

Linguistics and the law

Abstract

This chapter is an introduction to the diverse and growing field of language and law. It provides an overview of the key areas in the field, organised under two broad banners: the language of the legal process, and the role of linguistic analysis as part of that process. The first part considers the analysis of texts such as legal documents, police interviews and courtroom interaction. The second part focuses on the increasing use of linguists as expert witnesses, where linguistic analysis is presented as evidence in areas such as authorship analysis, language crimes, and trademarks.

As a whole, the chapter illuminates the pivotal role that language plays in the functioning of the legal system, while also highlighting the many ways in which the justice process ironically perpetuates injustice through language. It thereby demonstrates the important contribution which linguists can make through critical analysis of – and engagement with – the legal system.

Keywords

Applied linguistics; forensic linguistics; legal language; language as evidence; expert witness.

Introduction

‘Our law is a law of words... Morality or custom may be embedded in human behavior, but law – virtually by definition – comes into being through language... Few professions are as dependent upon language.’ Tiersma 1999: 1

From the *magna carta* to a marriage certificate, few texts are as influential over our daily lives as those generated by the legal world. By the same token, as highlighted by Tiersma, there are few institutions which operate so completely through the medium of language. The relationship between language and law is thus an intrinsic and important one.

Although ‘applied linguistics’ originally tended to refer only to applications relating to language learning, it increasingly involves applying the theories and findings of linguistic research to far more diverse areas, such as medicine, business, the media, and many others. Given both the significant role of language and the enormously high stakes involved, legal contexts offer the linguist considerable opportunity for truly meaningful ‘real world’ applications for their research. Yet the challenges involved in gaining access to and conducting research on what is often extremely sensitive and well-protected personal data, mean that this is an area of applied linguistics which has yet to reach the peak of its potential.

Readers may already be familiar with the term ‘forensic linguistics’. Linguists take great interest in the labels used to define concepts; lawyers like nothing more than arguing over definitions and scope. It is therefore no surprise that there is no firm agreement as to what ‘forensic linguistics’ actually covers. The term is used in a general sense to refer to any interface between language and law, thus including analysis of the language used within the legal system; the more widely accepted, and arguably more accurate, meaning is the use of linguistic evidence in the judicial process, usually

in the form of expert evidence from a linguist. Definitions aside, this brings out a useful distinction between the two main strands of the academic field of language and law: analysis (and usually critique) of the language of the legal process, and linguists as part of the legal process. This chapter is organised under those two broad banners, although inevitably there are areas of overlap. It should also be mentioned that there is a related, thriving, field of forensic phonetics, but this falls beyond the scope of this chapter.

In keeping with the field's 'applied' agenda, the work described in this chapter has no unifying methodology; much of the research has adopted the 'toolkit' approach of utilising an analytic approach, or combination of approaches, which is best suited to producing specific, 'real world' answers to perceived problems or challenges. However, that is not to say that there is not a keen interest in developing and maintaining methodological rigour; indeed this is a key site of activity in forensic linguistics in order to ensure that any linguistic evidence provided is of the utmost validity and reliability, not least so that it will meet the increasingly stringent tests being applied to the admissibility of expert witness evidence in court.

One unifying factor, however, is that much of the work in forensic linguistics has taken a critical stance, seeking to highlight instances of disadvantage and injustice. This has taken many forms, from revealing miscarriages of justice where police officers had falsified written documents used to support a prosecution (e.g. the Bentley case, reported in Coulthard 2002), to demonstrating the comprehension challenges of texts such as warning labels and jury instructions. An area which is gaining increasing prominence is critiquing current practice in using language analysis to determine national origin (LADO), especially in immigration and asylum contexts. It is worth emphasising that the intention behind the vast majority of research in this field is to inform and enhance current practice, by engaging with (rather than simply directing external criticism at) practitioners.

The majority of published research to date has focused on the legal systems of the UK, US and Australia, but is by no means limited to these jurisdictions. Research is being conducted in many other countries all over the world, and although there is as yet little in the way of systematic comparative analysis, it seems clear that the intrinsic link between language and law, and the tensions and communicative challenges which arise, are universal.

The language of the legal process

This section describes the key areas of interest for those studying the language used by and within the legal system. It is not an exhaustive list, and it only provides a brief overview of each topic, but hopefully this will serve to illustrate the many ways in which linguistic analysis can explicate and inform the legal processes and frameworks that govern our lives.

