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On the Status of Linguistic Evidence in Litigation

Abstrakt. Autor omawia status dowodów z opinii językoznawcy w systemie prawnym *common law* w Anglii i USA. Następnie przedstawia kwestię dowodów z opinii językoznawcy w Polsce. Wysuwa wniosek, że naukowe znaczenie takich dowodów jest tylko jednym z determinantów jego znaczenia prawnego. Wydaje się, iż znaczenie dowodów z opinii językoznawcy w kontekście prawnym jest jednocześnie uwarunkowane czynnikami innymi niż faktyczny stan rzeczy ustalony przez biegłego.

Abstract. The author discusses the status of expert linguistic evidence in common law systems of England and the USA. Then he touches upon the issue of linguistic evidence in Poland. It is concluded that the scientific validity of expert evidence is only one of the determinants of its legal status. It appears that the status of linguistic evidence in the legal setting is simultaneously conditioned by factors other than the scientific actuality of expert findings.

1. Introduction

Forensic linguistics has undergone an unprecedented academic growth in the last two decades. From a somewhat exotic enterprise banned to the most obscure corners of Academia, it has flourished into a fully-fledged scientific field. This status transformation came about with the recognition that having consolidated linguistic and legal interests into an applied discipline, forensic linguistics can address and control crucial social issues.

Social reality is governed by certain laws, the provision and execution of which depends upon legislative and judicial activity. Forensic linguistics and the law are thus directly related. This paper considers why the relationship is by no means a harmonious one. The considerations below will be limited to the status of linguistic expert evidence in the legal systems of England and the United States, though a reference will also be made to the Polish judiciary. It is understood, at the same time, that the problems discussed apply in a broader legal context, *i.e.* are representative of legal systems based on English common law as well as modern Roman law. By *linguistic evidence* will be understood the testimony of a linguist giving expert evidence in a court of law.

2. Legal terminology

Before proceeding, a few key terms need to be explained for the sake of avoiding terminology confusion. To begin with, it should not be unreasonable to clarify the notion of evidence, as used in the legal context:

Evidence [is a]ny species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention. (Black 1997: 555)

Expert evidence, in turn, is normally defined as:

evidence the relevance and probative value of which depends upon the witness having some special knowledge or skill, other than having directly perceived a fact. (Robertson and Vignaux 1995: 199)

It differs from expert *testimony* in that the latter is used to denote “opinions stated during trial or deposition by a specialist qualified as an expert on a subject relevant to a lawsuit or a criminal case” (Hill and Hill 1995: 124), or, in other words, “what the witness thinks, believes, or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves” (Black 1997: 1093).

In the common law systems of England and the United States, any evidence, before actually being utilised in either an incriminating or exculpatory capacity, has to be allowed to be introduced at trial – or *admitted*. Admissible evidence is that “which the trial judge finds is useful in helping the trier of fact and which cannot be objected to on the basis that it is irrelevant [or] immaterial (...)” (Hill and Hill 1995: 12). To qualify as admissible, evidence must then be relevant, *i.e.* “tend to establish material proposition” (Black 1997: 47); relevancy is the basic rule of evidence law. The rule provides that:

evidence which is relevant is admissible unless it is excluded by some other rule or its probative value is outweighed by its prejudicial effect. (Robertson and Vignaux: 1995: 202)

Once admitted, expert testimony can be found to constitute either *probative* evidence, *i.e.*:

means having the effect of proof; tending to prove, or actually proving an issue; that which furnishes, establishes, or contributes toward proof. (Black 1997: 1203)

or *corroborating* evidence, which is “supplementary to that already given and tending to strengthen or confirm it” (Black 1997: 344). In real-life legal contexts linguistic evidence is hardly ever probative and often corroborating.

3. Expert and linguistic evidence in common law systems

3.1. England

In England the admissibility of expert evidence in criminal trials is regulated by, *inter alia*, provisions contained in the 1988 Criminal Justice Act. Procedural rather than constrictive, they do not impose any special requirements for the admissibility

of expert evidence other than relevance and reliability. As a result “a field need not be generally accepted before expert testimony is admissible but it must be sufficiently established to be reliable” (Uglow 1997: 619). In reality, any expert witness must establish his/her credentials, which should be the result of practical experience and/or professional qualification (Uglow 1997). He or she is therefore expected to give full details of his/her education, training, publications and experience, including experience as an expert witness. (Robertson and Vignaux 1995). Whether the witness qualifies as an expert is invariably resolved by the judge, as is the issue of whether a field is sufficiently established.

