Introduction

In this paper I presented the language used in courtrooms and how lawyer’s questions can influence the witness’s answer and I also presented the legal documents which begins a trial.

In Chapter 1, I have discussed about the language of judges and lawyers and how English was introduce in courtrooms and replace French language. Current procedural law has had a long historical evolution. The early common law allowed an action to be brought only if it closely conformed to a writ . Then, the rule was “no writ, no right”, but this rule had changes over the past decades. Now, the legal documents are drafted by lawyers.

Chapter 2 is dedicated to pleadings. Pleadings are formal written documents that are filed with the court. Pleadings are public documents unless sealed by the court. The court's rules tell you what needs to be included in a pleading and how it should look. For example, each pleading has to contain the name of the court, the title of the suit, and the docket number, if one has been assigned.

A lawsuit begins when a plaintiff (the party suing) files a complaint against a defendant (the party being sued). The complaint is a written statement of the plaintiff's claim or cause of action. In it, the plaintiff states his or her version of the facts - what the defendant allegedly did -and asks for relief or damages. The answer is the defendant's written response to the complaint. In the answer, the defendant admits or denies each of the facts contained in the plaintiff's complaint and gives any reasons the plaintiff should not win. This is the procedure in civil cases. If the defendant believes that he or she is the injured party, he or she files a counterclaim and asks for damages. For example, if the plaintiff sues you for damages resulting from an automobile accident, you would file a counterclaim against the plaintiff if you think the plaintiff was the one at fault in the accident.

In Chapter 3, dedicated to examination of witness, I’ve presented the strategies used by lawyers in a trial and the types of examination. In this chapter I focused my attention on

the Simpson trial because it shows how he was acquitted due to his lawyer who undermined the witnesses and most of the evidences presented in court.

The witnesses' testimonies can either make or break the case being presented. Testimony is not the only type of evidence – documents, photographs and many other kinds of proof are equally acceptable – but it remains extremely important. It is the lawyer's job to prove the facts of the story alleged in the complaint. In most cases, the lawyer's objective is to discredit opposition witnesses and minimize the impact of their testimony. There are many cases in which the defense lawyer has no prove and he must discredit the plaintiff's witnesses through cross-examination. And it is in such contexts that lawyers make maximal use of their linguistic power accorded to them.

Chapter 1: English in the law courts

In 1362 an important step was taken toward restoring English to its dominant place as the language of England. For a long time, probably from a date soon after the Norman Conquest, French had been the language of all legal proceedings. But in the fourteenth century such a practice was clearly without justification, and in 1356 the mayor and aldermen of London ordered that proceedings in the sheriffs' court of London and Middlesex be in English (Shape, 1905: 73). Six years later, in the Parliament held in October 1362, the *Statute of Pleading* was enacted, to go into effect toward the end of the following January. The *Statute of Pleading* was enacted because many people involved in the judicial process didn't understood what is said for them or against them in a trial. Therefore, this Statute was made to help people to understand the judicial system, the law and to help them to defend themselves in a trial, because not many afforded a lawyer in those times. According to this *Statute of Pleading*, all lawsuits *shall be pleaded, shewed, defended, answered, debated, and judged in the English tongue*. (*Statutes of the Realm*, 1, p. 375-76. The original is in French. The petition on which it was based is in *Rotuli Parliamentorum*, II, p. 273).

It is interesting to note that the reason frankly stated for the action is that *French is much unknown in the said realm*. This constitutes the official recognition of English.

1.1. PRINCIPLES OF CONVERSATION ANALYSIS

Verbal interaction is the central and defining feature of human social life. Whether at home, at work, or at leisure, we spend an enormous amount of time talking to one another. The method used is straightforward: record every day conversations, transcribe them, and then dissect the transcripts in an effort to discern the resources that people employ to maintain order and coherence in social discourse. (John M. Conley and William M. O'Barr, *Just Words: Law, Language and Power*, 2005) The most important discovery about talk in everyday contexts is its orderly and highly structured nature. Without external supervision or any conscious awareness of how they are doing it, participants in a conversation come to

instantaneous tacit agreement on such complex questions as whose turn it is to speak and how long a speaking turn should last.

Conversation analysts tell us that conversations are governed by a structure that is as fundamental to talk as are the sounds of a language and its rules for constructing meaningful expressions. This structure is the grammar of talking. We learn as children how to have orderly conversations, just as we learn to construct meaningful utterances. (John M. Conley and William M. O'Barr, *Just Words: Law, Language and Power*, 1998) Among other things, the grammar of conversation specifies the following:

- A person who is speaking can expect to finish a syntactically complete utterance before the issue arises of who gets to talk next. (For example, "I was getting ready to" is not syntactically complete, whereas "I was getting ready to leave" is.)
- A speaker who reaches a syntactically complete point in the utterance (or one that another speaker considers complete) must either relinquish the turn or attempt to continue speaking.
- A person who is speaking can influence who the next speaker will be. (For example, "What do you think, John?" attempts to select John to talk next, whereas "Do you know what I think?" is an attempt at self-selection.)
- When speaker overlaps do occur (usually at points when speaker change is relevant), one speaker normally continues as others drop out. The speaker who continues usually recycles what was uttered during the period of overlapping speech.

Basic structural rules such as these allow us to communicate efficiently in everyday discourse. They enable ordinary conversations to take place with an alternation of speakers and minimal gaps and overlaps, and without referees or advance plans that state who will talk, what will be said, and how long a conversation will last.

1.2. The language of judges

Institutional environments such as the courtroom employ these basic rules, but modify them in important ways. The special rules governing courtroom interactions specify, for example, that lawyers ask questions and witnesses answer them. In addition, the courtroom environment has a distinctive feature not present in everyday conversation – namely a judge

who acts as referee to oversee the system of turn-taking, monitor the substance of what is discussed, and resolve complex interactional problems when they arise.

The special rules of the courtroom are highly unusual from a conventional point of view. (John M. Conley and William M. O'Barr, *Just Words: Law, Language and Power*, 1998) From an everyday perspective, it would be very peculiar to limit some speakers so that the only type of turn is asking questions, while restricting others to giving answers to whatever question they are asked. Such institutional constraints introduce into courtroom interactions a degree of rigidity not found in everyday contexts and thereby help the court to its assigned task of trying cases. But, in addition, these courtroom specific rules have the consequence of empowering lawyers linguistically over the witness they examine. For example, if a witness strays in answering a question, the lawyer has considerable leeway to interrupt and bring the witness back to the point of the question. And if the witness proves unresponsive despite such efforts, the lawyer may ask the judge to instruct the witness to answer the question. Witnesses, however, have no comparable power to demand that lawyers ask question that they deem relevant to the issue at hand. From the outset, the structural arrangements for talking in court do not privilege all speakers in the same way.

This imbalance of power is present in all courtroom dialogue. However, its consequences are more extreme during cross-examination, when lawyers examine the opposition's witnesses. When lawyers question their own witnesses on direct examination, they typically do so in a supportive manner, allowing friendly witnesses leeway in the form and substance of their answers. By contrast, the cross- examination is a hostile environment for both the lawyer and the witness. The lawyer's objective is to discredit opposition witnesses and minimize the impact of their testimony. And it is in such contexts that lawyers make maximal use of their linguistic power accorded to them.

Lawrence M. Solan in his book, *The Language of Judges* (1993) analyzes the language used by judges. Judges speak the same language that the rest of us speak. Their knowledge of language, which all of us acquired as young children as the consequence of a highly developed innate language faculty, makes interpreting language easy and automatic to a large extent, while leaving open a variety of possible interpretations in other instances. But the consequences of how the judge understands the open issues in the language that he hears and reads, and what he says about them are frequently more awesome than the consequences that

the rest of us construe sentences and express our understanding. We all may, in our darkest moments, wish that some evil-doer were dead. But judges are the ones who can properly use the sentence, "I hereby sentence you to death," as a performative to sentence someone to death. Armed with this enormous power, and faced with the responsibility of exercising it on a daily basis, judges will, at times, grab at any argument that the system accepts as legitimate in order to convince the parties and community at large that the court did what it was supposed to do. After close analysis, the court was left with only a single option, the judge tells us.

