# LITIGANT SATISFACTION VERSUS LEGAL ADEQUACY IN SMALL CLAIMS COURT NARRATIVES

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This article examines litigant narratives in small claims courts from two perspectives: the degree to which relaxed procedures and evidentiary constraints provide greater satisfaction to litigants than more formal courts, and the problems litigants encounter in providing legally adequate accounts without the assistance of attorneys. Data for this study are 55 trials in two states (North Carolina and Colorado). The findings show that narratives in small claims court bear many resemblances to everyday talk about trouble, provide litigants significant opportunities to tell their stories in court, but frequently fail to include critical components of legally adequate claims.



## I. INTRODUCTION

For more than half a century, the label "small claims" has been applied to a wide range of judicial procedures intended to achieve the simple and economical resolution of disputes involving limited amounts of money (Ruhnka and Weller, 1978: 1-5). Despite their differences, small claims courts share a number of common elements, such as simplified procedures, reduced costs, limited rights to appeal, and the opportunity for litigants to appear without lawyers (Steele, 1981: 330). Most research on small claims courts focuses on the parties involved or on the characteristics and outcomes of the cases brought. This paper has a different focus. We are concerned with how the informality of small claims court procedures affects the

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ways in which litigants tell their stories. This focus yields significant insights into the way that disputants conceive of their problems and devise strategies to resolve them while at the same time raising questions about the efficiency and fairness of the small claims court as an adjudicative forum.

Analysis of the form as well as the content of small claims narratives reveals the powerful effect of the evidentiary constraints found in ordinary litigation. Small claims litigants indulge in a variety of everyday storytelling practices that would be forbidden in most formal courts. It appears that the opportunity to tell a story in everyday terms to an authoritative decision maker enhances litigant satisfaction with small claims courts, but this ability and the resulting satisfaction may have a hidden cost. Our study of the structure of small claims narratives indicates that many accounts of disputed events that are entirely adequate by the standards of ordinary conversation prove to be legally inadequate because of judicial assumptions about how a story must be told and how blame must be assessed. In particular, unassisted lay witnesses seldom impart to their narratives the deductive, hypothesis-testing structure with which judges[1] are most familiar and often fail to assess responsibility for events in question in the way that the law requires. Although the legal inadequacy of narratives may influence the disposition of cases, and although legal inadequacy often results from correctable problems of form or substance, these issues appear not to be recognized in most instances by either litigants or magistrates.

## II. THEORETICAL BACKGROUND

Three sets of theoretical concerns led us to conclude that the way that litigants in small claims courts present accounts of their problems would be worth researching. First, our prior research on the use of language in more formal courts (O'Barr, 1982; Conley *et al.*, 1978) focused on participants' language strategies as a means of understanding the actual workings of the courtroom. Research on styles of testifying had made us keenly aware of the many problems witnesses face when their everyday conventions for giving accounts are frustrated by evidentiary restrictions. Recognition of these problems led us to wonder whether litigants might talk differently about their problems in a legal environment where such constraints were

[1] The term "judge" is used for convenience. It is meant to include various types of legal decision makers, some of whom, like arbitrators, may not formally be judges.



missing. This interest led directly to small claims courts which, like more formal courts, resolve disputes according to rules of law, but which, unlike more formal courts, do so with greatly relaxed rules of evidence and procedure.

Second, the small claims and alternative dispute resolution literature, while containing little explicit analysis of speech, is replete with references to the significance of language in the resolution of disputes. For example, Mather and Yngvesson (1980-81: 777) note that disputes undergo *rephrasing* (that is, "some kind of formulation into a public discourse") early in the disputing process. Subsequently, the disputants endeavor to frame the dispute in recognized, coherent paradigms of argument (Mather and Yngvesson, 1980-81: 780-81). Mather and Yngvesson contend that an important feature in all social conflict is a struggle over these paradigms. Moreover, they emphasize that where there is a written legal code and an official language of disputing, the ability to manipulate that language becomes an important determinant of the relative power of the parties.

Other researchers, approaching the significance of language from a somewhat different perspective, have noted the influence of speaking opportunities on disputants' attitudes toward the process. Yngvesson and Hennessey (1974-75: 260) observed that the opportunity for self-expression seemed to contribute to disputants' willingness to compromise; Abel (1982: 284) made the related point that small claims courts "allow grievants to let off steam, performing an expressive rather than an instrumental function," and thereby help to neutralize social conflict. These statements are consistent with the observation of Arno (1985) that, for some disputants, the opportunity for structured verbal interaction with a person in a position of authority is the most important aspect of the disputing process. They are also consistent with anecdotal evidence reported by both lawyers (e.g., Weinstein, 1977: 521; Kulat, 1984) and social scientists (e.g., McFadgen, 1972: 46-48) to the effect that disputants are frustrated by legal rules that limit their speaking opportunities and prefer forums that put fewer limits on the form and duration of narratives.

Third, we see our work as adding to previous research in the relatively new field of language and law. The relation of language and law has attracted the attention of researchers in such diverse disciplines as anthropology, sociology, linguistics, psychology, speech communication, and law, and most of their work has been empirical in orientation. The general question

of interest to most researchers is how a focus on language can illuminate legal processes. Topics that have been researched include such diverse, but related, issues as the comprehensibility of jury instructions (Charrow and Charrow, 1979; Sales *et al.*, 1977), the influence of question form on testimony (Loftus, 1979; Danet, 1980), and the effects of variations in speech style on the evaluation of testimony (O'Barr, 1982; Conley *et al.*, 1978). Within this research orientation, some attention has also been devoted to the nature of the testimony given in legal proceedings. For example, Atkinson and Drew (1979), using the microanalytic approach of conversation analysis, have examined how speech in court differs from everyday conversation, with particular attention to the attribution of blame and responsibility in courtroom examinations. Other microanalytic studies have further demonstrated how the conversation analysis approach can shed light on the nature of accounts given in legal contexts (see, for example, Pomerantz, 1978; Pomerantz and Atkinson, 1984; Drew, 1985).

Using a broader orientation to the trial process, Bennett and Feldman (1981) have attempted to understand legal decision-making by considering how jurors make sense of evidence presented by various witnesses in response to attorneys' questions. They argue that jurors reconstruct the evidence as "stories" and make decisions about the truthfulness of these stories on the basis of their structural characteristics. In her review of their work, Philips (1983) points to some significant deficiencies in it. The concept "story" is never clearly defined, and the similarities of legal reasoning to everyday judgmental processes are exaggerated while critical differences between courtroom proceedings and ordinary decision-making are underemphasized or ignored. Nevertheless, Bennett and Feldman's effort to study the trial as a whole is important, for it reminds researchers in the field of law and language not to lose sight of the trial as an entity in their attempt to understand its constituent parts.

Within the field of law and language, as this brief review suggests, attention has been given to microlevel interactive encounters at one extreme and to macrolevel cognitive schemata at the other. Little research, however, has focused on processes that fall between these extremes. We have chosen individual litigant narratives[2] as the unit of analysis in an

[2] The terms "account," "narrative," and "story" have been used somewhat interchangeably to refer to the telling of the particulars of an act, occurrence, or course of events by a witness in court. In our use of these terms, we seek to draw an analytic distinction between two aspects of a telling. A witness' "story" or "account" refers to the totality of the telling by any particular witness, even though the telling may not occur as a relatively uninterrupted or unbroken segment within a trial. "Narrative," by contrast, refers to a telling that occurs in a relatively uninterrupted manner, with the witness having an opportunity to determine both the form and the substance of the telling. An interesting finding is that most litigants come to court with a narrative that they want to tell and usually find a way to present it. In this article, we are concerned with both aspects of the way litigants talk about troubles in small claims courts. Differences in terminology reflect which aspect or aspects we are considering at any particular time.



initial attempt to understand and explain such middle-level linguistic phenomena.

To summarize, the significance of language in the disputing process has been widely recognized; it is a strategic weapon in the framing and presentation of disputes, and the way in which it is controlled by the forum may affect the attitudes of the participants toward the dispute resolution process. Moreover, the detailed study of language in legal and quasi-legal contexts has been shown to be a source of invaluable information about the functioning, fairness, and effectiveness of the institutions being studied. We hope to add to this body of knowledge by investigating language in a context where its significance has often been presumed or recognized but seldom documented or studied.

## III. RESTRICTIONS ON NARRATIVES IN FORMAL COURTS

Motivated by the research just reviewed and by our own prior experience studying formal courts, we decided to examine in detail the use that small claims litigants make of the opportunity to present their positions in a relatively unconstrained fashion. More specifically, our intention was to analyze the structure of the narratives told by small claims litigants. We were interested in what patterns could be observed in such narratives, especially what they might reveal about the litigants' goals and strategies and about the fairness and effectiveness of the small claims court as an institution.

When we began the present research, we already had access to over 100 hours of tapes and transcripts of criminal proceedings in the North Carolina Superior Court. The tapes had been collected in the mid-1970s in the course of a study on the strategic use of language in formal courts (O'Barr, 1982; Conley *et al.*, 1978). We began this study by reviewing our existing data, paying particular attention to the structure of

witnesses' narratives in these more formal courts. We recognized, of course, that the law of evidence places substantial restrictions on the length and scope of witness narratives, and that any narratives we found in our sample would necessarily differ from everyday storytelling conventions. We suspected, however, that by examining instances in which evidentiary restraints were placed on witness narratives, we would be able to make useful inferences about how witnesses would structure their narratives in the absence of such restraints. We therefore focused on narratives that engendered evidentiary objections, following Llewellen and Hoebel's (1941) dictum that situations in which a system breaks down often yield the most interesting information about the nature of the system.

