Madame du Barry, Privilege and the Organ of the Attorney

Ruth Morris
Bar-Ilan University, Israel

INTRODUCTION

In today's world of conferences on everything under the sun, it is still rare for a conference to address the "history, theory/ies and practice of legal translation." The February 2000 event at the University of Geneva provided an opportunity to raise a number of what appear to be esoteric and largely theoretical topics, such as:

- the relationship between a foreign-language original and an interpreted or translated version
- the reliability of interpreter performance
- interpreters and attorney-client privilege
- interpreter status and
- pressures on interpreters.

The key to this medley of interrelated subjects is provided, strangely enough, by a French aristocrat at the end of the eighteenth century. And, as will be seen, these theoretical and historical issues can have the most practical and immediate impact on the modern-day practice of the interpreter's craft in the judicial setting.

HISTORICAL BACKGROUND

In the early 1790s, the Comtesse du Barry made a number of visits to Britain in order to place her fortune at the disposal of French émigrés who had fled to "Perfidious Albion." She might have expected that the French Revolutionary authorities would not take kindly to this state of affairs, and indeed, accused of being in league with the British government, she was condemned to death by the Revolutionary tribunal and executed on December 7, 1793. What this "last and loveliest of the mistresses of the French king Louis XV", to quote the Encyclopaedia Britannica, would not have expected is that her name would subsequently be associated in the legal annals with two English legal cases which would set the tone for matters relating to interpreters and legal proceedings for centuries to come.

The case of *Simmonds v. Du Barré* was heard by Lord Hardwicke at Lincoln's Inn Hall in 1791, and involved the giving of affidavits by people who are "unacquainted with the English language." In the English legal world of yesteryear, affidavits were widely used in legal proceedings, both domestically and in foreign parts, much as depositions, letters rogatory and interrogatories are today in certain jurisdictions. The judge ruled that when such a foreigner gives an affidavit in his own language, a sworn translation must also be filed with it. A number of safeguards were built in to the procedure. These included a statement by the interpreter instrumental in the swearing of the affidavit that he is acquainted with the two languages concerned. Counsel could and did attack a specific procedure on the grounds that such technical requirements had not been complied with, with judicial opinions differing (see, for example, *Lord Belmore v. Anderson* (1792) 4 Bro. C.C. 90).

It should not be thought that this issue was specific only to centuries past: a related 18th century case, *Omychund v. Barker*, was cited in 1987 in Australia's *Butera v. DPP*, in which the High Court of Australia discussed the relationship between a tape recording of a conversation in a foreign language and a written rendering in English. The highly relevant question at stake here is: which is "the evidence"—the foreign-language original material, or its English-language version? Ultimately, the courts find that in striving for authenticity, they are faced by a conflict between what Morris (1993: 181) describes as "ideal vs. practical arrangements." Lord Hardwicke's ruling in *Simmonds v. Du Barré* was designed to preserve a record of the deponent's original words: in fact, sometimes the interpreted version, as written down and duly sworn to by both the person giving the affidavit and the interpreter, substituted for the original words. One way or the other, the ruling in *Simmonds v. Du Barré* must have helped the employment prospects of legal translators and interpreters in England down through the ages. (For a more detailed discussion of the language issue and the status of original-language evidence, see Morris 1993: 151-204.)

RELIABILITY OF INTERPRETER PERFORMANCE

A presumption that interpreters should act professionally, i.e. be impartial and produce a complete and proper version of what is said, echoes down throughout decades of legal reports, accompanied by an underlying acknowledgement that this is not always the case. The 1844 English case of Mantzgu identifies four principles that should ideally apply to the swearing of an affidavit by a non-English speaker, in each case showing the potential pitfalls if the safeguards are not complied with:

1. The right to have an opportunity to remove an interpreter if "notoriously incompetent or improper."

2. The right to monitor: interpretation to be provided in public to "see that the interpretation is really made, and fairly and properly made."

3. The right for the defendant to "put in an answer" in his own language ("far better than any system of interpretation").

4. Protection against interference, i.e. observing a chain of custody, "in order that the plaintiff may be assured that no alteration has taken place in the answer after the interpretation."

