

Cross-Examination of the Infant Witness: A Review of Lessons Learned From the Triangle Shirt Waist Fire Case and Related Trial Experiences

By Harold Lee Schwab

There is a hierarchy of risk in cross-examination depending upon who is the witness. Questioning an economist about his assumptions/projections will make almost any trial attorney look good. With proper preparation the cross of a technical expert can be challenging but rewarding. Cross-examination of a perjured witness when counsel is armed with a prior inconsistent statement or admission should always be successful. The cross of clergy and surviving spouses must be approached with caution and concern. Potential disaster looms large when cross-examining a catastrophically injured witness. But of all the categories of witnesses, children present the greatest challenge due to jurors' innate sympathies. Because of their tender years children are probably the most difficult to directly impeach. The need for delicacy, sensitivity, and possibly even a change in personality of defense counsel, is self-evident if the jury is not to be offended by the attorney's conduct. Aggressive cross-examination is unacceptable. However, a mere fatherly or motherly approach by the examiner will not suffice if nine-year-old Stephanie, who recounts events occurring six years earlier, is to be impeached. What to do? How to do it? For purposes of this analysis let us assume that there is no independent evidence available with which to confront the child. Impeachment must be predicated upon cross of the witness's story and nothing else. An impossible task? Possibly, but not necessarily. What follows may be of interest to trial counsel faced with the dilemma of cross-examining an infant witness.

One approach might be to have the child repeat what she said on direct. The goal would be for Stephanie, when repeating her story, to either omit a salient fact or at least partly change her version of the events. Even if the cross examiner is successful, the jury will empathize with the child and appropriate allowances will be made for mistakes, given the tender years of the witness. Worse still, simple repetition may violate one of the cardinal rules of cross-examination: never give a witness the opportunity to repeat his/her direct testimony. Repetition carries the inherent risk of solidifying as true in the mind of the jury those very facts which the examiner contests. As history has taught, even the big lie can be believed. Indeed, isn't one of the very reasons for the use of leading questions on cross-examination to prevent repetition?

I personally witnessed such a cross-examination debacle in 1969 while on trial in my first federal court case. During a recess I went across the hall to watch a portion of the well publicized trial of *United States vs.*

DeSapio before Judge Harold R. Tyler Jr., in the Southern District, New York. Carmine DeSapio was the last leader of Tammany Hall, the infamous Democrats' committee which controlled New York City politics for generations. He was charged with having conspired with Henry Fried, the owner of a construction company, to bribe James Marcus, a New York City Commissioner, to withhold permits sought by Consolidated Edison until Con Edison agreed to award the construction contracts to Fried. The accused was represented by Maurice Edelbaum, a well known member of the New York criminal trial bar. A key factual issue was whether Fried, at the time of the well attended opening of his multi-million-dollar horse farm in upstate New York, had a personal conversation with DeSapio. A defense witness testified that he had assisted Fried, who was walking with a cane and suffering from gout, onto a school bus touring the property from 1:30 to 5:30 p.m. The thrust of this alibi defense was that Fried could not have had any conspiracy conversation with DeSapio at the horse farm. The prosecution in rebuttal called various witnesses, including in particular Sister Ann James, a student nurse at the Carmelite Sisters Home for the Aged and Infirm. She wore a nun's habit in court. Sister Ann James testified that she had seen "Mr. Fried" walking around the swimming pool without difficulty and that he was not on the bus in which she rode. Unbelievably, counsel for DeSapio in his cross-examination asked the Sister to repeat her story. Imagine—a nun unrelated to either prosecution or defense, repeating her testimony as to what she had observed that particular day! Counsel could no longer credibly argue that Sister Ann was mistaken. What she said was indeed gospel and what she saw and did not see was a fact. She convinced me and apparently the jury. Due at least in part to this failed cross-examination, DeSapio was convicted.

