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The translator as an expert witness in court

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Abstract: In the matter of *R v Yang* the Supreme Court of Western Australia considered the role of a translator as an expert witness. In this particular case, the Court had to consider the accuracy and relevance of a translation provided in a criminal trial. The Court analysed in detail the role of the translator in the criminal legal process and how that related to his ethical obligations of accuracy and impartiality. In doing so, the Court also had to apply the law related to expert witnesses generally, and when that evidence could be excluded. This article analyses the role of the translator as an expert witness in legal proceedings and comments on the necessity for all parties, but especially translators, to have a proper understanding of their role and ethical obligations in this regard, where a premium on accuracy and impartiality is arguably at its highest.

Keywords: Expert witnesses; expert evidence rules; translators; ethics; Makita principles.

1. Introduction

As noted by Nell (2006, p. 63), reliance upon expert evidence is now a common occurrence in litigation, with expertise being claimed over a broadening range of areas. As a result, when lawyers are advising as to the use of such evidence and preparing expert's reports, it is important for them to be aware of the circumstances in which expert evidence can be admitted and the requirements that must be satisfied by a party seeking to rely upon such evidence at a final hearing. With the launch of the the *Recommended National Standards for Working with Interpreters in Australian Courts and Tribunals* in 2017, awareness of the essential role interpreters play in the administration of justice in Australia has increased (in ensuring procedural fairness for those who speak a language other than English as their primary language). While it could be argued there is now some level of familiarity regarding the role of interpreters in the courtroom, there is much less awareness of the role of a translator in this regard. This is even more highlighted when a translator is called to appear as a witness in court, primarily to be examined on translations he or she has prepared that form part of the substantive evidence in a trial. In such a situation, the translator will be considered an *expert witness*, and the rules governing the use and testimony of such witnesses differ from general evidentiary rules.

This article reviews the role of the translator as an expert witness in legal proceedings. In particular, it will analyse the decision of the Supreme Court of Western Australia in *R v Yang*[1], a criminal proceeding in which the role of the

[1] [2016] WASC 410 ('*Yang*').

translator was critical in the Crown's evidence against the accused. The Court analysed in detail the role of the translator in the criminal legal process and how that related to his obligations under the professional code of ethics for translators. By way of background, the article will first outline the rules surrounding the use of expert witnesses in legal proceedings, with reference in particular to what are known as the *Makita* principles, before moving on to a discussion of the facts surrounding *R v Yang*. The role of the translator in this case will be described, with an analysis of his ability to act as an expert witness, with reference to his ethical obligations of accuracy and impartiality as well as how the law relating to expert witnesses applies to translators. In conclusion, the article will provide observations regarding the understanding by all parties of translators as expert witnesses in legal proceedings. The conclusion will also comment on implications for the administration of justice and translator training.

2. Translation in legal settings

Several legal translation scholars have argued that, given the nature of legal texts and proceedings, where the rights and responsibilities of citizens are at stake, there is a higher premium on accuracy on the part of the translator than there would be in other situations. As Cao (2007, pp. 13-14) states, the complexity of legal translation is attributable to the nature of the law and the language the law uses. Judgments and legislation are prescriptive, carrying with them legal consequences – the force of the law – for citizens, the subjects of the law. Thus, such legal texts have a prescriptive, binding function, based on the imposition of rules that must be abided by, under pain of sanctions being imposed (Hutton, 2009, p. 62). In fact, in no other field does language determine the establishment of rights and obligations, and the failure to respect said rights and obligations results, in most cases, in implications of a criminal nature (Longinotti, 2008, p. 8). Therefore, there is no room for misinterpretation or error on the part of the translator in this context, and, as Šarčević (1997) argues, in these situations it is imperative that the translator not be swayed by his or her personal disposition. Accordingly, the principle of fidelity (or accuracy) on the part of the translator has been seen as critical in a legal setting, where a translation could well play a role in the determination of guilt or innocence of a party. In *Yang*, among other things, the accuracy of the translations was called into question by the accused, and the inferences to be drawn from them regarding his guilt.

