Communication Breakdown

The Importance of Cultural and Language Awareness in Court

Perth barrister Len Roberts-Smith explores the problems of multi-cultural communication in Court.

In any Court proceeding it is the sworn duty of the tribunal to do justice to the parties, according to the merits of the case and the evidence adduced before it. The extent to which the tribunal can fulfil that duty will often depend on the quality of the communication between the court, witnesses, the parties and their representatives.

That is often difficult enough with English-speaking Australians: it becomes dramatically more difficult - and dangerous - when dealing with litigants, defendants or witnesses whose first language is not English.

The problem is by no means confined to the law. In his article *Informed Consent: A Linguistic Perspective* [1] Robert Eagleson refers to the following interview between doctor and patient:

"Doctor: Have you had a history of cardiac arrest in your family?

Patient: We never had no trouble with the police."

The purpose of this paper is to examine the process of interpretation and to draw attention to some problems of communication which, if not appreciated, may lead a tribunal to act on a wrong understanding of the facts and so be unwittingly diverted from its primary duty to do justice.

First, consider the process of interpreting and the law relating to the use of interpreters. Different languages are not simply different sets of labels for the same things. Likewise, grammatical construction varies from one language to another. The very concepts behind the words may be dramatically different. The way in which words are used often varies widely from one culture to another. An appreciation of all of these considerations is of vital importance to any tribunal called on to assess the credibility of witnesses whose first language is not English and make findings based on the testimony of such witnesses.

The most obvious difficulty is lack of semantic equivalence, i.e. where there is no equivalent word or expression in one language for a word or expression in another. Some excellent examples are given in a seminal article on this topic by Dixon, Hogan and Wiezbicka. [2] They include the following:

"The simple Russian sentence 'Ivan udaril Petra nozom v ruky' (John hit Peter on the arm/hand with a knife) cannot be interpreted into English without additional information because the Russian word 'ruka' corresponds to the English word for both 'hand' and 'arm'."

"In Czech, Bulgarian, Croatian, Macedonian, Polish, Serbian, Slovak and Slovenian, the word for the hand is the same as for the arm and the word for the leg is the same as for the foot."

The legal significance of an evidentiary misunderstanding based on this purely-language difficulty, to a workers compensation claim, a personal injuries case or a criminal trial, is obvious.

Even words that are semantically close, but which have different emotional connotations may present major difficulties. Dixon *et al.* give the example of the simple geographical or political term "'Soviet", which has no equivalent in Polish. [3] Instead, there are two possible Polish words: the first "radzieki", is a word introduced and fostered by the post-Second World War Polish Government and implies love and respect for the Soviet Union; the second word, "sowiecki", implies the exact opposite. Use of the inappropriate word could provoke an unfortunate outburst or similar reaction; with the danger that a judge or magistrate, who did not realise what had in fact prompted it, might construe that outburst as in some way reflecting adversely on the credibility of the witness.

In Italian the sentence, "Lui e venuto dopo di me", literally and correctly interpreted is, in English 'He came after me'. But while the Italian version can mean only after in terms of later in time, the English version is ambiguous: it may mean either later in time or "He chased me". Again, the unrecognised incorrect use in evidence, for example, could be crucial to the outcome of a case.

The simple English sentence "I went to see a friend" cannot be interpreted into some languages without additional information. An interpreter from English to Serbian, Russian or Italian would have to know whether the friend was male or female to interpret it at all; but an interpreter who seeks that information is likely to be told not to engage in a conversation with the witness!

In England and Australia the morning finishes and the afternoon starts at 12 o'clock. But in Polish the morning "rans", finishes around 11 o'clock and the afternoon, "popoudaie" starts later at approximately 3.30 p.m. It takes little imagination to see the potential for a miscarriage of justice when the essential witness to an accused's alibi defence in a serious criminal case is asked whether she or he saw the accused in the morning on the day of the offence, the critical time in fact being, say, 11.30 a.m.; and the problem is, the English speakers in court will never realise what has happened in the interpretation.