In the main, English judges view expert opinions on language use with caution. This is especially so in cases where questions relating to contested meaning must be resolved (but not limited to them). Judges are often disinclined to admit (let alone commission) such testimony on the grounds that they themselves, as native speakers, have got the capacity to understand and unequivocally interpret the meaning of the linguistic matter in question. Judges’ reluctance to consider linguistic evidence on meaning is exemplified by an English Court of Appeal ruling in a case of assault occasioning actual bodily harm, as described in Stubbs (1996). Lord Chief Justice, having rejected linguistic testimony demonstrating how the language of a lower-court judge’s summing-up may have influenced the decision of the jury, proclaimed that:

(...) what the meaning is of the language used by a learned Judge in the course of his directions to the jury is a matter for this Court to determine and is not a matter for any linguistic expert. (Stubbs 1996: 239)

Coulthard (1997) reports on a case in which he gave evidence as expert witness. The accused, found guilty of carrying out four armed robberies in the Liverpool area in April 1986, claimed that a police officer had fabricated the record of a journey in a police car the accused made with him and two other police officers to determine his whereabouts at the time when one of the robberies took place. From a linguist’s point of view, the results of Coulthard’s analysis showed unequivocally that the document had indeed been fabricated, but nevertheless failed to convince the court. However, in another case where Coulthard provided expert evidence on authorship (*Regina v. Derek William Bentley* 1998), the Appeals Court not only admitted it but found relevant as well, which resulted in a posthumous pardon for the defendant, 46 years after he was executed for a crime he had not committed. The *Bentley* case is certainly a milestone for the use of linguistic evidence in litigation.

In yet another case relating to authorship attribution, stylometric evidence was proffered in the Court of Appeal, which – having rejected it – pointed to “the absence of a broad enough basis for this stylometric research” (*Regina v. St Germain* 1977; in Robertson and Vignaux 1995: 186), as well as stated that “[the expert witness] had been unable to advance his conclusions beyond that of hypothesis” (*idem*). At the same time, however, stylometric evidence *has* been admitted in a number of cases [*e.g. The Queen v. McCrossen* (1991) or *Regina v. Mitchell* (1993)], although with no significant impact upon the verdict. As Robertson and Vignaux (1995: 186) find, “no ruling relating to the admissibility of the stylometric evidence appears to have been recorded”.

3.2. USA

Based upon English common law, the legal system of the United States has as one of its precepts the doctrine of precedent. In the main, it consists in applying by the judges principles of law which, rather than being enacted by legislative bodies, are the result of earlier judicial decisions, or *precedents*. As regards expert evidence two cases in particular have had an enormous impact upon its legal status: *Frye v. US* and *Daubert v. Merrell Dow Pharmaceuticals*.

The most common standard for the admissibility of scientific evidence in the United States is known as the *Frye* rule, so named in recognition of the 1923 federal court case of James Frye, a man accused of murder. Frye's lawyer urged the court to admit in evidence the results of a polygraph test on the grounds of the general rule allowing experts to testify on matters of specialised experience or knowledge. Because the polygraph was a new technology, however, the court imposed a more stringent rule; refusing to admit the evidence, it justified its decision in the following way:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognised, and while courts will go a long way in admitting expert testimony deduced from a well-recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs. (*Frye v. U.S.*, 293 F. 1030: 1923)

The *Frye* ruling proved momentous. Having imposed requirements for admissibility additional to evidential relevance, it set the standard for the use of expert evidence for the next seventy years; it was not until 1993 that a ruling in a civil case marked the end of the "general acceptance" test.

In 1993 William Daubert, a US citizen, sued for damages the manufacturers of a prescription drug marketed under the name *Bendectin*, which – developed to relieve symptoms of nausea during pregnancy – he claimed to have caused his children's birth defects. Most notably, the plaintiff introduced evidence by expert witnesses whose testimony had not been subjected to peer review. On June 28th 1993, the US Supreme Court decided that the *Frye* test was no longer valid and that it was superseded by Federal Rules of Evidence. Instead of "general acceptance" in the scientific community, the *Daubert* standard requires an independent judicial assessment of reliability, as stated in the verdict:

Faced with a proffer of expert scientific testimony under Rule 702, the trial judge (...) must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. (*Daubert v. Merrell Dow Pharmaceuticals*, 951 F.2d 1128: 1993)

Federal Rule of Evidence 702 governs the admissibility of expert testimony and provides that:

If scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (Fed. R. Evid. 702: 1975)

The Rule therefore has three crucial requirements: 1. the expert may testify about substance relating to scientific, technical, or other specialised knowledge, 2. the expert's testimony must assist the trier of fact, and 3. the expert must qualify as such by knowledge, skill, experience, training, or education. The determination as to whether these requirements are satisfied rests with the judge, who – as *Daubert* provides – is required “to play a more pro-active role as gatekeeper in relation to scientific testimony” (Uglow 1997: 619).

