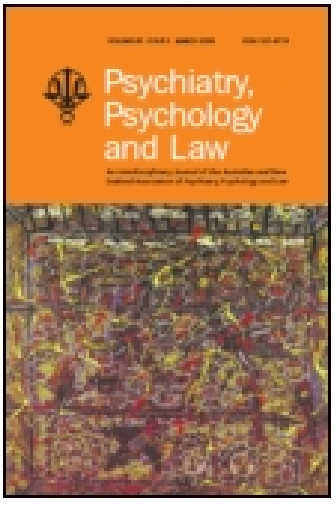

Psychiatry, Psychology and Law
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/tppl20

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Published online: 24 Oct 2011.

To cite this article: Dr Kirsten Hanna, Emma Davies, Charles Crothers & Emily Henderson (2012) Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-Examination Fair?, Psychiatry, Psychology and Law, 19:4, 530-546, DOI: 10.1080/13218719.2011.615813

To link to this article: http://dx.doi.org/10.1080/13218719.2011.615813

Psychiatry, Psychology and Law
Vol. 19, No. 4, August 2012, 530–546

Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-Examination Fair?

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The way in which children are questioned in forensic contexts can impact on the accuracy of their responses. Past studies have shown that children were often questioned in the New Zealand courts in ways that profoundly contradict best practice. This study analyses the questions posed to 18 child witnesses by forensic interviewers, prosecutors, and defence lawyers during criminal trials held in New Zealand courts in 2008. The results suggest that, as was found in earlier studies, many of the questions posed to children during cross-examination in particular were inconsistent with best practice in terms of eliciting full and accurate information from children. Indeed, the heavy reliance on closed, leading and complex questions, along with other common practices, casts doubt on the forensic safety of cross-examination, calling into question its fairness for children. The implications of these results for policy and practice are explored.

Key words: child witnesses; cross-examination; New Zealand.

Introduction

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Article 3(1), United Nations Convention on the Rights of the Child)*

The past decades have seen a sharp increase in the number of studies investigating the reliability of children's reports of past events in legal contexts. These studies have shown that the type of question posed to children can impact on the accuracy of the testimony elicited (Brown, Lamb, Pipe, & Orbach, 2008; Lamb, Hershkowitz, Orbach, & Esplin, 2008; Poole & Lamb, 1998). Specifically, this research has shown that children's responses to open-ended free-recall questions (such as *Tell me what happened*) are more likely to be accurate than their responses to other question types (Dent & Stephenson, 1979; Lamb & Fauchier, 2001; Lamb, Orbach, Hershkowitz, Horowitz, & Abbott, 2007). Hence, those questioning children in investigative interviews (i.e., in relation to police

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A version of this paper was presented at the 3rd Annual Conference of the International Investigative Interviewing Research Group, Norwegian Police University College Training and Conference Centre, Stavern, Norway, 22–24 June 2010.

ISSN 1321-8719 print/ISSN 1934-1687 online

http://dx.doi.org/10.1080/13218719.2011.615813
http://www.tandfonline.com

investigations) are urged to use open-ended questions as much as possible. However, children's responses to such questions do not always include the details required in a forensic context, such as time, place, potential witnesses, and so on. When open-ended questions fail to draw out such details, the literature recommends that interviewers use directive questions (such as *When did that happen?*) before resorting to question types that increase the risk of eliciting inaccurate information, namely closed questions, to elicit these details (Lamb, Orbach, Hershkowitz, Esplin, & Horowitz, 2007; Poole & Lamb, 1998). Leading questions are discouraged (Faller, 2000; Lamb et al., 2007; Saywitz, Camparo, & Romanoff, 2010; Walker, 1999). While this knowledge is to a greater or lesser extent informing practice in forensic interviews internationally, it is having less impact on the language used in the courtrooms of adversarial jurisdictions; indeed, leading questions are actively promoted in cross-examination as the vehicle of choice for maintaining control over witnesses' testimony (see Salhany, 2006).

It is not only the *type* of question which can impact on the accuracy of evidence elicited, but also the complexity. The language of the adversarial court is typically formal, characterised by complex syntax, high-register vocabulary, and court jargon. However, experimental studies have shown that young children and adolescents can struggle to comprehend such language (see, for example, Perry et al., 1995).