Our analysis of our earlier data repeatedly confirmed the intuition that lay witnesses come to formal courts with a repertoire of narrative customs and strategies that are often frustrated, directly or indirectly, by the operation of the law of evidence. Consider, for example, the following constraints that are imposed on witnesses in most American formal courts:

1. A witness may not ordinarily repeat what other persons have said about the events being reported.
2. A witness may not speculate about how the situations or events being reported may have appeared to other people or from other perspectives.
3. A witness may not ordinarily comment on his or her reactions to, or feelings and beliefs about, events being reported.
4. In responding to a question, a witness is ordinarily restricted in digressing from the subject of the question to introduce information that he or she believes critical as a preface or qualification.
5. A witness may not normally incorporate into his or her account any suppositions about the state of mind of the persons involved in the events being reported.
6. Value judgments and opinions by lay witnesses are generally disfavored.
7. Emphasis through repetition of information is restricted.
8. Substantive information may not be conveyed through gestures alone.
9. A witness is generally forbidden to make observations about the questions asked or to comment on the process of testifying itself.

These restrictions and prohibitions are supported by the statutory or common law of evidence or by unwritten custom widely followed in formal courts. Yet reflection on how we ordinarily speak suggests that each forbidden practice is common, if not essential, in everyday narration.



It appears that frustration and dissatisfaction are inevitable results of such constraints. One federal trial judge has commented at some length on the fact that litigants frequently feel dissatisfied because the trial process does not afford them a fair chance to tell their stories (Weinstein, 1977). He reports that greater satisfaction for litigants in small claims procedures seems to be related to the absence of formal rules of evidence. On the basis of his experience, Weinstein believes that

> allowing litigants to introduce evidence relatively freely and to rely on hearsay, provided the opponent can call the declarant and otherwise attack him with a minimum of barriers, tends to tranquilize them. This truism is demonstrated repeatedly in magistrates' courts where a complaining witness pours out his heart to an attentive judge and then, having had his day in court, withdraws the complaint (1977: 521).

Carlen (1976) reports that the experience of litigants and witnesses in Britain has been similar. The rules governing courtroom procedure, Carlen notes, place defendants in positions where they must plead their cases or give supporting testimony in a manner that is "quite divorced from the conventions of everyday life outside the courtroom" (1976: 24) and where the logic of the legal process is opposed to "commonsense interpretations" (1976: 85).

These observations are confirmed by conversations we have had with courtroom witnesses. Witnesses—both parties to the dispute and others—complained about their inability to convey their versions of the facts at issue. Many even went so far as to assert afterwards that they would never have taken their cases to court or agreed to testify if they had realized ahead of time how little opportunity they would have to tell their stories.

The source of this frustration is obvious from segments of superior court testimony we collected in which a witness' narrative efforts engender objections. In each instance, the agendas of the witness and the court conflict. Although the witness attempts to tell the story on his or her own terms, the court will hear the evidence only when it is structured in ways alien to the day-to-day lives of most of those who testify.

Texts 1-6 illustrate several difficulties that witnesses encounter. Texts 1 and 2 are drawn from a vehicular homicide case in which an allegedly drunk driver was charged with running a red light and colliding with an ambulance. As a result, a heart attack victim on her way to the hospital was

thrown out into the street and killed. In Texts 1 and 2, the witness is an ambulance attendant who was riding in the back of the vehicle with the patient. In the testimony quoted, the prosecution is attempting to establish that the patient was alive before the collision and died as a result of it. This witness has already run into difficulty several times for attempting to report what others said.

The account given in Text 1 differs in important ways from the type of account that one would expect in ordinary discourse, where the speaker has greater control over the organization of his story and where reports of conversations are common.

Text 1[3]

*W*: Well, I went, uh, Mr. N told me to go outside.

$L_2$: Object.

*W*: Well, I . . .

*J*: Just describe the physical act of what was done. Not what was said, but what actually transpired.

*W*: Well, I wasn't really doing anything in relation to the patient. Mr. N was doing all that.

$L_2$: Did you go, did you go back, did you return, return to the emergency vehicle?

*W*: I returned to the emergency vehicle.

The objection sequence in Text 1 occurs precisely at the point where the witness attempts to do what he would ordinarily do. The problem (and hence the objection) occurs as a result of the witness' attempt to use everyday discourse rules in the courtroom. When he violates the rule that reporting a conversation (hearsay, from the perspective of the law) is not ordinarily allowed, an objection occurs. As in this instance, evidence conventions (read: *the rules of courtroom discourse*) are seldom explained in any detail to those who must conform to them. At most, witnesses receive some instruction from attorneys in the course of pretrial preparation.

[3] Texts 1-5 are excerpts from trials we studied in a North Carolina superior court under a grant from the Law and Social Science Program of the National Science Foundation (GS-42742). Texts 6-13 are excerpts from small claims trials in North Carolina and Colorado. Readers can determine which state each small claims trial is drawn from by the difference between the terminology used for the judges in the two states: *magistrate* in North Carolina and *referee* in Colorado. Names, dates, and locations have been changed to preserve the anonymity of the persons whose cases we discuss.



In Text 2, the same witness attempts to state the source of his knowledge and finds that, because he heard it from someone else, it is disallowed. He comes up against two proscriptive rules. The first limits non-expert witnesses to their firsthand knowledge. The second, the hearsay rule, holds that firsthand knowledge of what another has said is not a permissible basis for testimony offered to prove the truth of what the other has said; in the example, the color of the victim's lips.[4]

Text 2

$L_1$: Were her lips blue at the time?

*W*: Uh, I don't remember. I think that, uh, the patient's family said they were blue.

$L_2$: Object to what the family said.

*J*: Sustained.

Text 3 presents a somewhat different hearsay problem. The text is taken from an armed robbery trial; the convenience store clerk who was held up is attempting to describe the car in which the robber fled. In her first answer, the witness acknowledges the hearsay source of the information, and the judge excludes it. The second answer, which omits any reference to the source, is allowed to stand. This text shows a good deal about the curious workings of the court. The witness has already stated that she knew the year of manufacture of the car because someone had told her. Yet the witness' testimony about the year of manufacture, which had been excluded when its hearsay basis was mentioned, is allowed to stand when presented in language that suggests firsthand knowledge.

Text 3

$L_1$: Now could you describe the year or approximate year?

*W*: Uh, seventy—, I was told seventy-three.

$L_2$: Object, your honor, to what she was told.

[4] These rules are thought to promote accurate fact finding because the law of evidence presumes that cross-examination of witnesses will resolve most questions about testimonial reliability by allowing the judge and jury to evaluate the witness' credibility and the plausibility of the witness' story. When a witness testifies only about personal observations, the witness may be cross-examined about everything that is reported. When a witness reports what someone else has said, however, the cross-examiner can only investigate whether the present witness is reporting the other person's statement accurately. The declarant's state of mind and the factual accuracy of the declarant's report cannot be probed.

*J*: Sustained as to what she was told. Disabuse your minds of that, members of the jury. It is not competent.

$L_1$: Could you describe whether it looked like a new or an old car?

*W*: Well, it was seventy-three then. It was a seventy-three Pontiac.

Texts 1-3 are typical of instances of reported conversations that occur in formal courts and are treated as hearsay. These texts suggest that in some respects at least witnesses often attempt to tell their stories in courts as they might tell them in everyday situations, and they are often frustrated in the attempt. If witnesses did not tend to report conversations in their testimony, the rule of hearsay would not be needed; in any event there would not be such frequent objections resulting from attempts to keep secondhand information out of testimonial accounts.

Evidentiary rules regarding the expression of opinions and conclusions in the course of testimony also cause frequent problems. Except in the case of expert witnesses, the law of evidence expresses a strong preference for concrete descriptive testimony. Lay opinions and conclusions are not necessarily impermissible, but they are frequently restricted. Judges have considerable discretion here.[5]

Text 4 illustrates the problem that many witnesses have in adapting to this preference for concrete testimony. The witness is a woman who has filed a criminal complaint against her father, alleging that when drunk he threatened her mother with a gun. In the quoted testimony, she is attempting to describe his behavior on a particular occasion. Rather than describing the behavior in concrete terms, however, she summarizes it in a conclusory fashion ("he gets uglier and uglier"). Moreover, she does not limit her account to events that she observed on the occasion in question but appears to generalize from observations she made on other occasions when he was drunk ("After he gets a certain amount of drink in him"). Although such generalization may be common in everyday conversation, it is unacceptable in court, since the law

[5] Lay opinions and conclusions are most often permitted when there is no simple way to describe a particular event: for example, a lay witness will usually be permitted to offer the opinion that another person appeared to be drunk without reciting all the observed physical characteristics that prompted that conclusion. Witnesses who qualify as experts are allowed to give opinions about matters within their fields of expertise. The circumstances under which opinions are admissible in the federal courts are described in FED. R. EVID. 701-5.



usually does not permit a witness to prove what happened on one occasion by reference to other, similar occasions. In this objection sequence, the basis for the objection is not explained to the witness. Nor does the witness show any understanding of the objection sequence; rather she ignores it and proceeds with her account.[6]

Text 4

*W*: . . . After he gets a certain amount of drink in him, he gets uglier and uglier and he does become very violent.

