Language and Law

A resource book for students

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First published 2016

ISBN: 978-1-138-02558-5 (hbk)
ISBN: 978-1-138-02557-8 (pbk)
ISBN: 978-1-315-43625-8 (ebk)

Chapter B4

Speech in the Courtroom

DOI: 10.4324/9781315436258-16

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

skills (i.e. it is a field of applied comprehension); for judges and judges' clerks, facility with the genre guides the drafting of opinions suitable in content and style for incorporation into a now sophisticated document style that originated as simply an aid to judicial memory. To the linguist, law reporting presents the challenge of understanding the development, functioning and style of a discourse form more institutionally constrained and complex than genres such as the conversational anecdote, the prayer, the detective novel, or the scientific research article.

B4

SPEECH IN THE COURTROOM

Fields including conversation analysis (CA) have shown that everyday verbal interaction is highly structured and rule-governed. How far, we ask in this unit, does courtroom discourse simply transpose structures from everyday verbal interaction into a new setting? Or does it alter patterns and expectations that underpin communicative behaviour, creating a distinct and specialised kind of interaction? Trials have often been characterised as a battle, contest, performance, or process of storytelling. All these descriptions capture important insights. But in this unit, we aim to describe courtroom discourse more precisely, by looking at how the verbal interaction involved consists of specific moves and sequences. Then we consider the higher-order organisation of courtroom discourse into episodes, as an overall genre. Finally, we explore how different levels of organisation of courtroom discourse are connected and why this matters.

Courtroom interaction

An early description of courtroom speech patterns, drawing on the then emerging field of **conversation analysis** (Hutchby and Wooffitt 2008), is presented in Atkinson and Drew (1979). Two characteristics distinguish Atkinson and Drew's approach from an ethnographic study. First, they do not only focus on obviously unusual speech patterns; rather, they seek to establish basic rules and patterns that constitute a whole, given area of observed behaviour. Second, their analysis avoids dependence on subjective reporting by conversational participants; instead, they offer an account based on linguistic evidence, including especially uptake by other parties in an interaction.

Atkinson and Drew's description suggests a mix of similarities and differences between courtroom talk and everyday conversation. For example, in examination of witnesses both the order of **conversational turns** and the types of turn permitted are highly constrained. In CA terms, the question–answer **adjacency pair** is the primary pattern of exchange. But other, locally managed sequence types are embedded into this unit of exchange including sequence types known as **challenge–rebuttal** and **accusation–denial**. More generally, Atkinson and Drew's study suggests a hierarchy of levels of structuring, with systems of local subroutines ordered by higher-order structures and purposes.

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Different types of interaction at different stages in proceedings

Popular images of a courtroom trial tend to highlight two contrasting organisations of language use in terms of participation. One is a kind of institutionally orchestrated theatre: a drama of speeches between characters in different roles. The other focuses on extended monologues, either by lawyers making submissions or by a judge delivering his or her judgment. Given this polarisation, it is useful to describe (allowing for the sorts of simplification we acknowledge in Unit A4) the different kinds of language use in a trial, including which stages consist of monologue and which consist of dialogue.

Heffer (2005; see extract in Unit D3) explains the distinctive characteristics of courtroom interaction in terms of participant roles and strategic goals. In everyday conversation, he suggests, it is usually clear who the speaker, listener or overhearer are for a given verbal interaction. But consider, by contrast, a courtroom question and answer sequence involving a lawyer and a witness. Interaction in such circumstances requires a more multilayered account of speech event roles, for instance a **framework for participation** along the lines described in Goffman (1981), subsequently developed in Levinson (1988). When a lawyer asks a question, Heffer (2005: 48–50) notes, he or she relates to what is said on a more complex **footing** than in ordinary conversation. The lawyer is the speaker of the question (in Goffman's terms, simultaneously the 'author' and 'animator'), but also the legal spokesperson for his or her client (Goffman's 'principal', here the person being represented). The witness is the apparent addressee and is expected to respond with answers. Yet the judge and jurors (where the latter are present) are the main **intended targets** for the entire sequence, since the purpose of the examination is to communicate facts and an overall impression to them. (Quite commonly, ahead of examination, lawyers in fact instruct their witnesses to look at the jury if there is one when answering, rather than at the lawyer asking the question). An opposing lawyer is also listening: a **ratified hearer** in Goffman's term, overhearing in a non-technical sense but with a legitimate, albeit adversarial purpose: exercising where necessary a (procedurally granted) right to interrupt, and preparing cross-examination or refining later submissions to the court in the light of what he or she hears.

The involvement of numerous participants in a courtroom interaction shaped by defined hierarchical roles and a complex framework for participation inevitably results in a highly ritualised discourse genre. Heffer suggests that the trial genre in fact includes three subgenres, which he describes as procedural (e.g. juror selection and instruction); adversarial (e.g. opening, examination and cross-examination, and closing); and adjudicative (e.g. deliberation and judgment). Cutting across the sequence and purpose of each subgenre, however, is an important further contrast: between sections that consist of **dialogue** and sections that consist of **monologue**. The verbal exchanges (dialogue) are themselves of several types: interaction among lawyers (typically on points of law or procedure), interaction between lawyers and witnesses (in examination and cross-examination), and interaction between lawyers and the judge(s). While these subtypes differ from each other in the legal status of their participants, as well as in their content and style, there is a stronger contrast between them collectively and other stages of the trial that resemble monologues: instructions, opening and closing

statements, verdict and sentencing. In these monologue subgenres, what is distinctive is precisely that no verbal response is expected. The complexity of different types and levels of contrast is partly why Heffer gives his chapter on the topic the title 'The trial as a complex genre' (Heffer 2005: Chapter 3).

