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# Appeals on incompetent interpreting

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*Empirical research has found that inadequate interpreting can have a significant impact on the outcomes of legal cases. While most interpreting inaccuracies go unnoticed in bilingual cases, with unknown consequences, some (possibly the most salient ones) have led to appeals. This article analyses the outcomes of 50 court and tribunal appeals on the grounds of incompetent interpreting from New South Wales, the Northern Territory, Queensland, Victoria and Western Australia between 2006 and 2008. The findings reveal that even when the performance of interpreters during a trial or hearing is questioned on appeal, the higher courts are not convinced by the linguistic arguments regarding the impact of poor interpretation on the witness's or applicant's credibility or the outcome of the case, unless the interpreting errors are directly related to an issue of specific significance to the case and constitute jurisdictional error. As a result, this ground of appeal rarely succeeds.*

## INTRODUCTION

No amount of swearing can guarantee high quality interpreting from an interpreter who does not have the necessary competency.<sup>1</sup>

Government reports spanning over 20 years have highlighted the need for specialist training for legal interpreters in Australia.<sup>2</sup> Academics and practitioners with an interest in the professionalisation of community interpreting have long been concerned about the avenues of entry into the profession, the national accreditation system, and the lack of compulsory specialist training for interpreters working in the legal system. They have been equally concerned about the lack of understanding of many judges, legal practitioners and police officers about the nature of language and the interpreting process, and the consequences of not employing competent interpreters at all levels of the judicial process.<sup>3</sup> Despite these concerns and all the evidence supporting the need for improvement in legal interpreting standards, little has changed in the past 35 years.

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<sup>1</sup> Berk-Seligson S, *The Bilingual Courtroom: Court Interpreting in the Judicial Process* (Chicago University Press, Chicago and London, 2002), p 204.

<sup>2</sup> Australian Department of Immigration, *Report on the Survey of Interpreting and Translating Needs in the Community* (Department of Immigration, Survey Section, Canberra, 1973); Jakubowicz A and Buckley B, Commission of Inquiry into Poverty, *Migrants and the Legal System* (Australian Government Publishing Service, Canberra, 1975); Committee on Overseas Professional Qualifications (COPQ), *The Language Barrier* (Australian Government Publishing Service, Canberra, 1977); Galbally F (chair), Review of Post-Arrival Programs and Services for Migrants, *Migrant Services and Programs* (Australian Government Publishing Service, Canberra, 1978); Australian Institute of Multicultural Affairs (AIMA), *Evaluation of Post-arrival Programs and Services* (Council of the Australian Institute of Multicultural Affairs, Melbourne, 1982); Senate Standing Committee on Education and the Arts (SSCEA), *A National Language Policy* (Australian Government Publishing Service, Canberra, 1984); Commonwealth Attorney General's Department (CAGD), *Access to Interpreters in the Australian Legal System* (Australian Government Publishing Service, Canberra, 1991); Women's Legal Resources Centre, *Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women* (Women's Legal Resources Centre, Sydney, 1994).

<sup>3</sup> Cooke M, "Interpreter Ethics Versus Customary Law: Quality and Compromise in Aboriginal Languages Interpreting" in Hale S and Ozolins U (eds), *Critical Link 5. Quality in Interpreting: A Shared Responsibility* (John Benjamins, Amsterdam and Philadelphia, 2010) p 85; Benmaman V, "Appellate Court Decisions Involving Interpreter-related Issues" (1999) 28(3) *ATA*



Most enter the interpreting profession by sitting a one-off generalist NAATI<sup>4</sup> test, with no theoretical background or interpreting training required.<sup>5</sup> Therefore, there may be little difference between a NAATI accredited interpreter and an educated bilingual. Research into court interpreting from Australia and other parts of the world clearly indicates that untrained interpreters are unaware of the impact of many subtle changes in their renditions. This is due to a lack of awareness of the significance of the strategic use of courtroom questions and of the influence of their interpreting choices on the witness responses and on the jurors' or bench's evaluations of witnesses.<sup>6</sup>

While the origins and initial *raison d'être* of NAATI may help explain the current situation, they do not justify it. NAATI was originally set up as a provisional body that would eventually allow a self-regulating professional organisation to take on the responsibility for accreditation. It was envisaged that, in time, all future interpreters would enter the profession upon completion of relevant degree courses.<sup>7</sup> However, these objectives were never met. Significantly, Dueñas Gonzalez et al compared the United States Federal Court interpreting specialist certification examination with NAATI's generalist interpreter test and concluded that:

... the test should not be used to examine court interpreters for three reasons: (1) it does not reflect the rigorous demands of the three modes used in judicial interpreting: simultaneous (unseen or spontaneous), legal consecutive and sight translation; (2) it does not test for mastery of all the linguistic registers encountered in the legal context, ... and (3) it would not be a valid instrument to determine ability in judicial interpretation because its format, content, and assessment methods are not sufficiently refined to measure the unique elements of court interpreting.<sup>8</sup>

