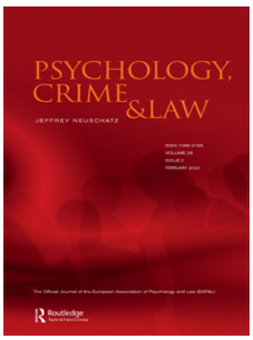

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ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/gpcl20

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To cite this article: Christopher J. Lively, Laura Fallon, Brent Snook & Weyam Fahmy (2022): Objection, your Honour: examining the questioning practices of Canadian judges, Psychology, Crime & Law, DOI: 10.1080/1068316X.2022.2030737

To link to this article: https://doi.org/10.1080/1068316X.2022.2030737

Published online: 31 Jan 2022.

PSYCHOLOGY, CRIME & LAW
https://doi.org/10.1080/1068316X.2022.2030737

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Objection, your Honour: examining the questioning practices of Canadian judges

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ABSTRACT

Judges are the gatekeepers of evidence in the justice system. Granted that witness testimony is pivotal to the truth-seeking function of the criminal justice system, and that judges sometimes intervene and ask questions in the courtroom to help ensure the testimony is accurate, little is known about judges' questioning practices. In the current study, we examine the questioning practices of a sample of Canadian judges. A total of 3,140 utterances spoken by 15 different judges across 22 criminal cases (169 witness examinations) were classified as one of 13 utterance types, and assessed as a function of examination type; utterance and response lengths were also calculated. Results showed that, when talking to witnesses directly, most of the questions asked were clarification (37%), followed by facilitators (17%), and closed yes/no (10%); less than 1% of all question types were open-ended. The longest answers were provided in response to open-ended questions. We also found that closed yes/no questions were the most frequently used question types during judge-led lines of questioning (i.e. examinations *per curium*), as opposed to lawyer-led lines of questioning (i.e. during direct and cross examinations). Implications for the truth-seeking function of the justice system are discussed.

ARTICLE HISTORY
Received 14 June 2020
Accepted 10 December 2021

KEYWORDS
Courtroom questioning; questioning practices; judiciary; judges; truth-seeking

Information and evidence obtained from human sources through questioning is critical for the truth-seeking function of the criminal justice system. In a criminal investigation, police officers question witnesses to find new leads, acquire evidence, and locate perpetrators. When the case goes to trial, lawyers question witnesses to check evidence reliability and ensure due process. In court, judges question witnesses to clarify ambiguities and gather additional information that is thought to be relevant for making the ultimate decision. Although police officers, lawyers, and judges serve different roles, there is uniformity in the need to ensure that the information and evidence used to make consequential decisions are accurate. Research has shown that police officers (Snook et al., 2012; Wright & Alison, 2004) and lawyers (Kebbell et al., 2003, 2004; Lively et al., 2020)

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*This research has been presented, in part, at the 4th North American Correctional and Criminal Justice Psychology Conference, (Halifax, NS, Canada).

do not always ask questions that inoculate witnesses against the frailties of memory (e.g. by asking leading questions). Little research has examined the extent to which judges – the gatekeepers of evidence – adhere to best questioning practices. Thus, the aim of the current study was to conduct a descriptive analysis of judicial questioning practices in the Canadian legal system.

It is well-documented that the way questions are phrased impacts the quantity and quality of the elicited information. A plethora of research has shown that question types that encourage respondents to recall information freely are the best way to obtain accurate and complete information (e.g. Clifford & George, 1996; Davies et al., 2000; Loftus & Palmer, 1974; Memon et al., 1994, 2003; Memon & Vartoukian, 1996; Milne & Bull, 2003; Read et al., 2009; Shepherd, 2007). Specifically, an *open-ended* question (i.e. those that start with *tell*, *explain*, or *describe*; Fisher & Geiselman, 1992; Griffiths & Milne, 2006; Milne & Bull, 2003; but see Farrugia & Gabbert, 2020, for findings relating to the challenges of asking such questions to individuals with learning disabilities or mental health issues) allows respondents to have complete control over the information provision process, which can lead to the provision of unanticipated information and reduces the likelihood that the respondent's account will be tainted by the phrasing of the question. Open-ended invitations have been shown to generate more information than all other question types (Lively et al., 2020; Milne & Bull, 2003; Snook et al., 2012). A *probing* question (i.e. those that start with *who*, *what*, *when*, *where*, *why*, and *how*) is a second type of question that allows respondents to engage in cued recall, encourages them to provide information beyond what was recalled in response to open-ended questions, and is less likely to contaminate provided information due to the phrasing of the question (Griffiths & Milne, 2006).

There is also general scientific consensus that certain question types limit the ability to gather complete information and interfere with the accuracy of the information that is gathered (Fisher, 1995; Oxburgh et al., 2010). Specifically, *closed yes/no* questions request a response in only a yes or no format, thus limiting the amount of information provided by the respondent or the discovery of unanticipated information (Fisher & Geiselman, 1992). *Forced-choice* questions provide the respondent with a few select options – often two – to choose from for their response; these questions limit the responses available and may lead to inaccurate information because of the available choice options (i.e. the factually correct option may not be present; Fritzley & Lee, 2003). Asking *multiple* questions simultaneously can result in confusion on the part of the respondent when deciding which question to respond to first. Furthermore, if an answer is attempted, it may not always be clear which question the answer is paired with, although some research suggests that the last question asked is typically the question that the respondent answers first (Kebbell & Johnson, 2000; Perry et al., 1995). *Leading* questions are those that directly suggest or imply a specific response – normally the response that the questioner wishes to receive, whether or not it is correct – and have the potential to alter an individual's memory for an event through the introduction of post-event misinformation (e.g. Clifford & George, 1996; Loftus & Palmer, 1974; Loftus & Zanni, 1975; see Loftus, 2005, for a review). Aside from the detrimental impact that such questions have on the quality of provided information, responses to these types of questions are also relatively shorter than those elicited using open-ended and probing questions (Lively et al., 2020; Snook et al., 2012).