When a court resorts to interpretive principles to justify its decisions, analytical problems immediately ensue from this situation. The judge not only has to decide the second case fairly, but now has the additional burden coping with the renegade interpretive principle that ruled the day in the first case. Without doubt, the lawyers for the litigant in the second case who would be helped by the application of this interpretive principle will have brought it to the court's attention, making the problem impossible to ignore.

At the root of this problem are some rather straightforward observations. First, the relationship between words and events in the world is largely underdetermined by our knowledge of the words. There is simply no theory of meaning that tells us whether the corporation is entitled to constitutional rights. Nor is there a theory of meaning that forces us to reach a particular view or whether the Fifth Amendment's prohibition against compelled self-incrimination protects us against government forcing us to submit to blood tests against our will. In instances like these, a court's resort to plain meaning of the document or of some interpretive principle will almost invariably come back to haunt it. For a precedent will have been created that will more likely than not stand as an obstacle to the adjudication of some later case.

This leads to the second point. Interpretive principles do not make good legal principles. Our knowledge of language renders much of interpretation automatic and beyond dispute, as Chomsky (1988) and others has shown us. That is, enormous amounts of interpretation occur without our even noticing it.

Judges will always be confronted with the task of interpreting language. In fact, that is largely what they do for a living. In performing their job, they will necessarily be faced with the task of trying to justify what they consider the right result in such a way that they appear

decisive and utilize only the sorts of arguments that the system considers properly. Much of the time, all of this can be accomplished. In more difficult cases, however, judges often have three choices: give a less than a candid reason for the decision since the full reasons would be unacceptable; tell the whole truth anyway even if it leads to instability in the system; or get tough and be loyal to precedent even if it seems wrong.

Lawrence M. Solan focuses on how judges frequently choose the first option when it comes to cases that require the interpretation of documents. It is an easy path, but not a very satisfying one. To venture out onto the second path requires a willingness to risk the stability of the system for its integrity without any guarantee of where this risk-taking will lead. The third path, available only some of the time, frequently leads to injustice. David Shapiro wrote in his book *In Defense of Judicial Candor* (1987) about the need for "judicial candor":

> *In a sense, candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say to another. Moreover, lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges* (D. Shapiro, *In Defense of Judicial Candor*, 100 Harvard Law Review, 1987:737).

Judges will continue to find themselves under pressure to write opinions based on interpretive principles, knowing that they could have, with equal force, justified the opposite decision using the same or other interpretive principles. Like the rest of us, judges differ in their degree of daring, and not every judge will accept every opportunity to avoid these interpretive difficulties.

Chapter 2: Pleadings

Pleading is the beginning stage of a lawsuit in which parties formally submit their claims and defenses. The plaintiff submits a complaint stating the cause of action - the issue or issues in controversy. The defendant submits an answer stating his or her defenses and denials. The defendant may also submit a counterclaim stating a cause of action against the plaintiff. Pleadings serve an important function of providing notice to the defendant that a lawsuit has been instituted concerning a specific controversy or controversies. It also provides notice to the plaintiff of the defendant's intentions in regards to the suit.

Old common law rules of pleading were complicated and rigorous. Meritorious complaints were often thrown out of court for technical flaws in form rather than substance. Today, in most if not all states, a pleading must no longer conform to archaic formats but may be a simple petition or complaint setting forth the relevant facts and asking for a remedy.

Pleadings are part of a larger category of procedural rules. In state court, pleadings are generally governed by state procedural rules. In federal court, pleadings are generally governed by the Federal Rules of Civil Procedure.

In this chapter I want to present the process of pleading to demonstrate that pleadings haven’t change too much since 1912.

2.1. A few legal documents

In the U.S.A. every action in the High Court of Justice is commenced either by a **writ** or by any originating **summons**. A *writ* is a formal document by which the King commands the defendant to “enter an appearance” within so many days, if he wishes to dispute the plaintiff’s claim, otherwise judgment will be signed against him. The writ must state the name and residence of each plaintiff and defendant, and the name and the place of business of the plaintiff’s solicitor, if he employs one. It must also specify the Division of the High Court in which the plaintiff intends to sue, and give an “address for service” (that is an address at which notice and all other written communications may be left for him). If he is suing, or if any one of the defendants is sued, in a representative capacity (e.g. as trustee of the estate of

some bankrupt, or as the executor or administrator of some one deceased), this also must be stated in the writ. If the plaintiff is a woman, the writ should state if she is a "widow", or a "spinster", or the "wife of A.B.". (W. Blake Odgers, 1912:2)

Besides these formal statements, every writ, before it is issued, must be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action. In some cases, the plaintiff is allowed to state the particulars of his case in full detail on the back of his writ, which is then said to be "*specially indorsed*". (see W. Blake Odgers, 1912:3) A plaintiff can only indorse his writ especially in one of the following six cases (where he seeks only to recover a debt or a liquidated demand in money payable by the defendant, with or without interest, arising):

1. Upon a contract expressed or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt).
2. On a bond or contract under seal for payment of a liquidated amount of money.
3. On a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, other than a penalty.
4. On a guaranty, whether under seal or not, where the claim against the principal debtor is in the respect of a debt or liquidated demand only.
5. On a trust.
6. In actions for the recovery of land by a landlord against a tenant whose term has expired or has been duly determined by a notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant.

And even in these six cases he is not compelled to specially indorse his writ unless he wishes so to do, though as a rule he is only too glad to avail himself of the privilege, as it may lead to his obtaining judgment more speedily. More often the plaintiff merely indorses on his writ a *general* statement of the nature of his claim, or he may claim an account, or he may indorse his writ for *trial without pleadings.* He must place on his writ one of these endorsements to show the nature of the action, otherwise the defendant would not know why he was sued. The endorsement should also state the relief which the plaintiff claims. As soon as the writ is prepared and its endorsements duly drafted, the next step is to "issue it", that is, to make it an official document, emanating from the Court.

2.2. The process of pleading in 1912

Pleadings are statements in writing delivered by each party alternately to his opponent, stating what his contention will be at the trial, and giving all such details as his opponent needs to know in order to prepare his case in answer. In many actions, however, there are no pleadings at all and as a rule there are now not more than two pleadings in any action (W. Blake Odgers, 1912):

(a) A Statement of Claim, in which the plaintiff sets out his cause of action with all necessary particulars as to his injuries and losses;

(b) A Defense, in which the defendant deals with every material fact alleged by the plaintiff in his Statement of Claim, and also states any few facts which tell in his own favor.

Sometimes the defendant sets up a Counterclaim, which is in the nature of a cross-action, and to this the plaintiff must deliver a special Reply stating his answer to the Counterclaim.

Before judge and jury are asked to decide any question which is in controversy between litigants, it is in all cases desirable and in most cases necessary, that the matter to be submitted to them for decision should be clearly ascertained. The defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff in his turn is entitled to know what defense will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff, or he may be prepared to prove other facts which put a different complexion on the case. He may rely on a point of law, or raise a cross-claim of his own. In any event, before the trial comes on it is highly desirable that the parties should know exactly what they are fighting about, otherwise they may go to great expense in procuring evidence to prove at the trial facts which their opponents will at once concede. It has been found by long experience that the most satisfactory method of obtaining this object is to make each party in turn state his own case, and answer that of his opponent before the hearing. Such statements and the replies to them are called pleadings. And in cases of difficulty and importance the Master will order the parties to deliver pleadings.

In that event, the plaintiff naturally begins; if he has not already specially indorsed his writ, he delivers a separate Statement of Claim. The defendant then puts in his Defense,

which, besides answering the plaintiff's claim, may also set up a Counterclaim. The plaintiff then sometimes replies, and the defendant occasionally, thought rarely, *rejoins*. It is very seldom that any further pleadings are ordered, but there may be *surrejoinders*, *rebutters*, and *surrebutters*. (W. Blake Odgers, 1912) Each of these alternate pleadings must in its turn either admit or deny the facts alleged in the last-preceding pleading; it may also allege additional facts, where necessary. The points admitted by either side are extracted and distinguished from those in controversy; other matters, though disputed, may prove to be immaterial; and thus the litigation is narrowed down to two or three matters which are the real questions in dispute. The pleadings should always be conducted so as to evolve some clearly defined *issues*, that is, some definite propositions of law or facts, asserted by one party and denied by the other, but which both agree to be the points which they wish to have decided in the action.

