"Now you are getting into the law": The mediation of specialised language in a jury trial

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Abstract This paper deals with the communication process involved within a criminal jury in the U.S. Drawing on authentic data, I attempt to describe the features that characterise the spoken interaction in this context, in light of some of the several communicative asymmetries between the participants, which constitute the core of this process. Moreover, I will try to determine to what degree the communication of specialised legal knowledge takes place, taking into consideration the procedural and legal constraints that are present.

This analysis also aims to offer new insights into the discussion on the adequacy of the communication developing between legal experts and laymen within a jury trial. Indeed, the knowledge asymmetry between the legal experts and laymen is evident in the context of a trial, where people with different cultural and professional backgrounds are put face-to-face, in a specific legal context. The success (or failure) of communication is based on the information exchange across these asymmetries, and an analysis of how this communicative process is carried out will contribute to a better understanding of the fundamental role and implications of this knowledge asymmetry and will describe how a very conventional and standardised context responds to the necessity of interacting with ordinary people.

Keywords legal language, courtroom communication, expert-layman communication, expert knowledge, knowledge asymmetries, spoken interaction

1 Introduction

This study focuses on the relevance of knowledge communication in a specific and standardised communicative event, i.e. the trial. Particular attention will be devoted to a specific communicative situation, represented by the opening statements in a trial before a jury in a U.S. court. In this paper the expression 'knowledge communication' will be used according to the following definition:

> Knowledge communication is strategic communication. As 'strategic' it is deliberately goal-oriented, the goal being the mediation of understanding across knowledge asymmetries. As 'communication' it is participative (interactive) and the communicative 'positions' converge on the (co-)construction of (specialized) knowledge. (Kastberg 2007: 2).

The study will analyse to what extent this definition is applicable to the communicative process developing within a trial and it will also aim to describe what features determine the uniqueness of a trial as a communicative event.

In the case of a jury trial the communication of knowledge between legal professionals and laymen is fundamental, as this corresponds, in very general terms, to the communication of knowledge between experts and non-experts. What emerges in this context is a jury knowledge paradox, which relates to the idea that the final and fundamental decision lies in the jury's hands, even though it often lacks the necessary relevant expertise to be able to judge

and take decisions on complex issues, mainly, but not only, of a legal nature. The jurors assume the role of decision-makers, even though this may appear paradoxical. A similar process takes place every day in different professional contexts, as knowledge is often communicated between experts and less or non-experts, but the context of a trial is, however, unique. First of all, the communication process is not a typically interactive one, as some phases are characterised by a predominant mono-directionality, since messages are apparently sent by a speaker (e.g. the attorney) and received by a listener (e.g. the jury), without a clear interchange of communicative roles. Secondly, in this case the decision has to be taken by the party (partially) lacking knowledge and cannot be delegated to the expert(s).

2 Knowledge communication in a jury trial

2.1 Basic assumptions

The comprehension of a text is obviously much more complex than the comprehension of its words and our understanding derives from, and is based on, our "mental models" (Johnson-Laird 1983, 1987). The receivers of a text activate a set of cognitive processes, and draw on their world knowledge in order to construct a representation of a text that is characterised by coherence, consistency and plausibility (Johnson-Laird 1983: 370). Therefore, drawing on the same text, people can make very different assumptions and come to very different conclusions. Although these considerations are then consolidated, when the perception and the interpretation of a text may determine crucial decisions and have important legal consequences, reflecting upon the role played by knowledge and knowledge communication in specific fields, such as the legal domain, appears to be fundamental.

It is clear that knowledge communication does not correspond to a mere knowledge or information transfer. From a linguistic point of view, as Fauconnier (1994: 22) affirms, "language, as we use it, is but the tip of the iceberg of cognitive construction. As discourse unfolds, much is going on behind the scenes: new domains appear, links are forged, abstract mappings operate, internal structure emerges and spreads, viewpoint and focus keep shifting."

These features of language are clearly displayed in specialised discourse as well. In the context of an opening statement, this is evident, as the communicative process is intrinsically based on the communication of beliefs, principles, assumptions, frames of mind, ways of thinking and reasoning, feelings, emotions, empathy, sympathy, etc. In particular, in order to make the communication effective, the process requires the ability to utilise this knowledge of the listener's previous experience and background and this is one of the reasons why, in a jury trial, an accurate knowledge of the jurors and their respective background experience is fundamental in order to be able to activate the most effective communicative strategies and make the communication/persuasion process convincing.

Indeed, knowing what our interlocutors know is one of the essential elements upon which communication is based (Bakhtin 1981, Nickerson 1999). Therefore, in order to make communication with laypersons successful, professionals should be aware of what kind of background knowledge the jurors possess. Generally speaking, it is often argued that jurors do not possess any legal knowledge, but counsellors obviously have to anticipate the different degrees (and the average degree) of knowledge of legal procedures and practice displayed by laypersons, including their legally incorrect knowledge and assumptions. The process of establishing the receiver's level of background knowledge is omnipresent in

communication, but in experts' communication this may be particularly complex and may develop into an overestimation of the receiver's knowledge (in this respect, see the concept of "expert blind spot", Nathan/Koedinger 2000). This problem is only apparently avoided in the communication process which takes place in an opening statement, as references to domain-specific concepts and procedures are not allowed (as will be shown in section 4.4), but playing on the border between what is admissible, and what is not, becomes a fundamental technique.