*Chronicle* 30; Benmaman V, "Interpreter Issues on Appeal" (2000) 9(4) *Proteus*, [http://www.najit.org/members\\_only/proteus/v9n4/benmaman\\_v9n4.htm](http://www.najit.org/members_only/proteus/v9n4/benmaman_v9n4.htm) viewed 17 March 2009; Berk-Seligson S, "The Impact of Court Interpreting on the Coerciveness of Leading Questions" (1999) 6(1) *Forensic Linguistics* 30; Berk-Seligson S, "Interpreting for the Police: Issues in Pre-trial Phases of the Judicial Process" (2000) 7(2) *Forensic Linguistics* 212; Framar I (Language Access Consultants), "NVTC Panel Speech" (Speech delivered at the Federal Interagency Conference on Limited English Proficiency in Bethesda, Maryland, United States, 15-16 March 2007), <http://www.languageaccess.us> (Resource pages) viewed 28 September 2009; Hale S, *The Discourse of Court Interpreting: Discourse Practices of the Law, the Witness and the Interpreter* (John Benjamins, Amsterdam and Philadelphia, 2004); Hale S, "The Challenges of Court Interpreting. Intricacies, Responsibilities and Ramifications" (2007) 32(4) *Alternative Law Journal* 198; Laver N, "Interpreters and the Judicial Process" (2007) 61(1) *International Bar News* 20, <http://www.languageaccess.us> (Resource pages) viewed 2 September 2009; Martinsen B and Dubsloff F, "The Cooperative Courtroom. A Case Study of Interpreting Gone Wrong" (forthcoming) 12(1) *Interpreting*; Morris R, "Images of the Interpreter: A Study of Language-switching in the Legal Process" (Unpublished PhD dissertation, Lancaster University, 1993); Morris R, "Eichmann vs Demjanjuk or Plus ç'est la même chose, plus ça change..." (Paper presented at the AICC Court and Legal Interpreting Seminar in The Hague, Netherlands, 6 July 2001), <http://www.sites.google.com/site/ruthmorris13> viewed 9 July 2009.

<sup>4</sup> National Accreditation Authority for Translators and Interpreters.

<sup>5</sup> National Accreditation Authority for Translators and Interpreters (NAATI), *Accreditation by Testing: Information Booklet* (2009), [http://www.naati.com.au/pdf/Booklets/Accreditation\\_by\\_Testing\\_booklet.pdf](http://www.naati.com.au/pdf/Booklets/Accreditation_by_Testing_booklet.pdf) viewed 2 August 2009.

<sup>6</sup> Berk-Seligson S, *The Bilingual Courtroom. Court Interpreting in the Judicial Process* (Chicago University Press, Chicago and London, 1990); Berk-Seligson (1999), n 3; Berk-Seligson (2002), n 1; Hale S, "Interpreters' Treatment of Discourse Markers in Courtroom Questions" (1999) 6(1) *Forensic Linguistics* 57; Hale S, "How are Courtroom Questions Interpreted? An Analysis of Spanish Interpreters' Practices" in Mason I (ed), *Triadic Exchanges* (St Jerome, Manchester, 2001) p 21; Hale (2004), n 3; Hale S, "Themes and Methodological Issues in Court Interpreting Research" in Hertog E and van der Veer B (eds), *Linguistica Antverpiensia. Taking Stock: Research and Methodology in Community Interpreting (5/2006)* (Hoger Instituut voor Vertalers and Tolken, Antwerp, 2006) p 205; Hale S, *Community Interpreting* (Palgrave Macmillan, Hampshire, 2007); Krouglov A, "Police Interpreting: Politeness and Sociocultural Context" (1999) 5(2) *The Translator* 285; Mason I and Stewart M, "Interactional Pragmatics, Face and the Dialogue Interpreter" in Mason I (ed) *Triadic Exchanges* (St Jerome, Manchester, 2001) p 51; Rigney A, "The Pragmatics of Question/Answer Structures in a Bilingual Courtroom" (Paper presented at the Conference of the National Association of Judiciary Interpreters and Translators in Seattle, Washington, United States, 1997); Rigney A, "Questioning in Interpreted Testimony" (1999) 6(1) *Forensic Linguistics* 83.

<sup>7</sup> NAATI, *Levels of Accreditation for Translators and Interpreters* (AGPS, Canberra, 1978).

<sup>8</sup> Dueñas Gonzalez R, Vásquez V and Mikkelsen H, *Fundamentals of Court Interpretation. Theory, Policy and Practice* (Carolina Academic Press, Durham, North Carolina, 1991) p 91.



More recently, Roberts-Smith QC indicated that “there are serious limitations to NAATI accreditation and none of the accreditation levels offered by this body involve specialist examination or legal interpreting accreditation”.<sup>9</sup>

The very structure of the NAATI accreditation system does not lend itself to specialisations: both the old levels and the current nomenclature<sup>10</sup> show a lack of understanding of the different types of interpreting. Rather than dividing accreditation examinations into different specialisation areas (eg generalist, conference, medical and legal) it created an arbitrary hierarchical system, with conference interpreting being at the top of the hierarchy. The myth that conference interpreting requires higher language or interpreting skills is thus perpetuated by NAATI.

