

# You understand? Non-native speakers of English and the Bill of Rights

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# You understand? Non-native speakers of English and the Bill of Rights

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This paper reports on the findings of a case study investigating whether or not the rights of a non-native English speaker were breached due to miscomprehension when he was charged with drunk driving in New Zealand. The findings show that the accused lacked sufficient proficiency in English to understand what was happening at the time, especially regarding the complicated legal vocabulary contained in the Bill of Rights caution. While the results of the language assessment are confined to the specific context described in the paper, the procedures that were developed may have wider applicability to other similar situations.

## INTRODUCTION

In New Zealand and other countries in the west, when non-native speakers of English run into trouble with the law, they - like the rest of the population - are read the caution from the Bill of Rights. This brief statement outlines to them what their specific legal rights are. The accused is required to respond that he or she understands these rights. For example, the New Zealand caution begins 'You understand...?' to which the reply is expected, 'Yes'. However, it seems that immigrants and others whose proficiency in English is very low often respond in the affirmative even when they do not understand the caution and their rights. If police continue with their procedures, it may be the case that the defendant's rights have been breached and the case must be thrown out.

One focus of this paper comprises procedures for designing language assessment tasks for determining the proficiency of non-native speakers of English in these situations. One specific purpose of the language assessment procedures described here is to determine whether or not the defendant comprehended complicated legal vocabulary contained in the caution. Findings may then be used by a Judge or others to assist in deciding whether the defendant's rights were in fact breached. The example of a 50 year-old Samoan man charged with drunk driving is presented as a case study illustrating how the procedures were applied.

## METHODOLOGY

According to the Writing@CSU: Writing Guide (2002), a case study

refers to the collection and presentation of detailed information about a particular participant or small group, frequently including the accounts of subjects themselves. A form of qualitative descriptive research, the case study looks intensely at an individual or small participant pool, drawing conclusions only about that participant or group and only in that specific context. (<http://writing.colostate.edu/references/research/casestudy/>)

This report is presented as a case study; more specifically, as an illustrative case study. This kind of descriptive study seeks to use one or two instances of an event to show what a situation is like. The flexible nature of illustrative case studies serve mainly to make familiar the unfamiliar and to give readers a common language about the matter in question.

### **PARTICIPANT AND CONTEXT**

In March 2000 I was approached by the defence lawyer for a 50-year old Samoan man (Mr A) who was about to appear in a New Zealand court on a charge of drunk driving. He had been read the caution and responded in the affirmative, later signing his name to a statement prepared by the police saying he understood what his rights were. My task was to identify whether, in actual fact, he had understood what was read to him.

Below, I outline the procedures involved in assessing the accused's language abilities, the results of the language proficiency assessment and my comments on the results.

### **PROCEDURES LEADING UP TO THE LANGUAGE ASSESSMENT**

There were two initial steps. First, I familiarised myself with the material relating to the charge. This involved an analysis of the following items that were provided by the defence.

1. Brief of Evidence of arresting evidence.
2. Copy of Bill of Rights Form.
3. Memo citing precedents.
4. Newspaper clippings in Samoan and English.
5. A copy of the actual Bill of Rights Caution form given to the accused

The second step was to design an appropriate assessment device. Language was central to the charge. For this reason, I felt it was necessary for the assessment to focus on Mr A's level of spoken English proficiency; his knowledge of vocabulary, especially the vocabulary used in the Bill of Rights; and his level of literacy both in English, and his first language, Samoan. A one-on-one interview seemed the best way to do this.

After consulting with a colleague I decided to divide the assessment interview into six 10-minute stages. The one-hour time frame was necessary to increase reliability and validity in the data collection. I felt it was unlikely that a lower-level, non-native speaker of English would be able to sustain any linguistic deception over this length of time. Prolonging the process of data gathering at the site is recognised as one method of addressing concerns about reliability and validity in case studies such as this (Writing@CSU, 2002).

The interview format is presented below in summary form.