3. Overview of the rules in relation to the admissibility of expert evidence

Expert evidence is a species of opinion evidence. A common definition of the term "opinion" is "an inference drawn or to be drawn from observed and communicable data".[2] Generally speaking, and as provided by section 76 of the *Evidence Act* 2008 (Vic),[3] for example, such evidence, as opposed to facts

[2] *Dasreef Pty Ltd v Hawchar* (2011) 277 ALR 611 per Heydon J at [53] quoting from *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73 at 75.

[3] All legislation cited in this article refers to Australian state or Commonwealth (federal) legislation.

directly observed, is inadmissible. The law therefore draws a distinction between facts and inferences based on facts, although this distinction is not always easy to draw.[4] It is the business of witnesses to state facts, whereas it is the function of the judge or jury to draw inferences based on the facts put in evidence (Heydon, 2004, p. 923).

However, as section 76 of the *Evidence Act* 2008 (Vic) stipulates, expert evidence is admissible as an exception to the general rule that evidence of an opinion is inadmissible. At a high level, the role of an *expert* is to assist the court to determine the issues in dispute. To do this, the court must be able to assess the evidence adduced, including the independent expert's *opinion*. Accordingly, expert evidence can be defined as a reasoned inference or set of inferences (the opinion) drawn by someone with specialised knowledge from facts that the expert has either observed or assumed. The opinion must be based, at least substantially, on that person's specialised knowledge (Kumar, 2011, p. 427). This position has been legislated in most Australian jurisdictions (with the exception of Queensland, South Australian and Western Australia), of which Section 79(1) *Evidence Act* 1995 (Cth)[5] is an example. It states, relevantly:

> 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.

It is thus the expert's responsibility to provide the court with criteria to enable the expert opinion to be assessed. For example, a qualified medical doctor may, as an expert, express his or her opinion regarding the probable cause of an illness. In a murder trial, a ballistics expert may be called to testify regarding the trajectory of a bullet.

What must be noted here, however, is the common law rule that, like any other evidence, for the expert evidence to be admissible it must be *relevant* (Heydon, 2004, p. 101). This principle has been enshrined the *Uniform Evidence Acts*, where "Relevance" is defined in section 55 as follows:

> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

Section 76(1) sets out the general prohibition on opinion evidence,[6] with section 79(1) (as provided above) setting out the exception in relation to expert evidence. However, expert evidence that satisfies the requirements of section 79 may nevertheless be excluded at the trial judge's discretion under sections 135 or 136 of the *Uniform Evidence Acts*. Section 135 provides:

> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might –
>
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) cause or result in undue waste of time.

Section 136 states:

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[4] *Risk v Northern Territory* [2006] FCA 404 at [472]-[473].

[5] These will be referred to, where applicable, as the *Uniform Evidence Acts*.

[6] The section states: "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

> The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might –
>
> (a) be unfairly prejudicial to a party; or
>
> (b) be misleading or confusing.

As a result, care should be taken to ensure that any expert witness instructed by a party to appear understands that his or her report should provide the court with such information, including the field of specialised knowledge of the expert, the expert's qualifications, the facts and/or assumptions that form the foundation of the expert's opinion and how the specialised knowledge of the expert applies to those facts and/or assumptions to produce the expert's opinion (Robinson, 2003).

4. The role of expert witnesses and admissibility of expert evidence

In relation to the role of expert witnesses, the courts emphasise that an independent expert's ultimate duty is to the court; NOT the engaging party. Therefore, great care needs to be taken when engaging experts and obtaining expert reports to ensure that the independence of the expert is not, and cannot be perceived to be, compromised in any way (Robinson, 2003). The approach of the courts to expert witnesses, and expert evidence generally, was the subject of the case of *Makita (Australia) Pty Ltd v Sprowles*,[7] and thus led to the development of what is known as the *Makita* principles in relation to the admissibility of expert evidence.