The last illustration was given by E.G. Cunliffe, Secretary and Director of Research of the Australian Law Reform Commission, in a most useful paper presented during Law Week in New South Wales in 1984. [4] He also pointed out colloquialisms, whether in English or of some other language, cause their own problems and noted a case in which a defendant was involuntarily committed to a psychiatric institution for observation because, when asked by a magistrate how he felt, he used an expression that literally interpreted meant, "I am God of Gods". In fact (unknown to the magistrate) this was a colloquialism in his language with a meaning in English similar to "I feel on top of the world". [5]

The basic point is, it is not simply words or grammatical constructions that have to be interpreted, but the concepts and ideas, the meaning, behind them. A sentence is, after all, no more than an expression of a single thought. Interpreters often have to seek further information before a reasonable interpretation is even possible. That is when we see lawyers, magistrates and judges who do not understand the process, insisting (usually with exasperation) that the interpreter "just interpret

exactly what the witness has said: don't have a conversation with him".

Interpretation is not a simple technical exercise; it is a difficult and sophisticated art. It requires (on the part of the interpreter) an awareness and understanding not only of the respective languages, but of the social, legal and cultural differences of the two communities. To the extent that interpreters do not have this awareness and understanding, their ability to properly interpret will be impaired.

I turn to the law: Article 14(3)(F) of the 1966 *International Covenant on Civil and Political Rights*, to which Australia is a signatory, stipulates that in criminal cases every one should "have the free assistance of an interpreter if he cannot understand or speak the language used in Court." This, however, applies only to criminal cases. Even then, it is a matter for the judge or magistrate to decide in his or her discretion whether or not the accused can "understand or speak" the English language. That is usually done by a series of questions along the lines of "where do you live?", "how old are you?"?, "how long have you been in Australia?", and so on, which can generally be answered reasonably well. It is quite a different thing altogether for the accused then to be able to understand the whole course of the evidence and addresses; and to do so sufficiently well to defend him or herself or give proper instructions to counsel. [5]

The decision whether or not a witness should have an interpreter must be made in the light of the fundamental proposition that the accused must have a fair trial [6] to which I suggest should be added "and be seen to have had a fair trial". The position is even worse in civil cases. There is clearly no right to the use of an interpreter and courts have generally displayed a marked reluctance to allow them where it appears that the party or witness have some understanding of English. [7]

It is often suggested that the interests of justice are better served by having a partially-fluent accused or witness cross-examined in English than by allowing him or her an opportunity to think about the answer before the question has been interpreted. It is beyond the scope of this paper to deal with that argument, and it has been well answered elsewhere. [8]

It has been asserted, however, that "there must be a stronger probability of injustice occurring when interpreters are not used than when they are used unnecessarily" and that is a view with which I respectfully agree. [9]

Interpreters are often used by the police when interviewing suspects. It is sometimes not appreciated by the interpreter that if the case is defended, he or she will have to be called as a witness for the prosecution. That is because what the interpreter has said to the interviewing officer in English would otherwise be hearsay. It becomes admissible only if the interpreter testifies that he or she understood both languages, interpreted properly both ways, added nothing and left out nothing. The High Court has held in *Gaio v. R* (1960) 104 CLR 419 that once these conditions are satisfied the interviewing officer can give evidence of the accused's answers as interpreted into English because the interpreter has acted merely as a conduit or interpreting device.

The judgments in *Gaio* have often been criticised as demonstrating the classic misunderstanding of the process of interpretation. To my mind such criticism is ill-founded. The High Court was not attempting to analyse the process from a language point of view at all; the Court was concerned simply to explain in terms of legal principle why such testimony did not offend the evidentiary rule against hearsay, as a matter of law.

The fact that a statement or record of interview is typed in English (which the accused does not understand) but is nonetheless signed or otherwise adopted by him/her, will not render it inadmissible. Indeed (subject to any other exclusionary rules), it will be admissible as a document if read over to the accused and adopted by him/her, through an interpreter. [10] This, of course, is only the principle of law as an admissibility, it does not go to the weight or reliability of such a document, which may well turn on the words actually used by the accused in his/her own language. Whatever the legal principle therefore, it is always best, where possible, to have the interview recorded in the accused's language, whether or not an English translation is provided.