While lawyers are aware of the gulf separating the language of children from their own, this does not necessarily mean that they adjust their language appropriately when questioning children. When Henderson interviewed 19 British and New Zealand lawyers in the 1990s about their practices, she found that most had a modest understanding of how to accommodate children's language competencies. The consensus among these lawyers was that it was unnecessary to adjust their language with children of normal intelligence over 10 to 12 years of age (Henderson, 2003). However, recent scholarship in the field of first language acquisition has demonstrated that significant growth occurs during school years and into adulthood in several areas of language acquisition, including grammar, semantics, vocabulary, and pragmatics (Miller, 2002; Nippold, 2000, 2007; Perera, 1984; Walker, 1999). Hence even when a child or adolescent uses words or grammatical structures in an apparently adult-like way, this does not necessarily mean that their understanding of them matches an adult's (Nippold, 2007; Sas, 2002; Walker, 1999). As Walker puts it:

> ... adults and children do not speak the same language. ... In particular, the fact that children often use words before they really understand them can deceive us as to what they are actually thinking. (Walker, 1999, p. 12)

Most adults recognise the need to adjust their language for young children, even if they are not entirely sure how to do so. It may be less obvious that care must be exercised when communicating with adolescents too: Even 15- and 17-year-olds' understanding of high-register words like *assert* or *imply* may be incomplete (Astington & Olson, 1990); children up to 15 may not fully comprehend common structures, like clauses beginning with *although* (Perera, 1984); some uses of words like *before* may not be fully understood until adolescence (Nippold, 2007); and bread-and-butter terms for legal professionals, like *cross-examination* or *defendant*, may be poorly understood (or not at all) by some children (Crawford & Bull, 2006).

There is ample potential for speakers to misjudge a young person's language competencies and for miscommunication to

arise. When miscommunication occurs in the criminal justice system, the consequences can be grave. Yet this study suggests that children are frequently asked questions, particularly in court, that are likely to cause comprehension difficulties.

The Present Study

A series of New Zealand studies has examined the way child witnesses were questioned by lawyers (Zajac & Cannan, 2009; Zajac, Gross, & Hayne, 2003)[1] or by forensic interviewers[2] and lawyers (Davies & Seymour, 1998).[3] While these studies, like the present one, were based on non-representative samples, they all reported that children were often asked age-inappropriate questions, particularly in the courtroom. The Davies and Seymour (1998) study, based on trials held in 1994, raised concerns about the types of questions posed to child witnesses, their complexity, and the tactics of cross-examination. Using transcripts from trials held in 2008, the purpose of the present study is to examine these same three features to determine whether questioning practices have changed substantially in the intervening 14 years, before exploring implications for practice and policy.

Method

Sample

The study is based on the court transcripts of 18 children's evidence; the children had testified as complainant or witness for the prosecution in a criminal court during 2008. The sample comprises 13 interviews by forensic interviewers, 16 examinations by prosecutors and 16 by defence lawyers. The children were aged between 8 and 15 (mean 12.5) at the time of their forensic interview (if any) and between 9 and 17 (mean 14) at the time of trial.

The trials related to allegations of physical and/or sexual assault and were held in the District Courts of three of New Zealand's largest urban centres, Auckland, Manukau, and Christchurch; one was held in the Auckland High Court. The transcripts were sourced, with the permission of the Chief High and District Court Judges, through the offices of the Crown Solicitors[4] and anonymised prior to their release to the researchers. The offices were requested to identify a convenience sample of transcripts (i.e., the last six children to testify in the relevant courts); we make no claim that this is a representative sample. The study was approved by the Auckland University of Technology Ethics Committee.

Data Coding

The transcripts yielded 8,154 questions relating to the substantive portions of the interviews: 4,048 posed by forensic interviewers, 1,752 posed by prosecutors and 2,354 by defence. The questions were classified into one of seven mutually exclusive categories as described in Table 1. The categories mirror those used by Davies and Seymour (1998), with a further category added, namely, "multiple", comprising utterances containing both open and closed questions. We followed Davies and Seymour (1998) in collapsing open-ended and directive *wh*-questions into a single category of "open questions" (excluding open loaded questions as defined in Table 1). That is, while acknowledging that open-ended questions are superior to directive *wh*-questions, these two question types are nonetheless generally considered to be superior to closed and leading questions (Lamb & Fauchier, 2001; Orbach & Lamb, 2001; Peterson & Biggs, 1997).

The questions were also coded for the presence of features known to cause comprehension problems for children, namely, multiple subordinate clauses, verbs in the passive voice,[5] complex or legalese vocabulary, double negatives, and difficult concepts (Carter, Bottoms, & Levine, 1996;

Table 1. Categories of question type.

Category	Description	Example
Open	A question which asks the child to supply missing information. These include *wh*-questions, imperatives and unrestricted alternative questions (i.e., ones with a catchall category).[6]	*Wh*-questions Where did you go? Imperatives Tell me everything you remember about *x*. Unrestricted alternative questions Was the car red, blue or some other colour?
Open loaded	A question that asks why the child failed to do something.	If it caused you that much of a concern, why didn't you tell your mum?
Closed	A question whose unmarked response is *yes* or *no* or, in the case of restricted alternative questions, one of the options posed.	Polar *yes*/*no* questions Did you go home after that? Restricted alternative questions Was the car red or blue?
Closed leading	A closed question which indicates the expected answer (declaratives with or without tags, but excluding Recaps—see below).[7]	Declaratives So you went home after that. Declarative plus tag So you went home after that, didn't you? So you went home after that, is that right?
Recap	A declarative utterance where the questioner faithfully repeats back to the child information which the child had provided earlier in the same examination. The recap may involve rephrasing; it may be adjacent to or at a distance from the child's original speech.	Example 1 Child: I was massaging his back … [8 questions intervene] Interviewer: **OK and you said something about massaging his back**. Example 2 Interviewer: … when you were massaging his back where was he? Was he sitting or standing or–? Child: Lying. Interviewer: He was lying where? Child: On the floor. Interviewer: **He was lying on the floor …**

(*continued*)

Table 1. (*Continued*).