Legal language

Legal language permeates our lives, even if we are often blissfully unaware of this. Written legal texts of one sort or another in fact govern virtually everything we do. To take an average day, it might begin with the sound of your alarm clock going off. The power which supplies your alarm clock comes from an energy company, with whom you will have entered into a written contract governing the terms of the supply. Despite our day-to-day reliance on the company upholding its end of this contract, you probably haven't given its existence any thought, especially not at this time in the

morning. But the alarm has gone off because you have to get up. This may be because you are employed, in which case you will have signed a contract which determines that you have a duty to work today. Or perhaps you are a student (in which case the alarm is probably set a little later). You will be bound by a contract with your educational institution, which likely enables it to impose penalties if you do not fulfil certain requirements, such as attendance. These obligations interfere with our overwhelming desire to stay in bed longer, and so perhaps we need to set up our alarm to be extremely loud. However, depending on where you live you may well be in breach of local by-laws, or even legislation, governing noise nuisance. As our morning continues we might glance at the warning label on the back of the bottle whilst we rely on our contract with the water company to keep the supply running long enough to rinse the shampoo out, take a chance on the fact that our peanut butter ‘may contain nuts’, travel by public transport having agreed (through the act of buying a ticket) to abide by the terms and conditions, and listen to music or read a book protected by a copyright notice (like this one – have a look!).

If we collected together all these texts, there are likely to be a number of similarities in the language used. Linguists (e.g. Crystal & Davy 1969, Tiersma 1999) have identified a number of features of what can be described as ‘legal language’, which make it distinct enough to be recognisable as a specific ‘genre’ (see chapter 15). These include a very formal register, with a lack of evaluative and emotive language; specific lexis or ‘jargon’, such as ‘reasonable grounds’; archaisms such as ‘aforementioned’, ‘hereinbefore’; the use of the present and future tense¹, e.g. ‘this book is sold’, ‘the replaced Product shall be warranted’; precision, such as ‘ninety (90) days’, and the inclusion of definition sections; binomial and multinomial expressions, e.g. ‘unauthorised or fraudulent use’; syntactic complexity and density, such as heavily embedded clause structure and unusual word order, e.g. ‘all rights of the producer and the owner of the work reproduced reserved’; and orthographic features such as the use of capitalisation, and numbered sections and subsections. Not all legal texts will contain all of these features, but the more that occur, the more the text will resemble ‘legalese’ and the more typical it will be of the genre.

It will be immediately obvious that these features are not reader-friendly; indeed they largely interfere with, rather than aid, comprehension, and it is easy to criticise texts of this type from a linguistic perspective². Such obscure and complex language designed and perpetuated within one profession has led to accusations of exclusivity and even deliberate obfuscation in order to create a demand for the services of a lawyer. Although this is unlikely, there is no doubt that legal language, like other in-group discourse within specific communities of practice (see chapter 17), serves to mark users as members of a particular elite group, inaccessible to the uninitiated.

However, there are other, more cogent, explanations for the features of this genre. It is, as always, essential to take into account the context and function of the texts. As Crystal & Davy note of legal language, ‘[o]f all uses of language it is perhaps the least communicative, in that it is designed not so much to enlighten language-users at large as to allow one expert to register information for scrutiny by another.’ (1969: 193-4). In other words, we as parties are not necessarily the intended audience

¹ Realised in English typically through deontic modality.

² However, it is often overlooked that for all the examples of obscure, impenetrable text there are also examples of the most powerful language performing remarkable feats through the simplest of speech acts: ‘There shall be a Scottish parliament’ (Scotland Act 1998); ‘I pronounce you husband and wife’.

for the texts that bind us; instead they are written for fellow members of the legal establishment, especially the courts whose interpretation would be called upon in the event of any dispute. The purpose of all such texts is to create a specific state of affairs, according with all applicable legal principles, and it must achieve that without any room for ambiguity, omission or misinterpretation. It thus cannot be like 'ordinary' day-to-day language, which is known to rely on inference, elision and indirectness (chapter 13). It often prefers not to risk even the inferential step contained within a pronoun, even when the intended referent would seem obvious, since this still potentially opens up an opportunity to argue for a different interpretation. This illustrates the tension between accuracy and accessibility which lies at the heart of legal language. For any legally binding text, certainty is essential. Legal texts involve the imposition of obligations and the conferment of rights; they are therefore constantly under attack from those seeking to avoid their responsibilities or abuse the rights of others. The language of the text carries the important responsibility of removing (as far as possible) the opportunities to do so.