4.1Makita (Australia) Pty Ltd v Sprowles

This matter was decided by the New South Wales Court of Appeal after a trial at first instance found the Appellant/Defendant was responsible for the injuries sustained by the respondent while at work. The relevant facts were that Ms Sprowles, an employee of Makita, sued her employer for negligence after she fell down stairs at her workplace. The court found the Appellant negligent and awarded her substantial damages. In the matter at first instance Ms Sprowles relied on expert evidence that the tread of the stairs was slippery. The trial judge accepted this evidence and, in doing so, found that the tread of the stairs was slippery, that this was the reason the plaintiff fell and that her employer was in breach of the duty of care that it owed the plaintiff by reason of the condition of the stairs. The finding that the plaintiff's fall was due to the slipperiness of the stairs was largely, if not entirely, based on the evidence of an expert called by the plaintiff (*Makita*, p. 724), who had concluded that the plaintiff's accident was caused 'by the inadequate frictional grip afforded by the very smooth concrete stair treads for [the plaintiff's] footwear. ...Whilst the interface between [the plaintiff's] shoes and step tread should not be classed as very slippery, the level of grip afforded is below that needed for a reliable margin of safety'(*Makita*, p. 724). However, there was also before the trial judge evidence of the plaintiff's use of the stairs in question repeatedly for nearly two and a half years prior to her accident and without incident or injury. Further, the plaintiff's immediate superior gave evidence of his regular and frequent use of the same

[7] (2001) 52 NSWLR 705 ('*Makita*').

stairs without incident or injury. The expert himself had observed that present occupants of the building regularly used the stairs in question for access to and from the car park and between the floors of the building. Finally, there was an absence of any evidence of any other person engaged in the defendant's business having ever encountered relevant problems on the stairs either before or after the accident. In those circumstances, were it not for the evidence of the plaintiff's expert, a conclusion that the stairs were not slippery would have been inevitable (*Makita*, p. 728).

The employer appealed. Included amongst its grounds of appeal was a claim that the trial judge had erred in accepting the expert evidence. Thus, the application of section 79(1) *Evidence Act* 1995 (NSW), which is identical to the provision in section 79 of the *Uniform Evidence Acts*, was in issue. However, it should be noted that the Appellant did not object to the *admissibility* of the expert evidence at trial; the only issue on appeal was the weight to be given to such evidence by the court (*Makita*, p. 745). The appeal was upheld unanimously and the verdict of the trial judged reversed. All three members of the Court of Appeal dismissed the evidence of the expert and found that the trial judge ought not to have accepted it, particularly in light of the evidence that was before the trial judge to the contrary effect.

In his judgment, Heydon JA (as he then was) endorsed the principle that the primary duty of an expert in giving opinion evidence is 'to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions' (*Makita*, p. 729). He enunciated the test of admissibility of expert evidence under section 79 (*Makita*, p. 743), which have come to be called the *Makita* principles:

> In short, if evidence tendered as expert opinion evidence is to be admissible it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specialised training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration of examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R* [1999] HCA 2; (1999) 197 CLR 414 (at 428 [41]) on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise".

In summary then, for the evidence of an expert to be admissible, his or her opinion must be:

1. within a field of 'specialised knowledge';
2. based on specific training, study or experience;
3. wholly or substantially based on the expert's knowledge;
4. based on facts that are identified and admissibly proved by the expert, or in some other way;
5. based on a proper foundation of facts; and
6. a demonstration of the conclusions reached based on expert's specialised knowledge.

Further, the expert's evidence must clearly identify the facts and/or assumptions on which the opinion of the expert is based. Accordingly, a crucial step in obtaining expert evidence is to brief the expert properly, providing him or her with all the relevant facts. A failure to brief an expert witness properly may result in the expert's evidence being rejected. In *Makita* the NSW Court of Appeal criticised the failure by the plaintiff's expert to explain how he had reached his conclusions, particularly the facts and assumptions underlying the conclusions. This resulted in the NSW Court of Appeal rejecting the expert's opinion and overturning a judgment in favour of the plaintiff for more than $1 million.

As stated by Hugo de Kock (2014, p. 10), state courts have generally embraced Heydon JA's approach in *Makita*,[8] while the Federal Court has not.[9] Further, as de Kock observes, the High Court's decision in *Dasreef Pty Ltd v Hawchar*[10] did not expressly resolve the difference of opinion between the state courts and the Federal Court; however, the majority did provide some support for Heydon JA's view *in Makita* (2014, p. 3). In a strong dissenting judgment, Heydon J, then subsequently sitting as a judge of the High Court, confirmed and expanded on the views he expressed in *Makita*.

