

## RETHINKING LEADING: THE DIRECTIVE, NON-DIRECTIVE DIVIDE

*There is a dearth of legal and psychological consideration of leading questions during the trial process. This article argues the current approach to leading questions does not assist or promote the accuracy of witness evidence. Witness here is taken to mean anyone giving oral testimony, whether for the prosecution, defence or indeed the defendant him or herself. We advance a revised definition of leading, differentiating between directive and non-directive questions. Directive questioning is the primary mischief to eliciting accurate witness testimony; we propose here its reform. Non-directive leading is of less concern and should be the leading form open to use in cross-examination.*

### LEADING QUESTIONS ARE IMPORTANT

Leading in cross examination is the imperative of advocacy tuition.<sup>1</sup> Its use is argued necessary to comply with certain rules of evidence, for example, that stipulated in *Browne v Dunn*.<sup>2</sup> The form is taboo in examination-in-chief to elicit all but mundane information. The leading question has,

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<sup>1</sup> See, eg, Iain Morley, *The Devil's Advocate*, 2nd edn (2009), pp. 158–9; Thomas A. Mauet & Les A. McCrimmon, *Fundamentals of Trial Technique*, 3rd edn (2011), pp. 199–200 and Peter Murphy, *Evidence and advocacy*, 4<sup>th</sup> edn (1994) London: Blackstone Press.

<sup>2</sup> *Browne v Dunn* (1893) 6 R. 67 (House of Lords): a cross-examiner must put the nature of his case in full to the witness in cross-examination, to give him or her the opportunity to comment on or explain the contradictory version.

however, received little scrutiny.<sup>3</sup> Its definition, as developed at common law, focuses on the content of the question, failing to account for the significant impact of its form on the witness. Legal definitions do not differentiate between the different forms leading may take, primarily, directive and non-directive, and their effect. The effect is most keenly observed, but not confined, to leading child complainants. The importance of the distinction between form and effect lies in the principle aim of the trial process: the determination of facts deduced from reliable and credible evidence.

#### **LEADING QUESTIONS HAVE BEEN UNDER SCRUTINY AS TO TYPE BUT NOT FORM**

It can be difficult to distinguish leading from non-leading questions owing to the relative nature of leading as a legal concept.<sup>4</sup> Even where it is established that a complainant has been touched, asking "What did he do after he touched you?" suggests that the accused *did* something after and is strictly leading despite being commonly considered non-leading in nature.<sup>5</sup> Whether a question is leading is often dependent upon whether there is a 'less leading' alternative.<sup>6</sup>

#### **FORM IS IMPORTANT**

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<sup>3</sup> *But see* Adrian Keane & Rudi Fortson, 'Leading Questions: A Critical Analysis' [2011] 4 Crim.L.R. 280.

<sup>4</sup> Rupert Cross, *Cross on Evidence*, 12th edn (2010); Adrian Keane & Rudi Fortson, 'Leading Questions: A Critical Analysis' (2011) Crim L R. 280, pp. 289–90, 294. *Cf* Emmett who finds the term confusing and suggests a more appropriate dichotomy is between a question that is leading and one that is objectionable (that is, one that falls within a defined exception): Arthur R. Emmett, 'Examination in Chief and Re-Examination' (1987) 3 *Australian Bar Review* 93, p. 95.

<sup>5</sup> Adrian Keane & Rudi Fortson, 'Leading Questions: A Critical Analysis' (2011) Crim.L.R. 280.

<sup>6</sup> Adrian Keane & Rudi Fortson, 'Leading Questions: A Critical Analysis' (2011) Crim.L.R. 280.

The above definition and approach speaks of content but not form. On this approach there is no distinction between "Did he touch you?" and "He didn't touch you, did he?" Yet the latter, directive form (which will be explained later) is not put as a question at all. It is a statement, submission or suggestion, with an inquisitorial sentiment tacked to some part of the form. Accurate punctuation, reflecting what the advocate wishes the court to hear, would discard the comma for an ellipsis: 'He didn't touch you ... did he?'; 'You're making this up ... aren't you?'<sup>7</sup> It is the statement or 'tag' which resonates — not the inquiry — by way of 'editorial' comments put in the form of questions.<sup>8</sup> These questions lead in content and by form.<sup>9</sup> The form has the greatest adverse impact on witness accuracy, over and above the content. The Court of Appeal in England and Wales has held that commenting during cross-examination of a child witness on their credibility is inappropriate<sup>10</sup> It has gone further in *Lubemba*<sup>11</sup> by suggesting there is no right to put your case to a witness in child cases. However, a broader analysis of the appropriateness of different forms of leading remains ignored.<sup>12</sup>

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<sup>7</sup> See *R v McDonnell* (1909) 2 Cr App R 322 where it was observed that questions put to a defendant in cross-examination ought to be put in an interrogative form — that is, questions commencing with "Did you?" and not "You did".

