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A Dozen Reasons Why Linguistic Expertise is Rejected in Court

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It's not always easy to discover why expert witness testimony by a linguist is accepted or rejected by the courts. Even when the principles of acceptance or rejection are outlined, only scant and sometimes confusing specifics become available about how these principles are followed. The case described in this paper is unusual because the appellate judge read the linguist's expert report and dealt with it in more detail than is commonly the case. Although it is somewhat painful to report why my testimony was excluded, I do so here so that these specifics can be considered by linguistic expert witnesses in their future cases. It is my hope that by citing the judge's ruling and thinking, forensic linguists can learn more about how to deal with not only the courts, but also the lawyers with whom they work.

Problems with court records

In American courts, expert witnesses have to overcome stiff hurdles before their testimony can be admitted at trial. Much has been written about how the Daubert and Kumho Tire decisions have led to new standards (Solan and Tiersma 2005; Shuy 2006) and the dust stirred up by these decisions hasn't settle yet. But the case described here took place in Dundee, Scotland where these American standards are not in place, these newer standards are irrelevant to the judge's thinking process and the case provides a clearer picture of the way a least one appellate judge thinks about what linguistics is, including discourse analysis, than I have hitherto had the privilege to observe.

In their otherwise excellent book, *Speaking of Crime* (Chicago 2005), Solan and Tiersma observe that linguists are "generally excluded (from testifying at trial) when asked to use discourse analysis to draw inferences about a speaker's intent (27)." When I pointed out to the authors that my common experience in criminal cases belied this, they replied that all of their information about this statement was extracted from court records of excluded testimony. These records are, of course, the only available accounts of such events, because the courts keep records only when appeals of convictions are filed and decided. When defendants are acquitted at trial, nothing is officially filed to show whether a linguist gave expert testimony. In my own experience over the past 35 years, when most of this testimony was based on discourse analysis of tape-recorded evidence in criminal cases, I have been admitted as an expert five times more often than excluded, but, unfortunately, there were no legal records for Solan and Tiersma to find that would confirm this.

Problem with pre-trial procedures

It is often difficult, even for me, to learn why my testimony was excluded those few times. One reason appears to be that in most of these exclusions, the lawyers I worked with represented to the courts what my testimony would be outside of my presence and knowledge. When these lawyers were effective, the judge allowed my testimony. But judges also excluded my testimony when the lawyers somehow gave the Court the impression that I would testify outside of what the judge thought to be the four corners of my linguistic expertise or when the lawyers came even close to suggesting that I might usurp the function of the jury. Since I was not present in such hearings, I could do nothing to correct these impressions.

In other cases, the lawyers I worked with prepared written offers of proof. When they shared their briefs with me before filing them, I had the opportunity to correct any misleading or inaccurate representations about what linguistics is and about what my testimony would be. If these were not shared with me in advance, the linguistics contributions had to be represented by lawyers who may not have fully understood what their expert linguist would or would not say on the witness stand.

In two of the cases in which judges excluded my testimony, I had the opportunity to represent what I would say in a preliminary *voir dire*. Each time the presiding judge cut short my effort to explain my field and my proposed testimony before I even could get to its essence. When this happens, it's hard to know what the judges were thinking or what exactly made them decide as they did.

Background of the case of the Crown v. Mohammed Arshad

In one recent case, however, I had the opportunity to learn more about what a judge thinks about the use of linguistic expert testimony that planned to include discourse analysis among other linguistic tools. On March 8, 2006, Lord Macfayden of the Appeal Court, High Court of Judiciary in Scotland, refused the appeal of defendant Mohammed Arshad concerning his conviction of incitement to murder (HCJAC 28 Appeal No: XC1282/03). Arshad's trial took place in December 2003. He was convicted and sentenced to seven years in prison.

Arshad is a native Pakistani who had lived much of his life in Dundee. This case was fraught with cross-cultural and linguistic issues that invited expert analysis. From the prosecution's perspective, it was a slam-dunk case. Shortly before Christmas in 2001, Arshad allegedly hired an undercover officer to murder his daughter's new husband. The major evidence consisted of two tape-recorded meetings and two phone calls between Arshad and an undercover Dundee policeman.