5. Application of law relating to expert witnesses to translators – *R v Yang*

The failure by an expert witness (a qualified and credentialed translator) to explain how he had reached his conclusions (in the way of his translations), particularly the facts and assumptions underlying such translations was the subject of analysis in this case, a criminal prosecution of an offender charged with importing methamphetamine into Australia under section 307.1 (1) of the *Criminal Code* 1995 (Cth). At the trial of the issues, questions were raised regarding the reliability of the expert translator, his use of discretion, inconsistencies in his translation notes, and whether he was providing an opinion beyond his expertise. As outlined by Fiannaca J in his judgment (*Yang*, at [9] and [11]):

> The offender entered his plea of guilty at a Status Conference in this court on 11 February 2016… [however] I decided that a trial of the issues would be necessary, because the factual difference between the parties was significant in determining the offender's culpability for the purposes of sentencing. His culpability would be

[8] *James v Launceston City Council* (2004) 13 Tas R 89 at [10]; *Biseja Pty Ltd v NSI Group Pty Ltd* [2006] NSWSC 1497 at [13] – [16]*; R v WR* (No 3) [2010] ACTSC 89 (31 August 2010] at [47]; *Rees v Lumen Christi Primary School* [2010] VSC 514 (17 November 2010 at [29]); *R v Ryan* [2002] VSCA 176 at [9].
[9] *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157. See also Nell (2006) in this regard.
[10] (2011) 277 ALR 611.

> significantly less on his version (becoming aware of the substantial risk he was importing illicit drugs after he arrived in Australia) than it would be if he intended to import the drugs or was aware of the substantial risk he was importing such drugs before he came to Australia.

The relevant facts were that the offender (Yang) was introduced to an enterprise through his friend ('Jeong') whereby Yang was to deliver a piece of luggage from China to Australia. The offender had performed a similar role in delivering luggage from Brazil to Thailand just prior to the flight to Australia. Yang received all his instructions from someone who purportedly operated out of Russia (Bello). As noted by Fiannaca J, the Crown's submission depended in large part upon text communications between the offender and his friend, (Jeong), who got him involved in the luggage carrying enterprise, and between the offender and a person going by the name of Angelica Bello (Bello) who purported to be involved in an apparel business and was the person who engaged the offender in the enterprise, arranged for him to be paid and gave him instructions about what he needed to do. The messages exchanged with Jeong (and with another Korean friend) were in Korean. An issue arose about the translation of those messages provided by Mr Y Lee, engaged by the Crown to translate them, who at the relevant time held the appropriate credentials to translate from Korean to English and from English to Korean from the National Accreditation Authority for Translators and Interpreters (NAATI). The accuracy of some of his translations was challenged. Apart from some issues of accuracy raised on behalf of the offender, issues were raised about the tone of some of the messages and the inferences to be drawn from them. The issue in respect of those is what inferences can be drawn about the offender's knowledge and his state of mind more generally about the enterprise he was involved in (*Yang*, at [5] to [8]).

Thus, the question at hand for Fiannaca J to consider in determining culpability was the state of mind of Yang in importing a border-controlled drug. Specifically, it was whether Yang:

1. knew the drugs were in the luggage and was consciously aware that he was importing it into Australia, or
2. was aware of the likelihood that the luggage contained a substance other than clothing or fashion accessories, and there was a substantial risk that the substance was illegal.

To assess these matters, a translator was engaged by the Crown to translate from Korean to English messages exchanged on Facebook and Kakao Talk (a messaging program) between Yang, Jeong, another friend named Meng and Yang's sister. Concerns arose in relation to the translations which brought into question the reliability of this expert evidence.

6. Analysis of Mr. Lee's evidence as an expert witness

As described in the judgment, during his plea in mitigation the offender's counsel indicated that he took issue with some of the translations of the Kakao Talk messages. Consequently, Mr Y Lee was called to give evidence about the translations. He was cross-examined at length by the offender's counsel. To this end, Fiannaca J stated (*Yang*, at [55]):

> Mr Y Lee's translations of the Kakao Talk messages were challenged in a number of respects. As I perceived the challenge, it was not to the witness's impartiality, but to the accuracy of some of the translations and his methodology. More generally, it could be said that the challenge was to Mr Y Lee's reliability as an expert.