Judges and magistrates presiding over criminal cases in which interpreters have been used by police should be aware of the possibility of incorrect interpretation having occurred during the interviews. It will no doubt be said that this is the duty of counsel for the accused, and so it is. But it is unfortunately too often true that neither the accused nor the court is well served by counsel in this regard. Many have no doubt also experienced cases in which a cross-examination on a supposedly inconsistent prior statement or record of interview is in fact based on nothing more than misinterpretation or lack of communication rather than anything sinister.

It may often happen that the word used in an accused's own language has more than one possible meaning in English. This can be a very real danger where an interpreter in a police interview, for example, has used an English word that reflects badly on the accused, whereas another English word (also appropriate semantically) may perhaps have quite a different meaning, which, indeed, may be the meaning intended by the accused.

Once again, where the court interpreter interprets the accused's meaning properly, the court is then likely to be confronted with a cross-examination directed to persuading it that the accused had changed his/her story between the police interview and giving evidence. This difficulty can generally be overcome only if the first interpreter has made a record of what was said *in the suspect's own language*, as well as the English language version.

Other Aspects of Communication

Against this background, lightly sketched as it is, I turn now to other aspects of communication that may have an effect on a court's ultimate disposition of a case.

A judicial officer with a proper understanding of the importance of language and cultural differences will be able to evaluate the extent to which a witness's demeanour, language and behaviour are attributable to general characteristics of that person's ethnic group rather than to his or her individual

personality.

Such factors can range from apparently coarse language (when the English-swearing version reflects no more than verbal emphasis common to the client's culture) to an impression of deceit or deviousness (when, for example, the Vietnamese client persistently avoids looking the lawyer in the eye, that being a sign of respect in his own culture and so demonstrating no more than good manners), to complete misunderstanding when the same Vietnamese client answers "Yes" (that being, again, a mark of politeness, usually meaning "'Yes, I am listening to..." or "have heard your question").

Reaction and attitudes to police and the courts can be markedly different. Reactions are often perceived by monolingual and monocultural Australians as characteristics of an individual, that is, in the person being difficult, unreasonable, aggressive and so on, when in reality they are no more than cultural characteristics common to the particular ethnic group and conditioned by different concepts and understanding. For example, in many European countries the police have an overtly political role and are given to arbitrary and brutal behaviour against which there is no legal safeguard. The courts in some countries are merely organs of political control and repression. People who have lived their lives under such systems will have quite different reactions to police and the courts than will Australians from other cultural backgrounds. It is necessary for lawyers and judicial officers to understand these influences.

Non-Verbal Communication

Body-language is a term that is currently very much in vogue. Those who think they have just discovered body language would no doubt be surprised to learn that lawyers have been aware of its importance for centuries. Lawyers' talk of the importance of a judge or tribunal being able to observe the demeanour of witnesses, is of course, simply another way of talking about body-language.

Like verbal communication, body language (non-verbal communication) also differs from culture to culture.

With Arabs emotions are controlled publicly by presenting a smiling face and using stereotyped utterances, but violent expression of emotion, i.e. screaming, is a sign of sincerity. Appearance is important to Arabs: they are sensitive to criticism.

Danes have a very small personal zone; Greeks feel ignored if they are not stared at in public; Italian youths and many Asian males hold hands; middle-Eastern voices are very loud but, to them, this means they are sincere.

For Vietnamese, in social, as in family life, the suppression of hostility, aggression and other negative feelings is encouraged, and flexibility, harmony and readiness to compromise are highly valued. In the wish to please another person a Vietnamese may say, "yes" without meaning it. The key to understanding lies in how committed or reluctant the person seems when the answer is given.

Smiling is a common social response, though sometimes hard to interpret since Vietnamese may smile with joy but also to hide confusion, ignorance, fear, anger, shyness, contrition, bitterness or disappointment.