From the defense's perspective, the case was not that simple. Feeling that the tape recorded conversations did not prove what the police believed, solicitors from the Dundee office of solicitor R.M.S. Macdonald asked me to review the tapes and analyze

them linguistically. I submitted my written report to Mr. Macdonald in August 2003 and was prepared to testify about my findings. Apparently he submitted it to the court along with his usual briefs and I was authorized by the Court to appear at trial as an expert witness. Shortly before the trial, however, I developed severe physical problems that led to three hospitalizations, the last of which resulted in colon surgery just before the trial was to occur. The Court rejected solicitor Macdonald's plea to postpone the trial until I could sufficiently recover and Arshad was convicted in my absence. Mr. Macdonald's office then filed an appeal, based on the single fact that the trial court judge did not allow the opportunity for my testimony. My expert report was included in this filing. A detailed description of my report's findings in this case can be found in my book, *Creating Language Crimes* (New York: Oxford University Press, 2005).

The following twelve reasons for excluding my expert witness testimony can be instructive to the field of forensic linguistics, because they can point out problems in the way we present our field, in the perception of the courts about our field, and to our need to better prepare the lawyers with whom we work about what linguists do. It is painfully clear that my report did not do an adequate job of presenting what linguistics is and how it can work to help the courts. Perhaps this was because I did my analysis for the case at great distance, thousands of miles away, because I never had the opportunity to meet and discuss my findings with the defense lawyers, and because I suffered under the false assumption that I would have the opportunity to explain linguistics when I got to court, any or all of which could be contributing factors. At any rate, the Court's reasons are represented here, along with my comments on them.

Reasons for rejecting linguistic expert witness

Lord MacFayden's ruling outlines the twelve reasons why he rejected my linguistic assistance as follows:

1. He agrees with the trial judge's ruling that the issues I discussed in my report could well have been made by the defense attorney at trial. It does not require an expert to say what I was prepared to say. The defense could have used my analysis when it cross-examined the undercover officer.

This poses a paradox for expert witnesses. When we make our linguistic analysis of the case clear and understandable, it may look so clear that its analysis easily could have been presented by the lawyers. The first problem here is that the defense lawyers are unlikely to have been able to think about the data the way a linguist can and, therefore, they would not have come up with my analysis in the first place. Arshad's lawyers suspected that something was wrong with the undercover officer's part of the conversation and with Arshad's responses, but they couldn't figure out what it was and they certainly couldn't have explained it even if they had discovered it on their own. That's exactly why experts are needed.

Second, the lawyers needed someone (a witness) to convey crucial information as part of their own side of the case in their direct examination. When this information is left for cross-examination of the government's witness, it doesn't look like it's even a vital part of the defendant's case. When it's part of the defense's case, it has more power because that is the point at which the defense is on the offense, not merely on the defense.

Third, an outside expert witness can provide objectivity and neutrality for jury consideration in a case in which lawyers on both sides necessarily are admitted advocates. Forensic linguists apparently have not made their potential contributions clear enough about these things.

On the other hand, there is some truth to Lord MacFayden's observation that the expert's knowledge sometimes can be conveyed by the lawyers—not "easily," perhaps, and not as effectively as a linguist could do it, but with considerable effort it could be done. It depends on the complexity of the analysis and the skill of the lawyer to absorb it sufficiently to use it in his arguments and cross-examinations. In fact, I have worked on several cases in which the analysis was simple enough that my advice to the lawyers was that could present it themselves. This depends on many factors, however, including the ability of the lawyer to absorb it properly, the judge's impatience about hearing still another witness in an already long trial, and the potential negative effect on a jury when the defense case seems so hopeless that the lawyer appears to need to resort to using outside experts to save the day.

2. He agrees with the trial judge that my testimony would usurp the function of the jury.

Obviously, expert witnesses should not usurp the function of the jury. Nobody is more aware of this than I am. But this is a matter that is most clearly decided once the expert is being qualified in person at trial. If there was any doubt about whether I might have usurped the jury's function, it could have been clarified in *voir dire* before my testimony. What the judges appear to be saying here is that my testimony "might have usurped" or "could have usurped" or "it looks like he might have usurped." But by proclaiming that it "would usurp," they end the matter before it is investigated.

3. He agrees with the trial judge that the defense should have found an alternative expert when I was physically unable to get to the trial.

However true it may be that alternative experts are available, the defense attorneys were already too far into the process to change linguists. Before my hospitalization, the judge was unhappy that the case had been put off several times already and finding a new expert at that point would necessarily set the timetable back even further. The Court had no idea how much time I had already put into my analysis. In most cases, expert

witnesses in fields such as medicine or engineering spend far less analysis and preparation time because their task is simply review the existing data and present their opinions about it. Courts are largely unaware of the fact that linguistic analysis starts from considerably further back in the process and requires much more time and effort to do the analysis. In this case, the defense located me after canvassing forensic linguists in the U.K., who recommended that they engage my services, because I had written several books on the subject and am known as a specialist in criminal cases with tape-recorded evidence. Lord MacFadyen didn't, and possibly couldn't, know about the availability of forensic linguistic specializations around the world. Nor have forensic linguists made such information easily accessible to the courts, a fault that should be remedied. At present, no centralized file of experts, the cases they work on, the times they testify, their special areas of expertise, or any other records are kept and made available to the courts.

