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Issues of truth, objectivity and expertise  
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**TITLE: Bringing the numinous into the witness stand**

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## **Bringing the numinous into the witness stand**

### **ABSTRACT**

While there are methodological differences between social scientists and lawyers where assumptions in those professions relate to truth, objectivity and expertise, they are not insuperable provided the two parties have a clear and fair, that is, respectful understanding of the differences. The inductive reasoning of social science, for instance, has a close parallel with the form of inferential argument favoured by lawyers. The legal emphasis on facts brings to mind Emile Durkheim's injunctions to treat social life with its values and attitudes as though they were facts. Jungian psychology treats dreams as real for those reporting them. There are many examples where the subjective has an everyday influence on what at first sight appear to be objective experiences. I propose to discuss aspects of this phenomenon by reference to my experience as an expert witness (oral historian/anthropologist) during cross-examination at the Miriuwung Gajerrong trial a few years ago. The emphasis will be on the presentation of anthropological and historical evidence in that native title case and on the apparently unusual intrusion of subjective and emotional factors.

## **Introduction**

This paper rests on two propositions, (1) that the subjective is not only inescapable in the courtroom, but (2) that the subjective has also an important place in the courtroom. This might concern lawyers and social scientists who favour a hard nosed approach where, in the fashion of Dickens's character Thomas Gradgrind, the dominant pursuit is for facts or hard evidence on a subject in dispute. If taken too literally, such an approach tends to ignore the insight that there are different sorts of evidence. When the subject is like that of native title where emotions run high, particularly among claimants who feel justified that their culture is under threat, the subjective stakes are correspondingly high. This should not be a new or surprising insight. Humans, like most animals, have subjective lives where the emotions are at play. And in the history of ideas there has been a duality of feeling coupled with so-called objectivity, sometimes directly opposing, sometimes blending. My point is that we should not espouse either side of this duality to the exclusion of the other. Both have their place when used judiciously.

In the western legal system, based on an adversarial model, there is a preoccupation on exact, factual, tangible evidence in order to present the most persuasive case possible. But my experience during the Miriuwung Gajerrong trial suggests a different perspective on this drive to establish facts. What I have called the numinous, meaning the presence of the unworldly or the metaphysical, more accurately the presence of elevated religious feelings, will intrude under certain circumstances. It may not be a direct outcome of a lawyer's cross-examination of a witness but it certainly can be a side effect of that cross-examination. It may not always be planned that way. But it may not always be unplanned.

**Text from the Miriuwung Gajerrong trial**

In December 1997 I was called as an expert witness in the proceedings of the Miriuwung Gajerrong native title claim and cross-examined on the east Kimberley life history publications and some of the transcripts and notebooks prepared during that research. The cross-examination lasted for four days, from Monday the 1st of December to Thursday afternoon the 4th of December 1997, and ran to a court transcript of 359 pages.<sup>1</sup> For the purpose, I was described as an historian and specifically an oral historian though my profession as anthropologist was not forgotten. I was one of several non-Aboriginal witnesses to be called. The indigenous witnesses had testified the previous year from various outstation communities in the east Kimberley where 'bush courts' were held. Their testimony was regarded as crucial, and persuasive, by Justice Michael Lee. As far as non-Aboriginal witnesses were concerned, in his Court Order of 24 November 1998, Justice Lee commended highly the testimony of a linguist. He also made extensive use of the oral history material from the life histories I had compiled.<sup>2</sup>

There are a number of ways by which one's experience as an expert witness can be described. Firstly, there is the physical and psychological environment of the court. Witnesses develop strategies for coping with the stress of unremitting concentration in a perceptively hostile environment. One whittled a small piece of soapstone, another followed a series of rituals: sipping from the water carafe, removing and replacing reading glasses, re-focussing the eyes for various distances in the room as one does when driving on a long journey. Secondly, there is the manner

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<sup>1</sup> Federal Court Transcript Miriuwung Gajerrong land claim trial, miragaj 01/12/97 to 04/12/97, pp. 5278-5637.

by which cross-examination and argument is conducted by lawyers. In an example drawn from the first day, in that early part of the proceedings called leading the witness, these two factors came together with an unexpected elicitation of the numinous. The court transcript reports the following exchange between Michael Barker QC and myself (BS).