Several studies have been devoted to the analysis of how and to what extent the awareness of the recipients' knowledge background influences the way in which the communication process is constructed (Nickerson 1999, Nückles/Wittwer/Renkl 2005, Bromme/Ramow/Nückles 2001), also with reference to legal language (Smith 1991, 1993). This awareness determines an adaptation to the laypersons' knowledge and receptive skills and needs. Consequently, the need to adjust and modify the way and the extent to which knowledge is communicated leads to a process of apparent "grading of communicated knowledge" based on the interlocutor's level (or assumed level) of knowledge.

2.2 Jury trials and knowledge asymmetries

Defining how (specialised) knowledge is communicated in texts, whose receivers are (in general terms) experts or laypeople, represents an important aspect, especially in the context of a jury trial. Several studies have analysed the differences in knowledge and expertise between laymen and professionals in different disciplines and professional contexts (e.g., Lundquist/Jarvella 2000).

In particular, Noordaman *et al* (2000: 237) remark that the three areas which distinguish the expert's knowledge are the quantity of knowledge, the way the knowledge is structured and the way the knowledge is used. In this analysis I will focus on the use of specialised legal knowledge by legal experts and its communication to non-experts. In this respect, Noordaman *et al* (2000: 236) state that "the comparison only makes sense if the experts and non-experts have something in common; if they can be located at a same dimension. The non-experts should be low-knowledge people and not no-knowledge people", and this certainly has important methodological implications. However, when dealing with the language of a trial and in particular with the communicative interaction between legal professionals and the jury, the latter, by definition, often lack specific knowledge related to the topic being examined, and clearly lack theoretical and practical legal experience. The positions of experts and non-experts have in common that they are inevitably confronted with each other throughout the trial, as they are part of the same social institution and the same situational context, but the determination of (specialised) knowledge displayed by the jurors is not easily attainable.

In certain cases the knowledge asymmetry and the decisional power asymmetry between the participants in the communication process play a crucial role. For example, Solan and Tiersma (2005: 153–157) report a case (*United States vs Clifford*) in which it was fundamental to establish the authorship of some threatening letters. The court did not allow an expert psycholinguist to testify and give his professional opinion in the matter, but it was left to the jurors (lacking any competence in the field) to decide about the authorship. Solan and Tiersma (2005: 156) reach the conclusion that "admitting expert evidence without proof or reliability should be avoided. Letting jurors decide questions of authorship without adequate basis for comparison is just bad".

In this respect, it is important to remember that jurors are usually selected from ordinary citizens, who generally do not possess any (specialised) legal expertise, whereas the knowledge displayed by experts derives from both practical and theoretical experience, which determine different levels of specialisation in knowledge and its communication. Notably, in a specialised communication setting such as the trial, specific knowledge seems to correspond to the knowledge held by the expert.

Another fundamental feature of the communicative event represented by the interaction between attorneys and the jury is that, on the one hand, the knowledge asymmetry is evident and attorneys are aware of this situation to the extent that they obviously develop techniques to carefully exploit this asymmetry; on the other hand, they are asked to use a clear and simple type of language and not to "get into the law", i.e. not to focus on theoretical legal principles and procedures. Indeed, a trial also constitutes a highly formalised context and the means to express and communicate knowledge are more limited than in less standardised contexts, because of the specific procedures and practices that have to be followed.

Implicit in communicating through a text is the necessity of communicating knowledge; in communication processes between people who possess different types and levels of knowledge a process of compensating for a surplus or a deficit of knowledge takes place. In particular, the explanation of certain domain-specific concepts underlying the text is a highly used means of activating a process of reduction of the knowledge gap, or to convey an appearance of such a process; similar communicative strategies for compensation are clearly used by lawyers in opening statements. It is often assumed that in order to facilitate the accessibility of the text by the receivers it is important to create a link between the text and the receivers' cognitive background. Nevertheless, the professionally-specific information available to the encoder of the message is not (entirely) available to the receivers. The former apparently provides the latter with detailed and specific information but the amount of information transferred (or so perceived) is carefully dosed.

Apart from text transfer, a transfer of culturally-specific information also takes place. However, regarding the transfer of legal information, this may be particularly limited by the law itself and its procedure. Geanakoplos (1992: 53–82) suggests that people, despite their level of rationality, usually make decisions on the basis of incomplete information. This is particularly evident in the case of a trial by jury, where the jurors do not possess any technical legal knowledge and are asked to express a verdict that cannot be based on a scientific analysis of the evidence or the application of complex legal norms. The incompleteness of information is also highlighted by the complex issue related to the impossibility on the part of the jurors to ask questions (see section 3.2), which may impede or reduce the access to certain information. Jurors are, to some extent, asked to construct their mental knowledge on the basis of a set of narrative formats that they have been confronted with. Even though the narrative one is certainly not the only format on the basis of which people construct knowledge, it seems to play an important role in the context of a trial (see section 4.2).