## International English Language Testing System (IELTS) exam.

At this point it is worth mentioning briefly some relevant information about IELTS. At the time of the court case I was involved in testing the oral and written components of the IELTS exam at the University of Auckland. Students are awarded a band from 1 (low) to 9 (high). The examination is used as something of a gate-keeping device with appropriate results from these tests allowing people to enter university, or immigrate to New Zealand, for example. IELTS examiners are not permitted to use IELTS training outside of these examinations. Thus, the assessment task I designed for Mr A does not represent an IELTS interview, the results that I discuss later do not represent IELTS scores, and the assessment criteria that I used do not represent those used in the IELTS oral examination. However, it is inevitable that the format of the IELTS interview has influenced the design of the assessment used here in some way. The main similarity is in the use of 9 bands.

The assessment scale that I designed needed to take into account various aspects of Mr A's language ability. Before the interview I consulted various sources including an IELTS textbook (Adams & Peck 1995) and band descriptors for various other exams (Carroll and West 1989) and decided on four basic areas of language proficiency relevant to the charge.

1. Communicative ability
2. Listening ability
3. Presence of errors
4. Pronunciation

### Stage 1: Introduction.

1. Greet Mr A and make sure he is relaxed.
2. Ask him to fill out a brief CV.

The CV asked for basic information including:

1. Family name
2. First name(s)
3. Date of birth
4. Place of birth
5. First language
6. Other languages spoken
7. Length of time you have spoken English
8. Educational background and qualifications
9. Work experience
10. Future plans
11. Other details: Hobbies, interests, family, church

The rationale behind the CV was that it would provide information for me to question him on in Stage 2. It also it would given me an initial impression of his spoken and written levels as well as his ability to follow instructions.

### Stage 2: Assessment of spoken English

1. Ask questions based on the brief CV he has just filled out.
2. Take notes.
3. Attempt to push him to his linguistic ceiling.
4. Attempt to grade him on the assessment scale.

By point 3 above I mean that I would attempt to push him to the upper limit of his spoken English ability and grade him on an assessment scale. This technique is used by examiners in the oral interview for the

I then developed descriptors for each area across 9 bands. Band 9 would recognise an expert user of English, band 8 a very good user, down to band 1. Band 1 would represent someone who was essentially unable to use English. As Mr A's linguistic proficiency was so low, I did not need to use the entire range. A cut down version of this assessment scale is presented in Appendix 1.

### **Stage 3: Assessment of vocabulary from Caution and Bill of Rights (1991)**

1. Explain how the task works using the examples.
2. Accused completes the vocabulary task.

Stage 3 was designed to take into account Mr A's vocabulary knowledge, especially his knowledge of vocabulary from the Caution and Bill of Rights (1991). The intended procedure here was for me to explain how the task worked using various examples and then for Mr A to complete the vocabulary task alone. The format for the vocabulary task comes from Nation (1990) and is well established as a vocabulary testing instrument. In fact, we already used the format to test for vocabulary knowledge in our language proficiency courses at the University where I taught at the time. I modified various examples from Nation's (1990) vocabulary tests and substituted words from the Bill of Rights. The reason for this was to assess whether Mr A actually knew the meanings of key words from within the Bill of Rights. The key words and phrases selected were as follows.

1. not obliged
2. recorded
3. evidence
4. consult

5. instruct
6. refrain from
7. practicable

### **Stage 4: Assess L1 literacy**

1. Mr A reads a short text in Samoan.
2. Mr A writes down in English what the article was about.
3. We discuss the article

### **Stage 5: Assess English literacy**

1. Mr A reads a short text in English.
2. Mr A answers comprehension questions about the text.
3. We discuss the article

Stage's four and five were designed to assess Mr A's level of literacy both in Samoan, his first language as well as English. The rationale behind this was that poor first-language (L1) literacy is often linked to poor second language literacy. The procedure for stage four was for Mr A to read a short text in Samoan and then write down in English what the article was about. Following this we would discuss the article.

