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TIPPING THE SCALES OF JUSTICE: DECONSTRUCTING AN
EXPERT'S TESTIMONY ON CROSS-EXAMINATION

ABSTRACT. American law is not a single discourse, but is the product of diverse and often discordant voices; nowhere is this more apparent than during the cross-examination of parties and witnesses at trial. The sequential organization of witness examinations has drawn the attention of conversation analysts, who have examined the effects of the turn-taking system governing such examinations on the organization of the interaction that occurs. This article applies the theoretical framework thus developed to the analysis of an attorney's management of expert cross-examination in a medical malpractice case. The article demonstrates that, rather than simply attempting to discredit an opposing witness' testimony, the cross-examining attorney actively exploits the question-answer sequence by using it as a platform for the construction of a competing and contrasting version of the facts, and that this construction occurs simultaneously with the deconstruction of the witness' direct testimony. It is shown that, by posing strategic questions, challenging evasive answers, building selected descriptions, and transforming hypothesis into fact, the cross-examining attorney seeks to substitute his reanalysis for the witness' testimony.

1. INTRODUCTION

As noted by Conley and O'Barr,¹ "American law does not comprise a single discourse. Rather, it is the product of diverse and often discordant voices". Nowhere is this more apparent than during the cross-examination of parties or witnesses at trial. Thus a scene dear to the hearts of movie and television producers is one in which a lawyer attempts to wrest the truth from a recalcitrant witness by forcing him to recant his testimony, while the witness either resists by repeating, expanding and explaining his prior answers – or, in the hackneyed tradition of *Perry Mason*, breaks down and confesses all.²

Notwithstanding the popularity of such scenes, "[t]he court is not a theatre. It is an institutional setting charged with the maintenance and

¹ J.M. Conley, and W.M. O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago and London: The University of Chicago Press, 1990), 1.

² R.D. Rieke and R.K. Stutman, *Communication in Legal Advocacy* (Columbia, SC: University of South Carolina Press, 1990), 169.



reproduction of existing forms of structural dominance' ”.³ This structural dominance requires that issues be aired in a manner by which the inherently contentious nature of the interaction is constrained. The mechanism through which this is achieved is the convention which requires the examination of witnesses to be organized into a series of question-and-answer pairs, so that each turn is at least minimally either a “question” or an “answer”.⁴ In this often depicted process, the attorney asks the questions and the witness answers them, thus vesting ultimate control of these exchanges in the former.⁵

The sequential organization of witness examinations has drawn the attention of conversation analysts,⁶ who have examined the effects of the turn-taking system on the organization of the interaction that occurs during examination and cross-examination.⁷ This article applies the theoretical framework thus developed to the cross-examination of an expert witness in a medical malpractice case.

2. MEDICAL MALPRACTICE

A medical malpractice action is a civil, as opposed to a criminal, action. A civil action may be filed on behalf of an individual who claims harm caused by the conduct of a person or entity resulting from the ‘breach’ (violation) of a legal duty, and who requests monetary compensation for the injuries claimed to have resulted from the breach. The breach of a legal duty is actionable if it results from the defendant’s negligence, that is, from his failure to exercise ‘due’ or ‘reasonable’ care in the performance of the duty. The class of cases arising out of such alleged breaches of duty are thus denominated ‘negligence’ actions.

Medical malpractice is a particular type of negligence known as ‘professional negligence.’ In a medical malpractice action, the legal duty of the physician arises out of the physician-patient relationship, and is imposed as a consequence of the law’s recognition that one who holds

³ J.M. Atkinson and P. Drew, *Order in Court: The Organisation of Verbal Interaction in Judicial Settings* (London and Basingstoke: The Macmillan Press Ltd., 1979), 14 (citing Carlen).

⁴ *Supra*, n. 3, at 62–63.

⁵ W.M. O’Barr, *Linguistic Evidence: Language, Power and Strategy in the Courtroom* (New York: Academic Press, Inc, 1982), 77.

⁶ *Supra*, n. 3.