So far as linguistic evidence is concerned, it has enjoyed mixed fortunes in US courtrooms. This is especially true of voiceprint identification, which – though at one time (in the 1960s and 1970s) was generally accepted as scientifically tenable – today is not normally seen as meeting the criteria of Federal Rule of Evidence 702. Mentioned here must be the *Prinzivalli* case (cf. Labov and Harris 1994), in which the testimony of a phonetic rather than acoustic nature resulted in the acquittal of a defendant accused of felony. Also admitted is typically evidence on the authorship of written material, most often wills and ransom notes. McMenamin (1993), for example, provides an overview of almost fifty civil and criminal cases where stylistic evidence has been admitted.

One landmark case in which stylistic evidence was *not* admitted is *United States v. Patricia Hearst*. In 1974 Hearst was kidnapped by the members of a terrorist organisation called the Symbionese Liberation Army. Several months later she joined her kidnappers in robbing a bank and was subsequently arrested and sentenced to seven years' imprisonment. During the trial Hearst's defence tried to persuade the judge to admit testimony on the authorship of several tape-recorded revolutionary statements spoken by her, on the grounds that they had been prepared by the terrorists, who forced Hearst to read them into the tape-recorder. The statements thus allegedly constituted evidence of coercion, which meant that, merely a tool of the terrorists, she could not be held accountable for the robbery. The trial judge, ruling against the defence's contention, supported his decision with three main arguments (Bailey 1979):

[1.] that the jury was to decide not the question of authorship but sincerity, ‘whether she meant what she said’; [2.] that hearing the expert testimony on authorship would be inordinately time-consuming; and [3.] that the relative infancy of this area of scientific endeavour might well have created an unjustifiable ‘aura of special reliability and trustworthiness around the testimony’ (1979: 6)

In one recent case, *United States v. Roy van Wyk*, the authorship of handwritten and typed threatening letters was at issue. Van Wyk sought to exclude the proposed expert testimony of James R. Fitzgerald, a federal agent and an expert in forensic stylistics, on the grounds that he was “not qualified to testify as a forensic stylistics expert” (van Wyk v. U.S., Crim. No. 99–217 (WGB): 2000) The defendant also indicated “the lack of reliability of the area of linguistic stylistics” (*idem*). Interestingly, as many as twenty-six years after the *Hearst* case the court still made in its Opinion a reference to the “novelty” (*idem*) of forensic stylistics. What is more, the Opinion questioned the scientific tenability of the field:

The reliability of text analysis (...) is questionable because (...) there is no known rate of error, no recognized standard, no meaningful peer review, and no system of accrediting an individual

as an expert in the field. Consequently, the existing data for forensic stylistics cannot definitively establish (...) that a particular person is “the” author of a particular writing. (*van Wyk v. U.S.*, Crim. No. 99–217 (WGB): 2000)

The court’s arguments do not seem uncontroversial. While there is indeed no known rate of error in forensic linguistic analysis, peer review is these days certainly more than “meaningful”. As for the “recognised standard” argument, it also appears rather spurious, given the fact that each individual case is unique and what is standard procedure in one type of cases, could not be applicable in others.

On February 8, 2000, the court issued the following order:

IT IS (...) ORDERED that Agent Fitzgerald may testify to comparison of characteristics or “markers” between the handwritten and typed writings, of which authorship is “questioned” or unknown;

and

IT IS (...) ORDERED that Fitzgerald’s testimony regarding any “external” or extrinsic factors and his conclusion as to the author of the “questioned” writings are barred.” (*van Wyk v. U.S.*, Crim. No. 99–217 (WGB): 2000)

It in principle meant that evidence on forensic stylistics was admitted, though, as a closer look at the reasoning in the Opinion suggests, largely on the rule of precedent. In any event, the *van Wyk* ruling is these days an important determinant of the status of linguistic evidence in US courts.

