PART FOUR

Dynamics of Evidentiary Discourse

Introduction

The verbal interaction between counsel, witness, magistrate/judge and interpreter (where present) can be termed *evidentiary discourse* which constitutes the *focal event* (see section 4.2.3) under examination in Part Four. Evidentiary discourse is contextualised by a number of interactive factors within the *field of action*. Some of these factors are inherent in judicial proceedings—for example, the broad purposes of witness examination and the characteristic question types—while others pertain to the testimony in question and include factors such as the nature and circumstances of the court case, the particular stage of the proceedings, and the roles and attributes of the interlocutors.

The purpose of Part Four is to identify and characterise the principal dynamics that operate in determining the quality and features of Anglo/Yolngu communication in evidentiary discourse involving Yolngu witnesses. This does not mean that there will be an attempt to characterise this interaction as a single discourse type, for it is not. Rather, evidentiary discourse will be typified by identifying key underlying dynamics that may combine in different ways and in varying degrees from one sample to another.

The analysis of Anglo/Yolngu interaction in the police interview with 'M' (Chapter 5) and in the courtroom examination of 'W' (Chapter 6) has prepared the way for this process. This revealed patterns of communication incorporating: gratuitous concurrence, scaffolding, pragmatic failure and first language interference, as well as a general difficulty with the Q/A interview structure—where these factors generally conspire to produce a susceptibility to verbal manipulation by the experienced native-English speaking interrogator.

This susceptibility is even more marked where NESB Yolngu witnesses undergo aggressive cross-examination without interpreting assistance. M's limited understanding of the questions she was responding to was seen to be useful for her police interrogators, and this state of affairs is accentuated for Yolngu witnesses held in the firm verbal grip of counsel in the courtroom. Even where there is obvious difficulty with communication, counsel cross-examining a Yolngu witness may find it convenient to persist without an interpreter. Exploration of the nature and features of Anglo/Yolngu communication in respect of evidentiary discourse must therefore account for the verbal tactics and strategies of lawyers as they apply their interrogative craft. Without this there is the danger of viewing all miscommunication as failed communication, whereas sometimes purposeful miscommunication—that is, where communicative intent is to confuse or mislead—may provide tactical advantage (see definition and comment regarding miscommunication in Part Two (Introduction), and discussion of intentional miscommunication in section 10.1 below).

The *Elcho Coronial* will figure prominently in Part Four. With 16 Yolngu witnesses interrogated—some at great length—by a range of counsel and under a various circumstances

there are opportunities for revealing the operation and interaction of a range of communicative and strategic dynamics. This case reveals that the capacity for courts to receive and hear the evidence of NESB Yolngu witnesses is heavily compromised where the *confrontation* tactic of cross-examination (see section 9.1 below) is applied. Yet the success of the confrontational approach is dependent on the absence or minimal utilisation of interpreting assistance. Reactions by counsel to the prospect or presence of interpreting assistance in this case therefore provide particularly useful insights into the communicative dynamics of evidentiary discourse involving Yolngu witnesses.

Part Four begins with the provision of contextual foundations of evidentiary discourse in Chapter 8. Section 8.1 addresses the use of interpreters in the criminal justice system, dealing with matters such as the right to an interpreter and varying perspectives upon their role, competence and use. Section 8.2 explores the nature of evidentiary discourse, beginning with the jurisprudential purposes of evidence elicitation and then the relationship between form and function of courtroom questions. This section concludes with an inventory of question types classified according to the type of response that is expected from the witness. Section 8.3 provides a background to the *Elcho Coronial* including the events that led up to this inquest, its sociopolitical context and the interests of various parties who had representation.

Chapter 9 begins with a few examples from the *Elcho Coronial* illustrating controlling questioning strategies and then proceeds to an investigation of how these strategies are affected by the integration of an interpreter within the discourse. This involves considering how witnesses actually come to be provided with an interpreter, reactions by counsel to the use of an interpreter, and how the interpreter affects the manner in which evidentiary discourse is conducted. In sections 9.2 to 9.4 the focus is upon the struggle for control over this discourse that was exhibited at the *Elcho Coronial.* Then *R v M* is revisited (section 9.5), this time in reference to M's courtroom testimony which provides an example of Anglo/Yolngu communication within the criminal justice context under conditions that prove to be very effective: she had the opportunity to give her evidence in narrative form and she had access to interpreting assistance.

CHAPTER 8

CONTEXTUAL FOUNDATIONS

8.1 Interpreters in courts

8.1.1 Background

The communicative disadvantages experienced by Aboriginal people as defendants and witnesses in Australian courtrooms was discussed as a contemporary issue in Chapter 1. These disadvantages were even more pronounced in earlier times. Until comparatively recently the intellectual, moral and religious capacities of Aboriginal people were openly questioned to the point that they were not considered capable of providing credible testimony. In the earlier years of colonial Australia their evidence was not even admissible (Castles 1982:532-3 in McRae, Nettheim & Beacroft 1991:18):

> The issue of the admissibility of Aboriginal testimony had certainly been raised officially as early as 1805. ... First, there was the basic difficulty of communication ... Secondly ... insuperable difficulty could ensue "where a proposed witness had been found ignorant of a Supreme Being and a future State". Under the prevailing notions of English law, sworn testimony could not be received in such circumstances. Sympathetically and strongly the British Aborigines Protection Society pointed out, "the rejection of the Evidence of these Natives renders them virtual outlaws in their Native Land which they have never alienated or forfeited ... they have to cope with some of the most cruel and atrocious of our species, who carry on their system of oppression with almost perfect impunity so long as the evidence of Native Witnesses is excluded from our courts".

Unsworn evidence from Aboriginal people (which, being untested by cross-examination, is considered of limited evidentiary value) was achieved through statutory provisions beginning with Western Australia in 1841 and then in 1848 in South Australia (from 1863 until 1911 NT was part of South Australia[77]). The *Evidence Ordinance NT* (1939) finally permitted Aboriginal witnesses to give sworn evidence at trial in this jurisdiction.

Such legislation of course did nothing to rectify communication difficulties experienced by NESB Aboriginal people that accrued from the alien courtroom environment and from the use of English language and English ways of arguing, reasoning and questioning. These difficulties remained patently and painfully manifest as Muirhead J observed in *Fry v Jennings* (1983) 25 NTR 19 (quoted from McCorquodale 1987:34):

> Daily experience in this Territory [i.e. the NT] illustrates the difficulties Aboriginal people experience in giving evidence in the Courts, difficulties compounded by lack of comprehension of issues, shyness, language barriers and, at times, embarrassment and fear.

[77] Control over the NT was subsequently passed to the Commonwealth Government in 1911 which in turn granted self-government in 1976.

Incomprehension could reach absurd proportions (Lester 1973:4):

> One old lady from Maryvale Station was picked up on a 'drunk' charge. She doesn't drink at all. She went to the hotel looking for her daughter; she was worried about her. I said: "Why did you say 'guilty'?". She said: "I didn't understand what was happening, so I said the same as the woman in front of me".

The relative ease with which confessions are obtained from many NESB Aboriginal suspects at interview (see Part Three) combined with communication difficulties they face as defendants at trial (Mildren 1997) contributes to the excessive ongoing incarceration of Aboriginal people as a group. The Royal Commission into Aboriginal Deaths in Custody (1987-1991) has provided the most extensive recent investigation into this phenomenon and the contribution of courtroom communication difficulties (at both linguistic and cultural levels) was indicated in several of its recommendations:

- (no. 96) That judicial officers ... whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program designed to explain contemporary Aboriginal society, customs and traditions ... such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.
- (no. 99) That legislation in all jurisdictions should be provided that where an Aboriginal defendant appears before a Court and there is doubt as to whether the person has the ability to fully understand proceedings in the English language and is fully able to express himself or herself in the English language, the court be obliged to satisfy itself that the person has the ability. Where there is doubt or reservations as to these matters proceedings should not continue until a competent interpreter is provided to the person without cost to the person.
- (no. 100) That governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts.

Unfortunately these recommendations have only been partially implemented in the NT. While magistrates have undertaken cross-cultural awareness training in respect of Aboriginal issues (a two-day workshop conducted by Batchelor College in 1996) the matter is still being considered by the NT Supreme Court[78]. As for the intercultural communication skills of lawyers, Mildren comments (1997:12):

> The recent experience of the Supreme Court of the Northern Territory is that there are fewer counsel with much idea of how to elicit information from Aboriginal witnesses than there were 10 years ago, or to put it another way, there is a preponderance of counsel who now have little or no idea of how to go about this task ...

Recommendation 99 is not fully supported by the NT Government and there has not been legislative effect given to it (the issue of the right to an interpreter remains as a matter for common law in the NT—see section 8.1.2 below). Rather, the NT Government gave a commitment to 'the development of an interpreter/translator service that would achieve the intent of this recommendation' (OAD 1993/94:94). However, as discussed in the previous chapter this 'intent' has only been manifest temporarily in a six month trial service—a

[78] OAD reports (1994/5 Vol. 2:121) that 'several individual judges have undertaken cross-cultural training of their own accord'.

permanent service did not follow. Implementation of Recommendation 100 has also been limited to the effect of this trial service. The ongoing difficulty in assuring the provision of appropriate interpreting assistance still presents as the critical issue. Muirhead J's lament in *R v Anglitchi* (unreported, NT Sup. Ct, Muirhead J, 1-12-80) is still applicable: '... without aid of trained and skilled interpreters in Aboriginal languages, the administration of justice in the Northern Territory remains sadly impeded' (quoted in Coldrey 1987:90-1).

8.1.2 Rights to interpreting assistance

The 'right to an interpreter' in court proceedings was examined in detail by the Commonwealth Attorney-General's Department (*Access Report* 1991). Australia is bound by a number of international agreements and conventions implying rights to an interpreter for people facing criminal charges where they are unable to participate effectively in proceedings due to language difficulties. Australia has ratified the Convention on the Elimination of All Forms of Racial Discrimination, where Article 5 requires signatories to 'Guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law ...' (*Access Report* 1991, para 1.8.8). The International Covenant on Civil and Political Rights (1966) contains specific provisions relating to the entitlement to an interpreter in criminal proceedings under Article 14(3), guaranteeing the right to have 'the free assistance of an interpreter if [an accused] cannot understand or speak the language used in court ...' (*Access Report* 1991, para 1.8.2). The Commonwealth Attorney-General's Department asserts that the principle of equality before the law clearly applies in respect to communication (ibid, para 1.3.2):

> The party or witness in legal proceedings who cannot speak and understand the language of the courts is at a disadvantage compared to his or her English-speaking counterparts. Justice can only be done if the evidence and arguments are clearly understood by all concerned.

The NT has no legislation specifying the right to an interpreter in court proceedings (and the Commonwealth has not chosen to exercise powers available under section 122 of the Constitution to pass laws to this effect). Instead, any requirements extend from common law where '(d)efendants in criminal cases have the strongest claims to interpreters, while the need for interpreters for witnesses in civil and criminal matters is less compelling' (Laster & Taylor 1994:78). The situation is clarified by Mildren (1997:17-8):

> An accused person who does not understand the language of the court is entitled to an interpreter and this right cannot be waived unless the person is represented by counsel. In civil cases a party—and, it is submitted, in both civil and criminal cases, a witness—may have the services of an interpreter only with the leave of the court.

The situation of NESB witnesses who speak some English is particularly problematic. First, the judiciary do not generally have the expertise required to determine a person's level of proficiency in cases where they speak some English and may easily overestimate it (see section 7.1.1 above). Second, even if is established that a witness is not fluent in English he or she may nevertheless be required to give evidence in English. In fact, there is a preference

by many judges and magistrates to hear evidence in English from NESB witnesses, reflected in judicial statements such as: 'Experience has shown that the tribunal of a fact can make a better assessment of a witness if there is no interpreter transposed between it and the witness' (*R v Johnson* (1986) quoted in Earle 1991:89). The variability in judicial attitudes towards interpreters was highlighted in the *Access Report* (1991:ii):

> ... there is substantial evidence to suggest that, in cases where a witness has limited understanding of English, there has been a reluctance by some judges to allow an interpreter to be used in circumstances where one would seem appropriate.
>
> This reflects the primary consideration ... that a witness with some understanding of English should not obtain unfair advantage. ... Less attention has been given to the real risk that a witness with insufficient knowledge of English may not be able to adequately understand the questions put and convey the meanings he or she wishes to express.

The report indicated a number of problematic assumptions involved in the exercise of judicial discretion (ibid, para 3.3.1):

- by using an interpreter 'the witness who has some knowledge of English may secure an advantage in cross-examination by pretending ignorance and gaining time';
- 'the use of an interpreter tends to make it more difficult to ascertain the truth';
- the 'risk that an interpreter may give the effect instead of giving a literal translation';
- 'Judges are capable of assessing the language competence of witnesses and parties';
- 'Judges should be given wide discretions to control proceedings in court'.

The practitioner's perspective was made explicit in submissions from 'a number of experienced lawyers [who] suggested that the decision whether to use an interpreter was a tactical issue' (para 3.3.4).

The tendency to give more consideration to these issues than to the language handicap of NESB witnesses was criticised in the *Access Report*. The issue of literal translation (see section 3.2.1 above) was of particular concern since, even after allowing an interpreter, 'many judges still insist that interpreters do no more than interpret the strictly literal words of the witness' (para 3.3.8). The chairperson of NAATI responded to the expression of such attitudes in its submission to the Report (para 3.3.19):

> NAATI views the notion that a court interpreter should provide a literal interpretation as a philological impossibility. Such a notion is essentially a problem of ignorance of comparative linguistics and the intimate relationship between language and culture.

8.1.3 The role of courtroom interpreters

From a conservative legal perspective an interpreter is defined as a mere 'conduit pipe' or a 'machine that itself translated from one language to another' or a 'bilingual transmitter ... not different in principle from that which in another case an electrical transmitter might fulfil in overcoming the barrier of distance' (*Gaio v R* (1960) 104 CLR 419, quoted from Laster & Taylor 1994:112). From a judicial perspective this conduit model is the most comfortable since it avoids the potential exclusion of interpreted evidence under the hearsay rule. The problem here is that if a witness answers counsel's question in a language other than English,

then the interpreter can be considered to be *reporting* what he or she heard the witness say; it can be put that counsel cannot be said to be hearing the witness directly, but by means of a third party. Assigning interpreters to a machine-like role as a literal translators who contribute nothing of themselves sidesteps the problem: they are retransmitters of words and sentences.

The reality is that the courtroom interpreter is an active member of a communication triad rather than a mere facilitator of dialogue external to him/her-self. They are inevitably and necessarily intrusive in a number of ways in legal proceedings (Berk-Seligson 1990b:198):

> [The court interpreter's] intrusiveness is manifested in multiple ways: from the introduction of the interpreter to the jury by the judge, to the common practice resorted to by judges and attorneys of addressing the interpreter rather than the witness when they ask their questions, to the need on the part of interpreters to clarify attorneys' questions and witnesses' answers. Included as well are the tangential side-sequence conversations engaged in by interpreters and testifying witnesses, interpreters' silencing of witnesses who have begun to verbalize their answers, and the interpreters' prodding of witnesses when they are not responding appropriately to a question.

Interpreters may not even be aware of their own effect. For example, Berk-Seligson found from research in English/Spanish bilingual settings that interpreters are usually primarily focussed at the lexico-semantic level while translating, being oblivious to the significance of the changes they effect by not taking account of the pragmatic meaning of utterances (1990a:2):

> observation of interpreters at work reveals that inattention to pragmatic aspects of language results in a skewing of a speaker's intended meaning: an interpreter can make the tone of a witness's testimony or an attorney's question more harsh and antagonistic than it was when it was originally uttered, or, conversely, she can make its effect softer, more cooperative, and less challenging than the original. For the most part, these changes are made unconsciously. On the whole, when interpreters make such fine alterations in the conversion of one language to another they seem completely unaware of the important impact that these alterations can have on judges and jurors.

That such 'fine alterations' as these can have a marked effect was demonstrated by the work of Lind and O'Barr (1979) who found that speech traits which had been thought to characterise female patterns of discourse could often be discerned in the courtroom responses of male *and* female witnesses, leading to the impression that such witnesses were less competent, truthful, trustworthy, intelligent and reliable than those who did not display these traits of what he termed 'powerless' speech style. Thus an interpreter who incorporates such features (e.g. 'hedges' such as *kind of*, *sort of* and *I guess*, or question-like intonation in declarative contexts) in the translation when their equivalents were actually absent in the source language or, conversely, deletes them in the translation when they were actually present, must detract from or enhance the witness's testimony.

O'Barr (1982) also found that testimony given in a narrative style is regarded more highly by jurors and lawyers than testimony given in a fragmented style. That the importance of this contrast is perceived by lawyers is evident in their practice of allowing their own witnesses to

answer in the narrative style while usually preventing their opponent's witnesses from doing so. Berk-Seligson (1990a:142) observed that interpreters sometimes lengthened and sometimes shortened testimony in the translation such that the translated version could, by lengthening, render a fragmented response in a more narrative style, or that when interpreters shorten witness answers in the translation they drop from the English the precise elements that are used to lengthen testimony—hedges, hesitation and polite forms.

Whilst these changes may go unnoticed by monolingual lawyers and jurors, there are other effects that the interpreter introduces which do not. One of the most obvious is the diminishing of the cross-examiner's power through the time delay afforded to the witness while a question is being interpreted. Another is the interruption of the lawyer by the interpreter seeking clarification concerning the lawyer's question. A third is that the witness often directs their responses to the interpreter rather than *through* the interpreter. The inevitable usurping of counsel's power over a witness in courtroom questioning, particularly in the context of cross-examination, *is* thus visible to the court. Insistence on literal translation as an interpreting method may be seen as one manifestation of the courts seeking to minimise the usurping by the interpreter of the courtroom lawyer's power during questioning.