4. He agrees with the appellate judge that the defense "said nothing that would support the requirement of a linguist to help the jury understand the tapes," gratuitously adding that my testimony would not have been admissible even if I had been physically able to be there at trial.

Here we have the same troubling problem noted above about how well the defense lawyer represented to the court what I might and might not say at trial. I was not present in any hearings that might have answered the Court's questions and I have no idea how well the defense lawyers represented my proposed testimony in this. However they did it, the result was negative, suggesting that considerably more conversation should have taken place between us before trial. Lord MacFadyen's explanation that my testimony would not have been admitted had I been able to be at the trial assumes, as lawyers like to say, "facts not in evidence." It is, in essence, a prediction not based on evidence.

5. He opines that my report went beyond the proper scope of my claimed expertise in linguistics.

For Lord MacFadyen to reach this conclusion, he would have needed to interpret points in my report in ways for which there was no basis for such inference. More troubling, however, is that this opinion implies that the Court knows what the proper scope of linguistics really is. If I had delved into the inappropriate and forbidden issues of guilt or innocence, which I did not, he would be correct. Here linguistics faces the overwhelming problem of what non-linguists really know and don't know about our field. Perhaps Lord MacFadyen thought of linguistics as usage, etymology, or even grammar. It is unlikely that he thought of it as discourse analysis or pragmatics, since these areas have not likely reached his attention. Again, if the Court had *voir dire* me to find out what the scope of linguistics is, his objection might have been overcome. There is much to be done if we are to make the courts understand what forensic linguists actually do and do not do.

6. He objects that I described the guidelines used in undercover tape cases in the US, noting, “he (Professor Shuy) is unacquainted with the requirements of Scottish undercover law enforcement officers. It is based on knowledge of FBI practice but ignorance of Scottish practice.”

It is true that as an American I am unfamiliar with the precise requirements of Scottish undercover officers (assuming that such exist). From my acquaintance with FBI guidelines and from many books on police interrogation and undercover work, I generalized to the Scottish situation. This was probably unwise on my part, since it seems to have generated a bit of nationalism on the judge’s part. The fact remains, however, that when deals for services or goods are made in virtually any area of life, both parties must be made aware of such basic things as exactly what the deal involves, who will do it, and what the cost will be. When these things are absent or violated, there is no agreement or contract to this speech event. My point was that the undercover officer not only was unclear in his representation of what the deal was all about, but his language gave evidence that he also disguised it in such a way that Arshad would think it was one deal while the officer considered it another (the trains passing in the night form of miscommunication). Although I would be very surprised if Scottish undercover law enforcement practices would see this in any other way, it was probably not wise of me to use the FBI comparison and this type of generalization error can be a useful warning to linguists in the future.

7. He rejects my linguistic analysis that the undercover officer only vaguely represented what he was offering to do for Mr. Arshad, noting, “The vagueness criticized by Professor Shuy is the very avoidance of leading the suspect that would be expected in Scottish practice.”

This point is astonishing because, as noted above, Lord MacFayden, who apparently did not understand my point at all, seems to support the notion of unfair tactics not only in undercover operations, but also in business and any other form of human interaction. A further problem is introduced here, however. If the Court’s point is that undercover officers should not ask leading questions or otherwise lead the targets into doing something that they otherwise might not do, he is quite right about this. But what my report said was quite different. My analysis showed that the officer made dozens of vague and ambiguous representations of what he would do in addition to his vagueness and ambiguity about the illegality of the enterprise. This is more than a leading question of the type that is not permitted in cross-examination at trial. It is one that led Arshad to agree to hire the officer to locate his daughter and her new family but there is no language on the tape showing that Arshad agreed to hire the officer to kill anyone, despite the officer’s many efforts to lead Arshad in that direction.

This appears to be a matter of both helping the courts understand what ambiguity and vagueness mean to conversations and to better helping judges understand what we say and write.

8. He objects to my report when it said, “The undercover officer fails to capture all of the evidence on tape,” noting that this would be obvious to anyone listening to it and it does not require a linguist to say this.

