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CONFLICT RESOLUTION IN COURT

What goes on in a trial in court is determined by the final purpose of arriving at a verdict by the judges. The verdict administers justice on the basis of the law in a case of divergent views on a controversial matter, i.e. in a case of argumentation. The declarative speech act of the verdict decides the issue to be dealt with juridically and thus changes reality. All relevant aspects concerning the matter to be judged by the court which are expressed in the process of the trial, for instance, in expert reports, are considered by the judges and are mentioned in the reasons for the judgement. They thus become arguments for the final judgement. In analysing an authentic expert report with respect to the verdict, the complex argumentative structure of the trial is elaborated.

Keywords: legal argumentation, dialogic action game, expert report, verdict, speech acts, trial.

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1. Argumentation and reality

To deal with such a complex topic as 'Conflict resolution' or 'Argumentation in court' in a short paper, it is necessary to be precise from the very beginning. I therefore have to first mention some fundamental assumptions on which my model of description is based. For justification of these assumptions and for further assumptions to be derived from them you are mainly referred to my papers on 'the dialogic action game' (Weigand 2000; 2002a; 2002b).

First, the main fundamental issue to be tackled is the question of where to begin: with theory or with the object-of-study. Unfortunately, in western culture, we have been starting with theory for more than two thousand years, namely with the traditional concept of a theory which is considered to reduce the complex by abstraction to a logical or rule-governed system. Linguists of passion however, like Martinet (1975), always knew in their hearts that we should first try to understand our complex object-of-study without damaging it by methodological exigencies. In principle, I consider it a fundamental methodological fallacy to start with theory without really knowing what the theory is about. In this way, for instance, we find argumentation defined as syllogism, a logical scheme of conclusion, and moreover a monological scheme leaving the issue of how argumentation is dealt with in dialogic interaction unsettled (e.g., Toulmin 1958).

The second fundamental assumption I would like to mention is an assumption about our concept of reality. What is reality, what is the world? Can we start thinking that human beings, language and the world are separate entities? In my opinion, human beings are from the very beginning part of the world, and their abilities of speaking, thinking and perceiving are integrated abilities which cannot be separated. We cannot go beyond thinking and awareness. Consequently, there is no reality as such. We perceive reality through the filter of our abilities. It is the eye of the observer which decides about so-called reality.

From this second basic assumption a third assumption is to be derived which is an essential assumption for analysis insofar as it gives us the key for opening up the complex. Human beings are purposeful beings guided by their interests and needs. As social human beings we negotiate our positions in everyday dialogues, in institutional dialogues and in media dialogues (Weigand and Dascal 2001).

With these basic assumptions in mind we are now going to address the question of what argumentation is about (Cattani 2001; van Eemeren 2001; Toulmin 2001). Again I have to be brief and concise: Argumentation as a natural phenomenon is an interactive phenomenon, dealing with a controversial issue, with different claims made by the interlocutors about this controversial issue (Weigand 2003).

Now I will introduce the authentic case of a trial I am going to analyse (here in English translation; the authentic German texts are included in the appendix; the court records in Altehenger 1996: 289 ff.). It is a case about a used car. This car becomes a controversial issue with reference to its empirical appearance: according to the plaintiff it shows rust and even extensive rust first signs of which must have already existed, only been painted over at the time of the purchase. According to the defendant there are only minor stains of rust which did not exist at the time of the purchase. Both parties confirm their view by an expert report. We thus have two different expert reports referring to a seemingly simple empirical question. Obviously, there are not even empirical objective facts. Consequently the court orders a further expert report specifying precisely the points to be clarified, among them the first point

(1) to ascertain whether the car delivered to the plaintiff has extensive rust on the underbody which has also affected load-bearing parts of the bodywork.

2. How to resolve controversial issues

Argumentation in court is thus to be considered as a dialogic technique of conflict resolution or as negotiation of a controversial issue (also Stati 1990: 63ff.). The controversial issue is based on two controversial claims to truth, a thesis and an antithesis. The role of argumentation is thus different from the role of an argument. Whereas argumentation is to be considered as a dialogic representative action game, arguments play their role as subordinate moves either in representative or directive action games, ie they support either a claim to truth or a claim to volition by reasoning (Weigand 1999).

Argumentation as a representative action game starts from two representative speech acts with controversial claims to truth. The thesis is initiative, the antithesis comes in as reaction of non-acceptance to the thesis (Weigand 2003):

thesis ⇔ antithesis
initiative reactive

Fig. 1: Argumentation

Now the question in principle is how to settle these controversial claims to truth in dialogue. The question is how to support thesis and antithesis by arguments. The weight of the arguments will influence the course of negotiation. I think there are in principle three ways of justifying claims to truth which correspond to three different sub-types of representative speech acts (Weigand 1989; 1991).