<sup>8</sup> The duty of the cross-examiner is to ask questions, not to inject 'personal views and editorial comments into the questions': *R v Bouhsass* [2002] 169 CCC (3d) 444, para. 12. The duty is timeless: see *R v Hardy* [1794] 24 Howell State Trials 199, pp. 753–4; *R v Ings* [1820] 33 Howell State Trials 957, p. 999; *Rees v Bailey Aluminium Products Pty Ltd* (2008) 21 VR 478, para. 80.

<sup>9</sup> Wigmore also recognised that leading may be by way of tone or inflexion of voice rather than the form of words used: John Wigmore, *Evidence in Trials at Common Law*, 4th edn (1970) para. 772 (163–4).

<sup>10</sup> *R v Barker* [2010] EWCA Crim 4, para. 42

<sup>11</sup> *R v Lubemba* [2014] WLR(D) 472, [2014] EWCA Crim 206

<sup>12</sup> Cf recent calls for the elimination of 'tag' questions and better training of counsel in England and Wales: Lord Justice of England and Wales, 'Half a Century of Change: The Evidence of Child Victims' (Toulmin Lecture in Law and Psychiatry, 20 March 2013, London) p. 9; Advocacy Training Council, *Raising the Bar* (2011) pp. 37–38.

### **PSYCHOLOGICAL EXPERIMENTS SHOW THAT FORM MATTERS**

Recently Wheatcroft and Woods have sought to identify and define different forms of leading question in such a way as to assist in understanding the effect the different forms have in the courtroom and whether comparative differences in accurate responses from witnesses are evident when different forms are used. They differentiate between directive and non-directive leading questions in cross examination.<sup>13</sup> A directive form is: “the young woman who answered the door had long hair, didn’t she?” The equivalent non-directive form is: “Did the young woman who answered the door have long hair?”

### **THERE IS A DIFFERENCE BETWEEN DIRECTIVE LEADING AND NON-DIRECTIVE LEADING**

The empirical study by Wheatcroft and Woods showed that when directive leading was compared against non-directive counterparts, adult witnesses were significantly less accurate in response to directive form; the form alone produced that result.<sup>14</sup>

### **DIRECTIVE LEADING CAN HAVE SEVERAL EFFECTS ON ACCURACY**

This has important implications for the law. Permitting a questioning form that facilitates exploitation of witness inexperience and reduces accuracy is

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<sup>13</sup> Jacqueline M. Wheatcroft & Sarah Woods, ‘Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence’ (2010) 14 E&P 187.

<sup>14</sup> Graham Wagstaff, Jacqueline M. Wheatcroft, et al., ‘Enhancing Witness Memory with Techniques Derived from Hypnotic Investigative Interviewing: Focused Meditation, Eye-Closure and Context Reinstatement’ (2011) 59 International Journal of Clinical and Experimental Hypnosis 146. *See further* Jacqueline M. Wheatcroft & Sarah Woods, ‘Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence’ (2010) 14 E&P 187.

repugnant to the fact-finding aims of the adversarial process.<sup>15</sup> There should be no place for questions that sideline the search for fact in the trial process.<sup>16</sup> At the very least, there should be no place for questions that impact negatively upon witness accuracy.

Implicit in the cross-examination process is the law's acceptance that witnesses are capable of giving accurate testimony under unusual and stressful conditions. Yet, a single word change in a proposition can affect subsequent responses.<sup>17</sup> Whilst the substance of the question is the same, for a witness unfamiliar with and made anxious by court surroundings,<sup>18</sup> there may be a substantial difference in the effect of asking: "Are you lying?" (non-directive) as compared with "You're lying, aren't you?" (directive).<sup>19</sup>

Leading forms obviously have different effects on different witnesses. However, studies suggest that very few witnesses are able to resist being misled during directive leading. Replication notwithstanding, one study found only five per cent resistance levels.<sup>20</sup> We are not suggesting that all leading questioning be abandoned for cross-examination. Use of leading questions is integral to that task. However, we suggest that the form

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<sup>15</sup> Robyn Layton, Gov. of Sth. Aust., *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (March 2003), p. 15.16; David Caruso and Timothy Cross, 'The case in Australia for further reform to the cross-examination and court management of child witnesses' (2012) 16 E&P 364, Pt I.

