

The need to raise the bar: court interpreters as specialised experts^{*}

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In this paper, Associate Professor Sandra Hale, Leader of the Interpreting and Translation Research Group at the University of Western Sydney, examines the complexities of the court interpreting process and identifies the key competencies for court interpreters. Apart from a high level bilingual competence, an interpreter requires an understanding of the interpreting process; cross-linguistic differences; the discourse strategies of the courtroom; and the nature of his or her role; as well as the expertise to know when and how to intervene. Associate Professor Hale opines that the responsibility for the quality of court interpreting must lie with all participants in the process and urges systemic improvements, highlighting the pressing need for pre-service specialised court interpreter training.

Introduction

“I am concerned that so many people who put their trust in the administration of justice ... have suffered from incompetent interpretation. If you do not understand the proceedings through competent interpretation, you are denied justice.”¹

Much has been said and written about incompetent interpreting in the courtrooms. Yet, little seems to have been done to achieve systematic improvements that will lead to a better administration of justice. Multiple factors contribute to this impasse, but its underlying cause seems to be the general lack of recognition of the complex nature of court interpreting as a highly specialised activity.² Many are quick to criticise the interpreter’s performance, but few are willing to advocate rigorous pre-service university

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1 R Todd, “Court interpreters inadequate?”, *Law Times*, 21 April 2008, at <www.lawtimesnews.com/200804214003/Headline-News/Court-interpreters-inadequate>, accessed 20 January 2010.

2 TP Christensen, “Judges’ deviations from norm-based direct speech in court” (2008) 10(1) *Interpreting* 99.

training, to provide adequate working conditions and to pay professional rates that are commensurate with the difficulty of the task.³ On the one hand, courts are happy to employ untrained bilinguals to act as interpreters at very little expense; on the other, they wonder why these poorly paid, untrained individuals are not performing satisfactorily.⁴ The answer should be obvious, yet little is being done at the systemic level to rectify this anomaly. Either the legal professionals do not see the connection, or they do not consider the issue important enough to take any action. What should indeed be surprising is that, given the current employment conditions, poor remuneration and lack of recognition, there are still many highly trained, competent and professional interpreters in the market whose work is undervalued, unrecognised and unacknowledged.

There also seems to be an underlying misconception, as implied by the introductory quotation, that it is only the accused who does not understand the language of the courtroom that needs interpretation in order to ensure a fair trial. The fact is that when one participant cannot understand or be understood, it is the legal process itself that suffers and justice cannot be done. A lawyer's best efforts to ask the most strategic questions in order to elicit the answers that will benefit his or her case can be thwarted by inadequate interpretation. A jury's attempts to evaluate the credibility of a witness can be frustrated by inadequate interpretation. A magistrate's evaluation of the evidence presented in another language will be flawed if based on inadequate interpretation. I use the word *inadequate* deliberately. *Inadequate* does not refer only to the interpreter's level of competence, but also to the interpreter's specialist training in court interpreting and prior preparation. In addition, the interpreter's opportunity to render an adequate interpretation depends heavily on the physical working conditions and the behaviour of all the participants involved in the interaction.

The 2007 Critical Link 5 Congress⁵ highlighted the necessity for all participants of interpreted interactions to assume some of the responsibility for the quality of the interpretation and the success of the communication. The misconception that interpreters perform "a purely mechanical function, much like a hearing aid, microphone, or typewriter",⁶ portrays interpreting

3 R Morris, "Missing stitches. An overview of judicial attitudes to interlingual interpreting in the criminal justice systems of Canada and Israel" (2008) 10(1) *Interpreting* 34.

4 S Berk-Seligson, "Judicial systems in contact. Access to justice and the right to interpreting/translating services among the Quichua of Ecuador" (2008) 10(1) *Interpreting* 9 (Berk-Seligson 2008).

5 The Critical Link international conference series is dedicated to interpreting in legal, medical and welfare settings. Critical Link 5 was held in Sydney, Australia, from 11–15 April 2007. Its theme was "Quality in interpreting: a shared responsibility".

6 NSW Law Reform Commission, *Blind or deaf jurors*, Discussion Paper 46, February 2004 at [5.23].

as an activity devoid of thought, judgment or effort and removes from the main speakers any responsibility to help the interpreter to understand and render the message accurately. Interpreted proceedings cannot be expected to be the same as monolingual proceedings, no matter how competent the interpreter. Allowances must be made in order to accommodate the interpreter. Before the event, interpreters need to be briefed with as much background information as possible in order to adequately prepare. During the event, speakers' turns at talk must be clear and of manageable length, and the interpreter should be given permission to interrupt the proceedings if and when clarification is required or a reasonable request warranted. The physical working conditions are also important, including proper acoustics so the interpreters can hear the speakers clearly, comfortable seating to allow for note taking and reference material, access to drinking water, and permission to take regular breaks. Ideally, for long trials, interpreters should work in pairs, which is the current practice in conference interpreting. This creates a quality assurance mechanism, because the interpreters can monitor each other's performance, as well as take regular breaks. However, even if such conditions were granted, only competent interpreters with the correct specialist training would be able to offer a quality service.

Lack of awareness about the complexity of interpreting and the need for high standards

Although some countries have accreditation or certification systems that provide some type of benchmark for competence, in no country is any type of training compulsory before interpreters are allowed to practise. It is still not uncommon in some countries for the police or the courts to use bilingual volunteers, including children or police officers, as interpreters.⁷ Ahmad comments on the inconsistency that exists in the United States, where:

“... lawyers rarely subject interpreters to the level of scrutiny regarding qualifications and reliability to which they would subject other types of experts. Indeed, it is nearly inconceivable that untrained, untested, unpaid volunteers would be used as expert witnesses with the frequency with which such volunteers are used for legal interpretation”.⁸ [Citation omitted.]