Although not heralded in the legal annals, this is a classic example of what not to do in cross-examination. I had hoped to listen and learn how to do it. Instead, the lesson learned was how not to do it. Although the cross-examination was of an adult, the same rule would appear to apply to children. By way of postscript, the government conclusively established in its post-trial motion that Sister Ann James was mistaken and that she had been referring to one Richard Fried, and not to Henry Fried!! Ironically, repetition had proven facts that were not correct. However, because of other compelling evidence the Second Circuit denied the motion for a new trial (435 F.2d 272).

Almost a century ago, Max Steuer was confronted with a comparable situation when faced with the apparently impossible task of defending Mssrs. Harris and Blanck, the owners of The Triangle Shirt Waist Factory, against charges of manslaughter. The company occupied the top three floors of a ten-story building at 23 Washington Place in New York City. The owners, dubbed "the shirt waist kings," operated the largest manufacturing business of ladies' blouses at the time. They employed approximately 400 young girls and women, mostly recent immigrants who spoke little English, to operate the sewing machines. On March 25, 1911, a fire began in discarded rags between the cutting tables and it quickly engulfed the upper floors. Panic set in for many. Those fortunate were able to escape down a narrow fire escape, an elevator before it stopped, the staircase before it became impassible, or from the roof to the adjacent New York University Law School building. However, 146 employees, mostly women, died because of burns, smoke inhalation, or jumping from upper floors to the street below. This was the greatest loss of life in New York City (exceeded as we know today only by September 11), and the public demanded justice. Although the Building Department came under attack, the owners were viewed as the primary culprits. Within weeks of the tragedy they were indicted for manslaughter.

The trial of *People v. Harris and Blanck* before Judge Thomas Crain began in December 1911 with Assistant District Attorney Charles Bostwick heading the prosecution. The defendants were represented by Max D. Steuer, reputedly a leading member of the New York Trial Bar. The prosecution focused its case on the death of Margaret Schwartz, a ninth floor victim. It was alleged that she could not escape because the exit door was locked in violation of the New York Labor Code. A key prosecution witness was Kate Alterman, who had been with Margaret when the two of them came out of the dressing room and found the ninth floor ablaze. Her principal testimony on direct examination follows:

Q Margaret Schwartz was with you at this time?

A At this time, yes, sir.

Q Then where did you go?

A Then I went to the toilet room, Margaret disappeared from me, and I wanted to go up Greene street side, but the whole door was in flames, so I went in hid myself in the toilet rooms and bent my face over the sink, and then ran to the Washington side elevator, but there was, a big crowd and, I couldn't pass through there. I noticed some one, a whole crowd around the door and I saw Bernstein, the manager's brother trying to open the door, and there was Margaret near him.

Bernstein tried the door, he couldn't open it and then Margaret began to open the door. I take her on one side I pushed her on the side and I said, "Wait, I will open that door." I tried, pulled the handle in and out, all ways—and I couldn't open it. She pushed me on the other side, got hold of the handle and then she tried. And then I saw her bending down on her knees, and her hair was loose, and the trail of her dress was a little far from her, and then a big smoke came and I couldn't see I just know it was Margaret, and I said, "Margaret," and she didn't reply. I left Margaret, I turned my head on the side, and I noticed the trail of her dress and the ends of her hair begin to burn. Then I ran in, in small dressing room that was on the Washington side, there was a big crowd and I went out from there, stood in the center of the room, between the machines and between the examining tables. I noticed afterwards on the other side, near the Washington side windows, Bernstein, the manager's brother throwing around like a wildcat at the window, and he was chasing his head out of the window, and pull himself back. He wanted to jump, I suppose, but he was afraid. And then I saw the flames cover him. I noticed on the Greene street side someone else fell down on the floor and, the flames cover him. And then I stood in the center of the room, and I just turned my coat on the left side with the fur to my face, the lining on the outside, got hold of a bunch of dresses that was lying on the examining table not burned yet, covered my head and tried to run through the flames on the Greene street side. The whole door was a red curtain of fire. A young lady came and she began to pull me in the back of my dress and she wouldn't let me in. I kicked her with my foot and I don't know what became of her. I ran out through the Greene street side door, right through the flames on to the roof.