<sup>16</sup> See Mark Brennan, 'The Discourse of Denial: Cross-Examining Child Victim Witnesses' (1995) 23 *Journal of Pragmatics* 71.

<sup>17</sup> Elizabeth Loftus & J. C. Palmer, 'Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory' (1974) 13 *Journal of Verbal Learning and Verbal Behaviour* 585.

<sup>18</sup> See Robyn Layton, Gov. of Sth. Aust., *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (March 2003), p. 15.10.

<sup>19</sup> See *R v McDonnell* [1909] 2 Cr App R 322 where it was observed that questions put to a prisoner in cross-examination ought to be put in an interrogative form; commencing "Did you?" and not "You did".

<sup>20</sup> Brian R. Clifford & Jane Scott, 'Individual and Situational Factors in Eyewitness Testimony' (1978) 63 *Journal of Applied Psychology* 352.

permitted must be nuanced because an easy way of contaminating memory (introducing errors) is via directive leading. By directive leading erroneous representation relating to the circumstances of the original incident can be made.<sup>21</sup>

Evidence from psychological studies suggests that questioning in the directive form may negatively affect accuracy, particularly of children, even when the substance of the question is not itself misleading.<sup>22</sup> This should be of concern as child testimony is generally reliable, with little evidence that children ‘make things up’ or supply falsehoods to conceal gaps in memory or knowledge.<sup>23</sup> This is especially so where the questions are tailored to the child’s cognitive development’.<sup>24</sup>

#### **WE RECOMMEND THAT THINGS CHANGE**

We anticipate that the legal professions would have extreme difficulty changing practices ‘fêted’ with such deep cultural significance, at least in the absence of a strong legislative shove.<sup>25</sup> Therefore, the call here is much more than just another way of saying when questioning witnesses you should avoid using tag questions.

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<sup>21</sup> Mark R. Kebbell & D.C. Giles, ‘Some Experimental Influences of Lawyers’ Complicated Questions on Eyewitness Confidence and Accuracy’ (2000) 134 *Journal of Psychology, Interdisciplinary and Applied* 129. *See further* Jacqueline M. Wheatcroft, Graham Wagstaff & Mark Kebbell, ‘The Influence of Courtroom Questioning Style on Actual and Perceived Eyewitness Confidence and Accuracy’ (2004) 9 *Legal & Criminological Psychology* 83.

<sup>22</sup> Rachel Zajac, Julien Gross & Harlene Hayne, ‘Asked and Answered: Questioning Children in the Courtroom’ (2003) 10 *Psychiatry, Psychology and Law* 199.

<sup>23</sup> *See* Susan McNichol, Rosalyn Shute & Alison Tucker, ‘Children’s Eyewitness Memory for a Repeated Event’ (1999) 23 *Child Abuse and Neglect* 1127.

<sup>24</sup> *FAR* [1996] 2 Qd R 49; (1995) 80 A Crim R 358, p. 367.

<sup>25</sup> Emily Henderson ‘Alternative Routes: Accusatorial Jurisdictions on the Slow Road to Best Evidence’ in John R Spencer & Michael Lamb *Children and Cross-examination: Time to Change the Rules?* Hart, Oxford, 2012 at 56-59.

## **THE CRIM PR AND CPD ALSO SUPPORT CHANGE**

Redefining the leading question is a real and effective means of ensuring the cross-examination of witnesses avoids subterfuge in form and enhances substantive accuracy. The ‘overriding objective’ of the 2014 Criminal Procedure Rules ‘is that criminal cases be dealt with justly’.<sup>26</sup> This includes ‘recognising the rights of a defendant’<sup>27</sup> and ‘respecting the interests of witnesses’.<sup>28</sup> It is the duty of each participant in the case, this of course includes advocates, to ‘conduct the case in accordance with the overriding objective’.<sup>29</sup> Thus cross-examination ought to be conducted such that defendants and witnesses are likely to give the most accurate accounts. ‘All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can’.<sup>30</sup> It could be argued that the Crim PR and CPD require non-directive only; thereby, we suggest that the Crim PR and CPD impose an obligation to ask leading questions in a non-directive form.