QC. ... Now, I just want to ask you some questions about what Grant told you, if anything, about a person called either Paddy Weaber or Ningbing Paddy.

BS. Mm. Yes. There's a Paddy Weaber who was involved in the picking of Grant up after his, the shooting of his people and he and his mother and sister were taken to Ningbing Station.

QC. Yes.

BS. That was Paddy Weaber, and I've got a reference on page 38 of 'Pelican Dreaming.' I think it should have - oh yes, it's this event that took place while the white men were shooting. Oh here we go.

QC. This is on page 38?

BS. Yes, sorry, thank you, yes, 38 - There were three white men, Billy Weaber, the Ningbing boss, his brother Jimmy Weaber, Ted Lachlan and Topsy, a girl from Borroloola. I think the reference is a little higher up. Oh yes:

And I ran off with that mob of dogs, took them all to the billabong. There were a lot of trees around there and I climbed up little leaning ones so the gadia would not see me ... (reads) ...

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<sup>2</sup> Federal Court of Australia J. Lee Reasons for Judgment, Perth 24 November 1998.

he called like that, 'Come on, come on.' I held onto the tree, he pulled at me -

And so on.

QC. I'll get you to pause there ...<sup>3</sup>

The transcript does not reproduce the full recitation, which was most of the paragraph. This is what was read to the court:

And I ran off with that mob of dogs, took them all to the billabong. There were a lot of trees around there and I climbed up a little leaning ones so the *gadia* would not see me. And then this bloody Paddy and a half-caste boy called Jacko (who died later at Ruby Plain) galloped up. "Ah, little boy, come ere, come ere." I sat there looking out at those two fellers. 'Hey boy, come on lad,' Paddy said to me. Paddy was a Miriwong boy and just big enough to ride a horse. His country was higher up from this river here. Ngalmarinmi is the hill where he was born, near the Gorge close to Yiralalam. His country, called Gobuama, was his father's and mother's too and started from the Top Dam. The river from the Top Dam to Ivanhoe is called Widam. That boy got off then from his horse. 'Come on mate,' he called to me like that. 'Come on, come on.' I held onto the tree. He pulled at me ...<sup>4</sup>

Local idiom was retained in all the life stories as an important policy of the transcribing. Hence billabong which needs no explanation, *gadia* meaning white

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<sup>3</sup> Op. cit., court transcript, pp. 5294-5295.

<sup>4</sup> Shaw, Bruce *My Country of the Pelican Dreaming: The life of an Australian Aborigine of the Gadjerong, Grant Ngabidj, 1904-1977 as told to Bruce Shaw*, Canberra: Australian Institute of Aboriginal Studies, 1981, p. 38.

person, half-caste meaning an Aboriginal person of mixed Aboriginal and European parentage, boy for Aboriginal man, girl for Aboriginal woman. The last three terms have neutral value in the east Kimberley and are often used in self-reference, but they are disrespectful if spoken in Australia's urban-rural south. Also, tales such as the one told by Grant Ngabidj are characteristically studded with details concerning person and place, where the physical environment and the human relationships taking place within it form an intrinsic and necessary part of the oral narrative. It was this feature that the lawyers preparing the Miriung Gajerrong claim found especially useful.

### **Truth, Objectivity, & Expertise**

We can establish a number of generalisations from this short extract and the exchanges between the QC and the anthropologist. On the surface, the purpose of the QC's cross-examination was to identify a man named Paddy. Paddy - indeed more than one person with that name - is mentioned elsewhere, not only in some of the other life stories (*Banggaiyerri: the Story of Jack Sullivan*)<sup>5</sup> but also in the testimony of Miriung and Gajerrong witnesses and in the genealogies drawn up by another anthropologist. The same pattern of questioning was followed to identify other personages, cross-referencing to the books, before shifting to the topics of the land and language names for the area that Grant Ngabidj knew. This exemplifies the use of syllogistic inferential argument, which is a well-established legal procedure.