$L_2$: Objection, if your honor please.

*J*: Objection sustained.

*W*: Anyhow, I was afraid—about the gun. That's what petrified me.

Text 5 contains a similar objection sequence, but this time the judge provides some explanation of his ruling on the objection. In this excerpt, which is taken from an appeal of a speeding ticket, the police officer who stopped the defendant is attempting to account for the events in question by referring to what often happens in similar situations. As in Text 4, the testimony is disallowed. Note that the judge's remarks are directed to the jury and not to the witness who has made the "mistake." As in most such instances, no instruction is given to the witness about the legal problem he has encountered in testifying. Consequently, witnesses do not understand such "errors," and our transcripts show witnesses making them repeatedly (cf. Atkinson and Drew, 1979: 209-15).

Text 5

$L_2$: After you entered the fifty-five zone, what happened next?

*W*: Um, our cars have the electronic siren and I tapped it a few times hoping he would pull over because, uh, sometimes when people decide to run they wait till they get to open road and so I was trying to get him to stop

. . .

$L_2$: Objection. Motion to strike.

[6] In this instance, the witness' "Anyhow" suggests that she means something like "I didn't understand what you said, but I will continue with what I was attempting to say." This interpretation is supported by other instances of similar reactions by witnesses to objections in comments like "Can I answer?" and "I beg your pardon."

J: Sustained as to what people sometimes do. Disabuse your minds of that, members of the jury. It is not competent. Motion to strike is allowed.

The law of evidence is in one sense epistemological: it reflects the law's views on what constitutes a fact and what sources of information are reliable. These views are in turn imposed on the form and content of the accounts that witnesses are allowed to give in court. Texts 1 through 5 provide evidence that witnesses come to court with their own epistemological assumptions, and that these assumptions often conflict with the ones embodied in the law of evidence. Witnesses' reactions to objection sequences suggest that they have little understanding of the nature of this conflict and that the explanations offered by the courts do little to enlighten them about why the law deems their narratives unacceptable. These kinds of difficulties in telling stories in court may contribute to the frequently reported dissatisfaction of witnesses with the formal judicial process.

These observations about problems with testifying under the rules of evidence suggested several specific questions for our study of small claims narratives. First, we believed that small claims narratives would be a fertile source of information about those "folk" approaches to narration that are apparently frustrated by formal court procedures.[7] Are there, for example, consistencies in the way that lay litigants structure legal narratives? Can narratives tell us anything about how litigants conceptualize their problems or about how they define their objectives in coming to small claims court? Second, we suspected that the relaxation of many of the evidentiary constraints on narration might affect litigant satisfaction with the process and hoped that the detailed analysis of litigants' speech might shed light on this issue. Finally, we wondered whether the removal of formal constraints on witness narratives might create its own set of problems even as it ameliorated, at least on a superficial level, some of the dissatisfaction that was so evident in formal court.

[7] Although small claims courts do not impose formal rules of evidence and procedure, there are rules, or at least customs, that control many aspects of litigants' behavior. For example, witnesses may not talk indefinitely, nor may they interrupt each other. Such rules and customs vary from court to court, from magistrate to magistrate, and even from day to day. In the tapes we collected, however, these rules and customs were never observed to frustrate witnesses in their efforts to present uninterrupted narratives.



## IV. THE SMALL CLAIMS STUDY: METHODS

We began the research with an ethnographic study of two small claims courts. Pursuant to confidentiality agreements with the respective courts, we observed and taped 30 small claims cases in Durham, North Carolina, and 25 cases in Denver, Colorado.[8] Durham is a city of about 100,000 people, but the Durham court's jurisdiction also includes many rural areas of Durham County. We also observed but did not tape three days of trials in Orange County, North Carolina, a less urban county adjacent to Durham in which the main campus of the University of North Carolina is located. In Durham, small claims trials are held in a small office, and the parties in each case generally remain outside in a waiting room prior to the beginning of the trial. In Denver, trials are conducted in a larger courtroom that is usually crowded with the parties to several cases. At least one of the researchers was present during all taped proceedings, observing and making notes to facilitate the study of the tapes. During breaks in the trial calendar, we had many opportunities to ask questions of the magistrates and engage in informal discussions. In both jurisdictions, litigants were informed at the start of each trial that we were observers conducting an academic study, but we believe that we were largely ignored by most litigants, who were necessarily more concerned with their cases.

In North Carolina, small claims courts have jurisdiction over civil matters in which the amount in controversy is less than $1,000 (N.C. GEN. STAT. §§ 7A-210-232; Guth, 1983). The cases are heard by full-time appointed magistrates whose duties include both hearing small claims cases and handling such criminal matters as issuing search and arrest warrants and setting bond. These magistrates need not be lawyers, and most are not. We observed six different magistrates in Durham and Orange Counties, one of whom had a law degree although he was not admitted to the North Carolina bar. (see Guth, 1983;

[8] We defined a "case" as an adversary proceeding in which at least one party appeared and which led to a judgment, either after trial or by default. In the courts we studied if the defendant fails to appear, the plaintiff is still required to testify in support of his or her case before a judgment is entered, but the defendant is automatically awarded a default judgment if the plaintiff fails to appear. We observed a few instances in which a single plaintiff, typically a landlord, obtained judgments simultaneously against several defendants who did not appear; we counted such an instance as a single case. In the Durham court, we also observed 22 "transactions," which we defined as other interactions between a "consumer" and the magistrate that did not fit the definition of a case. Such interactions were possible in Durham because people could walk directly into the magistrate's office/courtroom. In Denver, consumer inquiries were all handled by a clerk's office.

Haemmel, 1973). North Carolina magistrates are permitted but not required to follow the rules of evidence. A recent survey indicates that evidentiary constraints are rarely if ever imposed (Bashor, 1985). North Carolina small claims courts permit lawyers, but the parties were represented by counsel in only one of the 30 cases we observed.

Colorado small claims courts also have jurisdiction over civil cases involving less than $1,000. The judges, or referees, are appointed by the chief judge of the local county court and must be admitted to the bar. Lawyers are generally not allowed to appear; in most instances, if a party wants to be represented by a lawyer, the case is transferred to the county court. The rules of evidence and procedure are not observed (COLO. REV. STAT. §§ 13-6-407-416).

Following the collection of audio tape recordings in the two jurisdictions, we prepared transcripts for each of the trials. Our method for analyzing the trials was inspired by the group workshop technique used by many conversation analysts. In our analytic sessions, we were joined by three or four other researchers trained in law, social science, or both.

A typical session focused on a trial segment selected in advance, usually a single litigant's narrative as we have defined it (see note 2). Participants listened several times to the tape (often as many as five or six playings) and were furnished with a transcript similar to those prepared by court reporters. Following the playings of the tape, each participant spent 20 minutes or so writing notes about those features of the narrative which were of particular interest to him or her. The remainder of each session, usually 60 to 90 minutes, was devoted to a round-table discussion of our respective observations.[9]

The issues discussed in this article were among the most frequently recurring themes in our analytic sessions. The only prior agreement among the participants was to focus general attention on the matter of how small claims narratives differ in form and substance from testimony given in more formal legal settings. Such issues as deductive versus inductive narrative structure and the manner in which litigants assess responsibility repeatedly attracted analytic attention; indeed, a

[9] We wish to thank the following persons for their participation in the Duke-UNC Law and Language Research Seminar during 1984-85: Ron Butters, Chris Bashor, Roy Baroff, Mark Childress, Lynda Flanagan, Susan Hirsch, Tom Jarvis, and Sylvia Scryas. The group analytic method was suggested by Max Atkinson based on data analytic techniques commonly used by conversation analysts.



striking aspect of the sessions was the participants' high degree of agreement about the narratives.

Approaching the data in this manner allowed us to focus on the issues that the data suggest are important to the trial participants themselves. Inferences about litigant satisfaction resulting from the opportunity to tell one's story, for example, are based primarily on litigants' linguistic behavior in responding to the opportunity and secondarily on their comments about the process of testifying. Our conclusions about the adequacy of some of the narratives from the perspective of legal decision makers are similarly based primarily on the reactions of magistrates during the trial and secondarily on their out-of-court discussions with us about particular cases.

Our method is fundamentally similar to conversation analysis in that recordings of naturally occurring (institutional) speech are the primary source of data. We also rely on the native-speaker competence of the researcher as a principal tool for the analysis of the data. Thus, we share with conversation analysts the convictions that the best evidence for the study of the social consequences of speech lies in speech behavior itself and that this evidence is readily accessible to other members of the speech community.

Our method differs from most conversation analysis in that we deal with significantly larger units of data. Whereas conversation analysts frequently work on brief exchanges that commonly occur in everyday conversation, the narratives and accounts we analyze are often several minutes in duration. We work with such larger units of data for two reasons. First, the unit of the narrative is a natural one in small claims court: when witnesses are invited to tell their stories, they commonly respond with substantial narratives. Second, although we recognize that many important details of speech may be overlooked when such larger units are analyzed, it is also true that certain features are not discernible when approached with a narrow turn-by-turn focus. The major issues discussed in this paper—the structure of narratives and the assessment of responsibility—can only be studied by examining complete accounts given by witnesses.

Our approach differs in one further significant way from much of the work done in the conversation analytic tradition. Our specific goal is to understand the social and legal implications of the data we analyze rather than to further understanding of conversation itself. Accordingly, we strive to

ensure that our inferences are firmly grounded in the linguistic data available to us, but we consider the implications of these inferences for such issues as the fairness of small claims courts and their place in the larger social order rather than for a general theory about how conversation proceeds.

