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Empowering jurors to ask questions about the expert evidence in criminal trials

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Abstract

Jurors in common law jurisdictions receive a large amount of complex information about their role in the court process at the start of the trial. One common instruction is that, if the jurors have any questions, they can put their questions in writing to the judge. This article explores whether the current jury question process offers jurors a viable way in which to fill in perceived gaps in their comprehension of expert evidence. It does so by providing rare insight into the views of real jurors, judges, expert witnesses and lawyers from 55 Australian criminal jury trials. The results reveal that whilst most study participants believed jurors should be able to ask questions during the trial, in practice, some jurors were either too intimidated or unaware that they could do so. These findings should help inform judges as to how best to moderate the jury question process. Ensuring that jurors feel comfortable to ask questions of experts is likely to reduce the need for jurors to seek answers to their questions online and consequently safeguards the imperative of all adversarial justice systems; to offer a fair trial, based on the evidence presented during the trial.

Keywords

criminal law, expert evidence, juror comprehension, juror question procedure, jury trials

Introduction

Common law systems of justice permit jurors to ask questions of expert witnesses during criminal trials. (Coen and Heffernan, 2010; Klein, 2015; Lucci, 2005–6). Whilst there is a plethora of commentary and studies that discuss the jury question process generally (Darbyshire et al., 2002; Frank, 2014; Smith and Herndon, 2016), little research has been conducted about what jurors think. This is not surprising, as jury secrecy rules that exist in many common law jurisdictions make it difficult to get access to real jurors for research purposes (Horan and Israel, 2016).

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This article reports the results of a jury study where researchers were given access to real jurors. The study surveyed jurors from 55 Australian criminal trials about whether they asked any questions of the experts in their trial. The study also conducted follow-up interviews with the jurors where their perceptions of the jury question process were explored further. The first-hand views from jurors about the jury question process give us unique insights as to whether the process is useful to them and how it might be improved.

An overview of the historical and contemporary understanding of the common law jury question process is given, following this Introduction. The methodology used in the featured jury study is then explained before juror responses from the 55 trials are documented. The judge, lawyers and expert witnesses from those same trials were also surveyed and interviewed about the jury question process, the results of which are then summarised. The perceptions of all key trial participants are useful in providing context by offering a quadrangulation of views of the same trial. Judges provide instructions to the jurors as to how to go about asking questions during the trial. However, judges have no way of directly knowing whether those instructions are clear and useful to the jurors. The data enables us to compare how the judges perceive their 'jury questions instructions' are intended to be received with how jurors actually perceive the same 'jury questions instructions'. The results of the project are then analysed and discussed with a view to providing new insight into the jury question process. Ways in which to improve the process are also identified and explained.

As part of the analysis and discussion, the jury question process will be explored by applying a jury-centric analysis of the data collected from the featured study. A jury-centric approach asks: Do juries have all the tools they need in order 'to perform more effectively' their task (Byrne, 2022; Marder, 2003)? A central task is for the jury to determine the facts. In order to determine the facts, the jury must understand the evidence. Jury questions are a direct way in which jurors can improve their comprehension of the evidence.

Overview of the historical common law jury question processes

Historical records indicate that jury questions were an established part of the common law tradition in England and its colonies in the 18th century (Blackstone, 1765–1769; Cappello and Strenio, 2000; Marder, 2010). By the end of the 18th century, in line with the development of the rules of evidence, the advocates and judges had begun to increase in prominence in the courtroom. The lawyers slowly but surely took control of the proceedings (Dann, 1993). This included usurping the role of jurors to ask witnesses questions (Langbein, 2003; Stone and Wells, 1991). By the end of the 20th century, juries were commonly not informed of any juror right to question a witness (*R v. Lo Presti* [1992] 1 VR 696). Jurors were required to be passive observers, with parties maintining control over the case (Marder, 2010). In line with adversarial notions of justice, juror or judicial questions were perceived as undue interference with a party's litigation strategy (Frank, 2014).

Judges and jurors asking questions of witnesses became more common in some common law jurisdictions since the 1990s (Berkowitz, 1991; Lively et al., 2022; NZLC, 2001). This change in procedure coincided with the increase in complex scientific expert evidence being relied upon in criminal prosecutions throughout the common law world (Horan, 2012). It may be that the complexity of new forms of evidence, such as DNA profiling evidence, prompted the change in attitude from some of the judiciary towards their role. This departure from pure adversarial processes was possibly motivated by the desire of judges to clarify complex evidence for the lay jury. Today, judges from common law jurisdictions regularly ask expert witnesses questions when they perceive that the evidence has been inadequately explained to the jury. Litigators have grown accustomed to judges voicing their questions and jurors are appreciative of the judicial assistance (Freckelton et al., 2016; Lively et al., 2022).

However, the judge can only anticipate what the jury *might* need. The judge has no accurate way of knowing what the jury *actually* needs. Courts have become increasingly aware that having passive decision-makers ignores the potential gap between juror comprehension and a legalistic and/or technical explanations of the evidence and the law (Frank, 2014; Horan, 2012; Marder, 2010). Even when questions have been answered to the satisfaction of the judge and lawyers, the answer may still remain unclear to a jury of laypeople.

Instances of judges using their discretion to allow jurors to ask questions of witnesses have slowly increased over the last few decades (Horan, 2012; Mott, 2003; Smith and Herndon, 2016).

