

Analysis and Attestation of Linguistic Evidence in Judicial Practices

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On the basis of analysis of the mobile messages between the plaintiff and the defendant in the defamation case of *Yang v Hu* in which the authors testified as expert witness, this study shows that analyzing and attesting controversial linguistic evidence is indispensable in judicial proceedings. The expert opinion related to such kinds of linguistic evidence can help judges in maintaining the strength to the proof of the linguistic evidence. The main themes approached in this study are: the absence of the analysis and attestation of the key linguistic evidence in the court judgment, analysis of the linguistic evidence in the mobile messages as the linguistic evidence of the case, and status quo of legislation on expert witness of linguistic evidence in China.

Keywords: linguistic evidence, analysis and attestation, sexual hint

1 Introduction

Language is a complicated social-cultural phenomenon. Linguistic evidence involves idea of legal science, the scientific intension and the essence of the rule-of-law society. It is a very important research topic, which merits our in-depth study; that is, it is necessary to have a thorough understanding, a deep realization and an accurate grasp of the words encoded in the legal evidence. The calling upon of linguists as expert witness has been noted since early 1980s, though the cases were relatively rare then. With the increasing number in cases involving reputation, especially in the post-net epoch, linguist expert witnesses have attracted some attention, though far from enough, from law professionals and judicial practitioners. Studies on linguistic evidence can be well noticed in many studies both in China (Cheng & Wang,

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2007; Wang, 1999; Wu, 2002) and outside of China (e.g. Coulthard, 2004; Coulthard & Johnson, 2007; Kniffka, 2007; Shuy, 1993, 2007, 2010; Solan, 1998). These studies are undoubtedly valuable for the present case-based study.

In the context of legal language in the information ages, it is a fact in judicial practices in China that the cases involving linguistic disputes are going up. The judicial practices have proved that there is indistinct and vague analysis of linguistic evidence applied in judicial acts, in which the deficiency can be noticed in the capacity of analyzing and attesting for some investigators concerned. An inaccurate analysis and attestation of linguistic evidence will be undoubtedly detrimental to the impartial enforcement of law. Therefore, we must pay close attention to the analysis and attestation of linguistic evidence in studying legal language. We should make scientific analysis of the obscure and ambiguous linguistic evidence to excavate and dig up the real purpose of the words covered by the obscure and ambiguous words, and to eliminate the ambiguity so as to help the court in making an appropriate judgment of the legal fact. This study is not a comprehensive analysis of the legal significance and the categorization of the linguistic evidence. It is only a thinking derived from the key linguistic evidence presented in the case of *Yang v Hu* in the matter of infringing upon reputation.

2 Case brief

According to the judgment delivered by the trial court, in the late half of 2006 Hu (the defendant) was acquainted with Yang (the plaintiff) by recommendation of Hu's friends. During the time of recruitment of the crew for a TV drama, which was to be directed by the plaintiff, the defendant expressed her intention to play a part in the TV drama, and the plaintiff sent the playbook of the TV drama to the defendant through e-mail as well. During that period, the defendant joined the dinner-parties of friends at the invitation of the plaintiff, and they were in regular communication with each other by sending mobile messages as well. In August 2006, the crew finally decided not to select the defendant as a role in the TV drama. On 24 August 2006, the defendant set up her individual net daily record on Sina network (hereinafter:

blog) and published her article entitled “Having no choice but to do so?” It was stated and recorded in the article that the plaintiff, taking advantage of his position and power as the director of the TV drama, had asked the defendant to assist at wine dinner parties for many times and sent her affectionate mobile messages, giving sexual hints, and that the defendant would have been accepted to play a role in the TV drama subject to her consent to have sexual relations with him. After the defendant refused such a sexual invitation, the plaintiff finally withdrew his promise to select her as a role in the TV drama.

In the article, the defendant censured the plaintiff for taking advantage of his position as an artist, a poet, editor in chief and director to look for game, and with this, attacked the hidden rules in the film, TV and entertainment circles, in which it seems a common practice that it is necessary for an actress to be subject to having sexual relations with the director in order to play a role.

