Barristers on trial: Comprehension and misapprehension in courtroom discourse

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This thesis investigates the ways in which 'knowledge' is transferred and transformed in court and, in particular, explores the tactics employed in acquiring, constraining and reconstructing this knowledge. Above all, this study seeks to reveal the potential problems with the interpretation of certain linguistic tools employed in court, in particular tag questions and modality. In addition, I explore the existing anomaly between what barristers are trained to do and what they actually do in practice. For example, despite the Inns of Court School of Law (2000: 18) advising barristers not to recite facts at length and then end with isn’t that right?, the barristers in the data were found to do just that. By incorporating the techniques used in discourse analysis and conversation analysis, this qualitative study explores the language of barristers and witnesses in the evidentiary stage of civil trials before a single judge. Seven civil court
cases which took place in Northern Ireland, were transcribed, and all of the cases involved compensation claims following an accident.

I propose that in civil trials, barrister and witness discourse is dictated and influenced by the following two central issues: the communicative conflict and the balance of probabilities (the burden of proof adopted in civil disputes). Two competing and contradictory versions of truth are presented through examination-in-chief and cross-examination. This ongoing conflict, imposed by the adversarial approach, raises suspicion in both parties which has implications for language use and the search for truth. Barristers in the data were found to directly voice their suspicions by utilising what I called the pantomime effect, an exchange pattern which blatantly accuses the witness of lying through accusation-denial adjacency pairs:

Barrister: Now I have to put it to you, that’s a made up conversation. You’re making that up.
Witness: No I’m not.
Barrister: This conversation did not take place.
(Judge Interrupts)

It is difficult to say whether such a tool is perceived as strategically valuable by the decision-maker since straightforward agreement from the witness is highly unlikely.

Modality was found to be central to civil negotiations. Modal expressions such as epistemic sure were often used as modality prompts designed to elicit doubt in testimony:

Barrister: How sure are you that there were paving stones at that time?
Witness: I think there was anyway. I’m sure enough there was aye.
Barrister: Are you sure?
Witness: I’m sure there was.
Barrister: What in a loose sort of a way, ‘oh I think that road’s made of paving stones’ or ‘I actually remember paving stones’?

However, witnesses can also use modal expressions in their answers in order to downgrade (see Matoesian 1993: 181) the strength of the barrister’s competing propositions, thereby opening up other probabilities and possibilities that the barrister is loath to accept (e.g. It’s possible but unlikely, Occasionally, not often).

Civil trials rely heavily on expert opinion. In theory, opinion should only come from an expert. However, lay witnesses were also found to voice their opinions, often at the request of the barrister, whether intentionally or unintentionally,
through *Do you think...?* and *Do you agree...?* questions. Expert witnesses also frequently used modal expressions in order to express futurity. This is because barristers regularly invited them to comment on what might happen to a plaintiff’s condition in the future, as a result of the injury they have, or claim to have suffered (e.g. developing arthritis). Barristers therefore frequently engaged in hypothetical questioning and such questions were marked by the *If x then y* structure. Barristers commonly used such questions in order to test the limits of expert opinion.

The analysis revealed that civil trials appear not to be about facts but about plausibility and probability. Two conflicting accounts are in contest as to which is, on the balance of probabilities, more likely. This contrasts with criminal trials, where the barrister attempts to put forward a single account, which only needs to be undermined by the defence. This difference in philosophy leads to an abundant use of modal expressions by both barristers and witnesses. I therefore propose that the burden of proof in civil trials is a balance of epistemic modality, which enables the barrister to talk about things being otherwise.

Another useful tool for the cross-examining barrister is the grammatical tag question *isn't it?* and what I came to call the pseudo-tag question *isn't that right?* Berk-Seligson's (1999) model of tag questions treats these tag types as being grammatically the same. However, by analysing the data in this thesis in stricter grammatical terms, important differences became evident:

**BE/DO/HAVE/MODALAUX + (NEG) + PRONOUN** (Grammatical Tag)

*You were lying about that as well to exaggerate your claim, weren’t you?*

**BE + (NEG) + DEMONSTRATIVE PRONOUN + PRED ADJ** (Pseudo-Tag)

*and he’s failed them because when asked formally to show a range of movements, he showed a restricted range but he’s been observed informally or in a different context he reveals that he can actually do all the things he says he can’t do. That’s what the tests show, isn’t that right Doctor?*

Unlike grammatical tags, pseudo-tags do not have flexibility regarding the auxiliary or non-auxiliary component. The demonstrative pronoun *that* was always used in my data and there were a number of possible predicative adjectives (*correct, right, true, accurate* and *fair*) which express factuality. Pseudo-tags contain the anaphoric reference item *that*, which has a more remote meaning than personal pronouns. Pseudo-tags can follow single or multi-propositional turns and it proved difficult for witnesses to gauge
whether *that* was a substitute for the entire original question or referred to the final proposition only. Equally, it was difficult to determine whether a witness’s response related to all the propositions in the barrister’s questions or the final one only. My data revealed that barristers favour pseudo-tags during cross-examination, suggesting that they perceive them to be strategically more valuable in this context.

The question of whether the absence of a jury affects the barrister’s use of language in court is raised in this thesis. Du Cann (1993: 132) suggested that when a case is tried before a judge as opposed to a jury, the barrister ‘needs fewer histrionics, much more subtlety and much more speed’. However, the abundance of pseudo-tags in the data would contradict this view.

Overall, the thesis illustrates that barrister discourse is characterised by language which is habitually egocentric or self-serving, with the transfer of ‘knowledge’ often contaminated by linguistic tools that conceal rather than reveal the truth. The examples used throughout the thesis illustrate how pseudo-tag questions and modality can be used not only to identify contradictions in evidence, but also to create contradictions in evidence, thereby creating misapprehension. This makes it difficult to determine the true facts of the case.

References