## **ARGUMENTS AGAINST REFORM**

First, it might be said that an unrestricted leading question is integral to the cross-examiner challenging the witness’ version of events. This article demonstrates that neither the way in which cross-examination is approached by advocates nor empirical study of the effect of leading questions supports such fact-finding aims or outcomes in leading. The use of directive forms of

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<sup>26</sup> Criminal Procedure Rules 1.1(1)

<sup>27</sup> CPR 1.1 2(c)

<sup>28</sup> CPR 1.1(2) (d)

<sup>29</sup> CPR 1.2 (1)(a)

<sup>30</sup> Criminal Practice Directions 2013, 3E.4

leading questions during cross-examination is at odds with psychological findings about the sort of questions that elicit the most accurate answers. Arguing against the viability of leading questions is not an attack on cross-examination.<sup>31</sup> Our proposal does not require advocates to act against their professional duty toward the client and recalls that Wigmore's praise for cross-examination was limited to 'effective' cross-examination. Leading is not the only technique of cross-examination. Although there is a right to cross-examination, there is no, and has never been, a right to lead. The right to confront however has been argued as one that is 'shrinking'.<sup>32</sup> Our proposal recognises balance is necessary.

Second, it may be thought this reform, whether by placing the onus on advocates or by disallowing directive leading, robs the cross-examiner of a vital and long-established tool to advance the client's case. If our argument is accepted, that the reforms achieve a greater degree of witness accuracy and thereby enhance the fact-finding aims of the trial, the limits suggested are justified as serving the fundamental objective of the trial. There has never existed a right to question witnesses in a manner which confuses and renders unreliable their testimony. The proposed reform does nothing to alter the professional obligations owed by advocates to their clients; it does however ensure counsel align their advocacy with methods that promote the tenets of the justice system.

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<sup>31</sup> It is not to contest that '[c]onfrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial': *Lee v The Queen* (1998) 195 CLR 594, p. 602; *Osolin v The Queen* (1993) 86 CCC (3d) 481 (SCC) pp. 516–7.

<sup>32</sup> See Ian Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2010) 4 p .256. 'The range of special measures ..... available to vulnerable and intimidated witnesses is growing and sit in stark opposition to the right. Its "unique" or "special strength" seems a myth', p. 257.

Third, if witnesses can effectively be familiarised against the negative effects of directive forms it may be said that there is little need for reform, but here, we repeat the concern that the justice system should develop to best practices for elicitation of accurate evidence; not leave it to witnesses to combat the system's shortcomings. In any event, the varying methods of preparing witnesses have not been subject to sufficient empirical scrutiny in order to say that previous findings would be replicable and generalisable.<sup>33</sup> Familiarising witnesses is not a straightforward matter – it requires careful specificity to a whole range of potentially relevant factors (that is, witness type, questioning, and case typology, to mention a few). Familiarising witnesses to cross-examination is in its infancy – prohibiting directive leading will *immediately* aid witnesses and refine court process to meet trial goals.

Fourth, it might be argued that the proposal hinders compliance with the rule in *Browne v Dunn*. But we suggest that fulfilment of the requirements in *Browne v Dunn* do not require leading questions, as *Barker* implicitly acknowledges in holding that comment on the credibility of the child witness may need to wait until after cross-examination.<sup>34</sup> In any case, the reform proposed restricts only the *form* of leading.

Finally, the reform might be argued to have a marginal impact on witness accuracy. Recognition, management of and response to the trauma of the witness recounting their experiences, in a hostile environment, feeling

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<sup>33</sup> See Jacqueline Wheatcroft & Louise Ellison 'Evidence in Court: Witness preparation and cross-examination style effects on adult witness accuracy' (2012) *Behavioral Sciences & the Law*, 30, 821.

<sup>34</sup> *R v Barker* [2010] EWCA Crim 4, para. 42.

naturally anxious and faced with complex questions is a product of the trial experience regardless of cross-examination techniques. Progress has already been made to address such issues through, for example, video-recording of evidence, video recording of cross-examination, giving evidence via live-link from outside the court room, cross-examination facilitated by intermediary, as well as prohibiting cross-examination of vulnerable witnesses by the accused.<sup>35</sup> Through informing the child to alert the intermediary to any difficulties they may have the intermediary can then advise the court of any difficulty or distress the child experiences whilst testifying. Our proposal here is one of many needed to enhance the accuracy of witness evidence,<sup>36</sup> and would be in line with other procedural protocols witnesses encounter. Nevertheless, as the primary technique employed in cross-examination, leading and the manner in which it is employed have far-reaching consequences. A prohibition on the employment of directive leading is a reform which will promote systemic change.

