Obiter, compensation is linked to the cultural "value of the loss of attachment to country" and the loss of the right to "live on, and to gain spiritual and material sustenance from the land" (*Griffiths* 2019:312). With this renewed emphasis upon Aboriginal connection to country, for some anthropologists, this represents more familiar territory, than delving into the emotional life-worlds of others.

To conclude, in speaking of the role and significance of culture in the Timber Creek compensation case, one could say that the High Court has unwittingly adopted a Boasian approach to characterizing the connection which Indigenous people have with land, and, in doing so, differentiating compensation claims under the Native Title Act from so-called 'conventional cases' of compensation (ibid:303). With this emphasis upon 'culture', the High Court has certainly caught up with late nineteenth-century anthropological ideas explaining human difference and, in many respects, this new emphasis can be seen as a corrective to the definition of indigeneity in the Native Title Act, which is based upon the notion of 'race'.

Finally, the anthropologist, Roy Wagner, once said that we can define an anthropologist as "someone who uses the word culture habitually" (Wagner 1975), suggesting that, in the study of 'cultural loss', anthropologists might have something useful to say about the cultural values and significations of other people.

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