The development of legal procedures for using a transcript to assist the jury in understanding indistinct covert recordings used as evidence in Australian criminal trials: A history in three key cases

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Abstract. *The use of police transcripts to assist a jury in determining the content of indistinct forensic audio is a cause of concern to many in forensic linguistics. A common recommendation is that the law should make more use of transcripts produced by experts in linguistic science. While this can help in individual cases, it is not a general solution. In fact, it can make things worse instead of better. That is because it fails to take account of legal procedures which are little known in forensic linguistics, and the misconceptions about language that they embody. Previous papers have set out some of the relevant procedures as they currently stand. The present article offers a historical perspective, tracing the development of current procedures, and their misconceptions about language, through three key cases of the 1980s and 1990s which stand as authoritative precedents for Australian legal practice regarding the problematic use of police (and expert) transcripts as assistance in court. The conclusion outlines the solution being pursued by Australian linguists.*

Keywords: *Forensic transcription, forensic phonetics, legal procedures.*

Resumo. *O recurso às transcrições da polícia para auxiliar o júri a compreender o conteúdo de um registo áudio forense indistinto preocupa muitos especialistas na área da linguística forense. Uma recomendação frequente é que a Justiça deveria utilizar mais frequentemente transcrições produzidas por peritos em linguística. Embora isso possa ser útil em alguns casos individuais, não é uma solução transversal. De facto, isso pode, até, ter um efeito perverso, uma vez que não leva em conta os procedimentos legais, pouco conhecidos em linguística forense, e as conceções erradas sobre a linguagem que lhe estão subjacentes. Publicações prévias definiram alguns dos atuais procedimentos relevantes. O presente artigo traça uma perspetiva histórica, acompanhando o desenvolvimento dos procedimentos habituais, bem como os seus pressupostos errados acerca da linguagem,*

através de três casos centrais dos anos 1980 e 1990 que fizeram jurisprudência na prática jurídica Australiana no que diz respeito ao recurso problemático a transcrições da polícia (e de peritos) em tribunal. A conclusão apresenta a solução adotada por linguistas na Austrália.

Palavras-chave: *Transcrição forense, fonética forense, procedimentos legais.*

Introduction

Covert recordings, obtained via hidden listening devices, have been used by police investigating major crimes since the 1970s. Sometimes the recordings go on to be admitted as evidence in the subsequent trial. One problem is that the audio is often extremely indistinct – to the extent the court cannot understand the content without the assistance of a transcript (Fraser 2014). Note that 'indistinct' is a general term used by the law to refer to recordings affected by background noise, poor recording conditions, overlapping speech and/or other factors.

Australian and similar jurisdictions allow the jury to be assisted by a transcript produced by police investigating the case. Scholars of linguistics and phonetics often find this troubling. Reliable transcription of indistinct audio requires independence and specialised expertise. Since police have no relevant training, and are not independent of the case, their transcripts are unlikely to be reliable. However, even an unreliable transcript is liable to 'prime' a jury's perception of indistinct audio, potentially influencing the verdict (for a quick introduction to priming, see Burridge 2017).

For these reasons, linguists often recommend, as I did myself when I first discovered this situation (Fraser 2003), that courts admitting indistinct covert recordings should use transcripts produced by experts in linguistic science.

However, as I have learned in the decades since then (Fraser 2020a), this recommendation is not enough to solve the problem of police transcripts. Paradoxically, it can make things worse. This is because it rests on inadequate understanding by linguists of how the law actually uses transcripts to assist the jury.

Previous articles have sought to promote this understanding by looking in detail at the legal procedures as they currently exist (French and Fraser 2018). The present article aims to deepen that understanding by looking at how the legal procedures came to be the way they are. Note that, while the focus is on Australia, some aspects of the commentary may be relevant more broadly.

Background and overview

Australia is a Commonwealth of six states and two major territories.[1] While each of these is a separate jurisdiction, there are many similarities in how they administer criminal law. All use a jury system, and each has a roughly similar legislative framework (Finlay and Kirchengast 2020). In particular, most have a Uniform Evidence Act[2] which, among many other things, provides for the use of transcripts to assist the jury in understanding the content of indistinct covert recordings (Odgers 2018).

Importantly, interpretation of the legislation depends heavily on case law, via a system strongly influenced by English common law. That means that, in deciding issues such as admissibility of evidence, or procedures for presenting evidence to the jury, each judge refers to precedents set by previous judicial rulings, especially those that

have been upheld on appeal to a superior court in Australia or another country with a similar legal system (e.g. New Zealand, Canada, England). Rulings made by the High Court of Australia having the greatest authority.