## V. LEGAL NARRATIVES WITHOUT EVIDENTIARY CONSTRAINTS

The small claims courts we observed allowed litigants to tell their stories without evidentiary constraints.[10] Witnesses' accounts in these courts were indeed more like everyday speech than the accounts heard in the regular trial court. Accounts in small claims court include reported conversations and expressions of opinions as well as such other features as metapragmatic comments on the process of testifying and various organizational devices related to longer and more flexible narratives. Moreover, these accounts embody lay models of *legal adequacy*.

Our tapes are replete with evidence that small claims litigants realize that the opportunity to tell a judge a relatively uninterrupted story is a rare one. In an eviction action, for example, the defendant, a law school graduate who had fallen on hard times and was in arrears on his rent, recognized that he had no legal defense to the eviction. Nonetheless, he took several minutes to relate all his troubles to the magistrate, finally commenting that it had been worth the effort to come to court and that it had "at least [made him] feel better." In another case, the plaintiff sought to recover some personal property that his former wife had retained after their divorce. After a long trial marked by several emotional exchanges among husband, wife, and two sons, the magistrate ruled against him. His closing remarks indicated that he understood the ruling and felt that the trial itself had been a useful, if not therapeutic, exercise.

Other expressions of such sentiments could be cited. The most telling bit of evidence, however, may be simply the fact that *every* litigant we observed responded to the magistrate's invitation to speak by giving a narrative description of the situation. The invitation to speak was typically in the form of a question such as "Why are you here?" or "Why have you

[10] Over the course of 55 cases, we observed an evidentiary restriction being imposed only once, when a magistrate excluded a document as hearsay on his own initiative.



brought this matter to the court?"[11] Litigants, however, invariably responded not by answering the questions in a narrow sense but by commencing a chronological narrative of the dispute as they perceived it. The scope of these narratives often went far beyond the facts that the court was empowered to adjudicate.

All of this suggests that, from the litigant's perspective, the opportunity for unconstrained narrative is an important component of small claims court procedure. Litigants uniformly take advantage of the opportunity to talk, apparently viewing narration as an appropriate small claims strategy, and some even offer unsolicited favorable comments about this aspect of the procedure. These findings are consistent with Abel's (1982: 284) view that small claims courts neutralize conflict by allowing grievants "to let off steam."

Text 6 illustrates a typical account given in a small claims court. The plaintiff (Norris), a black man in his 20s, is a highly paid skilled industrial worker. He alleged that a suit he bought from a store was damaged when he got it back from its first dry cleaning. He sued both the cleaner and the store, asking the court to decide whether the damage resulted from defective material or negligent cleaning and to award damages against the appropriate defendant. The magistrate severed the cases against the two defendants, first hearing evidence against the cleaner. The cleaner had sent the suit for analysis to the International Fabricare Institute, which reported in writing that the material was defective. The magistrate accepted this report as conclusive. The manager of the cleaning establishment then testified for the plaintiff in his case against the clothing store. The court accepted the argument of the store manager that the manufacturer was at fault and ordered the case continued while the store attempted to gain a refund from the manufacturer. Text 6 contains the plaintiff's initial presentation of his case against the cleaner.

[11] The opening questions used by the North Carolina magistrates included: "At this time, Miss H, if you want to state to the court the reason you're bringing this action against the defendant"; "Mr. E, do you have any statement at this time concerning this matter?"; "OK, Miss S., do you wish to stand on the complaint as read or do you want to elaborate on that as read?" The single referee whom we observed in Denver frequently asked a series of specific questions to open the hearing but always issued an open-ended invitation to speak, such as, "From you what is there that I can learn that will help me decide this case?"

Text 6

*Magistrate*: OK, Mr. Norris, if you want to state to the court the reason you are bringing this action against NDE Company.

*Norris*: Uh, the reason I am bringing this action against NDE Company, I, got a suit, bought a suit from Feldman's around the last of May, I wore the suit one time, and I sent it to the laundry to have it, have it cleaned, and I, they send the suit back to me, the suit, well I can show it to Your Honor.

*Magistrate*: OK, show it to Mr. Cashwell also.

*Norris*: The suit come back to me like this here [*pointing to spot on suit*], like it had maybe, I thought maybe, it wasn't enough heat on it.

*Magistrate*: Uh, huh.

*Norris*: Mr. Rogers at the laundry, he told me that it was a defect in the material that was in the suit. He—I, I, I brought the suit home and I wore it and I seen this here [*indicating spot*] that it was on there so I took the suit off and I told my wife, "Well, we goin' send it back to the laundry the next day." This is the laundry ticket [*indicating ticket*] where they redone the suit. See, they didn't put this tag here on there till the second time I got the suit, OK. This first time I got it—the suit—they just had it in the plastic. I thought it was OK until I seen it, so I sent it back to the laundry and I was talking to a Mr. Rogers and he said that, uh, that the suit was—it was a defect in the material—he say, "What about waiting two weeks?" So I spent time out of work going back and forth talking to Mr. Rogers, and he put this on, on [*pointing to paper attached to suit in the plastic bag*], on the suit about the second time I picked it up. He said, "Well,"—you can see that [*indicating paper*]—he said, "Well, it's probably a defect in the material." He said, "What I'll do, I'll send it off and I'll have it analyzed and when it come back," he said, "if we're in the fault," he said, "we'll send—we'll, uh, refund your money." So I was waiting at the time two weeks, I'm hoping that maybe they'd find the fault and pay me my money, but he said that—"I can't pay you no money." He's given me, when the suit come back, he gave me this information here [*holding up several pages*].

The narrator provides three types of evidence within his account. First, he produces *documents* that support his story. Second, he calls *"witnesses"* by performing their parts. Third, he introduces *physical evidence*, the suit itself. In an everyday account, some of these might not have been included. Their inclusion in the plaintiff's testimony hints at his conception of legal adequacy. These features of the narrative suggest that the plaintiff believes that written records are more powerful pieces of evidence than his recollections; that the words of others



speak for themselves more forcefully than his own paraphrases or interpretations; and that physical evidence is especially useful because it can "speak" for itself. Analyzed in this manner, relatively unconstrained narratives offered as evidence to the court reveal lay models of the kinds of accounts that are appropriate and sufficient to prove a defendant's responsibility.

Other interesting features of this account include the perspective from which it is told, the performance of the story, and its structural features. The story is told from a frequently shifting perspective, sometimes from the vantage of the narrator's home and other times from the vantage of the cleaner's. Deictic markers[12] give clues to the perspective throughout the story. Abelson (1975) argues that a story told from a single vantage point[13] is easier to comprehend, but accounts given in small claims courts suggest that narrators do not follow this principle. In fact, the shifting of vantage points in an account is common in both small claims and more formal courts. In the latter, however, a shift away from the speaker's past vantage points is likely to occasion an objection that the witness is engaging in speculation or reporting hearsay.

One may well ask what significance the shifting of perspective has in a narrative, if, following Abelson, we assume that accounts containing multiple points of view are more difficult for listeners to comprehend. Having looked through a large number of accounts without discovering any discernible pattern regarding the vantage point from which stories are told, we have two hypotheses about what may be occurring.

First, multiple vantage points may reflect the natural tendency of the narrator to triangulate on the events being described. Narrators ordinarily tell stories from many perspectives. As listeners, we are taken from scene to scene, we hear the relevant parties "speak," and we may even get privileged information about the motives and thoughts of various parties to the action. Abelson's study of consistency in

[12] Deictic markers are linguistic features that speakers use to anchor themselves in discourse with respect to place and time (e.g., Fillmore, 1971; Jarvella and Klein, 1982). Our earlier research in formal courts revealed that witnesses frequently orient themselves by using such contrasting deictic pairs as *here* and *there*, *this* and *that*, and *come* and *go*, often to the apparent confusion and consternation of the court. (Much of this confusion may stem from judges' concerns about producing a clear and unambiguous record in the transcript.)

[13] Although Abelson uses the term "point of view" to mean the vantage point from which the narrator tells the story, we use the term vantage point in order not to confuse this aspect of a narrative with what is commonly referred to as point of view in literary studies (e.g., omniscient first-person narrative, third-person interior monologue, etc.).

perspective was a laboratory study. There is no reason to suggest that his findings about consistency of perspective and corresponding ease of comprehension are incorrect, but there is also no reason to assume that the artificial situation studied in the laboratory actually replicates the way people tell stories in natural settings.

Second, as Wolfson (1982) found in her study of the conversational historical present tense in English, it may well be that the shift of perspective is more important than the actual perspective that is assumed. Following Wolfson, we suggest that the shifting of perspective serves to highlight the story and hold the listener's attention. (The reader is invited to test Wolfson's theory by reformulating Text 6 so that it is told from a single perspective.)

Another interesting aspect of the account contained in Text 6 is the fact that the narrator performs the story by assuming the voices of the actors in it, rather than by merely relating it in some more distant or indirect manner. Students of folklore know from the writings of Hymes (1981) and others that the "breakthrough into performance" is considered in many cultures to be an important feature of persuasive narratives.[14] Although adequate and acceptable stories may be rendered without performance, it is generally true across cultures that those narrators who perform stories in telling them are perceived as giving better accounts. If this is true, then one of the consequences of the evidentiary constraints that proscribe performance by eliminating testimony relating to what other persons have said is to reduce the rhetorical force of the account. It may well be that those who are accustomed to performing stories and who are not allowed to do so give testimony that appears particularly uninteresting or even incredible.