There are also various other types of questions and utterances for which the nature of the impact on the information gathering process is less clear. One of these types, which has been operationalized in various studies on questioning practices, is the clarification question (Griffiths & Milne, 2006; Milne & Bull, 2003; Oxburgh et al., 2010; Snook et al., 2012). *Clarification* questions, which could also be described as follow up questions, aim to enhance comprehension of previously provided information (Oxburgh et al., 2010). However, some researchers suggest that rather than clarifying as the interview progresses, it may be better to summarize all provided information and clarify issues at the end of a series of questions (Fisher & Geiselman, 1992; Milne & Bull, 2003; see Altmann et al., 2014). Another type of question is the *re-asked* question, which refers to asking the same question repeatedly, presumably as a result of not receiving what is perceived to be a satisfactory answer. Although it is not formally established as a question type based on the existing literature, some researchers have found that re-asking questions induces the respondent to alter their previous response to the initially asked question (Brock et al., 1999; Gilbert & Fisher, 2006; Henkel, 2014; Poole & White, 1991), and others have found that it results in extracting additional information from the respondent (Scrivner & Safer, 1988; Turtle & Yuille, 1994). Re-asked questions differ from clarification questions in that the question is not being asked again to ensure understanding, but rather for some other purpose (e.g. in the courtroom, a lawyer may re-ask a question for effect if the response was pivotal to their case; in a police interview, an officer may re-ask a question because they are not satisfied with the respondent's previous answer).

Other types of non-question utterances used in information-gathering interviews that have not been extensively studied include opinions, commands, statements, and facilitators. *Opinions* involve the questioner providing their personal beliefs or viewpoints and could potentially induce the respondent to integrate this information into their response (Lively et al., 2020). *Commands* simply occur when the questioner requests that the respondent do something (e.g. 'Speak louder'; Lively et al., 2020). *Statements* refer to any declaration of fact that is not in the form of a question (Lively et al., 2020; Snook et al., 2012). *Facilitators* are verbal indicators or encouragements uttered during the interview (e.g. 'mhm', 'okay') and could be considered either detrimental or beneficial to the memory retrieval process depending on the context (Oxburgh et al., 2010; see Table 1 for examples of each of the aforementioned question and utterance types).

Witnesses often first provide information about criminal activity to the police. To ensure that a complete and accurate account is obtained, police interviewers are encouraged to avoid using question types that diminish the amount of information recalled by a witness or contaminate a witness' memory of what transpired. Research has shown that police officers – especially those that are not trained in proper interviewing practices – tend to ask questions that reduce memory performance more than those that enhance it (e.g. Clifford & George, 1996; Davies et al., 2000; Fisher et al., 1987; Myklebust & Alison, 2000; Snook et al., 2012; Snook & Keating, 2011; Walsh & Milne, 2008; Wright & Alison, 2004). Such research has raised concerns about the quantity and quality of information being gathered for investigative purposes; it is those same concerns that lead lawyers to challenge police interview evidence in court, and sometimes go as far as arguing that poor interviewing practices are a form of negligence (see e.g. *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007). Challenging the quality of

Table 1. Descriptions and examples of utterance types coded.

Utterance Type and Description	Example
Open-ended Invites witness to recall answers freely from memory.	'Tell me about the party you attended.'
Probing Invites witness to recall answers from memory using cued recall.	'When did you first notice the fight?'
Closed yes/no Tap into witness' recognition memory, and typically answered with a 'yes' or 'no' response.	'Did you drink alcohol?'
Forced-choice Offers the witness a limited number of response options.	'Did you kick or punch the man?'
Multiple Many questions simultaneously without giving the witness a chance to respond.	'How many people were at the party? Did you know anyone there? How much did you drink at the party?'
Leading Suggests/implies a desired answer to witness embedded in question.	'You were drunk, right?'
Re-asked Repeating a question previously asked and answered.	Judge: 'What happened to the cell phone?' Witness: 'I cannot remember.' Judge: 'Come on now, *what happened to the phone?*' (re-asked utterance emphasized)
Clarification Duplicating or paraphrasing the answer that the witness has given back as a question.	Witness: 'John said he went to a party.' Judge: 'Okay, *so John went to a party*?' (clarification utterance emphasized)
Opinion Providing a personal belief related to the allegations before the court.	'I think you assaulted Kirk when you saw him.'
Command Giving a directive or telling the witness to do something.	'Speak up, please'
Statement A declaration of fact not in the form of a question.	'That water is there for you, Mr. Barron'
Facilitator Verbal gestures that encourages the flow of conversation.	'Um-hmm', 'Yes', 'Okay'
Incomplete Utterance is interrupted or cut off by another speaker or witness. Also applied when utterances are transcribed as '(inaudible)' or '(unintelligible)' in transcript.	'So how often would you –'

police evidence because of the way it was obtained can lead to dismissal of said evidence and impact judicial decisions.

An emerging body of evidence also suggests that lawyers' questioning practices to witnesses are sometimes substandard. Specifically, research has shown that lawyers tend to ask questions that may be interfering with information and evidence gathering (e.g. closed yes/no) at a much higher rate than questions that improve that process (e.g. open-ended; Kebbell et al., 2003, 2004; Lively et al., 2020; Zajac & Cannan, 2009; see also Zajac et al., 2018, for an examination of the changes to courtroom questioning practices for child witnesses). Research has also shown that lawyers' questioning practices are particularly problematic during cross examinations (vs. direct examinations; Kebbell et al., 2003, 2004) and when the questioner is a defense attorney (vs. prosecutor; Zajac & Cannan, 2009; but *cf*. Lively et al., 2020). This is concerning given that such question styles have been shown to confuse witnesses and impair their ability to provide complete and accurate accounts (see Wheatcroft et al., 2004; also see Ellison & Wheatcroft,

2010 on the impact of courtroom questioning and pre-trial preparation on testimony accuracy).