Decisions about the use of transcripts of indistinct audio evidence in everyday courtroom situations depend on several key precedents, notably *Menzies 1982* (a New Zealand case), *Butera 1987*, and *Eastman 1997*. The next sections look at each of these authorities in turn. The intention is to bring the attention of forensic linguistics to legal concepts that may seem surprising, counterintuitive or plain wrong from a linguistics perspective, but that nevertheless greatly affect the way transcripts of indistinct covert recordings, whether by police or experts, are used in court.

To that end, each section gives an overview of the case, then draws out important legal principles, and examines them from the point of view of linguistic science.

R v *Menzies* [1982] NZCA 19

Menzies – The case

Menzies was a 1982 appeal to the New Zealand Court of Appeal against a 1981 guilty verdict handed down by the New Zealand High Court.[3]

The 1981 trial was one of the first in the country (indeed in the world) to admit covert recordings as evidence. Since legislation governing the use of hidden listening devices during investigations was new, there had been considerable legal argument over the admissibility of the audio, so one ground of appeal was that the trial judge had erred in admitting the audio itself. However, the appeal court rejected this argument, and it need not concern us further here.

Another ground of appeal, our focus here, was that the trial judge had erred in allowing a transcript to assist the jury in understanding the audio. It is worth looking in more detail at what had happened during the original trial.

It seems the covert recordings were so indistinct that the jury was unable to understand them even after they had been played twice in court. The prosecution sought admission for a transcript to assist them.

This was initially denied by the trial judge, for several reasons. Although this was the first admission of covert recordings, there were precedents for providing a transcript as assistance in other circumstances, for example when the audio was very lengthy, or included speech in languages other than English. However, in those cases, the transcript had been agreed by both parties.

In the present case, the defence did not agree to using the transcript. In that situation, the only way to admit the transcript would have been to call it an expert opinion – and that solution faced two problems.

One problem was that transcription, in general, was not considered by the law to require expertise. Judges in multiple precedent cases had stated that producing a transcript is merely a matter of listening to the audio over and over again. This is something the jury could do for themselves (and the judge was willing to allow the recordings to be played multiple times to enable this) so there was no basis for admitting an expert opinion.

Another problem was that, in this particular case, the transcript offered by the prosecution had been produced by a police officer. In general, police are not allowed to provide an opinion, only factual evidence.

However, after setting out these views in an official 'reasons for ruling', the 1981 trial judge was persuaded to try listening to the audio himself with the assistance of the police transcript. Upon doing so, he found the transcript so helpful that he did indeed allow it to assist the jury, developing some legal innovations (discussed in the next section) to overcome the difficulties referred to in his reasons for ruling.

In doing this, he emphasised that determining the content of the audio was a matter for the jury. He instructed them carefully that they should use the transcript only as assistance, checking it critically against the audio, using ticks and crosses to note the parts they agreed or disagreed with.

This was done, and the jury ultimately reached a verdict of guilty. It is important to be clear that there is no suggestion here that the guilty verdict was wrong or unfair. Plenty of other evidence was heard during the trial, so it is impossible to know what weight the jury gave to the audio evidence. In any case, without access to the forty-year-old recordings and transcripts we cannot know whether the transcript was reliable or not.

Our concern here is purely with the role the decision played in establishing procedures for using a transcript of indistinct covert recordings in future trials. In that regard, the important thing is that the innovative nature of the trial judge's ruling provided grounds for appeal – and the 1982 appeal court upheld his decision to let the jury have the police transcript, endorsing the procedures he had followed in doing so. This enabled the case to be used as a precedent, allowing police transcripts to assist juries in many subsequent trials as admission of covert recordings increased rapidly in New Zealand and Australia.

Since the features of the trial judge's decision that were endorsed by the New Zealand appeal judges laid the foundation for legal procedures regarding use of police transcripts, it is worth setting out some of the legal principles in more detail before considering some of the issues they raise from a linguistics perspective.

Menzies – Legal principles

In his initial rejection of the transcript, the trial judge articulated some very basic principles underlying the legal process in New Zealand, Australia and similar jurisdictions.

One of these is that determining the facts of a case is a matter for the jury, who listen to evidence provided by witnesses under examination by barristers on opposing sides. While the jury are assumed to embody the common knowledge accepted by society as a whole, they can be helped in their determination of the facts by the opinion of an expert witness called by prosecution or defence (and appropriately cross-examined by the other side).

However, an expert opinion is only allowed if it goes beyond what the jury can reasonably be expected to establish for themselves on the basis of common knowledge. Since understanding spoken English is a matter of common knowledge (after all the jury listen to witnesses and others speaking during the trial), it was a small step for the trial judge to decide that it should be up to the jury to determine the content of covert recordings by listening for themselves.