Tannen (1981) suggests that major differences exist between stories told in oral and literate cultures. One such difference she reports is the tendency for accounts to be performed in oral cultures and to be related in literate cultures according to the rules of written discourse, which places a higher value on consistency of vantage point. Accordingly, we suspect that some persons within a pluralistic culture such as our own may tend toward the oral mode of narration whereas

[14] "Breakthrough into performance" refers to the situation in which a narrator shifts from third-person reporting to enactment of a story by speaking the parts of the characters rather than merely reporting what they said.



others may be more familiar with the literate mode. Small claims courts, which have relaxed rules of evidence, allow and tolerate either mode, whereas more formal courts, based as they are on the literate tradition and its recordkeeping requirements, follow the biases of the literate tradition. Under these circumstances, it is easy to understand why many people feel constrained and inhibited by the formalities of courts of record and why they may prefer the informality of small claims courts.

Another feature of the account in Text 6 is its chronological organization. Although chronology might be expected as an organizational device for legal accounts, there are many situations in which accounts are not chronologically ordered. Perhaps the most common occurrence of nonchronological accounts is in cross-examination. Trial practice manuals advise lawyers to break chronology in order to unsettle witnesses. At the same time, they caution that presentation of facts out of chronological order may have the effect of confusing the jury or conveying the impression that the lawyer is disorganized (Keeton, 1973: 23; Bailey and Rothblatt, 1971: 192, 200-1; McElhaney, 1974: 27). The naturalness of chronological ordering is suggested by the fact that trial practice manuals give advice on when not to follow it. By contrast, most direct examinations tend to be chronologically ordered because of the legal necessity to demonstrate that the witness has the requisite firsthand knowledge of the evidence to be introduced—what lawyers call "laying a proper foundation." Equally important, however, is the fact that chronology is related to our cultural understanding of causality (i.e., event A must precede event B if A is a cause of B).

In small claims courts, most narratives are organized chronologically. For most witnesses the difficult decision is where to begin and end the account. The form of the invitation to testify does not seem to provide much assistance with respect to where to begin. In Text 6, for example, the magistrate invites the witness to state his reason for bringing the action. In Text 7, which is drawn from a case arising out of a boundary dispute between landowners, a fuller invitation is issued, yet there is no appreciable difference between the accounts that these different types of invitations elicit. It is also the case that witnesses sometimes embark on long chronological narratives

in response to highly specific factual questions.[15]

Text 7

*Referee*: Now likewise as a witness for the plaintiff, you've heard everything that has been said and you're closely related to all of this, and I believe you understand that, uh, your mother is, uh, alleging right to recover for the expenses that she's incurred over this long history and also she, it's her opinion that in the process she's been harassed and annoyed and all of that and she's seeking recovery for that as well. Now you're as familiar with this perhaps as anyone. From you, what is there that I can learn that will help me decide this case?

*Tom*: Uh, as you can see from the pictures of the trees that there were several trees on the Barretts' property that a particular tree grows underground and up onto other people's property. Uh, under the fence line and all the way up against the foundation of the house, these sumac trees have grown and spread out and, if I can point out something here *[pointing to photograph]*, uh, this is the particular tree . . .

*Referee*: In such a way that the defendant can see it as well.

*Tom*: These have grown up from their property onto our side of the house, OK, and they were removed by me. These, this is where the hedge line was, but now it is grown up with the same sumac trees that came out of their back yard and off of their property, and these are the trees that my mom was talking about having to cut after the hedge was actually dead and gone. There have been, um, a couple of instances where I, days where I went out and cut down the trees that had grown under the fence and it started to grow all over our yard and against the foundation, and poisoned those trees. They grew up through a bush that we had there and, uh, so there are several instances where I've had to go out and cut those trees and dig out and poison them, uh, to get them to stop growing on our property and then they grew up in the hedge area and then the hedge was removed and taken out. Um, it was a very poor choice of shrubs—something that spreads all over the, you know, area. Uh, the, uh, trees have dropped, you know, there's one *[indicating picture]* like that already. There's another picture with the trees growing up on the property and that's after they've already been cut several times. Um, and the big trees—you can see there—keep dropping things and the bushes keep growing through the fence which is onto our property, onto my mom's property.

[15] One of us (WMO) also serves as a mediator in a community dispute settlement center. Similar difficulties are common in mediation sessions. Mediators comment that parties often start "in the middle" of their stories. On being invited to give their side of the case, disputants often ask for guidance with a question like "How far back do you want me to begin?" In this particular center, mediators are taught to respond to such inquiries with a noncommittal answer like "As far back as you think necessary," leaving the decision up to the narrator.



Notice also that after his narrative began, the witness received few clues about when to continue and when to quit. Atkinson (personal communication) has suggested that magistrates in British small claims courts give cues about continuing through response tokens such as "yes" and "I see." In the small claims courts that we studied, such tokens are infrequent and witnesses are left more to their own devices with regard to how long to continue. In these circumstances witnesses tend to employ turn preservation techniques that allow them to continue speaking, usually until they decide that their stories are complete. Look, for example, at the use of the connective "and" in the narrative in Text 8, which is taken from a negligence case arising out of a collision between a car and a moped. Several times, the witness reaches a point where the listener might reasonably conclude that the story is over. The witness preserves his speaking turn with an "and," which is followed by another segment of the narrative. In addition, at several points in his narrative the witness employs rising intonation in an apparent request for acknowledgment and understanding. Because the magistrate gives no verbal response on any of these occasions, the witness is required to continue without the response he has requested. In formal court proceedings, the witness need not be concerned about where to begin and end, since the interrogating lawyer manages the allocation of speaking turns.

Text 8[16]

*Magistrate*: You tell your, please tell your story. She tells her story, then we decide. OK?

*Fisher*: All right. Uh, there's a, there's a four-way intersection here in Durham up close by the Oyster Bar, and we was making a left-hand turn

*Nancy*: Mmhmm.

*Fisher*: and, um, was pulling into, as we turned in—it's a short, very short distance, fifty foot, seventy-five foot, something like that where there's a parking area ↑ (1.0) to be parked at. We, she turned on the left turn, uh, the right turn signal to make a righthand turn into the parking lot ↑ (1.0),

[16] Two additional transcribing conventions are used in this text. First, discernible pauses are indicated (in tenths of seconds) in parentheses throughout the text. Second, rising intonation is marked with an upward arrow at the end of the phrasal segment containing the intonational contour.

and we started, the front, the front end of the car was into the, um, little uprise to get onto the parking lot area † (1.0), and when we did, first thing I know of, something hit me behind, the arm, pushed my arm up into the mirror, and then my arm come back into the car, (1.5) and then maybe I looked back to see what was going on and here's this lady on a moped all over us (2.0). And we had stopped right there in the road, and, um, she was on the ground, and Nancy went ahead and put the car into the parking lot to get us out of the middle of the road, and we got out to see what we could do to help the woman. And (1.0) about twenty minutes later, I guess, the Durham cop—police—finally come up, (1.0) and they, we went after they wrote out the summons for both of us to come to court and then—me and Nancy and Miss Devlin here to come to court—and we did. And we thought it was to get the money to fix the repairs for the car which what we found out was the only thing that done there was charged with a traffic violation. (1.5) And we was told—we asked the, uh, not the arresting officer, the man that was there,

*Nancy*: Carl.

*Fisher*: and he said we could, um, bring it to civil court or whatever † (1.5), to get, to get, um, to get the payments for the damages. (2.0) And that's—we, come down here and we was told where to go to talk to the lady, and she told us what to do and she's apparently set up a date to come here. † (1.5) And that's all we was told. We didn't [*inaudible*] anything else about the car . . .

*Magistrate*: Anything else? You want to add to that?

*Nancy*: No.

## VI. THE LEGAL ADEQUACY OF UNAIDED WITNESS NARRATIVES

The most significant of the problems faced by small claims litigants relates to the legal adequacy of their narratives. We use the term "legal adequacy" to refer to a narrative's form and content rather than to its impact on the outcome of a case. While it would be interesting to investigate whether particular narrative styles correlate with favorable case outcomes, we do not have sufficient data for that purpose. Legally inadequate narratives are for our purposes narratives that differ substantially in form and content from the accounts that judges are accustomed to dealing with by training and experience. There are three sources of information concerning the legal adequacy of individual narratives: the comments of the magistrates during extensive interviews before and after the cases observed, the training and experience of one of the authors (JMC) as a trial lawyer, and the reactions of the



magistrates to certain types of narratives during the hearing of cases. The third category of data is the most significant, since it is drawn from actual courtroom discourse rather than from the after-the-fact reflections of participants or observers.

From a common-sense perspective, the plaintiff in Text 6 appears to give an adequate account of why one of the two defendants should be held responsible for the damages to his suit. It is evident from an examination of the suit that it has been damaged. There are three possible responsible agents: the man himself, the cleaner, and the store and/or manufacturer. In describing his own behavior, the man excludes himself, at least by implication, since he says nothing that suggests he is to blame. When he concludes, he apparently believes that he has given the court an adequate basis for finding against either or both of the defendants.