7 S Berk-Seligson, “Interpreting for the police: issues in pre-trial phases of the judicial process” (2000) 7(2) *Forensic Linguistics* 212 (Berk-Seligson 2000); L Roberts-Smith, “Forensic interpreting: trial and error” in S Hale, U Ozolins and L Stern (eds), *The critical link 5. Quality in interpreting — a shared responsibility*, John Benjamins Publishing Company, Amsterdam, 2009, p 13; A Allimant and S Anne, “No room ... homelessness and the experiences of women of non-English speaking backgrounds”, paper presented at the 5th National Homelessness Conference, 21–23 May 2008, Adelaide.

8 M Ahmad, “Interpreting communities: lawyering across language difference” (2007) 54 *UCLA L Rev* 999 at 1059.

In a review article, the Honourable Len Roberts-Smith, a former WA Supreme Court judge, comments that “monocultural or Anglophone lawyers and judges”⁹ lack an understanding of interpreting issues, resulting in forensic error. He reviews a number of cases where poor interpretation created legal problems and attributes these to one of the following causes:

- the absence of anyone to interpret due to either a misconception from some judges and lawyers that interpreters are an obstacle to communication or to the unavailability of interpreters
- the provision of unqualified bilinguals or interpreters qualified in the wrong language
- the use of the services of “professional accredited” interpreters who are not trained and who do not possess the high level skills necessary to perform at the required level.

Such lack of recognition for trained interpreters and lack of awareness of the complexity of court interpreting is not unique to English-speaking countries. A study of court interpreting in Ecuador revealed a similar attitude.¹⁰ When asked about who interprets for Indigenous populations who do not speak Spanish, a judge said:

“We call in a person who understands the Quichua language and who translates it into Spanish. There are two or three people who live nearby. They are called. They collaborate. They aren’t paid. They are collaborators.”¹¹

Berk-Seligson comments that, ironically, although these judicial officers are happy to call on non-professionals, there are always vehement criticisms of their work.¹² Studies from other countries such as Malaysia,¹³ Spain,¹⁴ Austria¹⁵ and Denmark¹⁶ have produced similar findings.

9 Roberts-Smith, above n 7, p 29.

10 Berk-Seligson 2008, above n 4.

11 *ibid* at 20.

12 *ibid* at 27.

13 Z Ibrahim, “The interpreter as advocate. Malaysian court interpreting as a case in point” in C Wadensjö, B Englund Dimitrova and A-L Nilsson (eds), *The critical link 4. Professionalisation of interpreting in the community*, John Benjamins Publishing Company, Amsterdam, 2007, p 205.

14 JM Ortega Herráez and AI Foulquié Rubio, “Interpreting in police settings in Spain. Service providers’ and interpreters’ perspectives” in C Valero Garcés and A Martin (eds), *Crossing borders in community interpreting. Definitions and dilemmas*, John Benjamins Publishing Company, Amsterdam, 2008, p 123; C Giambruno, “The role of the interpreter in the governance of sixteenth and seventeenth century Spanish colonies in the ‘New World’: lessons from the past to the present” in C Valero Garcés and A Martin (eds), *Crossing borders in community interpreting. Definitions and dilemmas*, John Benjamins Publishing Company, Amsterdam, 2008, p 27.

15 M Kadric, “Interpreting in the Austrian courtroom” in R Roberts et al (eds), *The critical link 2. Interpreters in the community*, John Benjamins Publishing Company, Amsterdam, 2000, p 153.

16 Christensen, above n 2.

Hertog et al comment on the fear that surrounds the establishment and enforcement of adequate standards for legal interpreters.¹⁷ They speculate that not only may governments fear having to pay adequate fees to qualified interpreters, but also unqualified practitioners may fear losing their work and educational institutions may fear not attracting sufficient numbers of students or students with the high level of bilingual competence required to become interpreters. They conclude that “this unholy trinity of, often unnecessary, fear has hindered and still hinders progress”.¹⁸ It is ironic that the fear is based on issues other than the potential for misinterpretation and for the grave consequences it can have on the administration of justice.

Court interpreters as highly trained professionals

“[C]ourt interpreters must be properly trained, the difficulty and importance of their work fully recognized, their pivotal role in the judicial process acknowledged and accepted by judicial authorities, and their compensation established in accordance with their responsibilities.”¹⁹

Compulsory pre-service training will not guarantee error-free interpretation, just as legal training does not guarantee error-free lawyering. However, it will guarantee a minimum standard and professional status for interpreters. The different skills that interpreters need as their everyday tools are acquired through rigorous training and consistent practise. The main ones include the acquisition of pre-assignment preparation skills, specialised note taking and memory aide skills, and competence in the different interpreting modes: short consecutive, long consecutive, simultaneous interpreting and sight translation. Knowing when to use each of these modes, how accuracy is constrained by each of them, and the consequences of the interpreter’s choices on the interaction, are competencies that can only be acquired through adequate training based on sound theories and on the results of practical applied research.²⁰

Added to these generic skills, court interpreters need to acquire specialised knowledge of the legal system, of different legal settings, of bilingual legal terminology and of the discourse practices and strategies particular to the

17 E Hertog et al, “From Aequitas to Aequalitas. Establishing standards in legal interpreting and translation in the European Union” in C Wadensjö, B Englund Dimitrova and A-L Nilsson (eds), *The critical link 4. Professionalisation of interpreting in the community*, John Benjamins Publishing Company, Amsterdam, 2007, p 151.