In the judicial proceedings, the defendant applied for calling for the material (files) of the contents of the mobile messages sent by the plaintiff to the defendant from 1 June 2006 to 31 August 2006. After investigation and examination, the application of the defendant was considered to be valid, so the court called for the contents of the mobile messages between the plaintiff and the defendant from 1 June 2006 to 31 August 2006 from Beijing Mobile Communication Co. Ltd.

The content of the words of the mobile messages-communications between *Hu v Yang* (verified in the first review) is translated as follows:

1. (i) Hu: Have you been very busy recently?
(ii) Yang: Aha, aha, it won't stop me missing you, darling!
2. (iii) Hu: Come to get together someday when you are free!
(iv) Yang: I don' want to go out; I just want you to come in.
3. (v) Hu: I'm stupid. It's too abstruse. I can't understand it.
(vi) Yang: Then, let it be.
4. (vii) Hu: Is the action on 15 August?
(viii) Yang: Of course, shooting a TV drama isn't a trifling matter.
5. (ix) Hu: May I have an opportunity to cooperate with you?
(x) Yang: You haven't come in. How can we get in cooperation?

6. (xi) Hu: What did you mean by “come in”?
(xii) yang: It’s to satisfy my missing. (author’s translation)

The defendant held that the contents of the messages sent by the plaintiff to the defendant during this period, such as “I have been very busy, but it won’t stop my missing you, darling!”, “ I don’t want to go out; I want you to come in”, “Since You haven’t come in, how can we cooperate”, “It is to come into my missing and satisfy my missing”, “I’m missing you, darling!” etc., had the potential of sexual hints. The plaintiff hadn’t raised any objection to the truth of the contents of the mobile messages, stating that parts of the wordings in the above mentioned mobile messages were the wordings of ridiculing used by the plaintiff as a poet, so the plaintiff argued that the words “I want you to come in” meant the wish of the plaintiff for the defendant to bring her funds into the crew, and that “my missing” was of the similar meaning. The trial court did not give much consideration to the mobile messages, which led to the appeal from the defendant. The defendant then asked the author of this paper to testify as expert witness before the court. Unfortunately, the appellate court sustained the original decision, still without putting much weight on the strength of linguistic evidence give by the author.

3 Analysis and discussion

As will be shown in the following analysis, the analysis and attestation of the mobile messages between the plaintiff and the defendant as the key linguistic evidence of the case done by the court is not precise, thorough and unsound. Due to the deficiency of analysis and attestation of linguistic evidence during the court proceedings, the decision based upon the so-called legal facts is naturally doubtful. It is therefore not surprising that after the delivery of the judgment by the trial court, the defendant refused to accept it and took insufficiency in analyzing and attesting linguistic evidence as one of the major grounds for appeal. In an exceptional case, if there are certain obscure wordings of the contents of the linguistic evidence, which may lead to a dispute, a scientific analysis of linguistic communication by experts of related disciplines (such as linguists) is needed.

3.1 Deficiency in analysis of linguistic evidence

The written judgment of the first instance of the case involves the key linguistic evidence of the case – the mobile messages-communications between the plaintiff and the defendant. Due to the absence of the analysis and attestation of the linguistic evidence, there aroused vague room for thinking of “inner conviction” in the court’s maintenance of the legal fact of the case. This can be noticed in the following extract in the trial of the first instance:

Concerning the section that in her article (i.e. the defendant’s words signed on the blog on the Sina web – the author’s note) the defendant says that the plaintiff has sent her disgusting messages, it has been verified that there were mobile messages between the plaintiff and the defendant from 26 July to 5 August 2006. Though, judged *from the angle of general social understanding, there are some relatively affectionate wordings and obscure words in the messages from the plaintiff, which may cause ambiguity, they are not enough to be maintained that the plaintiff sent the sexual hints.* After the article published on the blog, it has had certain repercussions in public, which has led to negative criticism from mass of people towards the plaintiff, making his human dignity belittled... (*emphasis added*)

This extract, especially the emphasized part, is worth to be thought over and commented. The result of general public understanding reflects the social accumulation of the traditional Chinese culture to a certain degree, forming the social normal concepts of universal significance, including the normal concepts of sexual culture in people’s mind. Therefore, one may say that the public understanding is the lowest limit for the public judgment over the social public morality, which should be taken seriously by the court. According to the benefit of doubt and with the presupposition that the contents of the words of the mobile messages have been verified by the court, the result of the general public understanding should be to the dependant’s advantage, instead of being used to prove the negative influence on the plaintiff.

