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THE WHOLE TRUTH? HYPOTHETICAL QUESTIONS AND THE (DE)CONSTRUCTION OF KNOWLEDGE IN EXPERT WITNESS CROSS-EXAMINATION

Keywords: cross-examination, expert witness, epistemic stance, hypotheticals

Abstract

This paper examines the relation between hypotheticals and epistemic stance in jury trials, and it reveals how hypothetically framed questions (HQs) are used in cross-examination to construct "the admissible truth" (Gutheil et al. 2003) which is then turned into evidence. It looks at a selection of interactional exchanges identified in the transcripts and video recordings which document two days of expert witness cross-examination in two high-profile criminal cases. In the study, two approaches to data analysis were combined: a bottom-up approach focusing on markers of HQs offering "points of entry" into discourse through a corpus-assisted analysis and a top-down approach looking at cross-examination as a complex communicative event, providing a more holistic view of the interactional context in which HQs are used. The paper explains the role which such questions play in the positioning of opposing knowledge claims, as well as discusses the effect they create in hostile interaction with expert witnesses. As is revealed, HQs are used to elicit the witness's assessments of alternative scenarios of past events and causal links involving the facts of the case; to elicit the witness's assessments of general hypothetical scenarios not involving the facts of the case, or to undermine the validity of the witness's method of analysis. In sum, the paper explains how the use of HQs aids cross-examining attorneys in deconstructing unfavourable testimony and constructing the "legal truth" which supports their narrative.

Facts, you know, are not truths; they are not conclusions; they are not even premises, but in the nature and parts of premises. The truth depends on, and is only arrived at, by a legitimate deduction from all *the facts which are truly material.*
Samuel Taylor Coleridge (1831: 147)

1. Introduction

From a linguistic point of view, hypothetical constructs convey unassertable assumptions and give speakers the possibility to communicate what potential consequences an action may cause, as well as judgments about the likelihood of an event. However, rather than provide a "validated truth", they offer inferences from an "assumed truth" (Meyer 1980) and are a form of conjecture aiming to elicit an alternative cognitive framework (Davis 2009). Despite the considerable controversy they generate, hypothetically framed questions (HQs) are permissible in the Anglo-American legal system and they continue to be used within US courtrooms. When employed in jury trials involving expert witnesses, such questions seek to convince the jurors, as well as affect their perception and interpretation of the evidence, offering a fragmentary view of reality which supports the cross-examiner's narrative. Seen in this light, hypotheticals do not aim to present "the whole truth", but serve to construct "the admissible truth" (Gutheil et al. 2003) which is then turned into evidence.

Against this background, this study examines the relation between HQs and epistemic stance using interactional data from two highly publicized criminal cases: the trial of Conrad Murray, Michael Jackson's physician, who was charged with involuntary manslaughter, and the trial of Jodie Arias, now notorious as a female murderer, convicted of the first-degree murder of her ex-partner. Both trials received widespread media attention in the US, becoming a rich source of public data illustrating the discursive shaping of expert evidence within the adversarial procedure. Based on the video footage and written material documenting both trials, this study looks at the interactional management of HQs: how they are deployed by opposing counsel and how they are addressed by expert witnesses. It is hoped that the analysis will enrich language and law research with a discussion of one of the interactional resources which attorneys utilize to position opposing knowledge claims and deconstruct unfavourable testimony during expert witness cross-examination.

The remainder of the article is organized as follows. Section 2 discusses the relation between hypotheticals, cognition and epistemic stance. Section 3 provides an overview of studies which address the use of hypotheticals in various interactional settings, with a special focus on oral arguments and jury trials. Section 4 describes the data, the method used and the research aims, while Section 5 examines the use of HQs in the cross-examination of two expert witnesses and explains how such questions contribute to the deconstruction of expert testimony. Finally, Section 6 offers a discussion of the main findings and conclusions.

2. Hypotheticals, cognition and epistemic stance

The ability to engage in hypothetical thought can be described as "an impressive achievement of human cognition" (Byrne 2007: 441) as it allows people to imagine non-actualized situation types, to consider alternative causal links, and to weigh a range of eventualities and probabilities, all of which are indispensable elements of our daily lives. In a word, hypothetical reasoning enables humans to mentally "undo" or reconfigure some aspects of reality, and to evaluate the effect of this change in a possible discourse world, or in their mental spaces.[1] The latter conceptualization is supported, for instance, by Dancygier and Sweetser (2000: 2016), who argue that *if*-conditionals can "set up, imagine, and negotiate possibilities in either the world of linguistically described content, or in the world of current speech-act context and performance". Simply put, in their view, conditionals can build content spaces as well as speech-act spaces. Furthermore, in their analysis of conditionals, Dancygier and Sweetser (2000: 113) hold that mental spaces are "a more general mechanism than possible worlds, referring not only to very partial cognitive "world" or "situation" constructions as well as to more complete ones, but also to a variety of non-world-like structures which can be connected and mapped onto other cognitive structures". Elsewhere they argue, similarly, that mental spaces "are different from possible worlds in a number of respects, most importantly in that they are not objective in nature, nor necessarily describable in terms of Boolean truth conditions; and also in being local rather than global" (Dancygier and Sweetser 2005: 30).

Conditional, or hypothetical, constructs are also linked to *epistemic stance*, that is "the higher cognitive faculty of *metarepresentation*: the ability of representing one's thoughts (and other people's thoughts) as *representations* distinct from the world, and, consequently, reason about alternative representations of the world" (Rocci 2009: 17). These representations are related to belief, knowledge and evidence, and are reflective of individual experiences and attitudes (Nuyts 2001). Epistemic stance thus refers to "knowledge or belief vis-à-vis some focus of concern; commitment to the truth of propositions and sources of knowledge" (Ochs 1996: 410).[2] It is "a category in which some hypothetical state of affairs is indexed and evaluated" (Fetzer 2014: 333) and it concerns the ways in which speakers and writers express their positioning on and commitment to assertions and propositions (Biber et al. 1999; Marín Arrese 2015). In the case of conditional constructions, epistemic stance may be equated with the speaker's mental association with or dissociation from the

[1] Mental spaces are partial assemblies constructed when people think and talk for the purpose of local understanding and action. They are connected to long-term schematic knowledge (frames, cognitive models), as well as long-term specific knowledge (memories of specific events and situations), and can be activated in many different ways and for many different purposes (Fauconnier 1985; 1994).

[2] In this paper, following Bednarek (2006), the term *knowledge* refers to true or false information of which speakers/writers are aware and to which they refer in their propositions.

world of the protasis[3] (Dancygier and Sweetser 2005: 45) and the most common marker of hypotheticality – *if* – can be described as a signal of non-commitment, or non-positive stance, covering "a wide range of possible attitudes, from strong disbelief to near-commitment" (Dancygier and Sweetser 2000: 127). For these reasons, hypothetical constructs and their linguistic manifestations are an intriguing object of inquiry which can provide insights into how speakers and writers communicate, for instance, prediction and alternativity when engaging in acts of stance-taking in various social contexts.