Category	Description	Example
Echo	Verbatim echo of the child's words, immediately after the child utters them.	Example 1 Child: I was reading both of them. Interviewer: **Both of them**. Example 2 Interviewer: . . .we are gonna talk about two different times that something happened? Child: Just one. Interviewer: **Just one?**
Facilitator	Utterances with little or no lexical content; the questioner provides neutral feedback to the child but does not take the conversational floor.	Example 1 Interviewer: . . .what happened with Bob and you and who's Bob? Child: Um dad's friend. Interviewer: **Ahum**. Child: One of dad's old friends. Example 2 Child: The first time one time when dad went to Northanger he was touching me around there. Interviewer: **Yeah** Child: And then um and then he the second time . . .
Multiple	Utterances containing both open and closed questions.	How come Kerry would sleep with Leslie? Do you know that?

Perera, 1984; Perry et al., 1995; Walker, 1999) (see Table 2). In addition, questions were also coded if they contained more than one form of complexity.

Two researchers tested the coding system of 211 questions from one interview, including questions posed by forensic interviewers, prosecutors, and defence lawyers. The agreement between coders ranged across categories from 90% ($K = .801$) to 100%. Disagreements were resolved through discussion.

Results

Question Type

Frequencies are described in Table 3 as the mean proportion of utterances across interviewer type (i.e., forensic interviewers, prosecutors, defence lawyers) containing the target feature. A Mantel test indicated that the difference between interviewers in terms of the types of question posed was highly significant ($p < .000$).[8]

Complexity

Differences in frequencies between interviewer types were probed using post-hoc One-Way ANOVAs (Tukey's) (Table 4). These tests showed that, compared to forensic interviewers, defence lawyers used significantly more questions containing two or more subordinate clauses ($p = .000$), while prosecutors used more passives ($p = .009$). Both prosecutors and defence lawyers used complex vocabulary more frequently than forensic interviewers ($p = .003$ and $p = .000$ respectively). Defence lawyers used more double negatives than forensic interviewers ($p = .004$) and prosecutors ($p = .008$). There were no differences in terms of difficult concepts. Forensic interviewers produced fewer questions containing multiple forms of complexity than prosecutors ($p = .009$) or defence lawyers ($p < .000$).

Discussion

Question Type and Complexity

The literature is clear that, if the goal is to elicit full and accurate testimony from children, closed (Lamb & Fauchier, 2001; Orbach & Lamb, 2001; Waterman, Blades, & Spencer, 2001) and leading (Lamb & Fauchier, 2001; Orbach & Lamb, 2001) questions can be risky. Yet the questions posed by defence lawyers in this sample were precisely of these kinds: On average, 84% of questions posed during cross-examination were closed or leading, compared to 26% of forensic interviewers' utterances, and 52% of prosecutors'. Defence lawyers also asked proportionally fewer open questions than the other interviewers.

These figures reflect in part the greater freedom to use leading questions during cross-examination, enduringly viewed as, "the greatest legal engine ever invented for the discovery of truth" (Wigmore, 1974, p. 32). However, it is difficult to reconcile the notion that cross-examination is an effective means of uncovering the truth when the questions that typify it are associated with an increased risk of inaccuracy. Indeed, experimental studies have shown that cross-examination style (which included leading and complex questions) was associated with a reduction in accuracy for children aged 5 and 6 (Zajac & Hayne, 2003) and 9 and 10 (Zajac & Hayne, 2006).

The language of cross-examination was also characterised by other potentially error-inducing features, such as high proportions of utterances containing complex vocabulary, double negatives, multiple forms of complexity, and multiple subordinate clauses, as in the following example.

Example 1 (16-year-old witness)

> Defence: If he told the Police that that was what he thought you wanted to do, are you saying that you don't think he could have thought that?[9]

Table 2. Categories of complex language.