In the linguistic evidence, what kind of purpose of linguistic communication does it transmit in the expression that “there are some relatively affectionate wordings and obscure words”? If such a state of affairs appeared in judicial adjudication, i.e. the content stated in the linguistic evidence has its specific characteristics – “some obscure words”, “cause ambiguity” and so on. The cognition of the strength to prove of the linguistic evidence is usually beyond the scope of business of the judges, and the linguistic evidence has to be analyzed by experts of related disciplines and the result of analysis is expected to submit to the court for attestation. To resolve the dispute between the plaintiff and the defendant of the case on the mobile messages as linguistic evidence, we can ask the linguists for linguistic analysis of the contents of the linguistic communication to develop the real semantic meaning covered by ambitious words so as to find the real purpose of communication, while considering the purpose of the words understood by both sides of the communication. Only in this way can we get a better understanding of the legal fact in dispute to make a proper judgment for the just enforcement of law.

However, the trial court seemed reluctant to ask for linguist expert to analyze the linguistic evidence, as noted in its judgment:

The above mentioned facts, including the article published by the defendant on her blog, the relevant reports of news media, the negative comments of the public upon the plaintiff published in the network, records of the mobile messages between the plaintiff and the defendant from 1 June 2006 to 31 August 2006 and the statements of both clients, serving as the evidence of the case, and being a matter of record, are in proof of the case.

The court has not analyzed the contents of the evidence of the mobile messages concerned, and neither analyzed nor attested the explanation by Yang’s attorney and then had them as evidences of the case recorded in the written judgment. The written judgment based on such a fact is obviously unjust, which caused the appeal from the defendant.

3.2 Analysis of the speech chain and the rounds of communication

There are 12 sentences in the mobile messages – communication between Hu and Yang, which constitute six rounds of communication. The overall intention of the wordings of the six sentences in Hu's speech is very clear, i.e. in hope of striving for a part to play in the TV drama directed by Yang. The sentence (ix) is the most straightforward expression of such an intention.

We can see that there is a branching out of their respective intentions of communication in the first round: in sentence (i) Hu sent out her message of greetings of her own accord to Yang, using a normal sentence of etiquette of communication. From the subsequent sentences (vii) and (ix), we can confirm that Hu got in touch on her own initiative with director Yang to enquire whether she could have a chance to play a part in the TV drama, but in Yang's response [sentence (ii)], he made use of the subject under discussion to put over his own ideas, leading the topic of communication to "missing you", moreover, followed up with "darling!" Yang's intention of communication is, obviously, different from Hu's, if interpreted in association with Yang's responses [sentences (ii), (iv), (x) and (xii)]. Thus, from the beginning in the first round of communication in Yang's so called "ridiculing", we can see there is a touch of enticements.

In the second round of communication, Hu could still cope with Yang's response [sentence (ii)], sending sentence (iii) "Come to get together someday when you are free!" However, Yang's response [sentence (iv)] "I don't want to go out; I just want you to come in!" had made Hu have no choice. Yang's impure motive from his wordings aroused Hu's vigilance. By instinct, she made response "I don't understand" to protect herself. Since then starts the third round of communication. In the meantime, if it had been really like the explanation of Yang's attorney at the debate before the trial court that "it means that he [Yang] wants Hu to bring her funds to the crew", Yang would have made explanation in his response [sentence(vi)], but the linguistic fact reflected in the messages is otherwise – there has never been the topic of "bring funds into the crew" in the context of this mobile message, neither has it been in the previously arranged words. It is possible that such a meaning of words as "bring funds into the crew" may appear under given conditions. However, "Hu has never

told Yang about her financial conditions, how could Yang expect Hu to bring her funds into the crew?" (citing Hu's attorney before the trial court). Therefore, the interpretation of the expression "come in" is constrained by various factors but in any case it is impossible to mean "bring funds into the crew" by "come in" in the given linguistic context.