3 Opening statements in a jury trial

3.1 Communicative constraints

The communication process which takes place in a trial has been extensively studied, as regards its different phases (Rieke/Stutman 1990, Smith 1991, Mauet 1992), including

opening statements (Holmes 1982, Powell 2001). The effectiveness of this phase of the trial has been demonstrated by several legal communication scholars (Pyszczynski/Wrightsman 1981, Connolly 1982, Matlon 1988, 1993), to the extent that opening statements are sometimes defined as determiners of the final verdict. It has been stated that up to 80 percent of jury trials are decided after the opening statements (Bobb 2001, quoted in Karp 2003: 1) and jurors tend not to change their mind during the trial (Becton and Stein 1990: 19, quoted in Tanford 2002: 148). Aron/Fast/Klein (1996: 21–15) also write that "[s]ome lawyers feel that as many as 80 percent of all jurors make up their minds by the end of the opening statement". This data has often been criticized (Burke et al 1992, Tanford 2002), but, beyond the calculation of their persuasive power, it is clear that opening statements constitute a crucial phase (Haycock/Sonsteng 1994, Krivoshey 1994).

The knowledge asymmetry relating to the legal field is clearly exploited in opening statements, which constitute a significant moment of the trial. What is particularly interesting is that a communication paradox is therefore present in the language of lawyers before a jury: on the one hand, communicative strategies are used to keep the level of complexity particularly high in order to preserve and exploit this knowledge and language inequality; on the other hand, this asymmetry seems to be explicitly undermined by the use of a type of language more accessible to non-experts.

In this respect, attorney training manuals often suggest rehearsing the opening statements (and other parts of the trial) in front of a layperson, because "sometimes, lawyers can forget how to speak like a regular person" (Karp 2003: 4). The difference between legalese and ordinary language has been thoroughly investigated (Danet 1985, Gibbons 1994, 2003, Trosborg 1997, Tiersma 1999, Cornu 2005, Williams 2005), often focusing on its vagueness and its complexity (Bhatia *et al* 2005, Cacciaguidi-Fahy/Wagner 2006). It is clear that, in a trial before a jury, practising with people with a non-legal background is highly recommended. Mock juries are also sometimes used for this purpose, but their cost is often too high to allow their regular use (Karp 2003).

Legal trainers often highlight that it is important to keep the statement simple and to present the most important facts. Jurors are probably listening to the presentation of the facts for the first time. The events may be vaguely known, but they have not been officially presented to the jurors in an institutionalised context as yet. As few people feel comfortable judging something they do not understand, making them feel that they understand what the (attorney's) truth is represents a fundamental phase.

The length of the opening statement also plays an important role in its comprehension. As a listener's attention span is finite, it is important to be concise and succinct. The standard legal procedure implies that opening statements should be kept quite brief, and asking the judge (for example at a pre-trial conference) how much time will be allowed to the parties is a common practice (Walkowiak 2004: 2).

According to some legal communication scholars (Linz/Penrod 1984, Galligan 2000, quoted in Karp 2003, Weaver 2000) opening statements are crucial, especially with regards to the opening statement given by the prosecuting attorney because the rule of primacy comes into play: jurors tend to agree with, and remember, what they hear first, especially when the opening statements are delivered seriatim.

In the communication process between the lawyer and the jury the knowledge 'gap' may be strategically used when necessary. Highly technical terms and specific legal jargon may highlight the knowledge 'gap' and this distance may be intentionally maintained by the

lawyers in order to underline their status of expert and thereby allowing them to acquire a higher level of credibility, especially in comparison with their counterparts.

On the other hand, the (over)use of technical terms and legal jargon may cause confusion or loss of interest in the participants, or even hostility and diffidence. As Walkowiak (2004: 4) remarks, "the average jury will more likely embrace an attorney's comment if they feel the attorney is trying to help them to understand the evident than if they feel they are trying to convince them to do something. Jurors generally do not like people who lecture them".

3.2 Spoken interaction in opening statements

Spoken interaction in the courtroom can be described as highly standardised (Atkinson 1992, Drew/Heritage 1992, Gibbons 1994, 2003, Jackson 1995, Heffer 2005) with a clear pre-allocated turn sequence (Atkinson/Drew 1979). In particular, a trial constitutes a particularly complex communicative event, in which different interactional dynamics come into play. The main phases of a criminal trial by jury within the U.S. context could be summarised in Table 1:

Table 1: Phases and interactional dynamics in the criminal trial (adapted from Cotterill 2003: 94)

Trial phases	**Main participants and interactional dynamics**
1. Preliminary phase a. Jury selection	Judge ↔ jury pool Lawyers ↔ jury pool
2. Evidential phase a. Opening statements b. Witness examination c. Closing arguments	 **Lawyer → jury** **(Prosecuting Lawyer → jury)** **(Defence Lawyer → jury)** Lawyers ↔ witnesses Lawyers → jury
3. Judicial phase a. Jury instructions and summing up b. Jury deliberation c. Verdict d. Sentencing/release	 Judge → jury Juror ↔ juror Jury foreperson ↔ judge Judge → defendant

Despite the necessary simplification that characterises it, Table 1 highlights the principal interactional dynamics that take place in the trial-by-jury communication process. In the context of a trial, the participants assume a clear and standardised communicative role which, nevertheless, is also characterised by a high level of complexity. Indeed, an apparently simple communication event, such as the opening statement, presents complex dynamics. Even though the jurors represent the privileged receivers of the message to such an extent that the vocative expression "members of the jury" is regularly used, it is clear that an attorney presenting his/her opening statements is addressing not only the jury, but several other recipients as well. These are, for instance, the court, other counsellor(s), the parties, the audience, the legal profession and the media.