Despite the common-sense appeal of his story, the man received no compensation for his damaged suit. The cleaner presented an exonerating report from a purported expert, and the magistrate accepted it without question. The cleaner's representative, a middle-aged white man, then testified for the plaintiff, stating that the material in the suit was defective. This testimony shifted the burden to the store, whose representative, a young well-dressed black man, quickly persuaded the magistrate that the fault must lie with the manufacturer, which had not been sued. The man was told to come back later, after the store had tried to work things out with the manufacturer.

It is difficult to see in what respect the man's case fell short. From a legal standpoint, he acted properly in joining the two defendants and asserting that one must be held responsible. Even if one accepts the cleaner's "expert" report at face value, as the magistrate did, the man would seem to have a valid warranty claim against the store, to which the ultimate responsibility of the manufacturer should be no defense. The shortcoming appears to be not in the legal theory adopted but in the structure of the narrative itself.

It may be significant that in his narrative, the man proceeded as if the facts would speak for themselves. In particular, he never dealt explicitly with the issues of blame, responsibility, and agency. The assessment of responsibility for the damage he has suffered is accomplished only to the extent that the listener can draw inferences from the facts recounted. In this respect, his approach might reasonably be characterized as inductive. He does not lay out a theory of the case for

testing. Rather, he presents the facts he considers relevant and expects them to lead to a conclusion.

Compare the man's narrative with the case as a lawyer might have presented it in a formal trial or even in an argument to a small claims court magistrate. The lawyer would not have added any facts; on the contrary, some information, such as the reported conversation with the plaintiff's wife, might have been deleted. What the lawyer would have done is to begin the presentation with an opening statement that posited a hypothesis about who was responsible. The evidence would have been organized around that hypothesis, and the case would have concluded with an argument that emphasized the ways in which the evidence demonstrated the validity of the hypothesis. In contrast to the man's inductive approach, a lawyer would have organized the case as a deductive experiment in which the issue of responsibility was addressed directly.

In light of the result, it is interesting to note that both defendants dealt explicitly with the allocation of responsibility. The cleaner had his expert's report while the store manager laid the blame on the absent manufacturer. The significant point may not be that the defendants were correct in their theories but simply that each defendant articulated a theory of responsibility in the deductive form familiar to lawyers and legal decision makers. A litigant who is unable to structure his or her case in this familiar form may be at a serious disadvantage.

The point is further illustrated by a text taken from a case brought by a middle-aged white woman against a garage owner, a white man in his early 30s. The woman claimed that she—or, rather, a "friend" of hers—had bought a rebuilt car engine from the defendant, that the engine had never worked properly, and that as a result she had spent hundreds of dollars on oil, her transmission had been damaged, and she had lost her job when she was unable to get to work. She testified later in the case that her life had ultimately deteriorated to the point where she had been evicted from her apartment for nonpayment of rent and was sleeping in the disabled car.

A lawyer would probably characterize this as a breach of contract or breach of warranty case in which the plaintiff sought two kinds of damages: direct (the money paid for the engine) and consequential (the money paid for oil and compensation for the loss of job and eviction). The magistrate accepted the defendant's argument that the language on the bill of sale limited his liability, and ordered him to refund the price of the engine—something that he had apparently been willing to do all along.



### Text 9

*Magistrate:* OK. At this time, Miss Harrell, if you want to state to the court the reason you're bringing this action against the defendant.

*Harrell:* Well, on January the third, a friend of mine paid, uh, him $312 for a motor for my car. It was installed the seventh of January, and for a week—first week after that it was leaking oil all—everywhere around the lifters and all around the motor on the other side and there was a big puddle of oil in my yard. Every time the car was stopped it was leaking oil. I went back on the following Friday and told him about it, he—one of his mechanics told me to try some gaskets. So I went down and got the gaskets, came back, he reimbursed me for the bill for that, and the gaskets were installed. Um, two hours later, I decided to drive it up the street to see how it was doing, and it started knocking and making all kinds of noises, and since then, well, I have been back and forth over there. One of his mechanics even checked it out, it was smoking and everything else. And since then I have put over two hundred thirty-some dollars worth of oil in the car. It has damaged my transmission, uh, I've had it checked by a number of mechanics that said the motor was bad and it—uh, it was—the vacuum lines were intact, they, um, everything was checked on that and it has caused the transmission to—quite a bit of damage to that, and, um, so it's, um, it's been one thing after another. I called him, and, um, about the middle of March. I was calling him every day just about. Or two or three times a week anyway, and had to call him to remind him to find me a motor, and always—he, um, I offered to take my old motor back if they had, had been able to do anything with it, work on that, do anything with it, he didn't want to do that. This motor has, he said, has 62,000 miles on it, which is 162,000 and all the mechanics that I have contacted, you know, they've checked it out, the transmission, everything, said that the motor was bad and there was not enough vacuum coming from the motor to cause the transmission to change. I've had to put no transmission fluid in there, uh, it's, um, it's, um, it's just not, it's not changing, and it's, it's really played, uh, a havoc with my, um, livelihood.

Once again, this is an inductive narrative in which the litigant relates a series of facts from a highly personal point of view. Listening to her story, the audience hears in detail how the malfunctioning engine has intruded on and virtually destroyed her life.

Despite its compelling quality, the woman's narrative has one significant shortcoming. The facts that she relates include little information about the contractual relationship between her and the garage owner. In particular, she fails to say explicitly why the garage owner should bear responsibility for her troubles. With respect to the relationship, all we learn is that an unidentified friend paid for a motor for her car. She then describes a number of things that the garage owner did: he apparently talked to her on several occasions, he paid for new gaskets, he had his mechanic install them, he had the mechanic check the car on a subsequent occasion, and he failed to respond to further telephone calls. She does not explain, however, how the owner incurred an obligation *to her*, what the nature of the obligation was, in what respect he failed to live up to his obligation, and how his failure caused her troubles. (On the contrary, to the extent that she describes the owner's behavior, one might conclude that he behaved reasonably well.) The problem, put in somewhat different terms, is that she has failed to blame the owner in a legally significant way. In fact, it can be argued that if there is in the narrative an active agent that the woman explicitly blames for her troubles, it is the engine itself.

After the woman completed her narrative, the magistrate asked several questions and then turned to the garage owner for his account. The owner was an experienced businessman who ran the garage with his father. He did not respond to the woman's recounting of her troubles. Instead, he talked about his limited legal duty to the woman, as evidenced by the written form contract that he produced, and asserted that he had met that limited duty, making specific reference to actions that he had taken and offers that he had made. The magistrate accepted his characterization of the relationship without question or discussion.

A particularly striking feature of this case, and one that it shares with a number of others we studied, is that the parties talk past each other. Neither contradicts what the other says. Rather, each takes a different approach to recounting a problem whose essential facts do not seem to be in dispute. The woman's approach was personalized and inductive. She described her troubles in detail, but she failed to provide all the components of a legally sufficient account and to arrange her story in a way that would be familiar to a legal decision maker. The owner provided the missing elements of the case. His approach was deductive: he explained the relationship between



the parties, gave his version of the legal obligations that the relationship imposed, and referred to selected facts which suggested that he had not violated his legal obligations. The structure that he imposed on the facts was accepted by the magistrate. From a legal standpoint, this may well have been the appropriate structure. In any event, since it was the only alternative offered to the magistrate, the defendant seems to have gained a substantial advantage by proposing it.

Like other litigants we observed, the plaintiffs in these cases tell about the problems that have brought them to court, but they often fail to place blame or responsibility explicitly on any other party in a legally acceptable way. They may talk about the action and the acted upon without identifying any responsible human agent. Examples of this include such statements as:

> The rent started falling behind.
> The tools got stolen.
> I got injured.

The legal system cannot deal easily or adequately with such situations, since the law's theory is that a plaintiff must show the defendant as an *agent*, an *action*, and themselves as *recipient of the action*, as well as a causal link between the action of the agent and the harm the plaintiff has suffered. In small claims courts, however, plaintiffs often avoid dealing with agency even though the issue is critical for the legal process (e.g., Text 8). This finding is understandable when we compare small claims narratives to how people talk about trouble in everyday conversations.

The analysis of everyday conversations shows that people concerned with blame and responsibility tend to talk about these issues and to assess responsibility in interactive sequences rather than to attribute blame directly or unambiguously. In her study of blaming, Pomerantz (1978)[17] shows how people talk about troubles in everyday conversational contexts. She found that when trouble-tellers fail to deal with the issue of agency, those they are conversing with seek further information that clarifies agency. For example, a speaker reporting that his car blew up is asked what he did to it. In another of Pomerantz's examples a woman complaining that her face hurts is asked what another person did to her to cause her face to hurt. These instances show the recurrent pattern of an interactive search for agency—in order to assess

[17] For further discussion of how talk about trouble occurs in non-legal everyday contexts, see Jefferson (1980).

responsibility or place blame—when problems are described without the specification of a responsible agent. Often missing in small claims courts is this interactive search for responsibility, which is typical of everyday trouble tellings. By contrast, in more formal courts where rules of evidence apply and attorneys structure the telling of troubles by litigants, it is part of the lawyers' role to state a theory of responsibility.[18]

## VII. THE ROLE OF THE MAGISTRATE IN SHAPING NARRATIVES

In Texts 6 through 9, witnesses present accounts of their problems without the intervention of the magistrate. In each instance, the magistrate issues an invitation to speak, and the witness responds with a lengthy and largely uninterrupted narrative. In other cases studied, the magistrate plays a far more active role in eliciting and directing testimony, with the resulting account of the events in question emerging as the product of a dialogue between magistrate and witness. As the texts that follow illustrate, the effect of the magistrate's participation is often to provide the legal structure and explicit assessment of blame that is lacking in many unquestioned lay accounts.