Category	Example/description	Example
≥2 subordinate clauses	Utterances containing two or more subordinate clauses.	If I put it to you that nobody drank coffee, what would you say?
Passive verbs	Utterances containing a verb(s) in the passive voice, excluding *get* passives and *to be called*.	... what **was being watched** on the TV?
Complex or legalese vocabulary	High register words for which a lower register alternative is available	S*iblings* instead of *brothers and sisters*
	Legalese vocabulary/phrases	*I put it to you that ... ; Please tell the Court ... ; the accused*
	Unnecessarily formal language	*Make available to the Police* instead of *Give to the Police*
	Figurative language, including idioms	*In the spotlight; come to the surface; hammer the point*.
Difficult concepts	Time (when); frequency (how often); duration (how long); other people's intentions (why did *x* do *y*?); involving the words *before*/*after*.	
Double negatives	Utterances containing two or more negative elements, including negative words (*no, not*), negative affixes (*un*necessary, clue*less*) and concealed negatives (*unless*).	I'll put it to you that he at *no* time told you *not* to say anything to anyone.
Multiple forms of complexity	Utterances containing two or more of the first four types of complexity listed above.	

Table 3. Question types posed by forensic interviewers, prosecutors, and defence lawyers.

	Examinations by forensic interviewers ***n*** = 13 Mean (*SD*)	**Examinations by prosecution** ***n*** = 16 Mean (*SD*)	**Examinations by defence** ***n*** = 16 Mean (*SD*)
Open	35.6 (14.6)	41.2 (8.8)	12.1 (9.6)
Open loaded	0.0 (0.1)	0.5 (1.2)	0.3 (0.8)
Closed	19.8 (8.4)	38.7 (11.7)	27.1 (9)
Closed leading	6.3 (3.1)	13.2 (8.1)	56.5 (14.9)
Recap	10.8 (4.2)	2.8 (2.7)	1.2 (1.5)
Echo	3.0 (3.0)	0.9 (1.3)	0.8 (1.4)
Facilitator	22.5 (18.7)	0.8 (1.6)	0.8 (2.1)
Multiple	1.9 (1.4)	2.0 (2.4)	1.2 (1.6)

Table 4. Complex language in the questions posed by forensic interviewers, prosecutors, and defence lawyers.

	Examinations by forensic interviewers ***n*** = 13 Mean (SD)	**Examinations by prosecution** ***n*** = 16 Mean (SD)	**Examinations by defence** ***n*** = 16 Mean (SD)	**Significance**
≥2 subordinate clauses	9.8 (6.3)	17.8 (13)	26.8 (11.5)	a**
Verbs in passive voice	0.3 (0.5)	4.7 (4.8)	3.3 (4)	b**
Complex/legalese vocabulary	0.3 (0.3)	11.9 (7.1)	18 (13.3)	a**, b**
Double negatives	0.1 (0.2)	0.2 (0.4)	1 (1.2)	a**, c**
Difficult concepts	10.2 (4.7)	12.4 (7.6)	15.1 (7.4)	
Multiple forms of complexity	1.7 (.89)	16.9 (14.7)	22.5 (16.1)	a**, b**

*$<.05$.

**$<.01$.

a = Difference between forensic interviewers and defence significant.

b = Difference between forensic interviewers and prosecutors significant.

c = Difference between defence and prosecutors significant.

The questions posed by forensic interviewers, on the other hand, rarely involved passive verbs, complex vocabulary, double negatives or multiple forms of complexity. While prosecutors tended to produce proportionally fewer utterances containing these features than defence lawyers, the difference was only statistically significant in relation to double negatives. That complex language was also a feature of prosecutors' utterances is consistent with a view that its use is not necessarily – or at all – a tactical choice by either type of lawyer.

While forensic interviewers' practices tended to be superior to those of both types of lawyer in this small sample, it was the heavy reliance on closed, leading, and complex questions during cross-examination that was of particular concern, given that such questions are inconsistent with best practice as outlined in the investigative interviewing literature, and casting doubt on the forensic safety of cross-examination as it is commonly practised and its contribution to the truth-seeking function of the trial.

As a non-representative sample, it is possible that these patterns are particular to this set of transcripts. However, the findings in relation to cross-examination mirror those found in other New Zealand studies. Davies and Seymour (1998) found

that 77% of questions posed by defence lawyers to young children (5 to 12 years of age) and 80% of questions posed to older children (13 years and over) were closed or leading. Zajac et al. (2003) reported that around 65% of defence questions posed to children aged 5–13 were leading or closed, while Zajac and Cannan (2009) reported a figure of 89%, based on 15 cross-examinations of children aged 5 to 12 years of age.

Furthermore, although Davies and Seymour examined a different range of complex features,[10] as in the current study, defence lawyers used higher proportions of some of these than prosecutors or forensic interviewers, although those differences were not always statistically significant compared to prosecutors; in Zajac et al. (2003)[11] and Zajac and Cannan (2009),[12] defence lawyers used significantly more complex questions than prosecutors. That consistent findings are found across a range of studies suggests that the practices of cross-examination evidenced here are not unique to the current sample.