Laster and Taylor (1994) seek a more resilient solution to the 'skirmishes' frequently present between lawyers and interpreters. Beginning with the acknowledgment that the conduit model is fundamentally flawed to the point that it is demonstrably a fiction, they advocate reconstruction of the legal interpreter's role to that of 'communication facilitator'. While they note that better training for both interpreters and lawyers concerning the nature of interpreting can go part of the way in reducing misunderstanding and conflict over what the interpreter does, they assert that the term 'communication facilitator' should be introduced since it (p126-7):

> probably comes closer to reflecting the real work they perform ... "communication" embraces the cerebral, non-verbal and cultural dimensions of human interaction. "Facilitator", rather than "conduit" acknowledges the active and discretionary role performed by interpreters.

They argue that adherence to the conduit model ignores the reality that interpreters have a strong impact on communication with NESB people and forces interpreters into the position of making their discretionary choices and exercising their power covertly 'with individual interpreters privately resolving the inevitable role conflicts of their job'.

In courtroom contexts involving NESB Aboriginal people the role of an interpreter as a cultural bridge or 'quasi-advocate' becomes central as they must constantly negotiate the intercultural chasm separating often incompatible or irreconcilable world views, and into which either party's messages frequently fall. The need for an interpreter to be able to step

beyond a confined interpreting role is given some recognition in Aboriginal land claim hearings[79], as noted by Neate (1981:208, quoted from Laster & Taylor 1994:129):

> In translating a question or an answer the interpreter may, quite properly, wish to give a detailed explanation of the concepts used. This will, on the one hand, go beyond a strict translation (if such a translation is possible) and may verge on an explanation incorporating the interpreter's view about the information sought or the answers being given. A case can be made for an interpreter to be free to re-ask and re-phrase a question if there seems to be a failure of communication so that he is sure that the witness has heard him and that he has heard the witness. This may mean pursuing the meaning of an obscure or ambiguous word.

Given the conditions and restrictions usually operant in the courtroom context, placing one party's cultural concept intelligently and intelligibly into another culture's terms sometimes poses an overwhelming challenge for the interpreter. This means that the presence of an interpreter cannot of itself guarantee the linguistic empowerment of Aboriginal witnesses to the point where they can testify on equal footing with Anglo-Australian witnesses, especially if the interpreter is constrained from explaining implied and presupposed meaning, or where the hearer is not availed of relevant aspects of the speaker's world view—without which the message may remain unintelligible. (These are issues that will be specifically explored in Chapter 11.)

8.1.4 Availability and competence

In the case of Aboriginal languages interpreters there is a particular question concerning competence to perform in the legal context. There are no interpreters with NAATI accreditation at the first professional level (formerly, NAATI Level III) in any Aboriginal language[80] in spite of NAATI's recommendation, adopted by the Commonwealth Attorney General's Department (*Access Report* 1991:82-5), that this be the minimum level required for court interpreting. In fact NAATI went further in recommending that 'there is a need for interpreters working in the legal field to have further training, beyond NAATI Level III, to enable them to work in this specialised area'.[81] Even at the paraprofessional level (formerly Level II) some NT Aboriginal languages are entirely unrepresented on NAATI's register, so that the use of non-accredited interpreters is necessarily common. Therefore any rights to an interpreter in court proceedings must also be measured against the availability of competent interpreters—and the cost (Mildren 1997:18):

> In practice, the problem is not so much whether an interpreter will be permitted, but whether one will be able to be provided, and if so, at whose cost.

The problem of supply can have profound implications as in the case of a NT Supreme Court rape trial that had to be abandoned because of the lack of a competent interpreter in the Gunwinjku language (Watt 1994a) Bill Sommerville, the North Australian Aboriginal

[79] These are inquisitorial proceedings (not bound by the Rules of Evidence) conducted within the terms of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Commonwealth).

[80] This does not necessarily mean that there are no interpreters operating at this level—there has not yet been any NAATI accreditation testing conducted at this level in Aboriginal languages.

[81] NAATI's recommendations to the Inquiry are listed in the NAATI Eleventh Report 1989/90 (ISSN 0815-6441).

Legal Aid Service (NAALAS) senior lawyer, commented to the trial judge that the problem was systemic:

> It's not only in this language but in most of the Aboriginal languages. There is an interpreter service set up by the federal and State governments which provides qualified interpreters to interpret ... every other language than the Aboriginal language. We have never been able to get properly qualified court interpreters for Aboriginal people.

During another criminal case involving an Aboriginal defendant, Mildren J commented (Watt 1994b) that NT courts do not have the powers nor the money to provide interpreters: 'If parties (in a case) want an interpreter, it's their function to arrange that.' He placed the responsibility for locating and paying for interpreters with NAALAS although, according to the newspaper report, 'Justice Mildren said that it was up to the judge hearing the matter as to whether a person was allowed an interpreter'.

For the period of the NT Aboriginal Languages Interpreter Service Trial (January to June, 1997) two major hurdles identified by Mildren (1997)—availability and cost—were overcome so that Aboriginal languages interpreting was temporarily conducted on the same footing as 'migrant' languages[82]. Furthermore, while the matter of competence remains a continuing issue, the intensive interpreter training and accreditation program conducted in association with the Trial was reflected in the feedback from those in the legal sector who used the service (see section 7.2.1 above), establishing that the poor and inadequate court interpreting in Aboriginal languages that had previously prevailed can be substantially turned around.

8.2 Questions of Control

8.2.1 Courtroom questions: form and function

Courtroom questioning is governed by the conventions, rules and purposes of legal process and is distinctive compared to discourse patterns found in society at large. It is not that the grammatical structures of question forms used in the courtroom context are particular to that context; rather, it is that the controlling function of courtroom questions is reflected in a preponderance of those question forms which are suited to this function (Sandra Harris 1984).

From a judicial standpoint the purpose of courtroom questioning of witnesses is to enable the court to establish facts which are the basis of a legal dispute, that is, *facts in issue* (Bates 1985:1):

> Much of the time of lawyers, whether they be ... counsel or judges, is occupied, not by matters of law, but by matters of fact. ... The law of evidence is ... concerned both with the kind of facts which may be proved and the manner of their proof.

[82] The NT Office of Ethnic Affairs locates and supplies interpreters in migrant languages to NT government agencies—including legal aid services, public prosecutions and courts—free of charge (this service has been operating for a decade).

The carriage of justice according to formalist conceptions is that 'a just outcome is arrived at only by a conscientious application of legal rules' or, 'as long as the court has observed the rules then the decision is just' (Bottomley, Gunningham & Parker 1991:23). The rules of evidence are central to this conception of justice which is identified with legal *process*.

According to Bates (1985:1-2) the law of evidence is concerned with four main areas: the *kind* of evidence which will be accepted; the *amount* of evidence which will be required by the court; the *manner* in which evidence will be presented; and the *persons* who may or must give it. Evidence can be classified as direct: 'evidence of the facts in issue themselves'; or, circumstantial: 'evidence of facts which are not in issue, from which a fact in issue may be inferred'.

Evidence can also be classified as *original*: 'evidence given by a witness of events which the witness has personally observed or of matters of which the witness has personal knowledge'; or *hearsay*: 'evidence of what someone else has said about an event' (ibid:10). This distinction is critical as a principle basis for the exclusion of testimony since hearsay evidence will 'in general ... not be acceptable to a court as a means of proof'. Another basis for disputing the admissibility of evidence is that of *relevance*. The legal sense of relevance is different from the colloquial sense in that 'the courts will sometimes exclude evidence which, though it may afford proof, is of too slight value to make it worth considering the evidence' (ibid:14).

The taking of oral evidence (as opposed to written statements and exhibits) occurs during the process of asking questions to a witness during examination-in-chief, cross-examination and, if it occurs, re-examination. Glissan (1991) distinguishes them as follows (p39):

> The aim of examination-in-chief is to adduce before judge and jury the whole of the material that the witness can give about the case which is relevant and material; the aim of cross-examination is to test or attack that evidence, to correct error and supply omission; and the object of re-examination is to explain, rectify, and put in order.

There is an important distinction between examination-in-chief and re-examination on the one hand, and cross-examination on the other, with respect to the ways in which questions can be put. Examination-in-chief (and re-examination) is constituted by the questioning of a witness by the party who calls that witness, and leading questions ('questions which are either phrased in a manner which suggests the answer ... or which assume the existence of facts in dispute' (Bates 1985:109)) are generally not permitted[83]. On the other hand, leading questions *are* permitted in cross-examination for which the strategic purposes 'are, first, to cast doubt

[83] Bates lists some exceptions to this rule (p110): 'First, leading questions relating to introductory matters not in dispute ... are allowed. Second, a leading question may be permitted if a witness is obviously forgetful or where it is necessary to advert the witness's mind to the subject of the inquiry...third, leading questions referring to matters of identification may be permitted.'

on the evidence which has been given during examination-in-chief and, second, to establish facts which are favourable to the party cross-examining' (p122).

The means by which counsel achieve these purposes can be bewildering and intimidating to witnesses because they contravene many of our social norms of cooperative communication and politeness. For example, the lawyer may seek to confound and confuse the witness in order to establish that the witness is unreliable or incredible. Glissan's (1991:73-4) work on the techniques of advocacy provides the rationale behind this procedure:

> In theoretical or philosophical terms cross-examination is intended to provide an opportunity to test the truth of evidence of each witness and the accuracy and completeness of his story, and to be an aid to the just resolution of legal proceedings. ...
>
> For those engaged in the daily cut and thrust of the courts, cross-examination is more concerned with practical objectives ...
>
> ... there are two aims only, get any benefit that you can and destroy everything else.

Glissan quotes other writers on the same matter (p73):

> Morris in *The Technique of Litigation* ... Your objectives ... should be ... to show that the witness himself is not worthy of credence ... ;
>
> Harris in *Hints on Advocacy* said ... the objects of cross-examination are to ... obtain evidence favourable to the client ... to weaken evidence that has been given against your client, and finally, if nothing of value which is favourable can be obtained, to weaken or destroy the value of evidence by attacking the credibility of the witness.

In order to obtain damaging admissions counsel may resort to the tactic of jumping without warning from topic to topic—that is, without the provision of appropriate contextualisation cues (see section 4.2.3 above)—in the deliberate disorientation of the witness (Summit 1978:126 quoted in Walker 1987:62):

> People will not knowingly and willingly make damaging admissions. The witness must become disoriented, losing all sense of the context of the questions.

There are those witnesses, such as experienced police officers, who are resistant to this pressure and take the stand as skilled interviewees. Police also have the benefit expert advice through texts such as *How to Testify in Court: The Police Officer's Testimony* (Bellemare 1985). This book includes countering strategies for each of eighteen categories of frequent cross-examination techniques expected of opposing lawyers. These cross-examination techniques that he cites include:

- Dwelling on insignificant details (to divert the witness's attention);
- Several assertions in the same question (answering one answers all);
- Alleging contradictions made by other witnesses;
- Flattery (the *kiss-kick* technique);
- Threatening the witness;
- Misleading the witness;
- Trick questions (*Is it possible that ...?*);
- Rapid-fire questioning.

Bellemare provides comprehensive advice, down to the smallest details, to prepare a police officer to be a witness. The following example provides an indication of how seriously the craft of testifying is taken (p12):

> If a police officer is bringing a file with him as he walks towards the witness box, the file should appear neat and ordered, and the police officer should hold it in his left hand ... [so that he doesn't have to] put it down or shift it to the other hand when he is called upon to take the oath or affirmation.

On the other hand, a barrister is entitled to entertain a certain anticipatory confidence with respect to an impending cross-examination with a NESB Aboriginal witness who may have taken the stand already in a state of confusion and fright, possessing enough English to know when he or she is being asked to affirm what the barrister puts, but not so much as to understand the full sense of it (or what is being implied), let alone being able to articulate a concise and considered reply. Lester (1973:3) puts it thus:

> Cross questioning [cross-examination] confuses the people, especially about details of time and place. They can not understand the importance of such things. They think, "Why are they asking me all this?". Then they become afraid, and they might agree with anything, or forget what they just said.

The primary means by which barristers achieve their aims are summarised by Walker's work with the suggestive title 'Linguistic Manipulation, Power, and the Legal Setting' (1987). The lawyer's linguistic manipulation of a witness is predicated on the court's legal power to 'compel answers to questions properly put'. Nor is a mere answer sufficient—it must be 'responsive to the question'. Their questions in effect serve as commands. Additionally, the balance is all the lawyer's way with the witness 'not allowed to assume the role of initiator' him/her-self. This control over questioning also allows freedom (subject to the rules of evidence) to control the agenda. It is the manipulation of question form, Walker points out (p64), which is 'the most powerful weapon an attorney has in the war of words he wages with the witness'.

During their (cross)examination of witnesses lawyers must develop their arguments through the responses of witnesses to their questions. This is achieved by, amongst other things, careful attention to question form. They are framed to manipulate the testimony of the witness or, in other words, to get the witness to tell the lawyer's story. Danet and her colleagues put it this way (Danet et al. 1980:223):

> except for opening and closing statements to the jury, attorneys for opposing sides in a case may communicate their views only indirectly, through testimony they elicit; officially they may not assert, claim, or attempt to persuade during questioning—they may only ask. Consequently, during both direct [i.e. examination-in-chief] and cross-examination of witnesses, control of responses is essential.

8.2.2 Questioning in a cultural context

A precise definition of *question* is difficult to formulate even when restricting the context to English. One problem is that grammatical form does not necessarily determine pragmatic

function, as is often the case with interrogatives. For example, *Would you sit over there please?* can function as a command with a verbal reply neither required nor even expected. Conversely, a declarative form such as *I would like to know your opinion on this matter* can clearly function as a question in the sense that a verbal response which provides the relevant information is clearly expected. Implicit is the notion of a question as an utterance which functions to obtain a verbal reply (unless the question is rhetorical) and which directs that reply towards addressing the issue framed by that utterance. Goody (1978) formalises this notion by posing the question-answer exchange as a 'prime example of an adjacency pair' where 'a basic rule of adjacency pairing is that when the first member of a pair is spoken, another person must complete the pair by speaking the second member of the pair as soon as possible'. In this sense a question 'compels, requires, may even demand, a response' (p23). Goody also emphasises the immediacy of response as a hallmark of the question, claiming that 'the effect of adjacency pairing is to exclude any other contributions to the conversation until the question has been answered'.

These two features of compellation and immediacy cannot however be sustained in any universal sense since there are speech communities where neither necessarily applies. Both these features were addressed by Stephen Harris (1984) in respect of Yolngu society (see section 1.2 above). In regard to the answering of questions, he commented that 'a yolngu listener feels much less obligation to provide an answer to a question or statement than a balanda [European person] does, and feels much less embarrassment about blatantly avoiding either a direct response or any response at all' (p140). In regard to the matter of immediacy he found that Yolngu 'often prefer to be given time to think before they answer' so that 'to be impatient and demand immediate answers may be interpreted as rudeness' (p157). Thus, while the seeking of information is a functional commonality of questioning in English and Djambarrpuyngu, the expectation that this information will be supplied, and supplied immediately, is a hallmark of the English question (and questioner). And the courtroom provides an extreme case of both these expectations.

The Q/A interview style entails more than a series of Q/A adjacency pairs. For example, the practice of asking a question and then interrupting or challenging the response with another question is typical in cross-examination. Anglo-Australians observe this behaviour constantly in media interviews which may assist in desensitising them to this 'affront' as courtroom witnesses. However, many Aboriginal interviewees, particularly those who are elders, may suffer confusion and embarrassment as a result of this public cross-examination regarding information that they have volunteered as witnesses (CJC 1996:20). Further difficulties are posed by questions which seek quantified detail—to ask how far away was someone, or how many times something happened, or what time it was, or how many minutes had passed. This focus on quantified information can be confusing to the Yolngu witness who is unused to conceptualising events in these terms. Further difficulties posed by the Q/A interview style

include: the posing of questions for which answers have been previously given or which seek information that is patently obvious; and, the refusal to accept silence as an answer or not allowing sufficient time for the consideration of a response before answering. Finally, in the courtroom question there is an added difficulty arising when even the most relevant and informative reply may be cut off on the basis of it being hearsay evidence—yet without the witness understanding this.

The problems posed by the Q/A interview style for Aboriginal witnesses for whom the style is unfamiliar and culturally inappropriate, have been reviewed by Queensland's Criminal Justice Commission. It recommends legislative changes to enable witnesses to give evidence-in-chief in narrative form (CJC 1996 105), a provision that is already available in respect of federal judicial proceedings through the *Commonwealth Evidence Act* 1995 (section 29). This recommendation followed submissions and suggestions from a number of people concerned that the evidence of Aboriginal witnesses is often compromised by the Q/A method of elicitation and by witness replies being ethnocentrically evaluated. For example, the Legal Aid Office (Queensland) had submitted that (CJC 1996:49):

> The credit of a witness can also be damaged by the tendency to talk around a subject rather than directly answering questions or going straight to the heart of the matter. Whilst with a non-Aboriginal witness the failure to answer direct questions may draw comment that a witness is trying to avoid answering, the Aboriginal witness may simply be unaccustomed to or uncomfortable with approaching the story in that way. The use of questioning which invites a narrative answer may therefore produce a better quality of evidence.

Even without formal provision the effect of a narrative is sometimes achieved through what the CJC has termed 'guided narrative', explained in this way (ibid.):

> skilful counsel are able to elicit narrative from their witness in a natural and compelling way, but at the same time steer the witness away from inadmissible matters (such as hearsay or prejudicial material). This controlled form of questioning is referred to as "guided narrative".

This was successfully achieved by defence counsel with assistance from the interpreter in *R v M* (see section 9.5 below) whereas 'M' had not been able to adequately account for her actions under the Q/A discourse structure applied by police at her record of interview (see Chapter 5).

It may also of course be the case that many witnesses of Anglo/European background would welcome an opportunity to give narrative evidence. Conley and O'Barr (1990:13) have reported that North American 'lay witnesses come to court with a repertoire of narrative conventions that are often frustrated, directly and indirectly, by the operation of the law of evidence' (e.g. restrictions upon preamble, speculation, digression, supposition, opinion and other discursive behaviours that may normally be part of the reporting of events). If witnesses of the mainstream culture suffer this frustration with the constraints of rules of evidence upon them as they testify within the Q/A discursive paradigm, then the severe effects that are evident in the case of Aboriginal witnesses should not be unexpected.