Many legal texts, then, are designed to communicate a specific message to other legal professionals, and therefore to be understood and interpreted within that professional context. It is in that sense perhaps most accurately viewed as a type of technical language. UK primary legislation is drafted with the aid of specialist software which is also utilised in the construction of aircraft maintenance manuals. To use that analogy, when we board an aeroplane, we don't expect to be able to understand the maintenance manual; what matters to us is that it made sense to the maintenance engineer and so the wings aren't going to drop off. Legislative text ought perhaps to be viewed in the same light.

Although that argument may hold for legislation, it cannot be maintained across all types (or sub-genres) of legal language. For many legal texts the need for comprehensibility should be given far more weight than is currently the case. This is particularly the case for texts whose purpose is primarily to communicate with a lay audience, such as, for example, the instructions given to jurors on how to reach their verdict (e.g. Heffer 2008) or product warnings (e.g. Dumas 2010). Many such texts have been demonstrated by linguists to perform inadequately in terms of communicating their message to the intended audience, often with serious consequences. For example, Dumas describes a US case in which experts, called in to analyse the adequacy of jury instructions given in a death penalty case, concluded that 'the death sentence was imposed by jurors who did not understand their instructions' (2002: 254). Despite the intended audience and purpose of these text types, they have frequently been found to contain highly confusing features such as complex embedded clause structure, archaisms, and unexplained jargon. It seems that the producers of all types of legal text have a tendency to draw on the conventions of the genre, even when there is little justification for so doing.

The language of the judicial process

Thus far we have dealt only with written text. A significant proportion of legal text is actually produced orally, typically through direct interaction between members of the lay public and the legal system. In fact in Common Law jurisdictions such as the US, UK and Australia, most of the judicial process, through which the written legal texts discussed above are enforced and upheld, is enacted through spoken discourse. This gives rise to a different type of linguistic analysis, although the themes of miscommunication and disadvantage remain prevalent.

The legal system is an institution with its own unique organisational practices and communicative norms. When members of the lay public need to communicate with this institution, interactional trouble often ensues. The tension has been usefully explicated through the application of Bruner's concept of paradigmatic (typically legal), versus narrative (typically lay) modes of reasoning, especially in the work of Heffer (e.g. 2005). The idea that the legal system operates on the basis of a different conceptualisation of what is important or relevant in a telling, and of the most logical expected order of the component parts, is an important one, which goes a long way towards explaining why communication between a legal institution and members of the general public is often less than straightforward. The difficulty for the lay individual is that it is the other party who gets to determine and even enforce the interactional 'rules', and they also frequently have significant power over the outcome of the interaction.

Initial encounters

The tensions just outlined are played out in the microcosm of a call to the emergency services. These are typically very short texts, but a great deal is accomplished through them. They are thus ideally suited to the micro-approach of Conversation Analysis (see e.g. Zimmerman 1992), although by no means exclusively. Emergency calls to the police (via 911 in the US, 999 in the UK, and so on) often represent the first moment of institutional involvement, where an occurrence of some sort becomes transformed into an institutionally recognised and actionable 'incident'. Not every event reported to the police will be actionable, however: one of the most important functions of emergency call-takers is to act as gate-keepers, determining which calls merit a police response and which do not. The dividing line depends on numerous legal factors such as the limits of police powers, and whether the event described involves criminal activity as opposed to being a civil matter. The point at which this line is drawn will be known to those within the institution, but will not always be obvious to the lay caller. This can lead to a clash between lay expectations and the reality of the process, and emergency calls represent the site of that clash. They therefore not only make for fascinating linguistic data, but also represent an area of operational practice which could benefit immensely from the insights of linguistic research, which has examined features such as overall structure, opening turns of both callers and call-takers, strategies for aligning the caller with the institutional task in hand (Zimmerman 1992), and the particular complexities of calls about domestic disputes (Tracy & Agne 2002).

Another preliminary context which represents a common site of interactional difficulty, at least for the lay participant, is in the communication of rights. Several linguistic studies have highlighted the potential injustice caused by the interactional strategies and interpretive norms utilised by representatives of the legal process in situations where an individual may wish to invoke a particular legal right. This includes the invocation of the right to a legal representative for a police interview in the US, where the legal process apparently expects a person in a massively disadvantageous position to abandon all communicative norms of indirectness, politeness, and power relations, and to make their request for a lawyer in only the most literal and imposing manner. Thus utterances such as 'I think I would like to talk to a lawyer', and 'maybe I should talk to a lawyer' have been held by US courts not to be sufficiently clear to amount to an invocation of that right (see Solan & Tiersma 2005: 54-62 for an accessible discussion). However, Solan & Tiersma (2005: 62) points out that the same legal system shows itself to be entirely capable of determining the inferred meaning of far more ambiguous requests made by police officers who would otherwise be held to have carried out illegal searches.