As jurors began to be allowed to ask judges questions, some commentators raised concerns about whether jury questions would extend trials and undermine trial fairness by opening the floodgates to inappropriate matters being raised at trial (Cappello and Strenio, 2000; Marder, 2010). Researchers responded to these concerns. Research results highlight that jurors do not inundate the judge with inappropriate questions and trial length was only slightly extended (Heuer and Penrod, 1988, 1994; Marder, 2010). For example, an analysis of 820 questions asked in 50 civil trials in the United States of America (US) concluded that at least three quarters of questions asked by jurors were legally appropriate (Diamond et al., 2004). Only a few questions were considered to be argumentative, and no question was categorised as wasting court time. The questions that were disallowed reflected common-sense ways of reasoning but were legally inappropriate in that they breached the rules of evidence. Some jurors also acknowledged that the process of formulating the questions was of assistance to them. As the authors concluded:

> Whether or not jurors are permitted to submit questions during trial, we know that questions are occurring to them as they try to understand the evidence in anticipation of being charged with reaching a verdict. Permitting jurors to submit their questions during trial provides the opportunity to learn what those juror questions are and to address them when possible. As this research indicates, even when judges tell the jury that they cannot allow a witness to answer a juror's questions, the jurors generally accept the decision easily and move on. (Diamond et al., 2004: 29).

In the late 1990s, New Zealand jurors were told that they could ask questions. However, a New Zealand study of 48 criminal jury trials found that a majority of jurors they interviewed believed that they were not told they could ask questions (NZLC, 1999). Additionally, more than three quarters of the interviewed jurors would have liked to have asked a question(s) in order to clarify perceived ambiguities in the evidence, but didn't do so. When asked why, 40% said that they thought that this was the lawyers' job and that they were not permitted to ask. Some jurors explained that their questions were addressed by their fellow jurors' explanations, or by evidence presented later in the trial. Other jurors said they felt too intimidated by the courtroom environment to ask. Similarly, a study from the United Kingdom (UK) identified that jurors are often reluctant to ask questions out of fear of embarrassment or unwillingness to cause a delay (Matthews et al., 2004).

Research suggests that jurors often feel discouraged from asking questions (Darbyshire et al., 2002; Horan, 2004). In a UK Crown Court study, of the surveyed jurors who said they had wanted to ask questions, only 17% did so (Zander and Henderson, 1993). In an Australian study of jurors in criminal trials, 30% of jurors surveyed wanted further directions or explanations during deliberations, but only half of those jurors sought such information (Findlay, 2001). In a US study of civil trials, 67% of jurors indicated that asking questions made the decision-making process easier – however, some jurors were worried about the lack of structure and organisation in the process of asking questions (Sicafuse et al., 2013).

Empirical studies establish clear benefits of allowing jury questions. (Frank, 2014; Kaufmann and Murphy, 2011). As Gordon (2014: 789) concludes: '…giving jurors knowledge goals and then allowing them to ask questions about the law may motivate jurors to avoid closure and to continue considering other possibilities and generating multiple hypotheses about events. If jurors are motivated to avoid

closure in this way, this could lead to reliance on better reasoning strategies, fewer biases and greater accuracy, thus improving juror decision-making.'

Whilst research has established the benefits of jury questions, no study has yet focused on whether jury question procedures support or undermine such benefits. It is usually left to the discretion of the trial judge as to how they promote and manage the jury question process. The extent to which the jury question process is encouraged by individual judges varies between jurisdictions and from judge to judge. The current approach in common law jurisdictions is that judges should allow but not actively encourage juror questions (*Tootle v The Queen* (2017) 94 NSWLR 430; Marder, 2010). Most jurisdictions have opted for a judge-facilitated jury question procedure. Most jurors are required to put their question(s) into writing and pass them on to the judge. Once a question is submitted, the judge may act as a gatekeeper in determining which questions can be asked of the witness. The judge seeks the lawyers' assistance in determining whether a question is appropriate to ask. The judge has the discretion to modify or can refuse to ask the question. The question is then read out by the judge, and the witness is asked to answer the question (Horan, 2012; Marder, 2010).

There are some procedural variations amongst jurisdictions. For example, in some UK and US jurisdictions, jurors have traditionally only been able to discuss the evidence and ask questions during deliberations. More recently, some jurisdictions have expanded jury discussion and jury questions to include the evidence (Darbyshire et al., 2002; Diamond et al., 2006, Lakamp, 1998). In Australia, there has never been a distinction between juror questions during deliberation or during the evidence. In some jurisdictions in the UK and the US, jurors can write their question(s) on a note whilst remaining in the jury box and pass it to the usher/jury keeper who will pass it to the judge. This process has the benefit of ensuring that the question is asked whilst it is a fresh issue for the juror. In Australia and New Zealand, the jurors are encouraged to discuss their question with their fellow jurors during a break before they commit their question to writing. This approach has the benefit of seeing whether the question can be answered within the confines of the jury deliberation room. Furthermore, it ensures that those questions that are then written down and handed to the judge are well-formulated. The downside to enabling this longer process requires that the jury are provided with regular breaks in which they can discuss any questions that they might have.

This historical overview of the jury question process highlights that common law jurisdictions share a common history. Contemporary jury question procedures are sufficiently similar that the results of this following Australian study should build upon our shared learnings about jury questions in relation to expert evidence.