Texts 10 and 11 are drawn from a case brought by the owner of a brass bed against a moving company that allegedly damaged the bed. Both the plaintiff and the representative of the company are white men in their 30s. Factually, the case is strikingly similar to the one described in Text 6. The plaintiff claimed that the movers scratched the bed while moving it and then damaged the finish by treating the scratch with a chemical. This had all happened about six months before the trial; during the interim, the moving company had sent the bed to a furniture repair shop, and it had remained there while the parties tried repeatedly but unsuccessfully to settle their differences. The small claims referee heard the two witnesses, examined the bed, and awarded the plaintiff compensation for

[18] Attribution of responsibility in an interactive context can also be seen in Texts 1-3. In Text 1, the witness is attempting to deflect responsibility by explaining his action as a response to a request by another person rather than as a result of his own volition. In Texts 2 and 3, the witnesses seek to place responsibility for potentially important information they knew on those who told it to them. In these instances, the interactive setting of the courtroom—clearly different from the everyday contexts Pomerantz describes—prevents the diffusion or deflection of responsibility and requires individuals to take responsibility for their actions and knowledge.



the damage, although he denied a claim for the replacement cost of the bed.

In Texts 10 and 11, the plaintiff's case is presented in two very different ways. In the early part of the case (Text 10), the referee asks the plaintiff a series of highly specific questions. It is clear from this dialogue that the referee, himself a lawyer, has already constructed a legal theory of the case, which he is proceeding to test. He views it as a bailment, which involves entrusting one's property to another, such as a mover, mechanic, or parking garage, for a fee. If the property is not returned in its original condition, the recipient or bailee is liable for any loss in value, or for the replacement cost of the property if it has been destroyed.

Text 10

*Referee:* When did this move take place?

*Allen:* It took place at the end of April, sir. April 1984.

*Referee:* 84? And it's obvious this must or was this, uh, commercial property from a, uh, retail store or otherwise? Or was it personal . . .

*Allen:* It was personal, uh, property from my, uh, former, prior, uh, the prior place of residence to my new place.

*Referee:* And, did the defendant, was the defendant hired to move you?

*Allen:* Yes sir.

*Referee:* And in that process, according to the complaint, and by reason of some of the preliminaries in this case are more or less admitted that the move was accomplished and yes there was some damage and when did you turn the headboard back to the defendant for examination or repairs?

*Allen:* Approximately a week after, uh, I moved.

*Referee:* All right, sir.

*Allen:* Right around that time.

*Referee:* Did they pick it up or did, uh, you deliver it to them?

*Allen:* Well, Harry, uh, attempted to repair it, it at home with the, uh, a kind of a chemical. I don't know exactly what the name is but the chemical, uh, removed the, uh, finish, the lacquer finish. Therefore, it was decided to take it out to, uh, a place where it could be refinished.

After the completion of this dialogue, the referee invited the mover's representative "to respond and to further develop your defense or your answer," and he replied with a lengthy narrative. The representative did not refute any of the facts

alleged by the plaintiff. Instead, he began by talking about how he and his boss had acted in good faith by trying to help the plaintiff even though he had failed to complain within the time specified by the contract. He talked about his friendly relationship with the plaintiff and concluded by deflecting responsibility for the damage toward the furniture repair shop. Following this portion of the trial, the plaintiff responded as follows to the referee's request for "anything additional, by way of conclusion:"

Text 11

*Referee*: Back to you Mr. Allen as the plaintiff. Anything additional by way of conclusion?

*Allen*: Your honor, only that, that, I, I find some discrepancy in the position of the firm. When I spoke to Mr. Jefferson three weeks ago, uh, and at that time, I, I asked the reason I, I called them was look, um, I, I've been dealing pretty well, uh, with Harry, you know, with his employee. I had no, no problem. I think the most unpleasant experience was with Colorado Antique Finishing. Uh, but we've been able to talk with each other. And, and I said, there are some, some salient facts which he should be aware of. Uh, that I had gotten delivery without the proper assembly, that the buffing marks were there, that folks admitted, uh, that it had taken many months and I wanted to know if, if, uh, I said, "Can we resolve it?" and he said, "Yeah," I think, "you know we'll try to resolve it." In fact he was suggesting that I get a hold of some other firm that might rebuff it and he says, "We can work something out." I attempted to do so and, and I, I called several firms in, uh, here in Denver and, and it's, it's a complicated, uh, process, I guess. They, they to rebuff it they would have to do the thing over again and I called him back and I gave him the, the prices on that. I also gave him the price of what a, the new headboard costs. He called me back to say that he felt that it was worth no more than $65 and that he would be willing to settle at that point, keep the, uh, headboard, and give $65, which I thought was an absurdity, especially if you, uh, price the, uh, this particular headboard. So I find some discrepancy in saying things are OK but willing to pay $65 and then, and then keep my headboard and probably sell it for a higher amount. I'm not saying that Harry, uh, you know, said that. I got that directly from Mr. Jefferson. I think many months have passed on this thing. I sure waited a long time for that, uh, silly headboard. I'm beginning to have some feelings about it myself and the reason I'm fighting so hard is that if I don't get something back there at home, my wife was gonna, you know, really take care of me. So, uh, that's, that's practically [*inaudible*] to her, and it's so [*inaudible*] but I think you know, your honor, that, uh, uh, I have been very patient in it, that, uh, we take care of our things. We have no children. We take care of our things and make sure that they're in good shape and uh, that's, that's the way we like to keep them, and, and that's why we called and that's why we're unhappy with the shape that's in and we feel that, uh, once they accepted responsibility for it, then they should see that responsibility through, and if they felt strongly that, uh, we had no case in the matter that they shouldn't have accepted responsibility and simply said, "Allen, you're going to have to live with your scratch." I guess that's my case, your honor.



Like most others we observed, this narrative is chronological and inductive in structure. It deals with the issue of responsibility, but in a very different way than the referee dealt with it in his earlier questions. The plaintiff does not present the theory of absolute responsibility (bailment) that the referee seemed to be pursuing; rather, at the end of the narrative, he apparently acquiesces in the defendant's view that the mover assumed responsibility for the damage only by making a gratuitous offer of help. He seems almost to agree with the proposition that the mover could have avoided all responsibility simply by ignoring his complaint. Note particularly his characterization of the mover's settlement offer as "an absurdity." The implication is that the mover's offer of help created a relationship, and that each party then assumed a duty of socially reasonable behavior toward the other. As long as this duty was met, he felt that he had no grievance. When the mover breached the duty by making the "absurd" offer, the plaintiff, prodded by his wife, concluded that it was time to assert his complaint.[19] At this point the plaintiff sees in the defendant's cooperative actions an admission of responsibility.

The plaintiff thus gives an inductive account of his grievance, in the course of which he sets out a complex theory of responsibility. While the theory may be marginally adequate as a legal matter (compare the duty of reasonable care imposed on a rescuer), it bears little relation to the theory adopted by the referee. It therefore seems questionable whether the plaintiff would have fared any better than his counterpart in the case of the damaged suit (Text 6) if he had had to rely solely on his unaided narrative. Unlike the owner of the damaged suit, however, this plaintiff had the benefit of a

[19] The wife's behind-the-scenes role in the case seems crucial. One might conclude from the plaintiff's narrative that but for the domestic discord his inaction was provoking, there would have been no case. Instances such as this support Abel's (1982) suggestion that small claims proceedings often distort social reality by forcing litigants to view multifaceted problems as simple disputes between the parties who are actually in court.

referee who was willing and able to develop a theory of responsibility, frame the case in deductive terms, and then test the hypothesis developed against the evidence.

Text 12 presents another situation where the judge and the litigants pursue different agendas. As the text suggests, the case was brought against the parents of a teenage driver who had collided with and damaged the plaintiff's car. The magistrate, who has already heard from the plaintiff, is now attempting to impose a legal structure on the parents' position. In his questions, he breaks the problem down into three components: (1) the boy's legal liability for causing the collision; (2) the parents' legal liability for the actions of their minor child; and (3) the extent of the damages for which they might be liable. The referee's questions suggest that he assumes that point (1) will not be contested because the boy is not in court and the parents were not eyewitnesses to the accident and that point (2) is beyond dispute as an established rule of law. He apparently believes that the parents have come to court solely to contest the amount of the damages sought by the plaintiff.

## Text 12

*Referee*: Have you any questions as to the liability of parents for minors under ordinary circumstances?

*Mr. F*: Uh, in some cases because, uh, what chance do we have when he doesn't mind us, you know?

*Referee*: Well sir, that's, that's nothing that I can decide here today. There's a case has been filed. It appears that a case has been filed against two parents for the operation of a motor vehicle owned by the parents and in the possession of the minor, uh, son of the party. An accident arose and there was damage.

*Mr. F*: Well . . .

*Referee*: Now we're back to this again. Were either one of you there at this time?

*Mr. F*: No.

*Referee*: So you have no knowledge as to how it happened?

*Mr. F*: No.

*Referee*: Basically the question is this, and I understand your concerns that the driver should pay but that's, he's not a party to this and cannot be a party, uh, because of his age. He may have obligations to you. That's not before the court today. But are you concerned only with the dollar amount of what this is going to conclude to us?



*Mrs. F*: No. We're concerned with that also, but we don't feel that we're responsible. We feel that he should have to be responsible for it.