3. Hypotheticals, interaction and persuasion

Hypotheticals have been intensively studied not only from cognitive, but also from applied perspectives. Looking at interactional data, analysts have made observations about the range of pragmatic functions associated with hypotheticals and their persuasive potential both in institutional and non-professional genres. Quite a number of studies have focused on interaction involving HQs in medical communication, e.g., psychiatric sessions with transgender patients (Speer and Parsons 2006), counselling sessions with AIDS sufferers (Peräkylä 1993; 1995), advance care planning conversations with palliative patients (Land et al. 2018) or discussions with obese individuals (Armstrong et al. 2018). In these contexts, where sensitivity is of paramount importance, HQs have been found *i.a.* to mitigate the threat to the patient, to probe the patient's coping ability, and to encourage his or her autonomy. A number of pragmatic functions have also been identified in studies focusing on hypotheticals in non-medical settings. For instance, Bongelli et al. (2020) reveal that in everyday talk Italian speakers use HQs to inquire about the addressee's opinion or intention, communicate rhetorically their point of view, give advice, request permission or make a proposal. In a similar vein, Winchatz and Kozin (2008) bring into focus the so-called "comical hypothetical" utilized by speakers who depart from the usual turn-taking system in order to engage in the co-construction of an imaginary world, with Golato (2012), similarly, discussing actions accomplished by hypothetical discourse in German, such as the co-creation of humorous stories and the backing-up of claims in challenges and explanations. Koester and Handford (2018), in turn, highlight the discursive work of hypothetical reported speech in business meetings, where senior staff rely on this persuasive device to raise problems and offer solutions, while invoking the notion of irrealis. Taken together, the studies indicate that hypotheticals have the power to amplify emotions, to plausibly evoke alternative outcomes, and to persuade the audience to accept a fragmentary representation of certain aspects of reality.

As one would expect, the persuasive potential of hypotheticals is successfully exploited in legal settings, too. For instance, the hypothetical construct is utilized for

[3] In a conditional construction, the protasis refers to the clause containing the condition (*if it was…*), while the clause containing the conclusion is called the apodosis (*we would…*).

argumentative purposes at oral argument before the Supreme Court of the United States. In this type of legal-legal interaction advocates must prepare themselves for a barrage of hypothetical questions – some of which are lengthy, complex and confusing – addressing issues which go far beyond the case being considered by the justices and which are thus difficult to foresee (Prettyman 1984: 555). It has even been suggested that the Court places so much emphasis on hypotheticals in an attempt to reach "for anything that varies the routine, dispels the gloom, enlightens the proceedings, or adds lustre to an otherwise unvarying occasion" (Prettyman 1984: 556). Important as these reasons may be, the use of hypotheticals at oral argument requires a more balanced consideration. On the one hand, hypothetical questions allow the justices "to push counsel about how particular policy choices will hold up in slightly different circumstances and factual patterns" (Johnson 2004: 49). On the other, the Court's exploration of hypotheticals may generate an understanding of crucial case issues, as well as reveal the justices' potential voting positions (Malphurs 2013: 88).[4] Importantly, hypothetical questions are not always addressed to counsel, but to fellow justices who are skilled in this probing technique designed to test the outer limits of their potential decisions (Prettyman 1984: 591). That said, it may be argued that hypotheticals have become "a way of life in today's Court, and [that] no serious advocate can consider himself or herself even remotely prepared unless this aspect of the argument has been faced and dealt with" (Prettyman 1984: 556).

Similarly, hypotheticals continue to be used during cross-examination in Anglo-American jury trials involving expert witnesses. It is in this communicative environment that the status asymmetries between counsel and expert witnesses, representing legal and non-legal authority, respectively, cause epistemic tensions. This applies as well to hypothetically framed claims which are being negotiated in what is typically described as confrontational, or even hostile, interaction. Struggling over what is eventually accepted as "the admissible truth", the participants reason about the body of evidence in line with the field-specific construction; however, it is the legal framing (legal truth) that recognizes, or not, the scientific claims and hierarchies (scientific truth), and that reconfigures, using legal terminology, any concept or thought presented by the expert witness.[5] Simply put, hypothetically framed questions are one of the tools in the attorney's tactical arsenal and they serve:

1. To clarify a point using relatively abstract language.
2. To reveal implications of the question, which directly serve the questioner.
3. To put forth implications of the question and the anticipated response without leading the witness

(Brodsky et al. 2012: 356).

[4] However, long-winded hypotheticals and off topic explorations of issues which have no real bearing on the case may be seen as a waste of time, time which could be used for more productive arguments (Malphurs 2013: 88).

[5] It should be noted here that although both attorneys and expert witnesses are experts in their respective fields and represent "multiple layers of expertise" (Cotterill 2003: 166–167), once on the attorney's territory, expert witnesses have to comply with the procedural frameworks which significantly limit their opportunity to claim authority and expertise (Renoe 1996).

It is also important to note that while hypothetical questions may contain a factual basis similar to the facts of the case (thus creating the illusion of having objective foundations), they remain a conjecture which does not offer validated truths (Brodsky et al. 2012). By modifying the focus and/or the facts under consideration, hypothetical questions elicit an alternative cognitive framework (Davis 2009) based on inferences from an *assumed* truth (Meyer 1980) with the aim of convincing the audience. This poses the risk of a biasing effect and may result in the discrediting of expert evidence or the disqualification of the expert's opinion. For these reasons, although admissible under the federal rules of evidence, hypothetical questions are seen by some as "an intolerable obstruction of truth" (Wigmore 1940), rather than a legitimate questioning strategy. In the words of prof. Wigmore, the hypothetical question "has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case", instead representing only the conclusion contrived by the attorney, while misleading and confusing the jury as to the purport of the opinion (Wigmore 1940, par. 481/482). It is no coincidence then that hypothetical questions are readily employed by counsel whose aim is to reveal the knowledge, i.e. the answer, which is already hidden in their mind (Meyer 1980: 285).

As has already been underlined, hypothetical constructs remain a potent interactional resource which allows speakers, on the one hand, to manipulate the representation of causal relations, and, on the other, to enhance the persuasiveness of the message. According to earlier research, some aspects of reality – situated in the future or in the past – are easily "undone" in a mental simulation (Kahneman and Miller 1986), which has implications for the speaker's assessment of probability, causality and responsibility.[6] Naturally, this has particular relevance in legal proceedings involving lay jurors who make determinations as to the defendant's culpability or its lack. One experimental study on judicial decision-making has in fact shown that "different actors (jurors, judges, prosecutors, attorneys, victims and defendants) recur to counterfactual thinking when they evaluate events and their consequences, or assess causality and responsibility" (Catellani et al. 2021: 12–13). What the research found was a correlation between counterfactual manipulation of an event and responsibility attribution, as well as the relevance of focus (agent vs process) and salience to the perception of blame (i.e., if the focus is on a single actor or element, the role attributed to them is greater) (Catellani et al. 2021: 6). In other words, the authors of the study demonstrated that "counterfactuals embedded in communication function as a powerful cue in recipients' causal and responsibility attribution process, highlighting the perceived role of the actor on whom they are focused" (Catellani et al. 2021: 13). They similarly noted that in court, counterfactual thinking is no longer an *intra*personal, but rather an *inter*personal process (Catellani et al. 2021: 13), and

[6] In psychology, mental operations consisting in the creation of alternative scenarios – involving anticipation of an event or imagining it differently from how it actually took place – are known as *simulation heuristic* (Tversky and Kahneman 1973) and they are inherent in such processes as planning, problem solving or decision making (Bongelli et al. 2020).

that information which is presented in counterfactual format by an expert witness may affect the causal and responsibility attributions made both by lay people and legal professionals (Catellani et al. 2021: 13).