18 *ibid* p 164.

19 Giambruno, above n 14, p 48.

20 For more details see S Hale, *Community interpreting*, Palgrave Macmillan, Hampshire, 2007 (Hale 2007).

courtroom. Qualified interpreters will also be familiar with a code of ethical conduct that will guide them on issues of impartiality, confidentiality, and their role in providing a true reflection of the voice of the original speakers, as far as the situation and the participants will permit. Another crucial area of competence is the interpreter's ability to manage the interaction, to know when and how to intervene to highlight a translation ambiguity or difficulty or explain a translation choice that may impact on the case at hand. The next section will review each of these areas of competence with illustrative examples.

Court interpreting competence

Prerequisite to becoming an interpreter: high level bilingual competence

Interpreting is a highly complex activity that requires as a base, a native or native-like level of competence in at least two languages in a variety of genres and registers. This in itself is a rare ability that should be valued as such, as normally only those who have received formal bilingual education and have lived in at least two different language communities throughout their lives can acquire such high levels of bilingualism. Very few professions require such a demanding prerequisite to train in their field.

The pool of competent bilinguals in all of the language combinations which require interpreters is undoubtedly very limited. This fact alone makes it crucial for such people to be provided with the necessary incentives to pursue a career as highly specialised interpreters. It is an unfortunate reality that many of the best interpreting graduates in Australia²¹ do not practise as interpreters for very long, choosing to retrain for other more profitable and less demanding professions. On the other hand, examples of people who act as interpreters, but who lack basic linguistic competence, abound. These people are, of course, not necessarily trained, accredited or even paid for their services. Even if they have every intention of interpreting accurately, their lack of basic skills does not allow it. For example, Ahmad comments on an affidavit taken through an interpreter, which was replete with grammatical errors, basic vocabulary and very short sentences, giving the impression that the speaker was an uneducated person, when in fact he was a university academic.²² Berk-Seligson gives examples of police officers

21 For example, U Ozolins and S Hale, "Introduction: quality in interpreting — a shared responsibility" in S Hale, U Ozolins and L Stern (eds), *Critical link 5. Quality in interpreting. A shared responsibility*, John Benjamins Publishing Company, Amsterdam, 2009, p 1.

22 Ahmad, above n 8, at 1061.

in the United States who, despite their inadequate Spanish language skills, insist on asking questions in Spanish, making it very difficult for the suspects to understand.²³

Examples of inadequate English competence can also be found in Australia, with different implications on the outcome of the case. Example 1 below shows an instance of a Korean interpreter's grammatical inadequacy in English.

Example 1²⁴

Interpreter: Ben Kim said someone is going to Central Coast.

Counsel: to the Central Coast?

The interpreter's omission of the definite article is highlighted by counsel's need to clarify the utterance, adding unnecessarily to the length of the case and possibly creating confusion for the witness, who does not understand why his or her answer is being repeated by counsel. Another example of inadequate interpreting leading to an obvious consequence can be found in a recent Refugee Review Tribunal hearing, where the Arabic interpreter continually misinterpreted "persecution" as "prosecution" and "witness" as "martyr", confusing the witness and leading to an appeal on the grounds of poor interpretation.²⁵

However, even if a person is a balanced, competent bilingual, this does not guarantee their ability to interpret. The misconception that any bilingual, including children, can automatically be called upon to interpret, is unfortunately still prevalent. Roberts-Smith provides an example of police asking a 15-year-old girl, who was visiting the inmate they needed to interview, to interpret.²⁶ When she left, the interview continued without her, and on the record it was written "interpreter quit here", automatically attributing to the girl the title of "interpreter". A similar situation can be seen in Example 2 below, where the police prosecutor implies that a child was sufficiently competent to act as interpreter for her mother. Interestingly, the mother qualifies the daughter's "interpreting" performance in an insightful manner, proposing that the child was not interpreting, but providing her own version of the facts and supplying her with some words when needed.

23 Berk-Seligson 2000, above n 7.

24 J Lee, "Interpreting inexplicit language during courtroom examination (2009) 30(1) *Applied Linguistics* 93 at 106 (Lee 2009a).

25 *SZLDY v Minister for Immigration* [2008] FMCA 1684.

26 Roberts-Smith, above n 7.

Example 2²⁷

- Police prosecutor: Your daughter Karen was there, wasn't she?
 Witness: *Sí, estaba conmigo* (Yes, she was with me).
- Police prosecutor: And she speaks English?
 Witness: *Sí* (Yes).
- Police prosecutor: And she speaks good English?
 Witness: *Sí* (Yes).
- Police prosecutor: And she speaks Spanish as well?
 Witness: *Sí* (Yes).
- Police prosecutor: And she assisted you in giving your version of events to the police, didn't she?
 Witness: *Bueno, mi hija dio la ... la versión de ella, de lo que vio y me ayudó a mí las cosas que yo no ... que ella me preguntaba que yo no sabía cómo contestarla' porque no sé el inglés po'* (Well, my daughter gave her ... her own version of what she saw and she helped me with the things that I didn't ... that she asked that I didn't know how to answer because I don't speak English, you know).