Collectively, the research literature on how police officers and lawyers ask questions demonstrates that, broadly, the quality and quantity of evidence and information that is being used by triers of fact to make consequential decisions is not as high as it could be (e.g. Kebbell et al., 2003, 2004; Lively et al., 2020; Snook et al., 2012; Snook & Keating, 2011). It is worth noting that, on the surface, these two witness-questioning contexts are distinct because courtroom examinations have a different purpose than do police interviews. However, both police officers and lawyers are seeking the truth and engaging in the same task of extracting information from human memory, and when necessary, challenging those recollections. Furthermore, the process that is used to extract that information from witnesses is the same – in both settings, the information and evidence are gathered through asking questions. What is more, the questioning practices of both police officers and lawyers are subject to scrutiny by the same courtroom authority – the judge.

If the fairness of a trial is at risk, a judge is expected to mitigate concerns in an impartial manner (Pound, 1959). This judicial duty extends to situations where improper questions are posed to witnesses, either by a police officer prior to the trial, or by a lawyer at trial (Pattenden, 1990). When police officers ask inappropriate questions, a *voir dire* can be held to determine whether or not statements should be admitted into court as evidence (Pearse & Gudjonsson, 1999). The remedy for inappropriate lawyer questioning, in contrast, will often come in the form of judges addressing the other parties in the courtroom. For instance, judges will address the jury to prevent questions from misleading them and will also interact with the lawyers to ask them to simplify their questioning style, ensure the witnesses' understanding, clarify their questions, or tell them to avoid oppressing the witness (O'Kelly et al., 2003). In short, the judge is deemed the authority when it comes to governing the questioning practices of the other legal professionals in the courtroom.

It is important to note that in adversarial systems, judges are never the primary questioners in a criminal bench trial, but that they do sometimes intervene by questioning the witness directly. Judges may also intervene in order to simplify a question that was asked previously by a lawyer, give the witness advice or direction, or ask questions that were not asked by the lawyer(s) (O'Kelly et al., 2003). Judges sometimes ask questions to a witness during direct and cross examinations, or perform their own examination of the witness; this is, in Canada for example, referred to as an examination *per curium* (Rules of the Supreme Court of Canada, 2002).[1] While the questioning by judges is an important component of the criminal justice process, it is unclear whether or not their questioning practices achieve the standards of best practice (to which police officers and lawyers might be expected to adhere). If judicial questioning is substandard, it would impact the quantity and quality of information collected during a trial. This may also suggest that judges' knowledge of the effect of questioning practices on evidence quality is also substandard, which could impact other consequential decisions (e.g., statement voluntariness).

Although there is a dearth of research on how judges ask questions, there is some evidence to suggest judicial ideologies can affect their questioning practices. For instance, Tracy and Parks (2012) analyzed transcripts of court cases dealing with same-sex marriage issues and found that judges who were in support of same-sex marriage tended to ask harsher questions to state attorneys (i.e. those arguing against the practice). They also

found that judges who wereagainst same-sex marriage asked harsher questions the plaintiff's attorneys (i.e. those arguing in favor of the practice; also see Tracy, 2016). Furthermore, Philips (1998) purported that judges with a more liberal ideology tend to ask more open-ended questions, whereas more conservative-leaning judges asked more closed-ended questions. There is also research demonstrating that, in areas other than courtroom questioning, judges can be influenced by external factors and may stray from best practice. For instance, when dealing with the angle of the camera in a suspect interview (Lassiter et al., 2007), the impact of coercion on sentencing decisions (Wallace & Kassin, 2012), disregarding inadmissible evidence (Wistrich et al., 2005), and letting cognitive illusions influence decisions (e.g. anchoring, hindsight bias; Guthrie et al., 2002), it seems that expertise does not protect judges from falling victim to the biases that plague laypeople. These findings, combined with the previous work demonstrating that other actors in the justice system (i.e. police officers, lawyers) fail to adhere to questioning best practices, suggest that a new line of research examining judges' questioning practices is warranted.

The current study

The goal of the current study was to examine the question types that judges use when questioning witnesses. Using archival data from the Supreme Court of Newfoundland and Labrador in St. John's, NL, Canada, a sample of utterances spoken by judges to adult witnesses was coded for the type of utterance spoken. Similar to the approaches used by Kebbell et al. (2003, 2004) and Lively et al. (2020), the current study also aimed to specifically explore how questions asked by judges in the courtroom change as a function of examination type. An extensive body of literature indicates that police officers and lawyers tend to use ineffectual question types more frequently than effective ones; more specifically, research shows that productive types of questions such as open-ended questions are used much less than unproductive questions, and are rarely used overall (less than 5% of all questions asked; see Lively et al., 2020; Snook & Keating, 2011; Wright & Alison, 2004; Zajac & Cannan, 2009). Much of this previous research has also found that asking effective questions (i.e. open-ended, probing) produces more information from witnesses (e.g. Kebbell et al., 2004; Lively et al., 2020; Snook et al., 2012). Thus, based on the aforementioned literature, we made the following predictions:

> Hypothesis 1: Open-ended questions will be asked infrequently to witnesses.
>
> Hypothesis 2: Unproductive questions (i.e. closed yes/no, forced choice, multiple, leading) will be asked more frequently to witnesses than productive questions (i.e. open-ended, probing).
>
> Hypothesis 3: Productive questions (i.e. open-ended, probing) will produce the longest witness responses, whereas unproductive questions (e.g. closed yes/no, forced-choice, multiple, leading) will produce the shortest witness responses.

Given that judges are meant remain impartial, regardless of the type of examination being conducted and that no previous research has examined judicial questioning as a function of examination type, we refrained from making predictions about the impact of examination type on the types of questions asked by judges.

Method

Sample

A convenience sample of 22 courtroom transcripts were obtained from the Supreme Court of Newfoundland and Labrador in St. John's, NL, Canada. All were criminal cases heard at the Supreme Court of Newfoundland and Labrador between 1991 and 2015, and involved a wide range of crimes (see Table 2). A total of 15 different judges presided over the cases; seven of those judges presided over two cases each. Fourteen (93.33%) of the judges were men.