It may or may not be true that “this would be obvious to anyone” but in fact it was not in this case and is usually not in most other tape cases. It takes someone with the proper equipment and training to first notice that there are missing parts of the conversation by analyzing its contextual flow and by physically timing the stops and starts. When conversations begin in what is logically mid-stream, something is obviously missing. What is missing could have been Arshad’s rejection of the cop’s suggestions but we can never know for sure without a complete record of it on tape. Law enforcement agencies are beginning to understand this, thanks to linguists who have helped point this out in other cases. But apparently we still have a long way to go.

9. He dismisses my statement that the officer does not take “no” for an answer, noting, “We would not expect him to do so.”

It has been noted in several places (Shuy 1993; 2005), that when a target says “no” to an undercover officer’s suggestion of illegality, it usually means “no.” What is it about “no” that the police can’t seem to understand? And when the targets say “no” over and over again, it would appear to most people (with the possible exception of used car salespersons) that there is little hope of capturing them in a sting. How many “no” answers do law enforcement officers need to hear before they decide to stop asking. If the police “would expect him to do so,” what was the point in the sting in the first place? Law enforcement is not about persuading people to commit crimes; it’s about capturing actual crimes.

10. Even though he appears to agree with my point that Arshad’s frame of reference was different from that of the undercover officer, he does not feel that it takes an expert linguist to point this out.

Conversational framing is an important and rather recent development in linguistics. If it does not take an expert linguist to point it out, who then will do it? The structure of these conversations demonstrates that Arshad and the officer clearly were operating in two different frames of reference about what the job was and what should be done about it. That Lord Madfadyen recognized framing as important for the case is important, but it is unclear whether he would have recognized this without first reading my report. And if he or even the defense attorney would have recognized it, on what scientific basis could they have explained it to a jury? That’s what linguistics experts do.

11. He objects that my report notes that the officer's announced beginning and ending times on the tape's prologue and postlogue do not match the elapsed time of the tape in evidence, noting that this is a point that could have been made in cross-examination without the support of linguistic evidence.

One of the expectations of police reporting is that it be accurate. Some mistakes matter more than others. In some cases it's impossible to assess the nature of the errors. In tape cases, when the officer announces the start and end of conversation times that are longer or shorter than the timed length of the conversation, one is led to suspect that there was more of the conversation than was actually tape-recorded. If there was more, what did the participants say during the unaccounted for minutes? We can never know this because it wasn't recorded. In my 35 years of experience in such cases, I have yet to find a defense lawyer who even noticed such discrepancies. The point that the Court missed here, of course, favors the defense, for the time-marking error would not only impeach the accuracy of law enforcement, but also suggest that there could well have been evidence favorable to the defense that was omitted from the tape.

12. He notes, "there was no suggestion that he (Arshad) did not understand the undercover police officer or that there was any linguistic difficulty that explained away what he was recorded as having said."

It's hard to imagine how Lord MacFayden, having read the analysis in my report, could reach this conclusion. It is true that no linguistic analysis can say with certainty what was understood by the listener and what was intended by the speaker. As an expert witness, I cannot and would not touch these issues. What linguistic analysis can show is how the language used gives clues to understanding and intention, based on linguistic analysis of those clues. My report was filled with many citations of the language used by Arshad that clearly indicated where it's quite possible that he might not have understood what the officer was saying and doing. Some are even overt statements to that effect. Many are indirectly revealed through the linguistic context. My report was also replete with citations of the actual language used by the officer. These gave evidence of his lack of clarity that required inferences of his vague and ambiguous statements. These were all there for Lord MacFadyen to see. My suspicion is that he did not understand the whole area of pragmatics, inferences, indirectness, and comprehensibility, to say nothing of the cross-cultural context.

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The courts do not know what linguists do. They may even labor under very false impressions about our field. I suppose I could have included an introduction to linguistics in my report but the defense lawyers told me to make it as brief as possible in order to keep the judge interested enough to actually read it. This problem highlights one of the barriers to our being accepted as experts. Our analyses, reports, and testimony have to

teach a great deal before we can even begin our analyses. Then the paradox is that if we make our analyses clear and simple, it can look like anyone can do it and that our involvement at trial isn't really necessary.

Synthesizing Lord MacFayden's written decision, I find three major objections to my proposed testimony as revealed by my expert report:

1. My testimony went beyond the scope of linguistics.

Among other things, we have to ask ourselves, "How could Lord MacFayden have known what the proper scope of linguistics is?" It was up to me to have done a better job of this. He couldn't know about the current developments in our field without some instructions. Of all the fields in which linguistics has important contributions to make (and there are many), the field of law may be one of the most promising. Law presents some of the same problems that fields such as education and medical communication have but, based on my past extensive experience in all three areas, lawyers are, on the whole, more receptive to linguistic contributions than the others. All three fields are protective of their traditions and are cautious about outsiders coming in and messing things up. But lawyers tend to use linguistic expertise more than educators or medical practitioners and it is, therefore, more open to linguistic help. Judges, on the other hand, seem to be less inclined to accept it, suggesting that this is an area in which linguists should be doing more work.