As regards the role of the addressee in an opening statement, for example, this notion could be divided into Goffman's traditional functions of 'hearer', 'unaddressed', 'over-hearer', 'bystander' and 'eavesdropper' (Goffman 1979: 8–9, Levinson 1988). In our case the official listeners are explicitly addressed, but the attorney is aware of the presence of all "unaddressed" recipients (Goffman 1979: 9).

The prototypical definitions of sender and recipient are clearly debatable, especially if we consider the definition of communication not as a mere "transfer or exchange of information", but as a "process in which meaning is created simultaneously among people" (Beebe *et al* 2004: 11). An opening statement represents a peculiar event, in which a mutual and cooperative construction of meaning develops within a highly standardised and institutionalised context, where the characterisation of the respective communicative roles is, on the one hand, dynamic and, on the other hand, pre-established and subject to unchangeable constraints.

First of all, the impossibility of defining the borders of different specific communicative events (which are inevitably correlated, interrelated and interdependent) seems to be reduced, at least at a superficial level, because of procedural constraints, formulaic expressions and specific routines and practices that mark different communicative moments.

Secondly, in an opening statement the role of (in traditional terms) "sender" of the message is generally assumed by the attorney and this does not necessarily happen in other communicative events. In particular, the mono-directionality of the interactional dynamic of an opening statement is a fundamental point. Indeed, jurors do not (generally) ask questions, which impedes a bi-directional communicative exchange. The possibility for jurors to ask questions constitutes the core of an important theoretical and procedural debate (Berkowitz 1991). The practice of allowing juror questions is becoming more common and, as Mott (2003: 1100) suggests, juror questions are generally more widely accepted in civil trials than in criminal trials, even though their use depends on several other factors, such as the complexity of the case. The choice is, however, at the discretion of the judge. Mott adds: "According to state rules of procedure, typically all states allowed jurors to submit written questions during deliberations. As an expansion of this practice, many courts now allow jurors to ask questions during or after the counsel's presentation of the evidence" (Mott 2003: 1099). Typically, this practice is limited to other phases of the trial, such as witness examination, and is not used in opening statements.

Apart from the legal implications of such a practice, it is important to consider that this point is the core of the communicative process that takes place in a trial. Apparently the opportunity to ask questions would represent a possibility for the jurors to reduce their knowledge gap, as the jurors would have easier access to the information they require. They could ask for clarification when needed, vague or ambiguous expressions could be clarified, legal concepts reformulated, omissions investigated and important points analysed in more detail.

It is interesting to note that the apparent advantage of posing questions also displays the other side of the coin. By asking questions, jurors obviously expose themselves and their opinions to the other interlocutors, and in particular, to the counsellors, and they may therefore be more vulnerable, in the sense that their thoughts and their way of thinking are more easily captured.

Supreme Court Justice Joseph M. Sise says that when jurors ask questions, this represents a chance for lawyers to look inside the juror's mind (Caher 2005: 1). Being denied the chance to be the encoder of a message and assuming (mainly) the role of a recipient may appear to be a disadvantage, especially in a context where the decoders of the message possess the decisional power. However, the lack of opportunity to participate in the communicative exchange

as speakers could also be seen as a form of protection, a way of not exposing themselves, even though it could obviously be argued that extra-linguistic elements still allow an investigation of people's opinions or feelings.

4 Analysis

This study will analyse the Amadou Diallo case (*People vs Boss et al*) that has become very widely-known for its legal and social implications. The focus will be on the communication process taking place in the opening statements, because of their importance within the development of the trial (see section 3.1) and because of their peculiarity from a communicative point of view (see section 3.2). A brief introduction to the case and the preliminary phase of the trial, preceding the opening statements, will also be necessarily presented.

4.1 The Diallo case

On 4th February 1999 Amadou Diallo, a 23-year-old immigrant originally from Guinea, was shot by four New York City Police Department officers in plainclothes at 1157 Wheeler Avenue, in the South Bronx. Although the reconstruction of the event was extremely controversial, the four officers, Sean Carroll, Richard Murphy, Edward McMellon and Kenneth Boss, declared that they thought Diallo matched the description of a serial rapist and approached him. They also thought he had a gun and, because of a series of events and coincidences, 41 bullets were fired and Diallo was killed. He was found to have been unarmed at the time of shooting and had no criminal record. In the following weeks a Bronx grand jury began to hear evidence in the case and groups of citizens (especially belonging to minority groups) filed a class-action lawsuit. In December 1999 a New York appellate court ordered a change of venue for the trial, from the Bronx to Albany and, consequently, a new judge was appointed: Albany Supreme Court Justice Joseph Teresi.

The judge ruled that the New York law prohibiting TV coverage of the trial (New York Civil Law Section 52) was unconstitutional, and therefore cameras were allowed in court. Upon this point Teresi remarked:

> The quest for justice in any case must be accomplished under the eyes of the public. The denial of access to the vast majority will accomplish nothing but more divisiveness while the broadcast of the trial will further the interests of justice, enhance public understanding of the judicial system and maintain a high level of public confidence in the judiciary." (People vs Boss et al, 701 N.Y.S.2d, 894).