With these points in mind, in what follows, I consider the use of HQs by cross-examining attorneys and their interactional management by expert witnesses in two Anglo-American jury trials.

4. Data, method and research focus

As indicated in the introduction, this study uses data from two high-profile criminal trials, in which the evidence provided by medical and behavioural expert witnesses (specializing *i.a.* in critical care and pulmonology, pharmacokinetics, cardiology, domestic violence and psychology) proved crucial. In the study, two types of data suitable for two types of examination were scrutinized, i.e.: courtroom videos[7] and transcripts.[8] The bottom-up analysis focused on a selection of markers and structures (*(but/and/what) if*; *in the event (that)*; *assuming (that)*; *let's assume*; *had* + inversion) associated with hypotheticals and counterfactuals, and it relied on the written transcripts offering "access points" (Tognini-Bonelli 2001) in a corpus-assisted discourse analysis (Partington et al. 2013). This stage of the research was performed with the use of the concordancer in WordSmith Tools (Scott 2012) and resulted in a compilation of concordance lines which were then sorted manually to eliminate items not belonging to the attorney's discourse. The top-down analysis, on the other hand – informed by interactional linguistics and multimodal research – involved a careful perusal of the courtroom videos, thus offering more insight into the non-linguistic circumstances in which the cross-examinations took place, as well as exposing the multimodal conduct of the participants and their use of material artefacts.

Taken together, the transcripts and the videos allowed for the identification of extended interactional sequences in a broader discourse context, illustrating the deployment of HQs by cross-examining attorneys who, through their linguistic behaviour and embodied stance, conveyed varying degrees of persuasiveness and control over the discourse. The hybrid methodology applied in the study proved to be useful as it provided a broader perspective on the whole communicative event and the participants' conduct, bringing to the analyst's attention not only fixed lexico-grammatical patterns associated with HQs, but also non-canonical or incomplete structures, as well as the sequential presentation of several hypothetical scenarios.

[7] The analyzed portions of the cross-examination of dr Steinberg can be accessed at: https://www.youtube.com/watch?v=kOIyZjwJCDU, https://www.youtube.com/watch?v=2LrRNeGB13I, https://www.youtube.com/watch?v=zxsu9GzZY2s, while those from the cross-examination of dr Samuels can be found at: https://www.youtube.com/watch?v=iSD64yxpaH4 and https://www.youtube.com/watch?v=Aa4UCgli9Ng [date of last access: 10 November 2021].

[8] The transcripts were first generated automatically and then corrected manually, where necessary.

In this way, the two-pronged approach extended the scope of the investigation beyond a form-focused analysis of hypotheticals and brought to light interactional patterns involving HQs which might have gone undetected if the analyst relied solely on concordance lines promoting selective attention to fragments of discourse and individual items.

At this point it needs to be reiterated that the communicative context analyzed in the study differs in many ways from other situated social events, and as a distinct discourse text, it is "shaped by social structures and social practices, as well as by the social agents involved in the events" (Marín Arrese 2011: 197). As part of the adversarial phase of the complex genre of trial, the (sub)genre of cross-examination is discoursally controlled by its principal actors, i.e., the defence and the prosecution who, with the judge's supervision, conduct witness examinations and engage in argumentation with a view to constructing evidence which is likely to support their case and affect the outcome of the trial (Heffer 2005: 67).[9] Cross-examining attorneys deploy an array of verbal tactics to prevent unfavourable evidence from being revealed while eliciting evidence that is admissible and that assists the party's case.[10] In so doing, they construct a fragmentary view of events, or "the legal truth", which does not encompass the entirety of scientific evidence or the totality of circumstances, and which therefore should not be equated with the objective truth. The interactional goals of the cross-examiner are thus clear: to undermine the witness's credibility and to discredit the reliability of their testimony, or, put simply, to *de*construct their narrative. Expert witnesses, on the other hand – unlike percipient witnesses who report only what they have personally experienced or observed – offer their opinions informed by specialized knowledge, experience, skill and training[11] to facilitate the decision-making process of the trier of fact, i.e. the jury. Needless to add, under the rules of evidence, they are required to communicate their assessments with a reasonable degree of scientific, or discipline, certainty. All of the above makes expert witness cross-examination a unique interactional setting which is distinct from other trial (sub)genres and which admits hypothetical constructs.

As to the composition of the corpus, the first dataset documents approximately two hours of the cross-examination of the board-certified cardiologist Alon Steinberg in the California v. Murray trial, representing a less hostile type of questioning con-

[9] In his taxonomy of trial genres, Heffer (2005: 67) distinguishes procedural phase genres (jury selection, swearing-in, indictment), adversarial phase genres (opening speech, witness examinations, closing argument) and adjudicative phase genres (summing-up, deliberation, sentencing). Overlooked in this classification, but also worth mentioning in the context of criminal cases, are victim impact statements delivered before the courtroom audience at the end of the trial.

[10] For an analysis of questioning strategies in expert testimony, see e.g. Cotterill (2003, chapter 6); for a discussion on how counsel and witnesses build alternative and competing versions of events and how hypothesis is turned into fact, see e.g. Drew (1992) and Hobbs (2002).

[11] In the legal domain, an expert is someone who "is recognised as having a special competence to draw inferences from evidence within a certain domain", and whose competence "typically derives from access to a large body of evidence and from socialisation into specialised ways of perceiving and reasoning about evidence of that kind" (Ward 2017: 263).

ducted by J. Michael Flanagan (defence counsel). The second dataset, in turn, comprises close to three hours of the cross-examination of the psychologist Samuel Adams in the Arizona v. Arias trial, illustrating a more hostile questioning style adopted by Juan Martinez (prosecuting attorney). As Table 1 demonstrates, the milder style represented by J. Michael Flanagan is characterized by limited control over the witness's responses and a less dynamic manner of speech. On the other hand, among the attributes of the more hostile style of Juan Martinez, a greater use of restrictive request types and more powerful nonverbal communication can be seen. Drawing data from two criminal trials involving expert witnesses from the fields of medicine and behavioural science (cardiology and psychology, respectively) was related to the focus of the current study that seeks to establish, on the one hand, how HQs are exploited by cross-examiners adopting different questioning styles and, on the other, how HQs are addressed by expert witnesses, whose convictions and scientific knowledge oftentimes differ from the claims being attributed to them by the opposing counsel.