Bilingual helpers will normally do what the witness above stated; they will give their own summary of what they heard. Qualified interpreters are taught to aim at achieving faithful and complete renditions of what the speaker said, attempting to maintain the appropriate register and style. Faithful interpreting, however, is a complex and at times controversial concept. Although widely discredited, the idea that faithful interpreting equates to word-for-word translations is still common among some legal practitioners.²⁸ A number of scholars have based their theories of accurate interpreting on communicative theories of discourse and pragmatics, which also extend to translation theories.²⁹ These theories argue against the concept of literal, word-for-word translations, as such translations generally fail to achieve

27 The interpreter's version was removed from the example: *Police v X* [Assault case, Fairfield Local Court, NSW, 1996].

28 Hale 2007, above n 20; J Lee, "Conflicting views on court interpreting examined through surveys of legal professionals and court interpreters" (2009) 11(1) *Interpreting* 35.

29 J House, *A model of translation quality assessment*, Gunter Narr Verlag, Tübingen, 1977; C Nord, *Translating as a purposeful activity. Functionalist approaches explained*, St Jerome Publishing, Manchester, 1997; I Mason and M Stewart, "Interactional pragmatics, face and the dialogue

an accurate representation of the communicative point and effect of the original utterances. While it is beyond the scope of this paper to explain these theories in detail, the underlying concepts will be reviewed below, with accompanying examples.

Understanding the interpreting process

Untrained interpreters generally base their choices on personal intuition. Formal training attempts to systematise those choices by providing theories to guide and inform interpreters in the process. From a discourse or pragmatic perspective, the interpreter's goal is to interpret from the source to the target language in such a way that the listeners in the target language understand and react to the message in the same way listeners in the source language would; this has been referred to as "pragmatic equivalence".³⁰ Within a speech act theory framework,³¹ the interpreting process can be roughly explained in the following way: when listening to the source speech, the interpreter analyses it in terms of its locutionary act (the words uttered), illocutionary act (what is performed by those words), and perlocutionary act (what is achieved by them). In other words, the interpreter needs to fully understand the communicative function of the utterance and the likely effect on the listeners. Such understanding of the utterance will largely depend on the speech event itself, on its participants, and on the knowledge shared by those participants. To interpret faithfully, the interpreter needs to bridge the gap that exists between the two languages and cultures by aiming to render the illocutionary act, and at the same time aspiring to achieve the intended perlocutionary act. This is often done at the expense of the locutionary act. The examples below will illustrate some of the differences that exist across languages at the various levels of the language hierarchy: lexical, grammatical, semantic and pragmatic.

Footnote 29 continued

interpreter" in I Mason (ed), *Triadic exchanges. Studies in dialogue interpreting*, St Jerome Publishing, Manchester, 2001, p 51; S Berk-Seligson, *The bilingual courtroom. Court interpreters in the judicial process*, The University of Chicago Press, Chicago, 1990/2002 (Berk-Seligson 1990/2002); S Hale, "Pragmatic considerations in court interpreting" (1996) 19 *Australian Review of Applied Linguistics* 61 (Hale 1996); S Hale, *The discourse of court interpreting. Discourse practices of the law, the witness and the interpreter*, John Benjamins Publishing Company, Amsterdam, 2004 (Hale 2004); Hale 2007, above n 20.

30 House, above n 29; Hale 2007, above n 20.

31 J Austin, *How to do things with words*, Oxford University Press, Oxford, 1962.

Example 3

Spanish sentence: *A la niña la mordió el perro.*

Lexical translation: To the girl it (feminine) bit the dog.
(*literal, word-for-word*)

Semantic translation: The dog bit the girl.

Pragmatic translation: It was the girl that was bitten by the dog.

One difference between languages is word order, as shown in Example 3, which clearly demonstrates that a literal, word-for-word translation would be inadequate in English. The author proposes that interpreting competence can be matched with the approach the interpreter adopts when rendering his or her translation.³² For example, a person whose bilingualism is rudimentary will approach translation at the lexical level and produce a literal translation; untrained interpreters will tend to approach translation at the sentence level, concentrating only on the propositional content and produce semantic translations; and the most competent, trained interpreters, will approach translation at the discourse level and attempt to produce pragmatic translations. In Example 3, we can see that the semantic translation produces the correct propositional content: the dog bit the girl. The Spanish utterance, however, uses a marked structure leading to the presumption that in context, a possible distinction needs to be made between what animal bit which child, hence the marked theme position of the girl/object, even though the clause is in the active voice. The same effect can be achieved in English by resorting to a cleft construction. In order to achieve a pragmatic translation, the interpreter needs to choose from a different grammatical resource in English in order to match the original intention rather than the original words, or structure. This process can be further complicated when context, participants and culture are added to the equation.

This complex process is not widely understood or applied by untrained interpreters. Research has found that many tend to translate semantically, not pragmatically, thus inadvertently changing the illocutionary and perlocutionary acts of the original utterances.³³

32 Hale 2007, above n 20.

33 Hale 1996, above n 29; S Berk-Seligson, "The impact of court interpreting on the coerciveness of leading questions" (1999) 6(1) *Forensic Linguistics* 30; B Fraser and L Freedgood, "Interpreter alterations to pragmatic features in trial testimony", paper presented at the Annual Meeting of the American Association for Applied Linguistics, 6–9 March 1999, Connecticut.

Overcoming challenges caused by cross-linguistic differences

Trained interpreters will face as many challenges as untrained interpreters. However, trained interpreters will ideally have received the tools to deal with such challenges. They will also have the resources to not only make informed choices, but also to explain those choices to the court when necessary.

Languages differ at all levels of the linguistic hierarchy. Interpreters need to be competent at all levels in each language, and be able to make judgments about what aspects of the original utterance to sacrifice in order to achieve a pragmatic rendition when interpreting. This is particularly difficult in court interpreting, where subtle changes to utterances can lead to changes in the evidence and to the evaluation of witness credibility. This section will present a number of examples to illustrate cross-linguistic differences that require high level expertise to produce adequate, accurate interpretations.