8.2.3 The courtroom question

The term *courtroom question* will be used to apply to any utterance from a lawyer or from the bench which is directed at a witness for the purpose of eliciting a verbal reply which is responsive to that utterance. On the one hand courtroom questions are indeed questions in a functional sense in that they elicit informative responses, and they often (though not always) conform in a structural sense to typical question types. But on the other hand they must be viewed in their context. They also serve to constrain, control and coerce the witness and they serve to present information, opinion or argument in the guise of questions, to the court.

Lane (1988) approached the conceptualisation of the courtroom question in the context of analysing questioning strategies and cross-cultural courtroom miscommunication in New Zealand trials involving immigrant Polynesians. He also observed the difficulty of defining the notion, even in ordinary social contexts, pointing out that 'question' is:

> ... used variously as a term for a range of syntactic structures ... , as a term for a functional category (a 'speech act' or a 'conversational move'), as a term for utterances with particular intonation patterns, or any written sentence with a question mark at the end—and none of these categories matches entirely any of the others.

In seeking a functional (pragmatic/discourse/conversational) sense he settled on Labov and Fanshel's (1977) term *request for information*. He extended the use of this term to encompass requests for *confirmation* and considered information to include: factual information, the expression of opinion, and accounts of personal experience (Lane 1988:31). Lane identified functions of courtroom questions apart from those of seeking information or confirmation, in terms of strategic behaviour on the part of the speaker. He identified and described four functional categories as being relevant to the study of cross-cultural courtroom discourse: facilitative, clarifying, controlling, and challenging functions. These functions become important in a consideration of the pragmatics of intercultural evidentiary discourse since the pragmatic force of courtroom questions is often not recognised when counsel and witness do not share a common pragmalinguistic and sociopragmatic background.

In the courtroom context facilitative questions often aim at encouraging the shy or reluctant witness to participate in evidentiary discourse. Alternatively they can function in prompting the witness to start talking about a particular topic. Clarifying questions represent an attempt to clarify information already presented. The controlling function of courtroom questions has already been discussed. Witnesses are sometimes aware of this function and the frustration that is commonly expressed about not being able to tell one's story in one's own way reflects this awareness (Conley & O'Barr 1990). The case of a question functioning to cut short an extended reply to a previous question is an example of a controlling function quite distinct from the content or form of the new question.

In the courtroom questions can often function as a challenge or an accusation. This is of particular interest in intercultural discourse because accusations can go unrecognised for the

simple reason that behaviour which is objectionable in one culture may be perfectly acceptable in another. The frequent inability of NESB witnesses to recognise implicit criticism or accusation can have serious consequences for the witness who, in responding to the explicit message, may also unwittingly accept the 'accusation'.

8.2.4 Towards a typology of courtroom questions

Having considered the *sense* of courtroom questions it is appropriate to examine their forms given that: form and function are not unrelated; certain question types feature more in cross-examination than in examination-in-chief; and, that NESB witnesses show more difficulties with some constructions than with others (for example, Lane (1988) found that negative, tag and alternative questions tend to trigger miscommunication in the case of Polynesian witnesses). The purpose of this section is to develop a typology of courtroom questions, taking into account both form and function, to serve as a framework that will assist in the analysis Anglo/Yolngu evidentiary discourse.

Question forms can be categorised on the basis of syntactic features with prototypical categories including:

- *wh-* questions marked syntactically by: an initial *wh-* word, the presence of a finite verb, and subject-auxiliary inversion;
- *polar* questions with the auxiliary placed initially and subject-auxiliary inversion (e.g. *Did you say that?*);
- *alternative* or *disjunctive* questions, containing *or* (e.g. *Did you go home or to work?*);
- *tag* questions comprising a declarative clause followed by an elliptical interrogative clause or other verbless tag. The tag may have an opposite polarity to the main clause, and necessarily so if the main clause is framed negatively, when the tag cannot also be negative. Tag questions are a highly significant category of question in the courtroom since they often function as leading questions.

However, a typology of courtroom questions must encompass other forms of elicitation which the lawyer uses to evoke witness response:

- Imperative sentences function to elicit witness response and can therefore be categorised within evidentiary discourse as questions;
- 'Requestions' (Danet et al. 1980) are speech acts in which a request (or command in the courtroom context) to supply information is embedded within a polar question. Thus when counsel asks *Can you tell me what you were doing there?* s/he is obviously wanting more than a *yes/no* response—there is an implicit directive to supply information;
- Declarative sentences which are marked prosodically with a rising intonation can become questions;

- A declarative sentence without this intonational feature can also function as a question when it is followed by silence: in the courtroom witnesses becomes conditioned to respond to the 'gap' once they learn the 'rule' that the lawyer's utterances to them function as commands to respond.

A more broadly based typology of courtroom questions is thus required if one is to account for these other dynamics. This was undertaken in Danet et al.'s (1980) 'An Ethnography of Questioning in the Courtroom'. The authors considered the five most common question forms in the two trials they examined and classified them by form and function, before ranking them in decreasing order of coerciveness (i.e. their force/effect in directing or constraining an answer[84]). They found that the three most coercive question types (1, 2, 3 below) were also the most common (in both direct and cross-examination) and furthermore, that the two most coercive types (1 and 2) occurred in greater proportion during cross-examination:

1. Declarative, with or without tag (the mark of a leading question);
2. Interrogative *yes/no* or *choice* forms;
3. Interrogative *wh-*;
4. Requestions;
5. Imperative forms.

In a study of the frequency of different question types in magistrates' courts Sandra Harris (1984) observed that the *wh-* category also functioned (at a rate of 6% of total questions) to elicit an explanation or even a narrative. Harris therefore distinguished two functions: restrictive *wh-* (e.g. *Where did you go?*) and elaborative *wh-* (e.g. *Why did you go?*).

In reviewing a number of manuals and articles on the practice of advocacy Walker (1987) found that lawyers 'recognise and utilise some relationship between linguistic form and function' in courtroom questions. For example, lawyers recognise that using *wh-* questions avoids leading and that tag questions provide a measure of witness control. Walker developed a typology of courtroom questions whose categories are delineated not by the syntactic structure of the question alone, but 'based on the answer attorneys expect, or desire, from their respondents in a legal setting' (p69). These categories include: *wh-* questions; *yes/no* questions; *disjunctive* (or *alternative*) questions; and *'yes/no/what's'* questions (i.e. embedded questions such as *Can you tell me his name?*).

Walker's primary interest was understanding how question form is utilised in the exercise of power. She analysed this in the following terms (p78):

1. Power is viewed by all parties as being role connected, and vested in the examiner, who has the right to compel responsive answers from the witness.

[84] Of course there would be factors other than syntactic form which affect coerciveness, such as intonation, proximity to the witness, eye contact and 'body language'.

2. In what is essentially a linguistic event, having power means having control over testimony.
3. Control over testimony necessitates control of the witness who gives it.
4. Control of the witness is attempted by means which include restricting the right to question, employing sudden shifts of topic, and manipulation of question form.

In the categorisation of courtroom question forms Walker emphasised the type of expected response. This approach has the advantage of providing a detailed but relatively straightforward framework within which the operation of a number of interacting dynamics applying to evidentiary discourse involving Yolngu witnesses can be assessed. These dynamics include: the constraining of witness answers; the exercise by counsel of illocutionary power (i.e. the power to command particular responses); the effect of an interpreter in mediating constraint and power (e.g. through the way questions are translated or by the effect of clarifying questions or other forms of intervention); and, the elicitation of particular types of response (e.g. gratuitous concurrence, scaffolded replies). Furthermore, while Walker's approach is conducive to qualitative sociolinguistic analysis of Anglo/Yolngu interaction in evidentiary discourse (such as is being undertaken here), it also permits forays into the statistical realm which can assist typological description of this interaction.

Walker's system involves four broad *functional* categories:

1. *Wh- questions* (expect only *wh-* answer) provide counsel the opportunity to elicit new information. A *wh-* question 'expects only an information answer, and no other'.
2. *Yes-No/What questions* (*wh-* usually expected; *yes/no* = fall back) can be used by counsel for a *wh-* purpose but it also carries the opportunity for counsel to play 'power games' because of the inherent ambiguity of this form (e.g. *Can you tell us where he lives?).* Pragmatically these questions ask for information, but structurally they ask for a *yes/no* response. Thus, whichever way the witness answers counsel has the opportunity to demand the other.
3. *Disjunctive questions* (*yes/no* answer not appropriate) allow counsel to limit witnesses' choices (e.g. *Was it red, or black?*).
4. *Yes-No questions* (expect *yes/no* answer) are characterised in terms of the requirement that agreement or disagreement with the proposition contained by the question be given in order that the answer meet the responsiveness criterion. Walker comments that the most coercive form, according to the literature and her informants, is the declarative with a negative truth tag (*isn't that true/correct/right?*).

Based on Walker (1987) and Sandra Harris (1984) the following table of courtroom questions has been devised (Table 8.) where question types are categorised according to the type of answer sought. The five categories are arranged according to how far they restrict witnesses in their answer (i.e. how far their options are narrowed). They are given in order from the least restrictive (*elaboration* questions, which can extend to the point of inviting a

narrative) to the most restrictive (*yes/no* questions). The extreme case in this last category, a declarative *yes/no* with negative *truth tag* (e.g. *Your home is in Darwin, isn't that right?*), which allows counsel to explicitly direct the response required.

TABLE 8.1: TYPOLOGY OF QUESTIONS BASED ON TYPE OF ANSWER SOUGHT

1) elaboration questions (explanation (+/- narrative) or reason expected)

Imperative	
with *about*	*(Tell me about the accident.)*
with *wh-: why*	*(Tell me why you lied.)*
with *wh-: how*	*(Tell me how it happened.)*
Grammatical *wh-*	
with *why*	*(Why did you lie just now?)*
with *how*	*(How do you know?)*
with *what*	*(What was the reason for your behaviour?)*
Declarative	*(You went upstairs ...?)*
with tag	*(You were upset, were you?)*
Co-operative *wh-*	
with *why*	*(Can you tell me why you said that?)*
with *how*	*(Would you tell me how it happened?)*
Moodless	*(And?)*

2) *yes-no/wh-* questions (specified information expected; *yes/no* = fall back)

Grammatical *yes/no*	*(Do you know what happened?)*
Auxiliary *wh-*	
with *can/could/would*	*(Can/could you tell us where he lives?)*
with *able*	*(Are you able to tell us where he lives?)*
yes-no/any	*(Does he have any other home?)*
Moodless	*(Any children?)*

3) *wh-* questions (specified information expected, and no other answer)

Imperative	*(Give me your name!)*
Grammatical *wh-*	*(What is your name?)*
Declarative *wh-*	
by way of Trigger:	*(That person said what?)*
by way of Hint:	*(I have forgotten your name.)*
Cooperative *wh-*	*(Would/will you tell me your name, please?)*
Moodless	*(And his relationship to you?)*

4) disjunctive questions (*yes/no* answer not appropriate)

Disjunctive *wh-*	*(Was it red or what?)*
Disjunctive LIST	*(Was it red, black, blue, white?)*
Disjunctive X or Y	*(Was it red, or black?)*

5) *yes/no* questions (expectation of affirmation or negation (e.g. *That's correct.*))

Grammatical *yes/no*	*(Do you live in Darwin?)*
Declarative *yes/no*	*(Your home is in Darwin.)*
with Tag:	
same polarity	*(Your home is in Darwin, is it?)*
truth tag positive	*(Your home is in Darwin, is that right?)*
reversed polarity(+/-)	*(Your home is in Darwin, isn't it?)*
reversed polarity(-/+)	*(Your home isn't in Darwin, is it?)*
truth tag negative	*(Your home is in Darwin, isn't that right?)*
with Frame:	*(You are telling me that you can't remember?)*
Moodless *yes/no*	*(In Darwin?)*
with Tag	*(In Darwin, yes?)*

8.3 The *Elcho Coronial* (1990/91)

8.3.1 Background to the Inquiry

At about six o'clock in the afternoon of Saturday 28th April 1990, Ganamu Garrawurra (a Liyagawumirr clansman) was shot in the head and killed at Walwal Beach on Elcho Island by a police officer of the NT Task Force (i.e. a para-military type police unit). At the time, Ganamu was armed with a fishing knife, held in his raised hand as if to throw or stab, and was running up the beach towards his spears (which were lying under a tree) and in the direction of the policeman who shot him. At the time, Ganamu was surrounded by five Task Force officers, all armed with shotguns. The officer in charge had already fired three shots—intended, though probably not perceived, as warning shots. Ganamu had recently speared two people, was an expert bushman and hunter, and the police had considered him to be dangerous.

Ganamu was a short and slight middle-aged man who had not been heard (according to evidence given at the inquiry) to use English and who was at home in the bush. Periodically he suffered episodes of mental illness [5] when he would often leave other people and go off to camp by himself in the bush. The first record of his psychiatric condition was made in 1984. At times he was given medication but suffered severe side-effects and, considering the medicine to be poison, he often refused to take it. Although he had occasionally threatened violence he had never actually harmed anyone until he speared another man (who fully recovered) on the Thursday before he was himself shot.

A police officer happened to be on the Island at the time of the spearing (he was conducting training for the two Aboriginal police aides) and he organised a search party to find and apprehend the man. During the search a volunteer was speared in the hand by Ganamu. Following this further incident the Task Force was called in. They arrived on the Friday and began searching. They were fully armed and were there to catch a man who would possibly face two charges of attempted murder. (In his findings (p17)[86] the coroner stated, *'Everybody must understand Task Force was not sent to collect a mental patient.'*)

The Task Force searched with the assistance of the two Elcho Island police aides and a volunteer Yolngu tracker. A search on the Friday afternoon was fruitless. On the Saturday the police were informed that Ganamu had been seen in the area of Walwal Beach where he had a small camp. He had a mistrust of White people and also mistrusted the Aboriginal police aides. However, there were those whom he trusted. An old man who had been supplying Ganamu with tobacco, damper and tea, was asked to help trap Ganamu by going to Walwal

[85] Apart from stating that Ganamu had regularly suffered from psychotic episodes, psychiatrists giving evidence at the *Elcho Coronial* were unable to give a precise diagnosis because of being unable to interview him in English.
[86] The coroner's findings existed in two versions: the original English and the translated Djambarrpuyngu versions.

Beach by boat (the old man was living across the bay from Walwal on a small outstation) in the company of a few strong local men including the tracker, who was shown how to use handcuffs. They would hold Ganamu while the Task Force police, together with one of the Yolngu police aides, made their way to the beach by land. However, at the appointed time the old man declined to take part in what he saw as a police activity against his trusting relative. Others also declined, leaving the tracker and a teenage boy to do the job. The boy drove the boat and as they approached the beach Ganamu made his way down the beach from the shade of a small tree at the top of the beach where he had his camp. The tracker got out of the boat and started talking. Ganamu kept his distance and soon turned around to return to the tree. He had a fishing knife[87] at his waist, but his spears and spear-thrower were under the tree.

After first walking away, Ganamu then began to run. The police were visible at the top of the beach and they began to move down and encircle him. The man in charge, Sergeant Smith, fired warning shots. Ganamu pulled out his knife and ran zigzag (reacting to the shots) back towards the tree. One policeman (Constable[88] Grant) was moving down from the tree and blocked Ganamu's access to his spears. Ganamu was running towards that policeman or towards that tree (witnesses disagreed on this). His hand was raised and the knife was in it. Grant yelled at him to drop the knife. Sergeant Smith fired a third and final warning shot. At about seven metres distance Ganamu was shot in the head by Grant. Meanwhile the Aboriginal tracker (who had come in the boat) had already been signalled to remain near the water's edge, and the police aide had been told to stay back behind the dune at the top of the beach. The youth had remained in the boat.

Apart from the Task Force police there were three eye-witnesses to the shooting: Police Aide Brian Gumbula, the tracker (Geoffrey Walkundjawuy) and the teenage boy who drove the boat.

Rather than taking the wounded man to the village clinic the police elected to arrange for assistance on site and began organising medical help via radio, and gave first aid themselves (although without any kit). However, help could not be obtained quickly and Ganamu died on the beach after about fifty minutes. The police aide was told to stay clear of the dying man and this instruction remained in force when he was dead.

The next day the community at Galiwin'ku was informed and the body was taken to Darwin. The Task Force returned to Darwin while detectives arrived on the Island and began interviewing Aboriginal witnesses. Police Aide Brian Gumbula was interviewed as a witness on three occasions. The Task Force policemen were interviewed in Darwin on the Wednesday following the death.

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[87] This knife was subsequently found to be blunt with a broken handle.
[88] By the time of the *Elcho Coronial* Grant had been promoted to the rank of Sergeant.

8.3.2 Constitution and progress of the *Elcho Coronial*

An inquest into Ganamu's death bega n on the 22nd May 1990, at Nhulunbuy (a mining town and government administrative centr e for the East Arnhem region). There the date for a hearing at Galiwin'ku was set for the 19th of June. Generally there were ten or more lawyers participating in the proceedings (ir cluding three Queen's Counsel). The coroner had representation as did Ganamu's fa nily, the Commissioner of Police, the NT Police Association, the Task Force members (Constable Grant in particular), and the Department of Health and Community Services. Tov ards the end, Brian Gumbula was also represented by a lawyer.

At the commencement of the hearings Counsel Assisting the Coroner identified both specific and broad questions that the inquiry v ould seek to answer. The primary issue was the matter of the shooting itself: when Constable Grant fired his gun, did he do so lawfully—or at least with lawful justification or excuse— or did it constitute a criminal offence? Broader issues related to: determining the appropriate ness of the Task Force confronting the man themselves rather than asking the police aides to do so or perhaps simply removing his spears; examining the sufficiency of police training for the situation where they are dealing with a person armed with a knife or with spears; assessing whether there was an opportunity to shoot other than at the man's head; and, critically appraising the responsibilities of the police, the health department and the man's family in relation to the known fact of his mental illness.