When this is properly and fairly done, four advantages ensue:

(a) It is a benefit to the parties themselves to know exactly what are the matters left in dispute. They may discover they are fighting about nothing at all; e.g., when a plaintiff is in action of libel finds that the defendant does not assert that the words are true, he is often willing to accept an apology and costs, and so put an end to the action.

(b) It is also an advantage of the parties to know precisely what facts they must prove at the trial; otherwise, they may go to great trouble and expense in procuring evidence of facts which their opponent does not dispute. On the other hand, if they assume that their opponent will not raise such and such point, they may be taken sadly by surprise at the trial.

(c) Moreover, it is necessary to ascertain the nature of the controversy in order to determine the most appropriate mode of trial. It may turn out to be a pure point of law, which should be decided by a judge or by the Court; it may involve a lengthy investigation of complicated accounts, in which case the action should be at once referred to a special or official referee; or it may be a question proper for a jury.

(d) It is desirable to place on record what are the precise questions raised in the action, so that the parties or their successors may not fight the same battle over again.

The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points in which they agree; and thus to arrive at a certain clear issue on which both parties desire a judicial decision. In order to attain this object, it is necessary that

the pleadings interchanged between the parties should be conducted according to certain fixed rules. The main purpose of these rules is to compel each party to state clearly and intelligibly the material facts on which he relies, omitting everything immaterial, and then to insist on his opponent frankly admitting or explicitly denying every material matter alleged against him. By this method they must speedily arrive at an issue. Neither party need disclose in his pleading the evidence by which he proposes to establish his case at the trial. But each must give his opponent a sufficient outline of his case.

No entries are made at any parchment roll; the pleadings are written or printed on paper and interchanged between the parties; the solicitor of one party delivers his pleading to the solicitor of the other party, or to the party himself, if he does not employ a solicitor. This goes on till the pleadings are "closed". The cause is then entered for trial, for which purpose two copies of the complete pleadings are lodged with the officer of the Court. And the copy which is marked with the stamp denoting the fee paid on entry is regarded as the record.

Every pleading should be marked on the face with the date of the day on which it is delivered, with the letter and the number of the writ, the title of the action, and the description of the pleading. A Statement of Claim should also state the date of the writ. It must be indorsed with the name and place of business of the solicitor and agent (if any) who delivers it, or the name and address of the party delivering it, if he does not act by a solicitor. If it contains less than "ten folios" (i.e. 72 words) it may be either printed or written or partly printed and partly written; if it contains "ten folios" or more it must be printed. A "folio" contains seventy-two words of figures, every figure being counted as one word. Every pleading must be divided into paragraphs numbered consecutively. Dates, sums and numbers should be expressed in figures, and not in words. It is not necessary, though it is generally desirable, that a pleading should be drawn or settled by counsel; where it has been, he must sign his name at the end of it; if not settled by counsel, it must be signed by the solicitor or by the party if he sues or defends in person.

2.3. Types of pleadings

Common law pleading was the system of civil procedure used in England, where each cause of action had its own separate procedure: law and equity were entirely different judicial systems, each with its own causes of action and available remedies. Because the list of causes eligible for consideration was capped early during the development of the English legal system, claims that might be acceptable to the evolving court often did not match up perfectly with any of the established causes. Lawyers might have to engage in great ingenuity to shoehorn their clients' claims into the necessary "elements" required to bring an action.

Code pleading was introduced in the 1850s in New York and California. Code pleading sought to abolish the distinction between law and equity. It unified civil procedure for all types of actions as much as possible, and the required elements of each action are set out in carefully codified statutes.

However, code pleading was criticized because many lawyers felt that it was too difficult to fully research all the facts needed to bring a complaint before one had even initiated the action, and thus meritorious plaintiffs could not bring their complaints in time before the statute of limitations expired. Code pleading has also been criticized as promoting "hyper technical reading of legal papers".

Notice pleading is the dominant form in the United States today. In 1938, the Federal Rules of Civil Procedure were adopted. One goal was to relax the strict rules of code pleading. Code pleading served four purposes: notice, issue narrowing, pleading facts with particularity and eliminating merit less claims. The Federal Rules eliminated all of those requirements except for the notice requirement (hence we call it notice pleading). The requirements that were eliminated were shifted to discovery (another goal of the FRCP). In notice pleading, plaintiffs are required to state in their initial complaint only a short and plain statement of their cause of action. The idea is that a plaintiff and their attorney who have a reasonable but not perfect case can file a complaint first, put the other side on notice of the lawsuit, and then strengthen their case by compelling the defendant to produce evidence during the discovery phase.

2.4. Pleadings nowadays

The pleading stage, which formally begins a lawsuit, is where the plaintiff first tells his story to the court. The pleading that contains the plaintiff's story is typically called the complaint, at least in civil cases. But the story that the plaintiff tells through the complaint differs from our basic narrative structure in at least two important ways. (Peter M. Tiersma, 1999)

An ordinary story is normally asserted as truth, even if it is fictional. This means that the speaker expressly or impliedly represents the story as being true. In contrast, the story told in a complaint is alleged to be true; its truth remains to be established at trial. Admittedly, an allegation is quite similar to an assertion: both present facts that the speaker believes to be true, or at least has some basis for believing. The distinction is that the allegation makes a weaker claim to the truth, while indicating that the speaker will produce, or at least has available, evidence to support the claim. Allegations thus tell a story in a more tentative way, recognizing that the actual truth, for legal purposes, must await the outcome of the trial. Often the tentative nature of the complaint is unavoidable because the plaintiff may now know exactly what happened. Elsewhere, the plaintiff may be absolutely sure that his story is accurate, but presents it in the form of unproven allegations because this is the conventional format for pleadings, perhaps in deference to the court's role as determiner of the truth.

The complaint differs from the basic narrative in other ways: at the pleading stage, the story is still incomplete. This is so because there has not yet been a resolution of the problem or crisis; the outcome depends upon whether the facts alleged in the complaint can be proven at trial, as well as the judgment that the court decides to enter.

The basic structure of pleadings has been a fairly constant element of trials for many hundreds years. In fact, medieval lawyers were well aware that much of their task revolved around alleging and proving the stories of their clients. As early as 1230 there are references to pleaders who appeared in court, called *narratores* in Latin (Baker, *An introduction to English Legal History*, 1990:179). The story that the *narrator* told was – logically enough – a *narratio*. Incidentally, the Law French verb for telling a story was *counter*, a meaning which has survived in the words *account* and *recount*. Thus pleaders were known as *counters*, and

the narratives that they told were called *counts,* a term still used today (J.H. Baker, *Manual of Law French*, 1990:79-80).

The following example is an action for trespass from 1341. It first identified the parties and recited that the defendants has been attached to answer by writ (which brought them under the jurisdiction of the court). The record continues by presenting the plaintiff's story, which was made orally in the court by her lawyer, and was recorded in Latin by the clerk:

> *And thereupon the same Isot, by Simon of Kegworth her attorney, complains that the aforesaid John son of John of Clavering and the others, together with the said Robert the Ironmonger of Mimms and the others, on the Saturday (6 Nov. 1339) next after the feast of All Saints in the thirteenth year of the reign of the present King Edward, with force and arms, namely with swords etc., took and led away thirty-one cows, eight bullocks and ten heifers of the selfsame Isot's, worth thirty pounds, found at Ramsden Bellhouse, against the peace (of the lord king). Whereby she says she is the worse and has damage to the extent of sixty pounds. And thereof she produce suit…* (Baker, *English Legal History*, 1990:629)

Like the basic narrative, this complaint begins with certain background information, describing the parties and where they reside. It next gives a chronology of events. This sequence of events caused a problem or crisis. Unlike the basic narrative, however, the complaint does not resolve the crisis. Instead, it requests that the court do so by granting a remedy: payment of sixty pounds.