Conference Interpreter: This is the advanced professional level and represents the competence to handle complex, technical and sophisticated interpreting. Conference Interpreters practise both consecutive and simultaneous interpreting in diverse situations, including at conferences, high-level negotiations, and court proceedings. Conference Interpreters operate at levels compatible with recognised international standards, and may choose to specialise in certain areas.<sup>11</sup>

The above description epitomises the prevalent lack of understanding about the specialised nature of court interpreting, where the skills are different from – not subordinate to – conference interpreting, and therefore the two should not be mixed. NAATI’s definition of a conference interpreter also states that such a level is required to interpret in court proceedings. There are a number of contradictions embedded in this definition. First is that there is no NAATI accreditation examination for conference interpreting and, therefore, under this definition, no interpreter in Australia would be able to qualify for this type of interpreting. Second, the theory that underpins court interpreting is very different from the theory that underpins conference interpreting. Conference interpreters are trained to improve on the original speakers’ renditions to make them more coherent and more understandable. Such a practice would constitute a major inaccuracy in court interpreting, where the style of the testimony is as important as its content. Nevertheless, we argue that the working conditions enjoyed by conference interpreters (working in teams of two, in sound-proof booths, with ample preparation materials and good remuneration) should be extended to court interpreters.

## THE STUDY

This article reports the results of a study that was conducted by the first author as part of her Bachelor of Arts (Honours) degree and supervised by the second author at the University of Western Sydney. The aim of the study was to analyse the consequences of the unregulated interpreting profession in the Australian legal system over the years as reflected in the outcomes of 50 court and tribunal appeals on the grounds of incompetent interpreting. The appeals originated in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia between 2006 and 2008. The study attempted to answer the following questions: What are the grounds for incompetent interpreting stated in the appeals? What have been the outcomes of each of the appeals? How is competent interpreting defined in the rulings? And, what underlying perception of language and interpreting issues do the judges’ discourse practices represent?

## Methodology

A LexisNexis nationwide search was conducted to find appellate cases in which the standard of interpreting was cited as one of the grounds for appeal. The initial search was done in March 2009 and went from December 2008 back to 1991, the year in which the *Access to Interpreters in the Australian Legal System* report was published.<sup>12</sup> The cases were searched by using the key word “interpreter”.

<sup>9</sup> Roberts-Smith L, “Forensic interpreting – Trial and Error” in Hale S and Ozolins U (eds), n 3, p 32.

<sup>10</sup> The five-tier system was changed to “Paraprofessional Interpreter” (old level II), “Interpreter” (old level III), “Conference Interpreter” (old level VI), “Senior Conference Interpreter” (old level V); NAATI, “Recommendations for Changes to NAATI Levels System” (1992) 5(4) *NAATI News: Newsletter of the National Accreditation Authority for Translators and Interpreters* 8.

<sup>11</sup> NAATI, *Accreditation Levels*, <http://www.naati.com.au/at-accreditation-levels.html> viewed 21 July 2009.

<sup>12</sup> CAGD, n 2.



LexisNexis is the same database used by Berk-Seligson in her analysis of 49 United States appellate cases from 1965 to 1999.<sup>13</sup> The Australia-wide search revealed a total of 279 cases that met the search's criteria. Added to these were eight cases found through the Australasian Legal Information Institute (AustLII) website that had not come up in the LexisNexis search. Of a total of 287 appeals that emerged through the combination of both search procedures, 119 proved to be relevant. This is because the criteria applied was restricted to appeals in which the official interpreter's standard of interpreting at the hearing or trial was in question and did not include cases in which one of the following points was the basis for a ground of appeal:

- no interpreter was booked for the hearing, trial or interrogation when the person involved needed one;
- an interpreter in the wrong language or dialect was booked;
- the record of interview was conducted through bilingual police officers, family members or other ad hoc interpreters.

The data used for the analysis is made up of criminal appeals and appeals against Refugee Review Tribunal decisions. While the grounds for incompetent interpreting stated in these two types of appeals are not necessarily different, two representative illustrative examples of grounds for appeal are provided in Table 1 below.

**TABLE 1 Illustrative examples of grounds for appeal**

| Example of grounds stated in criminal appeals                                                                                                  | Example of grounds stated in appeals against Refugee Review Tribunal decisions                                                                             |
|------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The trial miscarried as a result of the poor quality of the interpreting service provided to the applicant by the court-appointed interpreter. | The standard of interpretation at the tribunal hearing was so inadequate that the applicant was effectively prevented from giving evidence at the hearing. |
| The deficiencies in interpretation were such that the applicant was unable to give an effective account of facts vital to his defence.         | Whether errors made by the interpreter at the tribunal hearing were material to the conclusions of the tribunal adverse to the applicant.                  |

**Analysis**

Given the limitations of this small-scale study, the data had to be further reduced. Of the 119 appeals from 1991 to 2008, the most recent 50, from 2008 to 2006, were selected for study. Table 2 shows the number of appeals allowed and dismissed in this period. We can see that appeals on the basis of incompetent interpreting increased by 27.7% between 2007 and 2008.