Method

This section provides a summary of the methodology used in this study. A detailed explanation of the data collection process, preliminary findings of the project, and the full versions of each survey instrument are reported by Freckelton et al. (2016).

Trial selection procedures

In 2011–12, 55 criminal jury trials that featured expert evidence were randomly selected from the three largest Australian cities: Sydney (22%, n = 12), Melbourne (60%, n = 33) and Brisbane (18%, n = 10). The jurors sat on a variety of criminal cases including murder (45%), rape (31%), assault (11%) and culpable driving (9%). A broad range of expert evidence was included in the project: DNA (29%), medical doctors (24%), forensic pathology (15%), psychiatry (14%), vehicle analysis (5%), ballistics (4%) and digital evidence (4%). Two-thirds of the trials featured prosecution experts but no defence expert evidence.

Participants

All jurors from the 55 trials were immediately asked, following the conclusion of their trials and before they left the court building, whether they would like to participate in a survey. Two hundred and ninety-six jurors agreed to participate out of a total of 660 eligible jurors (45%). Jurors that participated in the survey ranged from 18 to 83 years old, with an average age of 45 years old (SD = 15.97 years, range = 22 to 69 years). When compared to national statistics, the demographic make-up of the jurors that chose to participate in the project was representative of the broader Australian community with one exception – participants were more likely to have undertaken tertiary studies compared to the average Australian. At the conclusion of the survey, the jurors were invited to participate in an interview on the same day. One hundred and eleven jurors volunteered to be interviewed, and interviews were conducted either in-person, immediately or within a few days, via telephone (n = 111).

The judges, lawyers and experts were also interviewed usually in-person or via telephone within a few weeks from the verdict. Over forty judges out of a possible 52 judges (76% response rate) volunteered to fill in a survey and/or be interviewed. One hundred and fifteen lawyers volunteered to fill out a survey and/or be interviewed (over 90% response rate). Eighty experts volunteered to fill in a survey and/or be interviewed (over 80% response rate). In reporting the results of this project, participants are referred to, in gender-neutral language.

Limitations

This article focuses on an analysis of what the jurors told us when we surveyed and then interviewed them about the jury question process. All three jurisdictions that are featured in this study require jurors to write their question(s) and hand them to the judge. Accordingly, oral juror questions are not part of the discussion in this article. When considering the jurors' responses, it is also important to note that the survey questions were confined to their specific experience with the expert evidence in their trial. The jurors may have had questions of law that they wanted to ask the judge or questions for other witnesses. Whilst it would have been ideal to ask the jurors about all their questions (including questions for other witnesses and questions of law), such questions were strictly not allowed to be part of the study. The juror survey questions, specifically about questions, are set out in full in the following section. The full juror interview schedule of questions is available in Appendix 2 of Freckelton et al (2016). The survey and interview questions were necessarily shaped by the strict requirements placed around conducting real jury research. Before we could talk to the jurors, formal consent and support from 14 different agencies was obtained (Freckelton et al., 2016; Horan and Israel, 2016). There were many questions we would have liked to have asked but were not permitted to. Nevertheless, the questions that were answered provided us with rich data to guide discussion surrounding the jury question process as it pertains to expert evidence. To deepen our understanding of this data set, the jury views were also compared and contrasted with the views of the experts, prosecutors, defence counsel and judges of the same 55 trials. The thoughtful responses provided by all participants enable us to provide a valid yardstick upon which trial judges, counsel and experts are able to measure and reflect on the effectiveness of the current jury question processes that they use.

Analysis

The survey data was entered into an Excel spreadsheet by the fully trained research assistant. The research assistant also constructed a jury code for the jury survey responses. The author, as the primary researcher of this article, collected the results relevant to this article from the Excel data table and cross-checked these results with the hard copy versions of the jury survey instruments. All interview data was transcribed by a professional transcription service employed by the research

project. The author coded those parts of the transcripts that related to this article, by performing a question-by-question analysis of the transcripts and identifying themes. The transcripts were subsequently re-analysed to identify quotes that supported the identified common theme categories. The author then extracted quotes which were illustrative of the core themes. The quotes were altered in order to ensure that the trials remained de-identified and minor grammatical errors were corrected.

Results

Juror survey responses

The surveyed jurors in each of the 55 trials were asked specific questions in relation to the main expert witness for the prosecution and the main expert witness for the defence. Each of the jurors surveyed were asked: 'Did you have any questions that you wanted to ask the *prosecution* expert witness?' (Question ('Q') 5). Of the 296 surveyed jurors, 21% (n = 62) said 'yes'. Of the 62, 95%, (n = 59) of them said that they did not ask the question(s). The participants were also asked: 'Did you have any questions that you wanted to ask the *defence* expert witness?' (Q10). Of the 296 surveyed jurors, 14% (n = 42) of the jurors said 'yes'. Of the 42, 93% (n = 39) of them said that they did not ask the question(s). Twenty-three of the 42 jurors who answered Q10 did not answer in the same way for the prosecution witness (Q5). In total, over a quarter of all surveyed jurors (29%, n = 85) had unanswered question(s). There were very few instances where jurors wanted to, and did in fact, ask questions (7%, n = 6).