Q When you were standing toward the middle of the floor had you a pocketbook with you?

A Yes, sir, my pocketbook began to burn already, but I pressed it to my heart to extinguish the fire.

Q And you put the fire out on your pocketbook?

A Yes, sir.

How does one cross-examine a Kate Alterman given the enormity of the tragedy? Steuer initially established that the witness came from Philadelphia to the trial, had been in New York for over two weeks waiting to testify, and had actually gone to the building with Bostwick and another member of the District Attorney's office. The inference of witness coaching was thereby made but more was required. Steuer asked Alterman to repeat her story not one time, which might enhance credibility, but rather three times, which established that the witness's version was essentially memorized from a script.

After more preliminaries, Steuer asked on cross:

Q Now tell us what you did when you heard the cry of fire.

A I went out from the dressing room, went to the Waverly side windows to look for fire escapes, I didn't find any and Margaret Schwartz was with me, afterwards she disappeared. I turned away to get to Greene Street side, but she disappeared, she disappeared from me. I went to the toilet rooms, I went out from the toilet rooms, bent my face over the sink, and then went to the Washington side to the door, trying to open the door, but there I saw Bernstein, the manager's brother, trying to open the door; but he couldn't. He left; and Margaret was there too, and she tried to open the door and she could not. I pushed her on a side. I tried to open the door, and I couldn't and then she pushed me on the side and she said, "I will open the door," and she tried to open the door. And then a big smoke came and Margaret Schwartz I saw bending down on her knees, her hair was loose and her dress was on the floor and a little far from her. And then she screamed at the top of her voice, "Open the door! Fire! I am lost, there is fire!" and I went away from Margaret. I left, stood in the middle of the room, went in the middle of the room, between the machines and examining tables, and then I went in I saw Bernstein, the manager's brother, throwing around the windows, putting his head from the window—he wanted to jump, I suppose but he was afraid—he drew himself back, and then I saw the flames cover him. And some other man on the Greene Street side, the flames covered him, too. And then I turned my coat on the wrong side and put it on my head with the fur to my face, the lining on the outside,

and I got hold of a bunch of dresses and covered up the top of my head. I just got ready to go and somebody came and began to chase me back, pulling my dress back, and I kicked her with the foot and she disappeared. I tried to make my escape. I had a pocketbook with me, and that pocketbook began to burn, I pressed it to my heart to extinguish the fire, and I made my escape right through the flames—the whole door was a flame right to the roof.

Q It looked like a wall of flame?

A Like a red curtain.

Q Now, there was something that you left out, I think, Miss Alterman. When Bernstein was jumping around, do you remember what that was like? Like a wildcat, wasn't it?

A Like a wildcat.

After more preliminaries, Steuer asked a second time:

Q Now could you tell us again what you did after that time?

A After going out from the dressing room?

Q Yes.

A I went out to the Waverly side windows to look for fire escapes. Margaret Schwartz was with me, and then Margaret disappeared. I called her to Greene street, she disappeared and I went into the toilet room, went out, bent my face over the sink, and then I wanted to go to the Washington side, to the elevator. I saw, there a big crowd, I couldn't push through. I saw around the Washington side door a whole lot of people standing, I pushed through and there I saw Bernstein, the manager's brother, trying to open the door; he could not and he left. Margaret Schwartz was there, she tried to open the door and she could not. I pushed Margaret on the side, and tried to open the door, I could not. And then Margaret pushed me on the side; and she tried to open the door. But smoke came and Margaret bent on her knees; her trail was a little far from her and her hair was loose, and I saw the ends of her dress and the ends of her hair begin to burn. I went into the small dressing room, there was a big crowd, and I tried—I stood there and I went out right away, pushed

through and went out and then I stood in the center of the room between the examining tables and the machines. Then I noticed the Washington side windows—Bernstein, the manager’s brother, trying to jump from the window, he stuck his head out—he wanted to jump, I suppose, but he was afraid. Then he would draw himself back, then I saw the flames cover him. He jumped like a wildcat on the walls. And then I stood, took my coat, turning the fur to my head, the lining to the outside got a hold of a bunch of dresses that was lying on the table and covered my head, and I just wanted to go and some lady came she began to pull the back of my dress; I kicked her with the foot and I don’t where she got to. And then I had a purse with me and that purse began to burn, I pressed it to my heart to extinguish the fire. The whole door was a flame, it was a red curtain of fire, and I went right on the roof.

