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“I know it because it happened to me!” Confrontations of children within forensic investigations

Carmit Katz^{a,*}, Zion Barnett^b^a Bob Shapell School of Social Work, Tel-Aviv University, Israel^b Human Services Department, The Max Stern Yezreel Valley College

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ABSTRACT

Confrontations and cross-examination are considered to be a vital stage in forensic investigations; however, laboratory and field studies have systematically shown their adverse effects on children's testimonies. The current field study aimed to assess the strategies utilized, and the frequency with which they are used, in confrontations within forensic investigations involving children following suspected abuse, and to assess their effects on the children's testimonies. The forensic investigations were conducted using the National Institute of Child Health and Human Development (NICHD) Protocol. The transcripts of 224 children aged 4–14, who were referred for forensic investigation following suspected physical or sexual abuse, were analyzed. All the cases included external evidence suggesting a high probability of abuse. The results indicated that confrontations of children were utilized in more than 60% of the forensic interviews, regardless of the child's age. The vast majority of the interviewers' confrontation strategies involved references to the alleged suspects, with the number of confrontations ranging from 1 to 18 per interview. An examination of the children's responses to the confrontations revealed that most of the children insisted on their initial reported testimonies; however, some of the children displayed confusion or fear, and one child recanted the allegation. The discussion addresses how confrontations and cross-examination, as a necessary stage of forensic investigation, can affect children's testimonies, and the implications of these effects for the forensic context.

1. Introduction

Intensive efforts have been made by both researchers and practitioners to assess how a forensic investigation can be carried out in a way that prompts rich, coherent, and accurate testimonies from child victims (e.g., Malloy, La Rooy, Lamb, & Katz, 2011). These intensive efforts have yielded a wide consensus among researchers and practitioners worldwide with respect to a gold standard of best practice for forensic interviews with children (e.g., Lamb et al., 2011). That said, there is also a consensus that confrontations and cross-examination can profoundly contradict best practice (Hanna, Davies, Henderson, & Hand, 2012; Henderson, 2002); in most countries, however, they are perceived as being a core component of the legal process. Confrontations and cross-examination are seen as the obligation to challenge a witness's testimony in order to defend a suspect's most basic rights (Cashmore & Bussey, 1996; Eichelbaum, 1989).

* Corresponding author at: Bob Shapell School of Social Work, Tel Aviv University, Ramat Aviv 69978, Israel.
 E-mail address: carmitkatz@post.tau.ac.il (C. Katz).

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1.1. Forensic investigations in Israel: the current study context

In Israel, children who are alleged victims of abuse face a procedure that derives from the understanding that repeated interrogation and cross-examination can be harmful for children. The Israeli legislature initiated the Law of Evidence Revision (Protection of Children), which was passed by the Israeli Knesset in 1955 (Katz, 2015). This law prioritizes children's well-being over the basic rights of the suspects, and it was initiated to ensure that children would not be traumatized any further than they already had been – by the abuse they underwent – via the forensic process. The law requires that all children who are victims or witnesses of violence be interviewed by a special practitioner ("child forensic interviewer"). The child forensic interviewer is a social worker in the Investigative Interviews Service within the welfare office. Child forensic interviewers are given extensive power in the investigation process and a major role in any trials that follow.

In Israel, the child forensic interviewer is the only person who can interview the child and represent the child's testimony in court; this process overrides the suspect's basic right to a cross-examination of the alleged victim. Intense criticism of the process has resulted in an initiative by the Investigative Interviews Service for the inclusion of an optional phase of confrontations and cross-examination within the first forensic investigation of the child (Katz, 2015). It is important to stress that this phase is not part of the NICHD Protocol; however, forensic interviewers are expected to integrate this phase within their interviews, and when they do not do so they are often questioned about its absence in court. It should be noted that this "cross-examination phase" of forensic interviews is not a substitute for cross-examination in court. In Israel the interviewer decides whether or not the child should go to court. If the interviewer approves, the child testifies and is cross-examined by an attorney. In such cases, the forensic interviewer is permitted to stop the cross-examination at any point based on the assessment of possible damage to the child's well-being. If the interviewer does not approve, he or she testifies instead, but in that case there is a higher demand for corroboration.

An additional clarification relevant in the Israeli context is the nature of the cross-examination phase in the forensic investigation. As will be elaborated upon in the Method section, the questions in this phase are characterized as being forced choice prompts, confronting the children with hypothetical assumptions or external evidence. Nevertheless, the way in which cross-examination is used in this context differs from the way it is used when reported in court studies, where defense lawyers use a variety of questioning strategies with children.

1.2. Previous studies on confrontations and cross-examination

Several studies have explored court transcripts to identify the main strategies used by lawyers during cross-examination. Three main types of cross-examination questions, each of which poses unique challenges for children, were found: questions that challenge the children's credibility, linguistically complex questions, and leading or suggestive questions (Zajac, O'Neill, & Hayne, 2012). The types of questions asked, and the strategies utilized, can pose developmental and emotional challenges for children (Brennan & Brennan, 1988; Davies & Seymour, 1998; Davies, Henderson, & Seymour, 1997; Zajac & Cannan, 2009; Zajac, Gross, & Hayne, 2003, 2012).

In terms of the emotional impact of cross-examination, many have argued that it is a highly distressing process for child witnesses to undergo (Davies et al., 1997; Eastwood & Patton, 2002; Westcott & Page, 2002). Indeed, studies addressing the effects of cross-examination from a child's perspective have found that most children described cross-examination as very distressing (Eastwood & Patton, 2002; Eastwood, Patton, & Stacy, 2000; Prior, Glaser, & Lynch, 1997). In addition to the emotional impact of cross-examination, it can also significantly compromise children's reports, with studies documenting the fact that children do indeed change aspects of their testimonies as a result (Zajac & Cannan, 2009; Zajac et al., 2003). Such changes highlight the inconsistencies in children's testimonies and might lead to a dismissal of their cases. A recent field study that examined questions that challenged credibility in cross-examinations in 62 cases from the Scottish court (Szojka, Andrews, Lamb, Stolzenberg, & Lyon, 2017) reported that 54% of the children's responses included an insistence on their initial reports, a significantly higher number than the rate of responses in which the child backed down (compliant responses) (26.8%).

Given the contribution that these field studies have made to an understanding of the adverse effects of cross-examination, their reliability was then further explored in the laboratory context. Laboratory research has repeatedly shown that children's accuracy decreases markedly when they are interviewed by cross-examination (Righarts, Jack, Zajac, & Hayne, 2015; Zajac & Hayne, 2003, 2006; Zajac, Jury, & O'Neill, 2009). For example, in Zajac and Hayne's (2003) study of cross-examination, it was found that the majority of five- to six-year-old children (85%) changed at least one of their original responses during a cross-examination interview. These changes called into question the children's overall accuracy. Subsequent studies have replicated these findings (Righarts et al., 2015; Zajac & Hayne, 2006; Zajac et al., 2009).

1.3. The current study's context and rationale

The aim of the current study was to explore the frequency with which child forensic interviewers use "cross-examination" in their first investigations with children, the characteristics of their strategies, and the characteristics of the children's responses. Although this type of "cross-examination" differs in nature from the kind of cross-examination that usually takes place in court, the study provided a unique opportunity to explore how confronting children in this manner during their first investigation can impact their testimonies.

All of the forensic investigations were conducted in accordance with the NICHD Protocol which, aside from insuring that the interviews would be conducted in a standardized manner, also allowed for an exploration of cross-examination in a context where

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