Direct eye contact with "superiors" may sometimes be avoided as this could be considered challenging. A child who keeps his/her gaze fixed on the ground may be trying to show respect, not disrespect.

A lack of understanding of these factors is likely to cause a judge, jury or magistrate to draw incorrect conclusions about the veracity and credibility of a witness from his or her observed demeanour in court of the witness-box. Of course, injustice can occur both ways. These problems of interpretation or communication will not always work against an accused; they may work just as much against the prosecution. A wrong acquittal in this sense is as much unjust as a wrong conviction.

In criminal cases, cultural considerations (even apart from the problem of interpretation) can be vital. For example, what could not possibly amount to provocation of the reasonable white Anglo-Saxon Australian may well do so for someone from a European or other background. [12]

The Interpreters

Interpreters are a resource available to courts and tribunals to enable the latter to properly perform their judicial duty. As with any other resource, the court must have the ability to perceive when the need to use an interpreter arises. That will surely be when there is any real risk of a lack of full understanding by either the court or the witness. This risk is often greatest when the witness can speak some English. The tendency, inevitably, is to assume a greater degree of understanding than actually exists. Much will also depend on the circumstances, the nature of the occasion and the significance of the particular matter. In cases of doubt it is always wise to use a competent and accredited interpreter.

The use of family members or people not trained as interpreters should be avoided. The use of a family member can significantly inhibit a witness from disclosing to the court information that the witness may not want the family member to know.

Untrained interpreters, far from facilitating communication, can cause even greater problems. Their language skills may be deficient, they will often not have the necessary appreciation of relevant cross-cultural differences, they do not have interpreting skills (as opposed to merely a language ability), their choice of words is imprecise and can be misleading and they generally have a tendency to flavour the interpretation with their own views or perceptions of the facts.

The major hazard from the court's point of view, is that where one or more of these factors is present an dthe interpretation is inadequate or simply wrong, the court will not be aware of that.

There are other, less subtle, problems with using unqualified interpreters.

The proper use of interpreters requires specific skills and expertise. There is a list of excellent suggestions for users of interpreters appended to a most useful article by Crouch [13] and I would strongly recommend anyone frequently working with non-English-speaking people to obtain a copy.

When speaking, the first person must always be used, this

is particularly important in court. Thus questions must be addressed directly to the witness, not to the interpreter. The proper form is "What did you do next?" and Never (to the interpreter): "Ask him what he did next". The latter is a short road to confusion. The court must be receptive to comment from the interpreters on any difficulties being experienced. It is necessary to use short sentences so the interpreter is able to interpret them in a sensible way. Difficult terms, or legal jargon, may have to be explained either to the interpreter or the witness, or both. The interpreter should never be asked to comment on a witness's veracity or to express any personal opinion on the merits of the matter (which, of course, is not something likely to occur in court anyway); although he or she should be asked to indicate and explain any relevant language or cultural aspects that arise.

Conclusion

I hope this necessarily brief examination of the process of interpretation has been helpful in drawing attention to the importance of cultural and language awareness when dealing in a forensic context with people whose first language is not English.

We know that interpretation is not a simple robotic exercise, but a complex and demanding task requiring far more than just a language ability. In addition, it requires skill, a knowledge and understanding of both cultures and an ability to deal effectively with all manner of people.

Whether or not a judge or magistrate is able to properly fulfil his or her judicial duty will often depend, in no small measure, on the extent to which witnesses are able to communicate properly to the court. A judicial officer who has a genuine appreciation of the language and cultural considerations that arise in a particular case, will be at pains to ensure that anything that will improve that communication and so provide the court with a proper basis for fact-finding and assessing credibility and the value of the evidence generally, is encouraged, and that anything tending to impair or stand in the way of effective communication is avoided. ❑ Len Roberts Smith