Today, over a half millennium later, the basic structure of the complaint is remarkably similar. One major change is that the pleadings are now drafted by lawyers and presented to the court in writing. The following is a fairly routine complaint for personal injury filed in the 1980s:

> *The plaintiff Anne Rasmussen, by her attorney, William S. Hart … alleges:*

> *1. That on or about December 30, 1980, at a point on United States Highway No. 40 approximately 15 miles West of Steamboat Springs, Colorado, in the County of Routt and State of Colorado, the defendant Paula Graham did so negligently and carelessly operate a motor vehicle in which the plaintiff Anne Rasmussen was a passenger that said motor vehicle struck a snowplow and caused severe injuries to said plaintiff.*
>
> *2. That as a direct and proximate result of the negligence and carelessness of the defendant as aforesaid, the plaintiff Anne Rasmussen sustained numerous and severe permanent and disabling injuries including, but not limited to, lacerations, contusions, and fractures of the bones of the head, face and jaw…*
>
> *WHEREFORE, plaintiff Anne Rasmussen demands judgment against the defendant Paula Graham in the total sum of One Hundred Thirty-Four Thousand Seven Hundred Ninety One Dollars and 40/100 ($134,791.40), together with her costs, interest from the date of filing the Complaint herein, and for such other and further relief as the Court deems proper.* (Peter N. Simon, *The Anatomy of a Lawsuit*, 1996: 13-14)

In medieval times the exact words in pleading could be critical; one slip was sometimes fatal. The modern example illustrates that pleadings continue to be phrased in **legalese**, including much **formulaic** and **ritualistic language**, although it is safe to say that currently the content has become far more important than the form. The ritualistic language of pleadings signals that something significant and different from ordinary life is about to commence. In fact, because *complaint* is a legal homonym (with both an ordinary and legal meaning), the legalistic language helps make it clear to the defendant that this is not merely a grievance, which is the ordinary meaning of the word *complaint.* Rather, this is a *complaint* in the legal sense: an important legal document that puts into gear the machinery of the law. It suggests to her that perhaps she should consult an attorney.

Of course, the kinds of stories that can be told in a pleading are also greatly affected by the substantive law. For various reasons, the law limits itself to addressing only certain categories of problems or crisis. If your problem is that your neighbors have converted their

house into a loud factory that disturbs your sleep, the legal system will probably offer a remedy. On the other hand, a complaint that your neighbors have added a second story to their house may fall on deaf ears, even though it may precipitate a crisis for you by blocking your view, depriving you of sunlight, and invading the privacy of your back yard. The fact that the judicial system addresses only certain types of stories and problems is expressed in modern legal terms by the requirement that you have a cause of action. Another requirement is that you tell your story to the right person: someone endowed with the authority to offer a resolution. This is technically known as jurisdiction.

The defendant can respond to the complaint in various ways. One strategy is to contest the legal adequacy of the complaint, alleging that the plaintiff has no valid cause of action, or that the court has no jurisdiction. Another option is to admit that the story is legally adequate in theory, but to challenge its truth by denying the facts. Or the defendant can offer a counter narrative that – it found to be true – would require the court to resolve the dispute in the defendant's favor. Finally, the defendant can admit that the plaintiff's narrative is both legally adequate and true, but offer an excuse or justification for her behavior. Often an excuse or justification fills factual gaps in the plaintiff's story. Thus, the defendant may admit that she struck and injured the plaintiff, as alleged in the complaint, but might supplement the plaintiff's story by adding that she did so only after the plaintiff threatened her with a knife.

If the court decides that the plaintiff's story is legally adequate, the trial – to determine its truth - can begin.

2.5. Opening statements

Many people confuse pleadings (which are exposure of the counts of the charge/indictment) and opening statements. **Opening statement** is the explanation by the attorneys for both sides at the beginning of the trial of what will be proved during the trial. The defendant's attorney may delay the opening statement for the defense until the plaintiff's evidence has been introduced. Unlike a closing argument, the opening statement is supposed to be a factual presentation and not an argument.

The opening statement is generally constructed to serve as a "road map" for the fact-finder. This is especially essential in jury trials, since jurors know nothing at all about the case

before the trial. Though such statements may be dramatic and vivid, they must be limited to the evidence reasonably expected to be presented during the trial. Attorneys generally conclude opening statements with a reminder that at the conclusion of evidence, the attorney will return to ask the fact-finder to find in his or her client's favor.

Opening statements are, in theory, not allowed to be argumentative, or suggest the inferences that fact-finders should draw from the evidence they will hear. In actual practice, the line between statement and argument is often unclear and many attorneys will infuse at least a little argumentation into their opening (often prefacing borderline arguments with some variation on the phrase, "As we will show you..."). Objections, though permissible during opening statements, are very unusual, and by professional courtesy are usually reserved only for egregious conduct.

Generally, the prosecution in a criminal case and plaintiff in a civil case is the first to offer an opening statement, and defendants go second. Defendants are also allowed the option of delaying their opening statement until after the close of the prosecution or plaintiff's case. Few take this option, however, so as not to allow the other party's argument to stand uncontradicted for so long.

Chapter 3: Examination of witnesses

3.1. Testimony and the truth

Testimony is a solemn declaration usually made by a witness under oath in response to interrogation by a lawyer or authorized public official. Testimony may be oral or written, and it is usually made by oath or affirmation under penalty of perjury. Unless a witness is testifying as an expert witness, testimony in the form of opinions or inferences is generally limited to those opinions or inferences that are rationally based on the perceptions of the witness and are helpful to a clear understanding of the witness' testimony.

After the pleadings stage has been completed the search for the truth commences. In the American system there are extensive proceedings before trial during which each side has the right to obtain information about the other's case, a process called discovery. The discovery process, especially in civil cases, can include taking live testimony of potential witnesses (depositions), posing written questions (interrogatories), or obtaining documentary evidence (request for documents)

In law, a **deposition** is witness testimony given under oath and recorded for use in court at a later date. In many countries depositions are given in courtrooms, but in the United States they are usually taken elsewhere. In the United States, it is a part of the discovery process in which litigants gather information in preparation for trial. Some jurisdictions recognize an affidavit as a form of deposition.

Interrogatories (also known as *Requests for Further Information*) are a formal set of written questions propounded by one litigant and required to be answered by an adversary, in order to clarify matters of evidence and help to determine in advance what facts will be presented at any trial in the case.

The truth of the plaintiff's can be determined either by the judge or by the jury. Assuming that it is a jury trial, the people who comprise the jury must first be selected. A **jury** is a sworn body of persons convened to render a rational, impartial verdict and a finding

of fact on a legal question officially submitted to them, or to set a penalty or judgment in a jury trial of a court of law.

We search for truth mainly through the sworn testimony of witnesses. Testimony is not the only type of evidence, documents, photographs and many other kinds of proof are equally acceptable, but it remains extremely important. The law of evidence governs the use of testimony and exhibits physical objects or other documentary material which is admissible in a judicial or administrative proceeding. Circumstantial evidence is an evidence of an indirect nature which implies the existence of the main fact in question but does not in itself prove it. That is, the existence of the main fact is deduced from the indirect or circumstantial evidence by a process of probable reasoning. The introduction of a defendant fingerprints or DNA sample are examples of circumstantial evidence. The fact that a defendant had a motive to commit a crime is circumstantial evidence. Some people believe that all evidence is circumstantial because, some observers think that no evidence ever directly proves a fact.

We often say that a witness *gives* testimony. In reality, the legal system *takes* it. In the rest of this chapter we will discuss how lawyers use language to elicit testimony of witnesses. We will see that how questions are asked can potentially influence the answer. Furthermore, we will see how the fact finder can decide whether a witness is telling the truth.

3.2. Language variation in the courtroom

Language variations are common as in written and as in verbal communication. In written communication the language is more formal then in verbal communication. In verbal communication lawyers and other participants use a range of language varieties: formal legal language, Standard English, colloquial English and local dialects. It is interesting how each style of variety is used and also by whom it is used, the purpose for which it is used and the effect that it has on the hearer.