Based on the findings of earlier research (as summarised above in the historical overview section), the survey anticipated the possibility that some jurors would have questions that they did not ask. The survey included a follow-up question which delved deeper. The jurors that had questions but did not ask them were asked to identify the reason(s) for not asking their question(s):

Question 5. To what extent did the following factors influence your decision not to ask questions of the prosecution expert witness?

	Strongly Disagree	Disagree	Neither	Agree	Strongly Agree
I did not know jurors could ask questions	5	5	7	8	37
I was worried they would not be allowed	5	4	17	10	20
Someone else on the jury asked my questions(s)	31	4	15	4	0
The judge did not allow them.	18	1	31	2	4
The other jurors explained it to me	25	3	19	6	3
I did not feel comfortable asking questions.	13	3	19	6	9
Other (specify) – 17					

In relation to those jurors who had questions for the prosecution expert witness:

(i) 73% (n = 45) strongly agreed/agreed that they did not know jurors could ask questions.
(ii) 48% (n = 30) strongly agreed/agreed that they were worried that their question(s) would not be allowed.
(iii) 6% (n = 4) strongly agreed/agreed that a fellow juror asked the question on their behalf.
(iv) 10% (n = 6) strongly agreed/agreed that the judge did not allow the question.

(v) 15% (n = 9) strongly agreed/agreed that their fellow jurors explained it to them.
(vi) 24% (n = 15) strongly agreed/agreed that they didn't feel comfortable asking questions.
(vii) 27% (n = 17) chose to explain their response. Eight explanations highlighted that the jurors perceived that the 'Judge did not suggest we could ask questions' (Juror 4 from Trial 32, hereafter J4, T32). Another six explanations showed that these jurors were 'unsure' (J1, T55) and 'confused' (J1, T48) about the 'user-unfriendly' (J1, T50) process of asking questions. Three jurors said that they did not ask their question out of concern that their question was 'irrelevant or non-consequential' (J3, T50).

Question 10. To what extent did the following factors influence your decision not to ask questions of the defence expert witness?

	Strongly Disagree	Disagree	Neither A/D	Agree	Strongly Agree
i. I did not know jurors could ask questions	5	2	3	3	29
ii. I was worried they would not be allowed	6	1	8	4	15
iii. Someone else on the jury asked my questions(s)	21	1	8	0	0
iv. The judge did not allow them.	14	0	15	1	1
V. The other jurors explained it to me	16	2	16	2	2
vi. I did not feel comfortable asking questions.	6	2	9	6	9
vii. Other (specify)					

In relation to those jurors who had questions for the defence expert witness:

i. 76% (n = 32) strongly agreed/agreed that they did not know jurors could ask questions, with 7 jurors disagreeing with this proposition.
ii. 45% (n = 19) strongly agreed/agreed that they were worried that their question(s) would not be allowed.
with 7 jurors disagreeing with this proposition.
iii. & iv. The lack of agreement with these propositions support the fact that few jury questions were asked
v. Getting assistance from fellow jurors in resolving questions, was not something that featured in the perceptions of the responding jurors.
vi. 36% (n = 15) strongly agreed/agreed that they didn't feel comfortable asking questions.
vii. 19% (n = 8) chose to explain their response. Five of these jurors 'had no idea jurors could ask questions of an expert witness. We should be told this before the trial begins' (J5, T10). Three jurors were confused by the process.

Combining the responses to both questions 5 and 10;

- Two thirds (66%, n = 56) of all 85 jurors admitted that they did not know that they could ask a question. The jurors that admitted that they did not know they could ask questions, were not concentrated in a few trials but came from 27 different trials across all three jurisdictions (49% of the total 55 trials). These trials featured an adequately representative mixture of charges (murder, sexual assault and assault) and expert evidence (forensic scientists, psychiatrists, medical practitioners and DNA).
- Almost half of these jurors (45%, n = 38) were worried that their question(s) wouldn't be allowed.
- A third of the jurors (34%, n = 29) did not feel comfortable asking questions.

Juror interview responses

Juror interviews gave those interviewed a further opportunity to expand on this topic. The jurors that were interviewed were asked at Q9: 'Were there any times when you (or the jury as a whole) would have liked to ask a question about the expert testimony but did not do so?' In 24 of the 55 trials (44%) there was at least one juror we interviewed that agreed with this proposition.

Like the survey results, the most common rationale explaining why jurors wanting to ask questions did not do so, was because 'I was told I couldn't' (J1, T29). These nine jurors commonly blamed the user-unfriendly process; '[We] would have liked to have asked questions but…we weren't sure whether or not we could, so we didn't…. I guess we, yes, we were a little in the dark about what we were supposed to do and what we weren't' (J1, T34). These nine jurors came from trials where it was established, by cross-referencing the data, that the trial judge had told them that they could ask questions.

A further eight jurors explained that they were told they could ask question but were hesitant to do so; 'I know we were instructed if we were unsure of something [we could ask questions] but it didn't sort of twig to me…. I don't think others were aware that this was one of the options that was really open' (J1, T1). Some of these jurors identified the factors that discouraged them from asking their questions including: 'I probably would have felt like a bit of a goose if I had of asked something that was totally ridiculous' (T38); feeling 'scared, felt intimidated' even though 'the Judge was a very approachable human being' (J3, T16); not wanting to ask 'stupid questions' (J12, T29). One juror foreperson explained that, whilst 'the judge does make it clear at the beginning of the case that the jury are allowed to ask questions at any time, it doesn't quite feel organic to interrupt.' This foreperson gave an example: 'I had to interrupt for a toilet break once, and I copped the fury of [counsel's] death stare' (J10, T14).