These general principles were strongly and explicitly upheld by the appeal judges before they endorsed the trial judge's decision to allow the jury to be assisted by the police transcript. While they agreed that the trial judge's discovery of the assistance provided by the police transcript required articulation of new principles, it was important that these should sit on top of older principles, and be supported by reference to legal precedent.

For this reason, the police transcriber's ability to provide a transcript was ascribed, on the basis of previous judges' views on transcription, to his having listened to the audio many times.

This made it a very minimal form of expertise, which provided a solution to the problem that only experts can provide opinion evidence. The solution was to recognise the police transcriber as 'a temporary expert in the sense that by listening he had qualified himself as an expert ad hoc' (p.23).

> '[O]n being listened to only once or twice the tapes were unintelligible. It is common ground that this is so. But a police officer who had played them over and over again had thereby acquired a special expertise in their interpretation, enabling him to compile a transcript.' (p.19)

This was the introduction of the term 'ad hoc expert', which has been used for police transcribers ever since, allowing police transcripts to assist the jury in very many cases.

Further, and relatedly, the transcript was not considered evidence in its own right. The audio is the evidence. The transcript is merely assistance to the jury in understanding the evidence. Thus the police transcript does not have to be formally admitted as evidence (in *Menzies* the transcript was not even given an exhibit number, though the appeal judges recommended this should be done in future).

Finally, it may be worth mentioning a legal principle so basic it was not even stated – the judge is the ultimate gatekeeper regarding what evidence is admitted to the jury and how it is presented to them. Judicial decisions regarding admissibility usually consider matters such as whether the evidence is relevant, probative (likely to assist the jury in reaching the right verdict) and not prejudicial (unlikely to bias or mislead the jury).

In this case, the judge took the innovative step of listening personally to audio evidence (in order to evaluate the transcript). It is interesting to note that this step was not explicitly endorsed by the appeal judges. However, it is clear that they not only accepted his right to carry out this evaluation – they also accepted his evaluation without question. It seems they assumed that, as a neutral, responsible listener, he would have formed a reliable opinion as to the accuracy of the transcript as a representation of the audio content.

Menzies – Linguistics commentary

Looking back, it is notable that in all this legal reasoning there was no hint of recognition of linguistic science as a field of relevant expertise (cf. Tiersma 1993). All the judges' decisions were made on the basis of what we might call 'educated common knowledge' about language and speech (Fraser 2018a).

This is understandable. At the time, linguistics was a small and little-known discipline. Research on general transcription was in its infancy (Ochs 1979) and forensic transcription had not even begun to emerge as a specialised field (French 1990; Shuy

1986) – so it is not at all clear what linguists would have said if they had been consulted at the time.

However, we now know that, while educated common knowledge may correct some errors of common knowledge about language (e.g. false etymologies) it retains many misconceptions – nowhere more so than in relation to perception and transcription of indistinct recorded speech (Fraser 2018a).

With the benefit of hindsight, then, it is clear that several of the judges' decisions in *Menzies* were problematic. First, creating a transcript is not a simple secretarial task of listening over and over and writing down what you hear (Haworth 2018). It seems the judges were basing their understanding of forensic transcription on their experience with transcripts of court proceedings. In fact, even the transcription of court proceedings involves far more than listening over and over (Fraser 2021). Transcription of more complex material requires many decisions to be made, as we now know from work in fields like phonetics (Heselwood 2013) and conversation analysis (Sidnell and Stivers 2012). Further, due to the possibility of unconscious bias, it is essential that the transcriber should be independent of the material (Wald 1995). And forensic transcription, where the audio is extremely indistinct and the content is not known, raises yet more complexity (Fraser 2014). So while we cannot know factually how reliable the specific police transcripts used in *Menzies* were, we do know that police transcripts are often wrong in significant ways (French and Fraser 2018).

Second, the instruction that the jury should reach their own conclusion about the audio, using the transcript only as assistance, is unrealistic (Fraser and Loakes 2020). With indistinct audio, a transcript provides far more than 'assistance' that can be accepted or rejected (Fraser and Kinoshita 2021). Listeners' perception can be strongly but unwittingly influenced by a transcript even if it is demonstrably wrong (Burridge 2017) – especially if they follow the transcript closely, for example while 'checking' it with ticks and crosses.

Of course, priming does not affect only juries. Hindsight requires us to respectfully suggest that the trial judge himself was primed by the police transcript, as he progressed from finding the audio unintelligible to accepting the content suggested by the transcript (at least enough to allow it to assist the jury).

In saying this, it is important to emphasise there is no suggestion that the trial judge was biased. On the contrary, it is clear his intention was to follow the law with fairness to all parties. Priming is not the same as bias. It affects even neutral, responsible listeners, including experts in linguistics and phonetics (the latter may be less susceptible but are certainly not immune).