Another notable example is the delivery of the caution in the UK, which is intended to advise detainees of essential information about their rights and obligations relating to their questioning. A standard text must be performed by the interviewer at the start of every police interview with a suspect, but several linguistic studies have demonstrated the communicative challenges created by the fixed wording used (e.g. Cotterill 2000; Rock 2007). The caution is a classic example of a text whose function is to convey a complex legal provision to a lay audience; an intrinsically challenging task. Nevertheless, the application of linguistic research can once again assist in improving current practice.

Police interviews

One of the most significant sites of spoken interaction in the legal process is the police interview. A vital part of any criminal investigation is the interviewing of both witnesses and suspects in order to gain as much information as possible about the event(s) in question. These first-hand accounts will be key evidence for the investigation, and for any subsequent prosecution.

To focus on suspect interviews, the functions, formats and processes of police-suspect interview discourse make it a highly unusual, and linguistically fascinating, discourse context. There is international variance as to the conduct and format of the interview, for example UK suspect interviews are mandatorily audio-recorded and then transcribed in Q&A format, whereas in much of continental Europe the interview is aimed at producing a written summary of the interaction, authored by the police interviewer but sometimes reproduced as an interviewee's first-person monologue. These different institutional purposes and processes produce different types of discourse: for example, the interviewer's synchronous typing of a written statement has been shown to directly affect turn-taking in Dutch interviews (van Charldorp 2013); whereas in the UK, interview talk must simultaneously be addressed to both those present in the interview room, and the future audiences for the audio recording, a discursively challenging task to manage (Haworth 2013).

Whatever the process of production, the interview record will be an important piece of evidence, which is treated by the criminal justice process as resulting from providing the interviewee with an open opportunity to put forward their side of the story. Yet any linguist will recognise this not to be the case. Alongside the editing and changes which inevitably take place through the recording processes just mentioned, there are many discursive factors which will also affect the interviewee's words in the interview itself. Police interview participants are by no means equally matched: aside from the very real power that a police interviewer has over the interviewee, the discursive role of questioner itself grants the interviewer power over the topic, sequencing and overall structure of the interview (see e.g. Heydon 2005). Other linguistic features, available to an interviewer but not an interviewee, have also been identified as problematic, such as formulations and restrictive question types. The interviewee's discursive position as responder thus inevitably restricts what they will get to say, despite this being ostensibly the main interactional purpose.

This begs the question as to why a question-answer format is employed; however there are good reasons for an interviewer, who has the task of investigating an alleged crime according to a strict framework of procedural regulations and prosecution requirements, being enabled to keep the discourse legally relevant and institutionally appropriate. It is also essential that a suspect's account is challenged and probed. The discursive challenge lies in balancing this with providing the suspect

with a fair chance to speak in their own terms. The linguistic research thus far indicates that the very nature of the discourse means that this is frequently not achieved.

Courtroom language

If the police interview represents a challenging context for the lay participant, this is even more true of the courtroom. In all jurisdictions, courtrooms represent the most significant stage of the judicial process, and in Common Law adversarial systems they are also the most dramatic – both in the sense of being the culmination of the process, and of involving a large element of performance and display³. Cases must be decided solely on the basis of evidence presented orally in the courtroom (even physical exhibits must be introduced with an oral statement), and consequently mastery of the language is often as important to courtroom advocates as mastery of the relevant law. Lay participants, of course, do not benefit from any professional experience or training when put in the position of speaking in court; yet again we see that they are placed at the disadvantage of a highly restrictive and unfamiliar discursive environment, governed by legal rules which are largely unknown to them.

The significance of linguistic resources in the courtroom is well recognised, as reflected in numerous provisions which directly relate to language features, even if they are not expressed in such terms. Turn-taking and turn distribution are almost entirely pre-allocated, from the ‘micro’ sense of individual turns between lawyer and witness being restricted to question and answer, to the broader structure of the order in which each side gets to present its case, to question witnesses, and to make speeches. This rigid, and rigorously enforced, structure ensures an equal distribution of speaker rights between prosecution and defence, as well as ensuring that the last word always rests with the defence. The professional right to speak in a courtroom is itself closely protected: lawyers must earn ‘rights of audience’ through achieving specialist qualifications, and in some countries the type of qualification determines which level of court they may speak in⁴. There are also rules about the type of questions which can be asked at each point: when questioning their own witness, lawyers are not permitted to use ‘leading’ questions, for fear of interfering with the witness’s own evidence.