This procedure intrigued me. It appeared that a line of questioning was taken up on an issue, the identity of a person in this case, and that after a series of questions with corresponding replies had been pursued for a time, the matter was dropped and

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<sup>5</sup> Shaw, Bruce (ed) Bruce (ed). *Banggaiyerri: The Story of Jack Sullivan as told to*

the questioning moved on to ‘something completely different.’ Another witness who was also struck by this approach used the analogy of a piece of music being played that moved from one refrain or melody to another. Those of us who live in the worlds of the social sciences and the humanities are more accustomed to reading and producing sustained narratives and explanations that have a dense structure. One anthropologist in a seminal article referred to the methodology of collecting detailed ethnographic material, especially oral narratives, as ‘thick description.’<sup>6</sup> In the legal world, however, there is a point by point movement from the establishment of certain facts, and conclusions that arise from those facts, in what at first glance appears in the eyes of someone unused to the method to be a piece-meal process. It is in fact a tightly structured procedure in its own right that often has considerable material in it, material that in the Miriuwung Gajerrong court case originally formed the bare bones of an anthropological or historical report or the thick narrative of a published life story.

A summary of inferential argument using a syllogistic approach is contained in Andrew Ligertwood’s legal text *Australian Evidence* (1998).<sup>7</sup> Ligertwood begins by asking how we can reconstruct past events from their remnants in the memories of witnesses, a question that is also central in oral history methodology, and notes that, ‘Unexperienced events are discovered through a process of inference from direct experience,’ asking then in what ‘orderly way’ can this be done?<sup>8</sup> The orderly way is to make an analysis that begins by isolating the evidence and the ‘factual

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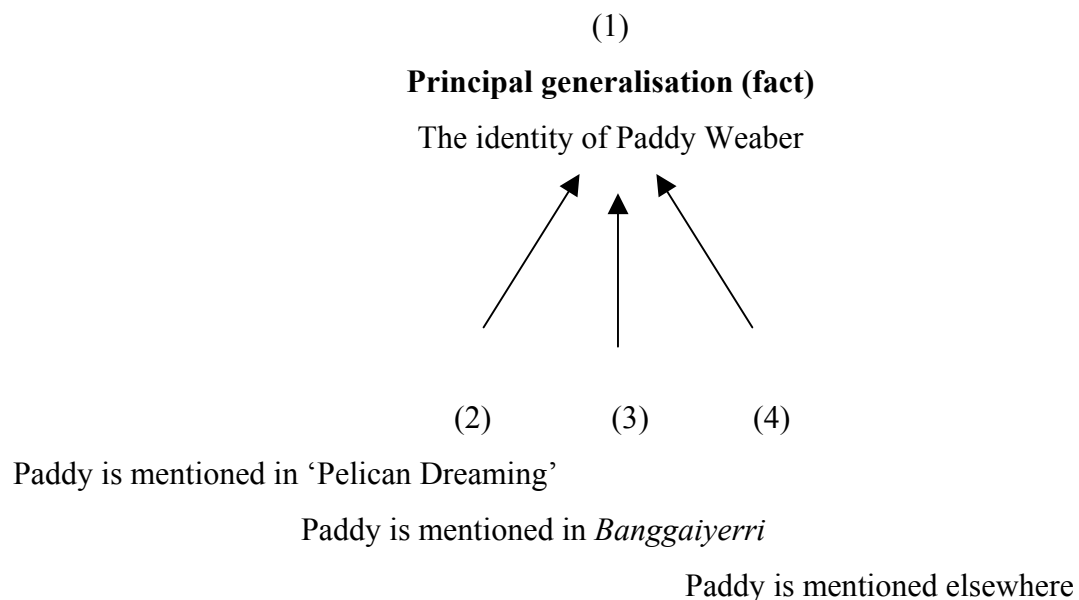
*Bruce Shaw*, Canberra: Australian Institute of Aboriginal Studies, 1983.

<sup>6</sup> Clifford Geertz ‘Thick Description: Toward an Interpretive Theory of Culture,’ in *The Interpretation of Culture*, New York: Basic Books, 1975, pp. 3-30.

<sup>7</sup> Andrew Ligertwood *Australian Evidence*, Sydney, 1998.

<sup>8</sup> Ligertwood, pp. 6-7.

conclusions' that can be drawn from it, which is done by adapting (simplifying) an earlier model from a text on judicial proofing.<sup>9</sup> This involves a form of cross-referencing, isolating not only a single fact but also 'a series of facts, some of which may be compounds of other facts,' and doing this 'clearly and precisely.'<sup>10</sup> Such cross-referencing is charted by means of a relatively simple diagram that can become complex when the number of facts are many, for all material available should be so charted.<sup>11</sup> This approach is very similar to inductive reasoning in the social sciences where a number of observable facts are brought together to give a comparatively rounded overview of the whole proceedings, as for example human behaviour during a ceremony. The diagrammatic model produced in this way begins with 'material facts' of which the first is the main item, and all others contribute their weight to that principal finding. Additional facts can be added so that by a process of accretion the diagram becomes complex. The simplified starting point looks like this:




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<sup>9</sup> Wigmore, *The Science of Judicial Proof*, Boston, 1937.