⁷ P. Drew, “Contested Evidence in Courtroom Cross-Examination: The Case of a Trial for Rape”, in *Talk at Work: Interaction in Institutional Settings*, eds. P. Drew and J. Heritage (Cambridge: Cambridge University Press, 1992), 470–520.

himself out as a physician has a duty to exercise a reasonable degree of skill and care in the treatment of patients; that duty is referred to as ‘the standard of care’.⁸ Because the law also recognizes that medical issues are beyond the scope of knowledge of a lay person, expert testimony – that is, the testimony of a physician familiar with the medical issues specific to the case – is required to prove the elements of the claim, including the standard of care, a breach or violation of the standard of care, and causation.⁹

3. THE EXAMINATION OF WITNESSES

In the Anglo-American legal system, the conduct of cases is adversarial, and is conventionally depicted as a contest to determine which of the two sides can produce the more convincing version of the relevant events.¹⁰ The central role of testing one side’s story against the other’s underlies the requirement that admissible evidence generally be limited to that which can be attested orally in court.¹¹ This testing of the evidence occurs both explicitly and implicitly: explicitly by the challenging of the versions produced by the parties’ witnesses on cross-examination, and implicitly through the jury’s opportunity to compare those competing versions.

Cross-examination is the opportunity afforded to each lawyer to question the opposing party’s witnesses, and occurs immediately after the lawyer offering the witness’ testimony has completed his direct examination of the witness. Cross-examination provides a classic setting for confrontational speech, in which the witness may be explicitly challenged to admit that he is lying, or mistaken, or both. More often, however, such challenges remain implicit, and result from inferences created by a series of questions in which the cross-examining attorney attempts to imply a version of the evidence that is contrary to the witness’ testimony, a process that Drew¹² refers to as ‘constructing contrasts’ because the questions “convey to the jury a contrast between the witness’s account of what happened, and what is likely in fact to have happened”. Far from being neutral requests for information, such questions are themselves freighted

⁸ *Swanek v. Hutzell Hospital*, 115 Mich. App. 257 (1982).

⁹ *Thomas v. McPherson Center*, 155 Mich. App. 700, 705 (1986), *Wallace v. Garden City Hospital*, 111 Mich. App. 212, 215 (1981), *rev’d. on other gr.* 417 Mich. 907 (1983).

¹⁰ *Supra*, n. 7, at 472.

¹¹ *Ibid.*

¹² *Supra*, n. 10, at 516.

with meaning, building a description of the relevant events that favours the position of the attorney's client.

4. DATA

This article examines data taken from the videotaped trial deposition in a medical malpractice action filed in Washtenaw County, Michigan, involving allegations of "birth trauma", i.e., obstetrical negligence at or around the time of birth. The plaintiffs claimed that serious neurological injuries resulted from a combination of factors including placental insufficiency (reduced blood flow to the foetus) and a 'precipitous' delivery in which the infant emerged in the mother's bed in the labour room with no doctor or nurse present. At trial, the plaintiffs presented the testimony of Dr. Richard Gable, a pediatric neurologist, to support their claims. This article examines one segment of the cross-examination of Dr. Gable conducted by defense attorney John Brandon. In this analysis, I will demonstrate how a cross-examining attorney attempts to systematically dismantle the conceptual edifice that has been erected on direct examination, and to provide a competing version, or reanalysis, of the evidence. Specifically, I will examine the attorney's management of this interaction by posing strategic questions, challenging evasive answers, building selected descriptions, and transforming hypothesis into fact. In so doing, I will demonstrate that lawyers' questions on cross-examination do not merely serve to elicit or shape the witness' testimony, but actively seek to supplant it through the construction of competing facts.