When it comes to lay participants, witnesses cannot simply give their evidence; they are restricted solely to answering the questions put to them by lawyers for each side, and this is enforced considerably more strictly than in a police interview. The defendant cannot speak in response to anything said by a witness against them; instead they must rely on their lawyer to speak for them, only through the format of asking questions, until eventually it becomes their turn to be questioned. It is difficult to imagine a communicative context which less resembles our everyday experience. Yet the tight control held over the discourse is intended to ensure fairness and adherence to legal principles, even if it results in a bewildering and frustrating experience for lay participants.

Analyses of courtroom language have highlighted the various linguistic strategies utilised by courtroom advocates in order to achieve their goals. Adversarial trials ideally require the creation of a coherent and persuasive narrative, into which all the evidence fits (or at least does not contradict). It is for this reason that lawyers attach so much importance to attempting to direct and restrict the

³ In Civil/Roman Law (inquisitorial) jurisdictions the courtroom trial is based mainly on the consideration of written documents, and as such has been subject to considerably less linguistic interest.

⁴ In England & Wales, for example, the right to speak in a Crown Court or higher is a badge of professional distinction between barristers (who automatically have that right) and solicitors (who do not).

evidence given by each witness, both for their own side and the other's. Their only resource for so doing is the questions they ask. The power of a question to shape the answer given has long been recognised, and this is turned into something of an art form in court, with every aspect from pauses to terms of address and lexical choice exploited for persuasive effect.

Although controlling the evidence produced in the questioning phase is challenging and unpredictable for advocates, they have the opportunity to present a much more structured and rehearsed version of events in their monologic opening and closing statements. These lend themselves well to narrative analysis (see e.g. Heffer 2005), and also to detailed analysis of the subtle linguistic features utilised by advocates to influence the judge and/or jury's perception of events. For example, Cotterill 2003 demonstrates the power of lexical choice in the speeches of the O.J. Simpson trial in the US, analysing the semantic prosody of seemingly innocuous terms such as 'encounter' (2003: 65ff). As she points out, '[t]hrough skilful exploitation of different layers of lexical meaning, it is possible for lawyers to communicate subtle and partisan information about victims and alleged perpetrators, without falling foul of the rules of evidence' (2003: 67). The courtroom, then, represents an important site where the interests of lawyers and linguists coincide, albeit coming from very different directions.

Language and disadvantage

It is apparent that the language of the legal process presents particular communicative challenges to those outside the system, which necessarily includes the very citizens it is designed to protect. Thus far, however, we have assumed that the lay participant has a 'standard' level of communicative competence. Yet for a significant proportion of those who find themselves involved in legal processes, there are additional factors which render the communicative process even more problematic. These are often those who in fact most need the protection of the legal system, such as children, speakers of other first languages, and victims of sexual crime. Extra protections are increasingly on offer to assist those who can be officially classed as 'vulnerable', such as the provision of interpreters, the use of specially trained interviewers, and the use of video recordings or screens when giving evidence to the court. Yet there is plenty of scope for further improvement, and there is a wealth of linguistic knowledge which can assist. Increasing police interviewers' understanding of the role of an interpreter can significantly improve their effectiveness in interviews, for example. And Eades' work on the cross-cultural communicative challenges faced by Aboriginals in the Australian legal system (e.g. Eades 2008) has highlighted specific culturally dependent features such as 'gratuitous concurrence' and the use of silence which are particularly likely to lead to misunderstanding and injustice. Eades raises a serious concern for the linguist, however: the danger that by increasing awareness of potential linguistic vulnerabilities, we simply provide the cross-examining lawyer with an extra weapon to use against a witness. This is, of course, not a reason not to engage with the legal process: if we have any inclination to be 'applied' or 'critical' in our linguistic research, and to oppose injustice, then what better site of engagement is there than the justice process itself?

Language as evidence

We now move to a separate and distinct area of linguistics and the law. There are many ways in which language itself becomes evidence, both in civil disputes and in criminal proceedings. When this occurs, linguists are increasingly being called on as experts to assist with the investigative and judicial process. This section outlines some of the key areas where the discipline of linguistics has

been utilised as part of the legal process, as opposed to being used as a tool for analysing it. Before going into the areas in which linguists have provided evidence, we will begin by considering the role of a linguist acting as an expert witness. Since the vast majority of expert linguistic evidence to date has been in Common Law jurisdictions (mainly the UK and US), this section will concentrate on the position in these countries, however the general principles are likely to be similar elsewhere.