Indeed, priming is not in itself bad. Priming with a reliable transcript is helpful and often necessary for perception of indistinct audio (Fraser and Loakes 2020). The problem is that priming with an unreliable transcript can cause listeners to hear, confidently, words that aren't in fact there. As we now know, personal confidence is a poor guide to accuracy of perception; and even if listeners reject particular words their understanding is still liable to be influenced by them. That is why, though we can't say for sure that the 1981 police transcript was unreliable, we can be certain that a judge's listening is insufficient to confirm it as reliable (Fraser 2018a).

Of course, the 1981 trial judge was unaware of all this, as were most people at the time. His listening gave him sufficient confidence in the transcript to decide it should be allowed to assist the jury (with the instruction to use it only as assistance). And his confidence, in turn, gave the appeal judges sufficient confidence to endorse his decision.

I hope it is clear there is no sense of blame in this account. Everyone at the time did what anyone at the time would have done. Equally clearly, however, the *Menzies* judges' decisions required correction to avoid problems that would inevitably arise from using them as a precedent guiding judges in the many future trials where covert recordings were admitted. Unfortunately, however, far from being corrected, subsequent rulings resulted in their further endorsement, and adaptation to cover a wide range of scenarios.

Butera v DPP (VIC) [1987] HCA 58

Butera – The case

Butera was a 1987 appeal to the High Court of Australia, against a 1985 guilty verdict in the Supreme Court of the Australian state of Victoria. Again, the trial involved indistinct covert recordings, this time in multiple languages (the quality of the recording can be gauged by the observation that there seems to have been uncertainty over whether some of the content was in Thai or Malay).

In this case, there was no legal issue regarding the use of transcripts. As mentioned earlier, the admission of audio featuring languages other than English was one of the situations in which judges in previous trials had recognised the need to provide a transcript to assist juries in understanding the content. Of course, these 'transcripts' were really translations. However, such translations were (and are) typically called transcripts by the law (see further discussion below).

In earlier trials, a single transcript/translation had been read out as the jury listened in court. In the 1995 trial, however, the audio was so indistinct that there were competing translations (interestingly, both provided by the prosecution). Rather than simply reading a single agreed version to the jury, it was necessary to read multiple transcript/translations, then have each translator explain the merits of their own version under examination by barristers on opposing sides.

Recognising that it was very difficult for the jury to follow this kind of argument via oral testimony, the trial judge allowed them to be provided with written versions of each witness's translation as an aid to their memory of what had been read out – an 'aide memoire'.

Use of an aide memoire in this way may seem uncontroversial now, but at the time it was a topic of considerable contention. Up until the 1980s, it had only rarely been permitted to provide juries with transcripts even of the court proceedings they had personally sat through. The thinking had been that providing a written version, while it might assist their memory, also risked distorting their experience by tending to emphasise aspects that they might otherwise have paid less attention to.

By the time of the 1985 trial, there had been precedents allowing transcripts of complex court proceedings to be given to the jury under certain circumstances. Here, however, the trial judge went beyond providing court transcripts to providing the translations themselves. For this reason, when the jury returned a guilty verdict, it was appealed all the way to the High Court of Australia, on the grounds that the trial judge had erred in allowing the written translations to be given to the jury.

The High Court justices[4] upheld the trial judge's decision to allow the jury to have the transcripts/translations as an aide memoire – and in doing so upheld the guilty verdict. Again, it is important to emphasise there is no suggestion here that the guilty verdict was in any sense inappropriate – and certainly no suggestion that the High Court justices were wrong in upholding the trial judge's decision to allow written versions of the transcripts/translations to be given to the jury.

The reason the decision is relevant for our purposes is that in upholding the trial judge's decision to allow the written transcripts/translations as an aide memoire, the High Court also endorsed several aspects of the *Menzies* appeal court ruling regarding the use of police transcripts. This had the effect of greatly strengthening the legal innovations of *Menzies* – including its concept that a police transcriber was an 'ad hoc expert', and its procedures for allowing police transcripts to assist juries in determining the content of indistinct forensic audio, which came to be applied routinely in very many cases.

This effect is interesting given that *Butera* involved no police transcripts or ad hoc experts (translators are considered genuine, not ad hoc, experts). The case turned solely on whether the jury should have been allowed to have the translations as written texts rather than oral testimony. The next section reviews the legal principles that enabled a High Court decision allowing juries to have written translations as an aide memoire to be extended to allow them to have police transcripts of English language.

Butera – Legal principles

In order to decide the question before them (whether the trial judge had erred in admitting the translations as an aide memoire), the High Court justices naturally turned to relevant precedents.