The coroner had the power to call anyone who could help in his inquiry to appear before him. Within the health system they rangec from nurse to the head of the government department for mental health services. Within the police system they ranged from police aide and police constable to superintendent (the police officer who killed the deceased did not take the stand). A coroner at that time had the power t o commit a person to their trial on criminal charges (this power has since been removed from a coroner in the NT).

An important difference between a trial and a coronial inquiry is that in a coronial inquiry the coroner is not bound by the rules of evidence. However, in the *Elcho Coronial* there was from the outset the real possibility that Constable Grant could be committed to trial for a serious offence. The coroner conside ed that any evidence adduced in the inquiry that might result in Grant's indictment would need to be admissible at trial. For this reason the coroner was cautious in overruling objections from counsel when they sought to have the rules of evidence upheld. A comment by the coroner (denoted by 'Cor') that followed upon one of these objections reveals his position (p37):

> Cor: It is possible tha your client could be committed from here, understood; understood. Also understood, I'm not bound by the rules of evidence. Also understood, no way in the world would I accept an argument that I commit him for trial on evidence

> which wasn't admissible evidence. Possibly theoretically I can, but I'd never dream of doing it ...

There were several sittings of the Coroners Court at Galiwin'ku during 1990 because of the large number of local witnesses whose stories had a bearing on the matter. Then in 1991 there were two more periods when the Court heard evidence in Darwin before the coroner retired to prepare his findings which were then translated into the Djambarrpuyngu language and delivered at Galiwin'ku on the 3rd June 1991. In his official findings the coroner stated (p23) that the police were 'acting in the course of their duty' and that 'the evidence is insufficient to put any person upon his trial for any indictable offence'.

8.3.3 The *Elcho Coronial* data

The corpus of data is provided by:

- official transcripts of the proceedings;
- audiotapes of much of the Yolngu testimony (the result of the researcher recording proceedings during most of the times that he was interpreting[89]);
- transcripts of the statements made to police;
- the coroner's findings and their translation;
- notes taken by the interpreter during the proceedings.

While evidence was taken from a total of 16 Yolngu witnesses, most attention was reserved for Police Aide Brian Gumbula, who had been a key eye-witness to the shooting and who had already been interviewed by police at length as a result. Mr Gumbula testified on a number of occasions during the inquest and his evidence occupies 296 out of 1,891 pages of the official transcript. Extracts from his evidence appear frequently in following chapters as a consequence of several factors: he was given a great deal of attention by several counsel using varying communicative approaches; the provision of interpreting assistance to him was highly contentious and he gave evidence both with and without an interpreter; and, his testimony covered a variety of topics, including a sustained cross-examination on abstract matters situated in the Yolngu cultural domain.

Other witnesses whose testimony has provided the bulk of material analysed in Part Four and Part Five include:

- Alfred Gondarra who lived in the same household as the deceased and whose English proficiency was considered *'quite excellent'* but who was nevertheless successfully confounded during cross-examination;
- Joe Gumbula, a second police aide who gave evidence in English. For him the matter of interpreting assistance had never been raised, yet while his answers were confidently given, analysis (in Part Five) reveals a deal of unrecognised

[89] The coroner permitted me, as interpreter, to record while interpreting. This was fortunate since the Court's tapes which carried an audio recording of the entire proceedings have since been recycled (i.e. recorded over).

miscommunication;

- the volunteer Yolngu tracker Geoffrey Walkundjawuy, who went by boat across to Walwal Beach with the youth. He was arduously cross-examined by counsel representing the Task Force police who successfully applied to have him give his evidence without an interpreter;
- Yilikari Bakamumu, the old man who lived on an outstation across the bay from Walwal beach and whom Ganamu trusted.

8.3.4 Contextual issues

In describing some of the unusual features of this court case, it is necessary to outline its political context. During the inquest public authorities as well as the individual police officers were under pressure. The shooting coincided with the final stages of the Royal Commission into Aboriginal Deaths in Custody and followed on the heels of two controversial shootings of Aboriginal people by paramilitary type police units in other states. At the same time the police and judicial institutions in the NT were sensitised to public criticism by continuing embarrassment over the saga of Lindy Chamberlain (refer footnote 16, Part One). Revelations from the 1987 Royal Commission into her convictions, and the quashing of her convictions by the Court of Criminal Appeal (15 September 1988), had served to make foolish, prominent judicial, police and government officials who had struggled to uphold her 'guilt'.[90] These circumstances combined to make an unknown bushman's death politically significant and the resulting inquest was to be critically appraised.

The taking of statements by police after the shooting had already revealed that for at least some witnesses interpreting assistance was essential. Two local bilingual residents were summoned as interpreters to appear at the first of the hearings as a preparatory measure. I was coincidentally visiting the Island on other business and was also asked to be present to interpret evidence. On the second day the potential for partiality on the part of the local interpreters was recognised by the Court when it was realised that they had had close family ties with the deceased. Thereafter they were no longer used.

The NT Department of Law adopted unusual measures in attempting to minimise intercultural miscommunication and to offset the alien nature of the courtroom as a communicative environment for many Aboriginal witnesses. The most significant of these was the provision of an interpreter at *all* hearings (both at Galiwin'ku and in Darwin). My role was taken beyond simply interpreting at the stand for Yolngu witnesses. I was also retained to assist the

[90] In response to the allegation stated by the Commonwealth Attorney-General in 1986 that 'there has been an attempt to cover up the actions of the administrators of justice in the NT in endeavouring to obtain a conviction' the Chief Minister of the NT decried what he saw as an attack on 'the integrity of eight judges, three Northern Territory Attorneys-General, the Territorial police force, the Territory Department of Law and Crown witnesses in the Chamberlain case' (Chamberlain 1991:744 . In May 1992, Lindy Chamberlain was paid $900,000 compensation by the NT Government.

family in relaying their instructions to their lawyer, to explain to community members what was happening in court, and, working with a community leader, to translate the coroner's findings so that they could be delivered in the dead man's community in the language of that community (to commission the translation of a court's findings and have them delivered in an Aboriginal language is, so far as I know, unique).

The early proceedings were conducted in a community meeting room. The room was packed with Yolngu, many of whom had been advised that they would be called to testify. One of the tasks of those lawyers who were engaged to protect the interests of the police was to establish by way of evidence that Ganamu had been fit, aggressive, unstable, and an expert handler of knife and spear so that five armed police officers could nevertheless be justified in being fearful for their lives in any confrontation where the man was armed (in the moments before he was shot he was brandishing a knife). This agenda was indicated in lines of questioning exemplified in an extract from the cross-examination of a young man who was with the search party on the occasion when one of the searchers (Mr Stacey) was speared in the hand. Although an interpreter was present with this witness (denoted 'Wit'), Counsel representing the Task Force members (denoted 'CTF') successfully appealed to be able to elicit this evidence without interpreting assistance. By means of a series of *yes/no* questions CTF established that Ganamu gave fear to the local inhabitants (p35):

CTF: When Stacey was speared, did you run away?

Wit: Yes.

CTF: Did you run back to the Toyota?

Wit: Yes.

CTF: Were those other Aboriginal men there with you?

Wit: Yes.

CTF: Did they run away?

Wit: Yes.

CTF: Were you frightened?

Wit: Yes.

CTF: Frightened of the dead man?

Wit: Yes.

(This series of agreements raised the spectre that the witness might be agreeable with anything (i.e. a case of gratuitous concurrence—see section 1.3 above). The last question of this witness was an attempt by the coroner to eliminate this as a possibility:)

Cor: Was there anything in those questions that you had trouble understanding? Did you understand all that Mr Reeves just asked you?

Wit: Yes.

Cor: I was hoping to phrase that so I wouldn't get a simple yes.

Since the only eye-witnesses not party to the actual shooting were Aboriginal, as were the

only people who could claim to know the dead man well, the successful cross-examination by Counsel representing the Task Force of Aboriginal witnesses, most of whom might testify disadvantageously, was crucial. Following an occasion when a witness had become unhappy at being pressed by questioning under examination-in-chief, CTF made it explicit that he had no intention of shying away from the tactical use of aggressive questioning in cross-examination (p278):

> CTF: ... I'm not going to be very kind to him I think at this stage, Your Worship, and it might be best if it's not done in this community, because I'm going to have to be quite harsh with him.
>
> Cor: Are you?
>
> CTF: If he was angry about what Mr Tiffin's doing, I think he will be a lot angrier later.

However, it should not be thought that CTF questioned only in an aggressive manner. For example, in the case of the youth who had driven the boat over to Walwal Beach and had witnessed the shooting, CTF was merely highly controlling: an examination of his first hundred questions to this witness (pp211-9) reveals every one of them to have been a *yes/no* question (mostly framed as declarative + tag).

From the cross-examinations of the first witnesses it became clear to others who were waiting to give evidence that they were in for a difficult time. During the first recess of the first day (20 June 1990) I and another interpreter were swamped by anxious prospective witnesses and their relatives begging our support. For them the interpreter was far more than a 'conduit' (refer section 8.1.3 above)—he was seen as one who was known to them, who could take the stand with them, and who could be their articulate mouthpiece. In short he was someone who could lessen their nerves and fear as well as their English language handicap.

My own position as interpreter requires further comment. I had been a resident of Elcho Island for four years (1982-1985) and had returned there frequently since that time. I was therefore well known to most of the Yolngu witnesses. Although I was a speaker of Djambarrpuyngu I had had no formal training as an interpreter nor any experience with legal interpreting. Except for a brief informal tutorial by one of the counsel informing me of what was expected, I was relatively unprepared. Following the first day of witness testimony there was an adjournment of two months during which I undertook a program of intensive self-education and also re-established a long-dormant interpreter training program at Batchelor College, with a group of Yolngu trainees from Elcho Island. Two of these trainees assisted me (each for a day) at the next hearing.

During the course of the inquest Yolngu witnesses testified under a variety of circumstances. Some relied almost totally on an interpreter to interpret in both directions. Some spoke

entirely in English without any assistance. Some had an interpreter sitting with them to provide assistance whenever the need was indicated or requested. Some witnesses were supplied with an interpreter without asking. Others were required to state from the witness stand their need for an interpreter. For one witness interpreting assistance was denied.

The approach taken by the interpreter to the task of interpreting evidentiary discourse depended very much upon the English proficiency of the particular witness. Those witnesses who spoke almost no English were often those who were most confused. During the course of their evidence a significant amount of discussion was often necessary between interpreter and witness in order to clarify what was being asked or in order to explain information that counsel may have assumed as known (such as the fact that the witness's conversation with police had been recorded and transcribed as evidence for use by counsel in their questioning: section 11.1 below). This discussion was often, but not always, summarised for the benefit of the court. Sometimes the answer to counsel's question would materialise during the dialogue between witness and interpreter in which case the interpreter would interpret this part of the dialogue and leave the remainder uninterpreted. (This form of interpreting practice readily confirms findings by Berk-Seligson (1990b) of court interpreters 'intrusiveness ... manifested in multiple ways'.)

In the case of witnesses who were provided interpreting assistance, but whose English proficiency allowed them to understand and answer many questions without this assistance, the approach of the interpreter was to intervene if either party displayed particular difficulty or to translate questions and/or answers upon request (or cue). In these circumstances the consecutive mode of interpreting was adopted (simultaneous interpreting is not practiced in Aboriginal languages court interpreting) with only the occasional need for the interpreter to actually *explain* to one what was said by the other.

Reactions to the use of an interpreter were varied. Some counsel welcomed his assistance while others viewed the interpreter as impeding their cross-examination. There was frequent courtroom contention over whether particular witnesses required an interpreter with objections to the use of an interpreter forthcoming on a number of occasions with respect to a number of witnesses from Counsel representing the Task Force members. Although his objections were usually rejected by the coroner, they were sustained on occasion. It is also a fact that for some witnesses no counsel saw any need for an interpreter and some witnesses did not indicate to the interpreter that they felt any need.

It had become clearly evident during the first day of evidence that counsel generally lacked skill in communicating with Yolngu witnesses, even with interpreting assistance. For example, in observing the Yolngu taboo on using a person's name (or any similar sounding word) after that person's death (refer footnote 1, Part One), counsel had referred to Ganamu

by the term *dead fella* (i.e. deriving from *dead fellow*), an expression which Yolngu witnesses usually did not recognise. Counsel had mistakenly assumed that Yolngu witnesses would be familiar with Aboriginal English terms such as this, whereas their E-YM interlanguage better accommodated the SAE term *dead person.*

As a result of holding a number of concerns about the quality of communication in the proceedings, I approached Counsel Assisting the Coroner (denoted 'CAC') during the ensuing adjournment to discuss them. The outcome was that he opened proceedings on the next occasion with some general advice to counsel. His comments (p180) are quoted in full for their value in summarising the level and extent of difficulty in Anglo/Yolngu communication that was already evident at an early stage in the Inquiry:

CAC: ... it may be of assistance if I indicate for general information some points that have been made to me in the last adjournment by Michael Cooke, one of the interpreters who interpreted when we were last here, and I make these observations with a view to assisting the taking of evidence.

Questions have been put to some of the witnesses asking them to indicate distances in units - so many feet, so many yards or so many metres; that is a very difficult concept I am told for people here to respond effectively to, but what they can do with considerable accuracy, I am told, is to indicate an object which is at a similar distance.

Cor: They sound very much like ordinary Australian witnesses the country over.

CAC: Secondly, I'm told that times present a problem if they asked to indicate a time by reference to the clock, but they can generally give an indication of morning or afternoon, concepts like that.

Cor: Most people here wouldn't wear a watch in their ordinary carrying on, I suppose.

CAC: Thirdly, where it is desired to ask a witness about something which occurred before something else, it's necessary to identify quite clearly and precisely as a first step the event that one wants to ask about, or wants to ask in relation to, and having fixed that event by at least a separate question, then one can ask 'did something happen just before' or whatever.

I am also told that there are certain matters that I put under the matter of style of English which have caused some difficulty in questions already put. I am told that the expression 'dead fella' is not one which is used here and that 'dead person' would be a more precise term, and a preferable term.

Fifthly, in common with many other areas, hypothetical questions involve conceptual difficulties and will not generally be understood properly.

And finally, negative questions - again in common with other places - an affirmative response to a negative question is agreeing with the negative proposition.

CHAPTER 9

LANGUAGE AND CONTROL

9.1 Questioning tactics and Yolngu witnesses

From counsel's perspective a successful outcome in the examination of a witness, whether in examination-in-chief or in cross-examination—but particularly in cross-examination—depends upon obtaining and maintaining control over the witness (Glissan 1991). In the case of NESB Yolngu witnesses the practice of control is inevitably and radically altered, and differently so in examination-in-chief compared to cross-examination, with the critical difference being the leading question.

As stated earlier (section 8.2.1), a leading question may either suggest an answer which the examiner seeks or assume the existence of facts which are in dispute. In the police interview with 'M' (Chapter 5) we saw how susceptible M was as a NESB Yolngu interviewee to questions that were suggestive, and to questions containing assumptions of criminality (e.g. *'So if he didn't get any help he could've died? You were hoping.'*; and, *'Now that you'd stabbed him to kill him and you'd hidden the knife, what did you want to do?'*). Her susceptibility to verbal manipulation arose from a potent mix of three interacting factors: her susceptibility as an Aboriginal person to gratuitous concurrence; her reliance as a non-native speaker upon the verbal scaffolding of her interlocutors; and, her inability to fully understand the meaning (explicit and/or implicit) of many questions.

In the cross-examination of NESB Yolngu witnesses these same factors are similarly operative; in fact they are further enhanced by the power of counsel to command answers and to interrogate aggressively. Furthermore, of the four standard tactics of cross-examination—*confrontation, insinuation, undermining,* and *probing* (Glissan 1991:94)—success with the first three is *promoted* by low levels of proficiency in English (e.g. ASLPR Level 1+) and *impeded* by the participation of an articulate interpreter. Support for this conclusion can be found in the reactions of counsel engaged in this type of cross-examination when they are faced with the prospect or presence of 'interference' from an interpreter.

On the other hand, the *probing* of a witness—either in respect of evidence already given under evidence-in-chief or in the search for (further) useful information—*does* depend upon the witness being able to understand the questions and counsel being able to understand any information that is forthcoming. The cross-examination of W during the *voir dire* in *R v G* (section 6.3.3 above) provides a good example of this approach and of the handicap that is suffered by counsel who is unable to communicate the point on which elaboration or explanation is required and where the witness does not have sufficient English skills to provide any clear answer, let alone an elaborated response.

The handicap suffered by counsel in actually seeking information from the NESB Yolngu witness (as opposed to merely imposing it upon the witness for their concurrence) is much greater in examination-in-chief because of the need to apply an oblique approach in questioning. This can make it very difficult for the witness with limited English to know what is being asked. A good example of this was provided in *R v G* during the examination-in-chief of 'W' when 16 questions were required simply to find out the dozen-or-so words said to him by police regarding his role as prisoner's friend and interpreter. It is therefore to be expected in such circumstances that counsel would be welcoming of the assistance of an interpreter (although in that particular case it was difficult for the prosecutor to ask that his witness be given an interpreter since it would have stricken his argument that W had been an adequate interpreter for his brother!).

In the evidence of W both counsel revealed the need, for their respective strategic purposes, to elicit information and explanation concerning W's participation in the PRI with his brother, and comparatively little need to constrain his answers. This is reflected in an assessment of question types (refer section 8.2.4 above) utilised by counsel: of the first 50 questions put to W in examination-in-chief over half were non-constraining (18 Elaboration; 8 *yes-no/wh-*) and this was also evident in a count of the first 50 questions put in cross-examination (15 Elaboration; 13 *yes-no/wh-*). Furthermore, of the *yes/no* questions from either counsel in this sample, no declaratives were commanding of the required response (i.e. none were tagged *reversed polarity* or *truth tag negative*). The proportion of elaboration questions addressed by counsel to W (i.e. approximately one third) stands in contrast to Sandra Harris's (1984) finding of 6% in her study and this is reflective of the probing approach that both counsel adopted in questioning W.