The linguist as expert witness

Put simply, the task of a court is to decide between competing versions of events, on the basis of the evidence presented to it. The court can only base its decision on what is presented to it in court; there are consequently detailed and complex rules governing admissibility. The general principle is that only evidence of 'fact' is admissible; a person's 'opinion' is not: the only opinion which counts is the court's, and no witness should usurp that function. However, sometimes the court will need help in interpreting the 'facts' presented to it, for example technical engineering data about a ship which sank, or complex medical information. In order to assist with this, an expert can be called. Their task is to apply their expertise to the facts which are being presented, and to provide the court with their opinion on them. This therefore breaks the fundamental rule about the inadmissibility of opinion evidence. Consequently, a huge body of case law and procedural rules has developed around expert evidence, in order to police the boundaries of its admissibility. There is no need here to go into the complexities of the relevant principles, but it is worth highlighting that one of the main criteria will be whether the expert can provide 'information which is likely to be outside the experience and knowledge of a judge or jury' (*R v Turner*⁵, a UK criminal case). The challenge for linguistics, then, is to convince courts that our discipline can offer scientific analysis and insight that goes beyond the knowledge that judges, as gatekeepers, think they already have about the language they use every day. In addition, courts will assess the validity and reliability of the methodology used, applying criteria such as whether there are known error rates⁶. A further concern, then, is developing methodologies and analytic frameworks which are robust and valid. This is, of course, essential given the use to which such analyses will be put and the hugely significant consequences for those directly involved. It also means that the field of forensic linguistics is increasingly at the forefront of developing reliable and innovative methodologies, especially for the analysis of short texts such as text messages. Thus this most 'applied' of linguistic fields has the potential to make major theoretical contributions.

It must also be noted that of the cases in which the advice of a linguistic expert is sought, a majority never reach court. They may be settled at an earlier stage, or a prosecution might be dropped, or a guilty plea might be entered. Nevertheless, the linguistic evidence may well have played a role in that outcome.

Authorship analysis

Probably the most well-known type of linguistic evidence is authorship analysis. There are many situations in which authorship of a text may become legally relevant: threatening letters; terrorist manuals; ransom notes; text messages sent by one person pretending to be another. The linguist's task is to provide analysis which is directed towards establishing the likely author of the disputed

⁵ *R v Turner* [1975] 2 WLR 56 (CA) p.60

⁶ Included in the criteria set out in the US case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

text. That statement is deliberately hedged: it is not, and never will be, possible to identify a specific individual simply from a sample of their language use; any individual's linguistic repertoire is too variable and vast for a 'linguistic fingerprint' to exist. Instead, a linguist will take the disputed text(s), and compile a referential sample of (preferably similar) texts produced by a potential author for comparison. The key to authorship analysis is in finding features which are distinctive within a known author's data, and which can therefore be used as identifying markers, and then in revealing patterns of consistency between a known author and the disputed texts. This is a challenging enough task in itself, but it is often made more difficult by the small size of the disputed data sample. On the other hand, there is often only a limited number of potential suspects. The question that a linguist will be trying to answer, then, is which of these is most likely to be the author of the disputed text. A related question is whether a text or group of texts has been written by the same author. This was the issue in what is widely regarded as the first case of forensic linguistics, that of Timothy Evans (Svartvik 1968). Evans was convicted of murder and hanged in 1950. However, subsequent evidence cast considerable doubt over his guilt. Many years later, the linguist Jan Svartvik noticed inconsistencies in the language of a statement supposedly made by Evans, and further analysis revealed that the parts which contained incriminating material were of a different style to the rest. This indicated that the statement was not the work of one author; indeed particular stylistic features suggested that the incriminating parts were in fact inserted by the police. Svartvik's analysis published in 1968 highlighted the potential contribution that linguistics could make in such cases, and is thought to contain the first use of the term 'forensic linguistics', thus staking a claim as the origin of the field.