A total of 169 witness examinations were extracted from the 22 cases. On average, 7.68 (*SD* = 4.65, *Range* = 2–19) examinations were extracted from a single court case. Across all cases, 81 different witnesses were examined on the witness stand; seventy-eight (96.30%) of these witnesses underwent a direct examination (i.e. conducted by the lawyer who called the witness to the stand), 73 (90.12%) underwent a cross examination (i.e. conducted by the opposing lawyer), and 18 (22.22%) underwent an examination *per curium* (i.e. conducted by the judge). In terms of witness type, 32 (39.51%) were eyewitnesses, 26 (32.10%) were police officers, 13 (16.05%) were the accused, eight (9.88%) were victims, one (1.23%) was an expert witness, and one (1.23%) was a character witness. Fifty-one witnesses (62.96%) were men. The mean number of examinations conducted by each of the 15 judges was 11.27 (*SD* = 6.63, *Range* = 2–24).

Design and coding

The current research consisted of an analysis of archived courtroom transcripts using a quasi-experimental design. The objectives of the current research were to provide a descriptive analysis of the type of utterances spoken by judges to witnesses, and to

Table 2. Breakdown of cases by crime type (*N* = 22).

Crime Type	Frequency (*Total*) (Subtotal)
Drug-Related	*6*
Trafficking	5
Production of a controlled substance	1
Assault-Related	*5*
Assault	2
Aggravated Assault	2
Assault with a Weapon	1
Sex-Related	*4*
Sexual Assault	3
Sexual Interference	1
Firearms-Related	*2*
Unlawfully Discharging a Firearm	1
Pointing a Firearm	1
Motor-Vehicle Related	*2*
Dangerous Operation of a Motor Vehicle	1
Impaired Driving	1
Homicide	*1*
*Unknown Crime Type**	*2*

Note. * = Two cases did not provide sufficient details within the available court transcripts to be able to classify the type of offences being tried before the court.

examine the extent to which utterances vary as a function of examination type (i.e. direct examination, cross examination, examination *per curium*). To achieve these objectives, a 16-item coding guide and associated content dictionary was author-constructed (based on the previous works of Kebbell et al., 2003, 2004; Lively et al., 2020; Snook et al., 2012; Zajac & Cannan, 2009; a copy of this coding guide can be obtained by visiting https://osf.io/n67fz/?view_only = ecf50407e8dc472ca44d7696279444e7). The following five trial/demographic variables were coded: judge gender (1 = *male*, 2 = *female*), examination type (1 = *direct*, 2 = *cross,* 3 = *per curium*), witness type (1 = *victim*, 2 = *eyewitness*, 3 = *police officer*, 4 = *accused*, 5 = *character*, 6 = *expert*), witness gender (1 = *male*, 2 = *female*), and the year that the trial took place. Every utterance spoken by a judge in each examination was assigned an identification number and classified as having one of three purpose types: case focused (i.e. utterances asked or directed to the witness about facts of the case), administrative in nature (i.e. utterances asked or directed to the lawyers about procedure), or having an unknown purpose (i.e. used for facilitators and incomplete utterances); utterances classified as having an unknown purpose were also sub-classified into whether they were spoken to a witness or to another courtroom player (e.g. lawyer, courtroom clerk). Only utterances spoken by a judge when the witness was testifying on the stand were coded mutually exclusively as one of 13 utterance types. A breakdown of the coding classification system is shown in Table 1. The total number of words spoken by judges and witnesses were calculated by using the word count feature in Microsoft Word 2016.

Inter-rater reliability

Coding of all 169 examinations was shared among three of the authors. The first and second authors coded 126 examinations; the second and fourth authors coded 22 examinations; and the first and fourth authors coded 21 examinations. The first author provided training on the coding guide and dictionary to the second and fourth authors. Any confusion or questions pertaining to the coding guide and dictionary were discussed and resolved during training. After training, all coders practiced coding on a set of courtroom examinations not included in the current sample. It should be noted that two of the coders (second and fourth authors) did not join the project as contributing authors until after the coding and data analysis were conducted, and thus they were not aware of the hypotheses during the coding process.

Reliability of the data were measured by collapsing across coders and calculating an overall Cohen's kappa (κ) value (Cohen, 1960). As a result, substantial inter-rater agreement was achieved for classification of both utterance type (Cohen's $\kappa = .69$; 95% *CI* = .68, .71) and purpose type (Cohen's $\kappa = .81$; 95% *CI* = .80, .83). Inter-rater agreement was high for decisions regarding whether the facilitators/incomplete utterances (i.e. utterances labeled as purpose unknown) were spoken to witnesses versus other courtroom persons (Cohen's $\kappa = .98$; 95% *CI* = .97, .99; Cohen, 1960; Landis & Koch, 1977). After reliability was calculated, disagreements were resolved through discussion between all three raters.

Data analytic plan

For our analyses, we quantified judges' utterances as a proportion (i.e. mean percent) of utterances spoken during each witness examination (Kebbell et al., 2003, 2004; Lively

et al., 2020; Snook et al., 2012; Zajac & Cannan, 2009). Frequency analyses were conducted to determine the number of unique utterances. Descriptive analyses of the proportion of utterance types were conducted for utterance types overall, for utterance types spoken to witnesses only, and also as a function of examination type (i.e. direct examination, cross examination, or examination *per curium*). Our main analyses applied a multivariate analysis of variance test, using each unique utterance type (i.e. dependent variable) to examine for any differences as a function of examination type (i.e. independent variable). Mean word length for each utterance type spoken by a judge was calculated and compared to the length of all other utterance types; mean word length was also calculated for all witness responses and compared to the length of responses for all other utterance types.

We chose to express the magnitude of any significant differences found (i.e. effect sizes) as Cohen's *d* (Cohen, 1988). Cohen's *d* is used to determine if comparative results have meaningful differences. For ease of interpretation, Cohen proposed four levels of effect sizes: no effect ($d \leq 0.19$; no practical significance); a small effect ($0.20 \leq d \leq 0.49$; low practical significance); a medium effect ($0.50 \leq d \leq 0.79$; moderate practical significance); and a large effect ($d \geq 0.80$; high practical significance).