Difficulty in analysing courtroom discourse is increased further by the fact that neither the monologue nor the dialogue stages are purely one or the other. During examination of witnesses, for example, whatever 'dialogue' takes place is highly controlled. Witnesses appear to engage in dialogue, in that they respond to questions using their own words. But from the perspective of a lawyer taking a witness through his or her evidence, witnesses function almost as animated objects: they verbally produce content, evidence, which the lawyer either knows already or strategically anticipates; they are then dismissed once the relevant content has been elicited. Because lawyers normally have access in advance to essential matters to be presented at trial, courtroom presentation and testing of evidence in an adversarial system may to this extent be viewed as a controlled performance for the benefit of the judge or jurors more than an inquisitorial process of eliciting information, or a dialectical enquiry into truth. The appearance of dialogue, for all its richness of detail and texture, is an incorporation of voices by an overarching, dominant voice, an impression reinforced in the final handing down of the court's judgment as described by Ferguson (1990): the judge synthesises courtroom interaction, absorbing contributions into an authoritative monologue.

Different kinds of structure, as might be expected, may be identified at different levels of courtroom discourse. There is a level of microanalysis of sequences and moves (a level that raises questions of the purpose, typical form of realisation, and effect on different participants of those moves and sequences). Moving up a level, there are relations of dependency among such moves as they constitute episodes in a trial: opening statement, taking of evidence, summing-up. Above these are macro-structural **characteristics** of the courtroom genre, in which a trial's discursive features are in contrast with other forms of legal discourse (e.g. inquests or police interviews), as well as with other kinds of institutionalised, multi-voice discourse (e.g. religious services; weddings and funerals; administrative and political meetings; sessions of parliament; and news broadcasts).

Courtroom discourse and its functions

It is arguably the macro-level perception of courtroom discourse that, beyond the sphere of law, conjures up the images of battle or contest, performance or storytelling (each of which picks up a genuine but selective aspect of trials). The micro-level of styles of address, specific wording and objections, by contrast, is what is often recalled by participants most vividly. A full account of this complicated form of adjudication-by-interaction is likely only to emerge from descriptions that can connect observed details of interaction at different levels with the higher-order functions that trials serve.

In this context, there are links to be explored further between several approaches: the microanalysis of courtroom interaction as developed by authors such as Drew and Atkinson; the account of courtroom discourse offered by Heffer; and participant-focused observations about witness behaviour made by researchers such as Conley and O'Barr (2005), which we discuss in Unit A4. Heffer's (2005) account of the language

of jury trial, for example, is part of a larger argument (which we consider in more detail in Unit D3): that such discourse shows a tension between two different ways of talking about (and in fact conceptualising) what is going on, use of narrative and legal exposition. For Heffer, what is important is that these two kinds of discourse together produce the 'complex genre' he describes, addressed simultaneously to two different audiences. But Heffer's general account may turn out to be more suggestive if considered alongside participant-focused observations about witness behaviour of the kind made by Conley and O'Barr (2005). They argue that how different litigants structure information can be categorised as being either **rule-oriented** or **relational**, based on informant interviews or analysis of conversational moves and sequences. What is significant from their point of view is that legal proceedings are receptive disproportionately to the former. If the contrast they put forward is justified, then there may be implications that go beyond the scope of any one of the studies described above on its own concerning the effectiveness of the justice system as a whole.

Such implications can be seen more clearly if findings from the different kinds of study are brought together. In their deliberations, for example, judges restructure relational accounts into legally relevant categories in order to pursue their own form of reasoning. In an empirical study conducted by Conley and O'Barr, however, members of the judiciary 'described relational litigants as hard to follow, irrational, and even crazy, while praising the straightforward efficiency of rule-oriented accounts' (Conley and O'Barr 2005: 73). Opposing that preferential treatment, Conley and O'Barr maintain (on the strength of sociolinguistic findings and research on reasoning in other fields) that relational accounts are not illogical, but simply follow a different kind of logic from the sort of reasoning a court can easily accommodate. For Conley and O'Barr, issues regarding courtroom discourse are in this way not only questions for scholarly analysis, but matters calling for practical reform, if litigants with legal claims of equal merit fare differently because they show different kinds of communicative competence. Their research (e.g. O'Barr and Conley 1990) shows a strong connection between witness background, greater satisfaction and less frustration with the (US) justice system when witnesses are able to use more narrative forms in small, informal courts or in tribunals or **alternative dispute resolution** (ADR; usually mediation) settings.

B5 LINGUISTIC STRATEGIES USED BY LAWYERS

In this unit, we introduce and discuss the main features of courtroom persuasion. We examine a series of examples of rhetorical techniques deployed at different stages of a trial in Unit C5.

Awareness of audience

Persuasion involves 'a deliberate effort to change a person's attitude' (Bradshaw 2011: 1). To persuade judges and jurors successfully, lawyers must combine attention to their

DOI: 10.4324/9781315436258-15