Peter M. Tiersma in *Legal language* (1999) presents and explains the language variation and code-switching used in the courtroom. **Code-switching** is a term in linguistics referring to using more than one language or variety in conversation. Bilinguals, who can speak at least two languages, have the ability to use elements of both languages when conversing with another bilingual. Code-switching is the syntactically and phonologically

appropriate use of multiple varieties. During the late Middle Ages, English lawyers engaged in code-switching between Latin, Law French and English. In written legal language, switching seems to have been dictated almost entirely by customs: court records were traditionally kept in Latin, for instance.

Code-switching is not random; speakers will alternate between varieties of language depending on a number of factors. One factor is the *topic* of discussion. When speaking about the law, it is natural for lawyers to switch to legal language, and particularly to employ technical terminology. The hearer's ability to understand the code is another important factor in code-switching. Effective communication requires speaking to someone in language that the person will best understand. When a lawyer examines a witness who has no knowledge about the legal language or formal language, the lawyer must use colloquial English.

A third factor is the type of language a speaker uses is closely related to his social and economic position, and thus greatly influences how others view him. Those who speak Standard English are regarded as highly educated people and are felt to have a higher status than those who speak regional varieties. Susan Berk-Seligson in *The Bilingual Courtroom: Courtroom Interpreters in the Judicial Process* (1990) explains that the speakers of some varieties of English are seen as people who have less well education and have lower socioeconomic status. I think that people with a lower education then lawyers are able to understand the formal legal language or Standard English. For instance, an African American who speaks both Standard English and Black English can signal that he is part of the black community by speaking Black English to his "brothers," while he can distance himself by speaking Standard English, "like a white man." The choice of one variety over the other can be used strategically, depending on the impression that the speaker wishes to make on a particular audience.

Lawyers can and do vary the formality of their speech during questioning, often for strategic reasons. A lawyer may use colloquial English to subtly criticize an expert witness for trying to obscure a simple matter by using big words, or on the other hand, use very formal language with a lesser educated witness as a way to emphasize his lack of education. (John M. Conley and William M. O'Barr, *Rules versus Relationships*, at 26, The University of Chicago, 1990)

Lawyers are well aware of the social implications of code-switching and some of them avoid unnecessary legalese because they realize that jurors will not understand it and can be confusing for them and for some witness who are an important part of a trial. Therefore, lawyers mostly speak Standard English in court. Also, lawyers use regional language for subtly communicate to the jurors that his client is a part of the local community and by this the purpose of the lawyer is to appeal subtly to values or attitudes that could not be invoked expressly.

Language is obviously a very powerful tool, and like all tools, it can be used for evil as well as good.

3.3. Direct examination and cross-examination of witnesses

The rules concerning the way that witnesses deliver their information to a court are grounded in the history of the adversarial trial. The selection deals with the presentation of witness testimony in court through questions from lawyer known as direct examination and cross-examination. A trial is often a contest between two views. In order to reconstruct the events in a way that best demonstrates their particular legal position, the lawyer routinely prepares his witnesses to give evidence.

The direct examination is a crucial part of the case. **Direct examination** (also called examination-in-chief) is the questioning of a witness by the party who called him or her, in a trial in a court of law. Direct examination is usually performed to elicit evidence in support of facts which will satisfy a required element of a party's claim or defense.

In direct examination, one is generally prohibited from asking leading questions. This prevents a lawyer from feeding answers to a favorable witness. An exception to this rule occurs if one side has called a witness, but it is either understood, or soon becomes plain, that the witness is hostile to the questioner's side of the controversy. The lawyer may then ask the court to declare the person he or she has called to the stand a hostile witness. If the court does so, the lawyer may thereafter examine the witness with leading questions during direct examination. In United States law, a hostile witness is a witness in a trial who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination. A hostile witness is known as an adverse witness.

When counsel examines or questions a witness that they have called, this first presentation of evidence is referred as “examination-in-chief” or direct examination. The party who calls a witness cannot “lead” their own witness in questioning except on non-contentious matters such as age, name, etc. This means that counsel cannot ask leading questions. Normally, the party calling the witness knows what the witness will say and that the testimony will favor the party’s position. Other exceptions are made in the following situations:

- where the witness is hostile to the examiner, or reluctant or unwilling to testify, in which situation the witness is unlikely to accept being "coached" by the questioner.
- necessity, with a child witness or a witness who is ignorant, weak-minded, timid, or deficient in the English language;
- where the memory of the witness has been exhausted and there is still information to be elicited;
- in a sensitive area, to avoid the witness from testifying to incompetent or prejudicial matter.

However, there are situations where it might be unfair to confine the examiner to non-leading questions. For example, in a case of a forgetful witness where the lawyer cannot refresh the witness’s memory. A witness may disappoint for other reasons, recanting his or her earlier version of events out of fear of the accused, for example.

The fresh account of the relevant events that a court hopes to receive may be anything but fresh by the time a matter gates to a trial. It can be months or years between the events in question and the giving of evidence in even a routine case. Sometimes the relevant events happened many years in the past.

A witness may have difficulty remembering the events in the witness stand. After counsel has determined that the witness has exhausted her or his memory, counsel may ask leading question with the permission of the judge in an attempt to revive the witness’s memory. For example:

> *Q: Can you remember the names of any other people who attended the meeting?*
> *A: No, I cannot.*

…

Q: Would you remember if I suggested to you that Mr. John Doe also attended the meeting?

A: You're right. Now I remember. (Example taken from Christine Boyle, Marilyn T. MacCrimmon and Dianne Martin, *The Law of Evidence: Fact Finding, Fairness and Advocacy*, at 462, 1999)

Leading questions are particular for cross-examination. A leading question suggests that there is only one correct answer, and in essence tries to "lead" the witness to that answer. Peter M. Tiersma in *Legal Language* (1999) presents three common ways for asking a leading question: one is to use negative *yes/no* question, another is to use *tag* question, and a common form of leading question is simply to make a statement with question information. Often the leading questions are assertions of facts or accusations made by the examining lawyer who seek for agreement. Leading questions may often be answerable with a yes or no (though not all yes-no questions are leading), while non-leading questions are open-ended. Depending on the circumstances leading questions can be objectionable or proper. The propriety of leading questions generally depends on the relationship of the witness to the party conducting the examination. An examiner may generally ask leading questions of a hostile witness or on cross-examination, but not on direct examination.

Cross-examination is the interrogation of a witness called by one's opponent. It is preceded by direct examination. Unlike in direct examinations, however, leading questions are typically permitted in a cross-examination, since the witness is presumed to be unsympathetic to the opposing side. The main purpose of cross-examination is to damage the case of the opposition, but sometimes the cross-examining lawyer simply seeks information from the witness, as on direct examination, to support his client's narrative or counter-narrative. In a sense, the cross-examining lawyer wishes to undermine what the witness communicated during direct examination. The lawyer aims to take the apparently clear communications made during direct examination and render them as uncertain, vague, and ambiguous as possible. The cross-examiners aim to muddy the message, and they may also try to drag the messengers through the mud by assailing their credibility or even accusing them of lying.

The testimony of witnesses begins with a ritualistic language as the witnesses are sworn in:

> *THE CLERK: Please raise your right hand.*
> *Do you solemnly swear that the testimony you may give in the cause now pending before this court, shall be the truth, the whole truth and nothing but the truth, so help you God.*
> *THE WITNESS: Yes, I do.* (Examination of Ronald Shipp, *Simpson Transcript*, Feb. 1, 1995)

Another pattern for questioning during direct examination is to begin by allowing the witness a brief narrative answer, but limited to the topic that the lawyer's question raises.

> *Q: Would you tell the ladies and gentlemen of the jury what you observed when you entered apartment 9?*
> *A: As we entered the apartment, we walked into the kitchen area…and I walked through the kitchen to the right into the living room, where I observed a white male, approximately twenty-four years old, lying face up o the davenport. He was covered partially with a blanket, and there was blood gushing from his mouth.* (Philip B. Heyman and William H. Kenety, *The Murder Trial of Wilbur Jackson: a Homicide in the Family*, 2d ed. 1985, at 138)

These questions are not request for information; they are polite commands to tell a mini-narrative. In fact, the "question" is functionally more like an imperative: *Please tell the jury what you saw.* (Peter M. Tiersma, *Legal Language*, at 160, 1999)

The most common types of questions used in direct examination are **wh-question**, which begin with a question word like *why, when, or how;* yes or no questions, which allow only **a yes or no answer**; and the **disjunctive question**, which limits the answer to two choices. These types of questions are used to clarify or expand on the testimony, or to focus on particular points.