Results

Across 169 witness examinations, 3,140 utterances spoken by a judge were coded. Overall, the average number of utterances spoken by a judge per examination was 18.57 ($SD = 28.88$, *Range* = 1–191, 95% *CI* = 14.19, 22.96). The distribution of the overall utterance types is shown in Figure 1. As can be seen, the most common utterance type spoken overall, on average, was commands ($M = 29.45$, $SD = 30.91$), followed by statements ($M = 21.98$, $SD = 21.02$) and clarification questions ($M = 14.75$, $SD = 17.81$). Collectively, open-ended and probing questions accounted for fewer than 5% of all utterances spoken.

Since our main interest pertained to how judges questioned witnesses, a total of 1,644 utterances were removed because they were directed to other individuals (e.g. lawyers or courtroom clerk). As a result, 1,496 utterances remained that were spoken directly to the witnesses, which corresponded to 20 cases, and 113 witness examinations; all 15 judges were retained.

Utterance type

The distribution of the utterance types spoken to witnesses only is displayed in Figure 2. As can be seen, the most common utterance type spoken to witnesses, on average, was clarification questions ($M = 36.63$, $SD = 29.95$), followed by facilitators ($M = 16.76$, $SD = 24.65$); one judge did not ask any clarification questions and all judges uttered at least one facilitator. Closed yes/no questions comprised 9.95% of all utterance types ($SD = 14.39$); four judges did not ask any closed yes/no questions. Forced-choice questions comprised 1.40% of all utterance types ($SD = 5.63$); five judges did not ask any forced-choice questions. Multiple questions comprised 3.15% of all utterance types ($SD = 7.87$); five judges did not ask multiple questions. Leading questions comprised 7.61% of all utterance types ($SD = 14.42$); three judges did not ask any leading questions. Collectively, less than 10% of utterances spoken to witnesses-only were open-ended ($M = 0.06$,

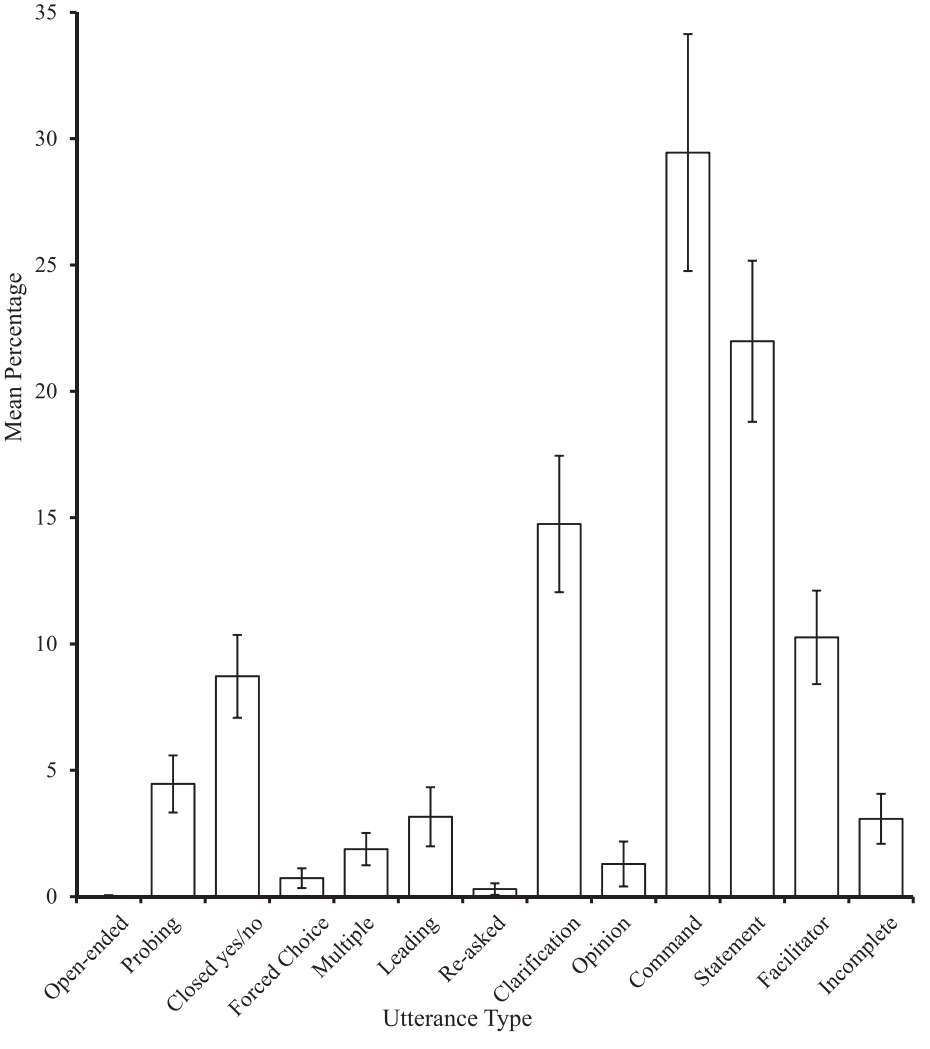

Figure 1. Mean overall percentage of utterance type and associated 95% confidence intervals per witness examination ($N = 169$).

SD = 0.51) and probing (*M* = 8.35, *SD* = 14.52) questions; thirteen judges did not ask any open-ended questions, and four judges did not ask any probing questions. Taken together, the aforesaid results illustrate that open-ended questions were asked infrequently, rendering support for Hypothesis 1, and unproductive questions were asked more frequently than productive questions, rendering support for Hypothesis 2.