First there is reference to empirical observation. There is however no empirical evidence as such. Empirical observation depends on accuracy and on evaluation by human beings, as becomes manifest with our example of the car. Reference to empirical observation constitutes the sub-type of a CONSTATIVE speech act. Truth seems evident, it seems to stare you in the face. The speaker reports what can be seen but additionally simultaneously shapes it by his individual point of view or evaluation. The first question in our above-mentioned expert report, the question whether there is extensive rust, refers to truth of this type (cf. 1).

Next, there is reference to rationality and knowledge by experience. Here we are dealing with claims to underlying truth which have to be justified by indicating reasons. These claims constitute the representative sub-types of ASSERTIVES and DELIBERATIVES or suppositions. The expert in our case of the used car is requested to clarify two questions of this type. He/she is ordered

(2) to ascertain whether rust of the type and extent described must have already been present on 01. 10. 90 and

(3) to ascertain whether the defects cannot be eliminated, as the plaintiff asserts.

And there is a third way of settling controversial issues in dialogue if they have not yet been settled by empirical observation or expert knowledge: the judicial possibility of a verdict or contract. The verdict or the legal contract is a declarative speech act which establishes validity by the law and thus creates reality. From now on the conflict is solved on the legal level: the question who is right and who is wrong, who counts as guilty and who as innocent is clarified, i.e. legally decided even if the conflict remains in the minds of both parties.

3. The institutional process of a trial

The institutional process of a trial is to be seen from the point of view of the court as a complex argumentative process of conflict resolution which brings a controversial issue of differing claims to truth to a close by the power of the law. From the point of view of the plaintiff and the defendant, the claim to truth may play a subordinate role, they may primarily be interested in their claim to volition, for instance, in our case of the used car, the claim to volition by the plaintiff to receive compensation. This claim to volition however can be justified only by clarifying the underlying claims to truth.

The trial, being an institutional process, is dependent on the culture of law of the country concerned. All relevant aspects concerning the controversial issue have to be expressed in the process of the trial, for instance, in the summing up by the prosecution and defence, in testimonies and expert witnesses, and have to be mentioned in the reasoning for the decision-making. They thus become arguments for the final judgement. A decisive position among the arguments is taken by arguments based on so-called pieces of circumstantial evidence. The verdict itself - at least the verdict in the German culture of law - therefore contains not only the declarative speech act but describes the course of events in and around the trial in a complex argumentative text. The different points of view are presented, and the arguments which influenced the court in negotiating between the view of the defendant and of the plaintiff are mentioned. The text of the verdict however is only one component in the complex cultural whole of the action game of a trial.

4. The role of expertises as argumentative components in a trial

Let us now analyse more in detail a part of our authentic expert report. In order to understand this text it is necessary to see its relationships to the other components of the trial. After the controversial expert reports brought in by the plaintiff and the defendant, a third expert report requested by the court is supposed to clarify the three clearly indicated questions which we have already dealt with.

(4) *Excerpt from the expert's report*

> On viewing the car which is at present parked in a garage at the plaintiff's house, 5 palm-sized areas of rust *were ascertained* on the underbody in the front, left-hand quarter of the floor of the passenger side. A dispersed area of rust, partly in the form of spots, partly in the form of small patches, was also visible in the rear right-hand quarter of the underbody. Rust corrosion has also already affected the centre right-hand connecting beam between the roof and frame of the vehicle.
>
> Judging by the type and extent of the damage, *I consider it extremely probable* that the rust protection to be applied at the factory was insufficient. The metal was therefore only partially protected so that in the course of several months the damage that was ascertained resulted.
>
> *I can exclude the possibility* that this damage could have occurred in the period from 01.10.90 to today.
>
> Carrying out rust protection treatment afterwards *would not completely* remove the damage that has already occurred. It would, at best, stop the progress of further rust corrosion.

The points which are relevant for our discussion are italicized. The expert report is a representative text referring to the three questions. The answers are given as different types of representative speech acts in reactive position insofar as the whole text is a reaction to the three questions. Concerning the first question whether extensive signs of rust exist the answer is CONSTATIVE indicating precisely the amount of rust by the verbal means of the indicative in the first paragraph, e.g., *5 palm-sized areas of rust were ascertained.* Concerning the second question when the damage appeared, the answer is ASSERTIVE, *I can exclude the possibility*, in the third paragraph. It is based on expert knowledge on the rust protection to be applied at the factory which is partly expressed as DELIBERATIVE, as a suggestion or supposition, because only high probability can be claimed: *I consider it extremely probable that the rust protection was insufficient.* The same is true for the third answer which is not simply expressed in the indicative of the present tense but of the future tense in German and in the conditional in English, which indicates an element of deliberation: *would not completely remove the damage.*

The argumentative role of this expert report for the verdict remains to be considered insofar as it is not the expert who decides but the court after having evaluated the representative text of the expert.