2. My testimony would usurp the function of the jury.

It is difficult to deal with this one, especially when there is no evidence of it in my report or in my proposed testimony. No expert should do this, of course, but it appears to be a handy mantra for judges to fall back on when they have no predisposition to accept the expert in the first place. What it suggests, however, is that linguists need to follow the advice of St. Paul: "Avoid the very appearance of evil." We need to be squeaky clean and obvious in our effort to avoid the appearance of usurping the jury's function.

Part of the problem may be due to confusing perceptions of the expert's role. By definition, experts are to render "opinions" based on their analysis and expertise. The word, "opinion," is troublesome, however, since a common dictionary definition is that an opinion is a *belief* or *conclusion* held with confidence but *not* substantiated by positive knowledge or proof. It is also defined as an *evaluation* or *judgment* based on special knowledge. However much the expert witness is asked to give an opinion, none of these definitions actually matches that expert's role in court. When we wade into the murky waters of beliefs, evaluations or judgments, with or without substantiation by positive knowledge or proof, we can be devoured by judicial sharks. It would appear that the word, "opinion," has different meanings in different contexts. To courts, opinions are

reserved for other matters, including the judge's and jury's opinions. The courts are aware of the possibility that experts can drift out of their territory, getting so absorbed in the case that they usurp the role of triers of the fact. In some instances, such as the Arshad case, it would appear that the threat of my possibly usurping the jury's function was sufficient to confuse it with what actually the report said. Apparently I should have done a better job of preventing this.

3. My testimony was unnecessary since what I said could have been said by the defense without me.

Experts know the context of communication, how it works, and how to analyze it and present their analyses of it to those who are not so skilled. My task, as expert, was to show how the language used by Arshad and the officer worked within the communicative structure of an undercover sting operation about a contract killing. An analogy may be appropriate. When you want to buy a house, you search the market until you find one you like, note the asking price, and try to negotiate a lower price. Everyone knows this. Offers are made, followed by counter offers until an agreement is reached and a contract is signed. The point is that you know, or at least think you know, what the quid pro quo really is. If something significant is hidden from you, you normally have a right to cancel the deal. Now translate this transaction into a discussion about hiring someone to do some work for you. You think you've made clear what the work is but the person you're trying to hire converts it into something else. The two of you come to an agreement—but about different things.

The context of the conversations in this case includes the communicative context found in undercover operations. Standard police work texts describe the optimal ways such conversations can work. They suggest a four-sequence structure in this communicative event: 1) first, let the suspects speak uninterrupted until they talk themselves into a conviction; 2) if this doesn't yield incrimination, drop hints of illegality, hoping that the suspects pick up on them and admit wanting something illegal to happen; 3) if the suspects still don't bite, get them to retell past events that show their guilt; and 4) if all else fails, the agent should represent the illegality of the enterprise clearly and unambiguously. Succeeding at any of these steps can bring a conviction. Failure cannot.

Like many undercover officers, this one was impatient, moving to step 2 from the very beginning, but without actually representing the illegality of his proposal. He omitted steps 1, 3, and 4 entirely. In fact, even in step 2 he didn't make his hints clear to Arshad. He was careful never to use words that represented illegality, such as *kill* or *hit* in the conversations, instead resorting to 71 terms (many repeated) including, *this job, your problem, do something for you, this deal, this, it, a job, that, this thing*. At one point the officer hypothetically suggested that if the husband's "body was not found," his daughter might not come home to Arshad, since she might wait for him to come home. Arshad

listened to the officer's hypothesis but remained consistent in his belief that the conversation was not about killing, but about helping him locate his daughter and her new husband. The defense lawyers certainly believed this to be the case but they were hard pressed to show how the structure of the communicative event, the actual words used by both speakers, the inferences, the evidences of comprehension, and the things not said, work together systematically for the defense. Even if they could say it, they couldn't use linguistic expertise to prove it. Again, this is what linguists, not lawyers, can do. The courts need to be educated about what linguistic analysis can accomplish in such cases.

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So here we have written evidence of the objections courts make about linguistic expert witness reports and proposed testimony. Lord MacFayden is certainly not the only judge who has made these objections in the past. It is up to linguists to do a better job than I did in this case if there is hope for change in the future.

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