When analyzed across examination type, 886 (59.22%) of the utterances spoken to witnesses occurred during a direct examination, 366 (24.47%) occurred during a cross examination, and the remaining 244 (16.31%) occurred during an examination *per curium*. Direct examinations contained, on average, 16.72 (*SD* = 27.41, 95% *CI* = 9.16, 24.27) utterances spoken to witnesses, cross examinations contained, on average, 8.71 (*SD* = 13.59, 95% *CI* = 4.48, 12.95) utterances, and examinations *per curium* contained, on average, 13.56 (*SD* = 12.58, 95% *CI* = 7.30, 19.81) utterances; a one-way analysis of variance revealed

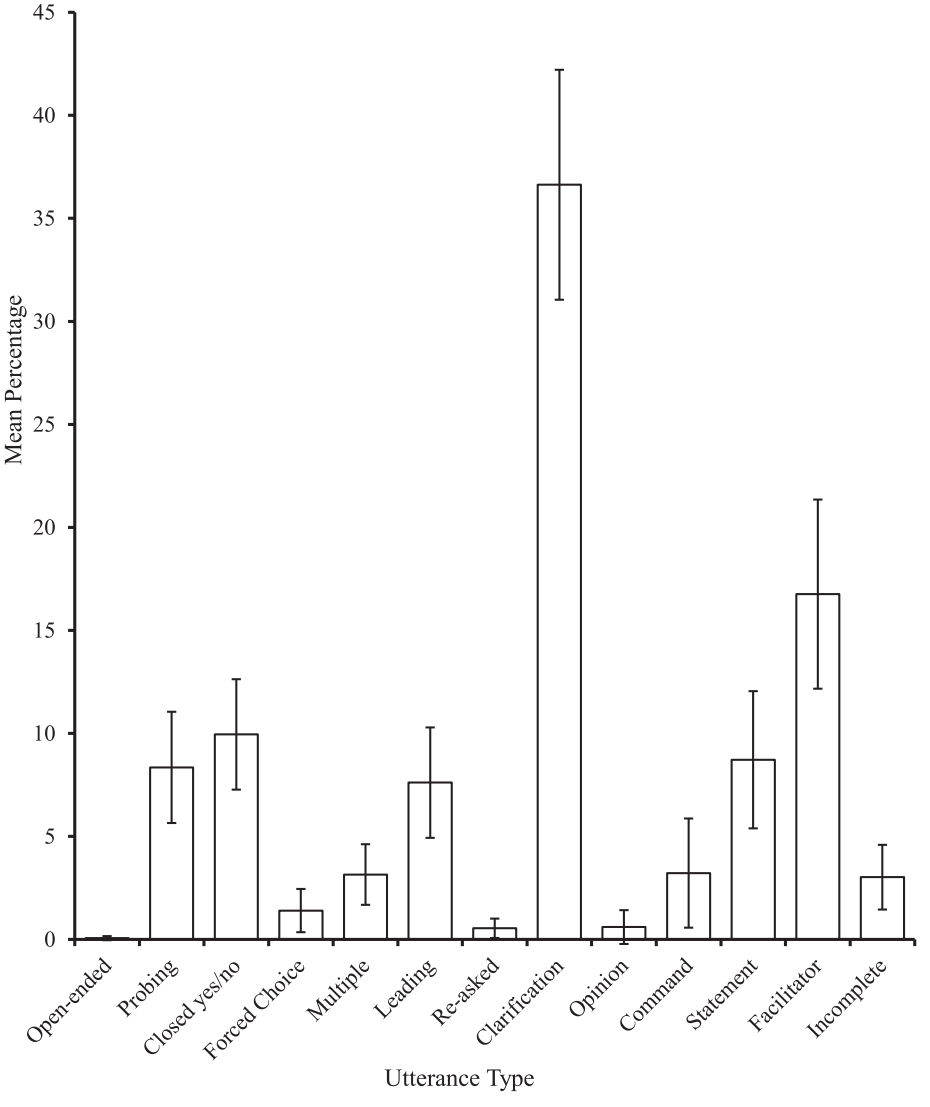

Figure 2. Mean percentage of utterance type spoken to witnesses-only and associated 95% confidence intervals per witness examination ($N = 113$).

that there were no significant differences in the number of utterances spoken by judges as a function of examination type, $F(2, 110) = 1.675$, $p = .19$, $d_{Range} = 0.13–0.37$.

A multivariate analysis of variance – using the proportion of all utterance types as the dependent variables, and the examination type as the fixed factor – revealed significant differences across examination type for closed yes/no questions, $F(2, 110) = 13.842$, $p < .001$, and multiple questions, $F(2, 110) = 3.406$, $p < .04$. Specifically, examinations *per curium* contained more closed yes/no questions than both direct ($d = 1.35$) and cross examinations ($d = 1.21$). Examinations *per curium* also contained a larger proportion of multiple questions than both direct ($d = 0.75$) and cross examinations ($d = 0.52$). The multivariate analysis of variance revealed no other significant differences across

examination type for any of the remaining utterance types, all $ps > .18$, $d_{Range} = 0.01–0.50$. Descriptive data can be obtained by contacting the corresponding author.

Utterance and response lengths

Analysis of the length of judge utterances and witness response showed that multiple questions contained, on average, the most words when spoken by a judge ($M = 18.32$, $SD = 12.29$); this was followed by forced-choice questions ($M = 16.85$, $SD = 14.30$), and statements ($M = 15.47$, $SD = 16.16$), respectively. Facilitators comprised the least number of words ($M = 1.2$; $SD = 0.63$), followed by incomplete utterances ($M = 6.56$, $SD = 7.27$). Judges used, on average, 10.00 ($SD = 2.83$) words when asking open-ended questions, and 8.54 ($SD = 6.76$) words when asking probing questions. Leading questions contained, on average, 11.60 ($SD = 7.05$) words.