(5) *Part of the verdict*

> According to the report of the expert Wagner which was not disputed by the defendant, the car supplied to the plaintiff has extensive rust damage in the area of the floorpan, the passenger area, and on the right-hand middle beam between the roof and the underbody. As a result of the expert's report the court is also convinced that this damage did not occur after the car was handed over in October 1990. In view of the extent of the damaged areas ascertained, this would not, according to the convincing evidence of the expert, have been possible for technical reasons.
>
> Finally, according to the expert's report, the defects cannot be completely eliminated.
>
> The rust damage on the car considerably reduces the value and fitness for use of this otherwise brand-new vehicle. The plaintiff is not required to accept this reduction in value and the plaintiff's claim on the guarantee is therefore justified.

From this part of the verdict which is a paragraph of the part entitled 'Reasons for the verdict', it can clearly be gathered that there are no independent facts but *statements by the expert* which are examined and evaluated by the court:

(6) As a result of the expert's report the court is also convinced that this damage did not occur after the car was handed over in October 1990.

So-called facts which can be observed and expert knowledge are taken together by the court in order to arrive at valid conclusions:

(7) In view of the extent of the damaged areas ascertained, this would not, according to the convincing evidence of the expert, have been possible for technical reasons.

> Finally, according to the expert's report, the defects cannot be completely eliminated.

The judgement by the court, ie the verdict, is based on such argumentative conclusions, clearly indicated by *therefore*:

(8) The plaintiff's claim on the guarantee is therefore justified.

5. Concluding remarks

I think it has become manifest that expert knowledge plays an important part in the argumentative process in court. Representative speech acts are defined by a claim to truth, ie not by an absolute truth value but by an individual claim of the speaker depending on their knowledge and experience. It can therefore be strengthened by the status of the speaker. Representative speech acts made by an expert are more liable to be believed. Experts are expected not to take position for any party. Even presupposed that they only follow their expert knowledge, different expert reports may come out depending on different knowledge and evaluation, as was the case in our trial.

The process of a trial is completely dependent on institutional premisses being laid down in the individual culture of law. It remains to be investigated in comparative studies, comparing different cultures of law, and analysing in more detail the individual components of the whole, among them the verbal component of the judicial records. In this regard, extensive collections of authentic texts in different languages are needed.

Argumentation as a complex process of a dialogic action game is dialogic interaction by human beings who are guided by their interests. Only by addressing the complex can we hope to elucidate the issue of how open and hidden interests shape the course of dialogue.

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Appendix:

The authentic German texts, (the court records in Altehenger 1996: 289ff.)

(1) festzustellen, ob der dem Kläger gelieferte Pkw ausgedehnten Rostbefall am Unterboden aufweist, der auch tragende Teile der Karosserie befallen hat,
(2) Rost nach Art und Umfang des Mangels schon am 01. 10. 90 vorhanden gewesen sein muß, und
(3) der Mangel nicht zu beseitigen ist, wie der Kläger behauptet.
(4) Bei Besichtigung des Pkw, der z. Zt. in einer Garage am Hause des Klägers abgestellt ist, wurden am Unterboden im vorderen linksseitigen Viertel der Bodenfläche des Fahrgastraumes 5 handtellergroße Roststellen festgestellt. Ein gestreuter Rostbefall teils punktförmig, teils in Form kleinerer Flächen, wurde auch im hinteren rechten Viertel der Bodenfläche erkennbar. Der Rostfraß hat auch bereits den rechtsseitigen mittleren Verbindungsholm zwischen Dach und Rahmen des Fahrzeugs erfaßt. Nach Art und Umfang der Schäden halte ich es für sehr wahrscheinlich, daß die werksseitig vorgesehene Rostschutzbehandlung unzureichend war. Der Werkstoff blieb dadurch teilweise ungeschützt, so daß es im Laufe mehrerer Monate zu den festgestellten Materialschäden kommen konnte. Ich halte es für ausgeschlossen, daß diese Schäden in der Zeit vom 01.10.1990 bis heute auftreten konnten. Eine nachträgliche Rostschutzbehandlung wird die bereits eingetretenen Schäden nicht mehr vollständig beseitigen können. Sie ist allenfalls geeignet, den weiteren Rostfraß zum Stillstand zu bringen.
(5) Der dem Kläger gelieferte Pkw weist nach den Feststellungen - von der Beklagten nicht angegriffen - des Sachverständigen Wagner umfangreiche Rostschäden im Bereich der Bodenplatte, des Fahrgastraumes und am rechten mittleren Holm zwischen Dach und Bodenplatte auf. Nach den Ausführungen des Sachverständigen ist das Gericht auch davon überzeugt, daß diese Schäden nicht erst nach Übergabe des Fahrzeuges im Oktober 1990 aufgetreten sind. Angesichts des Ausmaßes der festgestellten Schadstellen ist dies nach den überzeugenden Ausführungen des Sachverständigen aus technischen Gründen nicht möglich. Schließlich kann der Mangel nach den gutachtlichen Ausführungen auch nicht vollständig beseitigt werden. Die am Pkw vorhandenen Rostschäden bewirken eine erhebliche Minderung des Wertes und der Tauglichkeit dieses ansonsten neuwertigen Fahrzeuges, die der Kläger nicht hinzunehmen braucht. Der Anspruch des Klägers auf Gewährleistung ist daher begründet.