Since there were few previous decisions that related directly to admission of transcripts/translations of indistinct forensic audio, they cast a wider net to include apparently similar cases involving transcripts of other kinds of material, such as court proceedings, or indistinct forensic audio in English. The latter of course included the *Menzies* appeal ruling of five years earlier, which they cited with approval – adding the authority of the High Court of Australia to that of the Supreme Court of New Zealand.

In coming to a decision on the *Butera* case itself, the High Court justices also found it necessary to clarify a range of issues regarding the legal status of an audio recording used as evidence in court. They agreed, again with reference to numerous previous rulings, that a recording should be considered as a kind of document – not in the modern sense of a text written on paper but in the etymological sense of something from which information could be derived. This put audio recordings in a category that contained not just written texts but also photographs.

One special feature of recordings that required their consideration was that, unlike a photograph or written text, a recording does not yield its information simply by being looked at. Rather it is necessary to 'prove' the contents of the tape (again 'prove' is used in its etymological sense of 'demonstrate', 'establish' or 'lay out for all to see'). This, they decided, could be done either by playing the recording on a suitable device, or by providing a transcript.

This decision then raised the issue of the status of the transcript so used, with respect to the recording. The High Court justices agreed that a transcript was not equivalent to

the tape, nor was it a copy of the tape; rather it was a representation of the contents of the tape.

This made it, in their view (and following a number of precedents), a secondary form of evidence, equivalent to a chart or schedule used to summarise complex numerical data. Although producing a transcript required no great expertise, meaning that the jury could in principle do it for themselves, there was some effort in listening over and over again. So as a matter of convenience it was acceptable to provide a prepared transcript to assist their perception as they listened to the indistinct recording, thus saving them the time that would be needed to make their own.

Of course, when recordings featured languages other than English, an actual transcript was of no use to the jury, so there was no need for a transcript in the original language to be produced. All that was needed was the translation into English – which, as we have seen, was called a transcript.

This blurring of the distinction between a transcript and a translation had several important effects in the law. One was that, following the High Court's reasoning that the transcript/translations allowed by *Butera* should be deemed an 'aide memoire' (similar to a transcript of court proceedings), police transcripts also came to be called an aide memoire (even though of course in that situation the transcript is an aid not to memory but to perception – and, as we have seen, the 'aid' it offers can be highly misleading). On that basis, the instruction that the jury should use a police transcript only as assistance came to be called 'the aide memoire instruction'. These terms, and the concepts behind them, remain in common use to the present day.

Butera – Linguistics commentary

Again, the High Court ruling in *Butera* is notable for its complete lack of reference to linguistic scholarship. And again this is understandable with regard to transcription. As we have seen, at this time research even on general transcription, let alone transcription of indistinct forensic audio, was just emerging.

With hindsight, however it is clear that producing a reliable transcript of indistinct audio is just as problematic for languages other than English as it is for English. Indeed, the quality of a translation into English is severely limited by the quality of the transcription in the original language: the best translation will be misleading if it translates words that were not actually spoken.

This raises questions about the view that a transcript in the original language is unnecessary since it can't be used by the jury. The latter of course is true – but even if the jury cannot directly use a transcript in the original language, the opposing side should surely be given the opportunity to ensure the translator is working from a reliable transcript (Gonzáles *et al.* 2012). It also makes a strange contradiction with the expectation that the jury will somehow be able to determine which of the competing translations is a better representation of the audio content.

Further, calling a translation a 'transcript' glosses over the complexities of translation itself. The High Court justices seem to have assumed that, once a transcript is available, even if only notionally, translation is a simple mechanical transduction which translators get either right or wrong[5]. This misconception seems more surprising than misconceptions about forensic transcription. By 1987, translation studies was well established as a discipline (Munday 2016) with good recognition that, even with the source

text clearly specified, translation is a complex, context-sensitive process in which nuanced differences of opinion are possible.

We must also respectfully note that the High Court justices' discussion of the status of tapes and transcripts is rambling and poorly informed, embodying a number of misconceptions. For example, invoking the etymological sense of 'document' (covering anything from which information can be derived) ignores the special status of language as a shared symbolic system with significant social and cultural dimensions – which by 1987 had been well established for many decades by the disciplines of semiotics, semantics and philosophy of language. Conflating a recording and a written text further glosses over important differences between spoken and written language, also well established at the time (Chafe and Danielewicz 1987).

Despite these problems, and more, the concepts about transcription and translation embodied in *Butera* not only went unchallenged, they received the imprimatur of the High Court of Australia. This gave them an impact extending well beyond the situation for which the trial judge's original ruling was challenged (providing a written translation to the jury as an aid to their memory). Most importantly for the present discussion, they became the basis for routine provision of a police transcript to assist the jury in cases with indistinct forensic audio in English.