Along with Mr Y Lee's training and credentials, Fiannaca J (*Yang*, at [53]) observed that he appeared to be familiar with the Australian Institute of Interpreters and Translators (2012) *Code of Ethics and Code of Conduct* (*AUSIT Code*). The Code is divided into two sections, the *Code of Ethics* and the *Code of Conduct*, although the latter incorporates the ethical principles in the *Code of Ethics* and repeats some of the material from the former. The AUSIT Code requires interpreters and translators to be impartial and accurate in their interpretation or translation of material. Paragraph 5 of the *Code of Ethics* deals with accuracy and requires interpreters and translators to 'use their best professional judgment in remaining faithful at all times to the meaning of texts and messages'. "Accuracy" is defined to mean "optimal and complete message transfer into the target language preserving the content and intent of the source message or text without omission or distortion". As outlined above, several legal translation scholars have argued that, given the nature of legal texts and proceedings, where the rights and responsibilities of citizens are at stake, there is a higher premium on accuracy on the part of the translator than there would be in other situations. In short, in these situations, it is imperative that the translator not be swayed by his or her personal disposition (Šarčević, 1997; Cao, 2007). In relation to the translator's ethical obligation of accuracy, paragraph 5 of the *AUSIT Code of Conduct* provides, relevantly:

> *5. Accuracy*
>
> 5.1 Interpreters and translators provide accurate renditions of the source utterance or text in the target language. Accurate is defined for this purpose as optimal and complete, *without distortion or omission and preserving the content and intent of the source message* or text (my emphasis). Interpreters and translators are able to provide an accurate and complete rendition of the source message using the skills and understanding they have acquired through their training and education.
>
> 5.2 Interpreters and translators do not alter, add to, or omit anything from the content and intent of the source message.
>
> 5.3 Interpreters and translators acknowledge and promptly rectify any interpreting or translation mistakes.

With regard to paragraph 5.1 above, in particular the requirement to 'content and intent of the source message or text without omission or distortion', Fiannaca J noted that, to achieve this, an interpreter and/or translator would be required to exercise judgment regarding the best way to convey the original content and intent. However, he or she should not use discretion regarding the importance of words, symbols or emoticons and whether to leave out certain elements of the messages. This relates directly to the translator's role as an 'expert', and thus the applicability of the rules relating to the admissibility or otherwise of such an expert's evidence. In this regard, his Honour observed (*Yang*, at [54]):

> It is well known that literal interpretation or translation into English from another language will not necessarily convey the intent or real meaning of what has been

> said or written in that language. The *AUSIT Code* requires an interpreter or translator to use his or her best professional judgment based on his or her skills and understanding acquired through training and education (and, one might add, experience), to convey the intent of the source material. However, it is the meaning of the words in context that must be conveyed. It is not the role of the interpreter or translator to express an opinion about the speaker's or author's state of mind or what it was they were trying to convey (as opposed to what the words actually convey). It is not their role to draw conclusions, let alone speculate, about such matters.

Thus, Fiannaca J here appeared to have in mind the *Makita* principles as outlined by Heydon JA (as he then was), which enunciated the test of admissibility of expert evidence under section 79 of the *Uniform Evidence Acts*, namely:

- the requirement that the 'specialised knowledge' be shown to be based on the 'training, study or experience' of the witness; and
- the requirement that the opinion expressed by the witness be based wholly or substantially on that 'specialised knowledge' (*Makita*, p. 745).

This aspect also relates specifically to the duty of impartiality present in the *AUSIT Code* (at paragraph 4). The most pertinent sub-paragraphs in this regard are the following:

> 4.3 Interpreters and translators are not responsible for what clients say or write.
>
> 4.4. Interpreters and translators do not voice or write an opinion, solicited or unsolicited, on any matter or person during an assignment.

While Fiannaca J was satisfied that Mr Y Lee approached his task impartially, His Honour noted that in cross-examination Mr Y Lee was prepared to acknowledge that alternative translations were open when they were put to him and, upon reflection, he considered them to be reasonable. His Honour added (*Yang*, at [56]):

> I am also satisfied that generally his translations were accurate, and where there was ambiguity he indicated that in a translator's note. However, I accept the submission made by the offender's counsel that there were a number of deficiencies in the translations and in Mr Y Lee's approach. Some of them were conceded by Mr Y Lee.