## CONCLUSION

If the ‘credibility of the trial system ultimately depends on performance ... [in the] ... fact-finding task of the courts’,<sup>37</sup> that system cannot tolerate techniques which are in and of themselves proven to reduce a witness’ ability to recall facts. Nor can it tolerate the reluctance or inability of

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<sup>35</sup> See eg Youth Justice and Criminal Evidence Act 1999 (UK), including S. 28; David Caruso and Timothy Cross, ‘The case in Australia for further reform to the cross-examination and court management of child witnesses’ (2012) 16 E&P 364, Pt II.

<sup>36</sup> Advocacy Training Council, *Raising the Bar* (2011) pp 37-38.

<sup>37</sup> Australian Law Reform Commission, *Evidence*, Rep. No 38, (1987), para. 46.

advocates to abandon or modify traditional cross-examination techniques.<sup>38</sup> To differentiate between the directive and non-directive forms of leading questions is to separate the harmful from the acceptable and useful elements of the leading question. A prohibition on the directive leading question reduces the leading question to a form unlikely to confuse, leaving the witness' testimony to be tested, rather than their wit or ability to cope with pressure.

Improvement to the fact-finding processes permitted by cross-examination begs the corollary question - should the redefined leading question be allowed in examination-in-chief? Assessing the impact of the proposed reforms on examination-in-chief necessitates a distinct enquiry from that required for cross-examination. This is not least because leading as a whole is prohibited in examination-in-chief. We have focussed on the form of leading; taking as read the leading nature of the question's substance. In order to test the corollary proposition comparison must be made between the degrees of accuracy in open form question as against non-directive leading forms.<sup>39</sup> A case, if any, for allowing non-directive leading in examination-in-chief is a topic for another time; but a few points can be briefly made.

The reasons proffered for disallowing leading questions in examination-in-chief have been varied. Two of the more important reasons have been memory manipulation and the likelihood of agreement by reason

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<sup>38</sup> Adrian Keane, 'Cross-Examination of Vulnerable Witnesses - Towards a Blueprint for Re-Professionalisation' (2012) 16 E&P 175.

<sup>39</sup> Wheatcroft is currently investigating this issue.

of personal factors, other than bias<sup>40</sup> and trickery (that is, by way of implicit leading, which Keane defines as assuming the existence of facts yet to be established by the witness).<sup>41</sup>

Keane and Fortson question the relevance of these reasons for modern continuance of the prohibition.<sup>42</sup> The trickery rationale is questionable as questions based on facts yet to be established may be criticised for relevance beyond their characterisation as leading in nature. It is also unlikely that an examiner-in-chief would intend to trick a witness who is more often than not favourable to them.

The memory manipulation and likelihood of agreement rationale are to some extent overcome by what we have discussed herein regarding non-directive leading. Non-directive leading fosters the witness' ability to tell their own story. It is therefore less likely to manipulate memory and put words into the mouth of the witness than it is to promote recollection of detail by the witness through non-directive prompting. However, as we note, comparison between this and the open form is required.

In sum, the law's understanding of the leading question needs refinement and revision. On the basis of psychological evidence and advances of science, redefinition of the leading question<sup>43</sup> *will* enhance the fact-finding aims of the trial process through confining its use in cross-

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<sup>40</sup> Adrian Keane & Rudi Fortson, 'Leading Questions: A Critical Analysis' (2011) 4 Crim. L. Rev. 280, 283.

<sup>41</sup> Adrian Keane & Rudi Fortson, 'Leading Questions: A Critical Analysis' (2011) 4 Crim. L. Rev. 280, 285. The remaining justifications are: the likelihood of agreement by reason of bias; eliciting only favourable evidence; adverse impact on the deliberations of the jury (namely, their assessment of the witness' credibility).

<sup>42</sup> Adrian Keane & Rudi Fortson, 'Leading Questions: A Critical Analysis' (2011) 4 Crim. L. Rev. 280, 294.

<sup>43</sup> A definition of the non-directive leading question is suggested as one which is not interrogative or suggestive and not so restrictive that the form itself increases the likelihood that the response will be consistent with the features of that form.

examination. That need for change poses an opportunity not only to eliminate negative aspects of cross-examination but to enhance other features of the way advocates test oral evidence in the 21<sup>st</sup> century of adversarial litigation.