As noted earlier, this research sought to offer insight into the use of HQs in cross-examination, and to explain their persuasive and evaluative function in an effort to demonstrate their role in deconstructing unfavourable evidence, or opposing knowledge claims, whilst constructing the admissible truth consistent with the questioner's narrative. Specifically, the study aimed to address the following questions: 1) What is the linguistic design of HQs deployed in the cross-examination of expert witnesses? 2) What discourse-pragmatic functions do HQs serve in the cross-examination of expert witnesses? 3) What is the role of HQs in the positioning of opposing knowledge claims and the construction of the admissible truth? 4) What interactional patterns involving HQs are found in the discourse of cross-examiners representing less hostile and more hostile questioning styles? The findings are reported below.

5. HQs and the (de)construction of expert testimony in cross-examination

5.1. Design of HQs in the cross-examination data

In order to examine the design of HQs in the data, I first considered a selection of markers and structures associated with hypotheticals and counterfactuals, i.e. *(but/and/what) if*; *in the event (that); assuming (that); let's assume* and *had* + inversion. As predicted, among the markers subject to analysis, *if* proved the most frequent (Table 2) and the present perspective was favoured over past tenses (Table 3). It also transpired that most of the HQs identified in the data could be broken down into: hypothetical scenario[12] + interrogative component, with only several instances following the reversed schema, i.e., interrogative component + hypothetical scenario. While the data shown in Table 2 cannot claim exhaustiveness (they do not account for non-canonical HQs lacking explicit marking as in Example 1b), they do show that in general the attorneys preferred more restrictive formats (declarative questions, tags, yes/no questions) ensuring greater control over the response.

[12] The hypothetical component of HQs outlined either plausible or counterfactual scenarios.

Elements of the less hostile questioning style represented by J. Michael Flanagan	Elements of the more hostile questioning style represented by Juan Martinez
Questioning strategies – presence of 'narrate', 'specify' and 'confirm' requests – less control over the witness's responses – prefacing questions with *okay*, *and*, *now, well, but, so* or clusters of these DMs	**Questioning strategies** – preference for 'confirm' requests – more control over the witness's responses – prefacing questions with *so, and* or clusters of these DMs – frequent use of decontextualized examples from the data aimed at refocusing/reframing/selective interpretation of evidence – frequent use of negation – frequent use of repetition
Manner of delivery and prosodic features – monotonous voice tone – slow articulation of words – hesitation phenomena – occasionally mispronounces medical terms and provides an incorrect name of the medical board – occasionally shows confusion – more time taken before asking a question	**Manner of delivery and prosodic features** – variation in voice tone, loudness and tempo (including raised voice, threatening tone) – exaggerated/prolonged articulation of words – strategic use of silences and pauses – less time taken before asking a question
Gesture and materiality – static stance (counsel stands behind the lectern/microphone most of the time) ["slow-moving animal"] – 'defensive' or 'powerless' gestures (e.g. folded arms, touching the face, looking down) – absence of visuals and demonstrative evidence – counsel reads relevant excerpts from deposition transcripts	**Gesture and materiality** – dynamic stance (counsel walks most of the time) ["fast-moving animal"] – 'offensive' or 'powerful' gestures (e.g. hands held in pockets during questioning; 'expansive' manual gestures going beyond the body frame; frequent pointing) – use of visuals and demonstrative evidence – counsel presents audio recordings with deposition excerpts in addition to reading deposition transcripts

Table 1: Elements of the less hostile and more hostile questioning styles identified in the data

PATTERN	STEINBERG CROSS					SAMUELS CROSS				
	if	*in the event*	*had* + inversion	*let's assume; assuming*	**TOTAL**	*if*	*in the event*	*had* + inversion	*let's assume; assuming*	**TOTAL**
Hypothetical scenario + declarative question	7	1	2		**10**	2				**2**
Hypothetical scenario + declarative question + tag	4				**4**	11			1	**2**
Hypothetical scenario + yes/no question	7	2			**9**	4			2	**6**
Hypothetical scenario + alternative question	1				**1**					
Hypothetical scenario + *wh*-question	2		1	1	**4**	1				**1**
Hypothetical scenario + declarative statement						2				**2**
Hypothetical scenario + [missing interrogative component] (+ invariant tag)	4			2	**6**				4	**4**
Yes/no question + hypothetical scenario	2	1			**3**					
Declarative question + hypothetical scenario						1				**1**
Wh-question + hypothetical scenario						1				**1**
	27	4	3	3	**37**	22	0	0	7	**29**

Table 2: Design of HQs in the data

Temporal reference in the hypothetical component	**Steinberg cross**	**Samuels cross**
Present	20	21
Past	17	8

Table 3: Temporal reference in HQs

Equally relevant to the goal of the study was the analysis of request types and request functions linked to various instantiations of HQs. In this examination I relied on the typology of requests identified in Heffer (2005), which I adapted to the purpose of the current analysis. All HQs in the data were manually assigned to the respective categories in order to compare the degrees of control over information in the two datasets. What this comparison showed (Table 4) was that, indeed, the counsel whose style was more hostile produced predominantly 'confirm' requests, whereas the less hostile attorney gave the witness more room for manoeuvre by making requests which required not only 'confirmation' and 'specification', but also 'narration', thus allowing the witness to introduce evidence which might potentially be inconsistent with the attorney's line of argument.

Request type	Steinberg cross	Samuels cross
Narrate	9	0
Specify	14	8
Confirm	14	21

Table 4: Request type in the data

With that in mind, I will now turn to the request forms exemplified by the HQs in the data (Table 5). Here, we will note that the link between grammar and the request function is the strongest in the case of question tags and confirmation requests (cf. Heffer 2005). Beside this observation, also worthy of mention are the various realizations of the hypothetical scenario component (e.g. *if you were gonna determine…; let's assume that …; well, what if you don't know that…; now, assuming that …; what about if they …; and so … had they been able to …*) which, as noted earlier, typically preceded the interrogative component, rather than followed it. As to 'narrate' requests, these were linked to explicit lexical and grammatical narrative cues (*what would you expect …?*; *what should he have done …?*) or what could be interpreted as the implied interrogative component to the effect of *what will/would happen?* or *what would have happened?* The category of 'specify' requests included *wh*-questions, as well as either/or and yes/no questions. Finally, 'confirm' requests subsumed some types of yes/no questions, tag questions (affirmative, negative and invariant tags), declarative (prosodic) questions and declarative statements. Obviously, it was the category of confirmation requests that was associated with the greatest degree of counsel control.[13]

[13] Cf. Woodbury's (1984) seminal work on courtroom questioning in which she ordered questions along a continuum depending on the degree of control they exert. For a discussion of the relation between control, coercion and questioning, see also Danet (1980), O'Barr (1982), Luchjenbroers (1997) or Mortensen (2020).