In this chapter excerpts taken from the *Elcho Coronial*, and then from *R v M*, reveal a range of questioning approaches in respect of Yolngu witnesses and a range of responses to the participation of an interpreter. Equally, they reveal the general inability of Yolngu witnesses to withstand aggressive forms of cross-examination when they do not have assistance, contrasted with significant empowerment deriving from the opportunity to give evidence-in-chief in narrative form together with the support of appropriate interpreting assistance.

9.2 Power through English

The proceedings of the *Elcho Coronial* provide exemplification of the powerful control over testimony that is permitted through confrontational cross-examination of Yolngu witnesses in the absence of an interpreter. Confrontation as a tactic of advocacy is described in Glissan (1991:94):

> *Confrontation* is the method of direct attack. It amounts to 'firing', often rapidly, damaging facts at the witness; more particularly those inconsistent with his evidence. ... It can, on some occasions, be employed for the total destruction of a witness. More frequently it is used where there is less material, to damage an area of evidence.

The illocutionary power of counsel who confronts the NESB Yolngu witness unimpeded by interpreting 'assistance' is illustrated in an excerpt from the cross-examination of Alfred Gondarra (denoted 'AG') by Counsel representing the Task Force members. Counsel assisting the Coroner had earlier referred to the witness as a person whose *'English is quite excellent in fact'* (p519) and so the question of interpreting assistance did not arise. Nevertheless, a significant language handicap emerged under questioning from CTF who forced AG's concurrence on the point that Ganamu had once thrown a spear at his own brother. The reality—which happened to emerge in court some months later—was that it was a spear *shaft* which had been thrown; that is, a length of light wood that had yet to be fashioned into a spear. In what appears as a case of first language interference, the witness is confounded by the fact that the English word *spear* translates into Djambarrpuyngu as *gara*, a generic term for spear which also means *spear wood*. After twice trying unsuccessfully to explain that the deceased only threw a stick at his brother the witness misinforms the court under pressure of insistence to accept the confinement imposed by a declarative *yes/no* question with reversed polarity tag (pp558-9):

CTF: You knew that he'd thrown a spear at [his brother], didn't you?

AG: It wasn't a real spear - it was blunt in the nose.

Cor: It was what?

AG: It wasn't a real spear with a sharp edge on it.

CTF: When I asked you whether you know about these things ...?

AG: I've heard it, yes, I've heard about that.

CTF: Please tell me that you have?

AG: Yes.

(Objection)

CTF: You'd heard about him throwing a spear at [his brother], hadn't you?

AG: Yes.

The success of this confrontational and highly controlling approach to the cross-examination of Yolngu witnesses during the *Elcho Coronial* depended upon minimum 'interference' from an interpreter. In the case of Geoffrey Walkundjawuy (denoted 'GW'), one of the three Aboriginal eye-witnesses to the shooting, CTF made an application to prevent him from obtaining interpreting assistance at all. This led to him being asked to respond to questions seeking biographical information to check his understanding of English and, on the basis that his replies were appropriate and responsive, he was asked to continue with his evidence without assistance (p361):

CTF: Your Worship, before an interpreter is sworn, this witness managed to give a lengthy statement to the police without an interpreter and I'm told - - -

...

Cor: What are the dot, dot, dots? Is that people not answering? (The coroner is referring to the witness statement.)

CTF: As well I'm told that this witness has had a secondary* education.

(*Under cross-examination later (p429), this witness revealed that he had attended primary school for '*... not very long. I just went to the school and then I ran away from the school*'.)

Cor: Is there any reason why, Mr Tiffin, the witness needs an interpreter?

CAC: I must admit I am not sure of my knowledge. I am concerned in all cases that although there may be apparently responsive answers, that they are not in fact responsive answers.

...

Might I suggest that we start without the interpreter and see how we appear to be going.

Cor: Yes. Let's get some background first of all.

CAC: Geoffrey, where do you live?

GW: Here.

CAC: On Elcho Island?

GW: Yes.

CAC: And how old are you?

GW: 37.

...

CAC: Do you know when you were born?

GW: Can't remember.

CAC: Do you work here?

GW: Yes.

CAC: Who do you work for?

GW: I work for council plumbing.

CAC: And you're a plumber is that right?

(In E-YM interlanguage such questions are not taken to refer to the holding of qualifications but merely to indicate the types of work one does.)

GW: Yes.

CAC: Were you born on Elcho Island?

GW: Yes.

CAC: And you're married?

GW: Yes.

CAC: How many wives have you got?

GW: I got two wife.

CAC: How many children?

GW: About 6.

CAC: Do you remember after that dead person was killed you talked to the police and the conversation was recorded on a tape recorder? Do you remember that?

GW: Yes.

CAC: Was that a true story you told the police that time?

GW: Yes.

...

Cor: At this stage I am happy that we should proceed without an interpreter, but Geoffrey, if there's anything you don't understand, the man is ready to assist you. All right?

The most complex utterance provided by GW was *'I work for council plumbing'* which provides no basis for the conclusion that this witness's English proficiency would be sufficient to prevent significant miscommunication (an analysis of miscommunication that arose during the course of his evidence is given in section 10.4 below). Nevertheless, CTF successfully averted the prospect of having to accommodate the presence of an interpreter in his impending cross-examination.

Questioning approaches applied to GW by three different counsel can be usefully compared in order to establish differences in style that will be seen to be operative with subsequent witnesses as well. The distribution of question types helps to identify how far counsel seek to control a witness through constraining, prompting and even directing responses. The most controlling was CTF: of his first 100 questions to GW in cross-examination there were no elaboration questions—but there were 82 *yes/no* questions of which 55 were posed as declaratives, and 22 of these were accompanied by reversed polarity tags making it quite explicit which alternative was being sought, as is shown in this extract (p432):

CTF: And the - you were going to go across in a boat to the dead man, weren't you.

GW: Yes.

CTF: And the plan was to have Bob - Old Bob - with you in the boat, wasn't it?

GW: Yes.

CTF: Because the dead man trusted Old Bob, didn't he? You are nodding your head. Is that 'yes'?

GW: Yes.

CTF: And you thought with Old Bob in the boat the dead man would come in the boat with you, didn't you?

GW: Yes.

CTF: And then you could take him away and get him some treatment?

GW: Yes.

CTF: But Old Bob was drinking Kava there at the Dhayiri camp on the Saturday, wasn't he?

GW: Yes.

By way of contrast, the first 100 questions put to this witness in examination-in-chief had included 6 elaboration questions and less than half (46%) had been *yes/no* questions. Furthermore, while 20 of the *yes/no* questions were declaratives only one of these was

tagged. A remarkably similar distribution obtains from the first 100 questions put to the same witness under cross-examination by the Queen's Counsel representing Ganamu's family (denoted 'QCGF') as the following table, laying out the results from each of these three counsel, shows:

Table 9.1. Distribution of question types addressed to GW

Question Type	*CAC (ex.-in-chief)*	*QCGF (cross-exam.)*	*CTF (cross-exam.)*
Elaboration	6	7	0
yes-no/wh-	23	24	7
wh-	20	16	11
Disjunctive	5	4	0
yes/no	46 (1 x declarative+tag)	49 (3 x declarative+tag)	82 (27 x declarative+tag)
Total	100	100	100

The tight control that CTF maintained over GW through applying coercive question types (see discussion of coercive questions and question typology in section 8.2.4 above) was attributable to GW's status as an 'unfriendly' witness within the context of the case (i.e. threatening the interests of the CTF's clients) rather than a matter of personal style. By way of contrast, of the first 100 questions addressed by CTF in cross-examination of a *police* witness (Constable Majid), he permitted six elaboration questions and 31 *yes-no/wh-* questions. Furthermore, of his 57 *yes/no* questions to his 'friendly' witness *only three* were tagged.

For QCGF, GW's narratives, comments and explanations would provide support for arguments that the Task Force should never have been called to Elcho Island and that they had been unnecessarily heavy handed. Therefore, while control was necessary to guide him to these points, there was advantage to be found in GW's commenting upon them. On the other hand, in cross-examining witnesses adverse to his cause, QCGF appeared even more controlling than CTF. In his cross-examination of Constable Hutchinson, who had organised the search for Ganamu during which a searcher was speared, QCGF addressed *94 yes/no* questions (out of the first 100) of which *27* were tagged. And, not surprisingly, no elaboration questions were asked.

These figures are consistent with the findings of Danet et al. (1980, see section 8.2.4 above) that the most coercive question types—declarative, *yes/no*, *wh-*, and disjunctive—comprise the majority in both direct and cross-examination; and that the proportion of declarative, *yes/no* and disjunctive types increases under cross-examination (i.e. with the presumption that the witness is 'unfriendly'). However, the figures are not consistent with those pertaining to the questioning of the witness W in *R v G*, where both counsel posed most questions in a

non-constraining type (i.e. in examination-in-chief and cross-examination). This disparity highlights that the relative proportions of different question types is not simply a consequence of whether questioning occurs under examination-in-chief versus cross-examination, or of the status of the witness as 'friendly' or 'unfriendly'—but is also matter of the advocate's purposes in respect of the witness at hand. Thus, where it is necessary to 'probe' the witness (as was the case in the cross-examination of W in *R v G*) a considerable proportion of non-constraining questions becomes appropriate.

It is pertinent to note that the *Elcho Coronial* did not reveal that an interpreter constrained counsel in terms of the form in which questions are asked. CTF's cross-examination of Police Aide Brian Gumbula (a harmful witness accompanied by an interpreter) showed that the vast majority of questions—82 out of 100—remained *yes/no* questions, of which 57 were declarative in form (with 38 of these tagged). Rather, there are other ways in which the interpreter impedes the advocacy tactics of confrontation, insinuation and undermining, when counsel seek to apply these in cross-examination.

The nature and effect of this impedance will become apparent during the course of section 9.4. Before that, it is necessary to consider how witnesses at the *Elcho Coronial* gained interpreting assistance in the first place.

9.3 Obtaining interpreter assistance

Given that the interpreter was always present in court and that there were no set guidelines to govern his use, what were the actual circumstances under which he did end up with the witness in the witness stand? They can be grouped into four categories:

9.3.1 Request from counsel during testimony

The following extract provides an example of counsel finding himself unable to proceed without assistance (although the witness had given evidence-in-chief without an interpreter). Queen's Counsel representing Ganamu's family was attempting to cross-examine the Yolngu man who had been speared by Ganamu (p5):

QCGF: You'd met this man before I think, had you, Mr Wuruwul? (no response) You'd met this man before? (no response) Some time earlier you had met this man, is that right?

Wit: Met him for ...

QCGF: Yes you'd spoken to him?

Cor: You mean recently before?

QCGF: Yes.

Cor: They may have known each other since they were children.

QCGF: On an earlier time than the time when you got the spear had you met him? (no response)

Perhaps, Your Worship, I'd ask the interpreter to be sworn.

9.3.2 Before the witness is sworn

A witness had just been called to take the stand and the fact of a language difficulty was already known to the examiner-in-chief.

Cor: Who's going to swear this witness?

CAC: I think there is a language problem here Your Worship.
(The interpreter was then called to assist.)

9.3.3 Through the unchallenged presence of an interpreter

On several occasions, the use of an interpreter occurred when the witness walked to the stand in the company of an interpreter or when the interpreter had remained in his chair at the witness stand having just interpreted for the previous witness.

Being a non-verbal process this is not shown in the transcript. That is to say, no counsel made application or objection and no-one commented. For several witnesses interpreting assistance was gained in this way. Conversely there were witnesses who had, prior to being called, indicated to me (as interpreter) their wish for interpreting assistance. However, they were not given the opportunity to state this to the court after being called upon to take the stand. That is, they were not invited to express one way or another their level of comfort in their use of the English language. They were simply launched into examination-in-chief and then cross-examination, in English.

9.3.4 Upon the request of the witness

Police Aide Brian Gumbula (denoted 'BG') had begun giving evidence (p636) without an interpreter although he had already told me that he wanted assistance. He was unaware that he would have to halt questioning and specifically request an interpreter. I subsequently informed him of this necessity to actually demand an interpreter and on the next day he gave his request for assistance in answer to the first question asked of him (p650):

CAC: In the course of one of your interviews with police ... you drew a plan; is that correct?

BG: Yes. First of all, can I have my - my interpreter please.

9.4 Objections and contention over interpreting assistance

The request for assistance from BG had a stunning effect on the court. It was the first time in the proceedings that a witness had himself halted questioning to ask for an interpreter. On previous occasions it was only counsel who had done so when *they* were having problems getting answers from the witness. In this case counsel was comfortable but the witness was not. The police aide had enough English to converse but could not command the language as counsel could. His request provoked a submission from CTF objecting to interpreting assistance (this was one of a number of occasions when CTF sought to prevent or restrict the access to an interpreter). It is worthwhile to continue with the above extract to see the responses from various counsel and how the matter was dealt with on this occasion:

Cor: Is there a problem?

CAC: I'm not aware of there being a problem, Your Worship. On the other hand, I'm also conscious of the fact that sometimes one isn't aware that there's a problem.

Cor: Yes

CAC: It's not my application, but the witness has indicated that he would like the assistance of Mr Cooke and Mr Cooke is present.

Cor: I know. Mr Cooke is available. I'm going to allow it.

CTF: Can I just be heard on that your worship?

Cor: I'll allow you to be heard, yes.

CTF: Your Worship, we, on other occasions when witnesses have endeavoured to - wanted to use interpreters, we've made submissions. This witness has given three statements to Police without the aid of an interpreter. He, in one of his statements, sets out his background, education and training, and if it's necessary I'll ask him what his level of education is. I believe he attended school at Elcho and went to a later stage of that education.

... in my submission, unless the witness can establish to Your Worship that he actually needs an interpreter to assist in interpreting the language, as distinct from using him as some sort of prop, then Your Worship should not allow him to use an interpreter. He's shown no sign to date, in this court or in any of the statements that have been taken from him, of needing the assistance of an interpreter to interpret the English language.

Cor: All right.

QCGF: Does Your Worship want to hear me on that?

Cor: I'd much rather hear the witness, to find out why he wants an interpreter.

Why do you want to use an interpreter just now?

BG: It's in connection that I - the subject - the subject changes and I get confused. Give a good explanation. There's different varieties of questions.

Cor: Yes, Mr Ross?

QCGF: Yes. I just wanted to say this, just to echo what Mr Tiffin said, that we're not necessarily the best judges and probably he is. While it's pretty clear that, in general terms, his command of oral English has been demonstrated, one would have thought that what the witness probably wants is to make sure that the nuance of the question and the nuance of the answer is made clear.

I also have access to a statement that was apparently obtained by Mr Tiffin from Mr Cooke, and it demonstrates that there is not only a matter of explanation to the nuance of the words but that in various communities words that seem clear and unambiguous to us have different meanings in those communities. I don't know if Your Worship - - -

Cor: English words?

QCGF: - - - has access to that, that statement of Mr Cooke.

Cor: I'm sure I have access to it, but whether I can lay my hands on

it today, I don't know, but I - - -

QCGF: Well, what he's - you might recall that on an occasion at Elcho Island what seemed at first blush to be a difference of evidence about the state of the moon and the deceased man's waxing and waning illness associated with the changes of the moon, the evidence given by Aboriginal witnesses on that subject seemed to vary, but when Mr Cooke explained the way in which the terms were used it fell into place. And it's partly those cultural matters, rather than the matters of etymology themselves, that one would have thought that his assistance would be useful. But he's here on standby for that very purpose and one would have thought that, if he's not used, then no harm done. If he is used then its need will be demonstrated.

Cor: Yes. I intend to allow Mr Cooke to assist the witness. I see we've got two chairs there already; I'm surprised.

This exchange between counsel, coroner and witness encapsulates some of the principal communication issues underscoring the dynamics of evidentiary discourse where Yolngu witnesses (or indeed other NESB Aboriginal witnesses) are involved. They include:

- the failure to recognise the need for interpreting assistance (*'sometimes one isn't aware that there's a problem'*);
- the utilisation of interpreters as a tactical matter (*'when witnesses have ... wanted to use interpreters, we've made submissions'*);
- the perceived effect of an interpreter as *'some kind of prop'*;
- susceptibility to confusion by Yolngu witnesses from the Q/A discourse style (*'the subject changes and I get confused'*);
- misunderstandings where Yolngu use English expressions with non-standard meanings (*'words that seem clear and unambiguous to us have different meanings'*);
- the fact that interpreting assistance extends the range and depth of evidence that can be elicited (*'if he is used then its need will be demonstrated'*).

Some of these points have been discussed or touched upon in Part Three, for example in relation to: M's confusion under the Q/A discourse structure (Chapter 5); the tactical advantage accruing to police in avoiding use of a competent interpreter in PRIs (section 7.1.1); and, misunderstanding during W's evidence arising from the non-standard use of *'don't have to'* (section 6.3.3). What is interesting here, however, is the evident *consciousness* of the key dynamics of Anglo/Yolngu evidentiary discourse among the parties to it, and the fact that they have explicated these themselves in a way that exposes their particular interests in respect of Anglo/Yolngu communication. Each of these matters that the participants have themselves raised are explored in turn below, particularly drawing from extracts relating directly to this witness (BG). However, before doing so it will be valuable to raise two pertinent contextual factors: the particular pressure that BG faced as a witness, and his level of proficiency in English.

BG was under particular pressure as a witness at the *Elcho Coronial* from counsel representing police interests. Following the shooting, BG had said in police interviews that he had advised Constable Hutchinson (who organised the failed search for Ganamu prior to calling in the Task Force) that the family should help bring him in as they had helped three times before (p642). Furthermore, the Task Force police had denied him any opportunity to approach Ganamu on the beach (even after he was shot) and he was not allowed near the body. Finally, his account of the events of the shooting were at significant variance to those of the police.

