Lost in Translation

When " No" Means "Yes"

A paper by

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"24 The right to a hearing is a vain thing if the [applicant for refugee status] is not understood.": Gonzales v Zurbrick 45 F.2d 934 at 937 (6th Cir 1930). In this country, the function of an interpreter in courts and tribunals is to convey in English what has been said in another language (and vice versa). The function of an interpreter in the Tribunal (as in a court) is to place the non-English speaker as nearly as possible in the same position as an English speaker. In other words, an interpreter serves to remove any barriers which prevent or impede understanding or communication: see Gradidge v Grace Bros Pty Ltd (1988) 93 FLR at 425 per Samuels JA. An interpreter provides the means for communication between the applicant, the Tribunal and other participants in the Tribunal hearing, in cases where the applicant's own linguistic capacities are not, on their own, sufficient to that end.

25 Notwithstanding that Kitto J described an interpreter as "a bilingual transmitter" or "a translating machine" (in Gaio v The Queen [1960] HCA 70; (1960) 104 CLR 419 at 430-431), interpretation is no mere mechanical exercise: see, for example, Michael B Shulman, "Note: No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants" (1993) 46 Vand. L. Rev. 175 at 177. Interpreting reliably involves both technical skill and expert judgment. See, for example, Kenneth Polack and Anne Corsellis, "Non-English speakers and the criminal justice system - Part 2" New Law Journal, 30 November 1990, at 1676; and Commonwealth Attorney-General's Department, Report on Access to Interpreters in the Australian Legal System, (AGPS Canberra, April 1991) para 5.2.1.

26 Perfect interpretation may, moreover, be impossible. As Ludmilla Robinson observed in Handbook for Legal Interpreters (Law Book Co Ltd, 1994) at 98 "[v]ery rarely is there an exact lexical correspondence between the two languages being used." Schulman writes at 46 Vand L. Rev. 177:

> *No matter how accurate the interpretation is, the words are not the defendant's nor is the style, the syntax, or the emotion. Furthermore, some words are culturally specific and, therefore, are incapable of being translated. Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony. [citations omitted]*

Nonetheless, some interpretations will be better than others, and a particular interpretation may well be less than perfect yet acceptable for the Tribunal's purposes. How bad must an interpretation be to render reliance on it reviewable error? By what criteria is the quality of an interpretation to be assessed?"[1]

It is fair to say that "*perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony*"? If this statement is true, what measures must a Court take to ensure that the witness is not only heard, but correctly understood? Is there a real or perceived danger that interpreters may

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1 Per Kenny J in *Perera v Minister for Immigration & Multicultural Affairs* [1999] FCA 507 at paragraphs 24-26.

interpret an answer to a question as "no" when what the witness was in fact trying to convey was "yes"? There is, unfortunately, no simple answer to these questions.

This problem has existed for a long time, as the case of *R v Burke*[2] shows. In that case, the following interesting observations were made[3]:

> *"I may observe, that the question involved in the case is one of considerable importance as affects the administration of justice in those parts of this country where many persons profess not to speak or understand the English language, and are examined in Irish; and it is especially important with reference to cross-examination, the great value of which arises from the demeanour of the witness, and the hesitation or fairness with which he answers questions unexpected by him, and put suddenly to him, and his demeanour while being so cross-examined is powerful with the jury to judge of the credit which they ought to give to his testimony; and it is plain that the value of this test is very much lessened in the case of a witness having a sufficient knowledge of the English language to understand the questions put by counsel, pretending ignorance of it, and gaining time to consider his answers while the interpreter is going through the useless task of interpreting the questions which the witness already perfectly understands. To any one who has been conversant with trials, whether criminal or civil, the importance of this, and the materiality of the fact as to the language in which the witness is to be examined, is so well known that it is unnecessary for me to make any further observations on it."*

Roll the calendar ahead 150 years, and the following comments are found in the case of *Australian Fisheries Management Authority & Anor v Mei Ying Su & Ors*[4]

> *"It would only be in a clear case that the court might disturb a finding of credit where the primary judge has taken into account a number of apparent inconsistencies in the versions of events given by a witness from time to time and has had the benefit of seeing and hearing the evidence: see, for example, Paterson v Paterson (1953) 89 CLR 212; [1953] ALR 1095 per Dixon CJ and Kitto J at CLR 219-25; ALR 1096-100; State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) (1999) 160 ALR 588; [1999] HCA 3 per Gaudron, Gummow and Hayne JJ at [63]; Fox v Percy (2003) 214 CLR 118; 197 ALR 201; 38 MVR 1; [2003] HCA 22; Whisprun Pty Ltd v Dixon (2003) 200 ALR 447; [2003] HCA 48 per Kirby J at [67], and [90]-[100]; Apand Pty Ltd v Kettle Chip Co Pty Ltd (1994) 52 FCA 474 at 496-7; 30 IPR 337 at 356. That is the more so when, as here, the witness has told of events and subsequently gave evidence through an interpreter and the primary judge had the benefit of seeing that evidence given."*

The issue of a Court making findings of fact based in whole or in part on the demeanour of a witness (without the added complication of evidence given through

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2 [1858] 8 Cox CC 44.