5. ANALYSIS

5.1. *Re-framing the issues*

It is conventional in expert cross-examination to re-frame the issues before exploring them in depth. This re-framing performs two functions: It orients the jury to the nature and substance of the questioning that is about to begin, and it permits the cross-examining attorney to provide a preview of the competing version, or reanalysis of the evidence, that he or she will undertake to present. This initial reformulation is presented below:

549 Brandon: Ha, let me go back, hh an::d try to uh, understand better your uh,
 550 analysis of this situation. As I understand it, uh, there're tw:o
 551 diff'rent time stages if you will t:o y'r analysis >of the cause of the

552 brain injury<, one of them (.) involves what happened in utero to
 553 this child. .Hh the other one involves the actual delivery process
 554 itself. Is 'at c'rect?
 555 Dr. Gable: .Hhh. Uh=
 556 Brandon: ='n terms 'f the time ['s what we're lookin' at.]
 557 Dr. Gable: [L- let me-] be more specific, in terms of thee in utero life. This
 558 during the latter stages of labor, uh during the time when placental
 559 insufficiency became evident, clinically, (0.2) tch, and this was then
 560 compounded hh by thee uhh uncontrolled, un-attended delivery
 561 process, which I belie:ve hh was precipitous in nature.

In this sequence, the cross-examining attorney's reformulation of the witness' testimony removes the witness' unfavorable characterizations of the events: According to the witness, "*what happened to this child*" was decelerations (abnormal slowing of the heart rate) caused by *placental insufficiency*, and the "actual delivery process itself" was *precipitous and unattended*.

The witness' response to this summary parallels the attorney's move: In reformulating his opinions, Dr. Gable reinserts the negative characterizations originally stated by him on direct examination:

... during the time when *placental insufficiency* became evident, clinically, (0.2) tch, and this was then compounded hh by thee uhh *uncontrolled, un-attended delivery process, which I belie:ve hh was precipitous in nature*. (lines 558–561; emphasis added.)

This move and countermove display strategies analogous to professional chess, and aptly illustrate the characteristic push and pull of cross-examination, in which the established agendas of attorney and witness are diametrically opposed, resulting in a pattern in which virtually every turn may constitute a rejection of the proposition advanced by the other speaker. However, it would be a mistake to assume that the only purpose of such exchanges is to express disagreement. Here the witness' pointed reiteration of the terms used during his direct examination to 'correct' the attorney's summary encapsulates what may be the defining characteristic of vigorous cross-examination: Since there is no mutual advantage to achieving alignment, and since audience reaction is difficult to gauge, less attention is paid to the Gricean maxims than to the simple expedient of repeating one's own position as forcefully and as frequently as possible. This will be amply illustrated in the exchanges that follow.

5.2. Deconstructing the expert's testimony

The cross-examination on the issue in question proceeds in four question-and-answer sequences in which the attorney systematically attacks each component of the witness' testimony and, in so doing, substitutes his own

competing version of the relevant events for the version constructed by the witness on direct examination. The manner in which this occurs will be analyzed below.

5.2.1. *Posing strategic questions*

846 Brandon: Well let's talk about uhh, thee c- uncontrolled delivery process
 847 itself. D'you have any ide:a uhh, what- was the speed of the child
 848 through the birth canal during this uncontrolled process.
 849 Dr. Gable: We don't kno:w. Hh according to the records, uhh, it was (.) in
 850 bed (.) and it was, quote uncontro:lled (.) unattended, unquote.

The purpose of cross-examination is to challenge or undermine the witness' testimony, or to show that it is subject to a different interpretation than that presented by the other side.¹³ It may thus appear that an attorney's questions serve only to elicit information from the witness, and that the questions themselves are merely prompts. However, lawyers are aware that the information content of their questions is also before the jury. Thus although the ostensible purpose of cross-examination is to obtain the witness' answers, an attorney may ask strategic questions essentially for their own sake, in order to suggest facts contrary to the witness' testimony.

In this case, Dr. Gable on direct examination had testified in vivid terms about the '*precipitous*' delivery:

253 Dr. Gable: . . . precipitous, and the risk that that this- .hh uh head of the foetus will
 254 (.) suddenly (.) uh crash out, without thee *controlling* restraints (.)
 255 of anybody (.) providing, uhh, ay reduction in thee uh propulsive
 256 forces, that can result in an acceleration deceleration, causing the
 257 increase in venous pressure, which further reduces (0.2) blood
 258 flo:w to foetal brain.