**TABLE 2 Appeals allowed and dismissed in the period under study**

| Date | Total appeals | Allowed | Dismissed |
|------|---------------|---------|-----------|
| 2008 | 23            | 4       | 19        |
| 2007 | 18            | 3       | 15        |
| 2006 | 9             | 1       | 8         |

Table 3 shows that most of the appeals analysed were heard at the Federal Magistrates Court of Australia, followed by the Federal Court of Australia. Appeals against Refugee Review Tribunal decisions, where interpreters were used in an average of 90% of hearings between 2006 and 2008,<sup>14</sup>

<sup>13</sup> Berk-Seligson (2000), n 3.

<sup>14</sup> Migration Review Tribunal - Refugee Review Tribunal, *Annual Report 2007-2008* (2008), *Annual Report 2006-2007* (2007), *Annual Report 2005-2006* (2006), <http://www.mrt-rrt.gov.au/Publications/default.aspx> viewed 9 July 2009.



are made to the Federal Magistrates Court in the first instance and to the Federal Court in the second instance. Moreover, Refugee Review Tribunal hearings are sound recorded and the tapes are readily available to appellants.

**TABLE 3 Appeals allowed and dismissed by court**

| Appellate court                        | Total appeals | Allowed | Dismissed |
|----------------------------------------|---------------|---------|-----------|
| Federal Court of Australia             | 22            | 3       | 19        |
| Federal Magistrates Court of Australia | 26            | 4       | 22        |
| Supreme Court of Queensland            | 1             | 1       | -         |
| Supreme Court of Western Australia     | 1             | -       | 1         |

The 50 appeals selected came from New South Wales, the Northern Territory, Queensland, Victoria and Western Australia. Table 4 shows the number of appeals allowed and dismissed by State.

**TABLE 4 Appeals allowed and dismissed by State**

| Place     | Total appeals | Allowed | Dismissed |
|-----------|---------------|---------|-----------|
| Brisbane  | 2             | 1       | 1         |
| Darwin    | 1             | -       | 1         |
| Melbourne | 7             | 3       | 4         |
| Sydney    | 38            | 3       | 35        |
| Perth     | 2             | 1       | 1         |

What is evident from this table is that an overwhelming majority (76%) of appeals on the grounds of incompetent interpreting were heard in New South Wales courts and tribunals. It would have been interesting to see if there were any trends in appeals allowed versus dismissed according to State or jurisdiction and the interpreters' language and accreditation level. Unfortunately, however, this was not possible due to the fact that much of the essential information – such as language and accreditation details – is often not stated in the rulings. Such a practice seems to reflect the courts' lack of interest in interpreters' qualifications. The following quote from Lamer CJ in the Canadian case of *R v Tran* [1994] 2 SCR 951 at 975 illustrates the illogical nature of the current situation in most common law countries:

While there are, as of yet, no universally acceptable standards for assessing competency ... an interpreter must at least be sworn by taking the interpreter's oath before beginning to interpret the proceedings ... Where there is legitimate reason to doubt the competency of a particular interpreter, a court will be well advised to conduct an inquiry into the interpreter's qualifications.

An interpreter may affirm or take an oath that they will interpret to the best of their ability; however, irrespective of their good will and intentions, if they do not have the required knowledge and skills, "the best of their ability" cannot guarantee that they will perform competently to a safe standard. Interpreters should always be required to state both relevant qualifications and accreditation details for the record before the proceedings commence, not when a problem arises.

The Figures below present the information as found on the rulings. "Level unknown" means that while the ruling stated that the interpreter in question was accredited, the level of accreditation was not recorded. "Unspecified" means that the ruling did not mention whether the interpreter was accredited or not. "Recognition/None" refers to interpreters who were not accredited or who held NAATI recognition only. These are generally languages for which NAATI offers no accreditation



examinations. Of the languages stated in the rulings, five of them are not available for NAATI accreditation at any level (Bengali, Ewe, Georgian, Gujarati and Wik-Mungkan), and only six are currently available for NAATI accreditation at professional level: Amharic, Arabic, Cantonese, Hindi, Mandarin and Spanish.<sup>15</sup>

Figure 1 presents all of the appeals dismissed according to NAATI accreditation. As can be seen, for the majority of cases, there was no record of the NAATI level of the interpreter and hence we cannot make any inferences on whether NAATI accreditation has any relation to rate of dismissal.