Control over information ↓

REQUEST TYPE AND FORM	EXAMPLES
NARRATE	
Hypothetical scenario + WHAT [+ *would/ should*]	If you were, if you were gonna determine that there was a propofol drip, what would you expect to find at the at the scene?
Hypothetical scenario [+ implied interrogative component *what will / would happen? / what would have happened?*]	Let's assume that dr Murray has gone for a period of time longer than two minutes maybe it's 10, 15, 20.
Hypothetical scenario in the form of an interrogative [+ implied interrogative component *what will / would happen? / what would have happened?*]	Well, what if you don't know that the person is an addict?
SPECIFY	
Hypothetical scenario + WH-question (except WHAT questions)	Now, assuming that that amount of propofol was what put him to sleep, how long would you expect that propofol to keep him asleep?
WH-question + hypothetical scenario	Well then hold on, how would he then be able to know where the gun was if he had amnesia?
Hypothetical scenario + EITHER/OR question	If it takes two minutes to call 911, actually two minutes and forty-three seconds, would should the time be allocated by him personally calling 911 or turning to Mr Jackson?
Hypothetical scenario + YES/NO question (polar question)	What about if they get mild sedation, this would it be different for them?
YES/NO question (polar question) + hypothetical scenario	Okay, now, do you know anything about the blood level that would be obtained, obtained if you gave that two milligrams by IV at two o'clock?
CONFIRM	
Hypothetical scenario + YES/NO question (polar question)	Okay and if dr Murray immediately went that say 12:05 to get help, is that a violation of the standard of care?
Hypothetical scenario + declarative (prosodic) question	And so… had they been able to accomplish that by 12:10, he'd be okay?
Declarative (prosodic) question + hypothetical scenario	He couldn't remember the knife if you were…

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	REQUEST TYPE AND FORM	EXAMPLES
	Reported hypothetical (hypothetical scenario + declarative (prosodic) question)	Isn't that what you told us yesterday? If it's true dissociative amnesia that he wouldn't?
	Hypothetical scenario + declarative (prosodic) question + negative tag	Okay, and if he's mistaken in terms of his estimates, you could be mistaken in your assessment, couldn't you?
Control over information ↓	Hypothetical scenario + declarative (prosodic) question + affirmative tag	And so if he can't form any memory there and he can't form memory any memory here, if this officer then moves up to this area here, he has no memory, for example, of the gun, does he?
	Hypothetical scenario + declarative (prosodic) question + invariant tag	We're going with what you testified, so if he is in this true dissociative amnesia state at this point here, he will not remember the gun that was there, right?
	Hypothetical scenario + declarative statement	Sir, generally speaking, not in this case, if an individual in a case of Bobby something that you say is irrelevant, you've already deemed that it's irrelevant, lies to you about that irrelevant aspect, what you are telling us is that it doesn't matter to you because you've deemed that it's irrelevant.

Table 5: Request type, form and degree of control over information (classification adapted from Heffer 2005: 112)[14]

Worthy of note at this stage are also the less typical hypothetical constructions which, though undetected in an automated analysis targeting specific markers, invoked the dimension of irreality and, in the legal sense, constituted hypothetical questions. Such is the case with Example 1a which may be thought of as involving hypothetical reasoning reducible to "If a person lied to you about something you considered irrelevant, would that not affect your evaluation?" This instance bears a striking resemblance to Example 1b, produced by the same attorney at a later stage of the questioning, which conjures up an analogous scenario, this time with explicit irrealis marking (*Sir, generally speaking, not in this case, if an individual in a case of Bobby something … lies to you…*).

[14] While Heffer's (2005) classification focuses on legal-lay interaction in jury trials, my proposal narrows it down to the use of HQs by cross-examiners and, further, solely to expert testimony (hence the absence of certain patterns eliciting narratives like, e.g. *what did you do?, what happened when …?* or *tell us what you did*).

(1a) So, **generally speaking**, **a person**, when you're conducting these evaluations, **they can lie to you** about 10, 15, 20, 30, 50 things **that you consider irrelevant**, **and that's part of the hypothetical**, that you consider irrelevant [HYPOTHETICAL SCENARIO], **that still would not affect your opinion** in the case. ['CONFIRM' REQUEST][15]

(1b) Sir, **generally speaking**, not in this case, **if an individual** in a case of Bobby something that you say is irrelevant, you've already deemed that it's irrelevant, **lies to you** about **that irrelevant aspect** [HYPOTHETICAL SCENARIO], **what you are telling us is that it doesn't matter to you** because you've deemed that it's irrelevant. ['CONFIRM' REQUEST]

It might also be added that in the counsel's discourse there was one attestation of hypothetical reported speech (HRS), as shown in Example 2, by means of which the counsel puts to the witness a proposition which becomes part of the shared epistemic background, or pool of knowledge, against which the speakers' stances are to be negotiated.[16]

(2) PA:[17] If I say to you "what if it turns out that there are no images of women's breasts on the computer", you can see that there's an inconsistency there, right?
DC: Objection [illegible]
J: Overruled.
PA: Right?
EW: Yes, there's an inconsistency.

5.2. Functions of HQs in the counsel's turns

Let us now consider the discourse-pragmatic functions of HQs to see how they assisted the counsel in accomplishing their communicative goals and "getting the job done" by eliciting, or trying to elicit, confirmation of the propositions aimed at persuading the jury to accept their story. Although questions themselves do not constitute evidence, how they are formulated and what discourse objects and subjects they foreground – and what mental frameworks they conjure up – may in fact impact the jurors' perception, reasoning and assessment of the evidence presented in court.

When viewed from a broad perspective, the HQs under scrutiny were linked to one of three categories (Table 6):

- undermining the validity of the expert witness's interpretation or method of analysis;
- eliciting the expert witness's assessment of an alternative scenario of past events and causal relations involving the facts of the case;
- eliciting the expert witness's assessment of a general hypothetical scenario not involving the facts of the case.

[15] Here and in the following examples the emphasis is mine.

[16] For a discussion on the relevance of HRS to stance-taking in business negotiations, see Lohrova and Koester (2023).

[17] In the examples discussed in this paper the letters DC refer to 'defence counsel'; PA to 'prosecuting attorney'; EW to 'expert witness' and J refers to 'judge'.