<sup>10</sup> Ligertwood, pp. 8, 10.

<sup>11</sup> Ligertwood, p. 12.

### Items of fact

The supporting facts are then set down in a syllogistic chain. Hence, (1) is the main proposition, fact or finding; (2) is the first supporting fact; (3) is another supporting fact that also supports item (2); (4) is another fact that supports the main proposition and the other two supporting facts, and so on.

The syllogistic process is a familiar chain of reasoning. Ligertwood notes that it leads on to questions of probability: ‘... use of the deductive syllogism immediately puts the inference in terms of probability, raising the whole question of probability and its meaning.’<sup>12</sup> This recourse to probability theory is a means of addressing limitations in the model of chain reasoning. Ligertwood asks, how do we describe ‘the very process of individual inference,’ and how do the different inferences come together to reach good standards of proof?<sup>13</sup> In the end we cannot do more than approximate the ideal because this is an uncertain world. It is like the reminder in the social sciences that humans are complex and changeable and that the presence of an investigator can influence what takes place in a social setting. The oral historian remains aware that the memories of an interviewee are not infallible. The anthropologist by his/her presence may affect subtly a negotiation between two other parties. Investigative journalists meet with extreme situations where militia practise excessive violence towards their perceived enemies because they are acting up for the camera. Human changeability gives rise to middle range theories such as that of the self-fulfilling prophecy. When it was a neologism, this concept found its way into popular speech because it struck a particular chord in the imagination. Faced with

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<sup>12</sup> Ligertwood, p. 15.

<sup>13</sup> Ligertwood, p. 13.

such uncertainties, Ligertwood says, ‘all we can do is adduce *good reasons* for concluding a particular view-point about the world out there’ [emphasis mine].<sup>14</sup> The procedure of step by step inferential argument is a means of being as objective as possible under those circumstances. Ligertwood does not use the word truth, and indeed the search for a fully objective methodology is illusory because emotive factors will impinge whenever social intercourse enters into the picture. For this reason, it has long been accepted in the social sciences that there is no such thing as an objective social science.

### **The numinous**

The emotional outcome of reading a passage from what is arguably the most powerful chapter in the book *My Country of the Pelican Dreaming* was probably unintentional. The passage may have been chosen for the story’s impact as well as to establish a genealogical connection with an ancestor. But there were elements that the QC could not have anticipated because they came out of the way in which the recitation was done. As I began to read the extracts, especially those containing dialogue, I found myself slipping into the storytellers’ idiom. This happened more than once. Aboriginal oral narrative has a vitality of style and tone that cannot be communicated easily in print. This is why oral history work among indigenous Australians has its detractors. The critics have a point because there is ‘loss’ in the transition from the spoken word to print. But it is a universal difficulty with all oral history and is not a good reason to avoid working in that medium. One way of overcoming it is to include the tape recording with the text or in CD ROM, as Peter Read has done, both

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<sup>14</sup> Ligertwood, p. 14.

expensive solutions for most publishers though museums and art galleries often use this form of presentation. And some texts are published with diacritics and/or ‘stage directions,’ as Stephen Muecke has done. When a piece of idiomatic text is read aloud it can ‘bring to life’ the situation described and tell us something about the character of the original storyteller. For this reason, providing that the reading is not too dull, an emotional response will often be elicited from the listener.

Viewing the text alone does not alert the reader to the wheedling, almost sinister speech used by Paddy when he was trying to entice Grant as a young boy aged around four or five years to come down out of the tree. Sometimes Aboriginal storytellers speak in a kind of falsetto when reproducing dialogue where the speaker is a white person. Paddy was not a European, but I found myself using the same trick of speech when reading his dialogue aloud. Did I choose that mode of speech myself or had I internalised it from hearing Grant use it on a number of occasions? Grant did this too in his account of the Weaber brothers sighting a group of his countrymen and setting the dogs onto them. This is the best example of such a speech event. When it was prepared for the book, I drew attention to it in parentheses, one of the few moments I used that convention of inserting an editorial gloss in the text.