At the grammatical level, a number of challenges can arise. One such challenge is interpreting tense and aspect accurately between English and Chinese. In English, tense and aspect are manifested mostly through verbal morphology, whereas in Chinese the use of adverbial markers and context carry these meanings, thus making it difficult for interpreters to choose the most accurate renditions.³⁴ In the case of Arabic and Spanish, Hale and Campbell present the results of an empirical study which demonstrates the number of choices translators are confronted with when translating from English.³⁵ The study found that the categories that produced the highest number of alternatives, and therefore created the greatest difficulty in finding translation equivalents, were official terms, metaphors and complex noun phrases.³⁶ One example was the seemingly unproblematic English noun phrase “case management”, which caused difficulty both at the semantic and the grammatical levels because in neither Arabic nor Spanish can a noun modify another noun.

Another very subtle difference between Spanish and English is the way speakers verbalise motion. For example, Slobin found that English speakers tend to express the manner of the motion by using manner verbs such as “*staggered* into the room”, whereas Spanish speakers rarely describe the motion at all and when they do, do so by adding an adjunct of manner “*entró tambaleándose*” (entered staggering).³⁷ In a study of the way interpreters interpreted manner verbs in witness testimonies, Filipovic found that:

34 JW Lin, “Time in a language without tense: the case of Chinese” (2006) 23(1) *Journal of Semantics* 1.

35 S Hale and S Campbell, “The interaction between text difficulty and translation accuracy” (2002) 48(1) *Babel* 14.

36 *ibid.*

37 DI Slobin, “Two ways to travel: verbs of motion in English and Spanish” in M Shibatani and A Thompson (eds), *Grammatical constructions. Their form and meaning*, Clarendon Press, Oxford, 1996, p 195.

“As a result of the habitual need to express Manner in English, different lexical choices are made in the English translation that add information about the manner of motion, not present in the Spanish original due to the use of a manner-neutral lexical item, which could result in different interpretations of the situation described”.³⁸

One such example can be seen below.

Example 4³⁹

Witness: *pero ... salió por la seven*

Literal translation: But ... (he/she/you formal) exited via the seven

Interpreter: the suspect ran up 7th street.

Filipovic explains that the English questioning persistently insists on more detail on the manner in which the action took place, while such information tends to be absent from the Spanish descriptions. This may lead interpreters to believe that they need to add descriptions of manner, such as in Example 4, where *salió* (went out) is translated as “ran up”. Such translation demonstrates the interpreter’s own perception of the event, which may not necessarily match the reality, as the details were not specified in the original. The interpreter is possibly also attempting to make the English version sound more natural and pragmatically appropriate, but such an addition may impact on the propositional content of the utterance. In a legal case, a witness’s detailed description of what they saw is crucial and any subtle changes produced by the interpreter, as in Example 4, can impact on the consistency of the accounts by different witnesses. The interpreter is therefore presented with the difficult task of deciding how to achieve the illocutionary and perlocutionary acts without interfering with the propositional content. Filipovic goes on to explain that the interpreter’s assumption that everyone was running in the chase scene turned out to be incorrect, as it was later made clear that some people were on bicycles.

Another example provided by Filipovic is the difficulty in translating the non-agentive reflexive pseudo-passive from Spanish into English, as can be seen in Example 5.

38 L. Filipovic, “Language as a witness: insights from cognitive linguistics” (2007) 14(2) *The International Journal of Speech, Language and the Law* 245 at 252.

39 *ibid* at 253.

Example 5⁴⁰

Witness: *Se me cayó en las escaleras*

Literal translation: To-me-it-happened that (she/he/it) fell on the stairs.

The Spanish utterance in Example 5 poses a translation challenge that is difficult to overcome without an explicit explanation to the court. As Example 5 clearly shows, a literal word-for-word translation would not produce an accurate rendition. The interpreter in this case interpreted the utterance as either “I dropped her” or “she fell”, both of which are accurate translations, but neither conveys the same subtle meaning of the original. In this case, both translations caused confusion, leading to the same question relating to the dropping of the victim being asked nine times. The difficulty was caused by the different expressions of intentionality in Spanish and English. The Spanish utterance “*se cayó*” could be translated as “s/he/it fell”, as the gender is unspecified and the interpreter needs to clarify it, unless it is understood from previous information. The addition of “*me*”, as in the example “*se me cayó*” indicates that the speaker was involved in holding or carrying the person who accidentally fell out of the speaker’s grasp. The English “I dropped her” could indicate that the speaker deliberately let go, whereas the Spanish clearly indicates that the dropping was unintentional and intentionality is crucial in legal cases. This is a clear example of a situation where the interpreter would be justified in intervening to explain the translation difficulty, as a subtle misunderstanding of this utterance could have major legal implications.

At the discourse level, interpreting challenges occur when utterances can be translated easily at the lexical or semantic levels, but due to pragmatic differences, they do not portray the same illocutionary and perlocutionary acts. Interpreting speech acts such as polite requests in courtroom questions, can cause difficulties in some languages. In English, polite requests are normally preformed indirectly, by the use of a modal interrogative, such as: “Could you tell the court what happened?”. When interpreters hear this utterance, they firstly need to understand that it is an indirect speech act which functions as a polite request, and not as a genuine question about the listener’s ability to speak. The illocutionary act, therefore, is a polite request for specific information regarding an event. Languages such as Russian or Czech, for example, formulate such requests directly by the use

40 *ibid* at 262.

of the imperative followed by a politeness marker.⁴¹ A Russian interpreter, for instance, would need to change the indirect speech act into a direct speech act in order to match the illocutionary and perlocutionary acts in the target language.