In the fourth round of communication, Hu's words [sentence (vii)] had directly kept to the point of the topic of shooting the TV drama, asking in sentence (ix) in the 5th round of communication the question: "May I have an opportunity to cooperate with you?". Up to this point, Hu was always explicitly expressing her intention of communication, whereas Yang's response was somewhat surprising. The inconsistency between the intentions of communication between both sides has created obstacles in communication. Thus, in the followed 6th round of communication, Hu naturally questioned Yang closely [sentence (xi)]: "What do you mean by *come in*?" Finally, Yang emphasized clearly in a relative sense that he wanted her to "satisfy my missing". An ordinary person of a reasonable sense can realize at once that Yang had always followed up his ideas in the 1st round of communication, using obscure words to convey another intention of communication, which is inconvenient to be expressed explicitly.

3.3 Analysis of the linguistic context

Any linguistic communication occurs within certain linguistic contexts. A linguistic context is the context of linguistic communication, which includes the interested parties, the background, events, topics, time and scene of the linguistic communication. It is necessary to recognize the following factors of the linguistic context to analyze and attest the messages.

We can summarize the relevant social linguistic context covers the factors such as time, scene and the interested parties as follows:

The mobile messages occurred from 26 July to 5 August 2006 with Beijing as the scene. Yang is the plaintiff, male, 44 of age, the head of CCTV classic studio. In the case Yang is in his capacity as a producer, screen author, director of a TV drama, chief-editor of a poetic magazine. Such an identity of Yang entails the internal factor of linguistic context - power to decide the parts of actors / actresses in the TV drama. Hu is the defendant, female, 25 of age, graduate of the opera major from

Shanghai Conservatory of Music, which implies the internal factor of linguistic context: performance-lover, seeking opportunities to develop her potentialities in Beijing, having to look to Yang for help, i.e. having the intention to play a role in a TV drama directed by Yang.

Based on the factors of the social linguistic context, we may reasonably conclude that this civil dispute has taken place in Beijing performing arts circles between Yang, an authority with many titles in one such as a producer, a screen author and a director, and Hu, a young actress, “wandering toward the North” seeking a job. On the basis of the contents of the sentences from the mobile messages-communications between Hu and Yang, which contained their respective speech chains, we can come into conclusion after analysis as follows:

Hu sent mobile messages to Yang on her own initiative, hoping to play a part in the TV drama directed by Yang. Her wordings have always been around this intention. Her wordings are clearly expressed. Yang’s responses have always been a departure from the messages sent to him by Hu. His wordings are affectionate → obscure → ambiguous, but the first sentence and the last sentence in his speech chains are always around the “missing”, so the real intention of his linguistic communication has been implied /hinted by his covert and obscure wordings.

3.4 Analysis of “hint”

Hint is to produce an impact on someone’s mind and act in an implicit and indirect way, making someone think and act according to the will of the hinter to achieve his aim. There are two kinds of hints: one is the “self-hint” – an individual psychology, and the other is “hint by others” caused by the compact on oneself produced by others’ words and attitude. In this case, the hint using ambiguous wordings given by Yang to Hu belongs to the “psychological hint by others”. It contains:

The psychological hint – “missing”;

The environment hint – “to come in” (to come in to me);

The deterrent hint – “You haven’t come in, how can we cooperate?”, (asking a question in reply – to strengthen the dynamics of the hint).

The condition hint – “satisfy my missing”.

With the order of the speech chains formed by the six of Yang's messages, the dynamics of the hint has gradually been strengthened. Upon receipt of the above-mentioned Yang's messages of hint, there aroused a "self-psychological hint" in Hu's mind, which implies her not to rise to the bait. So, we can say that Hu's saying "I don't understand" is just the shields to protect herself from Yang's trap. The differences between the aims of communications between both sides created the obstacles to words cognition in the process of communication - Hu's saying "I don't understand". It is the surface meaning of language, that is, the external level of the linguistic context sent to the other party, the inner hint of which is for self-protection, refusing Yang's motives of hint.