	Discourse-pragmatic functions of HQs in the counsel's turn	Steinberg cross	Samuels cross
DECONSTRUCTION OF PRIOR KNOWLEDGE CLAIMS	undermining the validity of the expert witness's interpretation/method of analysis	1	4
	eliciting the expert witness's assessment of an alternative scenario of past events and causal relations involving the facts of the case	29	6
	eliciting the expert witness's assessment of a general hypothetical scenario not involving the facts of the case	7	19

Table 6: Discourse-pragmatic functions of HQs in the counsel's turns

As the analysis revealed, the attorney who cross-examined dr Steinberg deployed HQs chiefly to present the witness with alternative scenarios and (purported) causal links involving dr Murray's actions, or failure to act, preceding Michael Jackson's death.[18] Consider, for instance, the excerpt shown in (3), where the defence counsel elicits the witness's assessment of an alternative scenario of past events and causal relations involving the facts of the case. In this example, the cross-examiner focuses on the time lapse between the discovery of the critical situation (Mr Jackson not breathing) and dr Murray's call for help, which proved crucial in determining his negligence and gross violation of the standard of care. During the interaction, the counsel tries to "mentally undo" what dr Murray officially reported (leaving Mr Jackson's side for only two minutes) and suggests to the witness a different time frame (three minutes instead of two). Despite these attempts, however, the witness still claims that the defendant's behaviour deviated from the accepted standard.

(3) DC: In the event that he did seek help, five minutes, approximately five minutes after discovering the situation, but that just two minutes in five minutes caused him it'd be an egregious standard of care [sic!]?
EW: Every minute counts. It's an egregious standard, it's a severe… extreme deviation, yes.
DC: So, if he took more than two minutes and it was, say, three minutes, that minute causes it to be an egregious deviation from the standard of care?
EW: Yes, sir.

On the other hand, the counsel who cross-examined dr Samuels preferred general hypothetical scenarios not involving the facts of the case, and used them to undermine the logic behind the witness's assessments. For instance, in (1a) and (1b) presented in Section 5.1 above, the prosecuting attorney elicits the witness's assessment of a hypothetical scenario not involving the facts of the case (considering the credibility of a person who lies about minor issues) in order to draw parallels with the evidence at hand

[18] The issue of (the lack of) causation was, in fact, one of the pillars upon which dr Murray's defence was built.

and, ultimately, to undermine the narrative offered by the psychologist (claiming to believe the defendant's story about the killing despite her lying about other events).

The defence counsel in dr Murray's trial, likewise, resorted to this strategy, albeit with a lesser frequency. One such example is offered in (4), where the counsel tries to determine what may be expected at a scene involving the use of a propofol drip without referring specifically to the site where Mr Jackson's body was found. This attempt is, however, unsuccessful as the question is left unanswered since it is disallowed due to its vagueness and speculative nature.[19]

(4) DC: You're, you're… When you talk about this propofol drip, in the event there is a propofol drip, would you expect there to be an IV bag of propofol in it?
PA: Objection. Speculation. Vague.
J: Sustained. 352 territory.
DC: If you were, if you were gonna determine that there was a propofol drip, what would you expect to find at the, at the scene?
PA: Objection. Speculation. 352.
J: Sustained.

In (5), on the other hand, the prosecutor in the Jodie Arias trial undermines the validity of the witness's analysis and interpretation of the evidence by pointing out inconsistencies in his report. This function of HQs was the least frequent in the data and it was identified chiefly in the cross-examination conducted by the prosecutor Martinez.

(5) PA: If I say to you "what if it turns out that there are no images of women's breasts on the computer", you can see that there's an inconsistency there, right?
DC: Objection *[illegible]*
J: Overruled.
PA: Right?
EW: Yes, there's an inconsistency.
PA: Right. And if there is an inconsistency with regard to this and, for example, other issues, does that not give you pause while you're conducting an interview since there are these inconsistencies?
EW: There are certain inconsistencies that are irrelevant to the case.
PA: And so the answer is "no", even though these inconsistencies are there, you're saying I don't, it doesn't matter to me in my evaluation, that's what you're saying, right?
EW: It was not germane to the issue I was investigating.

As can be seen in the above examples, irrespective of the type of hypothetical scenario evoked by the cross-examiner, HQs serve to deconstruct prior evidence and to persuade the jury to accept the narrative crafted by the counsel while rejecting the story offered by the witness.

[19] The HQs asked by the defence are objected to under Par. 352 of the California Evidence Code which says: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury".

5.3. Expert witnesses' responses to HQs

Just as relevant as the design and function of various types of HQs was their handling by the expert witnesses. Since space restrictions do not allow me to provide a detailed analysis of each response type, I limit my discussion to their frequency (Table 7), as well as provide illustrative examples (Table 8). The context of some of the responses and their possible effect on the perception of the status of the evidence by the jury will be discussed in Section 5.4.

Response type	Steinberg cross	Samuels cross
Simple acquiescence	8	10
Qualified agreement	3	7
Agreement + elaboration	3	1
Evasive response	0	4
Disagreement + elaboration	2	1
Qualified disagreement	1	1
Unqualified disagreement	2	0
Narrative response	9	4
Clarification-seeking question + narrative response	2	0
Response not allowed (or interrupted)	7	1

Table 7: Expert witnesses' responses to HQs (adapted from Brodsky et al. 2012)[20]

At the two opposite poles of the classification shown in Table 7 are 'simple acquiescence' and 'unqualified disagreement.' Between these are several types of qualified or expanded agreement and disagreement, evasive and narrative responses, as well as cases in which the response was not allowed or was interrupted. While the frequency of individual responses varied, the data indicate that the cross-examination of dr Samuels yielded more confirmatory responses and evasive answers than did the cross-examination of dr Steinberg, who produced quite a few narrative responses and who was sometimes effectively prevented from responding due to the HQ being formulated in violation of the rules of evidence.[21] Thus, what the data seem to indicate is that the cross-examination of dr Steinberg was less successful (at least from the point of view of the defence counsel) than that of dr Samuels. Not only was dr Steinberg able to produce narrative responses whose scope remained outside the counsel's control, but he was also prevented from offering responses which the counsel hoped would support his line of argument.

[20] Cf. Heffer (2005: 116) who postulates five key categories of witness response which may be linked to counsel request type: restricted confirmation, expanded confirmation, restricted specification, expanded specification and narrative.

[21] Objections during cross-examination may include the following qualifications: beyond the scope of direct examination, hearsay, asked and answered, assumes facts not in evidence, compound question, misstatement of testimony, argumentative, improper impeachment.