### **Stage 6: Further conversation**

1. Tell me what happened.

### **DATA COLLECTION**

The language assessment interview was scheduled for 3.00 pm March 23, 2000 at a large university in New Zealand. This was seen as a more neutral environment for the assessment. In other words, it was not a courthouse or anything related to the court. The primary methods of data collection were the one-to-one interview and direct observation of the accused. The

actual interview took place on March 27, 2000 at approximately 11.00 am after being rescheduled. The interview was carried out in an empty classroom with myself and the accused present. I recorded the interview on cassette tape and took notes at the time.

As will be noted below, the assessment did not go entirely as planned due to Mr A's extremely limited proficiency in English.

## DATA ANALYSIS

Consistent with case study design, data was interpreted holistically. The results follow below.

### Stage I: The Introduction

The first stage was to be the introduction. During this time I greeted Mr A and attempted to make sure he was relaxed. I intended to ask him to fill out a brief CV as described above.

Here, Mr A was able to write down his family name, and first name without any assistance from me. I noticed at this time that he was left-handed, and took considerable time to form letters and write in English. He needed my help in spelling March when it came to writing his date of birth. I also had to help him with the year. From this point on I had to help the accused considerably with every single question.

He did not understand Place of birth until I gave him four or five examples. After some prodding he was able to answer. This happened again with the next item, First language. At this point I realised that it was not that he simply did not understand the words. The primary problem here was that he could not read the words, let alone understand them. This suspicion was

confirmed when I asked him if he could read the next item to me.

When explaining item 6 on the CV to him, he asked me to spell English for him. I then had to show him what the letters g and l looked like.

Item 7 was difficult for him to understand. I clarified the question orally by asking him 'How long have you been speaking English? How many years have you been speaking English?' Even after some discussion here and further clarification Mr A still misunderstood the question to mean 'How old was he when he started learning English'. Again, I had to spell 'ten years' for him.

Next, I simplified Item 8 by asking him about his schooling. The reply was that he attended primer one and primer 2 in Samoa.

Mr A seemed to understand Item 9 once I read it to him, but lacked the ability to explain what he really meant. From his reply, I understood that Mr A had done some work as a farmer for eight years and also had had a job ironing lava lavas. I asked him to write down farmer at this point. He did not know the letter r. We continued our discussion of his various jobs orally. At this point I began to notice one of Mr A's main errors: his use of the pronoun she. A brief transcript follows below of some of our conversation here. My use of 'xxx' refers to places where I am unable to make out what he is saying due to his pronunciation difficulties.

GS: What about in New Zealand? Have you done any work in New Zealand?

Mr A: Oh ... she come New Zealand she work first working for a cow

GS: Mmmm... Milking?

Mr A: ... yeah ... second working for the strawberry ... six years xxx... six years working strawberry xxx working strawberry ...

GS: picking the strawberries?

Mr A: picking a ... put down a plants ...yeah ...n all xxx strawberry umm she's picking xxx six year ... she's working Cheng Chon...

GS: St Johns?

Mr A: Yeah ... St John for North Shore Glenfield ... um ... she three years

GS: OK...

Mr A: xxx she no more working ... um ...she call the factory n she cun the boss an me no speak un'stand speaking

Mr A is using the pronoun 'she' to refer to himself. Also, it seems to be the case here that there was no more work for him with this particular job due his limited English ability.

By this stage I had begun to realise the extent of Mr A's language difficulties and had abandoned the idea of a separate second stage where we discussed his responses to the items on the CV. We were doing that already as I had to explain carefully and clarify what

The results of the first item in the vocabulary assessment task were as follows.

1. not obliged

2. complain

3. fix

4. hire

5. introduce

6. stretch

\_\_3\_\_ make wider or longer

\_\_4\_\_ bring in for the first time

\_\_6\_\_ not necessary to do something

each item meant. At this point I also abandoned the idea of Mr A writing his responses down. It was becoming obvious that his writing ability was extremely limited.