Although, wh-questions allow a long narrative answer, lawyers phrase them in such a way as to limit the answer to a brief reply. The following is an excerpt from the Simpson's case transcript:

> *Q: Why did you decide, detective Fuhrman, that there was no need to go get one of the guns that was in the house to accompany you?*
> *A: I don't think it was a need. I think it was a judgment call at that time. (*Examination of Mark Fuhrman, *Simpson Transcript, Mar. 14, 1995)*

Yes or no questions are a common category of questions during direct examination. As the name implies, the answer to a yes/no question is either yes or no:

> *Q: When you turned out to find this glove over a Rockingham, you knew that you would be on the case as long as it lasted, didn't you?*
> *A: No.* (Examination of Mark Fuhrman, *Simpson Transcript*, Mar. 14, 1995)

Similar to yes/no question is the disjunctive question, which restrict the answer to two choices, but the choices are explicitly presented in the question:

> *Q: Who did you see first Mr. Kaelin or Mr. Simpson?*
> *A: Mr. Kaelin.* (Examination of Allan Park, *Simpson Transcript*, Nov. 20, 1996)

Lawyers maintain rigid control over the client's case. For the plaintiff's counsel, this means producing persuasive evidence to support the critical elements of his client's story. Defense counsel must offer factual support for the defendant's counter narrative or defense. Lawyers accomplish these aims by steering the testimony of witnesses, to the extent it is legally and ethically permissible, in very specific directions.

Lawyers could allow witnesses to use the narrative format more often, especially because witnesses themselves seem to prefer it. From the lawyer's perspective, the danger that lurks in narrative testimony is that the witness could say too much. Irrelevant information

would be annoying and time-consuming enough. Even more devastating is when a witness volunteers information that damages the client's case. Thus, a lawyer typically allows for narrative testimony mainly for his own client, who should be well aware of what to say and what not to say, as well as expert witnesses, who are paid by the client and should be experienced enough to say only what will enhance their employer's case. Other witnesses are kept on a shorter leash. One of the worst things that can happen to a lawyer during trial is to lose control of a witness.

A reason for tight control over the testimony is the goal of precise communication. Lawyers often use questioning to clarify vague or ambiguous answers, or confirm exactly what the witness said. These questions are used strategically to undermine the witness's credibility and integrity.

> *Q: You don't think cheating on your wife and mother of your two children is a lie? Is that what you're saying to this jury?*
> *A: I'm saying to this jury –*
> *Q: Yes or no, sir?*
> *A: Yes.* (Examination of Orenthal J. Simpson, *Simpson transcript*, Jan. 13, 1997)

Lawyers realize that some technical terms must be explained for the members of the jury, such as: medical terms, legal terms, etc. Also slangs or argots need further explanations, although the lawyer knows the meaning of the term used, but he wants to have it explained to the jurors.

> *Q: Can you explain to us what a criminalist is?*
> *A: A criminalist is somebody who applies the principles of the physical and natural sciences to identify, collect, and analyze evidence related to a crime, and then presents his findings in a court of law.* (Examination of Dennis Fung, criminalist employed by Los Angeles Department, *Simpson Transcript*, Nov. 4, 1996)

Slang has the function of shortening communication. The following is an excerpt from the Simpson trial, taken from a side-bar conference in which prosecutor Darden is explaining what his witness's testimony is going to be and whether it is admissible:

> *THE COURT: All right. We are at the side bar. Mr. Darden, where we going with this?*
> *MR. DARDEN: I'm just trying to establish the closeness of their relationship, that's all. He is not going to jump out and say he had sex with another woman or used drugs, you know, the usual things guys talk about.*
> *THE COURT: What is he going to say?*
> *MR. DARDEN: And he is going to say he discussed an incident that apparently happened on January 1, 1989, and that is where we are headed. So you know, I don't think any bomb are about to fall on them.*
> *THE COURT: Mr. Douglas.*
> …
> *MR. DOUGLAS: Your honor, the court has different incidents that the court has ruled inadmissible and I want to make sure we are talking about things that are cool.* (*Simpson Transcript,* Feb. 1, 1995)

Side-bars during the Simpson trial were sometimes so casual that Judge Ito called the attorneys by their first names, and they replied using *you* rather than a third person form:

> *THE COURT: All right. We are over at the side bar.*
> *Marcia, this guy has said, hey, my best recollection is 10:50. He said this four times now. Johnnie has got him to say, yeah, I told the police it was sometime between 10:50 and 11:00. He said four times now my best recollection now is 10:50. How many times are we going to go over this? Just a question.*
> *MS. CLARK: You are right.*
> *MR. COCHRAN: You are right. Thank you, your honor.*
> *MS. CLARK: Okay*. (*Simpson Transcript,* Feb. 8, 1995)

Lawyers sometimes use broad or general words, followed by a list of more precise elements that are included within the general term. Often this combination of the general and the specific communicates more clearly than just a general term or a list. In testimony, when a witness uses broad or general term, the lawyer may try to achieve this aim by eliciting a list of specific items included within the general language.

> *Q: When we talk about hair and fiber evidence, tell us what that is.*
> *A: Hair and fiber evidence is, or it can be hair that is left at a crime scene or fibers that are left at a crime scene.*
> *Q: Fiber from something like a carpet or a piece of clothing or any -- Any item that is made out of cloth, for instance, correct?*
> *A: That's correct.*
> *Q: Or synthetic material?*
> *A: Yes.* (Examination of Dennis Fung, criminalist employed by Los Angeles Department, *Simpson Transcript*, Nov. 4, 1996)

A common strategy in direct examination is that the opposing counsel can object to vague or overbroad questioning, and by this forcing the examining lawyer to be more precise. An example is the Simpson Trial, in which prosecutor Darden was asking a witness whether he had ever had intimate and personal conversation with the defendant. The judge sustained defense counsel objection. Then Mr. Darden limits his questions to more precise types of intimate conversation.

> *Q: Did you ever have intimate and personal conversations with him* [the defendant]?
> *A: Yes, I did.*
> *Q: What kind of things did you talk about during those personal and intimate conversations?*
> *MR. DOUGLAS: Objection, your honor, overbroad, vague.*
> *THE COURT: Sustained.*
> *Q: Did you ever discuss your health with the defendant?*

A: No, I did not.

Q: Did you ever discuss your relationship with your wife with the defendant?

A: I don't believe so. (Examination of Ronald Shipp, *Simpson Transcript*, Feb. 1, 1995)

After a lawyer questions her own witness, the opposing side has a chance to cross-examine. Sometimes the cross-examining lawyer simply seeks information from the witness, as on direct examination, to support his client's narrative or counter-narrative.

The process of cross-examination is more liberal then direct examination that is during cross-examination the lawyer can use leading questions. Leading questions control the flow of testimony from a witness who presumably does not want to assist the lawyer because they compel a "yes" or "no" answer. This is an example of a leading version of the direct question:

Q: Detective Vannatter, there was no cut on the left-hand glove that you found at Bundy?

A: No.

Q: But there was a cut on the defendant's hand when you first saw him?

A: Yes. (Examination of the Detective Vannatter, *Simpson Transcript*, Mar. 21, 1995)

There are three ways to ask a leading question: the use of a **negative yes/no question**, the use of **tag question** and another way is by simply making a **statement with question information.** The following is an example of a negative yes/no question from the Simpson trial:

Q: Doesn't the manual say that it could be a mixture, it could be contamination, it could be a DX gene, or it would be cross-hybridization?