RESPONSE TYPE	EXAMPLES
Simple acquiescence	Yes sir. Absolutely sir. Correct.
Qualified agreement	Probably not. I probably would agree. That's possible, yes. Yes, but my addendum referred to the new material, though. If he was at that point, yes.
Agreement + elaboration	Yes, because what happened was, is that at 12:12, he had called Michael Amir and then he came back, and at that point, he lost his pulse, so if they would have found him, let's say between 12:05 and 12:10, he would have still had a pulse, they would've probably been able to save him.
Evasive response	Well, when we do work like this we always talk in probabilistic terms. The probability may be a hundred percent, but it could be 90% and so it's hard to know retrospectively exactly what degree of dissociative amnesia an individual had. So what I'm trying to be is more accurate actually by giving the answer that I am.
Disagreement + elaboration	It doesn't take two minutes and 43 seconds, it takes liter… Two seconds to dial and say 'I'm a doctor, there's an arrest, come to 100 Carolwood, now!'. Put them on speaker. Do your stuff. They have everything recorded. They know to come immediately.
Qualified disagreement	Dr Murray did not show that ability on this one patient and one night. My answer is apparently not.
Unqualified disagreement	No.
Narrative response	He should have gotten Mr. Jackson's oxygen up higher by giving him positive pressure, you could have intubated the patient. If he had the equipment, he should have given flumazenil to reverse the sedative effect of benzodiazepines.
Clarification-seeking question + narrative response	EW: From who? OC: Security. EW: You… The time that you call and call for security, you could have called 911 already.
Response not allowed (or interrupted)	—

Table 8: Examples of expert witnesses' responses to HQs

5.4. HQs in counsel-expert witness interaction: Two hypothetical scenarios

However revealing, the examples mentioned so far have not been reproduced together with their broader interactional contexts. To better understand how HQs are deployed by the cross-examiner and how they are addressed by the witness, both of whom interact with conflicting communicative goals, it is necessary to consider the use of HQs in longer interactional sequences. To this end, in the ensuing portion of the paper, I consider and discuss in more depth the recruitment of HQs in two extended counsel-expert witness interactions.

The first excerpt comes from the California v. Murray trial and illustrates the counsel's manipulation of causal links involving the facts of the case. Put briefly, in this instance, the counsel tries to convince the audience that irrespective of how long Mr Jackson was left on his own, dr Murray's actions were not causative in his death.

HYPOTHETICAL SCENARIO 1

Let's assume dr Murray is gone for a period of time longer that two minutes

DC: So your opinion is based upon assumptions that you've made in your opinion is that dr Murray put him on a propofol drip?
EW: Yes sir.
DC: And that dr Murray was only out of the room for two minutes?
EW: Two minutes.
DC: And two minutes before he came back Mr Jackson was fine?
EW: Two minutes before he came back he was fine, yeah.
DC: And so dr Murray leaves the room to go urinate and comes back two minutes later, so Mr Jackson couldn't have been having any trouble breathing or or with heart function for longer than two minutes?
EW: Yes sir.
DC: And if that's true, he was saveable?
EW: Absolutely sir.
DC: Okay. If that's not true, and Mr Jackson had not been breathing for an extended period of time, say, five or ten minutes, then he wouldn't be saveable, would it?
EW: So I have to, I have to pretend that he was, this is a…
DC: No, no, I'm not asking you to pretend, I'm giving you a hypothetical.
EW: You're giving me a hypothetical.
DC: Let's assume Mr… dr Murray is gone for a period of time longer than two minutes, maybe it's 10, 15, 20.
EW: At that point he was still saveable.

First, Mr Flanagan elicits the witness's acknowledgment that what he wrote in his report was based on "assumptions" rather than facts (the claim that dr Murray put Michael Jackson on a propofol drip and that he left the room for two minutes) in an attempt to weaken the epistemic status of the prior testimony. The counsel challenges the witness's claim by suggesting that dr Murray could have left for an extended period of time (despite the fact that, when interviewed by the police, the defendant himself admitted to leaving Michael Jackson's side for only two minutes). Then, Mr Flanagan goes on to conjure up alternative scenarios (*And if that's*

true… vs *If that's not true…*), implying that if the two-minute period relied on in the expert witness's report did not reflect what actually happened, the expert witness's assessment was inaccurate since Mr Jackson was not saveable and would have died regardless of dr Murray's actions. At the same time, the counsel fails to admit that according to medical standards, Mr Jackson should have been constantly monitored while on the drip and ignores the fact that leaving the patient unmonitored was a gross violation of the standard of care on the part of the defendant. In this way, he constructs a partial view of what happened, aiming to refocus the testimony and sow doubt in the jurors' minds as to whether the defendant's conduct was causative in this case.

If we consider this interaction in detail, we will also notice that the counsel produces a series of 'confirm' requests and invites the witness to collaborate with him in building a scenario that supports the party's case. However, even though the witness produces confirmatory responses (*Yes sir*; *Absolutely sir*), he is not committed to the truth of the main argument offered by the counsel (*he wouldn't be saveable*) and formulates his own epistemic position (*he was still saveable*). Another thing to note is the clash between the voice of law and the voice of medicine. From the medical perspective, consideration of alternative scenarios which are assumed to have been realized may be perceived as "pretending" (*So I have to, I have to pretend that he was, this is a…*).[22] However, from the counsel's perspective, counterfactual reasoning involving manipulation of causal links belongs to the realm of the "hypothetical" (*No, no, I'm not asking you to pretend, I'm giving you a hypothetical.*). By describing a hypothetical state of affairs, and regarding it as "the horizon of discourse" (Peräkylä 1993), the counsel produces unassertable statements with the aim of affecting the jurors' perception of causality and, ultimately, their assessment of dr Murray's conduct.

The final observation concerns the use of discourse markers and the counsel's multimodal stance (cf. Matoesian and Gilbert 2018). As the excerpt illustrates, Mr Flanagan prefaces his questions with the markers *and* and *so*: the first signals narrative sequencing, the latter is used for topic and narrative movement, and for showing the causal link between the ongoing discourse and prior turns (cf. Johnson 2002).[23] Not shown in the transcript above, but equally significant, was the counsel's manner of speech and embodied stance. As the trial videos indicate, the counsel moves

[22] It is even clearer in the following exchange that took place during the same cross-examination: DC: Well, let's assume that dr Murray was gone for a longer time than two minutes. EW: First of all we're assuming he's not on a propofol drip which we're assuming and you're assuming I, all my testimony is based on what's written that he's on a drip and that he was gone two minutes, you want me to pretend that those things don't happen, that he only got 25 milligrams and I need to pretend that he was gone for more than two minutes, is that right? DC: I'm not asking you to pretend.

[23] *And*-prefacing indicates that the questions *and* prefaces have a routine or agenda-based character (Heritage and Sorjonen 1994). Cross-examining attorneys use this strategy when they present a compilation of "puzzling" or "inconsistent" events (Drew 1992). *So*, in turn, is found in follow-ups and attorneys use this marker to "oblige the witness to concede and reiterate in an explicit form something damaging" (Cotterill 2003: 153). For a discussion on *so*-prefacing, see also Holt and Johnson (2010).

and speaks rather slowly, uses less expansive movements, looks down and folds his arms at times, and does not vary his voice tone, loudness or tempo. He also takes some time before asking questions, which additionally makes his speaking style less dynamic and less hostile.

The second example comes from the Arizona v. Arias case and it demonstrates how a series of general hypothetical scenarios is elicited to undermine the logic behind the witness's claims related to dissociative amnesia and the defendant's lack of memory of the gun she used to kill her ex-partner.

HYPOTHETICAL SCENARIO 2

If it's true dissociative amnesia… he wouldn't.