Understanding the discourse strategies of the courtroom

Another layer of complexity is added to the interpreter's task when interpreting in the courtroom, due to the constraints placed upon the interpreting process by the setting and by the strategic use of language itself. Studies of the discourse of the adversarial courtroom in particular, have shown the significance of language as a metaphorical tool.⁴² Different types of questions are used by lawyers to achieve specific goals depending on the type of examination. The form and the words used in questions can influence the answers they elicit, and even the recollections they trigger in eye witnesses.⁴³ Similarly, the language and style used by witnesses when giving evidence can impact significantly on how convincing or credible they are.⁴⁴

A number of studies into court interpreting found that even competent, accredited interpreters who had not received specialised legal interpreting training, were not aware of the significance of certain linguistic features of courtroom discourse, and consequently tended to unjustifiably omit or disregard them. Examples include arbitrary changes of question type,⁴⁵ the

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- 41 JR Searle, "Indirect speech acts" in J Cole and J Morgan (eds), *Syntax and semantics*, Academic Press, New York, 1975, p 59; M Mir, "Direct requests can also be polite", paper presented at the 7th Annual Meeting of the International Conference on Pragmatics and Language Learning, 1–3 April 1993, University of Illinois, Urbana-Champaign.
- 42 B Danet and B Bogoch, "Fixed fight or free for all? An empirical study of combativeness in the adversary system of justice" (1980) 7(1) *British Journal of Law and Society* 36; P Drew and J Heritage (eds), *Talk at work. Interaction in institutional settings*, University of Cambridge Press, Cambridge, 1992; J Gibbons, *Forensic linguistics: an introduction to language in the justice system*, Blackwell Publishing, Malden, Massachusetts, 2003.
- 43 S Harris, "Questions as a mode of control in magistrates' courts" (1984) 49 *International Journal of the Sociology of Language* 5; E Loftus, *Eyewitness testimony*, Harvard University Press, Cambridge, Massachusetts, 1979; Y Maley and R Fahey, "Presenting the evidence: constructions of reality in court" (1991) 4(1) *International Journal for the Semiotics of Law* 3.
- 44 WM O'Barr, *Linguistics evidence: language, power, and strategy in the courtroom*, Academic Press, New York, 1982.
- 45 Hale 2004, above n 29; L Pérez González, "Interpreting strategic recontextualization cues in the courtroom: corpus-based insights into the pragmatic force of non-restrictive relative clauses" (2006) 38(3) *Journal of Pragmatics* 390.

omission of discourse markers to preface lawyers' questions,⁴⁶ the omission of coercive tag questions during cross-examination,⁴⁷ changes to levels of politeness, and changes of style and register in witness testimonies, all of which led to different evaluations of character.⁴⁸

The changes found in these studies were generally not justified by cross linguistic pragmatic differences; rather they were usually the result of interpreters disregarding what they seemed to consider superfluous features of speech. Example 6 shows an unjustified change of question type, from an open-ended question to a polar interrogative, eliciting a very different answer.

Example 6⁴⁹

Question: Yeah, can you tell the court to the best ... to the best of your recollection, to the best of your memory?

Interpreter: *Pero algo recuerda usted?* (But you remember something?)

The English question is an indirect request to the witness to tell the court what he or she remembers. The interpreted question changes the expected answer to a yes or no response, which would then require a further question to get the witness to describe the events. The interpreted version not only omits the reference to the court, but also changes the register and level of politeness. The interpreter deviated completely from the question's original intention.

Example 7 shows the omission of the discourse marker *well*.

46 S Hale, "Interpreters' treatment of discourse markers in courtroom questions" (1999) 6(1) *Forensic Linguistics* 57.

47 S Hale, "How are courtroom questions interpreted? An analysis of Spanish interpreters' practices" in I Mason (ed), *Triadic exchanges. Studies in dialogue interpreting*, St Jerome Publishing, Manchester, 2001, p 21; AC Rigney, "Questioning in interpreted testimony" (1999) 6(1) *Forensic Linguistics* 83.

48 A Krouglov, "Police interpreting. Politeness and sociocultural context" (1999) 5 *The Translator* 285; Berk-Seligson 1990/2002, above n 29; Hale 2004, above n 29.

49 Hale 2004, above n 29, p 58.

Example 7⁵⁰

- Question: And uh you tell the court that you have no prior convictions?
- Interpreter: *¿Dice usted a la corte de que no ha tenido antes ninguna condena?*
(Are you saying to the court that you have not had any convictions before?)
- Answer: *No.*
- Interpreter: *No.*
- Question: Well, is it correct that you have no prior convictions?
- Interpreter: *¿Es correcto decir que usted no ha tenido condenas anteriores?*
(Is it correct to say that you have not had convictions before?)

The use of *well* in this case indicates that the lawyer was dissatisfied with the answer because it was ambiguous; an ambiguity that was caused by the original question. It is not clear whether the answer “no” refers to “no I don’t tell the court” or “no, I have no prior convictions”. In order to clarify the question, the lawyer asks another, which he links with the discourse marker *well*. Pragmatically, *well* implies “let me put it another way”, which maintains coherence in the discourse. However, the interpreter omits the initial discourse marker altogether and simply translates the rest of the question. Such an omission changes the pragmatic effect of the question. *Well* in this case could have been translated as “*Bueno, pero*” (well, but) or by the conditional “*Entonces, sería correcto decir ...*” (Then, would it be correct to say...).