A: No, I don't believe so. (Examination of Mr. Collin Yamauchi, criminalist at Los Angeles Police Department Scientific Investigation Division, *Simpson Transcript*, Nov. 18, 1996)

Tag question can be an indicator of politeness, emphasis, or irony. They may suggest confidence or lack of confidence; they may be confrontational or tentative. The following is an example of a tag question used in the Simpson's trial:

> *Q: You gave a few statements about information that you have concerning this case, isn't that correct?*
> *A: Yes, I have.* (Examination of Examination of Ronald Shipp, *Simpson Transcript*, Feb. 1, 1995)

The following is an example of a statement with question information made by Mr. Bailey while he cross-examined Sergeant Rossi in the Simpson's trial:

> *Q: You mentioned yesterday that Detective Phillips was making notes of the crime scene?*
> *A: Yes, he had a note pad with him.* (Examination of David Rossi, *Simpson Transcript*, Feb. 15, 1995)

Cross-examination is counsel's opportunity to challenge the version of events given by the opposing party's witness in two ways. Impeaching (impugning or criticizing) the witness's credibility in order to cast doubt in their version of events, and eliciting information that advances the cross-examiner's case are generally seen to be the twin goals of cross-examination. They are achieved by a combination of the style of the questioning and it's content. If the most questions are leading, and if counsel has prepared a follow-up question for either a yes or no answer, they are in control of the questioning and well on the obtaining answer that will assist their cause. If the answer is not the desired one, the lawyer must demonstrate that the witness has given an inaccurate or false answer by providing a mean to impeach his credibility for truthfulness.

Cross-examination is not restricted to matters that were raised in the direct examination. Thereby, the cross-examiner may prepare the overall cross-examination in two

separate parts: a section designed to impeach and a section designed to elicit new or changed evidence.

A statement that the witness has made on a previous testimony may be used to impeach the witness's credibility:

> *Q: Did you use the word "them"* [glove] *in your answer on July 5th?*
> *A: Yes, sir.*
> *Q: And was the last item to which "them" could have applied in your narrative the word "glove"?*
> *A: Singular, yes.*
> *Q: I'm simply asking whether glove, line 14, was the item you were talking about just prior to saying "I saw them at his feet"?*
> *A: "Them", I was referring to the knit cap, the glove.*
> *Q: Show me anywhere on that page where the knit cap is mentioned? Can you?*
> *A: That page, no.*
> *Q: All right. Do you see anything on the prior page, Detective Fuhrman, about the knit cap?*
> …
> *A: I do not.* (Examination of Detective Fuhrman, *Simpson Transcript*, Mar. 14, 1995)

In another sequence, lawyer F. Lee Bailey used leading questions to attack Detective Fuhrman's credibility more directly. Fuhrman have denied ever saying the word *nigger* during the prior ten years:

> *Q: Are you therefore saying that you have not used that word in the past ten years, Detective Fuhrman?*
> *A: Yes, that is what I'm saying.*

> *Q: And you say, under oath, that you have not addressed any black person as a nigger or spoken about black people as niggers in the past ten years, Detective Fuhrman?*
> *A: That's what I'm saying, sir.*
> *Q: So that anyone who comes to this court and quotes you as using that word is dealing with African American would be a liar, would they not, Detective Fuhrman?*
> *A: Yes, they would.*
> *Q: All of them, correct?*
> *A: All f them.* (Examination of Detective Fuhrman, *Simpson Transcript*, Mar. 15, 1995)

If the lawyer intends to specifically contradict the witness, in the sense of demonstrating the inconsistency, the cross-examiner needs to show the statement (transcript) to the witness to prove that the statement was made. The lawyer may cross-examine the witness on a prior written statement relative to the subject matter of the case without showing the statement to the witness, but the lawyer intends to contradict the witness, the attention of the witness must be drawn to the relevant parts of the statement that will be used in contradictory.

The credibility of an opponent's witnesses can be impeached by cross-examination on discreditable actions or character qualities that suggest that their evidence is untrustworthy. Character evidence generally means proving characteristics and psychological invention that tend to show that a person is more likely to behave in a certain way because he is that kind of person. The lawyer may use an antecedent (a fight or a criminal record) to prove this characteristic of the witness. The following example is the statement of Mark Day, an employee at residential security firm. He was the witness at a previous fight between O. J. Simpson and his wife, Nicole Simpson. Through the statement of Mark Day the presumption of the innocence of O. J. Simpson was affected.

> *Q: Could you tell me, first of all, what happened when you responded there at that time* [1985]*?*

A: Upon my arrival I came on the property from the north gate and walked -- was walking towards the front door and I was the first person on the scene, and I was met by Nicole Simpson as she came running across the front yard.

Q. Can you explain Nicole Simpson's appearance to me, and demeanor as she ran across the front yard?

A. She was hysterical, she was crying, very upset.

Q. And what, if anything, did she say to you at that time?

A. She -- specifically I can't give you a quote, but it was, you know, that she was very upset and that he had lost his [Orenthal Simpson] *temper and that she was afraid*. (Examination of Mark Day, *Simpson Transcript*, Nov. 18, 1996)

The conversation between lawyer and witness follows the question-and-answer format which differs from ordinary conversations. In fact, in this conversation both participants are addressing to the jury and not to each other. Occasionally, witnesses turn to the jury when giving an answer. Saul M. Kassim and Lawrance S. Wrightsman in *The American Jury on Trial* (1988) explains how frustrating is for many jurors that they cannot question the witness. Fortunately, some judges now allow jurors to pose their own questions, although they must normally be submitted in writing to the judge, who reviews the question before asking it.

3.4. Eyewitness testimony

The bedrock of the American judicial process is the honesty of witnesses in trial. Eyewitness testimony can make a deep impression on a jury, which is often exclusively assigned the role of sorting out credibility issues and making judgments about the truth of witness statements (George Fisher, *The Jury's Rise as a Lie Detector*, 107 YALE L.J. 575, 1997). Perjury is a crime, because lying under oath can subvert the integrity of a trial and the legitimacy of the judicial system. However, perjury is defined as *knowingly* making a false statement—merely misremembering is not a crime.

Moreover, the jury makes its determinations of witness credibility and veracity in secret, without revealing the reason for its final judgment. Recognizing the fallibility of witness memories, then, is especially important to participants in the judicial process, since many trials revolve around factual determinations of whom to believe. Rarely will a factual question result in a successful appeal - effectively giving many parties only one chance at justice. Arriving at a just result and a correct determination of truth is difficult enough without the added possibility that witnesses themselves may not be aware of inaccuracies in their testimony.

Courts, lawyers and police officers are now aware of the ability of third parties to introduce false memories to witnesses. For this reason, lawyers closely question witnesses regarding the accuracy of their memories and about any possible “assistance” from others in the formation of their present memories. However, psychologists have long recognized that gap filling and reliance on assumptions are necessary to function in our society. We are constantly filling in the gaps in our recollection and interpreting things we hear.

The process of interpretation occurs at the very formation of memory - thus introducing distortion from the beginning. Furthermore, witnesses can distort their own memories without the help of examiners, police officers or lawyers. Rarely do we tell a story or recount events without a purpose.

Every act of telling and retelling is tailored to a particular listener; we would not expect someone to listen to every detail of our morning commute, so we edit out extraneous material. The act of telling a story adds another layer of distortion, which in turn affects the underlying memory of the event.

Once witnesses state facts in a particular way or identify a particular person as the perpetrator, they are unwilling or even unable - due to the reconstruction of their memory - to reconsider their initial understanding. When a witness identifies a person in a line-up, he is likely to identify that same person in later line-ups, even when the person identified is not the perpetrator. Although juries and decision-makers place great reliance on eyewitness identification, they are often unaware of the danger of false memories.

Memory is affected by retelling, and we rarely tell a story in a neutral fashion. By tailoring our stories to our listeners, our bias distorts the very formation of memory - even without the introduction of misinformation by a third party. The protections of the judicial

system against prosecutors and police "assisting" a witness's memory may not sufficiently ensure the accuracy of those memories. Even though prosecutors refrain from "refreshing" witness A's memory by showing her witness B's testimony, the mere act of telling prosecutors what happened may bias and distort the witness' memory. Eyewitness testimony, then, is innately suspected.