Judges have discretion to control inappropriate questioning. In the current sample, judges in 10 out of 16 cross-examinations intervened 38 times,[13] far more often than judges in Davies and Seymour's (1998) study, and in relation to a wider range of issues. The interventions included asking children whether they had understood a complex question (or indicating that the judge had not understood); clarifying ambiguous responses; and requiring lawyers to rephrase questions to make them less confusing, as in the example below. As the judge's rephrased question on line 8 illustrates, even with the best of intentions, legal practitioners are not always successful in adjusting their language appropriately.

Example 2 (15-year-old witness)

Defence:	Now do you remember what day you said that the later sexual violation occurred?
Child:	Pardon?
Defence:	Do you remember what date it was or when it happened?
Child:	On the first one.
Defence:	No the second.
Judge:	Mr X, ask a question in a less confusing manner.
Defence:	Yes, Your Honour. The –
Judge:	Like this. When was the first time that you told anybody about sex abuse when you were a lot younger?
Child:	I, I only – on – the first time I told anyone was – I don't know what was the date – I just told the nurse.

The greater attention by some judges in 2008 to complex questions is encouraging and may be a direct result of s85(1) of the Evidence Act 2006 (NZ), which, unlike the Act in force at the time of the Davies and Seymour (1998) study, includes within the category of "unacceptable questions" ones "expressed in language that is too complicated for the witness to understand", although disallowing questions is discretionary, rather than mandatory. However, there were many more complex questions which *were* allowed. It is unclear whether they were allowed because the judge did not consider those questions difficult, whether judges are wary of the repercussions of applying s85 too vigorously (e.g., the disruption to proceedings and/or the prospect of appeal), or for some other reason altogether.

This study suggests that proper control of cross-examination was inadequately exercised (and/or the mechanisms for control may be inadequate), not only in terms of complex language, but also in relation to

the tactics used in cross-examination as discussed below.

Tactics of Cross-Examination

> *It may be that in more than one sense [cross-examination] takes the place in our system which torture occupied in the mediaeval system of the civilians.* (Wigmore, 1974, p. 32)

The objective of cross-examination is to test the witness' evidence, although manuals on cross-examination, such as Salhany's *Cross-Examination: The Art of the Advocate* (2006), tend to describe the objectives differently:

> The first [goal] is to discredit the testimony of the witness by demonstrating that the witness's testimony lacks credibility. The second is to use the testimony of the witness to discredit harmful testimony presented by the other side. The third is to use the testimony of the witness to corroborate favourable testimony of the advocate's witnesses. Finally, the advocate's goal should be to bring out evidence helpful to its side that the witness did not disclose during examination-in-chief. (pp. 11–12)

The author states that these objectives are met by controlling witnesses' responses through careful framing of questions, noting that, " ... a question framed as a statement of fact [i.e. leading] is much easier to control than a question which invites an open-ended answer" (Salhany, 2006, p. 76). When examining child witnesses, he once again favours leading questions:

> Children usually want to please adults. If you take the time to frame questions carefully, you will discover that the child witness will often be very helpful to you ... Most importantly, [questions] should be framed in such a way that they elicit either a 'yes' or a 'no'. A child will probably answer 'yes' to a question that suggests a yes answer and 'no' to one that suggests a no answer. (p. 103)

By controlling the evidence in this way, the lawyer becomes the narrator, with the witness relegated to agreeing or disagreeing with the lawyer's assertions. As one advocate put it, cross-examination is a speech, just like an opening and closing (cited in Henderson, 2002).

Although not universally recommended (see, for example, Salhany, 2006, pp. 80–84), using language which trips children up was another tactic endorsed by a New Zealand lawyer in Henderson's study:

> You're looking ... to make sure [children] make mistakes. ... Some counsel ... give double negatives to kids. And the kids get it wrong ... But that is a valid technique that is used by very senior counsel and very successfully. (Henderson, 2002, p. 286)

Double negatives are not always used to intentionally confuse. The example below was posed to a prosecution witness by the prosecutor, who would have had no motive to confuse the witness, but illustrates the potential for a mistaken or ambiguous response to such an utterance: It is unclear what the child meant when she said "yes" (nor would a "no" response have been clearer).

Example 3 (16-year-old witness)

Prosecutor:	You were also asked some questions and it has been suggested to you that when you were raped you <u>didn't</u> say <u>no</u>?
Child:	Yes. [*emphasis added*]

As we have already seen, cross-examination in the transcripts analysed was characterised by the ample use of leading and complex questions. A device used by one lawyer was to present the defence's version of events via a series of leading questions, asking if the child remembered those events. This strategy exploits the ambiguity of a negative response to "Do you remember [event]?" or "You don't

remember [event]'' questions: ''No'' could mean, ''No, I don't remember [event]'' or ''No, [event] did not happen.''

For example, in line 5 of the following exchange, the lawyer asks whether the child remembers asking Chris to carry her to bed; she denies doing so. In line 12, the lawyer states that the child doesn't *remember* doing this, contrary to the child's evidence; the child answers ''no''. This response could be interpreted as the child acquiescing to the insinuation that her memory is at fault, rather than that the event did not occur. The rhetorical repetition of ''you don't remember'' in lines 8, 10, and 12 arguably constructs an impression that the witness' memory is unreliable, potentially undermining the child's credibility.