It is not the aim of this paper to analyse the impact and the consequence of the use of cameras in court (Lassiter 1996, Goldfarb 1998, Borgida *et al* 1990), especially from a procedural point of view. However, this evidently had crucial communicative implications, related, for instance, to the presence of a vast number of potential spectators (see section 3.2) and the consequences this has on interactional dynamics.

In February 2000 the jury selection process, a fundamental element of the preliminary phase, was completed, and in the Diallo case raised an important debate about the impartiality of the jury. The twelve-panel jury consisted of four African-Americans and eight Caucasians and the four alternates were also Caucasian men and this predominance of white jurors provoked some criticism.

4.2 Jurors, like most of us, like stories: the use of narrativism

The language of the jury trial has often been defined as having a strong narrative connotation (Schum 1993, Olivier 1994, Jackson 1995, Ogborn 1995, Kadoch 2000) and this is particularly evident in the opening statement phase. In this crucial communicative phase the communicative and organisational structure is fundamental as it allows the jury to structure the presentation of the events in a more efficient way. Even though all phases of a trial have a strictly standardised structure, opening statements have a particular narrative organisation that makes them a unique phase. The storytelling structure that characterises this communicative event has been described in several studies (Jackson 1991, Lempert 1991, Papke 1991, Powell 2001, Voss/Van Dyke 2001); in particular, Walkowiak (2004: 4) remarks that jurors, like most of us, like stories because they can follow and remember them. Narrativism (Bruner 1986, 1990, 1991) represents a fundamental tool in the knowledge transfer and communication process and this happens because "the typical form of framing experience (and our memory of it) is in narrative form. What does not get structured narratively is lost in memory" (Bruner 1990: 56).

In an opening statement the main recipient of the story is the juror and one fundamental point of this communicative exchange is that technical knowledge is apparently excluded from the communication process. This result derives from two main reasons: firstly, procedural rules do not allow counsellors 'to get into the law'. In this respect, storytelling represents the most adequate format to describe the events and the attorney's arguments avoiding complex speculations about the law and how to apply it. The second reason is related to the communicative purpose: if lawyers use a more technical approach, they cannot be easily and immediately understood and this can potentially create a communication breakdown. This happens because, when the events are not presented in the frame of a sequential story, recipients need to reorganise the events in a more sequential structure in the recalling process (Mandler/Johnson 1977, Mandler 1984). Providing the jury with a story displaying structured and organised events helps them to comprehend the story, to recall it, and to analyse the cause-effect relationships in the events.

This means that jurors tend to rely on a story format and, when this is not provided, they (more or less intentionally) tend to reorganise the pieces of information they were given into a sequential order. In other words, if the attorney wants the jurors to remember a certain story, it is important that it should be provided clearly, so that all elements are in accordance with his/her narration, especially the (positive or negative) connotation of the main characteristics of the story.

The narrative model is fundamental in the decision making process (Pennington/Hastie 1992, Spiecker/Worthington 2003) and the aim of the attorney is to present the story in such a way that it may appear interpretable in only one way or that it may appear so obvious as not to need any interpretation process. In Bruner's words this "illusion created by skilful narrative" is generated by "narrative seduction" (related to the pre-emption of any possible alternative interpretation) and "narrative banalisation", according to which the story assumes such a conventional and canonical nature that the interpretation is necessarily an automatic and routine process (Bruner 1991: 9).

4.2.1 Applying narrative structuring

Attorneys explicitly present their narrative format as the only logical, acceptable and, therefore, true one, as is clearly visible in the following example:

> There is really only one of three possibilities here. [...] we can agree as people of common sense that the first two are ridiculous. (Mr. Worth).

In this case any other possible interpretations of the events are clearly pre-empted, as they are presented as not logically acceptable.

The organisational structure of the story is fundamental (Bennet/Feldman 1981, Herman 1993) and legal scholars and trainers often suggest telling a story that is easy to remember. In order to do so, a chronological order should be followed. Alternatively, especially in a criminal trial, starting from the climax could be particularly effective, as it would represent a shocking element that would catch a juror's attention.

In the Diallo case the prosecuting attorney starts by establishing when and where the event happened and the tragic end of the victim is immediately presented:

> *In the 1990s in Bronx County, in Albany County,* or anywhere else a human being should have been able to stand in the vestibule of his own home and not be *shot to death* […] (Mr. Warner).

Providing a time line is another tool that allows the jurors to better follow the sequence of events, which are obviously presented in the way the counsellor wants the jury to perceive and recall them (Powell 2001) and this approach is used by the prosecuting attorney in his opening:

> *On February 3, 1999, at about 10:30 p.m.,* just hours before he was killed, Amadou left the store. He took the subway and he arrived in the Bronx *shortly before midnight. Shortly after that* he arrived at his apartment, where he spoke with his roommate, one of his roommates, about their utility bill. (Mr. Warner).

> *Less than an hour later,* Amadou Diallo would be dead. (Mr. Warner).

The constant use of time references allows the listener to frame the discussion of the events as a storytelling process, which enables the jurors to follow the story in a clear way.

4.2.2 Making the story memorable

In order for the story to be understood and accepted, the counsellor must ensure to keep the jury's attention and make his version of the story memorable. Different communicative and persuasive techniques are used in order to achieve this aim.