### Stage II

The second stage was the assessment of Mr A's spoken English. As mentioned above, the first two stages merged together due to Mr A's inability to write or read the material on the CV. As we discussed most of the items orally, I used this time to make an initial assessment on the band descriptors. My initial assessment at this stage was a Band 2. This means that I found him able to communicate basic information only and extremely limited in his ability to respond.

### Stage III

Even in explaining the instructions for the test it was obvious that Mr A's understanding of basic instructional language was limited. He was unable to read even the examples which contained such basic words as 'clock' , 'pen' , and 'wall' and he had considerable difficulty actually doing the examples. I gave him several minutes to see if could do the actual task. Again, however, I had to abandon the idea of Mr A doing the task by himself. We then went through the task orally.

Not only was he not able to match 'not obliged' from the Bill of Rights with 'not necessary to do something', he was unable to match other simple vocabulary items like 'stretch' and 'introduce'. These other words are called distractors by test designers and help make it harder for the person being

tested to randomly guess the answers, thus improving the reliability. I realised at this stage that we did not have the time to attempt every single vocabulary item orally. I then proceeded with the test, but without the distractors. The results were as follows

- |             |              |                                 |
|-------------|--------------|---------------------------------|
| 1. blast    |              |                                 |
| 2. career   | <u>  4  </u> | put down on paper, tape or film |
| 3. humour   | _____        | change to improve something     |
| 4. recorded | _____        | profession                      |
| 5. monument |              |                                 |
| 6. reform   |              |                                 |

- |               |              |   |
|---------------|--------------|---|
| 1. ballot     |              |   |
| 2. efficiency | <u>  6  </u> | information used in court                       |
| 3. parade     | _____        | piece of paper used to vote                     |
| 4. evidence   | _____        | safe room for keeping money or expensive things |
| 5. shovel     |              |   |
| 6. vault      |              |   |

- |               |              |                              |
|---------------|--------------|------------------------------|
| 1. area       |              |                              |
| 2. carbon     | <u>  1  </u> | ask for an opinion           |
| 3. diagram    | _____        | size of a surface            |
| 4. factor     | _____        | study of the meaning of life |
| 5. philosophy |              |                              |
| 6. consult    |              |                              |

- |              |              |                              |
|--------------|--------------|------------------------------|
| 1. alcove    |              |                              |
| 2. barricade | _____        | baby's clothing              |
| 3. instruct  | <u>  3  </u> | tell someone to do something |
| 4. diaper    | _____        | released from prison early   |
| 5. gag       |              |                              |
| 6. parole    |              |                              |

- |          |  |  |
|----------|--|--|
| 1. charm |  |  |
|----------|--|--|

- |                 |       |                               |
|-----------------|-------|-------------------------------|
| 2. attack       | __6__ | deliberately not do something |
| 3. lack         | _____ | pleasing quality              |
| 4. pen          | _____ | not having something          |
| 5. shadow       |       |                               |
| 6. refrain from |       |                               |

- |                |       |  |
|----------------|-------|--|
| 1. comment     |       |  |
| 2. practicable | __4__ | feasible                               |
| 3. import      | _____ | goods from a foreign country           |
| 4. nerve       | _____ | part of the body which carries feeling |
| 5. pasture     |       |  |
| 6. tradition   |       |  |

In brief, under highly controlled conditions and a much simplified test format, Mr A matched three out of seven vocabulary items correctly. On reflection, it is my opinion that at least one of these was a wild guess as Mr A demonstrated on several occasions a tendency to guess words he did not know. This tendency to guess unknown words is something many language learners do.

During the vocabulary assessment I noticed that Mr A did not know many of the words in the explanations, let alone the actual vocabulary items I was testing. For example he did not know the word 'opinion' in the third example above.

#### Stage IV

The text in Samoan which I gave Mr A was about Rugby League. He read some of this slowly out loud to me, but stopped whenever he encountered a non-Samoan word in the text. This seems to indicate that Mr A has some literacy in his first language even if he has minimal literacy in English. I then asked him what the text was about. Below is an excerpt from this part

of our conversation.

GS: Tell me what it's about.