Relevantly, Fiannaca J found there were several deficiencies in the translator's evidence, for example:

1. a lack of translator's notes when translating a laughing emoticon into 'ha';
2. a lack of translator's notes when disregarding certain parts of the messages and correcting typographical errors in the messages, which could have been ambiguous;
3. not translating all the laughing emoticons when they appeared;
4. repeated Korean expressive characters were translated into a single 'oh' or 'ah' sound, which lost its expressive characteristic, and
5. expressing an opinion about a conclusion to be drawn from a message.

With reference to these more specifically, Fiannaca J stated that it was submitted on behalf of the offender that, because of the deficiencies in the translation of the laughing symbols, 'any inference drawn from the translation could prejudice [the offender] as the tone and/or intent of the original Korean message may, in fact, be very different to the translation' (*Yang*, at [71]). In particular, the use of emoticons in the messages added an additional element of difficulty in assessing Yang's state of mind around his conduct. This may have been because there could have been potential ambiguity surrounding the meaning of the emoticon in the context of the message. For example, many messages contained laughter through the use of emoticons in a discussion of the nature of the enterprise and whether illicit drugs were involved. The Crown inferred this to be either nervous or sarcastic laughter but during examination Yang disputed this, claiming them to signify a light conversation so his comments were not to be taken seriously. Yang was concerned that the above inaccuracies in translation could be misleading as to his intent as they may not have been a true representation of the messages between him, his friends and sister.

In addressing this issue specifically, Fiannaca J opined (*Yang*, at [68]):

> A substantial amount of time was spent in the cross-examination of Mr Y Lee challenging him on the number of 'ha's he used in translating the laughing symbols when they appeared in messages. He admitted that he had used discretion when the character was repeated several times in the one sequence. For instance, where four laughing symbols appeared together, he may have translated the sequence as 'ha ha' … [T]he omission in the latter had the potential to affect the tone of an important message in the context of determining the offender's belief about the nature of the business in which he was involved for Bello.

Fiannaca J agreed with the defence's submission that the approach taken by the translator was inconsistent with the AUSIT Code requirement that the translation must preserve "the content and intent of the source message or text without omission or distortion". He added (*Yang*, at [69]):

> While a translator is entitled (indeed, required) to use judgment as to the manner in which to best convey the content and intent of a message, he is not entitled to use discretion as to whether something like a laughing symbol or character has significance or importance in the context of a particular message, nor whether the number of laughing symbols may have significance in assessing the tone of a message. Those are matters for the tribunal of fact to determine having regard to all the circumstances, including any explanation that may be given by the author of the message.

As such, Fiannaca J exercised some caution in drawing inferences from the messages that were affected by the inaccuracies. Additionally, the Court disregarded any opinions made by the translator that was outside the field of his expertise. In this regard, I quote again from the judgment (*Yang*, at [57]):

> Mr Y Lee did not translate or make a translator's note in respect of the last character in the message at TB 257.[11] Jeong appears to be expressing concern that the offender's sister might guess that he, Jeong, was the person who involved the offender in the enterprise. Mr Y Lee agreed in cross-examination

[11] The translations were identified in the judgment with reference to the relevant page number in the Trial Brief (TB).

> that the character at the end of the message, which is a vowel, not a complete word, can signify crying. He said he did not regard it as a main part of the text, and he did not think it added to the meaning of the sentence, so he disregarded it. The problem with that approach is that, upon analysis of all the messages, the use of symbols, whether to signify laughter, crying or any other emotion, may be significant. They may inform the tone of a message, which in turn may reveal a state of mind which is relevant to the issues under consideration. The use of a crying symbol in contrast to a more regular use of laughing symbols may show a change of tone, although I am mindful that emoticons signifying sadness in English text messages can be used ironically. In any event, this was an instance in which the translator should have included an explanatory note about the presence and non-translation of the character.
>
> In respect of the message at TB 357 (in which the offender was indicating to Jeong his impression of whether Bello was really in the apparel business), Mr Y Lee, in a translator's note, expressed his opinion of the intent of the message. While the fact that it was identified as a translator's note made it clear that this was not strictly part of the translation, but a possible meaning to be attributed to the message (in light of the preceding messages, which provided context), it was nevertheless the expression of an opinion about a conclusion to be drawn from the text, which in my view was not a matter upon which Mr Y Lee could provide an opinion as an expert translator.