This testimony appears designed to produce a dramatic effect. Use of the term 'crash out' evokes images of cannonballs, hurtling vehicles, or other fast-moving objects. Additionally, because it constitutes an implicit conclusion (i.e., that a certain minimum speed was generated) for which there was no foundation in the evidence, it was grounds for objection. However, an attorney may hesitate to object to such testimony because the objection may be seen by the jury as an admission that the testimony is damaging to his client, and/or an attempt to conceal information from them. Thus, rather than objecting, a lawyer may take up the issue, directly or indirectly, on cross-examination. In this case, the cross-examining attorney exploits the arguably metaphoric use of the term 'crash

¹³ *Supra*, n. 3, at 105.

out' to create a pointed question which essentially parodies the witness' testimony:

846 Brandon: Well let's talk about uhh, thee c- uncontrolled delivery process
847 itself. D'you have any ide:a uhh, what- was the speed of the child
848 through the birth canal during this uncontrolled process.

This question strongly challenges the witness to defend the position he has taken. The design of the question, '*D'you have any idea,*' contains the negative polarity item '*any*' and thus embodies a preference for a negative response.¹⁴ Moreover, the manner in which this preference is conveyed is very heavy handed, appearing as a direct challenge to the witness' expertise, since the question prefers a response that is contrary to the witness' known position. In response to the question, however, the witness initially states, '*We don't know.*'

Drew¹⁵ notes that a witness can obstruct a line of questioning by responding that she 'doesn't know' or 'doesn't remember' the fact that the attorney is attempting to elicit, and thus can avoid producing or confirming potentially damaging information. Here the witness' use of 'not knowing' might be a way of avoiding a debate about 'how fast is fast enough.' In addition, through his use of the word 'we' he disclaims responsibility for his lack of knowledge, thus implying that the answer is simply unknowable.

Nevertheless, this response acts as an implicit admission that the witness cannot objectively justify his use of the terms 'crash out' and 'precipitous.' Thus, in an apparent attempt to overcome the inadequacy of this answer, he repeats his previous characterization of the delivery, this time indicating that his description is a direct quotation from the medical records:

849 Dr. Gable: We don't know. Hh according to the recor:ds, uhh, it was (.) in
850 bed (.) and it was, quote uncontro:lled (.) unattended, unquote.

Direct quotation may be used to establish that a statement is 'authoritative,' rather than simply a statement of the speaker's point of view.¹⁶ Here the witness at last provides evidence to support his statement. At the same time, however, he distances himself from the statement by denying

¹⁴ J. Heritage, *Garfinkel and Ethnomethodology* (Cambridge: Polity Press, 1984), 22.

¹⁵ *Supra*, n. 7, at 481.

¹⁶ J.A. Lucy, "Reflexive Language and the Human Disciplines", in *Reported Speech and Metapragmatics*, ed. J.A. Lucy (Cambridge: Cambridge University Press, 1993), 9–32. Here p. 19.

that it is his own. This augmented answer initiates the second questioning sequence.

5.2.2. *Challenging evasive answers*

849 Dr. Gable: Hh according to the recor:ds, uhh, it was (.) In
 850 bed (.) and it was, quote uncontro:lled (.) unattended, unquote.
 851 Brandon: .Hhhh. (.) Is the record uhh absolutely uniform on that point,
 852 Doctor?
 853 Dr. Gable: .Hh ah, thee notes that were made, uh, contemporaneously with patient
 854 ca:re, uhh, addressed that.
 855 (1.0)
 856 Brandon: .Hh didja happen to observe uhh, thee note by the nurse? Wh:o, uh,
 857 (.) recorded the delivery?
 858 (1.2)
 859 Dr. Gable: A-ah, I'm waiting f'r you to read it.
 860 Brandon: Sure. Let me read it to you. (3.0) Oh eighteen. Oh- I'm sorry,
 861 oh one eighteen. Head delivered. Next push, baby delivered at oh
 862 tw- one twenty-one, (1.2). Delivery controll:ed but (emergent).
 863 (1.0)
 864 Dr. Gable: Tch. >Well, there's a contradiction then in the records.