Example 4 (9-year-old witness)

1	Defence:	So the first night you spoke about, Jordan went to sleep on the couch.
2	Child:	Not that I remember.
3	Defence:	You don't remember Chris carrying Jordan down to bed?
4	Child:	No.
5	Defence:	OK. Do you remember asking Chris if you could be carried to bed as well?
6	Child:	No, I didn't ask him that.
7		(16 utterances intervene)
8	Defence:	So you don't remember Jordan falling asleep on the couch.
9	Child:	No, she was asleep with Charlie.
10	Defence:	You don't remember Chris carrying Jordan to bed.
11	Child:	No.
12	Defence:	You don't remember you asking Chris if he would carry you to bed.
13	Child:	No.
14	Defence:	Okay. Can we talk about the second time?

Other techniques common to cross-examination are the skip-around tactic and focusing on peripheral details. The former involves moving rapidly from one topic to an unrelated one without the use of conventional means of heralding a topic shift, as in line 5 of the following example:

Example 5 (15-year-old witness)

1	Defence:	Now you were aware that there were some arguments between your mother and your uncle. Is that correct?
2	Child:	Yes.
3	Defence:	Okay. There was a bit of argument over family things and over a funeral. Would that be correct?
4	Child:	Yes.
5	Defence:	You say he had ripped trousers – sorry ripped boxers – I put it to you that he didn't have ripped boxers at all.
6	Child:	He did.

This technique may confuse and disorientate the child (Brennan & Brennan, 1988) but is recommended in advocacy texts. Levy (1991, as cited in Ellison, 2001, p. 361) suggests this tactic if the lawyer suspects children have memorised their testimony. Stone (1995, as cited in Henderson, 2000, p. 90) suggests that:

> Rapid questioning, especially in an unpredictable order, may give a liar too little time to invent answers ... Off balance he can be led into inconsistencies, improbabilities, or testimony which can be contradicted by other evidence.

It seems possible that such tactics could just as easily confuse the honest witness as trip up the witness who is lying. Davies & Seymour (1998) reported this tactic was used in 65% of the 26 cross-examinations they analysed; in the current study, it was used at least once in 12 out of 16 cross-examinations (75%).

The second technique is to focus on peripheral details. It is well established that

salient or central information tends to be better remembered than information that is peripheral (Fivush, Peterson, & Schwarzmueller, 2000; Reed, 1996; Toth & Valentino, 2008). Inconsistencies around peripheral details are to be expected. Furthermore, when children report on multiple events, as is often the case in sexual and physical assault trials, " ... increasing error for less distinctive events is most often a matter of confusing details among similar experiences rather than reporting details that were never experienced" (Fivush et al., 2000). In contrast, manuals on cross-examination tend to assume, " ... real memories are complete in every particular and peripheral detail and inconsistencies indicate untruthfulness" (Henderson, 2000, p. 89).[14] Some suggest questioning the witness about, " ... fine peripheral details as a test of reliability" (Henderson, 2000, p. 91).

Davies and Seymour (1998) reported this tactic was used in all cross-examinations of children aged under 13 and 85% of those with older children. The 2008 transcripts revealed this tactic in one of the three cross-examinations involving children under 13 and 61% of those involving older children. Neither set of transcripts is representative of practice nationwide; however, if these findings were replicated in a larger sample, it would represent a change for the better since the 1990s in the culture of cross-examination in New Zealand.

Another feature of cross-examination was accusations that the child was lying. Children who have testified in criminal proceedings often cite this as one of the worst aspects of their entire court experience (Cashmore & Trimboli, 2005; Eastwood & Patton, 2002; Hamlyn, Phelps, Turtle, & Sattar, 2004). Allegations of lying, from the outright ("That's a lie") to the more subtle ("Isn't the real truth that ... "), featured in five of the 16 cross-examinations analysed, including suggestions that the alleged offences were a fantasy or imagined ("Is it the case that you have re-created this event in your mind?"). In one trial, the child was accused of lying five times in the space of 11 defence utterances.

There are other ways of casting doubt on the child's testimony that avoid outright accusations of lying, including suggesting the child's memory is faulty ("It's quite hard to remember the details now, isn't it?"), that they have become confused ("Do you think you may have got a bit mixed up?"), questioning their certainty ("You sure about that?"), and insinuation ("So now you're saying ... "). In the following example, the use of the word *selected* is an overt, but subtle, accusation of dishonesty:

Example 6 (14-year-old witness)

> Defence: The first question I want to ask you is about the dates which you have selected for these allegations ...

Children were accused of lying, having faulty memories, being confused or uncertain in 11 of the 16 cross-examinations analysed here.