Direct address and involving the listeners happen regularly. The reiteration of the expressions "members of the jury" or "ladies and gentlemen" aims to include the addressed recipients and to retain their attention. One of the defending attorneys introduced all new points with such expressions:

> And as long as you, as members of the jury, […]
> And, ladies and gentlemen […]
> Ladies and gentlemen, […]
> Members of the jury, […] (Mr. Epstein).

Moreover, the jurors are often asked to assume one of the parties' perspectives:

> And what I will ask you to do, to try and do, is to try and step inside his shoes. (Mr. Brounstein)

Similarly, generalisation is often used to increase the level of involvement of the jurors: by pointing out that this could have happened to any human being, the attorney gains the attention and the sympathy of the jurors:

> In the 1990s in Bronx County, in Albany County, or anywhere else *a human being* should have been able to stand in the vestibule of his own home and not be shot to death […] (Mr. Warner).

The attempt to communicate feelings and emotions is confirmed by the use of strategic sensationalism and in this respect the description of the victim's death is particularly striking:

> One bullet went through Amadou Diallo's chest, his aorta, his left lung, his spine, and his spinal cord. Another bullet went through his spleen, his left kidney and his intestines. Three more bullets went through his left hip, causing perforations of his pelvis and his intestines. Another bullet went through the left side of his back, his spine, his spinal cord, his liver, and his right lung. Another bullet broke the bone in his right arm above the elbow. Another bullet fractured both bones in his left shin. Another bullet went through his thigh, exited his groin and grazed the scrotum. Another bullet went into his right leg, traveled upward and lodged behind his knee. Nine more bullets struck him from the torso to toe. (Mr. Warner).

This presentation of the victim's death conveys an appearance of technicality, thanks to the use of a detailed description supported by a scientific approach in order to make the narration of the events more convincing. Providing specific technical details gives the event an aura of undeniability and truth.

However, what often emerges is a tension between the search for technicality and the need of higher comprehensibility and the use of these two opposing, yet complementary, elements is carefully balanced. Indeed, in certain circumstances, some specific terms that could display an excessive level of technicality and could not therefore be easily comprehensible are deliberately avoided and replaced with a paraphrase (e.g. broke *the bone in his right arm above the elbow*). This approach is used in order to guarantee a higher level of comprehensibility.

The description does not simply aim to inform the audience about the specific parts of the body that were involved in the shooting, but it fulfils a complex persuasive purpose, which can be seen as twofold: on the one hand it aims to immediately establish the credibility of the attorney and of their story, by highlighting the scientific validity behind it. On the other hand, it aims to create sensationalism and emotive involvement in the jurors and this approach seems particularly effective, especially considering that it was preceded by the assumption that this could have happened to any human being.

Another technique that is often used in the attorney-juror communicative process is the reiteration of words or phrases. On the one hand this allows the listeners to follow the story easily, to better understand and to inevitably acquire and memorise certain concepts:

> They put on *a bulletproof vest, a bulletproof vest* that's part of their work. (Mr. Brounstein).

> Ken Boss is *assigned to the Street Crime Unit.*/ He was *assigned to the Street Crime Unit. He works* at night. *He works* from 9:30 in the morning […] (Mr. Brounstein).

On the other hand, the reiteration of words also creates dramatic effects in the narrative structure:

> When I said Ken Boss *wants* to testify, you will hear why. And when I say *wants* to, he *does want* to and he *does need* to, because *he needs, he needs,* to *tell* you, to *tell* you and to *tell* the world what happened that night and why he took the action he took. And he will /tell/ you. (Mr. Brounstein)

> This incident happened in a *very, very* brief moment in time and these officers had to make a *very, very* difficult decision in a very brief moment in time. (Mr. Brounstein)

> He was *a good cop.* He is *a good cop.* He is a fine young man. (Mr. Culleton).

The use of metaphors is also particularly common in lawyers' speeches addressing the jurors, as they try to focus on emotional features of the language:

> A situation that is every good cop's *nightmare* and is now his. And I hope that you will listen to the evidence and end his *nightmare.* (Mr. Epstein).

Moreover, in the case analysed, lawyers display a general tendency to use rhetorical figures connected to the word *heart,* for its intrinsic emotional nature:

> Well, I'm going to ask you at the end of this case to *look into your hearts* […] (Mr. Culleton).

> You will find *in your heart* and in your head that his conduct was justified. (Mr. Brounstein).

> I tell you what is important, and *I say this from my heart,* is that all human life unquestionably is precious and important. (Mr. Brounstein).

> *My heart* goes out to the Diallo family, as does *my client's heart.* (Mr. Culleton).

4.3 Adaptive interaction techniques: addressing the judge and the jury

It has often been stated that a trial-by-jury depends on the way the evidence is presented rather that the evidence itself, and the defence attorney's opening is particularly effective in flattering the audience:

> First, I want to thank you for your patience and attention so far. And we can see how seriously you have been taking this case. And certainly on behalf of my client, Ed McMellon, we appreciate it. And we appreciate the effort that you are going to put in as this case goes along. This case was thrust upon the City and County of Albany in general and on you people individually. And we appreciate you accepting the duty and responsibility to hear the case. (Mr. Worth).

In this case, the lawyer introduces a preamble to thank the jury for their patience and their time, before narrating his reconstruction of the events. This technique would not be used with a legal professional, such as the judge, who is involved in the process because it is their job and they have a duty to guarantee the best professionalism and attention and that is implicit and taken for granted. Therefore, thanking them for their "patience" and their "attention" would not only be superfluous, but even counterproductive. Instead, in this case the jurors are praised for their attitude and are thanked for accepting the case.