In initiating this sequence, the attorney again poses a question incorporating a negative preference. Here, use of the word “*absolutely*” in the question, “*Is the record absolutely uniform . . . ?*” signals that this is a hostile question, and strongly suggests that the answer is “no”.¹⁷ Notably, the witness does not respond to the question posed; instead, he specifies where in the records the quoted material is located. This evasive response displays positive resistance to the question.¹⁸

Lawyers vigilantly monitor the testimony of opposing witnesses for evasive answers, which the law views as detrimental to the truth-finding process that a trial enacts. Accordingly, an attorney will be afforded great leeway in obtaining a “real” answer to his or her question and, in cases of extreme resistance, may even ask the judge to order the witness to answer. In this case, the witness’ evasive answer prompts another heavy-handed challenge, this time to the witness’ familiarity with the evidence (i.e., the labor and delivery records):

856 Brandon: .Hh didja happen to observe uhh, thee note by the nurse? Wh:o, uh,
 857 (.) recorded the delivery?

Here the form of the question, “*Didja happen to observe,*” like the attorney’s first question, “*D’you have any idea*”, strongly implies the witness’ lack of knowledge of a fact which the witness’ own testimony

¹⁷ *Supra*, n. 14, at 19–20.

¹⁸ S. Clayman, “Answers and Evasions”, Unpublished Manuscript (2001), 10.

has constituted as critical to his opinions in the case. This question is followed by a 1.2 second pause, following which the witness states, “*Ah-h, I’m waiting f’r you to read it*”. Although pauses are more frequent in courtroom examinations than they are in ordinary conversation, and to some extent may be oriented to issues of audibility and understanding in the former case,¹⁹ there are points at which these pauses are or become noticeably the attorney’s or the witness.’ Here the witness acknowledges that it is technically his turn, but defers responding, thus declining the invitation to speak, by passing the turn back to the attorney, while indexing the dispreferred nature of his response with his turn-initial “*Ah-h*”.²⁰ After the attorney responds by obligingly reading the delivery note, which includes the statement, “*Delivery controlled*”, the witness grudgingly concedes, “*Well, there’s a contradiction then in the records*”.

In this question-and-answer sequence, the question initially receives an evasive answer, prompting a sequence in which the attorney introduces evidence (the note) implicitly answering the question he has posed. Thus the lawyer, in this sequence, has himself produced evidence that renders the witness’ answer in some sense superfluous. In other words, by his reading of the note, the lawyer has introduced the fact that the labor and delivery records state that the delivery was “controlled”. This directly contradicts the witness’ testimony on this point and appears to expose it as inaccurate or untruthful. Moreover, the witness displays a consciousness of this in prefacing his response with “*Well*”, and then offering a mitigating explanation, thus avoiding the production of a clear-cut answer. This evasive maneuver, however, provokes a negative sanction.

5.2.3. *Building selected descriptions*

Answering questions is viewed as a basic moral obligation, not only in the courtroom but in interaction in general.²¹ Thus the witness’ continued resistance licenses an explosion of drama by the attorney, who begins his next question with what is practically a shout:

865 Brandon: These- this note by this nurse, made (.) at the tim:e of the delivery,
 866 would not support y’:r conclusion th’t there was a precipitous
 867 delivery. True?
 868 Dr. Gable: Tch. That partic’lar note does not address it one way ’r the other
 869 because it doesn’t tell exactly what the nurse was doing. Was the
 870 nurse actually delivering the child, or not.
 871 Brandon: Does that note, Docto:r, reflect (.) a:y precipitous delivery? Is

¹⁹ *Supra*, n. 3, at 198.