If one of the objectives of cross-examination is to discredit witnesses, then lawyers have many tools at their disposal: phrasing questions as leading and complex, skipping from one topic to another and back again, focusing on peripheral details. These techniques are likely to confuse child witnesses. It is therefore unsurprising that inconsistencies arise – especially as children are often reporting on multiple events which occurred years beforehand.[15] Having highlighted real or apparent changes in testimony, these inconsistencies become the basis for accusations (direct or otherwise) of lying, which can add to the child's stress.

Limitations

The current study is based on a small sample of examinations from three urban centres. These transcripts are not a representative national sample, nor necessarily

representative of practice in those three centres. Nonetheless, the results echo those found in other New Zealand studies conducted using different samples at different times, suggesting that the practices evident in 2008 were not restricted to this particular set of examinations.

The decision to use police and court transcripts, rather than transcribing audio or audiovisual recordings, was taken to protect the identity of the child witness. However, there are limitations to these types of transcripts. They do not indicate a range of speech attributes that may contribute to the meaning and/or intelligibility of the sentence, such as tone, pace, and volume (Walker, 1993).

Nor is overlapping speech indicated. There were, for example, instances where an alternative question was transcribed as ending with *or*, followed by the child's response, as in Example 7. It is unclear whether the child interrupted the interviewer before s/he was able to provide a catchall category (i.e., "or something else"), or whether the interviewer's speech trailed off and did not provide the catchall. For this reason, utterances like this were excluded from the analysis.

Example 7

Forensic interviewer:	Oh ok so when you were massaging his back where was he, was he sitting or standing or?
Child:	Lying.

The features chosen for analysis were determined in part by these limitations, to ensure a focus on aspects that were likely to be accurately represented in the transcripts, such as question form, the presence of complex features, question sequencing, and interventions. However, the limitations of court and forensic interview transcripts must be borne in mind when interpreting the study's findings.

Conclusion

While the function of the trial may be to determine the truth, the function of cross-examination is to, " ... persuade the jury that there is insufficient evidence to be satisfied beyond a reasonable doubt of the defendant's guilt" (Boyd & Hopkins, 2010, p. 156). In doing so:

> Though it may be an unpleasant task, in child sexual assault cases, defence lawyers are obliged to pit their wits, their learning and experience, against the child ... The central point is that employing all of the techniques of advocacy against a child is normative behaviour in the adversarial system of trial. (Boyd & Hopkins, 2010, p. 157)

The use of closed and leading questions, along with the tactics outlined here, are in keeping with the system's expectations of lawyers; in fact, one defence lawyer asked a series of open-ended questions about the events in question (in keeping with best practice), then was reprimanded by the judge for confusing direct with cross-examination. The use of language that may exceed witnesses' language competencies is another matter altogether and judges have discretion to control complex questions; yet if judges intervened to disallow every complex question, the disruption to the examination would be intolerable.[16]

The present study suggests that overall practice has changed little over the past 14 years in terms of the question types used and tactics; it also suggests that the normative practices of cross-examination are likely to increase the risk of eliciting inaccurate testimony and are in profound conflict with best practice.

The principle of a "fair trial" sits at the centre of the criminal justice system (Boyd & Hopkins, 2010). The challenge is to vigorously protect the accused's right to a fair trial while providing fairness for the child witness by ensuring their testimony is

taken and tested in ways that are appropriate to their linguistic and cognitive competencies; yet these two aims are seemingly in conflict (Boyd & Hopkins, 2010).

The answer to resolving this conflict may lie in exploring alternative ways of examining children. As Boyd and Hopkins (2010) note, videotaping cross- and re-examination of children at a pre-trial hearing may enable judges to disallow improper questions as interventions could be edited out before the evidence is played to the jury at trial, reducing any appearance of favouring one side and allaying fears of appeal should a guilty verdict be returned. Judges would need training on children's language in order to apply controls on inappropriate questioning adequately – and prosecutors should also receive training so they too can recognise and object to poor questions.

Alternatively, it may be that the function of cross-examination could be achieved via other methods, ones which rely less heavily on error-inducing question types and techniques. Having intermediaries put questions to child witnesses instead of counsel was raised as a possibility in a recent judgement of the United Kingdom Supreme Court in relation to the cross-examination of children in wardship proceedings (*Re W* [2010] UKSC12).

Elsewhere the authors have argued that a similar system, where intermediaries (or "specialist child examiners" trained in communicating with children) question children on behalf of counsel, may be feasible in criminal proceedings (see Davies, Henderson, & Hanna, 2010). Protection for the accused could be achieved by conducting the questioning under the control of the judge, with both counsel given opportunity to instruct the specialist child examiner on which lines of questioning they want to be put to the child.