In the excerpts from BG's evidence that will feature both here and in Part Five, it will be seen that his English language proficiency closely matches with competencies described within the category of ASLPR Level 2 (i.e. 'Basic Social Proficiency', see section 5.5 above). That is to say:

- he is able to 'convey simple reported speech' using 'some indirect speech forms' and 'can describe and/or comment upon everyday things in the environment';
- he is 'particularly restricted in terms of the complexity of meaning and the amount of abstraction that [he] can convey' and displays an abundance of 'non-standard L2 forms [that] are characteristic at this level';
- he 'understands sufficiently well to be an effective participant in basic social conversations'; but,
- 'has particular problems ... where important meanings are carried in complex or elliptical syntactic forms' and 'utterances are sometimes misinterpreted, necessitating repetition or rewording'.

The NESB Yolngu witness who presents with this capacity to describe and comment upon everyday events and to participate in conversation, but who at the same time carries the comprehension limitations attached to Level 2, is particularly vulnerable to verbal manipulation and especially through leading questions. It is not difficult to entrap such witnesses by inserting meanings within questions that the witness simply misses—but nevertheless appears to address—in their reply. This type of witness is all the more vulnerable because miscommunication that does occur may not be obvious to the court. It is not surprising then that the ardent cross-examiner struggles against relinquishing easy control over evidentiary discourse.

9.4.1 *'sometimes one isn't aware that there's a problem'*

An important interpreting issue identifiable within the above extract concerns the matter of recognition of the need for assistance. When a witness speaks little or no English then the need is clear. When the witness speaks with some fluency then the need can be masked as it was in this situation *('I'm not aware of there being a problem, Your Worship.')*. Problematic communication was in fact evident on a number of occasions in respect of BG, both in testimony preceding his request and in his prior interviews with detectives.

The need for assistance had been demonstrated on the previous day when BG was asked to affirm the veracity and accuracy of the transcripts of his interviews with police. This affirmation is routinely established through a series of questions applied as standard procedure to the witness who has made a statement, prior to the statement being tendered as evidence. These questions serve to protect the witness from having to answer questions about a document purporting to arise from their words—without their having seen, approved, and affirmed it. In the case of a native English speaking witness the ritual questioning usually proceeds smoothly as it did with the Senior Constable ('SC') in the following extract (p990):

CAC: You were interviewed by Detective Sergeant Frew on 29 April of last year?

SC: That's correct.

CAC: That interview was recorded on tape?

SC: That's correct.

CAC: And that tape was subsequently transcribed, is that correct?

SC: That's correct.

CAC: Have you had the opportunity to see a copy of the transcript?

SC: I have.

CAC: Does it appear to be a direct transcript of your interview?

SC: It does.

CAC: And is the story that you told in the course of that true to the best of your knowledge and belief.

SC: It is.

CAC: I tender tape and transcript, if Your Worship pleases.

We see quite a contrast when BG first took the stand (p637):

CAC: You were interviewed by a police officer on Sunday morning, 29 April, commencing before 8 a.m. and that was a conversation that was recorded on tape. Is that right?

BG: Yeah, that's correct.

CAC: Have you seen a copy of the transcript that was subsequently prepared of that interview?

(The native English speaker would perhaps in this context extend the meaning of *seen* to include *read*. There is no assurance that BG was understanding that he was being asked more than whether or not he has merely sighted the document.)

BG: A few.

(I understand this to mean that he has seen or read a part of the document; i.e. a few pages. A subsequent question from CAC (further below) indicates that *he* has understood the witness as having confirmed seeing/reading *several documents*—instead of a few pages of one.)

CAC: As far as you can recall is that an accurate transcript of the conversation?

BG: The best I can think of, yeah.

CAC: If Your worship pleases I tender the tape ... together with a transcript of that. Its a document of some 42 pages.

BG had been interviewed by detectives on three occasions and so the ritual was repeated to cover each record of interview (p638):

CAC: ... was there a further interview conducted ... which was also recorded on tape?

BG: Yes.

CAC: I think you've already told us you've also seen the transcript of that?

(Apparently CAC was referring BG to his previous answer of *'a few'*. There is no other indication in the transcript to account for his impression that BG has already told the court that he has seen the second document.)

BG: Yes.

CAC: Does it appear to be an accurate transcript as best you can recall?

BG: Yes, if I can think of it.

(BG's previous answer concerning the first transcript was *'The best I can think of, yeah'*. The answer given here is quite indefinite, even implying that he couldn't actually recall this document. However his answer failed to alert CAC who proceeded to tender the document. A third transcript and a statement were also subsequently tendered by CAC.)

BG's answers to the questions about having seen, read, and affirmed transcripts apparently satisfied the court that he had, and that his rights had thus been protected. The questions leading to the tendering of his statement appear to have been delivered more as a courtroom ritual than as considered communication. The fact that he had not had the opportunity to read these transcripts was revealed only after he spent a full day in the witness box being examined and cross-examined arduously and at times aggressively, about the contents of 'his' statements (p716):

Cor: When did you last see those [transcripts], Mr Gumbula? Indeed, have you ever seen them?

BG: The detective himself read it to me. I haven't had a chance to carefully look at them.

Cor: I somehow suspected that was the right answer. Does anyone know in fact whether he has seen them since the day they were made.

CGF[91]: I showed him the transcripts on Monday morning but he had them for a few minutes.

Cor: I couldn't read them in that time.

BG was then asked to read them overnight so that he could take the stand for a third day. He was provided with tapes and transcripts of his interviews with Police, and he was provided with assistance from the interpreter. Witness and interpreter worked from 7 o'clock in the

[91] 'CGF' was junior counsel acting for the family and community of the deceased.

evening until 4.30 the following morning, with the witness making substantial corrections, changes and additions to his statements. Even after nine hours work he had not yet completed this task which the court had earlier 'established'—from the first questions put to him as witness—as being already complete.

Apart from his difficulty with the matter having *'seen'* his statements there were several other occasions when BG had shown that he was struggling to understand exactly what was being required of him. Before the point at which he requested an interpreter (he had been asked 65 questions by then) he had shown difficulty with English expressions concerning time and number:

- (p640)

CAC: Mr Gumbula, just on that last statement, the one that you made to legal aid, do you have any idea when you made that statement?

BG: Monday evening.

CAC: Monday, that's the Monday after the dead fellow died?

BG: No, no. He died on Saturday.

- (p642)

CAC: Do you recall if you were at the police station at about 9 o'clock that night?

BG: Am or pm?

- (p643)

CAC: And you suggested that several times?

BG: Yeah, once.

Finally, in spite of CTF's assertion that *'He's shown no sign ... in any of the statements that have been taken from him, of needing the assistance of an interpreter'*, there were indications during his interviews with police which might have alerted Counsel assisting the Coroner of there being a problem. There were numerous instances in these interviews where BG was being asked to state how far individuals were from one another at various stages of the unfolding tragedy at Walwal Beach. In common with many Aboriginal people who 'often tend not to use expressions of quantifiable specification, or to use them vaguely, inaccurately, or inconsistently' (Eades 1992:29), BG exhibited great difficulty in supplying such information in the terms in which it was requested (page numbers refer to reference NT CIB 1/000035; 'Det' denotes detective):

- (pp9-10) The detective and BG were conferring over a map of Walwal Beach.

BG: ... so we had a little bit from here, but there, was about 50, 50 miles.

Det: 50 miles?

BG: Not miles - - -

Det: Yards.

BG: Yards, um yeah that's, that's 50 that half.

Det: Metres, meaning one big pace.

BG: Yeah.

Det: Yeah, I mean like this. (Detective presumably takes a step.)

BG: No, no, no, no not not - - -

Det: That would be about a metre.

BG: Yeah metre, about 50 metre.

Det: Yeah.

BG: Yeah.

While BG's initial proposition of 50 miles in the above extract was absurd the detective was able to renegotiate the units and thus render the answer feasible. However, BG was led to this outcome so that the concern that he may be inaccurate and unreliable in his quantified specification of distance remains. A few minutes later in the interview the detective asked for another interval to be specified whereupon BG did so in the common Aboriginal way of comparing visible reference points in the immediate environment (BG referred to a mound of earth visible from the interviewing room). The detective then asked for the distance to be quantified and, perhaps in view of BG's previously demonstrated unreliability in respect of units of measurement, dispensed with standard units in favour of car lengths (or possibly widths—he was not clear).

- (pp16-7)

Det: How far away from the Constable was the dead man when he fired them (the shots) in the air?

BG: Um, see he was, um er see that hill over there - - -

Det: Yeah.

BG: - - - hill over there.

...

Det: Alright. Now, how many cars would fit between here and that hill do you think?

... (BG responded to an earlier issue and did not answer the question.)

But how, how many cars away, how many cars could fit between here and there if they were up against each other, connected.

BG: Oh I'd say about, about forty.

Det: Forty cars? Is it forty cars or 40 metres you're talking about?

BG: Well 40 cars parked, metres you know.

Det: Forty metres?

BG: Yeah forty metres.

...

Det: ... for the purpose of the tape I would estimate ... the hill would be about oh thirty metres.

2nd Det: Yes, I, I confirm that as well.

It is apparent that the detective found BG's answer of 40 cars to be unreasonably excessive, given that both detectives estimated the distance as 30 metres, and again renegotiated the units to accommodate the numeral. Yet the fact that BG expressed 40 parked cars as equivalent to 40 metres indicates inconsistency (even if he was referring to car width rather than car length), and thus unreliability in his expression of quantifiable specification. This demonstrated difficulty in communicating in this domain could only have adversely affected his reliability as an eye-witness and thus the credibility and value of his evidence. An interpreter could have made clear to the detective that the difficulty did not relate to perception but to both enumeration and the use of standard units. Questions could then have been reformulated enabling the witness to confine his answers to comparisons with features in his physical environment, and police could measure the resulting distances 'for the tape' as necessary. That Counsel assisting the Coroner was *'not aware of their being a problem'* in respect of these interviews may have been because he had not appreciated the degree to which collaborative discourse, including scaffolding, was utilised in rendering some of BG's responses sensible. Alternatively, or additionally, he may simply have dismissed BG's unrealistic answers about distances as a sign of an individual incapacity to reliably estimate.

9.4.2 *'we've made submissions :* the interpreter as an obstacle

It was Counsel representing the Task Force police who most frequently sought to minimise the participation of the interpreter. In contrast, there is no record in the transcript of Counsel assisting the Coroner expressing any objection or difficulty with the use of interpreting assistance. In fact for some witnesses it was provided at his instigation and it was at his request that an interpreter was on standby throughout the inquest. Counsel acting for BG and Queen's Counsel for Ganamu's family also made full use of the interpreter since the development of their positions was assisted by clear testimony that could serve to challenge the evidence of police witnesses.

The considerable effort taken by counsel to remove or circumvent the use of interpreting assistance indicates the significance of the interpreter as an obstacle to control and manipulation. Objections to interpreting assistance from CTF were put on various grounds, such as a witness having managed previously to give a lengthy statement to police without using an interpreter, or that the witness ought to be required to himself state his need for an interpreter from the witness box. In the case of Geoffrey Walkundjawuy, CTF's submission for the evidence to be given in English was successful. In cases where the provision of an interpreter could not be prevented there were frequently attempts to limit the interpreter's participation. These included attempts at discrediting his capacity; confining his role; restricting access of witnesses to him; and challenging his integrity—and they are exemplified below.

9.4.2.1 Discredit capacity

On an occasion when the interpreter wished to use a native speaker of Djambarrpuyngu as an assistant an objection was forthcoming questioning the competence an interpreter who has this need. The coroner's reply acknowledges the legitimacy of accessing linguistic expertise outside of literacy based resources (p182):

CTF: ... as I have done on a number of occasions in relation to interpreters, I make the submission again that it's our contention that an interpreter should not be used unless the witness requests it, and I am opposed to ... two interpreters being used at the same time; it tends to underscore the lack of capacity in one of them to do the task they have just sworn to do. ...

Cor: Yes. When it was put to me that ... the interpreters ... would feel happier with assistance, it seemed to me that ... what we were doing was basically the same as if one is interpreting from a language which is well documented and allowing him to use a dictionary. Here we've got a language which I take it isn't particularly well documented, it doesn't have a literature, and he's falling back on people who are experts in the language ... because they are native speakers.

The coroner subsequently confirmed with the witness that he wanted an interpreter, and allowed the assistant.

9.4.2.2 Restrict role

While the Queen's Counsel representing the Commissioner of Police encouraged a broad role for the interpreter during his own cross-examination of Mr Gumbula, this was not his position earlier in this witness's evidence where, while the witness was under examination-in-chief, he sought to restrict the interpreter's role to that of literal interpreting. This occurred following his observation of the interpreter conferring with the witness over a sheet of paper in answering a question (p659):

QCCP: Your Worship, I note the interpreter is comparing notes of some sort.

Int: I'm carrying a map which the court - - -

Cor: They've got the map.

QCCP: I'd just like to know what the interpreter is doing, and I would ask that - - -

Cor: Yes, I imagine he was looking at the map ...

QCCP: Thank you. Well, I ask that we all be given the benefit of whatever ... the interpreter is saying to the witness from time to time ... Perhaps he should just be reminded of his responsibilities as an interpreter.

Cor: What do you say his responsibility is as an interpreter?

QCCP: To interpret every question asked literally and to interpret every answer given literally.

Cor: Well, as I understand the law in this country, it's not simply a matter of interpreting every question and bringing it back

... an interpreter is supposed to take into account all sorts of cultural things and so on ...

9.4.2.3 Restrict access

After the failure of his submission to prevent BG from being granted interpreting assistance, Counsel representing the Task Force police sought to minimise or exclude his participation, as in this example (p1103):

CTF: ... And you said this morning that each of those warning shots came from your right, didn't you? ... ...

Why are you now saying that they came from your left?
(The witness turns to speak through the interpreter.)

You don't need to ask Mr Cooke with you there. Why are you now saying - - -

Int: He's not asking.

BG: Well I didn't know - I didn't know ...

(Another barrister raises an objection to CTF's interjection, which the coroner sustains:)

Cor: I know. ... Thank you for butting in. ... I think he can ask Mr Cooke.

9.4.2.4 Challenge integrity

The submission and accusation which immediately followed the above discussion perhaps stemmed from the frustrating effect of the interpreter's presence upon counsel's planned course of cross-examination:

CTF: Your Worship, in cross-examination, particularly on a point where a witness has been demonstrably contradictory and unreliable, as he has here, particularly when he's been answering all the questions up to that stage by himself, in my submission he should be required to answer the final question ... by himself, unaided with the support of an interpreter to try and dream up some explanation for it. ...

Cor: It's utterly impertinent to suggest that the interpreter is going to help him dream up an explanation.

CTF: ... well, I'll withdraw that Your Worship. ...

9.4.3 *'some sort of prop'*: the interpreter as a shield

An interpreter inevitably provides some degree of shielding from aggressive cross-examination—if only through impeding the pace of questioning or through relaying the questions in a more civil, and therefore less threatening, tone of voice. Berk-Seligson (1990a:153) found that by adhering to the cultural norms of the language they interpret into, interpreters could, for example, 'ameliorate the aggressiveness of the whole speech situation' by introducing polite address forms in the translation of aggressive questions. Further shielding arises when word-traps set by counsel are defused in the translation. Three extracts follow, illustrating how the interpreter may serve as a shield for the witness.

9.4.3.1 Avoiding a trap

BG was being questioned about his observation of a wound to the hand of a searcher speared by Ganamu. CTF appeared to be trying to pressure the witness to agree that it was a serious injury so that he could then establish a contradiction with an earlier statement the witness had made to Aboriginal Legal Aid that it was a small cut. By turning to the interpreter in answering this question, BG was able to develop a full *yes and no* answer to a *yes or no* question, and so avoided the trap that had been set for him (p811):

CTF: And it was a serious injury wasn't it, from what you could see? (Witness begins to speak to the interpreter. Counsel interrupts:)

Mr Gumbula, it was a serious injury - - -

QCGF: Well wait on, please, the interpreter and the witness are speaking.

CTF: Well, Your Worship, I will - we're going to be here for weeks unless I'm able to interfere and insist upon an answer to a simple question.

Cor: Well, can we have an answer to that one.

Int: Well, the answer has come but it's a double answer. It was serious in one respect because it was one person injuring another, but in terms of anatomical damage, it seemed to be quite a small injury from his perspective ...

9.4.3.2 Spoiling a trap

The next extract shows the interpreter thwarting what appeared as an attempt by counsel to slip past BG a misquotation of his statement to police in which he had said that Ganamu was carrying a knife *'on the left hand'*. BG had amended the statement to remove the impression that he was meaning *Ganamu's* left hand, because he actually meant Ganamu's *right* hand, which was on *BG's left hand side* from his perspective facing Ganamu. In this following exchange Counsel was saying *his left hand* in place of *the left hand* in what might appear as an attempt to dupe the witness into openly contradicting himself. The interpreter exposed the misquotation. Whether it was the left hand or the right hand was an important point because the Task Force police had said Ganamu was about to throw the knife (which was why he was shot) using his left hand, and yet the Galiwin'ku community knew him to be right-handed (p824):

CTF: You told the police on the Sunday morning after the incident that it was on his left hand that the knife was held, didn't you?

Int: Where is this, I'm sorry?

CTF: In those bits I just read out to you.

Int: It says 'On the left'.

Cor: Yes, 'On the left hand'.

CTF: That's what I just said, 'on the left hand'. That's what you told police on the Sunday morning, wasn't it?

BG: Yes.

...

CTF: ... So now you say it was in his right hand?

BG: Hmmm.

CTF: That's the story now, is that right?

BG: Yes.

CTF: But on the Sunday morning when you talked to Police the story was that it was in his left hand, wasn't it?

BG: Yes.

QCGF: Well. I object to that, Your Worship, because he didn't say it was in his left hand, he said it was on the left hand.

Counsel subsequently tried a third time (p825):

CTF: On the Sunday morning when you spoke to Police you told them that it was in his left hand, didn't you?