END NOTES

1. Eagleson R. *Informed Consent: A Linguistic Perspective.* Medicine, Science and the Law Symposia, 1986, Law Reform Commission of Victoria.
2. *Interpreters: Some Basic Problems*, Dixon, Hogan and Wierzbicka, (1980) *Legal Service Bulletin*, p.162.
3. ibid., at p.163.
4. Paper *Interpreter Useage in the Legal System* delivered to a NSW 'Law Week' Seminar on 3 May 1984.
5. See also *R. v. Lee Kun* (1916) 1 KB 337, where an appeal by a non-English speaking Chinese against conviction for murder was dismissed on the ground there was no substantial miscarriage of justice when the evidence given on his trial was not interpreted to him, because that had been the same as the evidence given on the committal - which had been interpreted.
6. *Johnson* (1986) 25 A. Crim. R. 433 (CCA, Qld).
7. See *Harvey v. Fuld* (1986) 2 All 55; *Filios v. Moreland* (1963) SR (NSW) 331 and *Dairy Farmers Co-op v. Aquilina* (1963) 109 CLR 458.
8. *Australian Government Commission of Enquiry into Poverty, Migrants and the Legal System*, Ch.5, Courts esp, at p.36; and *Interpreters in the Legal System* by E.G. Cunliffe, supra.
9. *Migrants and the Legal System*, supra, at p.36.
10. *R. v. Lambe* (1791) 2 Leach 552; 168 ER 379; *Curtis v. The Queen* (Unreported) Tas. CCA, S.No. 12/1972 List 'A', *R. v. Zema & Jeanes* (1970) VR 566; *Fande Balo v. The Queen* (1975) PNGLR 378.
11. The use (or non-use) of interpreters in police interviews with non-English-speaking suspects may be a ground for subsequent judicial exclusion of any confessional material so obtained. See e.g. *R. v. Anunga* (1976) 11 ALR 412; *Gudabai v. R* 52 ALR 133 and *Interrogation of Australian Aborigines* by Frank Bates, 8 *Crim. L.J. 373.*
12. *R. v. Dincer* (1983) VR 460. The striking difference in possible outcomes under a criminal code similar to those in Queensland and Western Australia but applying a different cultural yardstick can be observed in Papua New Guinea. In *Regina v. Yanda-Piaua & Ors.* (1967-68) PNGLR 482, having held that in determining whether provocation exists so as to reduce wilful murder to manslaughter. Mann CJ concluded that a blow in the face with a fist was sufficient to constitute provocation reducing murder to manslaughter even where the retaliation consisted of an attack with an axe committed with such violence as to evidence a plain intention to kill. His Honour based this conclusion on a finding that the ordinary peaceful citizen living in the cultural environment of the accused could be expected, almost to the point of certainty, to react in such a manner. In *Regina v. Noboi-Bosai & Ors.* (1971-72) PNGLR 271 Prentice J held that the seven accused who had eaten the body of a recently-killed native from another village were not guilty of improperly or indecently interfering with a dead body because cannibalism was an accepted practice in the area and that "in assessing propriety and decency of behaviour in relation to corpses in the Gabusi area, (the court) should endeavour to apply the standards.....of the reasonably primitive Gabusi villager of Dadalibi and Yulabi in early 1971' (p.284).
13. Crouch, A., *Interpreters, Translators and Services: Towards a Better Understanding* CHOMI Reprints No. 398, Clearing House on Migration Issues, 133 Church St., Richmond, Vic., 3121, and see generally, *The Current Situation in Legal Interpreting in Australia*, a paper for the Interpreting and the Law Conference, Sydney, July 1988, presented by the Victorian Ethnic Affairs Commission; and *Migrants and the Australian Legal System* by J.A. Kiosoglous, SM, a paper prepared by the Australian Institute of Multicultural Affairs.

Not to the Point

Starke J. "This is an appeal from the Chief Justice, which was argued by this Court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties. The evidence was taken and the matter argued before the Chief Justice in two days. This case involves two questions, of no transcendent importance, which are capable of brief statement, and could have been exhaustively argued by the learned counsel in a few hours." *(Federal Commissioner of Taxation v. Hoffnung & Co. Ltd. (1928) 42 C.L.R. @ 62).*