Judges', lawyers' and experts' responses

The judges, lawyers and experts were asked *inter alia*: 'Did the jury ask any question(s) in relation to the expert evidence? If "Yes", which of these questions did you allow? If you disallowed them, why did you do so? Was it a useful exercise?' Six of the 40 judges said that the expert(s) in their trial were asked jury questions and that this was a useful exercise. The judges and lawyers from the same trials expressed a positive experience with jury questions. The questions have been 'very much on point and targeted and things that counsel have missed or either not got to' (Judge, T8).

Whilst it was not a direct question in the interview schedule, an analysis of the responses suggests that 93% (n = 37) of judges told their jury at the beginning of the trial how they could ask a question. Five judges explained that they do not believe jurors should be able to ask questions. These five judges believed that jury questions are not appropriate in our adversarial system where the decision-maker must remain a passive recipient of the evidence and not interfere with the party-led process. As the Judge from Trial 10 explained that he 'discourage(s) that because of the adversarial process and the fact that questions are often deliberately not asked for forensic purposes, and there may be good reasons for not doing that. The most important reason that comes to mind is that it may invite a response which may be prejudicial and not admissible and could have the effect of an application being then made to discharge the jury. It's dangerous to invite juries to ask questions' (Judge, T10). The judge in Trial 25 gave an example of such a 'dangerous' question: '[If the jury asks] "Does the accused have any prior convictions?" well then what do you do, assuming he has? You have to say, "Don't answer that" and then as soon as you say that you might as well say "Yes" and then you've got a major problem on your hands' (Judge, T25). In contrast, Judge 53 reasoned that inadmissible 'silly questions' are still worth getting in the belief that a well-reasoned judicial explanation as to why the jury should not concern themselves with such questions will encourage the jury to redirect their focus back to the

evidence. One prosecutor also noted the benefit of jury questions as the only way for the court to identify juror comprehension difficulties: 'One will never know if the jury had difficulty understanding. Except if they have asked any questions' (Prosecutor, T49).

Some lawyers noted that there was a wide variation amongst the judiciary in the form and timing of jury question instructions; 'Some judges…encourage jurors to ask questions, others are pretty much making it sound as though, 'oh you can ask questions if you really, really, really want to, but it's probably best to leave that to the lawyers to do it' (Prosecutor, T3). The prosecutor from Trial 36 noted that the jury might have difficulty in understanding the jury question instruction 'because it's all delivered orally, it's buried in amongst a lot of other directions about other things, and they're not provided with any written instructions' (Prosecutor, T36).

Ninety-six per cent of the experts (77 out of 80) said they were not asked questions and explained: 'I hope they would have asked me more questions if they had [misunderstood].… I suspect there probably was [difficulty], but they didn't have the opportunity to ask me questions' (E1, T18). The three experts that said they were asked jury questions said that the questions were useful.

The interviewed experts were also asked: 'What has been your general experience with jury questions in past trials?' Thirty per cent of the experts (24 out of 80) shared a similar response to Expert 2 from Trial 42: '[I] don't actually recall ever there being one…I would have given evidence in several thousand cases and I have no recollection of…a question coming back'. The general experience of experts with jury questions is that they are seldom asked, but when asked, the experts 'really like getting questions from the jury' (E2, T39) as 'the majority of the time, I find them to be quite insightful' (E1, T44). 'Too often, we may think we're explaining things in layman's terms, but we don't know unless we're given feedback' (E1, T55).

Summary and analysis

Over 90% of all the study participants thought jurors should be able to ask questions. Jury questions were perceived as an opportunity to obtain feedback with a view to clarifying trial evidence. In line with this positive disposition towards jury questions, in over 90% of trials, the jurors were told at the beginning of the trial that they could ask questions.

The judges', lawyers' and experts' positive attitudes towards receiving jury questions did not result in jurors asking their questions. The most notable finding was that over a quarter of all surveyed jurors had unanswered question(s). Two-thirds of the jurors that had unanswered questions said that they did not know they could ask questions. The jurors that admitted that they did not know they could ask questions were not concentrated in a few trials but came from half of all the trials. This finding sits in contrast to the assumption made by the interviewed lawyers and judges that the judicial instructions at the beginning of the trial were clear and understood by the jurors.

Two interconnected themes emerged from the reasons the jurors provided as to why they did not ask their questions: first, some jurors were unaware that they could ask questions, and secondly, some jurors were intimidated by the courtroom environment and too scared to speak up for fear that they would embarrass themselves and/or waste precious court time.

I did not know jurors could ask questions

Despite most of the jurors being told at the start of the trial that they could ask questions, some of them reported they did not know that they could ask questions. This suggests that these jurors did not absorb the judges' initial instructions provided to them when judges orally explained the trial process, including how they could ask questions. There are clues in the interviews as to why this message was not heard. One of the lawyers acknowledged that the jury may have had difficulty in understanding the jury instructions 'because it's all delivered orally, it's buried in amongst a lot of other directions about other things, and they're not provided with any written instructions' (Prosecutor, T36). Some jurors explained that at

the start of the trial they were 'quite frightened and in shock' (J3, T38) Some jurors are so overwhelmed with being in their new environment that they are not in the right frame of mind to retain extensive and unfamiliar oral instructions at the start of the trial.