In theory, all these principles are equally applicable to the giving of testimony by an individual who does not speak the language of the court. Interpretation should be provided by a "proper" (i.e. competent and unbiased) interpreter, whose performance can be monitored (and hence challenged), and an accurate record should be kept both of original-language utterances and all the interpreter's renderings. In practice, even at the beginning of the 21st century, at least one of these desiderata—keeping an accurate record of original-language material—is almost never met. And although some judges may be able to directly understand an individual testifying in his or her own language, rather than through an interpreter, the system or specific court may not allow this (see the Canadian case of *Robin v. College de St-Boniface and England's Trepca Mines*), or it may not have the practical resources (e.g. shorthand writers) needed in order to cope with such a procedure (see Andrews 1983).

INTERPRETERS AND ATTORNEY-CLIENT PRIVILEGE

But the case associated with the Comtesse du Barry which has most influenced the law on interpreter status in England, and, by association, in other English-speaking jurisdictions too, is that of *Du Barré v. Livette*, heard at the Guildhall in mid-1791 by Lord Kenyon. This case constitutes a watershed: after it, there could be no doubts as to the legal and moral position of the interpreter at conferences between lawyer and client.

In the background leading up to *Du Barré v. Livette*, since the client spoke no English and the lawyer spoke no French, the two were compelled to communicate via an interpreter. In a pretrial conference the defendant had admitted to the lawyer—in the presence of the interpreter, one Rimond—that he had "stolen the diamonds", to quote the case report. Being an honest type, immediately the interpreter "discovered the wickedness of the transaction, he abandoned the defendant", i.e. Livette.

Civil proceedings subsequently took place in England against Livette for "conversion" (wrongful dealing) of the jewels from a house in France. Rimond was now called to give evidence, in order to prove the defendant's admission to the theft. Counsel for the defence objected to someone who had previously interpreted between lawyer and client, being permitted to give this evidence, contending that "this was a confidence which ought not to be broken." In turn, the lawyer for the plaintiff (the Comtesse du Barry) argued that this evidence ought to be admitted. In this argument, the interpreter's position was described as follows: "No confidence was reposed in Rimond: he was merely the organ which conveyed the sentiments of the defendant to this attorney, and those of the attorney to the defendant. When he had done this, his duty was over, and he had no further interest in the matter."

Which view of the interpreter's status should prevail? The judge hearing the case, Lord Kenyon, ruled as follows:

> The relation between attorney and client is as old as the law itself. It is absolutely necessary that the client should unbosom himself to his attorney, who would otherwise not know how to defend him. In a case like the present it is equally necessary that an interpreter should be employed: everything said before that interpreter was equally in confidence as if said to the attorney when no interpreter was present; he was the organ through which the prisoner conveyed information to the attorney, and it is immaterial whether the cause for the defence of which the conversation passed is at an end or not, it ought equally to remain locked up in the bosoms of those to whom it was communicated. (*Du Barré v. Livette* at 110-111, emphasis added)

Lord Kenyon did express some doubt as to the validity of his ruling, but in order to err on the safe side he excluded the evidence of the interpreter, Rimond. Ever since, the case has been cited whenever the position of the interpreter in attorney-client communication is raised as a legal issue, and it remains the authority to this day. Writing in 1982, Walsh expressed the point thus:

> An interpreter is perhaps most often cited as a third person whose presence during a communication between attorney and client does not destroy the attorney-client privilege. That interpreters are so recognized is so well established that no further discussion of the point is merited. (Walsh: 1982, 602)

Hence in this situation an interpreter is covered by the lawyer-client privilege which allows clients to speak freely to their lawyers, knowing that what they say will not subsequently be disclosed against their will.

INTERPRETER STATUS — THEORY AND PRACTICE

If the interpreted lawyer-client conference lies at one end of the interpreter-status continuum, the interpreted police interview may be considered to lie at the other end. In English law, interpreters at police interviews are considered the only valid witnesses to what was said in the foreign language by non-English speakers, including any confessions they may have made, unless the interviewing police officer understood the language of the suspect directly. The theory behind this position is that during the interview, the police officer's "knowledge" of what the suspect is saying comes entirely through the medium of the interpreter. As a result, because of the hearsay rule ("second-hand evidence"), strictly speaking the interpreter is the only person who can therefore testify in court to what the suspect said.