In terms of witness response length, it was expected that productive questions, namely open-ended and probing questions, would produce longer responses than unproductive questions (Hypothesis 3). Open-ended questions resulted in the longest responses, with an average of 53.50 ($SD = 72.83$) words per response. The second longest responses, on average, occurred after facilitators were used ($M = 24.74$, $SD = 47.96$) and commands were given ($M = 19.17$, $SD = 29.02$). Probing questions elicited, on average, 9.27 ($SD = 12.03$) words per response. The shortest replies were provided in response to opinions ($M = 3.33$, $SD = 1.16$), followed by closed yes/no questions ($M = 8.50$, $SD = 11.90$), and statements ($M = 8.66$, $SD = 14.86$). Witnesses' responses to leading questions were, on average, 9.58 ($SD = 22.05$) words. Consequently, these findings confer partial support of Hypothesis 3.[2]

Discussion

The goal of the current study was to examine how Canadian judges phrase questions to witnesses on the stand. Our main finding was that judges use question types that are misaligned with what is recommended for eliciting complete and accurate information from witnesses – a finding that echoes similar research on the questioning practices of other legal professionals (e.g. Lively et al., 2020; Snook et al., 2012). Although we found that judges asked clarification questions most frequently to witnesses, they rarely asked effective questions (i.e. open-ended and probing). Disconcertingly, judges used ineffective question types (i.e. closed yes/no, forced-choice, multiple, and leading) almost three times as often as effective question types. We also found that judges asked more closed yes/no questions, and more multiple questions, in examinations *per curium* than in both direct and cross examinations. Broadly, these findings raise concerns that judges, as the gatekeepers of the court, may not be protecting the integrity of the information gathering process as well as one might expect, and may actually be contributing to the degradation of witness evidence in some instances.

Utterance type

On a positive note, we found that judges asked clarifying questions more than twice as often as any other question or utterance type. Such a finding was also expected

because, unlike lawyers whose primary purpose in the courtroom is to question witnesses, judges oversee the court as a whole and are not responsible for the main lines of questioning – at least in adversarial court systems. Judges typically only interject when they have procedural matters to address (e.g. matters related to adjourning a session, instructing the witness to answer a question or speak into the microphone) or when requesting further information from the witness (O'Kelly et al., 2003). Thus, it makes sense that judges would attempt to seek clarification frequently. To reiterate, seeking clarification is likely a good practice because it can enhance comprehension of information previously provided by the witness (Oxburgh et al., 2010), which may aid triers of fact in making a fair verdict. However, it is worth cautioning that some researchers advocate for the clarifying of information at the end of a witness' testimony rather than throughout the questioning process to avoid interrupting memory retrieval processes (e.g. Fisher & Geiselman, 1992; Milne & Bull, 2003; see Altmann et al., 2014); thus, it is not entirely clear whether or not asking clarification questions is always a positive practice.

Open-ended and probing questions accounted for less than 10% of all judicial utterances spoken to witnesses. Specifically, we observed that open-ended questions were used very infrequently by judges (i.e. less than one percent of all witness-directed utterances, a finding similar to that of studies examining questioning practices of other legal professionals; e.g. Lively et al., 2020; Snook et al., 2012), thus, confirming support for Hypothesis 1. These findings are concerning because decades of research have demonstrated that asking open-ended questions, along with follow-up probing questions, is the optimal way of helping witnesses directly, and uninhibitedly, provide information of their own volition (Fisher & Geiselman, 1992; Milne & Bull, 2003; Powell et al., 2005). Moreover, inviting witnesses to provide information in an open manner protects the questioner from tainting the reported information.

Judges used nearly three times as many ineffective question types as effective question types, thereby supporting Hypothesis 2. Closed yes/no question types were commonly used, which is consistent with previous findings on how police officers and lawyers ask questions (e.g. Lively et al., 2020; Snook et al., 2012; Snook & Keating, 2011; Wright & Alison, 2004; Zajac & Cannan, 2009). Surprisingly, the judges in our study asked leading questions almost as frequently as closed yes/no questions, albeit both question types uniquely made up less than 10% of all utterance types. Compared to the question types used by lawyers (e.g. Lively et al., 2020), our sample of judges asked leading questions less frequently. This is interesting considering that prior to being appointed to the bench, all judges in Canada were once lawyers themselves. Initially, one might have thought that the style of questioning practices as a lawyer would continue in a similar pattern as a judge – after all, training related to how to conduct a line of questioning in the courtroom would be the same for both lawyers and judges. However, our data suggests otherwise, at least for judges in this sample. Given that lawyers aim to encourage witnesses to provide information that matches their account of events, it is to be expected that lawyers would ask a higher proportion of leading questions than judges, who are expected to be impartial and objective gatekeepers of due process. The difference in the proportion of leading questions may also be accounted for by the difference between the amount of questioning time allocated to the judge compared to lawyers. In other words, judges speak much less frequently and when they do speak outside of examinations *per curium*, it appears to only be for specific instances and for a short period of time.

Although caution should be used when comparing these groups due to contextual differences, it should be pointed out that judges asked leading questions more frequently than police officers (e.g. Snook et al., 2012; Snook & Keating, 2011). This is somewhat perplexing, considering that some judges have lambasted police officers for their inappropriate use of such questioning practices, and have highlighted how such practices can lead to miscarriages of justice (e.g. false confessions). For example, specific recommendations from the *Report on the Prevention of Miscarriages of Justice* (FPT Heads of Prosecutions Committee Working Group, 2004) suggested that police officers need to make greater efforts toward preventing any contamination of witness evidence through unnecessarily communicating privy information to the witness (i.e. recommendation 103; e.g. asking leading and closed yes/no questions). Although both judges and police officers are expected to remain objective when questioning witnesses, judges have authority over police officers, rule on objections pertaining to question quality, and at times are directly involved in evaluating police interviews – sometimes even refusing to admit witness statements as evidence that were obtained through ineffective questioning practices. Our findings suggest that judges do not adhere to the guidelines that they themselves expect police officers and lawyers to follow when gathering evidence from human sources. Consequently, judges are apparently no better at asking productive questions than the individuals whose questioning behaviour they critique on a regular basis (i.e. police officers, lawyers). If judges are using the very same types of ineffectual questions that they are condemning police officers for using, and even worse, are using them more frequently, then there are serious questions about how well information is being regulated in the legal system.