Q You never spoke to anybody about what you were going to tell us when you came here, did you?

A No, sir.

Q You have got father and a mother and four sisters?

A Five sisters. I have a father, I have no mother—I have a stepmother.

Q And you never spoke to anybody else about it?

A No, sir.

Q They never asked you about it?

A They asked me and I told her once, and then they stopped me; they didn’t want me to talk anymore about it.

Q You told them once and then they stopped you and you never talked about it again?

A I never did.

Q And you didn’t study the words in which you would tell it?

A No, sir.

Steuer asked a third time:

Q Do you remember that you got out to the center of the floor—do you remember?

A I remember I got through the Greene Street side door.

Q You remember that you did get to the center of the floor, don’t you?

A Between the machines and the examining tables, in the center.

Q Now tell us from there what you did; start at that point now instead of at the beginning.

A In the beginning I saw Bernstein on the Washington side, Bernstein’s brother, throw around like a wildcat; he wanted to jump, I suppose, but he was afraid. And then he drew himself back and the flames covered him up. And I took my coat, turned it on the wrong side with the fur to my face end the lining on the outside, got hold of a bunch of dresses from the examining table, covered up my head, and I wanted to run. And then a lady came and she began to pull my dress back, she wanted to pull me back, and I kicked her with my foot—I don’t know where she got to. And I ran out through the Greene street side door, which was in flames; it was a red curtain of fire on that door to the roof.

Q You never studied those words did you?

A No, sir.

On redirect examination the witness endeavored to explain that she used the same language when repeating her story “Because he asked me the very same story over and over.” The remarkable similarity of the versions strongly suggested, however, that Kate Alterman had been coached if not in fact programmed. Surely, “red curtain of fire” and “like a wildcat” were not words of her own choosing. Max Steuer had successfully impeached through continued repetition a most sympathetic witness who had survived a major tragedy. At the very least, her credibility after cross-examination was suspect. The defense subsequently called approximately 50 witnesses to testify and it therefore cannot be said that the cross-examination of Kate Alterman was the *sine qua non* of the jury verdict for the defendants, returned after only two hours of deliberation. However, it certainly assisted in the result since Kate Alterman was indeed a critical prosecution witness.

Many years ago I decided to use the Max Steuer approach in a Bronx trial before Justice Matthew Coppola. The case involved a child who had obtained a carpenter’s stud gun from the superintendent’s office of the defendant. As one might expect, the five-year-old infant, while

playing with the gun pulled the trigger and blinded himself in one eye. The principal negligence issue was whether the stud gun had been left out for children from the building to play with or whether it had been put away in a reasonably safe place. At the time of trial the infant, then 11 years of age, described on direct examination the salient events of the accident as if they had just occurred the day before and as if he was an adult with total recall. This presented an opportunity to emulate the cross-examination of Kate Alterman.

I approached the witness as would any understanding father, asked a few innocuous questions, and requested that the child repeat for the jury what happened. I was not disappointed. With the clarity of a tape recording the story was repeated verbatim. However, from this one-time repetition, it was possible that the jury did not yet appreciate the import of the cross-examination. To stop at that point would result in another "Sister Ann James" debacle. After wasting a few more innocuous questions, I asked the child to tell once again what took place. The memorized recitation was repeated word for word. Feeling reasonably certain but not 100% that the jury had the idea now that the testimony had been scripted, I asked a few more throwaway questions and requested that the child tell the jury one last time how the accident happened. For what was a fourth time (1 on direct and 3 on cross), the jury heard the exact same story.