3.3. Expert evidence and the adversary system

The common law system is an adversary system. One of its principal characteristics is that, in contending against each other, the opposing parties retain experts independently. Importantly, the defence may well choose to ignore any unfavourable reports from experts. The adversary system seems therefore by no means conducive to an objective provision of scientific facts, as an example of a civil case described in Finegan (1990) illustrates. In 1983 a libellous letter listing instances of alleged misconduct was sent to the board president of an American corporation. The libelled parties filed suit against a person they suspected of writing the letter. To support their contention, they consulted a linguist, who, having compared the questioned letter with 38 letters known to be authored by the defendant, concluded that there was a very high probability that the anonymous letter had indeed been written by him. The soundness of the linguist’s methodology was confirmed by another linguist, also hired by the plaintiffs, but challenged by two further linguists hired by the defendant. A fifth linguist was subsequently consulted by the plaintiffs; he judged the first linguist’s methodology to be valid and the case was eventually settled out of court.

It must be made clear that problems with the provision of expert testimony are not peculiar to the adversary system. Kniffka (1994), for example, gives an account of a case heard in a German court, in which the expertise of a linguist summoned by the court to express an opinion on the authorship of an anonymous letter was found to have been carried out in a methodologically improper way, as an expert linguist

consulted by the prosecution demonstrated. Similarly, in a case heard in a Polish court the judge commissioned as many as five expert witnesses to determine the semantics of an allegedly defamatory lexical item. (*Bartimpex v. Marian B.* 2000).

The principle of the adversary system regulating the presence of experts in court may be one reason why no conviction has so far been secured in either England or the USA on the basis of linguistic evidence only, which, relatively novel, is particularly vulnerable to attack by skilled defence lawyers.

4. Linguistic evidence in Poland

Based upon Napoleonic law, the Polish legal system is inquisitorial. All expert evidence commissioned by the court is admitted automatically. Significantly, most forensic science laboratories are run by the police, which again raises serious doubts as to the objectivity of expert testimony. At the same time, however, the inquisitorial system allows the use of independent experts by prosecution as well as defence.

In Poland the court asks an expert for an opinion if “the uncovering of circumstances of importance for the resolution of the case requires special knowledge” (Polish Code of Criminal Procedure 193.1). Importantly, not only an expert on the court’s register is obliged to make available his/her expertise, but also “any person of whom it is known that he or she possesses appropriate knowledge in a given area” (ibid 195).

The status of linguistic evidence on authorship attribution in Poland seems to be the result of common sense rather than scientific proof. Tape-recorded evidence was deemed admissible in criminal trials in Poland by a 1960 Supreme Court ruling and it has been used on the assumption that the voice and speech patterns of an individual are unique. What is more, such evidence often has probative value, as it had in the *Augustynek* case (cf. Kredens and Góralewska-Łach 1998), in which the accused was found guilty effectively on the testimony of an expert linguist. In *Augustynek* the commonsense approach became particularly manifest in the judgement of the Appeals Court, which, upholding the conviction, observed that a greater emphasis should have been placed in the lower court’s judgement on the unique nature of voice and speech patterns and its implications for the verdict.

5. Conclusions

As it stands, the scientific validity of expert evidence is only one of the determinants of its legal status. It appears that the status of linguistic evidence in the legal setting is simultaneously conditioned by factors other than the scientific actuality of expert findings. What is a consensus in an expert community may for example get discredited by courtroom exposure, falling prey to the adversary practice of common

law systems, which fact calls into question the capability of the legal adversary process for dealing with scientific expertise. Another problem has to do with the institution of trial by jury; the intricacies of expert opinion may simply elude lay triers. Finally, as is the case with forensic authorship attribution, the same scientific issue, which one would expect to be resolved with the same results irrespective of the jurisdiction, is decided differently in different legal systems, with different implications for the verdict. The question arises whether forensic linguistic evidence can have probative value for language A but not B – it could after all be the case that just as the individuating potential of some style markers is greater intralinguistically, some languages provide the analyst with more style markers on which to base his/her findings. In any event, it seems that the status of linguistic evidence in courts of law can be ameliorated with an improved communication between linguists and lawyers; language description need not be counterposed against legal procedure axiomatically only if forensic linguistics can reinforce its social presence with an invariably unbiased and faithful account of what it can and cannot offer.

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