In summary, while Fiannaca J stated that it may be accepted that some of the inaccuracies and deficiencies had the potential to mislead as to the intent of some of the messages, he still believed it remained possible to draw inferences safely about the offender's state of mind from a number of other messages (*Yang*, at [63]). Accordingly, the translator's expert evidence was ruled admissible, despite its deficiencies. Further, even though there were shortcomings in the approach taken by Mr Y Lee, they did not prejudice the offender, as Fiannaca J drew conclusions about the meaning by having regard to the context and the offender's evidence (*Yang*, at [76]). Consequently, His Honour concluded that the only reasonable inference that could be drawn was that Yang intended to import such a substance and that he was reckless as to whether the substance was a border-controlled drug, contrary to section 307.1 (1) of the *Criminal Code* 1995 (Cth). That is, he was aware there was a substantial risk that the substance was a border controlled drug and nevertheless took the risk of importing such a drug in circumstances in which taking the risk was not justifiable.

7. Conclusion

This article has reviewed the rules in relation to the admissibility of expert evidence and their application to the evidence of a translator in a criminal proceeding, namely *R v Yang*. It is argued that the judgment in *Yang* highlights not only the intricacies in the translation of foreign languages, but more importantly emphasises the importance of an expert bearing in mind the *Makita* principles. Court guidelines also typically require an expert to clearly disclose where they have relied on instructed facts and/or made assumptions (KordaMentha Forensic, 2018). If a professional is engaged as an expert, some of these principles may also be enshrined in professional standards and codes of conduct in their field of expertise (KordaMentha Forensic, 2018). This was seen in particular in *Yang* with reference to the *AUSIT Code*. A failure to comply with these requirements may reduce the weighting applied to an expert's

evidence, and may possibly result in his or her evidence being found to be inadmissible, thus having consequences for the administration of justice. Court calendars are already under significant strain, with parties having significant wait times before matters get to trial. As an example, in the *2019 Annual Report of the District Court of Western Australia*, the Chief Judge of that Court, His Honour Kevin Sleight, noted the following (at p. 1) in relation to wait times:

> The impact of the increase in the number of criminal cases coming before the court has been exacerbated by matters becoming more complex and lengthier, creating further demands on judicial resources. The workload pressures have meant that the number of cases on hand (that is, matters waiting to be dealt with) has increased to 2,202 matters as at 31 December 2019, an increase of 19.5% on the previous year. The median time to trial (that is, the time from the date the matter is committed from the Magistrates Court to the first day of any listed trial) is 43 weeks, an increase of 12.8% over the last 12 months.

Thus, if evidence is held to be inadmissible if a translator (or any other expert for that matter) is not properly briefed as to his or her role and duties as an expert witness, the chances of a re-trial or a stay of proceedings will be increased, thus putting even further pressure on an already stretched court calendar. This factor, added to the important principle emphasised by the courts that an independent expert's ultimate duty is to the court, not the engaging party, makes it even more imperative for parties to be aware of the role of expert witnesses and the nature of their evidence. As noted in the introduction to this paper, when advising as to the use of such evidence and preparing expert's reports, it is important to be aware of the circumstances in which expert evidence can be admitted and the requirements that must be satisfied by a party seeking to rely upon such evidence. Otherwise, the risk of such evidence being excluded will be high. Finally, it is argued that this has consequences for the training of all parties, and especially, for translators of legal documentation or documentation that may be used in legal proceedings. As seen in *Yang*, translators in these circumstances must be acutely aware of their general ethical obligations of accuracy and impartiality, particularly in legal proceedings where there is no margin for error, given the consequences. Along with these crucial ethical considerations, translators must also have a proper awareness and understanding of the role and admissibility of expert evidence, which evidence will be crucial to the proper functioning of those proceedings.

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