The case changed from one of sympathy for the child who had sustained a major injury to one of highly questionable credibility regarding the details of the occurrence. Plaintiffs' counsel, Herman Glaser, referred to at that time as the "Dean" of the New York plaintiffs' bar, clearly sensed the effect of this cross-examination. The matter was settled almost immediately afterwards and even before the defense had presented its case.

Possibly the most ingenious cross-examination of young children took place in the medical malpractice case of *Levine v. Kent*, tried in Supreme Court, New York County (Index 124206/99) before Justice Martin Schoenfeld in February 2002. The twin girls, Avery and Betsy, had been born prematurely at about 26 weeks. They were in neonatal care for an extensive period, both underwent heart surgery, and one had laser eye surgery. It was claimed that they had cerebral palsy, as well as physical and developmental problems, but the defense maintained that they made a spectacular recovery, although diminutive in height, and were actually attending a mainstream public school. At the age of six, the girls were presented in court and gave brief testimony on direct examination. Query, how do you effectively cross-examine a six year old to demonstrate the extent of the recovery?

Defense counsel Peter Kopff opened up his black bag and introduced each child to five hand puppets, Chicken, Noodle, Shy Shelly, Alligator and Moose. He previously used the puppets when teaching children in

Sunday School. Without objection from plaintiff's counsel and with the help of the puppets, he put the girls in a conversational mood to speak about their brothers, wearing knapsacks, going to restaurants, music, books, etc. The girls were articulate. From playing with the puppets they demonstrated good hand-eye coordination. The session for each child lasted 20 to 30 minutes, and with the aid of the puppets, the plaintiffs' claim of ongoing developmental problems was effectively destroyed. Justice Schoenfeld is reported to have said that the use of the puppets was "brilliant" and that defense counsel "got this very shy child to respond to his questions." Without doubt, the shirt-sleeved defense lawyer, sitting on the floor and conversing with the children through puppets, additionally served to establish a unique rapport with the jury, although the extent to which Chicken, Noodle, Shy Shelly, Alligator and Moose contributed to the malpractice defense verdict is uncertain.

The motivation for this article results not merely from the Triangle Shirt Waist Company cross-examination and the other cases referenced above, but also from the recent trial of *Torres v. New York City Housing Authority*, Supreme Court, Kings County (Index No. 40054/00) held in March 2006 before Justice Arthur Schack. I had planned to utilize the Triangle Shirt Waist Fire "tell it again" technique to cross-examine 9 ½ year-old Stephanie Torres, but almost unexpectedly another impeachment approach appeared possible and potentially even more devastating. The plaintiffs claimed that defendant had made repairs to the apartment stove but failed to reinstall the unit into a special floor-mounted bracket which would prevent the stove from tipping. A pot of beans boiling in water was on the stove. Query, did 3-year, 9-month old Stephanie pull the pot of beans off the stove onto herself, causing the disfiguring 3rd degree burns, or did the accident occur because the stove tipped over? The only witness to the accident was the child herself.

Stephanie testified on direct examination that she had gone into the kitchen and climbed up to get a glass of water from the sink. She then described how the accident happened:

Q Well, when you were in the kitchen was there anything cooking on the stove?

A Yes.

Q What was cooking on the stove?

A Beans and water.

Q And do you remember where on the stove the beans and water were?

A No.

Q And can you tell what happened after you got your water?

A I opened the oven door and I sat on it and the beans fell.

The intention had been to cross-examine Stephanie by asking her to repeat her story three or four times in the “tell again what happened” tradition of Max Steuer. Her “one”-liner version appeared programmed and memorized. Multiple repetition would certainly prove the point. However, initially it was important to establish that there had been conversations (i.e., coaching) between mother and daughter. Whether Stephanie admitted to it or not was really irrelevant, since the suspicion of manipulation would be implanted in the mind of jury. Stephanie was therefore asked on cross the following questions and gave the following answers:

Q Now, did your mother ever speak to you, Stephanie, about how the accident happened?

A I don't know.