MA: . . . oh . . . she down . . . she ready da . . . xxx . . . de . . . um . . . Auckland . . .

GS: Mhmm?

MA: . . . for play . . . she playing, playing a . . . xxx for for super 12 . . .

Next I asked him to write down for me what it was about. This was what he wrote.

*ready Auckland pl 12. Waratahs*

*Ao Sanni atu Auckland taulo m. Waratahs*

I had to help him with the spelling for the word 'ready'

#### Stage V

The procedure in stage five was for Mr A to read a short text in English, answer some comprehension questions about the text, and discuss the article with me. The text which I gave Mr A was from the New

and	the	of	Samoan	a	of	at	49	year	old	in
to	on	November	25	at	his	home	Otara	1000		

Zealand Herald and concerned the recent funeral of a famous Samoan tattooist that the accused was already familiar. The text was initially too daunting. However, with my considerable prompting Mr A read though the first 2 \_ sentences. He could identify numbers and basic words within the text. The list below contains words from the text that Mr A was able to read without help from me.

When he encountered a word not on this list, he waited for me to read it aloud before he would continue. It seems obvious to me from this list that his vocabulary is limited to words of mostly one syllable from the 100 or 200 most frequently used words of English.

Also, he could answer basic questions about the text where he had to identify numbers. He showed a tendency to guess answers to some comprehension questions here.

### Stage VI

The final stage, was further conversation where I asked him to tell me what happened. It was not my intention to cross-examine him, but rather to hear him talk in more detail on a subject that obviously would motivate him. This stage gave me a final chance to further assess Mr A's communicative ability in English and confirm my initial thoughts concerning his level. I returned to the assessment band descriptors at this stage and finalised my evaluation of Mr A's language proficiency.

### Summary of Results

With regards to his reading ability, the results showed he could read simple words of one syllable that fall within the most frequently used function words of English such as 'at', 'the', and 'to', for example. Mr A appeared to have some ability to read in his first language, Samoan. This, though, seemed limited too. He could read a short text aloud, but became confused and stopped when he encountered Palangi or European words in the text. He could not explain to me what the text was about, either orally or in writing.

Furthermore, he was unable to write coherent sentences in English, although he could write some words if they were spelled aloud or if he is able to copy them. He could write his name but little else without considerable prompting. In general, he wrote with difficulty and appeared to have problems forming letters on the page. He could not remember how to write some letters of the alphabet (for example g, r). The results of the language assessment showed that Mr A was able to recognise a wider range of words if they were read aloud to him slowly several times and were explained carefully.

With regards to communicative ability, the assessment which I designed for this case seemed to indicate that Mr A could only communicate basic information and simple meaning, using mostly isolated phrases and sentence fragments. He had extremely limited ability to respond to stimuli in English especially questioning. He was barely able to handle basic listening operations

with any degree of confidence or competence. Errors were extremely frequent and interfered with communication. Communication with Mr A broke down very frequently and while it was possible to communicate at a low level, the presence of so many errors means that sometimes communication often became virtually impossible. Furthermore, Mr A frequently confused pronouns. 'She' seemed to be his default pronoun for 'I', 'He' and 'She' or anyone. This made it virtually impossible to understand whether he was referring to himself or someone else in conversation. He frequently misunderstood questions and requires considerable clarification and checking.

Mr A's first language, Samoan, strongly influenced his pronunciation in English. This meant that due to pronunciation difficulties his speech ranged from being often unintelligible to being simply unintelligible.

Before the interview, I had designed a global scale with various descriptors with which to assess Mr A. This scale ranged from 1 (someone who is essentially unable to use English) through to 9 (a non-native speaker with basically the language proficiency of a native English speaker). Based on this scale and the results of the assessment, I rated him a band 2 on this scale. I labelled him an intermittent user of English who sometimes ranges through to an extremely limited user (band 3) under ideal conditions. The assessment was, of course, all under ideal test conditions, in other words in an empty classroom, in a (reasonably) non-threatening and neutral environment with a sober test candidate.