I was worried they would not be allowed and did not feel comfortable asking questions

Other jurors admitted hearing the judge's instructions at the start of the trial, but they still felt like asking questions wasn't 'one of the options that was really open' (J1, T1). This rationale fits in with an observation from a prosecutor, who observed that some judges deliver the jury question instruction in a way that makes it clear that the judge would strongly prefer that the jury didn't ask questions unless they 'really, Really REALLY' want to (Prosecutor, T3). Some jurors admitted to self-censorship as they did not want to waste the court's time. Even when a judge was perceived to be approachable by jurors, they still felt 'scared' and 'intimidated' (J3, T1). The perception that they would embarrass themselves and feel 'like a bit of a goose' (J3, T38) led to some jurors remaining silent.

Judicial concern about jurors asking inappropriate questions

Not a single interviewee identified a jury question from the 55 trials that was 'dangerous' (Judge, T10) or created a 'major problem' (Judge, T25). Hypothetically, five judges did fear that jurors might ask an inappropriate question(s). As referenced earlier, studies confirm that problematic juror questions are rare and that the fears of inappropriate questions derailing a trial are not well placed (Diamond et al., 2004; Heuer and Penrod, 1996).

Adept judicial management of the jury question process can ensure inadmissible questions do not negatively impact upon the perceptions of a fair trial. If a written jury question asks for extraneous material, the judge should perceive the question as an opportunity to educate the jury, rather than assume it is evidence of a biased jury. The judge can educate the jury by providing a reasoned and contextualised explanation as to why they must confine themselves to the facts presented to them and not stray beyond those facts. Jurors are highly motivated to do a good job (Vidmar and Hans, 2007). They are likely to accept an explanation as to why their question cannot be answered. Such a logical explanation is likely to quell any desire on the part of the jury to continue to seek the answers to their questions outside the courtroom. Marder (2022) talks about such exchanges as a strengthening of the judge and jury relationship. Building such a trusted relationship is likely to ensure that the jury returns to the judge if they have further questions and resist their instinctive urge to search online for their answers (Tenzer, 2020).

Judges are unable to anticipate all questions the jury might have. For example, judges could not expect 'silly' or 'stupid' questions, but, as the judge from Trial 53 acknowledged, it is still worth getting them. This is because it provides parties with the opportunity to correct misunderstandings which have arisen. If a juror asks an inadmissible question, then the judge has the opportunity to provide a reasoned explanation as to why the question is not relevant to the trial. These measures maximise the chance that the jury will not be distracted by or rely upon inappropriate facts or assumptions when making their decision.

A jury-centric analysis of the data

A jury-centric analysis of the data collected from the featured study in relation to the jury question procedure asks: Do juries have all the tools they need in order 'to perform more effectively' their task (Byrne, 2022; Marder, 2003)? With a specific focus on jury questions, the broader question is addressed through a three-step process:

1. What do jurors need, in order to understand the issues that they must determine?

2. Are the jurors receiving what they need?
3. If the answer is 'no' to Question 2, how could the perceived problem(s) be ameliorated or resolved? (Byrne, 2022; Marder, 2003)

Question 1: What do jurors need in order to understand the issues that they must determine?

Jurors told us that they wanted to be able to ask experts questions. The quality of advocacy in each trial differs. The life experience of each juror also differs. It is logical that not all evidence will be explained to the requisite satisfaction of each of the 12, usually silent, decision-makers. The vast majority of other trial participants supported this perceived jury need.

Question 2: Are the jurors receiving what they need?

No, not all jurors are receiving what they perceive they need. Over a quarter of the 296 surveyed jurors had questions they wanted answered by expert witnesses, but did not ask them. This suggests that the jurors in this study perceived that they were not getting what they needed.

Given that jurors seldom provide formal feedback on court processes, it should not be a surprise that there is sometimes a disconnect between what jurors want and what jurors are given. The juror explanations shed light on the disconnect in relation to jury question procedures. One in five jurors did not know that they could ask questions, despite the fact that the lawyers and judges assuming that the specific jury instruction relating to jury questions that is given at the start of the trial addressed that perceived need. Some jurors were either confused about the process of asking questions or perceived jury questions as unwelcome intrusions into the trial.

The interview responses identify three interconnected problems that contribute to the fact that not all jurors are getting what they need: first, the timing of the instructions; secondly, the failure to take into account the intimidating environment of the trial on jurors; and thirdly, the singular form of the instructions.

The timing of the instructions. The majority of judges and lawyers who responded thought that jurors were already receiving adequate instructions as they were verbally told, at the start of the trial, that they could ask questions. However, this initial jury question instruction is one of many unfamiliar instructions delivered in one format only: orally. The contemporary juror is not used to receiving large chunks of information without pause, dialogue or feedback. Psychological research has highlighted that contemporary learners have limited working memory and can experience cognitive overload that hampers the processing of new information (Rogers, 2021).