Forensic authorship analysis has moved on considerably since then and is now utilised as part of both prosecution and defence evidence – as opposed to simply academic studies like Svartvik's. Recent examples include terrorism offences where linguistic analysis was requested to determine whether a suspect was likely to have written certain documents found at his house which related to a terrorist plot. There is a significant legal difference between merely having a copy of such a text and being responsible for its production, and so establishing a link between these documents and texts known to have been written by the suspect is a vital part of this investigation. Other cases include murder trials where no body has been found, and text messages have continued to be sent from the victim's phone after their disappearance. It is notoriously difficult to secure a conviction in such circumstances, but linguistic analysis has been able to establish that those texts were more likely to have been written by the main suspect than the victim, providing compelling supporting evidence at trial.

Modern modes of communication such as text messages and instant messaging present methodological challenges to the analyst, not least due to their tendency to be very short. However, these innovative, fluctuating data types also produce more idiosyncratic features, since the rules and conventions are not yet settled. There is therefore room for wider interpersonal variation, making it easier to find features which are distinctive within one writer's style. Nevertheless, this is an area where methodological concerns are at the forefront of current thinking (see e.g. Grant 2010).

Determination of meaning

Another key area in which the expertise of a linguist is sought is in the determination of meaning. This can take many forms, for example whether the language used by an individual amounts to a criminal offence, whether the interpretation provided of a police interview is an acceptable

representation of the original, whether a product warning is adequate, or whether the wording of an agreement can really cover what a party claims for it. This can often be a challenging task, where legal expectation and linguistic knowledge clash. The legal system demands certainty, but linguists are well aware that communication is rarely explicit or unambiguous, and meaning is heavily context-dependent. There are therefore many ways in which linguistics can inform and improve courts' decision-making in these areas.

Language crimes

An area where it is often necessary to determine the meaning of an utterance is in the various criminal offences in which language forms the substantive act (known legally as the *actus reus*). These include crimes such as bribery, conspiracy and blackmail. Alongside a specific act (e.g. the offering of money), most criminal offences also necessitate establishing the thinking behind the act (*mens rea*). Speaker intention therefore becomes both legally and linguistically relevant. The difficulty is that even at the best of times we rarely state our purpose directly; instead we tend to convey our meaning through inference and indirectness, rather than by explicit statement. This is even more so when there might be a reason to disguise our intentions, such as the fact that they amount to a crime. These factors make it very challenging to prove that a person's words had one particular meaning, which is effectively what a court is trying to do in these cases.

Often the difference between whether an utterance amounts to a language crime or not comes down to the type of speech act involved. For example, if a person says to someone at the top of a flight of steps 'be careful, if you slip you'll hurt yourself', this might be a threat, but could equally plausibly be a warning, or a prediction. However, if the steps are outside a courtroom and the addressee is a witness about to give evidence against the speaker's brother, it is more likely to have been taken, and indeed intended, as a threat. The difficulty for the courts, then, is that the distinction between these speech acts lies not in the literal words used but in the underlying implication generated in the specific context of utterance. To put this in linguistic terms, the part of the utterance which is criminally actionable is the perlocutionary intent, not the illocutionary act, yet this is never likely to be made explicit. So how far can the courts go from the actual words used when convicting someone of a crime? How much inference is legally acceptable? A court needs to be sure of the intended meaning if it is to convict the speaker on the strength of it. Equally, it cannot be right for those guilty of a serious offence to be able to take advantage of ordinary principles of communication in order to escape justice.

The other side of the coin is that, just as people rarely use literal statement to commit a language crime, when people do use words which literally amount to a crime they are highly unlikely to mean it. Consider, for example, how commonly verbs such as 'kill' are used in a metaphorical sense, to mean anything from switching off a light to reprimanding someone (e.g. 'I'm going to kill him when I see him'). Such metaphorical usage is often colloquial, and can vary between sociolinguistic communities. Even if we are not part of that speech community, it would seem obvious that the speaker's meaning is not in fact to commit a serious crime, but both historical and recent examples illustrate the preference for law enforcers to ignore pragmatics and sociolinguistic variation and rely instead on a literal, 'legalistic' approach to interpretation of meaning. Thus an African American minister who said in a sermon 'we will kill Richard Nixon' found himself charged with threatening the President (Solan & Tiersma 2005: 207), and in 2012 an English tourist who, eagerly looking forward to an upcoming holiday, commented on Twitter that he was going to 'destroy America', was refused

entry to the US⁷. Although such cases seem to fly in the face of common sense, let alone linguistic research, their existence points to a genuine conflict.