3 Per O'brien J. Though in the minority on the particular issue being considered in *Burke*, the comments remain relevant.

4 [2009] FCAFC 56 at paragraph [38].

an interpreter) has received much judicial comment. As Justice McHugh said in *Abalos v Australian Postal Commission*[5]

> *"As I pointed out in Jones v. Hyde (5) when a trial judge resolves a conflict of evidence between witnesses, the subtle influence of demeanour on his or her determination cannot be overlooked. It does not follow that, because her Honour made no express reference to the demeanour or credibility of either Professor Ferguson or Mrs Archer, demeanour or credibility played no part in her findings on the supervision issue. But in any event, no matter how impressive Professor Ferguson's evidence may appear, it cannot claim the consideration of an appellate court to the extent necessary to overcome the advantage which her Honour enjoyed in seeing and hearing Mrs Archer give evidence. There is simply no basis for concluding that, in so far as her Honour preferred the evidence and demonstrations of Mrs Archer to the evidence of Professor Ferguson, she failed to use or palpably misused the advantage which she had of seeing and hearing the witnesses. In any event, her Honour may well have taken the view, not without justification, that Professor Ferguson's evidence on the issue of supervision was too limited and tenuous to outweigh the effect on her of the video cassette and in-court demonstrations given by Mrs Archer."*

Further, in the joint decision of Justices Brennan, Gaudron and McHugh in *Devries and Anor v Australian National Railways Commission and Anor*[6] the following observations were made:

> *"Indeed, the fact that the plaintiff should answer this interrogatory in the terms which he did tends to support the trial judge's conclusion that he has difficulty in understanding questions and properly expressing himself in written English.*
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> *No doubt the inconsistencies between the plaintiff's out-of-court statements and his evidence at the trial were matters which might make a tribunal of fact hesitate to accept his evidence. But the trial judge had the great advantage of seeing the plaintiff in the witness box over several days. This gave the trial judge an incomparable advantage over an appellate court in determining what reliability could be placed on the sworn evidence having regard to the out-of-court statements of the plaintiff. Furthermore, the trial judge accepted the plaintiff's wife as a witness of truth and her evidence confirmed that the plaintiff was fit for work on the morning of 23 January 1985, as did the evidence of the fellow worker who noticed a drastic change come over the plaintiff about 10.30 a.m.*
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> *More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge*

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5 [1990] 171 CLR 167 at 179.

6 [1992-93] 177 CLR 472 at 478-479.

> *"has failed to use or has palpably misused his advantage" or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable".*
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> *The evidence of the plaintiff was not glaringly improbable. Nor was it inconsistent with facts incontrovertibly established by evidence. Indeed, the plaintiff's account received much support from the evidence of his wife and his fellow worker. The learned trial judge dealt in detail with the inconsistencies between the plaintiff's evidence and his out-of-court statements. No ground exists for concluding that the judge failed to use or palpably misused his advantage."*

Before turning to the main topic of this paper, I will pause to give a practical example of the way in which the demeanour of a witness can properly be used to determine if a witness is answering a question with a simple 'yes' or 'no'. I remember this piece of evidence well. It may remind many of you of a piece of script from the English television series *The Vicar of Dibley*! In answer to a relatively simple yes/no question, the witness replied:

> "NO no no no no no no Yes"

Consider those words as they appear above, devoid of any knowledge of the demeanour of the witness, pausing between words, etc etc. Is the answer to the question no, or is it yes? Did the witness conclude with the word yes by way of exclamation to effectively ram home his point that his answer was an emphatic no? Was the witness confused and didn't know how he was answering?

I will now give some context to the answer. The words "NO no no no no no no" started confidently, loud, and grew softer and weaker, and were accompanied by a shaking of the head from side to side which also lessened as the word was repeated. After the last no was said, there was a slight but perceptible pause, including a deep breath by the witness, followed by a nod of the head in conjunction with the spoken word yes. The witness, who had commenced his evidence in confident style, showed real concern in his facial expressions as he repeated the word "no", and a form of relief when he said the word "yes".

My findings as to what this witness actually meant were both very simple and clear to me. Answering the question "yes" was very prejudicial to the witness. Answering no on the other hand, certainly would help his case. Clearly wanting to help his case, the witness wanted to answer "no". However, the witness was also one who had taken the fact of giving evidence under oath very seriously. He did not want to break his oath by lying. Accordingly, each time he said the word "no", he convicted himself more, until finally it became too much for him to bear and he then gave the truthful answer, in my view, of "yes".