It may be argued that technology may make a quantitative or even a qualitative difference in the interpreter's position. For example, the requirement since 1984 that police interviews in England and Wales be tape-recorded has made it unnecessary for the interpreter to make a written record of what was said in the foreign language, as was previously the case. However, although the advent of audio and, sometimes, video recording has somewhat modified the practicalities of interpreted police interviews (for both spoken-language and sign-language interpreters), the legal theory remains the same.

On the other hand, if a challenge is made to the interpreter's original renderings during the police interview, the electronic recording enables an accurate transcript to be made of both the original and the interpreted material, as well as a competent translation of the interpreter's renderings. The parties can then argue over the merits or failings of the interpreter's performance. (For such an instance, see the Ohio case of *United States v. Alejandro Ramirez*.) However, in the adversarial system judges prefer evidence to be introduced by a live witness testifying before them in court. Technology cannot entirely displace the human element.

In the seminal 1958 English case of *R. v. Attard* which led to the legal position described above, the prosecution argued that "interpreters are in a different position from that of police officers; they are impartial, mere cyphers, and are not expected to take an intelligent interest in the proceedings." Rejecting this point, counsel for the defence stated that "an interpreter is obviously a person who must use his intelligence and be ready to give evidence concerning inflections and matters of that kind in both languages, if necessary, and is a fully competent witness" (Attard at 91). The judge hearing the case accepted the defence argument. As a result, in theory at least, in English courts the interpreter became the only person who could subsequently testify in court as to what had actually been said by the non-English speaking suspect over the course of a police interview.

This issue of the interpreter's independent existence (or not) as a thinking individual has been addressed in a number of other cases, with a variety of views and differing case-law outcomes being expressed.1 How do the principles embodied in *Du Barré v. Livette* and Attard respectively apply to other situations in which interpreters function in the legal system? Are interpreters a kind of chameleon, in different situations assuming the mantle of their English-speaking "principal"?—in *Du Barré v. Livette*, the lawyer, and hence the principle of

privilege; in Attard, the police officer, with the accompanying role of an amanuensis or human tape-recorder.

A clear-cut view of the status of the interpreter's rendering such as resulted from Attard, however, is not universally held. For example, the American case of *United States v. Nazemian* discusses whether a "translator's" statements should be considered as the original speaker's own. If so, then it can be argued that no hearsay is involved. This is the "agency" theory, under which the interpreter, chameleon-like, adopts the mantle of the non-English speaker. Following this exception to the hearsay rule, some American courts have held that the interpreter is "no more than a language conduit" and therefore the translation does not "create an additional layer of hearsay" (*United States v. Koskerides* at 1135). In Koskerides, the court further points out that the record contained nothing to suggest that the interpreter had any motive to mislead or distort, nor any indication that the translation was inaccurate. The inference is that there is no difference between original and interpreted versions, so that the interpreter's words are, for all intents and purposes, those of the speaker. The upshot is a legal fiction which allows the circumvention of the hearsay rule. As a result, the product of the interpreting process is almost always treated as a legally valid equivalent of the original utterance (Morris 1995: 29). This view may arguably be acceptable when qualified, experienced and skilled individuals act as interpreters. It is certainly not acceptable in light of the flaws which inevitably occur when unskilled, untrained individuals are engaged to provide interpreting services in the legal system (see Morris 1993: 203-204).

Outside the narrowly defined area of lawyer-client communication through the medium of an interpreter, uncertainty envelops the interpreter's precise role and status. Nazemian reviews developments both over time and in different jurisdictions in the United States, showing how judicial views of this field can and do differ widely. It may be argued that the status of interpreters in the legal system, broadly defined, depends crucially on exactly where they are situated on the continuum on any specific occasion. At one extreme, they are expected to function almost as the equivalent of a tape-recording, for example in connection with a police interview. At the other, they are practically the alter ego of lawyers, who need utterly confidential relationships with their clients in order to fulfil their professional obligations.