**FIGURE 1 Appeals dismissed by NAATI accreditation**

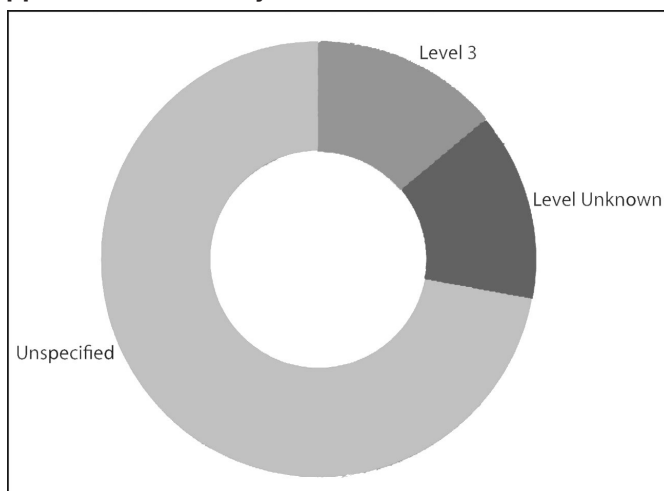
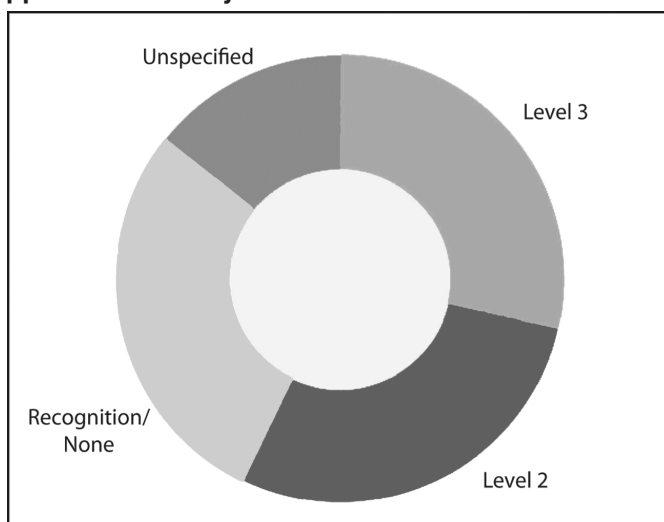


Figure 2 presents all appeals approved according to NAATI accreditation. Here, however, we can see no clear link between NAATI accreditation and rate of approval, as there are roughly equal numbers spread across all levels of accreditation. Although this is a very small sample, this result seems to reinforce the fact that NAATI accreditation alone does not guarantee quality and that there is a real need for training in addition to NAATI accreditation as a means to improve such quality.

**FIGURE 2 Appeals allowed by NAATI accreditation**



<sup>15</sup> NAATI, n 5, p 2.



Figure 3 shows the appeals dismissed and allowed by languages. The majority of dismissed cases fall under the “not stated language” category, followed by Mandarin and Arabic. The approved cases, however, are equally spread: Arabic 2; Mandarin 2; Georgian 2; Cantonese 1 and Wik-Mungkan 1. Therefore, a link cannot be made between language and lack of competence from this sample either.

**FIGURE 3 Appeals dismissed and allowed by language**

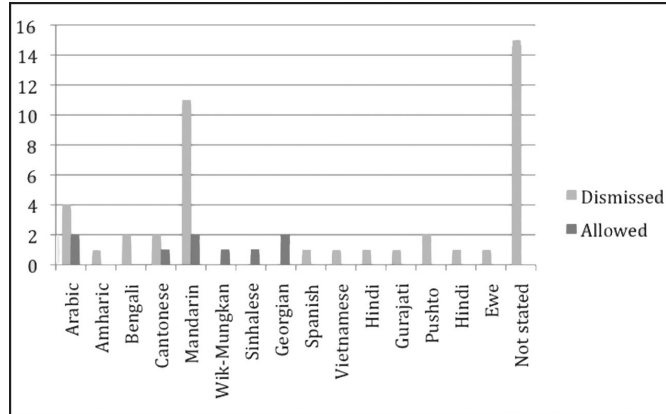
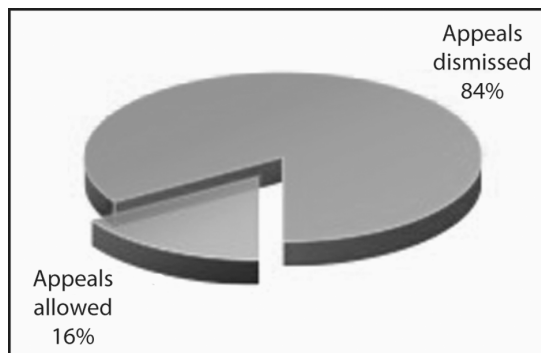


Figure 4 presents an overview of the appeals outcomes. A ratio of 5.25 appeals dismissed to every appeal allowed confirms Benmaman’s findings in United States appellate cases:

Perusal of several hundred decisions has revealed that courts of appeal historically grant broad discretion to the trial court in determining the need for the appointment of an interpreter, selection in that appointment, and all matters pertaining to interpreter performance. The predominant pattern has been for appellate judges to uphold the rulings of lower courts, and reject the defendant claims that their trials have been unfairly conducted, as long as an abuse of discretion has not been substantiated by credible evidence<sup>16</sup>

**FIGURE 4 Appeals outcome**



Finally, and to introduce the subject of rulings, Table 5 classifies the appeals outcomes according to the reasons given in the judges’ rulings regarding the standard of interpretation at trial. For the purpose of this analysis, the reasons were divided into five main categories, as follows:

1. *Inadequate standard of interpretation.* This category includes rulings stating at least one of the following reasons:
  - the standard of interpretation was so inadequate that the applicant was effectively prevented from giving evidence;
  - the standard of interpretation was so inadequate that the applicant was deprived of a fair hearing;

<sup>16</sup> Benmaman (1999), n 3, p 31.