²⁰ *Supra*, n. 14, at 266–267.

²¹ *Supra*, n. 18, at 1.

872 there any indentation in that note that this chil:d was delivered at a
 873 precipitous manner?
 874 Dr. Gable: It is, uh, silent on that particular point.

The outraged tone of the question, punctuated by the repetitive use of the deictic *this* (the verbal equivalent of a pointing finger) and delivering an additional rhetorical punch through the use of the statement-plus-tag formulation, which presents the information as a statement of fact, and only belatedly identifies it as interrogative, unequivocally marks it as an accusation. It is important to recognize, however, that the opportunity to level this accusation did not simply appear fortuitously, but was *prospectively managed* by the attorney's development of the prior question-answer sequences.²² Specifically, the attorney designed his questions so as to build up the facts progressively, not through the witness' answers, but through his own *selection of descriptions*,²³ by introducing the subject of the records, reading the nurse's note, and then drawing his own conclusion from its contents. Thus, rather than attempting to elicit the desired information from the witness (a doubtful undertaking at best), the attorney guarantees its production by producing it himself. As noted by Atkinson and Drew, for an attorney conducting a cross-examination, "[D]escribing is not merely an appendage to other interactional work; rather, it is often through constructing descriptions that certain interactional tasks may be accomplished".²⁴

However, despite the evidence supporting the description, and although the lawyer's tag ("*True?*") invites the witness to agree that the note flatly contradicts his testimony that the delivery was precipitous, he continues to resist:

868 Dr. Gable: Tch. That partic'lar note does not address it one way 'r the other
 869 because it doesn't tell exactly what the nurse was doing. Was the
 870 nurse actually delivering the child, or not.

Here the witness attempts to sidestep the question by suggesting that the note is incomplete because it does not state what the nurse was doing (other than writing a note). However, the lawyer will not allow him to do so, but repeats his question:

871 Brandon: Does that note, Docto:r, reflect (.) a:y precipitous delivery? Is
 872 there any indentation in that note that this chil:d was delivered at a
 873 precipitous manner?
 874 Dr. Gable: it is, uh, silent on that particular point.

²² *Supra*, n. 3, at 115.

²³ *Supra*, n. 22, at 106.

²⁴ *Supra*, n. 22 at 107.

Again, the witness grudgingly concedes. At this point, his direct testimony has been demolished.

5.2.4. *Transforming hypothesis into fact*

The purpose and goal of cross-examination is to challenge or discredit the competing version of the “facts”.²⁵ Thus, in cross-examining a witness, an attorney attempts to present a coherent version of the evidence that is contradictory to the witness’ testimony. When this has been accomplished through the production of information in the witness’ answers, in the descriptions contained in the attorney’s questions, or both, the attorney will normally present a summary of this version and attempt to obtain the witness’ acquiescence to the accuracy of that summary. The closing summary serves two distinct and related purposes. First, it presents in a compact, vivid form, conclusions which often have been established through a series of laborious stages. Thus the summary insures that the jury is able to envision “the big picture” and not merely a series of disconnected, and thus potentially confusing, component parts. In addition, the summary allows the attorney to review and repeat the evidence that the jury has just heard, thus gaining a persuasive advantage.²⁶ However, it must be constructed in such a way that it does not provide the witness with an opportunity to “win back” any concessions that have been gained. Ordinarily, this is accomplished by presenting the witness’ admission, followed by a hypothesized conclusion that necessarily follows from the admission, i.e., *If X is true, then Y is true/not true.*

However, the use of hypotheticals creates temporal and psychological distance and decreases verbal immediacy, resulting in decreased persuasive force.²⁷ This being so, how is an attorney to resolve the dilemma posed by the need to eliminate the possibility of resistance while at the same time preserving persuasive immediacy? These data provide a solution to that problem by the attorney’s shift in modality whereby questions hypothesized to be answered in the future (creating psychological and temporal distance) are transformed into factual questions *which have already been answered, and which are currently being confirmed* (creating psychological and temporal proximity):

²⁵ *Supra*, n. 7, at 516.