The eminently fluid judicial views of the interpreter's status are illustrated by a statement by the Supreme Court of Kansas which manages, revealingly, to simultaneously encapsulate four or even five views of the interpreter's status:

> While a person who is engaged in discharging the duties of interpreter is a witness, and may even be regarded as acting in the capacity of an expert, he or she is more than a mere witness. Though in a sense he or she is an officer of the court, an interpreter is best described not as a court officer but merely as an attendant. (*State v. Van Pham* at 861: citations omitted)

This constantly shifting, quasi-schizophrenic status can and does lead to confusion about how interpreters should act and how they are perceived. This may well be the reason why some prosecuting counsel try to argue that the person who has acted as the interpreter for the defence team prior to a court appearance is biased, and should not therefore interpret in the trial itself. Unlike their prosecution counterparts, English defence lawyers are not normally known to object to interpreters who have assisted the police on the grounds that they are

therefore biased. The freelance members of England's Association of Police and Court Interpreters work in both settings.

In a properly regulated system, the position should be that all interpreters who appear in a courtroom, irrespective of who has engaged them, will act professionally and fill the role of an officer of the court on that occasion, as Lord Fleming commented in the Scottish case of *Liszewski v. Thomson*:

> The interpreter is not to be regarded as being a representative either of the prosecution or of the defence. He is pro hac vice an official of the Court, and ought to be an independent person. (*Liszewski v. Thomson* [1942] J.C. 55 at 58)

Theory and practice do not always dovetail. For example, as explained above, in England, the strict legal position (following Attard) is that as a potential prosecution witness, the interpreter at the police interview should not be engaged to interpret at any subsequent court proceedings. This is acknowledged by the fact that a number of police forces have standing orders or informal guidelines prohibiting the use of the initial interpreter in subsequent court proceedings other than in exceptional circumstances (Butler and Noaks 1992: 6). However, several English police forces have been reported as ignoring this point, actually preferring to engage the original interpreter for the trial, presumably because they will have some knowledge of the background to the case (Butler and Noaks 1992: 7).

PRESSURES ON INTERPRETERS

As has been shown, even with a particular jurisdiction the status ascribed to and hence the behaviour expected from interpreters vary widely according to the legal situation in which interpretation is being provided. Irrespective of such expectations by other players, interpreters—even when judicially perceived as "merely" organs through which information is conveyed—should most certainly be "expected to take an intelligent interest in the proceedings", as argued in Attard.

Under these circumstances, moral dilemmas can and do arise. When they do, they must be dealt with, often by a single interpreter acting in isolation. Even when interpreters are governed by a code of professional conduct, areas will remain in which discretion must be exercised. Alternatively, police officers, lawyers, judges or others may be unaware of the requirements of professional rules. An example of such situations is provided by a clash between the interpreter's and the judge's perceptions of the interpreter's role, which occurred in the 1988 Australian case of Gradidge. In the Gradidge courtroom, a sign-language interpreter refused to obey instructions from the bench not to interpret everything to her deaf client. The appeal court ruled that the interpreter had been right, and the bench wrong. (For further analysis of this case, see Morris (1999) 14-15.)

Thus interpreters are subject to various pressures and expectations from other players in the interpreting situation to act in a variety of ways. They then need to decide how to react in the specific circumstances. Lawyers may (incorrectly) direct questions specifically at the interpreter, to the detriment of the quality of their communication with the client. One interviewee even stated that it would not be helpful for him to address his non-English-speaking client directly, and that he always looked at and spoke to the interpreter only. In turn, the non-English speaking individual may seek to give information to and request

information of the interpreter in person, failing to recognize that individual's vital but essentially peripheral role. When providing interpretation in the more informal and less rule-bound setting of a lawyer-client conference, the lawyer may well accord the interlingual interpreter the status of a vital cultural informant or expert and professional colleague. In one Australian case (*Di Mento v. Visalli*), an interpreter played an unusually large part, translating documents, personally serving a petition in Sicily, and giving oral evidence to assist the judge in understanding the translation of court documents from Messina.