- denial of procedural fairness regarding quality of interpretation;
  - jurisdictional error.
2. *Adequate standard of interpretation*. This category includes rulings stating at least one of the following reasons:
    - the applicant was not prevented from giving his or her evidence;
    - the applicant was not deprived of a fair hearing;
    - no denial of procedural fairness regarding the quality of interpretation;
    - no jurisdictional error.
  3. *Material errors*. This category includes rulings which state either one or both of the following:
    - there were errors in interpretation which were so material as to cause the decision-making process to miscarry;
    - errors made by the interpreter were material to conclusions adverse to the applicant.
  4. *No material errors*. This category includes rulings stating that although there were interpreting errors, these were not material to the outcome.
  5. *Unsubstantiated assertion*. This category includes rulings stating that in the absence of the transcript the claim cannot be made out. No evidence.

**TABLE 5 Appeals outcomes according to judges’ reasons in their rulings**

| Reasons for judgment                  | Appeals allowed | Appeals dismissed |
|---------------------------------------|-----------------|-------------------|
| Inadequate standard of interpretation | 8               | -                 |
| Adequate standard of interpretation   | -               | 16                |
| Material errors                       | 5               | -                 |
| No material errors                    | -               | 12                |
| Unsubstantiated assertion             | -               | 21                |

As can be seen from this table, the most quoted reasons for dismissed appeals fall under the “unsubstantiated assertion” category followed by the “adequate standard of interpretation” category. These findings will be best appreciated with examples from the rulings, which are provided in the following section.

## DISCUSSION

What follows is a discussion about the current methods used by judges and tribunal members to assess competency.

In the majority of the 50 appeals analysed in this study, the adequacy of the interpreting was assessed by the monolingual judge/s based on the transcript alone. In some cases, the opinion of other interpreters was sought. Most judges referred to *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6; [1999] FCA 507 to help them describe “competent interpreting”. *Perera* was a case where the appropriate standard of interpretation in court proceedings was the subject of a substantial judgment by Kenny J. Other cases have considered whether errors made by the interpreter at tribunal hearings were material to the conclusions of the tribunal and adverse to the applicant.<sup>17</sup> In *Perera*, her Honour stated at [29]:

... there is rarely an exact lexical correspondence but, even so, some interpretations are better than others. Whilst the interpretation at a Tribunal hearing need not be at the very highest standard of a

<sup>17</sup> See eg *Ismail v Minister for Immigration and Multicultural Affairs* (1999) 59 ALD 773; [1999] FCA 1555 at [25]; *Soltanyzand v Minister for Immigration and Multicultural Affairs* [2001] FCA 1168 at [18]; *NAUV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 79 ALD 149; [2003] FCA 1319 at [42] and *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511; 77 ALD 1; [2003] FCAFC 171 at [63]ff.





first-flight interpreter, the interpretation must, nonetheless, express in one language, as accurately as that language and the circumstances permit, the idea or concept as it has been expressed in the other language.

While her Honour's judgment is fairly detailed, from a forensic linguist's or legal interpreting expert's perspective, it is inaccurate. Her reasons clearly demonstrate a lack of understanding of the meaning of accurate interpreting and of the consequences of subtle changes to the original speaker's intention and style, as well as the content. Her comments also support the apparently widespread view that language interpretation at courts and tribunals need not be of "the very highest standard". One should question why the highest standards should not be applied in courts where people's lives are at stake. In a similar way, a remark about "cultural facilitators" made by the trial judge and quoted by one of the appellate judges in *R v Watt* [2007] QCA 286 at [39] reveals their underlying misunderstanding of what interpreting entails:

... and I think that's partly what [the interpreter] is doing for us here; is not just the simple language translation and interpreting but also facilitating between our culture and the Wik culture, and that's important, to get the real meaning of what's being said across ... So perhaps we should be regarding [the interpreter] something of both.

In essence, "to get the real meaning of what's being said across" describes accurate interpreting, which includes "the meaning of words in context, the appropriate use of language according to tongue, culture and situation ... the intended meaning behind the surface".<sup>18</sup> The loaded statement, "not just the simple language translation and interpreting" encapsulates a prevailing misconception among both judges and legal practitioners that interpreting is about relaying utterances word-for-word, without taking into account the context or the speaker's style, culture and intention. It also attests to the judge's belief that translation and interpreting are *just* simple tasks. Unfortunately, this attitude is reflected in the poor remuneration of court interpreters.

In *SZLDY v Minister for Immigration and Citizenship* [2008] FMCA 1684, an appeal heard at the Federal Magistrates Court of Australia in Sydney, the interpreting errors were easily identifiable and the appeal was allowed. In contrast to the previously cited judge, this judge's insight as to the effect of interpreting errors on the applicant's understanding is evident. She described the Kafkaesque communication event as follows (at [45]-[49]):

The interpreter continued to interpret the word "*persecution*" as "*prosecution*" throughout the hearing ... The effect on the applicant of such mistranslation is apparent from his response. Perhaps unsurprisingly, the applicant responded ... "*Why would I be prosecuted by the Lebanese? My name is clean I don't have problems with the legal Lebanese government, the government of Saniora.*" However the interpreter then mistranslated "*prosecution*" as "*persecution*". The applicant's response was translated into English as "*According to the Lebanese government I have no fear of persecution. I have a clean name. I have no problems with them at all.*" The mistranslation could be said to have made it appear that the applicant was providing a non-responsive or vague response. It was submitted that it hindered the Tribunal's comprehension of the difficulties the applicant was experiencing with what he understood were questions about prosecution rather than persecution.