PA: Well, we assume that, you, you were telling us about true dissociative amnesia when you testified, right?
EW: Okay, fine.
PA: We're going with what you testified.
EW: Okay.
PA: So, if he is in this true dissociative amnesia state, at this point here, he will not remember the gun that was there, right?
EW: Correct.
PA: So that if for example he goes over to the suspect, he's a police officer, he goes over to the suspect, he won't know where the gun is, right?
EW: Ahm… He would not have the conscious ability to go over to the suspect if he was in a true state of acute stress.
PA: All right, but you're saying he couldn't even walk, he could…, the fact that you have this lack of memory doesn't mean you fall down, right?
EW: Oh, no, no…
PA: He could ambulate, right?
EW: He could ambulate, yes.
PA: Sure. So, if he ambulates over to the suspect, he's not gonna know where the gun is because he has no memory of it, right?
EW: That's possible.
PA: No, not "that's possible". Isn't that what you told us yesterday? If it's true dissociative amnesia that he wouldn't?
EW: He wouldn't have… Okay, if it was true dissociative amnesia…
PA: Sure.
EW: …he would not have a memory of where the gun was.
PA: Right, and that's what you were telling us yesterday.
EW: Yeah.
PA: And the same is true for the knife. If for example he, we know that he can ambulate, if he starts going, this is the gun, and this is the knife…
EW: Hmm.
PA: If he then continues to ambulate and there's a knife involved, he will not know where that knife is because he cannot form any memory at that point, right? In true dissociative amnesia.
EW: Unless…
PA: Objection, your Honour, as to clarification, because we're hearing about knife, gun, what time, what foundation is, is the state talking about when this person, hypothetical person, is supposed to not know where things are?

In the above excerpt, after providing the context for a series of HQs produced one after another, with the preceding discourse containing several HQs not included here, Mr Martinez invites the witness to imagine a police officer who suffers from dissociative amnesia becoming involved in a confrontation with an attacker. Following this, the counsel reminds the witness about his prior testimony (…*you were telling us about true dissociative amnesia when you testified, right?*; *We're going with what you testified.*), before formulating a series of HQs in order to expose the inconsistencies in the witness's narrative. By compounding the HQs, the counsel constructs, turn by turn, an unreal scenario which does not concern the defendant or the facts of the case, but instead a hypothetical person and his imagined behaviour. Here, again, the witness is invited to make epistemic commitments and to accept the characterization which is being offered by the counsel, which he initially does by acquiescing (*Okay; Correct; Yeah*). After producing a qualified agreement (*That's possible*), however, the expert is admonished for not committing himself fully to the narrative contrived by the questioner (*No, not "that's possible". Isn't that what you told us yesterday?*).

If all this is borne in mind, we will see that instead of focusing on the defendant's memory function as described in the prior testimony, the prosecuting attorney chooses to build an analogy with a hypothetical police officer, only to conclude at a later stage that what the witness testified to could not have been true. Unlike the first hypothetical scenario discussed earlier, in this case, the counsel's manner of speech and multimodal conduct enhance the forcefulness of the questioning. In addition, to visualize the correlation between the lapse of time and the memory function of the hypothetical person, the counsel displays a drawing, which becomes an object of joint attention during the examination. It is likewise important to note that the counsel produces 'confirmation' requests only, thanks to which he can exercise greater control over the witness. Mr Martinez's questioning style is characterized by *and-* and *so*-prefacing, a frequent use of the invariant tag *right?* (produced in a threatening voice), the use of expansive and dynamic gestures, walking while speaking, and a variation in voice tone, loudness and tempo, that is features which cumulatively increase the hostility of the questioning. Finally, it should be explained that even though Mr Martinez deploys HQs to construct a hypothetical scenario not related to the evidence at hand, he does so to ultimately deconstruct the witness's testimony about dissociative amnesia as it relates to the defendant.

6. Conclusions

In this paper I have argued that counsel use hypothetically framed questions in the analyzed trial (sub)genre to express their epistemic stance – that is their association with or dissociation from an alternative representation of reality offered through HQs – and to construct "the admissible truth" collaboratively with the expert witness. I have shown some of the ways in which two cross-examining attorneys were able to exploit this interactional resource to elicit the anticipated

response through 'narrate', 'specify' or 'confirm' requests, most of which exemplified the 'hypothetical scenario' + 'question' schema. The expert witnesses' responses, on the other hand, ranged from simple acquiescence, through varying degrees of uncertainty and evasiveness, to unqualified disagreement, and did not show any recurrent patterns.

We have also seen what actions may be accomplished with HQs that create the illusion of having objective foundations, but which are nevertheless conjectures directly serving the questioner. In the data under consideration, HQs were used to evoke imaginary scenarios, involving the facts of the case or bearing no direct relation to them, with a view to affecting the jurors' perception of causality, possibility and responsibility. As shown, in court, reasoning about alternative representations of reality becomes an interpersonal process engaging not only the questioner, but also the expert witness and the jurors, making them "undo" certain aspects of reality in a mental simulation. By highlighting the perceived role of the actor/event on whom/which they are focused, HQs influence the orientation of the expert witness's narrative and constrain his or her freedom in telling the whole story, thereby misleading the jury as to the foundations or implications of the expert's opinion. What is more, since HQs "can create inferences founded on implausible and unfounded theoretical suppositions" (Brodsky et al. 2012: 360), they are likely to produce a biasing effect. In addition to this, through question-and-answer elicitation, the counsel, acting as the authoritative "story teller", presents his own narrative while simultaneously trying to deconstruct the prior testimony, if not compatible with his line of argument.

The analysis has shown a correlation between the form of the HQ asked and the counsel's questioning style, on the one hand, and the degree of control and hostility, on the other. It was found that the less hostile style represented by J. Michael Flanagan resulted in less control over the expert witness, who, at the same time, appeared poised and confident. The cross-examination conducted by Juan Martinez, in turn, exemplified a hostile questioning style, which coupled with the fact that the expert witness seemed unsure and non-committal, enabled the counsel to exercise control over the responses to a far greater extent. As predicted, the differences between the two questioning styles were reflected in the design of the HQs and their handling by the witnesses. In the first case, dr Steinberg produced narrative responses and was able to make claims which did not support the story the counsel was gradually building in his turns-at-talk. In the second case, dr Samuels produced quite a few evasive responses and did not commit himself fully to the knowledge claims the counsel was trying to attribute to him, although, at the same time, he accepted the counsel's propositions pertaining to the general hypothetical scenarios that did not involve the facts of the case.

Summing up, it may be concluded that HQs are readily offered to expert witnesses to provide perspective in a participatory manner and to "commune with [their] imagination" (Hurley 2018: 24), all in the service of "the admissible truth". As the two cases examined in this study indicate – irrespective of the questioning style or the type of the HQ employed – the goal of the cross-examiner remains the

same: to elicit the answer they have in mind and to reveal a fragmentary, if not distorted, view of reality. What awaits further exploration, however, is the effect that exposure to hypothetical questioning has on the jurors' interpretation and assessment of expert evidence and, ultimately, on their decision-making.

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