Lawyers place great import on testimony by the other side's witness that favors their own side's case. For example, defense attorneys make much of prosecution witnesses' recollection of exonerating details. In light of psychological studies demonstrating the effect of bias on memory, the reliance and weight placed on such "admissions" may be appropriate, since witnesses are more apt to tailor their stories - and thus their memories - to the interests of the first listeners. An eyewitness to a crime is more inclined to recount, and thus remember incriminating details, when speaking to a police officer intent on solving the crime. If later the eyewitness still remembers details that throw doubt on the culpability of the suspect, such doubts should hold greater weight than the remembrance of incriminating details.

While confidence and accuracy are generally correlated, when misleading information is given, witness confidence is often *higher* for the incorrect information than for the correct information. This leads many to question the competence of the average person to determine credibility issues. Juries are the fact-finders, and credibility issues are to be determined by juries. The issue then arises whether juries are equipped to make these determinations. Expert testimony may not be helpful. Indeed, since the very act of forming a memory creates distortion, how can anyone uncover the "truth" behind a person's statements? Perhaps it is the terrible truth that in many cases we are simply not capable of determining what happened, yet are duty-bound to so determine. Maybe this is why we cling to the sanctity of the jury and the secrecy of jury findings:

> *We can put such questions before the jury entirely without fear of embarrassment, because the way the jury resolves the questions and, in all likelihood, the soundness of its answers will remain forever hidden. Perhaps the allure of the black box as a means toward apparent certainty in an uncertain world has tempted us to entrust the jury with more and harder*

questions than it has the power to answer (George Fisher, *The Jury's Rise as a Lie Detector*, 107 YALE L.J., 1997).

The courts' reliance on witnesses is built into the common-law judicial system, a reliance that is placed in check by the opposing counsel's right to cross-examination - an important component of the adversarial legal process - and the law's trust of the jury's common sense. The fixation on witnesses reflects the weight given to personal testimony. As shown by recent studies, this weight must be balanced by an awareness that it is not necessary for a witness to lie or be coaxed by prosecutorial error to inaccurately state the facts - the mere fault of being human results in distorted memory and inaccurate testimony.

3.5. Closing arguments

A **closing argument**, summation, or summing up is the concluding statement of each party's counsel (often called an attorney in the United States) reiterating the important arguments for the *trier* of fact, often the jury, in a court case. A closing argument occurs after the presentation of evidence. A closing argument may not contain any new information and may only use evidence introduced at trial. It is not customary to raise objections during closing arguments, except for egregious behavior. However, such objections, when made, can prove critical later in order to preserve appellate issues.

The plaintiff is generally entitled to open the argument. The defendant usually goes second. The plaintiff or prosecution is usually then permitted a final rebuttal argument. In some jurisdictions, however, this form is condensed, and the prosecution or plaintiff goes second, after the defense, with no rebuttals. Either party may waive their opportunity to present a closing argument.

During closing arguments, counsel may not (among other restrictions) vouch for the credibility of witnesses, indicate their personal opinions of the case, comment on the absence of evidence that they themselves have caused to be excluded, or attempt to exhort the jury to irrational, emotional behavior.

In a criminal law case, the prosecution will restate all the evidence which helps prove each element of the offense. There are often several limits as to what the prosecution may or

may not say, including precluding the prosecution from using a defendant's exercise of his Fifth Amendment right to silence as evidence of guilt. One of the most important restrictions on prosecutors, however, is against *burden-shifting*, or implying that the defense must put on evidence or somehow prove the innocence of the defendant.

In some cases, a judge's presentation of the jury instruction is also known as summing up. In this case, the judge is merely articulating the law and questions of fact upon which the jury is asked to deliberate.

Conclusions

A legal action, in its simplest form, is a proceeding of a plaintiff against a defendant from whom redress is sought. The plaintiff begins a lawsuit by filing a complaint, a written statement of his or her claim and the relief desired, with a court that has jurisdiction. The defendant is served a process that notifies him or her of the suit and usually responds with an answer.

Today, liberal rules of discovery allow parties to a civil action to obtain information from other parties and their witnesses through depositions and other devices. Discovery is now used to ascertain the facts believed by the other side to exist and to narrow the issues to be tried. At common law , pleadings performed this function, and they were continued beyond the complaint and answer until an issue was agreed upon.

Most evidence is offered by witnesses who testify before the court. Here, the question of the witness's personal competency must be resolved; it must be shown that the witness was able to know, understand, and remember the matters on which he or she is to be examined. Thus, a witness must possess the sensory faculties needed to apprehend the facts reported and must not be considered mentally ill or incompetent. Children offered as witnesses are examined by the judge to determine their intelligence and understanding. The general attitudes toward child witnesses have changed dramatically over the last decade, though some psychologists are still divided. Some deem children as reliable and quiet capable of providing accurate and detailed testimony (due to their resistance to suggestion regarding events they took part in), while others describe them as having difficulties in distinguishing reality, for which further questioning must be initiated, and thus unreliable. But over all, it is logical to assume that children have similar failings to their adult counterparts, with the possible exception of being more easily confused by technical or unclear questions.

Eyewitness testimony is a powerful tool within any field particularly that of justice, as it is a readily accepted form of evidence that allows for convictions. Unfortunately in its present state, eyewitness evidence, though technically reliable in its own right, tends to convict innocent individuals. The eyewitnesses' confidence in their words can lead even the

toughest jury to convict an innocent person. This confidence can persuade the jury to believe whatever it is that they are saying and give the false impersonation that what they are saying is actually the truth. The court system assumes that individuals' memory can perform like a video in that they will be able to store information with precise clarity and without prejudice.

The witness is first directly examined by the party who offers him or her, then is cross-examined by the adversary. No witness may express an opinion on any matter when the jury can draw its own conclusions from the facts; but on technical questions an expert witness may state an opinion.

Witness questioning also plays an important factor within the development of a functional testimony system. When questioning a witness it is important to approach them with questions that are not perplexing, but instead clear and conscious. Unclear questions lead to uncertainty, which in turn leads the witness to become more reliant on the context of questions. The use of earlier made statements by the witness are good tools for cross referencing the validity of eyewitness testimony, but this cross referencing must be done in a non hostile, non accusatory way to decrease the possibility of increased anxiety which would otherwise create an unstable witness. At the same time, particular attention needs to be placed on the wording within questions, as one term might produce a different response to that of another, even though technically, the two words might have identical meanings.

References:

Baker, John, 1990, *An Introduction to English Legal History*, 3d ed., London, Butterworths

Baker, John, 1990, *Manual of Law French*, 2d ed., London, Scolar Press

Berk-Seligson, Susan, 1990, *The Bilingual Courtroom: Courtrom Interpreters in the Judicial Process*, Chicago, University of Chicago Press

Boyle, Christine, MacCrimmon, Marilyb and Martin Dianne, 1999, *The law Of Evidence: Fact Finding, Fairness and Advocacy*, Toronto, Edmond Montgomery Publication

Chomsky, Noam, 1988, *Language and Problems of Knowledge*, Cambridge, MIT Press

Conley, John and O'Barr, William, 2005, *Just Words: Law, Language and Power*, Chicago, University of Chicago Press

Fisher, George, 1997, *The Jury's Rise as a Lie Detector*, Yale Law Journal, vol. 107

Heyman, Philip and Kenety, William, 1985, *The Murder Trial of Wilbur Jackson: a Homicide in the Family*, West Pub. Co.

Kassim, Saul and Wrightsman, Lawrence, 1988, *The American Jury on Trial*, New York, Hemisphere

Odgers, Blake, 1912, *The Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, London, Stevens and Sons, Chancery Lane

Shape, Reginald, 1905, *Calendar of Letter-Books…of the City of London, Letter-Book G*, London, Corporation of London

Shapiro, David, 1987, *In Defense of Judicial Candor*, Harvard Law Review, v. 100, no. 4

Simon, Peter, 1996, *The Anatomy of a Lawsuit*, Michie Law

Solan, Lawrence, 1993, *The Language of Judges*, Chicago and London, The University of Chicago Press

Tiersma, Peter, 1999, *Legal Language*, Chicago and London, The University of Chicago Press