In the quotation below, the appellate judge (at [50]) uses a significant number of direct quotations with the corresponding mistranslations and makes a clear effort to justify the reasons why the applicant may have appeared unresponsive.

The applicant then ... started to explain the cause of the conflict with Hezbollah. He claimed he was "*confronting them politically*". This was mistranslated as "*I was the person that would negotiate between them*". He referred to threats from Hezbollah and its members in the village (translated as "*supporters*") and political conflict. The Tribunal reminded the applicant ... "[Applicant], *I will again remind you that I need to hear about any personal fear of persecution not about the political situation in your village*". This was translated as "*She is reminding you again that she wants to hear from you about your own fear of any sentence against you, being prosecuted in your country she doesn't want to hear about any politics and ...*" The applicant responded "*Any sentence against me? Hezbollah will*

<sup>18</sup> Hale (2004), n 3, p 5.



give me the death sentence” but this was translated as “*Hezbollah is going to persecute me by giving me the death sentence*”, another answer that might well seem unresponsive to the question that was actually asked by the Tribunal.

The interpreting issues in the following criminal case of rape and deprivation of liberty were not so clear-cut. The Aboriginal interpreter in the Queensland case *R v Watt* [2007] QCA 286 had a Master’s degree in linguistics, in which she had studied applied linguistics, language development, child language and issues in language and culture. Significantly, however, she did not have any qualifications in legal interpreting or forensic linguistics. This is a good example of the importance of relevant, specialist training. It was stated (at [3]):

The transcript of the proceedings in this trial suggests that ... the complainant may not have been given a full opportunity to give her version of events in the trial. Whether or not that is so, the jury’s inconsistent verdicts and the unsatisfactory state of the complainant’s evidence as interpreted mean that the appellant must be acquitted because the prosecution did not establish his guilt beyond reasonable doubt.

For better or worse, the interpreter’s poor overall performance in this trial had a direct bearing on the outcome of the case, as all three appellate judges agreed.

A different approach was taken in *De La Espriella Velasco v The Queen* (2006) 31 WAR 291; 197 FLR 125; [2006] WASCA 31, a criminal appeal heard at the Supreme Court of Western Australia, which was dismissed, where one of the judges stated the following about interpreting errors (at [98]):

They all fall to be considered in the context of two questions. The first is whether there was a failure of accurate interpretation in respect of any issue of specific significance to the case; the second is whether the combined effect of the deficiencies had potential to weigh adversely against the jury’s assessment of the appellant as a credible witness, or the content of the case he was seeking to advance.

The judge’s comment is clear and understandable. However, it is impossible for a judge to ascertain the combined effect of the interpreter’s deficiencies on the jury’s decision. Experimental research has shown that even subtle changes to the style of speech can have a significant effect on jurors’ perceptions of witness credibility and assessments of guilt.<sup>19</sup> The defence hired the services of an expert witness who expressed the opinion that the jury relied solely on the interpreter’s rendition to make their evaluation of the witness credibility, rather than paying attention to the manner in which the witness gave his evidence in Spanish, a language the jury did not understand. In response to this argument, the ruling stated (at [366]) that:

This is an opinion to be respected, but the trial process must involve the jury in making an assessment of the witness as he speaks the foreign language. Evasiveness, argumentativeness and inability to answer questions would all be noticed if that occurred. If, on the one hand the appellant was able to answer all questions fluently in Spanish, that, no doubt, would be a factor that the jury would note.

Once again, the results of research have contradicted the above assertion. Jurors seem to make their assessments based on the interpreter’s rendition and not on the original speaker’s, which reinforces the need for interpreting to be of the highest calibre.<sup>20</sup> Although much more research is needed to corroborate these findings, another issue that is misunderstood, when different cultures and languages are concerned, is that cross-cultural pragmatic difference may lead to incorrect perceptions. For example, what may sound as an aggressive or argumentative tone in one language may be considered to be neutral in another. What may appear to be evasive in one language, may be considered to be a polite response in another. Herein lies the risk of jurors attempting to evaluate the witness based on the foreign language and culture that they do not understand, as this can clearly lead to cross-cultural misunderstandings.<sup>21</sup> When discussing cross-cultural communications in *Kathiresan v Minister for Immigration and Multicultural Affairs* [1998] FCA 159, Gray J aptly warned about the dangers of paying too much attention to the “subtle influence of demeanour”, for “judging the

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<sup>19</sup> Berk-Seligson (1990), n 6; Hale (2004), n 3

<sup>20</sup> Berk-Seligson (1990), n 6; Hale (2004), n 3

<sup>21</sup> See Wierzbicka A, *Cross-Cultural Pragmatics. The Semantics of Human Interaction* (Mouton de Gruyter, Berlin and New York, 1991).