Q What did you say, Stephanie?

A I don't know.

It appeared certain from these two “I don't know” answers that Stephanie did not want to admit that her mother had spoken to her; that is, told her how the accident happened. What the transcript unfortunately does not reflect is the time lapse between the questions being asked on cross and Stephanie's answers. This was yet further proof of the child's desire not to tell an untruth. Accordingly, an immediate tactical decision was made to forgo asking Stephanie to repeat her story. Cross-examination would be even more effective if additional “No” and “I don't know” answers were obtained. The following took place next:

Q You don't know whether your mother ever asked you how the accident happened?

A No.

Q Did your mother ever ask you whether you sat on the oven door, Stephanie?

A I don't know.

Q You don't know? Did you ever tell your mother that you did not sit on the oven door, Stephanie?

A No.

Q No? Are you, sure of that, Stephanie?

A Yes.

Q Huh?

A Yes.

Q Okay. And Stephanie, you're recalling now what took place how many years ago?

A I don't know.

Although it seemed that the jury must already realize that Stephanie's story of the accident was memorized, a tactical decision was made at this point to press the matter further. Why not ask the child whether she had any conversations with her lawyer? Her answer, whether it be “yes” or “no,” could only help the defense. At the very least it would emphasize, as in the questions about the mother, the potential involvement of another key person in the preparation of Stephanie for trial. In this case, however, the answer was even better than a simple “No” or “Yes.”

Q Did you ever speak to Ms. Ball about how the accident happened, Stephanie?

(Pause.)

THE COURT: Do you know, Stephanie?

A (Shakes head.)

THE COURT: You have to say something.

A No.

Q Do you want to answer that question, Stephanie, or do you not want to answer that question?

A I don't know.

Q You don't know?

THE COURT: Okay.

Q When you climbed down from the sink, Stephanie, were you near the stove?

A Yes?

Mr. Schwab: I have no further questions.

It was additionally clear that Stephanie did not want to admit speaking to her attorney. Court personnel noted that Stephanie made the worst child witness seen in their many years of experience. There was no need to ask Stephanie to repeat her story in the Max Steuer tradition. Her essential disavowal of any conversations with her mother and attorney was even more effective than repetition, since it was tantamount to an admission that she had been programmed. The jury subsequently returned a unanimous verdict for the defense. Implicit in the verdict was the rejection of Stephanie's testimony.

Cross-examination is indeed an art and not a science. For every general rule on cross-examination there is usually either a corollary or an exception dependent upon a fact-specific situation. This article is certainly not intend-

ed to be either authoritative or definitive, given these verities about which every trial attorney is well aware. However, some of the approaches worthy of consideration in the cross-examination of infants, particularly when independent impeachment proofs do not exist, appear to be:

1. Ask the child whether he/she has had conversations about the accident with his/her parents. Did mother or father tell how the accident happened? Whatever the answer, it should direct the attention of the jury to the possibility of coaching and programming.
2. Ask the child whether she had conversations with his/her lawyer about how the accident happened.
3. Inquire whether the child was taken back to the scene of the accident.
4. Bring out the fact that the child is describing today what occurred many years ago.
5. Do not ask the child to repeat his/her story only one time since that single response will only serve to reinforce that version.
6. Consider asking the witness to repeat his/her story three or even more times to prove that it has been programmed and memorized.

7. Always remain flexible and be prepared to alter your planned cross-examination when an unexpected response or new situation develops.
8. Be ever cautious not to alienate the jury.
9. Be inventive—in the right case with the right issues, it might even be worthwhile to buy a puppet of your own.

It may be that the approach to be used in the cross-examination of infants will depend upon the particular testimony and issues involved as well as the personality of counsel and even that of the child. Nevertheless, the purpose of this article is to present for discussion and consideration possible approaches to cross-examination by referencing salient aspects of the Triangle Shirt Waist fire case and others personally known to this writer. There are lessons to be learned from almost every trial. It is hoped that in addition to being of general interest this article has served a useful purpose for those readers who are trial attorneys.

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