One common complaint from judicial officers has been that:

“... evidence given through an interpreter loses much of its impact ... The jury do not really hear the witness, nor are they fully able to appreciate, for instance, the degree of conviction or uncertainty with which his evidence is given; they cannot wholly follow the nuances, inflections, quickness or hesitancy of the witness; all they have is the dispassionate and unexpressive tone of the interpreter”.⁵¹

The fear expressed above has been confirmed by the results of experimental studies. However, it has also been found that interpreters can be trained to maintain certain features of discourse that will minimise the impact of the

50 *ibid* p 64.

51 *Filios v Morland* [1963] 63 SR (NSW) 331 per Bereton J at 332–333, in Roberts-Smith, above n 7, p 15.

interpreter on the evaluation of witness credibility.⁵² Based on authentic transcripts,⁵³ Hale conducted a number of experiments to ascertain whether the stylistic characteristics classified by O’Barr as powerless and powerful speech styles,⁵⁴ determined the way jurors evaluated the credibility, trustworthiness and competence of witnesses. The results showed that Spanish jurors rated the Spanish speaking witnesses who spoke in the powerful style as more credible, more competent and more trustworthy. The same results were obtained from English speaking jurors, thus corroborating O’Barr’s study, both for English and Spanish speaking jurors. When the ratings of the original Spanish witnesses were compared with the interpreters’ renditions, it was found that the interpreters who interpreted accurately at the propositional level but changed the style of the original from powerless to powerful, obtained a better evaluation on all three points. When interpreters maintained the propositional content, but changed the style from powerful to powerless, they received a less positive evaluation than did the original witness on all three points. However, when the interpreters maintained as much as possible of both the propositional content and the style of speech, the impact of the interpreter was minimal and the juror evaluations showed no statistically significant differences. The results of the above study show that with adequate training, competent interpreters can produce renditions that are stylistically, propositionally and pragmatically accurate, which will counteract the negative effects of the interpreter’s intervention mentioned by Breerton J in the passage quoted from *Filos v Morland* above.

Understanding the role of the court interpreter

Misunderstanding of the interpreter’s role is common among non-professionals hired as interpreters. Instead of seeing their role as that of impartial interpreters, they see themselves as advocates or gatekeepers. Such attitudes may be manifested overtly, in their comments or advice to their “client” or to the legal practitioner (as in Example 8); or covertly, either through the omission of utterances they deem irrelevant or through the addition of information (as in Example 9). At the one extreme, we find examples such as the one provided by Ahmad,⁵⁵ where a Burmese priest acts as volunteer interpreter.

52 Berk-Seligson 1990/2002, above n 29; Hale 2004, above n 29.

53 Hale 2004, above n 29.

54 O’Barr, above n 44.

55 Ahmad, above n 8.

Example 8⁵⁶

- Lawyer to client: Is there someone there that we could speak to?
- Reverend Sen: Why is it necessary for you to speak with them? (to
(volunteer interpreter) lawyer, without interpreting into Burmese)
- Lawyer: Reverend, would it be possible for you to just translate what we said? If Mae has questions about why we would like to speak with them, we can answer then.
- Reverend Sen: I have helped many Burmese to apply for asylum, and I don't see why this information is important. Please explain it to me before I translate for Mae.

Reverend Sen cannot be blamed for acting in this way. He is not a professional interpreter and is not bound by any professional ethical code, nor has he received any training as interpreter. The responsibility here lies with the lawyers who did not hire the services of a professional interpreter and expect a volunteer to act as one.

Ibrahim gives another example of an interpreter in Malaysia, who unbeknown to the Bench, persuaded an unrepresented accused to change his plea from not guilty to guilty based on what the interpreter himself considered to be evidence against the accused which would most certainly lead to a conviction. Ibrahim explains that the interpreter is considered by the Malaysian legal system to be:

“... a bilingual intermediary, clerk of the court, and advocate of unrepresented accused, [who] receives little or no training and is not paid appropriately for the responsibilities (s)he carries”.⁵⁷

In Austria, studies of paid interpreters in asylum interview settings also found examples of role confusion, where some interpreters interwove their own comments in their renditions and covertly took on the role of pseudo immigration officials. This can be seen in Example 9.⁵⁸

56 *ibid* at 1005.

57 Ibrahim, above n 13, p 209.

58 S Pöllabauer, “Interpreting in asylum hearings: issues of role, responsibility and power” (2004) 6(2) *Interpreting* 143; W Kolb and F Pöchhacker, “Interpreting in asylum appeal hearings: roles and norms revisited” in D Russell and S Hale (eds), *Interpreting in legal settings*, Gallaudet University Press, Washington, DC, 2008, p 26.

Example 9⁵⁹

- Adjudicator: *Und haben Sie Ihre Religion ausgeübt?*
(to applicant) (And did you practise your religion?)
- Interpreter: Did you practise that religion?
- Applicant: Yeah, I was a Christian! And I go to church.
- Interpreter: Yes, but but-look, there are many Christians who never go to church — You went to church?
- Applicant: Yes.
- Interpreter: *Ich bin in die Kirche gegangen.* (I went to church).

In Example 9, the answer “Yeah, I was a Christian!” was not interpreted into German, presumably because the interpreter did not agree with the implication that Christians practise their religion, a personal opinion the interpreter makes explicit to the applicant, but not to the rest of the tribunal. Here the interpreter holds a private conversation in English for no reason other than his or her disagreement with the applicant’s proposed inference. It is impossible to say whether this interpreter had received any specialist training and whether he or she understood the consequences of his or her choices.