The communicative approach used by the lawyer while addressing the judge differs from the one used to address the jury, not only because of communicative needs but also because of procedural constraints and standardised practices that must be followed. This is exemplified in communicative situations when the same issue is dealt with in a completely different way according to the addressee.

In particular, before the jury is brought into the courtroom, the defence counsellor tells the judge that they would like to vary the order of their opening. He obviously does not go into details explaining the reason for this change and the reason is clear: on the one hand, it does not represent a communicative need for the recipient as the judge is not required, from a procedural point of view, to ask why this request was made and, on the other hand, he is probably already aware of the reasons underlying the request, or he can infer them as a result of his professional background and his experience.

The communicative exchange between the attorneys and the judge develops in the following way:

> Mr. Worth: Your Honor, with the Court's permission, we have informed the District Attorney's Office that we would like to vary the order of our openings.
> The Court: Okay. Do you have any objection to that?
> Mr. Warner: No, sir.
> Mr. Worth: Shall I give you the order?
> The Court: Sure.
> Mr. Worth: I will be going first on behalf of the defendant McMellon. Mr. Epstein will be going next on behalf of Mr. Carroll. Mr. Brounstein will be going next on behalf of Mr. Boss. And Mr. Culleton will be going last on behalf of Mr. Murphy.
> The Court: Mr. Culleton seems to always get to go last.

It is interesting to note that the judge makes a subtle observation about this request (*Mr. Culleton seems to always get to go last*), which can be interpreted as a sign of his ability to understand the reasons that may lie underneath such a request. The jury is not yet in the courtroom at this stage and consequently the judge is also aware that his words will not influence the jurors. The exchange seems to involve only professional experts, who are well aware of the situation taking place and do not need to explain their words. Conversely, in his opening statement one of the lawyers feels the need to explain to the jury the reason why the opening order was changed. Obviously, he does not discuss his colleagues' abilities or rhetorical skills, or the efficacy of that order, but he suggests that this decision was taken so as not to waste the jurors' time and to guarantee efficiency:

> The other bit of housekeeping I wanted to say is you see we are changing the order that we have gone in before. And we may do that from time to time because what we are going to try to do, and I'm sure you can appreciate this, is not stand up and say the same things to you all over, repeat the same things. So we are going to try to vary how we go, which works the best way, the most efficient of your time. So don't think anything more of it than that. (Mr. Worth).

This would clearly appear paradoxical to an expert in the field, as this action is a programmatic part of the defence's communicative strategy, but it may be appealing and convincing for the jurors and eliminate any suspicion that may have risen about the decision to change the order.

As regards the specific order for opening statements in multi-party lawsuits, this is typically pre-established, although it may be varied in specific circumstances (Tanford 2002: 151–152). The order is usually decided among the parties at pre-trial conferences or, alternatively, decided by the judge. Typically the party with the most to gain opens first among the prosecutors, whereas the party with the primary liability generally opens first for the defence. Tanford (2002: 152) adds:

> Attorneys representing multiple defendants might be allowed the customary option of reserving their openings until the start of their own cases, but this can result in unfairness if one defendant opens immediately following plaintiff, and another waits until the start of the defence case. For that reason, most judges will require that multiple parties arrayed on one side make their opening statements all at one time. (Tanford 2002: 152).

The jurors may not be aware of legal practices related to the opening order and the lawyer's (apparent) explanation of the (apparent) function of the modification of the order may be perceived as a tool to provide them with new knowledge, even though the communicative purpose is not to inform the jurors about procedural aspects, but to apply persuasive techniques (*and I'm sure you can appreciate this*) and to pre-empt the possibility of a different interpretation (*So don't think anything more of it than that*) and in this case the border between explanation and persuasion appears to be extremely subtle.
Another tool that is sometimes used by attorneys while addressing the jury is the explicit reference to legal practices, which often happens in (over)simplified terms:

> I tell you now I'm breaking *one of the rules, one of the rules in law school. One of the rules they always tell you when you are a young lawyer* is never commit to say that your client is going to testify. I tell you right now as we stand here you are going to hear from Ken Boss. He will testify. (Mr. Brounstein).

A "confession" of rule breaking such as this may give the impression that the lawyer is acting altruistically, doing something he should not do in order to help the jurors to better understand the situation. Actually, the lawyer is not breaking any legal rule and is just mentioning a common legal practice. What is presented as a disadvantageous practice is actually a strategy whose aim is twofold: on the one hand, he gives the jury a piece of information that is part of his opening strategy and on the other hand he seems to be revealing a secretive practice, one of the tools of the expert. By apparently giving it away, he appears willing to reduce the knowledge 'gap' (or the perception of such 'gap') between himself and the jury, which contributes to building his credibility. In other words, what emerges is a sort of tension between two different, yet complementary, strategies: first of all, there is an attempt to emphasise the difference in the level of specialised knowledge between the experts and the laymen, as this can be exploited in order to support the expert's 'status.' At the same time, however, throughout the trial the attorneys try to convey the idea they are trying to facilitate the jurors' understanding and to help them to reduce such 'gap.'