The authors fully appreciate that any notion of replacing traditional cross-examination with an alternative method is likely to be met with scepticism (at the very least) from those who view cross-examination as, " ... the greatest legal engine ever invented for the discovery of truth" (Wigmore, 1974, p. 32). However, the authors have found no empirical evidence to support the view that the standard tactics of cross-examination (such as the use of leading questions) are indeed effective means of discovering the truth, although in the hands of skilled advocates they are no doubt, as noted by the United Kingdom Supreme Court in *Re W* [2010] UKSC12, well suited to casting doubt on witnesses' credibility.

The incorporation of specialist child examiners into an adversarial system would need careful consideration to ensure that the accused's right to a fair trial were in no way jeopardised – in particular, the system would need to be confident that children's testimony *can* indeed be appropriately tested without heavy reliance on leading questions and other such tactics. However, the current system, which pits highly literate professionals against children, is unacceptable and inconsistent with responsibilities to child citizens.

Acknowledgements

This article reports on part of a larger study into child witnesses in New Zealand's criminal courts (Hanna et al., 2010) funded by the New Zealand Law Foundation, Ministry of Social Development, Ministry of Justice, and New Zealand Police. The authors are grateful to the Advisory Group that guided that study for their comments on drafts of the chapter that appeared in Hanna et al. (2010); to administrators at the offices of the Crown Solicitors in Auckland and Christchurch for sourcing and anonymising the transcripts upon which this study was based; and to Dr Robin Hankin of AUT's School of Computing and Mathematical Sciences for his assistance with statistics.

Notes

1. These studies examined how children (5–12 years ($n = 15$) and 5–13 years ($n = 18$

direct and $n = 21$ cross-examinations) respectively) were questioned by prosecution and defence.

2. In New Zealand, children who allege abuse, who are strongly suspected of having been abused, or who have witnessed crime often give their statement to police via video-recorded forensic interview. New Zealand's forensic interviewing service comprises statutory social workers and Police officers who have completed training on communicating effectively with children. Since 1989, taped forensic interviews can be shown at trial as the child's evidence-in-chief.
3. This study examined 12 forensic interviews and 26 direct and cross-examinations by lawyers in 16 trials.
4. "Crown Solicitors are private legal practitioners appointed on the recommendation of the Attorney-General and by warrant of the Governor-General. The Crown Solicitors are appointed for a particular district, usually in a High Court centre, and are responsible for the conduct of indictable trials in the High Court and District Court on behalf of the Crown" (Retrieved from the Crown Law Office website: http://www.crownlaw.govt.nz/).
5. Although young children may understand some types of passive, scholars have suggested that full "control" of this form may not occur until the age of 10–13 or possibly even later, in early adulthood (Walker, 1999).
6. Some utterances contain a matrix *yes/no* question and a subordinated question, e.g., "Can you tell me [what happened next?]". In the vast majority of cases, children answered the question in the subordinate clause. With these question types, the form of question in the subordinate clause was coded.
7. This definition is consistent with s4 of the Evidence Act 2006: "a question that directly or indirectly suggests a particular answer to the question."
8. In all but two cases, each child was examined by at least two different interviewers; a Mantel test was conducted testing the hypothesis that interviewers' questions differed no more between children than to the same child. No significant result was found, consistent with the assumption that differences between questions are driven solely by the interviewer, not the child. We also conducted Mantel tests assessing the hypothesis that the *age* of the child affected the types of questions. While the types of questions posed by forensic interviewers did not significantly differ with age of the child ($p = .323$), there were differences for defence lawyers' ($p = .0176$) and prosecutors' ($p = .0383$) questions; further study would be needed to elucidate how lawyers' questions differed in this respect.
9. Subordinate clauses are not uniformly difficult to comprehend; nor does the presence of multiple subordinate clauses in a single sentence necessarily indicate that the sentence will be difficult to comprehend (consider the nursery rhyme, *This is the house that Jack built*, with its multiple (right-branching) subordinate clauses). However, some utterances contained so many subordinate clauses that they were in all likelihood difficult to unravel. Utterances like this which contain multiple subordinate clauses before the main question (i.e. left-branching) are considered particularly difficult to comprehend (Bailin & Grafstein, 2001).
10. Namely, negative rhetorical and multi-faceted questions, ones with no grammatical or semantic link, sentences containing verbs in the passive and nominalisations, and tag questions.
11. Complex questions were defined in this study as those involving inappropriate negation, embedded clauses, complex vocabulary, complex concepts, unannounced topic shifts, and those involving two or more questions.
12. Complex questions in this study included multipart questions, abrupt changes in topic, legal jargon, complex non-legal language, embedded clauses, inappropriate negation, and references to measurements.
13. A single intervention might involve a single utterance or several in succession.
14. Salhany (2006) is an exception to this tendency.
15. The average delay between the first offence and appearing at trial was 31 months for a sample of New Zealand child complainants ($n = 46$) who testified during 2008–2009 (Hanna, Davies, Henderson, Crothers, & Rotherham, 2010).
16. As noted by one British judge, "You can only interrupt or send the jury out so many times" (Plotnikoff & Woolfson, 2010).

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