In Example 10, we see the interpreter being confronted with a claimant who does not understand his role. The interpreter is interpreting to the claimant simultaneously in the whispering mode, while others are giving evidence. This is standard practice in court interpreting, but while the interpreter interprets, the claimant must not make any comments, as that would interfere with the interpreter’s rendition. In Example 10 we see that the claimant intervenes by commenting to the interpreter that he or she did not have a contract. The interpreter then tries to explain his or her role in the subsequent turn.

59 Kolb and Pöchhacker, above n 58.

Example 10⁶⁰

(Interpreting simultaneously while others are giving evidence)

Arbitrator: Do you have a lease with this lady?

(addressing the defendant)

Interpreter: Do you, Ma'am, have a contract with this lady?

(for the benefit of the Polish-speaking claimant — in Polish)

Claimant: But I don't have a contract.

(in Polish)

Interpreter: No, no no, Ma'am. I'm only translating what the lady is asking.

(to claimant, in Polish)

Unrealistic expectations of the role of the interpreter which added to poor working conditions and inadequate pay have led to interpreters refusing to take on court assignments or leaving the practice altogether. Ibrahim speaks of the:

“... perpetual shortage of interpreters in Malaysian courts, as senior ones retire and new ones either resign after a short period or do not come forward at all”.⁶¹

A parallel can be found with Australian Aboriginal interpreters, as expressed in the quotation below:

“I stopped doing court interpreting years ago ... They just didn't really understand what the interpreter's role was, and I just got sick of sort of being blamed, you know, for allowing people to go free or putting people in.”⁶²

Acquiring the expertise to know when and how to intervene to offer expert opinion

Interpreters are constantly faced with difficult choices about how best to interpret each utterance, and need to continually make judgments about the likely impact of any changes on the legal process, so as to alert the court of potential misunderstandings. A well-trained competent court interpreter will have the expertise to intervene to explain situations where potential

60 PS Angermeyer, “Who is ‘you’? Polite forms of address and ambiguous participant roles in court interpreting” (2005) 17(2) *Target* 203 at 215.

61 Ibrahim, above n 13, p 213.

62 M Cooke, “Interpreter ethics versus customary law: quality and compromise in Aboriginal languages interpreting” in S Hale, U Ozolins and L Stern (eds), *The critical link 5. Quality in interpreting — a shared responsibility*, John Benjamins Publishing Company, Amsterdam, 2009, p 91.

misunderstandings arise, where direct equivalents are not possible, or where a linguistic strategy does not have the same effect in the target language. Such interpreter expertise should be valued and welcomed by the court. Lee speaks of difficulties encountered by Korean interpreters due to ambiguity and inexplicitness found in Korean utterances.⁶³ In an interview with Korean court interpreters, she found that most were reluctant to interrupt the court proceedings to seek clarification when utterances were ambiguous. Lee argues that the interpreters' reluctance to intervene is mainly due to the intimidating atmosphere of the court, which tends to ignore the presence of the interpreter or not to view them as experts.⁶⁴

On the other hand, Berk-Seligson and Hale found that untrained Spanish interpreters interrupted the proceedings for a number of unjustified reasons, for example, in order to point out to counsel that a question just asked had been asked previously, or to attempt to help the witness answer a question.⁶⁵ Attempts to make clarifications were also found to create more confusion. These untrained interpreters demonstrated a lack of understanding of the discourse strategies of the courtroom and of the role of the interpreter, as well as inadequate linguistic and interpreting expertise.

Conclusion

Despite the law's claim to "precision", language is imprecise,⁶⁶ misunderstandings are common in monolingual situations and the potential for misunderstanding in bilingual situations is even greater. Legal systems have failed to recognise the complexities of court interpreting, and have been content to "make do" with less than adequate interpreting services provided by unqualified bilinguals. Such bilinguals, however, are often subject to unrealistic expectations, criticised for their failings, overworked and underpaid, or even unpaid. The inadequate performance of these bilingual helpers has at best led to appeals on the grounds of poor interpretation, and at worst, to no action at all, with unknown consequences.

63 Lee 2009a, above n 24.

64 *ibid.*

65 Berk-Seligson 1990/2002, above n 29; S Hale, "Excuse me, the interpreter wants to speak' — Interpreter interruptions in the courtroom: why do interpreters interrupt and what are the consequences?", paper presented at the proceedings of the third Critical Link Conference, May 2001, Montreal; <<http://criticallink.org/conferences/conference-papers/critical-link-3/>>.

66 Gibbons, above n 42.

If justice is to be served, things need to change. The system must first acknowledge that highly competent court interpreters are crucial for the successful conduct of bilingual proceedings; and second, the system must be prepared to pay for a quality service. On the one hand, the demand for trained, competent interpreters will lead to the creation of high quality university programs. On the other, incentives such as adequate remuneration, decent working conditions and due recognition will lead to high level bilinguals choosing to complete the relevant training to enter the profession.

Interpreters who receive adequate training will be educated not only on linguistic, cultural and interpreting issues, but also on the discourse practices of the courtroom and the requirements of the setting and its participants. Similarly, legal professionals are to be educated about the requirements of interpreters in order to perform adequately, with all participants assuming some of the responsibility for the success of the interaction. Ultimately, legal professionals need to work together with interpreters to achieve their goal and recognise them as expert participants, rather than “mere” translation machines. Only when the bar is raised on court interpreting, will quality services be guaranteed and justice served.