²⁶ In experimental studies using mock jurors, subjects consistently rated repeated statements as more true than new statements, strongly supporting the hypothesis that repetition influences belief. Moreover, the effect occurred equally with objectively true statements and those which were objectively false see Rieke and Stutman, *supra*, n. 2, at 204–205.

²⁷ *Supra*, n. 2, at 160–161.

875 Brandon: And if this delivery was controlled, (1.0) then, there was no
 876 acceleration deceleration injury.
 877 (0.7)
 878 Dr. Gable: That's correct.
 879 Brandon: An::d this neurologically intact chil:d, ah, was delivered with no
 880 further compromise.
 881 Dr. Gable: Tch. If this was ay controlled delivery, (.) without a precipitous
 882 component, (0.7), then, uhh, (.) there was prob'ly not enough to
 883 account f'r the current outcome.
 884 Brandon: .Hh. An:d (.) thee brain damage, if it was present then, was not
 885 cause:d by the labor 'r delivery.
 886 Dr. Gable: Evidently.

The force of this rhetorical strategy is revealed by considering the questions in isolation from the witness' confirming answers:

875 There was no
 876 acceleration deceleration injury.
 879 And this neurologically intact child was delivered with no
 880 further compromise.
 885 And the brain damage . . .
 886 was not caused by the delivery.

Moreover, this force is objectively demonstrated by the witness' complete lack of resistance, not only to the questions themselves, but also to the manner in which they are formulated. Confronted with the first question, the witness responds with an unqualified "*That's correct*" – the first unqualified confirmation he has given during this cross-examination. The witness' answer to the second question also displays interesting features:

879 Brandon: An::d this neurologically intact chil:d, ah, was delivered with no
 880 further compromise.
 881 Dr. Gable: Tch. If this was ay controlled delivery, (.) without a precipitous
 882 component, (0.7), then, uhh, (.) there was prob'ly not enough to
 883 account f'r the current outcome.

In this sequence, the witness reinserts the omitted *X*-clause; however, rather than effecting the (perhaps expected) transposition ("*If it had been a controlled delivery*"), which would rule out a positive response, the witness adopts the attorney's formulation, "*If this was*". Having thus projected a positive response, the witness concedes that "*there was prob'ly not enough to account f'r the current outcome*". This answer paves the way for the final question-and-answer sequence relating to this subject:

884 Brandon: .Hh. An:d (.) thee brain damage, if it was present then, was not
 885 cause:d by the labor 'r delivery.
 886 Dr. Gable: Evidently

And here the witness gives, with this unqualified 'Evidently', the answer that dismantles all of his prior testimony on this subject.

6. CONCLUSIONS

The law is a profession of words, and legal proceedings consist primarily of speaking; thus an understanding of how language operates is critical to an understanding of the legal process.²⁸ In this article, I have examined an attorney's management of expert cross-examination in order to demonstrate that, rather than simply attempting to dismantle or discredit an opposing witness' testimony, the cross-examining attorney actively exploits the question/answer sequence by using it as a platform for the construction of a competing version of the facts. Thus by posing strategic questions, challenging evasive answers, building selected descriptions, and transforming hypothesis into fact, he substitutes his reanalysis for the witness' testimony.

To date, there have been few detailed linguistic analyses of cross-examination at trial, although it is on this terrain that the battle of trial is most fiercely fought. It is hoped that this analysis will serve to stimulate further investigation of this subject.

Transcription conventions

- Hundred = Underline indicates emphasis
- we:ll = Colon indicates lengthening of preceding sound
- > < = Inverted brackets indicate compressed speech
- = Dash indicates abrupt cutoff of talk
- hhh = A series of 'h's' indicates an intake of breath
- (.) = Period in parenthesis indicates less than one-tenth second pause
- Number within parenthesis indicates pauses in seconds and tenths of seconds

²⁸ *Supra*, n. 5, at 28.

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