4.4 Stay away from the law: bridging the knowledge 'gap'?

From a procedural point of view opening statements are characterised by a fundamental feature: they are not arguments and should primarily have an informing purpose, as is often highlighted in training manuals and legal texts. For instance, Tanford remarks:

> You may not argue about how to resolve conflicts in the evidence, nor discuss how to apply the law to the facts, nor attempt to arouse the emotions of the jurors. How strictly these limits are enforced, however, is a matter usually left to the discretion of the trial judge. Some judges permit the attorneys wide latitude to discuss their cases; others will more strictly enforce the general rules concerning what one may and may not say during the statement. (Tanford 2002: 153).

However, it is self-evident that, despite these procedural constraints, the argumentative element is invariably present. For example, it is clear that arousing the emotions of the jurors constitutes a fundamental strategy, even within this phase of the trial (see section 4.2.2).

Furthermore, as Tanford explains, this phase of the trial is mainly supposed to assume the function of the facts that the lawyer intends to prove, but "[t]he temptation to argue – to discuss legal standards, debate the respective credibility of witnesses, make inferences, and speak in broad terms about justice and truth – may be almost irresistible at times" (Tanford 2002: 147). The extent to which it is possible to talk about the law in opening statements varies significantly according to local rules. Although most jurisdictions permit a concise statement of the main legal issues related to the case, discussion of the law is not usually allowed in this phase (Tanford 2002: 154). This emerges clearly in the case examined: when the language assumes a more technical tone, the judge orders the lawyer not to get into the law and simply to show what he believes the proof will be.

> Mr. Worth: I'm going to have to wait a little longer before I find out what the motive is for this shooting.
> Mr. Warner: Objection.
> The Court: Overruled.
> Mr. Worth: Now, while the People don't have to prove motive to you, they only have to prove intent, you are entitled to find the absence of motive to be compelling.
> The Court: *Now you are getting into the law,* counsellor. *Stay away from the law.* Tell the jury what you believe the proof will be.

In this case the lawyer attempts to explain a legal issue that concerns the jurors' decisional process and the judge points out that this is not allowed. The strategy of using a more domain-specific vocabulary or of mentioning specific procedures is immediately identified by the prosecuting lawyer (who objects) and, then, by the judge who orders that the lawyers 'stay away' from the law.

In another circumstance the lawyer is also asked to stay away from the law, when he mentions it:

> Mr. Culleton: Under our law, although…
> Mr. Warner: Objection.
> The Court: *Stay away from the law.*
> Mr. Culleton: I won't go into the law, Judge.

"Staying away from the law" in a trial may seem paradoxical, as the law is the intrinsic element in the process of establishing somebody's innocence or guilt.

Talking about the law is not allowed, but lawyers often attempt to intentionally introduce references to the law in their speech. This may provoke objections from their opposite number, but these attempts often have the underlying purpose of reinforcing the attorney's status of expert and, indirectly, have a persuasive effect.

This is why training manuals often suggest objecting immediately when the other party's attorney tries to "instruct the jury on the law" (Dombroff 1988, quoted in Tanford 2002: 178),

as otherwise the opponent will acquire credibility and assume an aura of competence and professionalism. However, it is fundamental to be certain that the objection is made when the judge will sustain it because an overruled objection (especially in this matter) will have the devastating consequence of widening the expertise gap between the lawyer and his opponents in the jurors' eyes as the jury, in close cases, may defer to the attorney who appears to hold the higher status (Tanford 2002: 178).

5 Conclusions

As I hope to have demonstrated, it was not the aim of this paper to express a judgement on the trial-by-jury system, but to gain a better understanding of the communicative dynamics that take place in this context, and of how knowledge management and communication management play fundamental roles in a specific phase of the trial, such as the opening statement.

The 'strategic' aspect that characterises knowledge communication (Kastberg 2007:2) seems to play a fundamental role in the specific professional context of a jury trial, where communication develops along the lines of evident knowledge asymmetries. To a certain extent, these asymmetries constitute the *conditio sine qua non* for the communication process within a jury trial, as the intrinsic differences between the interactants constitute the core of the emic logic of this type of trial. Even though it can certainly be argued that knowledge asymmetries represent a prerequisite for all types of communication, their importance is made evident in the interaction between the agents involved in this communicative event.

As has been shown, the communicative events taking place in opening statements are characterised by a particular tension: on the one hand, one implicit communicative purpose is to maintain, or even widen, the knowledge 'gap' between professionals – especially on the part of the lawyers – and laymen, who have been given the decisional power, because this process may allow the speaker to consolidate his status of professional and acquire more credibility in the eyes of the jurors. On the other hand, what also comes into play is the need to make sure the laymen do not perceive themselves as being treated as people displaying a lower level of expert knowledge, as this may cause hostility on their part towards the speaker, and have important consequences on the final decision. As a consequence, specialised legal language is carefully dosed and adaptive interaction techniques are constantly used.

Opening statements were chosen as the privileged area of analysis because of their peculiarities, as well as for their importance within the decisional process (see section 3). It seems clear, however, that the understanding of a complex event such as a trial could benefit from the collection, the exploration and the analysis of the nature of the other phases that constitute this event. Such investigation will allow us to gain more comprehensive insights into how interactional dynamics may develop during a trial and how different asymmetries must be taken into consideration in order to understand how communication processes are shaped in this context. ◆

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