Uniform Evidence Acts

The Uniform Evidence Acts (UEA) sought to harmonise legislation governing the admission of evidence in criminal trials across the various Australian states and territories (Judicial College of Victoria 2014). After many years of complex negotiation, the Commonwealth Act was enacted in 1995,[6] with NSW enacting its Uniform Evidence Act the same year, and most other states following over subsequent years.

This gives the force of legislation to several of the concepts outlined above. For example, in relation to covert recordings, the UEA dictionary defines a document as 'anything from which sounds, images or writings can be reproduced', while Section 48 establishes a recording as a document whose content can be proved by playing the recording on a suitable device or by 'tendering a document that is or purports to be a transcript of the words'.

More directly related to police transcripts, Section 79 states, in part: 'If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'. The opinion rule referred to is given in Section 76 'Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed'.

Together, these rather cryptic clauses state the general principle, outlined earlier, that while most witnesses, including police, are limited to providing factual evidence, opinions can be offered by expert witnesses who can back up those opinions on the basis of their specialised knowledge.

In relation to present concerns, police transcribers are considered to have 'specialised knowledge' of the audio by virtue of having listened to it many times. That means there is no difference in principle between police ad hoc expertise and genuine expertise in linguistics and phonetics. Indeed the term 'ad hoc expert' has no official

standing, though it is still used informally (and I will continue to use it here, precisely to distinguish police transcripts from transcripts by genuine experts).

It is notable, however, that police transcribers are not mentioned specifically anywhere in the UEA. That means that the application of Section 79 in relation to police transcripts relies wholly on case law. *Butera* remains a key authority, frequently referenced for legal concepts such as 'ad hoc expert', 'aide memoire', the aide memoire instruction – as well as for general ideas related to the status of recordings and transcripts, notably the concept that a transcript is secondary evidence provided merely as assistance. However, detailed practical procedures for how police transcripts should be presented in court were established by another appeal ruling, which also established procedures for presentation of expert transcripts.

Eastman v The Queen [1997] FCA 548

Eastman: The case

Eastman was a 1997 appeal to the Federal Court of Australia against a guilty verdict in a 1995 trial in the Supreme Court of the Australian Capital Territory. The 1995 trial was one of the first major trials to deal with indistinct forensic audio under the Uniform Evidence Act. It had been an extremely complex and contentious trial, five years in preparation, and involving many then-new types of forensic evidence, as well as a long series of extremely indistinct covert recordings (the complexities are greatly simplified here; more detail is provided in Fraser, "The Eastman transcripts: An unfortunate precedent?", to appear).

One important development, in relation to the present topic, was that, in addition to the police transcripts provided by the prosecution, both sides also provided transcripts by genuine experts in phonetics or speech science – the prosecution seeking to add credibility to the police version, the defence to oppose it.

The contentious nature of the trial meant that multiple aspects of the provision and use of all transcripts, police and expert, were challenged during the 1995 trial, resulting in explicit rulings by the trial judge on a wide range of topics. These rulings were then further challenged via the 1997 appeal process – resulting in endorsement by the appeal court. This established *Eastman* as a key precedent for handling police and expert transcripts, which has been followed in numerous subsequent cases as admission of covert recordings has burgeoned.

Eastman – Legal principles

The *Eastman* appeal upheld and endorsed all the decisions and reasoning in *Menzies* and *Butera*, with additional explicit detail regarding several aspects that until then had been tacit. One example was the concept that if the police transcript was erroneous it should be an easy matter for the defendant to provide the words that were really spoken – meaning that failure to do so gave implicit support to the police version. Unfortunately, while this may sound like common sense to non-specialists, a number of factors mean it can actually be surprisingly difficult, even when the police transcript truly is wrong, for a defendant to provide an alternative that is more convincing to the court than the police version is (Fraser 2020a). In addition, it is a general principle of our law that it is up to the prosecution to prove their evidence is valid, not the defendant to prove it is wrong.

Eastman also gave explicit recognition to the practice started in *Menzies*, whereby a challenge to the police transcript resulted in the judge listening personally to ensure it was not potentially misleading or prejudicial – before leaving determination of the content to the jury, under the aide memoire instruction. As in *Menzies*, the fact that the trial judge had listened personally and accepted the police transcripts was taken as confirmation by the 1997 appeal judges that the transcripts were reliable enough to be given to the jury under the aide memoire instruction.