The vast majority of contemporary jurors were educated in schools and work, in places where long instructions are broken down into short chunks. These chunks are often accompanied by a written version of the instructions. Key tenets of contemporary learning also include checking frequently for understanding and allowing learners the opportunity to actively and successfully participate in the learning process (Dann, 1993; Rogers, 2021). Current teaching styles are at odds with the way a jury, as 'novice legal learners', are required to learn. Courts do not: check frequently with the jury for understanding, present material in small chunks to prevent unnecessary confusion and allow the jurors the opportunity to actively participate in their legal learning process (Rogers, 2021). Several of the jurors in this study expressed frustration due to the perceived constraints and unfamiliar parameters set around their problem solving. As Juror 1 from Trial 18 explained: 'It would be great to just clarify that, but I had to stop myself from talking' (J1, T18). These results support the findings of earlier studies, such as the 1998 New Zealand Study that found jurors misinterpreted when and how questions could be asked, despite being told when and how they could do so at the start of the trial.

The failure to take into account the intimidating environment of the trial on jurors. Added to the 'cognitive overload' on jurors, during the initial instructions delivered by the judge, is the 'sensory overload' where jurors are dealing with being in an unfamiliar and tense environment. As some of the jurors explained, they were 'frightened' and 'in shock' (J3, T38) that they were sitting there. Jurors are not in an ideal frame of mind, to listen and retain new information at the start of the trial. It is therefore unsurprising that jurors are unable to recall all of the judges' initial directions.

Whilst the tension in the courtroom is at its most intimidating at the start of a trial, jurors still feel this pressure throughout the proceedings. One of the reasons jurors do not ask questions is because they are made to feel that they are interrupting the process, rather than being a natural organic part of the process. The example is given above of the foreperson that 'copped the fury' of the defence counsel's 'death stare' for requesting a toilet break (J10, T14). This result aligns with other research which identifies that jurors feel too inhibited to ask questions (Darbyshire et al., 2002; Young et al., 2001; Zander and Henderson, 1993) and lack confidence in the jury question process (Warner et al., 2011). Judges in the study did not commonly repeat the jury question instructions. Even when Judge 15 gave the oral instructions about jury questions on three occasions, there were two jurors in the trial that said that they did not hear them. Even with the best of intentions, oral instructions given by the judge to the jury are not always being absorbed in the way that the judge intended.

The form of the instructions. Delivering the instructions in an oral format only is also at odds with what we know about the way in which jurors learn. Repetition, in different formats (written, oral and visual), caters for different learning styles that are likely to be present on a jury of 12. This maximises the aim of ensuring that more jurors will be able to absorb the message. As Marder (2022) explains:

> …some jurors learn by listening to the judge read the instructions aloud in the courtroom, while others understand the material if they can listen to the instructions and follow along with a written copy; still others prefer to listen to the instructions read aloud, to take notes, and to review the written instructions and their notes after the reading. Other jurors may only want to engage with specific instructions at the time that they need to apply the rule (p. 28).

Question 3: How could the perceived problems be ameliorated or resolved?

The timing of the delivery of the jury question instruction is not ideal to be given at the start of the trial, when the jury are feeling uncomfortable in their new environment. The sheer volume of instructions at the start of the trial makes it less likely that the jurors will be able to comprehend the instruction. However, this instruction must be given at the start, as it sets the ground rules for the role of the jury. Providing the oral instruction in a relatable way may assist the jurors in remembering the rule. For example, one judge from New South Wales would say to the jury 'I am your Google.' Elaborating on this, the jury could also be told that 'Your Facebook friends and family MUST be replaced by your fellow jurors when sharing your thoughts about the trial.' Repeating the instruction in different ways so that the judge caters for different learning styles in the jury is also more likely to ensure that all jurors are able to absorb the instruction. Below are three practical ways in which retention of jury question instructions may be improved and the perceived problem can be ameliorated.

Varying the format of the jury question procedure. The judge in Trial 35 provided the jury with several copies of a form headed 'Jury Questions'. The judge explained to the jury that the forms are designed for the jury to write their questions on. The form was left on the table in the jury room for easy access by the jury. Whilst it is common for jurors to be provided with pen and paper that they can write their questions on, this physical form, clearly headed 'Jury Questions', is a clear indication to the jury that questions are allowed and not discouraged. The form provides a timely reminder to the

jury each time they sit in the deliberating room where they are at liberty to voice any of their confusion with their fellow jurors. In Trial 35, the jury used the form six times. The first form contained five questions for the defence expert. The second form contained four questions relating to other general evidence. The third form sought to clarify legal definitions. The other forms contained procedural questions. The seven jurors from Trial 35 that filled in the survey said that they had no questions for the prosecution witness. One of the jurors said that they had questions for the defence witness that were asked and that their fellow jurors' feedback on the questions was helpful. These responses and the extent of use of the form suggests that this judge was successful in ensuring the jury felt comfortable asking questions.

Providing the instruction in written form. Another way in which we can ensure jurors are able to retain the jury question instruction is to provide a step-by-step instruction in written form. In the same way that Marder (2022) says the judge's oral instructions as to the law should be complemented by written instructions, in order to cater for different learning styles amongst the jurors, so too should the procedural instructions (including how to ask a question) be provided in writing. The written version of the instructions acts like a script for the judge. As the judge delivers the content of the script, the jurors can enhance their comprehension by following the judge's words along in the provided script. The jurors can then take the script with them to the deliberation room and can refer to the script in their own time and as often as they want to. Jurors don't have to rely purely on their memory in recollecting the instructions but can be prompted by the written version of the instructions.