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". The appeal judges were not prepared to accept the expert witness's opinion. It may very well be due to the fact that the expert witness did not possess any relevant higher qualifications in interpreting and linguistics and did not substantiate her opinion with the results of research, thus making her argument unconvincing.

It should also be highlighted that in most of the appeals analysed where such information is recorded, the only qualification stated for interpreters employed as "experts" to listen to the tapes or go through the transcripts of the trial or hearing is NAATI accreditation. This seems to be the only criterion taken into account nationally. And yet, as has been argued, NAATI accreditation at any level does not provide the specialist knowledge required of a competent legal interpreter, even less as an expert who can comment on the performance of another. Accordingly, a protocol on expert witnesses for interpreting performance is needed.

In this regard, while some providers of court interpreting services, such as the Community Relations Commission in New South Wales, have formalised procedures for following-up on complaints about interpreters, there are no standardised national protocols for the use of interpreters in legal proceedings. Insofar as it can be ascertained, the mechanisms currently in place to assure interpreting quality in Australian courts and tribunals are as ad hoc as the practice of legal interpreting itself. For example, in the abovementioned case, the trial judge allowed the accused's wife to sit with him and the court-appointed interpreter, and interpret for the accused during the entire trial other than when he was giving his own evidence. She was neither sworn nor affirmed as an interpreter and had been involved to some extent in the activities out of which the charge arose.

This lack of a consistent set of practices across Australia is increasingly being recognised by the judiciary who are making efforts to train their members in interpreting issues, through conferences and workshops, and are beginning to support research into such matters. The second author of this paper is currently conducting a research project jointly funded by the Australasian Institute of Judicial Administration (AIJA) and the Interpreting and Translation Research Group to describe the different interpreter protocols in Australian courts and tribunals, with the aim to improve and uniformise practices, leading to a national protocol.

## CONCLUSION

Nothing could be more logical than to investigate the places where language and justice converge. From a sociolinguistic perspective, the question is whether language variation has social consequences in legal settings. The sociolegal version of this question asks whether we can discover in language the precise mechanisms – Foucault's microphysics – through which injustice happens.<sup>22</sup>

Legal interpreting is a highly complex activity requiring practical and theoretical knowledge and skills, for which specialist training is essential.<sup>23</sup> Being "bilingual" or highly proficient in two languages is merely a prerequisite to be able to train as an interpreter. Language skills in themselves, however remarkable, are not enough to guarantee competent and adequate interpreting performance in legal settings. Contrary to popular belief, it is perfectly feasible for an accomplished conference interpreter to perform poorly in court. Similarly, a one-off generalist interpreter test is not sufficient. Another complex task is that of assessing adequate interpretation, given the intricacies of language, culture and the legal system. This is a specialist job that should only be performed by experienced and adequately qualified linguists in the relevant languages, trained in interpreting and forensic linguistics.

This article presented the results of a small study of appeals on the grounds of incompetent interpreting by practicing, paid interpreters in the relevant languages required by the non English speaker. Fifty court and tribunal appeals from 2006 to 2008 were analysed, quantified and described.

<sup>22</sup> Conley J and O'Barr W, *Just Words: Law, Language and Power* (University of Chicago Press, Chicago, 1998) p 14.

<sup>23</sup> For a full discussion on the need for specialist training see Hale S, "The Need to Raise the Bar. Court Interpreters as Specialized Experts" in Coulthard M and Johnson A (eds), *Routledge Handbook of Forensic Linguistics* (Routledge, London and New York, 2010) p 440.



The appeals came from New South Wales, the Northern Territory, Queensland, Victoria and Western Australia. The study highlighted a number of issues: only the most blatant cases of incidents of incompetent interpreting are detected and appealed, leaving an unknown quantity of others with equally unknown consequences for the administration of justice; the qualifications of the interpreter are not considered to be important enough for them to be stated in the case; there is no clear protocol about how to assess the competence of an interpreter once it is questioned, with judges generally making those assessments based on their monolingual perceptions of language; little use is made of the results of research into court interpreting and the effects of inadequate interpreting on the evaluations of credibility.

This was a small-scale study and did not elaborate on the discourse of judges. Further research on the discourse of appellate judges in their rulings may help elucidate whether there are specific patterns associated with winning and losing cases<sup>24</sup> that relied on interpreting services. Nonetheless, the findings in this study lead us to make the following recommendations:

1. That court interpreters be required to undertake specialist legal interpreting training in addition to NAATI accreditation and be adequately remunerated.
2. That the judiciary obtain training on the intricacies of court interpreting.
3. That all proceedings be sound recorded, so as to keep a record of utterances in the original language, as relying on the English transcripts is insufficient to assess interpreting quality.
4. That details about interpreters' qualifications, accreditation level and language(s) be recorded in all cases and published rulings.
5. That experts in forensic linguistics and interpreting be consulted when assessing interpreting quality.
6. That further research into the effect of interpreters on the legal process be supported by the legal system.

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<sup>24</sup> Wennerstrom A, "Immigrant Voices in the Courts" (2008) 15(1) *The International Journal of Speech, Language and the Law* 23.