Examination type and utterance response lengths

In direct and cross examinations, judges only ask questions in relation to the lines of questioning already initiated by the lawyers. However, examinations *per curium* provide a glimpse into the judges' own line of questioning for a witness. Comparing across examination type, we found that judges asked more closed yes/no questions and multiple questions in examinations *per curium* than they did during direct and cross examinations. The reason for this pattern is unclear; however, it is possible that it has to do with the judges' objectives in this questioning role within each type of examination. It is possible that judges asked more closed yes/no questions and multiple questions in examinations *per curium* because they were looking for new information as opposed to simply clarifying or elaborating upon responses already provided. However, such an explanation does not account for why the judges chose to use those question types more than others to gather their own information. Given that all judges were once lawyers (either crown or defence) prior to being appointed to the bench, perhaps their choice for using certain question types over others is showing some form of bias from their past practice as a lawyer; that is, lawyers have been found to ask closed yes/no and multiple questions frequently (e.g. Lively et al., 2020). Nevertheless, this postulation is only speculative on our part since our current data set is unable to provide any insights on this notion. Consequently, an interesting future study pertains to the effect of the judge's role on the questions asked during an examination *per curium*.

Analyses of judge utterance and witness response lengths illustrate the effect that utterance type has on the amount of information provided by witnesses. As predicted

by Hypothesis 3, open-ended questions elicited the most information from witnesses, averaging more than 50 words per response, even though they were among the shortest judge utterances, on average, at only 10 words. In contrast, multiple and forced-choice were the longest utterances, but did not result in the provision of as much information from the witness, further supporting Hypothesis 3 and echoing findings from previous studies on questioning practices (e.g. Kebbell et al., 2004; Lively et al., 2020; Snook et al., 2012; Snook & Keating, 2011).

Our findings raise an important question about whether or not judges can effectively evaluate the appropriateness of the questioning practices of police officers and lawyers. If judges are to act as gatekeepers in the court, making consequential decisions about how lawyers should question witnesses and whether or not to admit evidence obtained by police officers during questioning, then they ought to use these productive questions whenever they are addressing witnesses. Although we did not study how well judges are able to classify question types and rule which question types are productive or unproductive – a potential area of future research – the observed use of unproductive question types as a proxy measure suggests that judges are likely unable to classify question types accurately, and ultimately rule on them when being objected by a lawyer.

Limitations

All of our findings presented here must be considered in light of some limitations. First, our sample was limited geographically, in that it consisted of court transcripts only from the Supreme Court of Newfoundland and Labrador. Relatedly, although our sample is much larger than previous courtroom questioning studies (e.g. Kebbell et al., 2004; Lively et al., 2020), it was still relatively small, which contributed to imprecise estimates of the percentage of question types asked by the judges (as can be seen in the wide confidence intervals for some utterance types). Future studies should aim to broaden their samples to include judges from across Canada, using larger samples, to increase generalizability of their findings. Moreover, examinations of judicial questioning practices from other countries (in both adversarial and inquisitorial systems) would contribute even more to our knowledge of how judges question witnesses. Due to our use of archival court transcripts, we were also limited with regards to the amount of information we were given about our sample. For instance, we were not provided with any information about the judges, with the exception of gender (which we inferred based on names and pronouns used when this information was presented in the court transcripts), and were also only provided limited information about the witnesses (i.e. type of witness, inferred gender). Although additional demographic information about the examinations in our study would have certainly been useful, we were unable to access that information. The limited sample also meant that the cases we included in our analysis differed substantially in terms of the year they took place. Ideally, we would have liked for all the cases in our sample to be recent, but again, we were unable to control these factors – however, as noted in the footnotes, the wide gap between the cases did not change the outcome (or our interpretation) of the data and conclusions. Our sample also differed with regards to the type of crime being adjudicated, but we suggest that this is actually somewhat of a strength rather than a weakness, since many similar studies focus on a single type of case (e.g. rape; sexual assault; e.g. Kebbell et al., 2004). Nevertheless, future studies

should attempt to replicate our findings using samples of more recent and homogenous cases.

Conclusion

Phrasing questions to avoid tainting responses is undoubtedly a difficult skill to acquire naturally. Even training people to ask good questions is notoriously difficult to accomplish (see MacDonald et al., 2016). For these reasons, it is imperative that rigorous checks and balances in the legal system, by well-trained individuals, are in place to prevent tainted information from being included in decision processes. Specifically, few would quarrel with the idea that police should be well-trained on the science of interviewing witnesses and that they should work diligently to ensure evidence is pristine when being used in investigative and legal proceedings. A failure to follow best practice means they should be held accountable in court by lawyers. Likewise, lawyers are held accountable by each other through objections to the types of questions they ask, and by judges who rule on those objections. Most would likely concur that judges should admonish lawyers who step out of line in their attempts to inordinately influence witness testimony. In each situation, the questioning practices of police officers and lawyers are kept in check – however imperfect that process may be. However, a more pressing concern emerges when one asks, who is monitoring the ultimate judicial gatekeepers? Our findings raise concerns about the extent to which judges may be tainting information during proceedings, and the preparedness of judges to make decisions about information quality. To have full faith in lady justice, it is imperative that judges have an expert level of understanding of how different types of questions impact information quality – which does not yet appear to be the case.

Notes

1. The Statutory Orders and Regulations governing the *Rules of the Supreme Court of Canada* (2002) was repelled and amended in May 2011. Prior to this, Section 40 (1)(e) of these rules outlined the requirements for formatting court documents, and stated that evidence tendered by a judge was referred to as an 'examination *per curium*'. The majority of cases in our sample were bound to the Statutory Orders and Regulations of SOR/2002-156, and as a consequence, the examinations conducted by a judge were referred to as examinations *per curium*. For consistency, we have retained this terminology throughout our paper. For further information about the repelled and amended changes to the *Rules of the Supreme Court of Canada* (2002), see https://www.scc-csc.ca/ar-lr/notices-avis/11-04-eng.aspx
2. Concerns were identified about the wide range of time that the court cases were sampled from (i.e., 1991-2015; we thank an anonymous reviewer for this insightful feedback). We conducted additional analyses to test whether questioning practices differed between earlier and more recent court cases; we found the same pattern of results as reported in the manuscript. Therefore, we have no concerns related to the wide gap in years with the data. For further information on these analyses, please contact the corresponding author.

Acknowledgement

Thank you to the clerks at the Supreme Court of Newfoundland and Labrador (Trial Division) courthouse in St. John's, NL, Canada, for providing the researchers with the dataset.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Data availability statement

The data that support the findings of this study are available from the corresponding author upon reasonable request.

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