The legal system necessarily requires certainty in enforcing the line between criminal acts and non-actionable behaviour; it also has a tendency to decontextualise and examine evidence as if it existed independently from the context which gave rise to it. It is also used to applying principles of interpretation to legal texts which do rely on literal statement as the norm. But legal language is an atypical genre, as we have already seen. And 'ordinary' language cannot be packaged up and re-presented in a courtroom as an isolated, context-free artefact for detached scrutiny, in the way that other forensic evidence can be. The processes through which humans derive meaning from language are far more complex and elusive than the linear, detached logic the legal system often seems to expect. The role that linguists can play in such cases, then, is in ensuring that when courts are faced with the challenge of interpreting meaning, they do so by applying the principles derived from linguistic research into everyday communication, rather than using literalistic methods which may feel more in keeping with legal principle.

Trademarks

Trademarks are another area of law where linguists have frequently been called on to provide evidence, especially in the US. It is an obvious area of linguistic and legal interrelation: as Butters states, '[t]rademarks ... are proprietary language – bits of linguistic or semiotic material that people, corporations, and institutions in a very real but limited sense own' (2010: 352). The extent to which a person, or corporation, should be able to claim ownership over any part of our shared language is a thorny question, but equally it is a commercial necessity that providers of products or services can distinguish themselves through the use of marks or brands, and that any investment in that mark (in the form of time, money and marketing, for example) is protected – as far as legally appropriate. Disputes arise when one party considers that their trademark ownership is being infringed by another party who is attempting to use a mark which is too similar to their own. The response from the other party may be to argue that the marks are not sufficiently similar to give rise to any confusion between them; an alternative rebuttal is that the claimed trademark is too weak to merit legal protection. Both of these are areas where linguists can contribute.

With regard to similarity and confusion, the main areas in which linguists can assist are as to whether the marks sound the same, and whether they share meaning. As with other areas of forensic linguistics, these are aspects which a court may consider to be within their own understanding without the help of an expert, although the numerous cases in which linguists have successfully given evidence suggests otherwise (see e.g. Butters 2010; Shuy 2012). The type of analysis provided will depend on the case, but may draw on phonetics, lexicography, pragmatics, and psycholinguistics, to name but a few, in order to assist the court to reach a reasoned and logical decision which goes beyond mere impression.

As to whether a particular mark is actually strong enough to merit protection, the law will not protect a mark which is merely generic or descriptive. For example, a court held that 'steakburger' could not be a trademark (see Butters 2010: 359-61). A real difficulty arises for companies who have been so successful that their brand name has become synonymous with the product or service in

⁷ 'Caution on Twitter urged as tourists banned from US', BBC News, 31 January 2012, available at: <http://www.bbc.co.uk/news/technology-16810312> (last accessed 14/08/14)

general. In the UK, for example, only a minority of my students recognise 'Hoover' to be a company name and not simply the verb for using a vacuum cleaner, and their number dwindles every year. Dictionaries only provide part of the picture of everyday language use, and so linguists can usefully be called on to provide evidence of language shift and dilution such as this. In the US Roger Shuy gave evidence in a case where McDonald's sought to prevent Quality Inns opening a chain of hotels called 'McSleep Inns'. Essentially, McDonald's wanted to claim the prefix 'Mc-' as their trademark, whereas Quality Inns' case was that it had become generic. Shuy looked to actual language use, and produced a corpus including 'McCinema', 'McBook', and 'McHospital', finding that it had come to have a general meaning of 'basic, convenient, inexpensive, and standardized' (2012: 459). However, McDonald's won the case: the judge found that the prefix had acquired 'secondary meaning' which had created such a strong association with this one company that consumers might assume that the hotels were part of the McDonald's group.

The outcome of this case may well make many linguists uncomfortable in that it purports to affect the ownership of language, but it must always be borne in mind that the courts in trademark cases, and all other cases involving language evidence, are not making judgements of linguistic issues, but legal ones. Linguistic evidence may play an important part in a case, but it must always sit alongside numerous other considerations.

Conclusion

Overall, then, there are many areas of common interest between law and linguistics, and this chapter has inevitably not covered all of them. There is also an obvious tension: law is about justice, and yet the legal system's use and interpretation of language has frequently been demonstrated by linguists to lead to the perpetuation – indeed creation – of injustice. It seems that this is often due to misunderstanding or ignorance of the principles of language and communication, rather than any deliberate intention. The onus is therefore on linguists to challenge those misunderstandings, to make the case for our involvement, and to demonstrate the need to bring our research into practice. Much of the work mentioned in this chapter is already making that contribution, but it is only a starting point. Hopefully this chapter will serve to encourage others to continue this aim.

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