*Referee*: All right, well you're bypassing the question now. Are you saying that it, the accident was not the fault of your son?

*Mrs. F*: No, we're not saying that. We don't know whose fault it was.

*Referee*: All right. We don't know. Then maybe that answers the next question, which is how this all got started. Uh, do you deny that it was your son's fault?

*Mr. F*: Could be. His friend loaned him the car.

*Referee*: Well, at the accident when this thing happened, are you admitting, let's phrase it that way, are you admitting that it was your son's fault?

*Mr. F*: Yeah, I admit that.

. . . . [testimony from plaintiff]

*Referee*: Back to the defendants. Anything additional?

*Mr. F*: Well, you know, I can see paying for the rental car and everything else. That was $157.27. But this, uh, this Holt, you know. Uh, I think he just typed up something since it was a friend of Sally's and everything else. You know, this is a kind of large amount for, you know, a short time. Three thousand miles. That's a thousand miles, you know, a month, but it's, I really don't know. I'd just like to see Carl pay for and, you know, get it off my back. We don't have much control over it. We don't . . .

*Referee*: What restraints were there placed on Carl as to the use of the vehicle?

*Mr. F*: I didn't even know his friend loaned him the car, gave him the keys, you know, where he was going or nothing else. We don't let him drive our car.

*Referee*: Logical question from the opposition with attorneys present would be why. We won't get into that. That will conclude the testimony. . . .

It can be inferred from the parents' answers that they have come to court with a different view of the significance of the issues in the case. In particular, they are prepared to discuss the broader social issue of whether parents should be "responsible" (contrast the referee's use of "fault" and "liability") for the actions of a child "when he doesn't mind us." After a series of specific questions from the referee, the parents admit "fault" as the law defines it, but it is unclear whether even then they appreciate the divergence between their agenda and that of the court. Finally, after the plaintiff has testified,

the parents address themselves briefly to the single issue of concern to the court, the dollar value of the damage. The father comments on the fairness of the rental fee that a friend of the plaintiff charged her but reverts quickly to the issue that is of greatest importance to him, the responsibility of parents for the actions of uncontrollable children. The referee might have intervened to pursue the rental fee issue but does not do so; instead, after his provocative comment about what might have happened "with attorneys present," he concludes the testimony and goes on to render judgment for the plaintiff.

Texts 10, 11, and 12 are similar to other cases we observed in which the magistrate or referee intervened to take an active role in developing the testimony of one or both of the parties. Two important points emerge from these cases. First, the timing and content of the magistrates' remarks and questions indicate that they have found many of the witnesses' narratives to be legally inadequate in the sense of not containing the information necessary to support a legal judgment, or at least not containing that information in a form they find useful. In Text 12, the problem is primarily one of content: the defendants insist on discussing a problem that the magistrate believes is not for him to solve. In Texts 10 and 11, by contrast, the differences between the unaided narrative and the elicited account relate as much to the way in which information is presented as to the information itself.

Second, these cases highlight the critical role of the magistrate. They suggest that most of the problems encountered by lay litigants, whether substantive or stylistic, can be resolved by a magistrate who has the time, inclination, and ability to intervene. At this stage in our research, we are not in a position to comment on the frequency with which magistrates intervene or the circumstances under which they do so, except to say that intervention is sporadic and that some magistrates appear to intervene more than others. As Texts 10, 11, and 12 illustrate, magistrates intervene sometimes to restructure testimony for the apparent benefit of the witness and sometimes to resolve an issue that the witness seems determined to avoid. Important questions for further research include whether identifiable characteristics of witnesses or their behavior correlate with different kinds of magistrate intervention, and whether the likelihood and nature of intervention by particular magistrates correlate with features of their background or training.



We hesitate at this point to speculate about cause and effect in the outcomes of cases. Thus far, we have worked as ethnographers describing *how* a system works; questions about the frequency of certain features remain open for more detailed quantitative analysis. Nonetheless, we have been impressed by the range of cases in which a credible narrative that appears to contain the elements of a legal claim has failed to evoke a sympathetic response from the magistrate or referee. Our suspicion in some of these cases is that the fatal flaw in the narrative is the party's failure to develop a theory of responsibility and present it in the deductive, hypothesis-testing form that is most familiar to legal decision makers. In a formal court trial, the lawyer performs this function, and it is left to the judge or jury simply to test the hypothesis against the evidence. The role of the small claims court magistrate, like that of the judge or jury in formal court, is to apply the law to the facts. However, the small claims court magistrate must not only perform this evaluative function but must also develop the hypothesis to be evaluated, all in the course of a brief hearing, aided only by a one- or two-sentence complaint.[20] This may be asking too much, particularly when the magistrate lacks legal training or experience.

[20] The statements of complaint filed in the Colorado cases we discuss in this article are typical. The following statements are taken verbatim and in full from the complaint forms filed by plaintiffs (italicized words are printed on the summons and complaint form provided by the clerk's office):

*The Defendant owes me* $35.00 + 286.00 *for the following reasons:* For Damage received to my automobile on Nov. 11, 1983 in McNichols Arena Parking lot. Plus the cost of Filing in Adams & Arapahoe counties 35.00 total.

*The Defendant owes me* $256.50 *for the following reasons:* I worked for the defendants as line cook for one week at (est 57 hours) rate of $4.50 per hour during est week of August 10, 1984. I have one witness that was told I would get $4.50 an hour and that I was a line cook. Plus 50% $128.25.

*The Defendant owes me* $400 *for the following reasons:* At the beginning of June, 1984 defendant took our Queen-size brass headboard for repair after damaging the finish. Headboard has not been refinished nor assembled properly as of this date. It is in the possession of University Movers or their agent in this matter. It has not been delivered to me in either proper repair or re-assembly. I am seeking replacement headboard of identical type and manufacture.

*The Defendant owes me* $200.00 *for the following reasons:* Damages to my car '73' ply duster.

*The Defendant owes me* $500.00 *for the following reasons:* payment of phone bill.

## VIII. SOME ETHNOGRAPHIC CONCLUSIONS ABOUT ACCOUNTS IN SMALL CLAIMS COURTS

We have employed several texts drawn from cases we observed and taped to illustrate the range of our findings. Several points that these texts have in common are particularly significant. First, each speaker employs certain narrative devices that have been found by other researchers to recur in non-institutional, everyday narrative contexts. Speakers thus appear to bring to the court the same narrative strategies that they use in ordinary social interaction. Second, many of the more common features of small claims narratives violate the rules of evidence in force in formal courts. As we suspected in reviewing the formal court transcripts, the law of evidence is in frequent conflict with many of the conventions of everyday speech. Our data suggest that evidentiary constraints may preclude many of the narrative features that speakers in courtroom contexts view as most important. Third, our data indicate that this narrative freedom is a mixed blessing, as many cases seem to turn on legal inadequacies in litigant narratives of which the litigants seem totally unaware.

In particular, the data show that witnesses giving testimony in small claims courts often lack any understanding that the law imposes highly specific requirements on narratives. In presenting accounts in court, witnesses rely on the conventions of everyday narratives about trouble and their informal cultural assumptions about justice. From the law's perspective, such accounts often have disabling shortcomings. For example, it is common to find accounts that fail to include a full theory of the case that links an *agent* with an *action* that caused harm to the plaintiff. Because the court functions to test hypotheses about relations among agents, actions, and recipients of the action, it is unable to respond affirmatively when accounts are incomplete. Failure to generate a complete hypothesis for testing against the facts to be presented may result in losing the case.

Findings such as these complement research already done on small claims courts and suggest directions for further investigation. The detailed analysis of how disputes are presented in small claims court adds to our understanding of the origin and evolution of disputes (Miller and Sarat, 1980-81) and the social, psychological, and linguistic processes through which grievances are transformed into active disputes (Felstiner *et al.*, 1980-81; Mather and Yngvesson, 1980-81; Coates and Penrod, 1980-81). These findings also have



relevance for broader questions of legal and social policy. For example, Abel (1982) analyzed small claims courts and other alternative dispute resolution procedures as mechanisms of social and political control. The findings of this study explicate some of the means through which such control is exercised. The approach used in this research may be similarly useful to those who have expressed concerns about the balance of power between small claims litigants (e.g., Nader, 1979), for the analysis of what is said in court provides an empirical perspective on this problem.

Perhaps the most significant policy question raised by this research relates to the social distribution of the ability to formulate legally adequate narratives. It may be the case that certain categories of litigants are less prone to present legally adequate narratives and accounts. If such differences exist and follow ethnic, racial, or gender lines, new and important questions would arise about the fairness of present small claims court procedures and about possible reforms such as assistance both before and during trials. The need to consider such issues is suggested by the findings reported in this article, but additional research is clearly needed to further our understanding of these matters.

The frequent complaint of witnesses who have testified in formal courts that they did not get an adequate opportunity to tell their story takes on a new light in the small claims context. Small claims courts, operating without the formalities of the rules of evidence, do indeed allow accounts to be given in a relatively unconstrained manner so that people generally feel that these courts allow them the storytelling opportunity denied in more formal courts. However, a new and potentially more serious problem emerges when plaintiffs fail to give accounts that deal adequately with issues of blame, responsibility, and agency and to present them in a deductive framework that the court can test against the evidence presented. This may be a mechanism by which informal procedures substitute expressive satisfaction for the enforcement of rights.

## REFERENCES

ABEL, Richard L. (1982) *The Politics of Informal Justice*. New York: Academic Press.