In the course of research conducted in England in the 1990s, interpreters reported that in police interviews, officers may seek to impose an independent interrogatory role on the interlingual interpreter ("Find out if..."); leave the interpreter alone with the suspect and then ask what has been elicited; or alternatively, may totally discount any attempts by the interpreter to draw attention to police failure to observe procedural rules such as contacting a consular official. Interpreters may face dilemmas concerning their duty (or otherwise) to relay non-semantic information to an interviewing officer, such as material concerning non-verbal linguistic cues about regional origin, indications of any abnormal psychological condition which may not be obvious across the language barrier, or background information about economic or social status.

The interpreter may become privy to comments from the non-English-speaking defendant, a problematic situation which frequently occurs because detained individuals are often kept in total isolation from their linguistic and cultural backgrounds. Aware of this state of affairs, the English police officers who sit in the “dock” together with defendants, are known to attempt to elicit information from interpreters. In the United States, where defendants sit together with their legal representatives at their trial, this situation cannot arise. During witness examination, non-English-speaking defendants may ask the interpreter at their side questions concerning procedure which, were the client an English speaker, might not be asked at all or might be asked directly of the legal representative. The latter option is easier to apply in the American system. As always, different circumstances confront interpreters with a variety of challenges.

DISCUSSION

Today’s panacea, technology, is not only of practical use in this area, for example by preserving original-language words (something which judges a century ago realized would help immensely: see *Rajnowski* at 850); it is also responsible for a qualitative innovation, by enabling interpreters who work in a particular organizational and geographic setting in the judicial system to be in touch with their spoken and signed-language counterparts who work elsewhere (both at home and abroad) in legal and other settings. As a result, through electronic as well as other forums, a lively discussion is underway at the beginning of the 21st century about the duties and responsibilities of the court interpreter. As one participant in such a discussion has written, “The old concept of the interpreter is that an interpreter is an extension of the powers of the party that hires the interpreter. That concept is biting the dust because we as a profession are stressing our neutrality and impartiality.” The corollary is clear: “The new concept of the court interpreter is that the interpreter is an extension of the powers and services of the court. As such, we are neutral and impartial. No matter where we are sent by the court, we are working for the court. Just another service of the courts — that’s all.” (Boido, February 11, 2000, quoted with permission) Nearly sixty years after *Liszewski v. Thomson*, Lord Fleming would have nodded his head in approval.

Being recognized as a "service" of the court once the level of court proceedings has been achieved would clearly remove interpreters from the adversarial system's "battlefield" between prosecution and defence. It should help improve quality, by fostering recognition of court interpreting as a proper profession with its own standards and codes. As in any regulated profession, misconduct would then be a "breach of ethical and professional duties" and could be dealt with accordingly (*Gradidge* at 422).

At the time of writing, more than two centuries have passed since the "conversion" of the Comtesse du Barry's jewels faced an interpreter with a moral dilemma and the court with a legal predicament. The judge's ruling at that time is still valid in many jurisdictions. It is suggested that it is high time for the various components of the legal profession to view the interpreter as a neutral service rather than an adjunct of a particular part of the adversarial system.

This does not mean, however, that the interpreter should be equated with a piece of machinery or electronic gadget. The dilemma that faced M. Rimond is likely to face his modern-day counterparts as well. His solution—to walk out on his assignment—may not be that which would be chosen by today's "neutral" interpreter. As they move somewhat haltingly towards increasing professionalization, his successors certainly benefit from the recognition of the essential nature of their role in the lawyer-client relationship that Lord Hardwicke in *Du Barré v. Livette* intuitively felt must be safeguarded. Over two centuries later, it is now high time that all legal players throughout the world be made aware of the proper status and position of interpreters in their particular variation on the administration of justice.

POSTSCRIPT

One mystery that remains is why the English courts changed the Countess's name from du Barry to du Barré. Perhaps overzealousness on the part of court clerks? Or other judicial participants?

NOTES

1 See in particular Wigmore 1970, Vol. 3, Evidence, s.811 at 282; Sarazin (In the matter of letters patent granted to Raoul Roland Raymond Sarazin (1947) 64 RPC 51 at 53, and in contrast, *Russell & Somers (Wellington) Ltd. v. Wellington Harbour Board* ([1977] 2 NZLR 158 (cited in Morris 1993: 1993, Note 132).

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