I should add for completeness that this testimony did not arise during any rigorous, long or complex cross-examination. Rather, it unfolded in response to a simple question.

I have often asked myself what my findings with respect to the witnesses answer would have been had that evidence been provided through an interpreter. Of course,

in a different linguistic or cultural context, the words may have been said very differently. Add to this the difficulties that an interpreter may encounter in attempting to accurately convey what the witness has said. In this regard, I am particularly mindful of some Eastern European languages in which an exclamation may be said at the end of a sentence to convey both the end of the statement and the force of the view. In such circumstances, would it be unreasonable for an interpreter to translate the words as "NO no no no no no Absolutely No"?

In this context, the observations of Justice Gray in *Kathiresan v Minister for Immigration and Multicultural Affairs*[7] are relevant:

> *"In an area in which cross-cultural communications occur, there is danger in giving too much rein to the "subtle influence of demeanour". The work of tribunals operating under the Act is such an area. The dangers of attempting to assess the truthfulness of witnesses by reference to their body language, where different cultural backgrounds are involved, are well-known. ... The problem is exacerbated even more when evidence is given by way of an interpreter. Judging the demeanour of the witness from the tone of the interpreter's answers is obviously impossible. Judging the demeanour of the witness from the witness's own answers in a foreign language would require a high degree of familiarity with that language and the cultural background of its speakers. It is all too easy for the "subtle influence of demeanour" to become a cloak, which conceals an unintended, but nonetheless decisive bias ...."*

Like comments were made by Kenny J in *Perera v Minister for Immigration & Multicultural Affairs*[8] where His Honour said:

> *"49 A witness whose answers appear to be unresponsive, incoherent, or inconsistent may well appear to lack candour, even though the unresponsiveness, incoherence or inconsistencies are due to incompetent interpretation. In the present case, the incompetence of the interpretation cannot have assisted the Tribunal in making a reliable finding about Mr Perera's credit. It may well be that, by resting its findings as to credit on answers that were poorly interpreted, the Tribunal failed to take advantage of its opportunity to see and hear the witness."*

Throughout my career, I have had many instances when I have had to rely upon the expertise of interpreters. The circumstances vary from that of a formal Court proceeding in Brisbane; sitting cross-legged under a tree in the dust of Borroloola; discussing "culture" on a moonlit night on the sands of Mer, Torres Strait; a student seeking assistance in Siberia; or a Chief of Police asking a question of me during a lecture on official corruption at the Zaporizhya National Technical University in the Ukraine.

My experience tells me this: sometimes, no really means yes. On other occasions, yes clearly means no. Sometimes, a language may contain many different forms of yes or no, and the correct interpretation may actually be something like "sort of"

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7 Federal Court of Australia, 4 March 1998 at 6 (unreported).s

8 [1999] FCA 507 at 49.

"kind of" "a bit" "not really" or a myriad of other possibilities. The interpreter must be acutely aware of not only the technical translation of actual words, but also of the manner in which the technical words are said, particularly if such manner gives rise to alternate meanings. If in any doubt, the interpreter is obliged to seek clarification so as to be sure of the interpretation. Likewise, a Court receiving evidence in such circumstances must take extreme care to ensure that the evidence given through the interpreter is not divorced from the demeanour of the witness. The task is not always an easy one.

About the author:

Paul was appointed to the Queensland Judiciary in March 2000 following an extensive legal career, most notable for his important roles in Mabo No. 1; Mabo No. 2 and Wik. Paul worked extensively with Aboriginal and Torres Strait Islander communities throughout Queensland in the 1980's and 1990's. He is a Harvard trained mediator and negotiator. He was the recipient of a Churchill Fellowship in 1998, and has conducted Visiting Professor duties at Universities in Siberia (Russia), the Czech Republic, and the Ukraine since 2008. Paul is a Fellow of the Centre for International Legal Studies located in Salzburg, Austria.

Paul is currently a Member of the Land Court of Queensland, The Land Court has a specialist jurisdiction involving many and varied aspects of law relating to ownership and use of land, including Compulsory Acquisition, Land Valuation, Mining , Petroleum, Coal Seam Gas, Water Rights, and Indigenous Cultural Heritage.

In addition to his many achievements in the field of law, Paul is also a current delegate to the Australian Olympic Committee and is also President of the Oceania Continent Handball Federation and Handball Australia. He is a delegate to the International Handball Federation.

Paul is also active in social welfare activities, having been a founding director of the welfare organisation Ipswich Assist located in Queensland. He was also a member of the Queensland State Reconciliation Committee in 1999. He is an active member of the Presbyterian Church at both a local and state level. He is married to his wife Debra and has three adult sons.