With regard to expert transcripts, the *Eastman* procedures made clear that it was the police transcripts that were to play the principal role in assisting the jury. Expert opinions, if offered, were merely alternatives for the jury to consider – even when, as in this case, the prosecution's own expert disagreed substantially with the police version (while also accepting a number of incriminating sections – see further discussion below). The procedures also privileged the police version in multiple ways (discussed further in Fraser, to appear). As an example, the police transcript was provided first to the jury, who followed it as the audio was played, while expert opinions were discussed afterwards, via oral examination of the experts.

It is interesting to notice that the judges continued to assert that police transcribers' 'ad hoc expertise' derived from their having listened over and over – even though all the experts made clear they also had listened many times – as well as bringing their expert analytic skills to the task.

Eastman – Further developments

Despite being upheld by the 1997 appeal ruling, the 1995 guilty verdict continued to be contested through various channels. In 2012, a major inquiry was commenced, and looked into all aspects of the trial. The 2014 report of the inquiry upheld most of the previous judicial decisions, including the admission and use of the audio and transcripts.

However, serious flaws were uncovered regarding some of the other forensic evidence, creating a catalyst for major reforms in the forensic sciences (Maxwell 2019). More importantly, the review concluded that these flaws had created a miscarriage of justice. Mr Eastman was released after 19 years in prison. Eventually a retrial was ordered. The 2018 retrial found Mr Eastman not guilty, and he was awarded more than $7,000,000 in compensation for wrongful conviction and imprisonment.

Crucially for the present discussion, preparation for the 2018 retrial revealed that the police transcripts used during the 1995 trial had been substantially misleading (even more so than had been demonstrated by the phonetics experts at the time, as discussed below). This of course casts yet more doubt on the outcome of the 1995 trial. Far more importantly, it casts doubt on the procedures the 1995 trial had established to ensure the jury was not misled by an unreliable transcript – and on the endorsement of those procedures by the 1997 appeal.

Eastman – Linguistics commentary

As we have seen, the 1995 trial was the first in which both sides used transcripts from genuine (as opposed to ad hoc) experts. By this time, forensic transcription was beginning to be established as a specialised area of practice in linguistic science. However, it was still seen as a branch of applied phonetics rather than a branch of linguistic science in its own right (see Fraser 2020a). In particular, the effect of priming on the perception of experts was not fully understood.

For example, the 1995 experts produced their own transcripts by editing the police version. This was common and expected practice in forensic transcription at the time, assumed to be merely a time-saving measure. Interestingly, late in the trial one of the experts came to suspect that editing the police transcripts had influenced his perception, and reported this in court. However, he did not have a body of research to refer to and his concerns were dismissed. Now of course it is recognised that editing existing transcripts is not good practice – indeed preparation for the 2018 trial made clear that all the 1995 experts' transcripts had been influenced by the police transcripts (despite having noted many substantial errors in them).

More importantly, the 1995 experts had limited understanding of how their opinions fitted into the overall trial process. For example, the prosecution expert, who had found many errors in the police transcripts, nevertheless accepted, in response to one in a long series of questions posed to him in the witness box, that listening to the tapes for many hours had qualified the police transcribers as ad hoc experts – presumably not recognising how this answer might affect development of Australian legal procedures.

While the experts all disagreed substantially with the police transcripts, they also disagreed with each other. This is inevitable with extremely indistinct audio. The problem is, such disagreement gives the law the impression that the experts' opinions are no better than anyone else's. More importantly, the few areas where experts appeared to agree with police (often due to editing) were taken as support for the police transcripts overall. The effect was, paradoxically, to increase, rather than diminish, the trial judge's, and appeal judges', acceptance of the police version.

By the time of the 2018 retrial, forensic transcription was starting to be recognised as a topic of research in its own right. Among other developments, a detailed Australian case study had demonstrated that the procedures arising from the cases discussed here are incapable of protecting juries from being misled by an inaccurate police transcript (Fraser 2018a).

For this and other reasons, in the 2018 *Eastman* retrial, both prosecution and defence were at pains to demonstrate that their experts had not been inappropriately primed.[7] This meant that many of the explicitly incriminating parts of the original police transcripts were omitted from the prosecution versions. The few that remained were opposed by the defence – and presumably rejected by the jury, since they reached a verdict of not guilty.

What is most important, for present purposes, is that preparation for the 2018 retrial showed unequivocally that the police transcripts used in the 1995 trial had been highly misleading – presumably contributing at least in part to the acknowledged wrongful conviction of Mr Eastman. This is surely incontrovertible evidence that the procedures used in the 1995 trial, endorsed by the 1997 appeal, and followed as a precedent in numerous trials since then, are incapable of protecting juries from misleading transcripts.