The Victorian judiciary have recently developed, piloted and implemented written guidelines for jurors. Since November 2023, judges in Victoria are encouraged to provide the 'Jury Guide' to jurors at the start of the trial. The booklet gives the judge a firm structure in which to approach the formidable task of delivering the initial instructions. The first half of the booklet is written as if it was transcript of what the judge tells the jury during the initial instructions. This part ends with acknowledging that being a juror can be stressful and provides a few strategies in relation to managing any stress. The 'Jury Guide' is likely to ameliorate feelings of intimidation and discomfort about asking questions, as it steps the jurors through the jury question process so that they are not left feeling like they have approached the process in the wrong way. The booklet has been refined and finessed several times over, so that the language used to explain the trial process is simple and accurate (Bourgeois et al., 1993). Jurors do not need a tertiary education to understand the content. The last page of the 'Jury Guide' provides definitions of 'Key Terms' used in the courtroom, which is likely to reduce the need for jurors to look up these unfamiliar legal terms online.

The jury is allowed to take the booklet with them into the deliberation room. This gives jurors an opportunity to refresh their memory of the initial instructions in their own time, away from the intimidating environment of the courtroom. It is hoped that the jurors will remember to look at the booklet when they have a question that they want to ask. The booklet provides:

What if I have a question during the trial?

- If you are unsure about anything during the trial, please ask a question.
- If you have a question:
  - you may wish to discuss it first with the other members of your jury; or
  - you may ask me.
- To ask me a question, please provide the question in writing (if possible) to my staff to give to me. If the question is urgent, bring it to the attention of my staff as soon as possible.
- Do not worry about whether you are wasting the court's time or whether your question is allowed. Your questions are important. I will decide whether the law allows your question to be answered (page 11).

The results of this study provide a firm reason why all judges in all jury trials would benefit from utilising a step-by-step written jury instruction guide as a way to ensure that jurors understand when and

how they can ask questions. Ideally, an electronic version of the written guide to jury instructions would also be made available for jurors. An electronic guide at their fingertips at the moment when they are alone, online and struggling with the unfamiliar legal terminology or focused on filling their perceived gaps in the evidence might encourage the jurors to leave their questions unanswered and ask them when they return to court.

The timing of jury question instructions. Rather than one instruction at the beginning, nestled in the middle of a swathe of other directions, the jury question instructions should ideally be given at other appropriate times throughout the trial. For example, if there is a natural break in the middle of an expert's evidence, this is a good time for a judge to remind the jury about their opportunity to ask the expert questions. The jury can then, in their break, discuss their concern with their fellow jurors. If none of the fellow jurors can answer the question, the jury can work together on formulating the question. This ensures timid jurors have fellow juror support and less articulate jurors have the assistance of their more articulate fellow jurors when formulating the question. This process will also reduce the likelihood of inadmissible questions. The UK Home Office and Former Chief Justice Bathurst of the Supreme Court of New South Wales recommended that judges should invite the jurors to ask for clarification at the end of each court session (Bathurst, 2012; Matthews et al., 2004). Inviting questions at the conclusion of the expert's evidence and asking jurors if they need a pause to formulate any questions should be standard across all trials so as to ensure against jury questions remaining unanswered.

Conclusion

Our deepening understanding of what jurors want, coupled with a greater comprehension of the impact of contemporary conditions on jurors, has heightened the need for courts to continue to find ways in which to improve the jury question process. The ability of judges to manage the jury question process well underpins the veracity of verdicts. The results of this study of real jurors enables us to provide a valid yardstick by which trial judges can measure and reflect on their jury question procedures.

The jurors in the featured study told us that they wanted to be able to ask questions when they perceived they did not have everything they needed in order to make a thorough assessment of the evidence. This study confirms that too many jurors complete their jury service with unanswered questions. If we want to enable jurors to make the most reliable assessment of the evidence possible in the circumstances, then they must perceive that they have had the opportunity to ask questions that will resolve any lingering confusion about the evidence.

The results of this study identify that the formal atmosphere of the courtroom intimidates some jurors and interferes with their ability to ask questions that they perceive to be important. As the courtroom process is unfamiliar and sometimes counterintuitive to the contemporary juror, it is not surprising that one instruction at the start of the trial, buried amongst several other important instructions, is missed by some of the jurors. Jurors need reminders of the initial instruction at times when they are less likely to be overwhelmed by the intimidating courtroom environment. Repeating the initial instruction at timely points in the trial will enhance the ability of jurors to ask questions when they perceive they need to. Providing the instructions in different forms, such as a written Jury Guide or leaving a blank question form on the jury deliberation table, are all ways in which the message can be delivered in a more timely, comprehensible and user-friendly way.

Research highlights that when jurors are made comfortable to bring their questions to the judge, the questions do not undermine the system when the process is handled well by the judge. A compelling reason to ensure that jurors know that they can ask the judge questions is that this is likely to discourage jurors searching for the answer online. Reducing the lure of the internet for jurors with unanswered

questions, by redirecting their concerns back into the courtroom, can only help to improve the quality of decision-making in our courts. In this way, the suggested improvements for jury question procedures are safeguarding the imperative of all adversarial justice systems: to offer a fair trial.

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