QCGF: I object to that . . it says 'on the left hand'.

Cor: Yes, which is different.

9.4.3.3 Reducing pressure

Counsel had referred BG to his record of interview with police but did not give him the opportunity to carefully read that which was about to be questioned. BG was able to read English, but slowly. The interpreter provided him with this opportunity by delaying the question from counsel (p1117):

CTF: ... then if you go on to the next paragraph, I suggest that ...

Int: Excuse me while he reads.
(witness reads)
Now repeat the question.

9.4.4 *'the subject changes and I get confused'*

After BG was given an interpreter he answered many questions without assistance nevertheless, and only occasionally turned to the interpreter to have the meaning of a question explained or to have him translate an answer. Under cross-examination the tactic of rapid-fire questioning sometimes had the effect of cutting out any interaction with the interpreter. On one of these occasions the concerns BG had earlier expressed—*'the subject changes and I get confused ... There's different varieties of questions'*—were clearly manifest. The questions addressed a conversation between BG and Constable Hutchinson, who had just called for help from the Task Force following the wounding to the hand of the volunteer searcher (p818-9):

CTF: And is that the only time that you spoke to Constable Hutchinson about the task force coming?

BG: Yes.

CTF: And so are you saying that you knew on Thursday night that the task force was coming to the island?

BG: Yes.

CTF: I thought you'd told us before that you first knew on Friday morning? Are you confused about that?

BG: Yeah I was confused.

CTF: Are you confused about that?

BG: No, you question me 3 different and I didn't concentrate on one question.

CTF: Well which is correct: you first knew about the task force coming on Thursday night or Friday morning? Do you understand the question, Mr Gumbula.

BG: Yes, just give me time to think.

CTF: Well, which is correct, that you first knew on Thursday night or - - -

QCGF: Please, Your Worship, please intervene.

Cor: He said he wanted time to think about it, let him have a think about it.

9.4.5 *'words that seem clear and unambiguous to us have different meanings'*

In his submission to the coroner supporting BG's request for an interpreter, QCGF referred to *'a statement that was apparently obtained by Mr Tiffin from Mr Cooke'*, this being the statement cited previously in section 0.1 as '... an illustrative compilation of exchanges between various counsel and witnesses ... which have been marred by misinterpretation' (Cooke 1991a). The statement includes reference to an occasion during the inquest when a Yolngu witness had been accused of fabricating his evidence following his use of the term *half*. The witness, Police Aide Joe Gumbula (the other of the two police aides), had been speaking about Ganamu's reputation for exhibiting symptoms of mental illness at the time of the new moon. Under cross-examination by Counsel for the Commissioner of Police ('CCP') the witness was standing by his claim, given in evidence the previous day, that there had been a *'half moon'* on the night that the searcher had been wounded in the hand by Ganamu's spear. The interpreter perceived that communication breakdown was occurring and that it was due to the different SAE and E-YM interlanguage meanings for *half*—in E-YM interlanguage it means *small portion*. Although the witness was not giving evidence through an interpreter, the interpreter interjected in an effort to resolve the miscommunication (p499-500):

CCP: So that was Thursday night?

Wit: Thursday night.

CCP: And you say it was a half moon that night?

Wit: Half moon.

Cor: Perhaps my diary is wrong.

CCP: You are sure you're not making this up now?

Wit: No.

CCP: So you definitely went out - you went outside particularly to have a look at the moon, did you?

Wit: Yes, I did.

...

Int: Could I make a suggestion here? When people use 'half' here ... that doesn't necessarily correspond to our terms ... So if you are asking what the moon was like could I suggest that an easy way for him would be to draw the shape of the moon on that night or something like that.

Cor: The answer seems too simple.

CCP: Well perhaps you would be able to draw what the moon looked like on that night.

Cor: Witness draws a thin crescent moon.

9.4.6 *'if he is used then its need will be demonstrated'*

The need for interpreting assistance was evident during CTF's cross-examination of BG—notwithstanding his submission to the coroner that this witness had no need of interpreting assistance. In this extract CTF was seeking BG's concurrence that he had asked the senior member of the Task Force group to speak to the Yolngu representative council for the township of Galiwin'ku, emphasising that he (BG) had had nothing to do with the shooting (p703-4):

CTF: About 15 or 20 minutes after the dead man was shot you had a discussion with Sergeant Smith, didn't you?

BG: Say it again?

CTF: About 15 or 20 minutes after the dead man was shot you had a discussion with Sergeant Smith, didn't you?

BG: Yes.

CTF: You told Sergeant Smith that you wanted him, Sergeant Smith, to speak to the council about the shooting, didn't you?

BG: You're saying I said to Grant ~~something~~ **saying** to go in and talk to the council?

Cor: No, not to Grant; Sergeant Smith?

BG: Smith?

CTF: I'll repeat the question. In that conversation 15 to 20 minutes after the dead man was shot you spoke to Sergeant Smith about he, Sergeant Smith, speaking to the council on Elcho Island, didn't you?

BG: Yeah I told him to - - -

CTF: Did you speak to him about the council?

BG: ~~Can't say~~. **Council**.

CTF: About speaking to the council?

BG: Yes, yes.

CTF: Yes. You wanted Sergeant Smith to tell the council that you had nothing to do with the shooting, didn't you?

BG: Can you just talk slow again?

CTF: Yes. You wanted Sergeant Smith to tell the council that you had nothing to do with the shooting, didn't you?

BG: Me?

CTF: Yes, you.

Cor: (addressing the interpreter:) Feel free to translate.

While seeking to minimise or exclude the participation of an interpreter was integral to the generally confrontational approach taken by Counsel for the Task Force Police in his cross-examination of Yolngu witnesses, it was not the only approach taken by counsel who were representing police interests. The approach taken by Queen's Counsel representing the Commissioner of Police ('QCCP') depended upon full utilisation of the interpreter as he sought to explore with BG matters of Yolngu kinship, ceremony and law, including his position as a relative of Ganamu, as a traditional landowner, and in respect of the ceremonies arising from the death. The motivation behind his line of questioning was to cast doubt upon the reliability of the evidence previously given by BG of events surrounding the shooting. This motivation was made explicit to the Court at the conclusion of his cross-examination (p1155):

QCCP: Perhaps I should make it plain if it's not already, that the only relevance of this line of questioning is not to find out about ceremonies etcetera but it's rather to lay the foundation for a submission that this witness's recollections and evidence is likely to be affected because of the important role.

This probing and lengthy cross-examination concerning complex and abstract matters could only effectively proceed with the participation of an interpreter—amply demonstrating its need (excerpts from this cross-examination will be examined in Part Five). In fact, QCCP explicitly invited the assistance and participation of the interpreter on a number of occasions during his cross-examination, even going so far as to invite input far beyond a conventional interpreting role:

- (p1140)

  QCCP: If you think that some of the questions that I am asking you or some of your answers are about things that you shouldn't talk about ... you tell me or tell Mr Cooke so that he can tell me to stop asking that sort of question. Do you understand that?

- (p1142)

  QCCP: And I wonder if I can ask Mr Cooke also, is there a European interpretation for that word?

- (p1153)

  QCCP: Mr Gumbula and/or Mr Cooke, I understand that some of the - - -

  Cor: I'm not sure whether Mr Cooke is sworn as a witness at this stage.

  QCCP: No, I am not sure about that but he has been assisting us somewhat. Well, Mr Gumbula, I understand that some of the things we were talking about before lunch are things that you don't want to be broadcast, either in the newspapers or on TV or radio, is that right?

  ...

> Perhaps if I can invite Mr Cooke to indicate how he thinks it best dealt with - - -

9.4.7 Discussion

The above comments by QCCP stand in stark contrast with his initial appeal to the coroner for the interpreter to be confined to the role of literal translation (at that time the witness was still under examination-in-chief), and with the frequent efforts of his colleague, CTF, to preclude or minimise the participation of an interpreter. However, underlying this apparent inconsistency there is a systematic congruity with the tactics and strategies of the particular witness examination. The congruity between the positions adopted by various counsel regarding interpreting assistance and their particular purposes as advocates at the *Elcho Coronial* was made explicit in the brief courtroom discussion that followed BG's request for interpreting assistance.

Thus CAC, who occupied neutral ground (in representing the coroner), adopted an equivocal position in his contribution to the interchange: *'I'm not aware of there being a problem ... I'm also conscious of the fact that sometimes one isn't aware that there's a problem'*; and, *'It's not my application, but the witness has indicated that he would like would like the assistance of Mr Cooke'*. QCGF, whose case was built upon full disclosure from Yolngu witnesses of what they saw and heard was more forceful: while acknowledging that BG *'in general terms'* demonstrated *'a command of oral English'* he argued that there were matters of nuance and culture that might require the assistance of the interpreter for their communication. On the other hand, CTF, whose general strategy of discrediting earlier testimony from Yolngu witnesses relied upon force of language, was persistent in his submissions (*'on other occasions ... we've made submissions'*) against the use of interpreters.

The other party to the evidentiary discourse who made his position clear was the witness in saying that he experienced confusion under questioning and that the interpreter could assist to *'give a good explanation'*. Having seen 14 Yolngu give their evidence before he did, BG had been able to observe the communication difficulties that they had faced and the amelioration of these that was afforded by interpreting assistance.

Finally, the interpreter's perspective was also brought into the discussion through QCGF's reference to the *'statement that was apparently obtained by Mr Tiffin from Mr Cooke'*. While this statement had not yet been tendered as evidence it had been circulated among counsel thereby serving to bring out into the open the quality of Anglo/Yolngu communication in evidentiary discourse as a concern. The statement presented analysis of evidence given by three Yolngu witnesses who had been questioned without the benefit of an interpreter (this material will be drawn upon in Part Five) and paid particular attention to the frequent miscommunication arising from the preponderance of declarative *yes/no* questions put to

these witnesses under cross-examination by CTF (such as where CTF elicited agreement from a witness that Ganamu had thrown a spear at his brother, when it had only been unfashioned spear wood—see section 9.2 above). In fact, the statement carried criticism of this form of questioning (p4):

> It has been common to merely seek from the witness an affirmation of the proposition (put negatively or positively) which the lawyer wishes to establish. In some cases such propositions have been contained within grammatically complex, lengthy, and convoluted interrogatives. In being prompted into giving a *yes/no* response, and especially when cued as to which of these two alternatives is being sought, the witness is not required to demonstrate any significant degree of oral or aural competence of English and thus the court may find itself unable to evaluate the accuracy, veracity or applicability of the response.

The document concluded that the extensive and sometimes unrecognised miscommunication revealed by the analysis served to 'call into question the manner in which language issues are dealt with (or not dealt with) during the course of court proceedings' and, more directly (p48):

> It is clear that testimony given by most Aboriginal witnesses speaking without assistance at this Inquest, has been devalued because of numerous instances involving communication difficulty or breakdown.

Notwithstanding the document's ultimate rejection as evidence (refer section 0.1 above), the interest of the interpreter in how evidentiary discourse was being conducted was clearly evident by the time that BG had asked for interpreting assistance. The interpreter's statement had even revealed his position on the matter of the interpreter's role in court proceedings, one that is much more closely aligned with Laster and Taylor's (1994:126) notion of a communication facilitator than with that of linguistic conduit (Cooke 1991a:48):

> The role of an interpreter remains to be more clearly defined and asserted, though it is to some extent necessarily problematic. Obviously it extends far beyond an attempt at literally translating back and forth between counsel and witness. (Literal translation is commonly not possible and when it is, it can still be misleading—the interpreter must decide when the vernacular *yes* translates as an English *yes* or an English *no,* in the case of negatively framed questions for example.) Guidelines governing permission for the interpreter to interrupt proceedings when he perceives that an Aboriginal witness (giving evidence in English) is being misunderstood (or is misunderstanding), need to be enunciated. The role of an interpreter requires extension on occasion to include that of an interpreter of culture, necessary to place some questions and/or responses within the appropriate cultural context, so that they (questions or responses) are not misconstrued.

With the primary communicative interests of counsel, witness and interpreter as parties to Anglo/Yolngu evidentiary discourse now broadly elucidated, the principal communicative dynamics of this discourse that have been revealed by the *Elcho Coronial* up to this point can be summarised:

- In accordance with the observation made in the *Access Report* (para 3.3.4), the position taken by counsel in relation to the use of interpreters, or support for the use of interpreters, is a 'tactical issue'. Counsel know that in the absence of interpreting assistance Yolngu are malleable under cross-examination, being particularly susceptible to leading questions (and especially tagged declaratives) because the

witness need not understand precisely what is being asked in order to respond and because they have difficulty in expressing full replies in any case. Counsel who question in this manner find the interpolation of an interpreter a threat to their control over witness testimony and react accordingly. Conversely, counsel who require informed and full responses from Yolngu witnesses willingly enlist the assistance of an interpreter, even when the witness displays a command of English at the conversational level.

- Counsel are not always aware that miscommunication is taking place or may easily overestimate a witness's capacity to give their evidence in English. Counsel tend to initiate requests for interpreting assistance only where the need is blatant. Unrecognised miscommunication (in either direction) may ultimately lead to confusion or may result in a witness's credibility coming under question.
- Yolngu witnesses with a relatively good command of conversational English (at about ASLPR Level 2) may not realise the limits of their competency in respect of the requirements of evidentiary discourse and consequently may not give consideration to the need for an interpreter. Those who do give this consideration may not be aware that they must specifically request an interpreter in order to gain assistance.
- Yolngu witnesses who speak some English may proceed to answer questions without disclosing to the court that they are experiencing difficulty. Yolngu who anticipate communication difficulties and who have access to an interpreter willingly utilise this assistance.
- The interpreter's level of participation is variable. While some Yolngu witnesses cannot engage in evidentiary discourse without full interpretation of questions and responses, others choose to communicate principally in English only turning to the interpreter at times of difficulty. Some counsel promote the disengagement of witness and interpreter while others may promote interpreter participation in order to introduce complex or abstract issues for the witness's consideration.
- The interpreter's role in evidentiary discourse is potentially wide ranging, extending beyond the narrow function of interpreting utterances between witness and counsel towards a pro-active role where the interpreter takes responsibility for maintaining clear communication between the NESB Yolngu witness and the court.

Most of these points (but not the last) can be seen to have general applicability to situations where Yolngu witnesses give evidence in court. The *voir dire* in *R v G* for example displayed a number of these features in the testimony of the Yolngu witness (section 6.3.3). Even though there were several interpreters present, interpreting assistance was not sought to alleviate the pronounced communicat on difficulties that surfaced during W's testimony. For the Crown Prosecutor this may well have been a tactical matter since W's own role during the PRI with his brother had included that of an interpreter, and it would have been difficult for the prosecution to sustain its argument that W had provided adequate interpreting assistance to

his brother if he himself was in need of the same assistance. There was also an evident presumption that as a senior official in the local council and as a person who was able to converse informally in English, W did not require an interpreter. In the midst of W's difficulty under cross-examination, that is, at the point where he fell silent and was asked by the judge if he understood counsel's question, W went so far as to say my own name but he did not make a coherent request for assistance from an interpreter and he may not have known how to formulate such a request under the circumstances (or even that such a request was permissible). There can be no doubt that the value of W's evidence was compromised by the manifest communication difficulties in both directions where these were the result of his inadequate proficiency in English in consideration of the requirements of testifying in court.

It is the point concerning a pro-active role for the interpreter that must be heavily qualified. An idiosyncratic feature of the *Elcho Coronial* was that a wide ranging role evolved for the interpreter over the course of the hearings, especially those conducted at Galiwin'ku in the informal setting of a large community training room. This evolving role extended to the interpreter sometimes becoming a pro-active participant, as was indicated in QCCP's submission to the coroner (p1557) against receiving the interpreter's statement into evidence. QCCP was arguing that the interpreter had had opportunity to clarify miscommunication during the proceedings, thereby undermining the validity of his effort to submit, after the fact, that proceedings had been marred by miscommunication:

> QCCP: ... Indeed, there were occasions at Elcho Island where Mr Cooke was able to interrupt questions and/or answers to clarify certain things....

The opportunity to interrupt in this way is unusual in court proceedings and would not be present in formal trials such as are conducted in the Supreme Court. This is not to say that the interpreter's role is necessarily confined exclusively to the behaviour of a 'conduit' in Supreme Court trials, but that interjection on the part of an interpreter does not have a place within the formalised structure of evidentiary discourse pertaining to this setting.

In the next section the quality of Anglo/Yolngu communication will be examined in a jury trial (*R v M*) where the defendant was able to give evidence-in-chief in narrative form with support from an interpreter. These represent ideal circumstances for Yolngu witnesses considering the difficulties that they encounter giving evidence under a Q/A discourse structure and without interpreting assistance. It should come as no surprise that the defendant presented a quite different story when she was able to relate events in her own way, and occasionally in her own language, compared to the earlier account of events that developed out of her PRI conducted entirely in English in the Q/A discourse structure.

9.5 Linguistic empowerment from narrative evidence with interpreting assistance

A background to *R v M* was provided in the context of M's PRI in section 5.2. There, it was disclosed that after having observed M's capacity to communicate coherently and fluently with the assistance of an interpreter, her defence counsel (DC) decided to call her as a witness so that she could tell the full story of her time with RB. The expectation was that this would rectify the impression she had given in the PRI that she had gone far beyond the bounds of self-defence by stabbing RB outside of the Housing Commission cabin when he was clearly already disabled as a result of wounds she had inflicted beforehand. The PRI had effectively revealed a quite gratuitous killing and provided the Crown Prosecutor with a powerful case.

M was the only witness to be called by the defence and it remained for her to convince the jury that she had not committed wilful murder. DC's role would be to initiate and guide her narrative. My own presence as interpreter was to ensure that she would not falter simply for the lack of an English word or phrase, and to allow her to express herself as she wished in her own language (Djambarrpuyngu). And for the cross-examination, I would be available to translate any complex questions and to allow her to answer difficult questions in a language she could command, rather than faltering in English.