## DIFFICULTIES

The vocabulary test I had planned for the assessment was largely a failure as the accused could not read. Even in a highly simplified oral version he still failed to recognise even half of the words. Those words he did match correctly may have simply been guessed as the test was rendered less reliable in its simplified state. As mentioned earlier, it is worth bearing in mind that the vocabulary test I administered involved me explaining and reading as we went through. I also decided to not test him on the distractors - words I added to vocabulary test to disguise the words from the BOR. The reason for this was, also as mentioned earlier, that I realised that he was basically illiterate and could not complete the test alone. Also, if we had gone through every item on the test orally it would have taken an additional hour. Time constraints mean that this was not possible. Another problem with the vocabulary test is that it was a forced choice test. My opinion is that if I had asked Mr A, 'What does X mean?', he would not have been able to answer at all.

## IMPLICATIONS

The current study could have been improved by designing a more comprehensive set of band descriptors across a wider range of linguistic variables. An increased array of variables would mean that more specific problems in the accused's linguistic competence could be identified.

Another, perhaps more important, concern is that many cases like this may slip through the courts unnoticed. There is currently no way of monitoring the situation of immigrants falsely convicted because of poor linguistic competence. The way in which this issue may be addressed comprehensively is beyond the scope of this paper. However, my recommendation is

for increased responsibility and awareness of language issues on the part of the New Zealand Police force, particularly when charging a suspect. This may mean that interpreters and or bilingual lawyers need to be made available on call in the same way that nurses and normal lawyers are.

## CONCLUSION

The accused, a non-native speaker of English, when confronted by an officer of the law with the Bill of Rights Caution, indicated that he understood what was being read to him and later signed a statement to the same effect. The results of the case study provided by the six-stage, one-to-one interview described above indicated that Mr A was basically unable to read or write English. The assessment seemed to show he was extremely limited in terms of communicative ability, had poor - often unintelligible - pronunciation, and an extremely limited vocabulary. Given these results it was extremely unlikely that Mr A understood the Bill of Rights Caution, even though he indicated that he did and even signed a statement to that effect. I reported these results to the court in my role as an expert witness. Subsequently, the case against Mr A, a New Zealand immigrant accused of drunk driving, was thrown out by the Judge because his rights were breached through incomprehension of the Bill of Rights caution.

These specific findings have limited generalisability and no attempt is made to link them to any universal truth or larger theoretical perspective. With regards to the case of Mr A, the emphasis has been purely on description. This is consistent with case studies on the whole. However, this paper has also reported on procedures for designing language assessment tasks for

determining the proficiency of non-native speakers of English in these situations. In this sense, the procedures may be applied and adapted by others to their own specific circumstances as a method for evaluating the proficiency of those who perhaps find themselves in the same kind of situation as the person referred to in this paper.

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**Appendix 1: Language assessment band descriptors**

<i>Band</i>	<i>Use of English</i>	<i>Communicative ability</i>	<i>Listening ability</i>	<i>Presence of Errors</i>	<i>Pronunciation</i>
4	Limited	Communicates basic meaning in familiar situations	Handles simple listening operations with a degree of confidence and competence.	Errors are frequent and interfere with communication Longer utterances break down	Strong influence of L1. Frequently interferes with communication. Often faulty.
3	Extremely limited	Communicates simple meaning in familiar situations	Handles very simple listening operations with a low level of confidence and competence.	Errors are very frequent and interfere with communication. Communication frequently breaks down	Strong influence of L1. Significantly interferes with communication. Faulty
2	Intermittent	Communicates most basic information only	Barely able to handles basic listening operations with any degree of confidence or competence.	Errors are extremely frequent and interfere with communication Communication very frequently breaks down	Very strong influence of L1. Often unintelligible. Faulty.
1	Essentially not able to use English	Communicates isolated words, phrases, sentence fragments only.	Unable to handle simple listening operations with any degree of confidence or competence	Communication virtually impossible due to the presence of errors.	Extremely strong influence of L1. Unintelligible. Faulty.