As stated above, Yang's direction of words has not clearly responded to the other party's requirement (i.e. "if it is possible to cooperate with him"), but pointed to "I want you to come in, to satisfy my missing" and taken this as the condition to cooperate with him. Yang's aim of communication has been hidden in the covert linguistic context covered by his obscure words of hint. If one doesn't understand the above-mentioned background of the linguistic context, taking only the wordings literally, one can never understand what Yang meant. On the basis of scientific definition of "hint", Yang's wordings tally with the conception of "hint", i.e. to produce an impact on Hu's psychology and act by using implicit words and in an indirect way of saying to achieve his aim as expected - to "come in" and to come into his "missing" and to "satisfy his missing". There is only one interpretation of the context of the speech chains of Yang's messages, and no other interpretation of the linguistic information can be found.

3.5 Analysis of the ambiguity

There is ambiguity in languages and words. Therefore, we cannot rule out the existence of ambiguity, which gives sexual hints in this particular case; however, there is possibility to clear up ambiguity in a given linguistic context. Ambiguity is not the basic attribute of wordings. It is an extraordinary state of language. Arising of ambiguity is the result of application of language and skills of language application as well, which can be manipulated by users of language. Since the trial court of the case could point out the ambiguity in the

contents of the messages sent by Yang to Hu, then the proof of the meaning of the wordings of the linguistic evidence cannot be given on the basis of the interpretation of the words said by Yang's side only (e.g. Yang's saying that "come in" means "let Hu bring her funds into the crew"); instead, it should also take into account Hu's cognition of these words.

Then, are there any 'sexual hints' in Yang's mobile messages? In the old culture of the Chinese nation having a history of thousands of years, sexual hints have never been unfamiliar to the people having some education and experiences of life. Therefore, there is no need to give any more examples for proof. In fact, both clients of the case know in their hearts without saying anything, having a tacit understanding, so do the court and the readers. It is informed on the network that most of the net citizens considered Yang's messages hinting a sexual deal, but the court will not take it as the basis of judgment. We are all expecting that the civilized, just and open judicial action would give the green light to the analysis of the words in linguistic evidence soon and accept the arrival of it, because it is based on a scientific way.

4 Conclusion and implications

In *The Resolution on the Administration of Judicial Authentication adopted by the Standing Committee of the National People's Congress, PRC* (effective as of 1 October 2005), analysis and attestation of linguistic evidence are not explicitly included in the scope of business of judicial expertise. Correspondingly, there is the absence of analysis and attestation of linguistic evidence of this kind in the judicial procedure. In the world, there have been theories and practice of this field in justice of many countries. Richard Lightfoot, an Australian senior expert witness, who has worked in the field more than 40 years, expressed his point of view on this topic: "Without the support of professional knowledge or special experiences of the experts related, it

is difficult for the average persons to form a strictly logical, precise and reliable judgment upon the issues beyond common sense”.¹

Since the analysis and attestation is directed against the specialized knowledge, the Regulations are applicable not only to the disputes over the fact in an ordinary case, but also to the matters within the scope of investigation by court. The common sense possessed by ordinary people does not belong to the scope of “comment evidence” adjusted by the law of evidence. The exception of the program of comment evidence is directed to the “expert evidence”, i.e., “the testimony-comments given by experts having specialized knowledge in related fields on the basis of the specialized training, totally or essentially, ability and insight and experiences can be acceptable.”²

In China, the *Resolutions of the Evidence of Civil Proceedings* have been worked out by the People’s Supreme Court. What has been established by the judicial interpretation is only the system of expert-auxiliary, but not the system of expert-witness in full sense of meaning. The Article 61 of the judicial interpretation stipulates that “the client can apply to the People’s Court for 1-2 experts to appear in the court for illustration of the specialized issues of the case, which can effectively promote the reasonable cognition of the specialized issues in the way of normal logic thinking and the usual experiences of trials by judge, thus, to achieve the soundness of judgment. Although linguistic evidence was not well recognized in this particular case, but just one year after the case, the new Evidence Rules of the People’s Republic of China explicitly include linguistic evidence as one type of admissible evidence before the court.

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