Unfortunately, however, the fact that the 1995 police transcripts had been unreliable was not officially recognised by the judge the 2018 retrial (which in any case was not an appeal capable of becoming an authoritative precedent). Thus the law has made no moves to amend the procedures endorsed by the 1997 appeal ruling. To the contrary, these flawed procedures continue to be used in large numbers of trials around the country, creating actual and potential unfairness in the Australian criminal justice system.

This is a major problem in urgent need of a solution. The next and final section briefly considers the question of what solution to aim for, and how linguistic science can help in achieving it. The first step is to specify the problem accurately.

Towards a solution

Specifying the problem

From a linguistics perspective, the concept of police transcribers being ad hoc experts is clearly wrong. Any ability police may have to hear more than others do, in audio related to their cases, comes not from listening over and over again, but from their contextual knowledge of the case. While this contextual knowledge can be helpful in particular instances, it is also liable to mislead, as we have seen.

An obvious solution, commonly recommended by linguists, is to ensure that transcripts by independent experts in linguistic science are made available to the jury. However, the case of *Eastman* demonstrates that, even if genuine experts are employed, misleading transcripts can still be provided as 'assistance' to the jury, where, due to the power of priming, they are likely to create a false impression of the audio content.

It seems the key factor is not who creates the transcripts, but who evaluates the transcripts to ensure they offer reliable assistance to the jury's perception. Under current procedures, as we have seen, evaluation relies heavily on lawyers and judges gaining a sense of personal confidence in the police transcript by checking it against the audio. While these procedures were established in good faith using knowledge available at the time, it is now known that this sense of personal confidence is highly unreliable.

An even more important factor is who decides how the transcripts should be presented to the jury, especially in situations where there are multiple competing versions for them to consider. As we have seen, current procedures, designed by judges on the basis of educated common knowledge, as well as reference to legal precedents, privilege a police transcript even if (as in *Eastman*) a well-qualified expert on the same side has shown it to be unreliable.

Under these circumstances, simply calling for increased use of expert witnesses can exacerbate rather than cure existing problems. That is why Australian linguists have chosen to take a different approach.

The Australian approach

It is essential that all indistinct forensic audio admitted in Australian criminal trials should be accompanied by a reliable transcript (Fraser 2020a).

By 2017, Australian linguists had recognised that achieving this required change to legal procedures, especially those based on the fundamental misconceptions that creating a transcript of indistinct forensic audio requires no expertise beyond listening over and over, and that in any case the transcript is merely 'secondary evidence', an 'aide memoire' that a jury can use 'only as assistance'.

They raised a 'call to action' which resulted in a working party of judges holding a consultation with representatives from linguistics and law enforcement – and concluding that the linguists had raised issues in need of investigation. As a result, The Research Hub for Language in Forensic Evidence was established at The University of Melbourne (Fraser 2020b).

The Hub has two main aims. The first is to assist in bringing about appropriate changes in legal procedures (Fraser 2018b). This is clearly a difficult task given the long-standing nature of the procedures, but some slow progress is evident.

The second aim is to create an accountable, evidence-based process for preparing reliable transcripts. This means recognising forensic transcription as a specialised area of expertise, similar to forensic pathology or forensic fingerprint analysis. These fields do not rely on individual experts claiming personal knowledge and experience. Rather they employ accredited practitioners to follow evidence-based methods established via collaborative expert research. It is time that forensic transcription was treated as a dedicated field of expertise in the same way (Fraser 2020a).

Conclusion

The fact that Australian law allows police transcripts to assist the jury in determining the content of indistinct forensic audio used as evidence in criminal trials is a major problem that clearly arises from misconceptions within the law about the nature of speech and speech perception, especially how a transcript affects listeners' understanding of indistinct recorded speech.

Solving the problem requires linguists not just to teach legal professionals about our subject but also to learn more about how the law works, both in principle and in practice, especially practice that takes place 'behind the scenes' (Fraser 2020a). It is hoped that the present review of three historical cases offers some assistance in achieving this.

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Notes

[1]There are also eight smaller territories which we set aside here.

[2]Each state has a slightly different version, and some use a different system – but these details are not relevant to the present discussion.

[3]In New Zealand, the High Court is lower than the Supreme court, while in Australia Supreme Courts are lower than the High Court – which is the highest court in the land.

[4]Note that one of the five justices dissented, arguing that the transcript/translations might indeed have tended to mislead because they did not include notes about the arguments raised against the translation of certain expressions.

[5]Note that the dissenting justice had a more nuanced view of translation.

[6]The Australian Capital Territory and Northern Territory were covered by the Commonwealth Act until they enacted their own in 2011.

[7]For reasons peculiar to this case, police transcripts were not used in the 2018 trial. Rather the 1995 prosecution expert produced updated transcripts.

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