At the trial the prosecution's main evidence for murder over manslaughter was given by the videotaped PRI and testimony of police reporting her constant repeating of 'I had to do it' to them after they had found her later that night outside a hotel. It was argued that self defence was not a defence because the first two stabs in the chest had removed the threat RB had posed. Following him outside and stabbing him after he had collapsed went beyond self defence. They argued that she wanted to kill him. She had said, 'I had to do it'. She had said in the PRI, *'I got wild at him. I wanted to get rid of him.'* She said she had not called the ambulance, *'(b)ecause I wanted him to be dead'*.

The narrative which formed the defence case lasted an hour. It did not so much contradict much of what M had said to police in terms of the facts, but it put everything that she had said into another perspective; and so it put the whole case into another perspective. M's lawyer infrequently interrupted her except to ask her to elaborate on something she had just said, or to steer her to the next point in her story. M's narrative style was powerful in bringing past events into the present and the effect was felt upon the jury, some becoming visibly moved. She now presented as a courageous victim, whereas during the police interview she had presented as a killer. Her account was made all the more powerful by direct (rather than reported) quoting of speech as she recounted dialogue during the course of her narration.

M's cross-examination centred mainly on attempting to force her to acknowledge that at the time of the violence she had wanted RB dead (and that this is what she had meant by *'get rid*

of him') and that she had been fully aware of stabbing him outside. However, her story held up. The cross-examination was short, no more than twenty minutes, and following it there was a recess. Upon resumption the prosecution dropped the charge of wilful murder and substituted manslaughter to which M elected to plead guilty and so the jury was discharged.

M was able to accomplish a number of things during her testimony that she could not in her interview with the police. First, in spite of the alien and intimidating nature of the courtroom environment (M had no criminal record and no experience with the trial process) she was able to tell the full story from the time she first met RB until the time she killed him. Secondly, she was able to give much longer and more complete answers to questions. In doing so she was able to explain herself: her feelings, her motivations and, most importantly, her state of mind at the time of the stabbing.

The data is provided by the official transcript of M's courtroom evidence complemented by my own notes of the trial (refer to p. xii for transcription conventions).

9.5.1 Getting the story out

DC began by eliciting autobiographical information from M serving to establish her NESB status and to lay the groundwork for her story (for example, how she came to be in Darwin at the time that she first met RB). Examination-in-chief then tracked the events that lead to the killing by way of M's story of her journey with RB from Darwin to his Western Australian community. She named each stop along the way and described each in terms of the events that cumulatively constructed the picture of a woman taken by terror and violence to the end of her tether.

The violence had begun at Noonamah, not 30 kilometres out of Darwin. At Yuendemu (still within the NT) she had refused to go further, until (p87) *'he got angry with me and I seen his face change ... I was scared.'* By the time they reached Western Australia M was being assaulted daily. At Balgo she was publicly humiliated and bashed (p90): *'he took me to Balgo and he bashed me up there in front of all the people that was watching me'*. At the next stop, Mullin, RB asked her to buy cigarettes and then followed her into the shop himself and hit her. When counsel asked the possible reason M replied (p90):

M: I was just asking that man who sell the smokes ... Maybe he [RB] thought I was standing there for a long time talking to him. He just went there, hit me, and I said, "What's that for?" "Let's just go. We going."

RB's complete subjugation of M was established at B-, the last stop before they settled for some time at C-. At this point in the narrative M explains her submission, to enable her own survival (p91):

M: But when I got there [to B-] with him his family came to see him and see me. They were all there. His brother was there. He [RB]

was talking, talking, telling stories about Darwin. He was talking to them telling stories and when he finished telling them a story his cousin-brother stand up and he said, "I see you later, [M]", and [RB] thought he was going to see me that night.

DC: Visit you?

M: Yeah, to see me, visit me, and he said, "How did you know him? He said, "He's going to see you. You know him." I said, "No," and my mind said what did I did wrong? He got a stick, a long one. He was going to hit me but I <gutjparr'yunmirr munathalila> *threw myself on the ground* and I got up and ran into the room. He ran after me. He was trying to open the door and he was bashing me inside that room.

DC: How was he bashing you?

M: He was using his fist.

DC: What happened then in your travels?

M: Then I was real afraid of him at that time. I was just listening, listening to him, and to obey his words.

DC: To obey him?

M: Yeah, and then he took me to [C-].

It is clear here that M has firmly established herself in the story-telling mode. Thus, even when the last two questions from the her counsel were out of sequence with her recount she simply passed over them to continue in her own way. Counsel's strategy here was clearly to keep her talking in the manner of a recount, only interrupting to clarify a significant point (e.g. *'How was he bashing you?'*) or to move the story along to the next point (e.g. *'What happened then in your travels?'*).

Her replies were much longer here than she had been able to produce in her police interview and she exhibits a communicative ability that consistently places her in the realm of ASLPR Level 2. In the above extract she only required the interpreter's assistance in order to express that she had thrown herself on the ground (gutjparryun-mirr = *throw*-REFLEXIVE; munatha-lil-a = *earth*-ALLATIVE-IMMEDIATE) and this pattern of occasional recourse to assistance from the interpreter in order to compensate for limitation in her vocabulary or from a lack of confidence in idiomatic English expressions (such as *throwing oneself on the ground*) persisted throughout her narrative.

During her interview with the police M had twice begun to recount an attempt to escape RB with the help of a tourist couple, only to be diverted by further questions. During the trial she was able to explain the incident. Her recount of this episode began with an introduction of 156 words in length that provided a full and effective foreground to the incident itself. It appeared that on this occasion RB's violence had been precipitated by his brother showing her a photograph of himself taken while in prison. She was ordered inside and bashed. When she screamed for help she was gagged (p95):

DC: Is there anything else, [M], before we start talking about the day that [RB] died?

M: Before I went to Halls Creek with him there was no phone there at [C-], no phone, not much people there at [C-], The only chances to get to town is to hitchhike any tourists that comes in. One day I was talking to [DB], his younger brother, and his wife, [SW]. I was talking to them. He was there and [DB] gave himself a photo to look at that he was in prison (i.e. DB gave M a photo of himself for her to look at) and RB said, "[DB], give that photo to your own wife." [DB] said, "No, she's just looking at it," and [RB] said, "Get up, [M]. Go back.". I got up. I went back to the place where I was staying with him. I follow behind and I was waiting for him, "Close that door." He start bashing me again but when I scream for help for [DB] and [SW] he got <girri'> *material* to put over me (M indicates her mouth); material, yes (i.e. M affirms the interpreter's translation).

M went on to explain that she managed to run outside but was pursued by RB who had his gun. Nearby tourists stopped in their car and let M in, who was now bleeding. RB dragged her back out and proceeded to kick her after having driven the tourists off by threatening them with his gun.

The true nature and extent of the violence, terror and provocation that M was subjected to was clearly established through recounting her journey with RB. At C- the sense of imprisonment that M had alluded to in her police interview was revealed to have a literal basis. RB had finally resorted to locking her up in the house whenever he was away and denying her access to anyone (p92): *'From that day he locked me. ... He wouldn't let me go out by myself. He wouldn't let me talk to anyone. Every time he used to bash me I used to cry for help.'*

9.5.2 The opportunity to explain

What passed between M and RB at the time of the final stabbing outside of the house, and what was in M's mind at that time, were obviously critical matters since at that time RB posed no immediate physical threat. During the PRI M had said that RB was swearing at her and that he had threatened *'I'll get you'*. When asked how she had interpreted that threat she had replied, *'When he said to me like that maybe he would come out from the hospital and got me'*. That was as far as this line of inquiry had gone.

In court M was more fortunate in being permitted to explain herself, and in doing so, to correct the impression that one of the police officers had formulated during the PRI concerning her motivation: *' ... you said he was talking to you, so you just wanted him to go away, so you just stabbed him another two times'*.

M explained to the court that from inside the house she had pursued RB outside from fear (p98): *'I thought he was going to get something outside and came back in again and he might kill me.'* She also began to explain her state of mind at the time of the stabbing. It became

apparent that M may have lost conscious control over her actions in stabbing RB. It was at this point in her evidence that access to the interpreter was crucial as she struggled to explain her state of mind. Through the interpreter she was able to explain (pp98-9):

- ... at the time when I was holding the knife all these thoughts were flashing through, the past treatment and I lost myself.
- My mind and head turned ... kind of like - blackout.
- I thought there was nobody else near me. My mind was blank. I was just moving my hand any way, not conscious of exactly where I was hitting.
- It was like when someone yells at you in an angry way so hard you can behave in a way where you are not conscious of actions. That's the kind of feeling.

M's counsel was, even at this stage, maintaining and guiding her narrative and thus it emerged that a major contributor to M's *'mind turning'* was fear of sorcery (M is speaking at times through the interpreter, indicated by the use of italics):

M: ... I ran after him (outside) but I didn't know what I was doing then. I was just running.

DC: Can you tell us what happened then if possible, please?

M: And when he was sitting there he ran and he sat there and talking to me. *I couldn't be certain what he was saying. I didn't know whether he was doing something in the sorcery through his words.*

DC: What, sorcery, how was that making you feel?

M: Feel funny and dizzy like that kind, like, where I come from I believe in people putting curse on someone, making them bit nervous and he was saying, I couldn't understand what he was talking. I didn't know that I had stab him two times outside.

DC: You are saying you didn't know that?

M: I didn't know that but after that he kept on saying, "[M], I'll get out. I'll get out and I'll get you. I'll tell on you to my family."

DC What did that make you feel?

M: *It made me very fearful because by using those words, "I'll tell you to my family," I anticipated sorcery against me.*

M's free access to an interpreter at the trial was a significant aid for her in her narration, but especially so at those times when she was challenged to explain. The fact that she spoke mainly in English does not detract from the linguistic empowerment that interpreting assistance enabled her at those points when deficiency in her second language blocked her expressive capacity.

Under cross-examination M's previous testimony that she had not been conscious of stabbing RB outside was tested over a series of questions. The Crown Prosecutor (CP) conducted his cross-examination in the traditional Q/A style seeking to constrain M's testimony by leading

her with tagged declarative *yes/no* questions: of the first 50 questions 38 were *yes/no* questions and 24 of these were tagged declaratives (see table and discussion of and question typology in section 8.2.4 above).

The following extract from M's cross-examination illustrates her reliance upon interpreting assistance in responding to questions about the precise meanings of words she had used in her police interview. M was being asked what she had meant in the PRI by the phrase, *'getting rid of him'* and specifically, whether this had meant killing him. She used the interpreter in translating the distinction she saw between two meanings of 'rid' (pp105-6):

CP: And the reason why you stabbed [RB] two times outside was, as you said to [the police officer], "to get rid of him". That's right isn't it?

M: Not get rid of him. I just made him go to hospital for once. I didn't mean to kill him.

CP: Why did you tell [the police officer] that you wanted to get rid of him?

M: The way he was treating me.

CP: Yes?

M: I didn't mean to kill him.

CP: No, but you wanted to get rid of him, didn't you?

M: I didn't like the way he was doing to me. I didn't - - -

CP: No, you didn't like the way he was treating you and you wanted to get rid of him because of that, didn't you?

M: Not just get rid of him, just let him - be myself for once.

CP: Yes?

M: *Send him away so that to live in freedom, not to kill him.*

CP: But when you were interviewed on the video by [the police officer] you told him, after you said you wanted to kill him, you told him you wanted to get rid of [RB]. Why did you tell [the police officer] that?

M: *I was telling him in a meaning of sending him away, not in the meaning of "rid", not in the way of sending him away to death.*

CP: How were you going to send him away then? If you didn't mean sending him away in the meaning of death, how did you mean "send him away"?

M: Just let him stay in hospital for a while so I (M turns to the interpreter to continue in Djambarrpuyngu) *can stay and live in a happy state so that he is not pestering me to do this or to do that and telling me to follow his way.*

CP: So you didn't want him to die, you just wanted him to stay in hospital for a long time. Is that right?

M: Yeah, for a while.

CP: For a while, for a long while?

M: Not for a long while. He was going to do something with me. *I was fearful of sorcery at that time.* (M broke down at this point.)

CP: Just a couple more questions, [M]. You kept on saying to all

the police officers that you had to do it. You had to do it?

M: I had to do it.

CP: What did you mean by that?

M: *Not to truly stab him but to disable him.*

CP: I will leave it there, Your Honour.

M used the interpreter more during this last part of her evidence than she had at any other time. She used him to enable her to express herself; she did not turn to the interpreter to have any of these questions translated. In this way she was able to explain that to be rid of RB had meant to be free of him; that her fear of his sorcery had made her desperate; and that she had intended only to disable him.

9.5.3 Discussion

When M was encouraged to tell her own story to the court, utilising interpreting assistance when needed, she presented as a courageous victim, whereas during the police interview she had presented as a killer. Her case confirms the critical effect of the mode of discourse when information is being elicited from NESB Aboriginal people.[92] The contrast between her performance in the PRI and under examination-in-chief underlines the handicap suffered by those who have little or no familiarity with the Q/A interview style contrasted with the fluency that is enabled by the opportunity to narrate.

The manner in which M used the interpreter in cross-examination is also worthy of comment. First it is important to note that the cross-examination did not reveal any attempt to constrain M from using the interpreter. M's status as a defendant rather than witness would make the use of the interpreter difficult to dispute, especially given that both counsel were in possession of the linguist's report that had concluded with this finding:

> It is my assessment that [M] cannot communicate effectively and reliably in English in formal settings and that her difficulty has been clearly demonstrated in the videotaped interview I have been supplied with from Broome C.I.B.

Secondly, M very rarely used the interpreter to have a question explained to her. Rather, she utilised the interpreter mainly for expressive purposes. This pattern is contrary to judicial concerns recorded in the *Access Report* (1991, para 3.3.1; refer section 8.1.1 above) that,

> by using an interpreter 'the witness who has some knowledge of English may secure an advantage in cross-examination by pretending ignorance and gaining time'.

It is also worthy of comment that the interpreter performed his role during M's testimony in a manner very different to that displayed at the *Elcho Coronial.* There was only one occasion when he interrupted M's evidence, and this was to correct his own error in translation.

[92] Eades (1994) has shown that mode of discourse is similarly critical for speakers of Aboriginal English.

Another correction was made at the conclusion of examination-in-chief; and upon the conclusion of M's testimony the interpreter sought leave to inform the judge that he had exceeded his brief by translating a Yolngu Sign Language hand-sign that M had used during part of an answer (the interpreter had not been sworn to translate from any sign language). There were no instances of the interpreter seeking clarification from counsel of their questions or from the witness of her answers. Thus, during the testimony itself, the intrusiveness of interpreters in judicial proceedings referred to by Berk-Seligson (1990b, see section 8.1.3 above) was mild. However, it was not absent.

At a point during M's testimony where she broke into tears the interpreter became conscious of M's need for paper tissues. After waiting for a period to see if a court officer would meet this need, the interpreter momentarily left the witness stand and returned to the dock to retrieve a box of tissues that M had left behind when she was called to give evidence. This show of concern for the well-being of the witness was obviously outside of the interpreter's role and may easily have left an impression on members of the jury.

A second source of intrusion would not have been obvious to counsel, judge or jury. I refer to 'fine alterations in the conversion from one language to another' that Berk-Seligson (1990a, see section 8.1.3 above) identified through her observation of courtroom interpreters at work. For example, M's request to the interpreter for clarification of one of the Crown Prosecutor's questions had been given with the words, *'Nhaltjan ŋayi ga waŋa?'* which translates directly as *'What is he saying?'* (although more literally it was: *How is he talking?*). However, instead of giving this as the translation or reporting to CP that the witness had expressed confusion, the interpreter translated M's utterance as *'What are you trying to say?'* (p104). This rendition served to alter the pragmatic meaning of M's question from a simple expression of confusion uttered to the interpreter, to a request to counsel that he come to the point or that he make his question more clear.

9.6 Conclusion

The dynamics of Anglo/Yolngu evidentiary discourse that are introduced by the interpreter are obviously variable. One of the constants is that an interpreter is, in one way or another, an intrusive element and another is perhaps that 'fine alterations in the conversion of one language to another' are inevitable. But intrusiveness on the part of the interpreter that is verbalised as such by counsel—either directly through comments to the bench or indirectly through tactics to prevent, remove or minimise interpreter participation—was a feature of the *Elcho Coronial* where the quality of communication between Yolngu witnesses and the court materialised as a matter for tactical manoeuvring. In this respect, the *Elcho Coronial* has been invaluable in exposing the consciousness on the part of counsel that control over the Yolngu witness is enhanced by control over the witness's access to English—the language of power. When the strategy is to 'get any benefit that you can and destroy everything else' (refer section 8.2.1 above) then counsel may seek to have the witness understand only as much as

is necessary to enable the standard tactics of confrontational cross-examination to operate, exploiting the susceptibility of Yolngu witnesses to gratuitous concurrence and their dependence upon collaborative discourse. On the other hand, when counsel's strategy is for the Yolngu witness to provide complete and informed responses to their questions then it becomes agreeable for the witness to have open access to an interpreter.

In the case of *R v M* the defence case depended upon its only witness, the Yolngu defendant, being able to tell her own story. And this in turn depended upon the witness's access to a powerful Yolngu genre, the narrative; and upon her access to interpreting assistance, enabling her full expression.

The Australian Government's *Commonwealth Evidence Act* 1995 provides for narrative evidence with respect to federal courts (section 29.2):

> A witness may give evidence wholly or partly in narrative form if:
> (a) the party that called the witness has applied to the court for a direction that the witness give evidence in that form; and
> (b) the court so directs.

While this Commonwealth legislation is not binding upon State or Territory courts, receptivity to narrative evidence on their part is not precluded either. In fact, at M's trial her counsel did not seek leave to elicit narrative evidence. He simply posed the kind of questions that achieved this effect. Similarly, there is nothing precluding police from asking suspects to tell their story during a PRI or from taking statements in narrative form. It is not unlikely that if M had been able to tell her full story in her PRI the charge of wilful murder may never have been laid. Thus the costs and time associated with a contested jury trial may have been saved, and the additional trauma for M may have avoided.