I will tell you now how the shooting happened with my people, when the white men put the chains around their necks. The white men came along with a big mob of pack horses and they found tracks. ‘Oh, them blackfeller. You look, That’s the blackfeller track.’ They came on and met one old man called Pompey and another called Ding Ding. ‘Ah. Is that a old man there, a old man there?’ Gddip, gddip, gddip, gddip, he rode up. ‘Ah, ullo old man?’ [in a falsetto voice]. That white man knew him very well too. ‘Ullo Pompey. Ullo, old man. I’ll give you tobacco.’ He had it in his pocket, and gave him some to chew. ‘Ah old man, where this mob?’ ‘Ah boss, you seeim that one fire there? They on

island. Big mob blackfeller there.’ This was a round island near the marsh. ‘Ah right old man, I’ll go ‘way now.’ ‘Oh yeah.’ Pompey did not know what he was doing, that they were going to shoot them. He was very sorry about it afterwards.<sup>1516</sup>

The QC in his opening address read virtually the full chapter of the shootings. I was not present but I doubt that the falsetto style was used. However, I was informed that at the close of the reading one could have heard a pin drop. My subsequent rendering of Paddy Weaber’s enticement of Grant from the tree had a similar emotional effect on one of the listeners, who said afterwards that it made a shiver run up her spine. I too experienced a shift in awareness when reading some of the longer passages. At times it felt that those men were speaking through me. That is not to suggest that I have the abilities of a spiritualistic medium; it means that I was experiencing the same sort of reader response as some of my listeners. This is an accepted fact in the world of literature and literary criticism.

### **Summary Observations**

What I have reported here are two insights into the relationship between the social sciences and the legal system that came to me from the Miriuwung Gajerrong case. The first is double-sided, that evidence of a subjective nature will enter into the courtroom, sometimes as a result of presenting a passage of narrative in order to establish a small item of fact. As a consequence, the subjective is an important component in many court cases. But when subjective aspects of human affairs enter into the courtroom they need not confound what is understood by that slippery concept of ‘truth.’ The well-known phrase ‘beyond a reasonable doubt’ is a touchstone for one’s search for accuracy in methodology, in data collection and in

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<sup>15</sup> Ibid., p. 36.

interpretation for all disciplines. Descriptions of harrowing events, such as the shootings on Ningbing Station as described by Grant Ngabidj, can have veracity beyond a reasonable doubt precisely because they are so shocking (the Thesaurus includes the word numinous among these meanings), especially if they can be substantiated from more than one source. Grant's peers knew about the killings. It was common knowledge among those elders<sup>17</sup> (just as the killings in the Mistake Creek locality of the east Kimberley are well-known in the oral tradition, though one historian recently gave little credence to oral testimony). Our appreciation of the subjective is especially prominent in the humanities too. In literature for example, where the use of different images and tropes is not only more widespread than in the social sciences, it is virtually a requirement for literary expertise. Elements of a literary nature are intrinsic to indigenous narrative, so that when such narratives are recited in court the subjective, which includes the metaphysical and at times the numinous, slips into the proceedings.

The second insight is that there are grounds for mutual understanding between the legal world and the worlds of the social scientists. In none of these disciplines can we be absolutely certain about the so-called truth of a matter, but there are modes of interpretation that lead us to the next best thing. There are very similar methodologies practiced in law, the social sciences, and the humanities. We may describe them as inference following a pattern of syllogistic argument and cross-referencing, as in law, or express them variously as inductive reasoning or the phenomenological approach in the social sciences, which emphasise direct experience too. Such rules of thumb as

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<sup>17</sup> See Shaw, Bruce (ed). *Bush Time Station Time: Waddi Boyoi and Johnny Walker Reminiscences of Eighty Years*, Underdale: Aboriginal Studies and Teacher Education Centre, University of South Australia, 1991, p. 89. Also Jack Sullivan, Op.

to adduce good reasons for coming to a particular conclusion (the beyond-a-reasonable-doubt principle) have proven to be useful tools of enquiry. They provide a neat balance between fact-finding and the intrusion of the numinous, and are a point of rapprochement between lawyers and social scientists.

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