

**Gertie's Law
Episode 13 - Reporting the Court Part 2
Judge / Journalist panel**

Greg Muller

I'm Greg Muller and this is Gertie's Law. Last episode we looked at the relationship between the Supreme Court and the media. And examined the institutional tension which exists between the two.

Despite judges and journalists both working here every day, they never get a chance to talk. In part two of this episode - they do.

We assembled a panel of four Supreme Court judges and four working court reporters. We all met one evening after court had finished for the day and sat around the bar table in court 15.

The very same court where Cardinal George Pell's Appeal judgement was heard - and viewed around the world - the day before.

From salacious headlines to suppression orders. Journalists on one side of the table. Judges on the other.

Justice Whelan

And what's the topic Greg?

Karen Sweeney

How wonderful the media is...

Greg Muller

...and how everyone loves judges and what a great job they're doing.

Karen Percy

Alright we won't be talking for very long.

Adam Cooper

My name is Adam Cooper. I'm a court reporter with The Age.

Karen Sweeney

I'm Karen Sweeney. I'm a court reporter with Australian Associated Press, AAP

Shannon Deery

My name's Shannon Deery – reporter with the Herald Sun

Karen Percy

My name's Karen Percy. I'm a reporter with the Australian Broadcasting Corporation

Justice Hollingworth

I'm Elizabeth Hollingworth – I'm head of the criminal division in the trial division.

Justice Riordan

Peter Riordan – head of the commercial court.

Chief Justice Ferguson

Anne Ferguson – Chief Justice

Justice Whelan

Simon Whelan – Court of Appeal.

Adam Cooper

I'll start off maybe this question can be to you Your Honour – In my few years covering courts it felt like there's been an erosion of trust between the courts and the media. Do you think that's the case and if so do you have a reason why?

Justice Hollingworth

I think one thing we have noticed is when we started there was a lot more dedicated court reporters and many publications and I'm not referring to people who are here at the table, now due to resourcing issues send down people who may not have particular expertise at court. And certainly speaking for myself, one has awareness these days that you're dealing with a mixture of people that understand the rules of sub-judice.

Greg Muller

Sub Judice basically means before a judge or court. It's a Latin phrase which translates as "under judicial consideration." For reporters it means they can report in a fair way what is said in court but can't report or comment on it in a way which might undermine a fair hearing or prejudice the outcome. Doing so can lead to contempt of court proceedings for the journalist. More importantly it can lead to an unfair trial. The rule is aimed at avoiding a 'trial by media.

Justice Hollingworth

...and that can lead to a little bit of caution. That said – I'd like to think (and maybe I'm kidding myself) that we're becoming a little bit more open certainly in terms of allowing things to be reported, trying to provide materials to the media and so on, so I think there's a mixture of movements going on but certainly speaking from my part I think it's somewhat regretful that the expertise that used to exist – certainly when I started, and I think when Justice Whelan started isn't necessarily there with all the court reporters.

Justice Whelan

And there's been some big changes too. Over the last 15 years the pressure on reporters has increased significantly because there's no deadline anymore. The deadline is permanent. It's five minutes time, whereas when we started it was not like that. You didn't have to get a story up straight away so the time pressure has become more intense, I think and the other things that's happened is the competition within the media has I believe become more intense so the temptation to try to make a story attractive – to get a reaction has increased, and that's meant that the natural tension that exists between what we do and what you do has also come into sharper focus because we're dealing with particularly in crime – these highly charged situations – highly emotional situations and I suppose in some

ways we are not ignoring the emotion but trying to deal with the things which need to be dealt with in a way which is in accordance with the law and to that extent not emotional.

Those reporting the matter have a different agenda. They're concerned to accentuate the emotion – at least in part they're concerned to do that – because that will be more likely to make an interesting story. And to get a story that people will want to read. So, the increased time pressure and the increased pressure to get a reaction might have led to more tension than had existed in the past. Having said that I think we've done a marvelous job.

Justice Hollingworth

Just picking up on what you're saying Simon, it makes me reflect on how the role of victims and members of the public has changed over the years because when I first started sitting in crime, you often wouldn't get victim's families in court throughout a trial. They certainly didn't want to speak to the media and I think social media has made the whole community more aware of putting themselves out there. And it's now not uncommon for many members of the victim's family or friends to come and sit throughout a trial.

Karen Percy

Can I pick you up on that though in terms of it being more perhaps salacious or more emotional or whatever. I think that when you go back through the archives – I'm actually shocked at some of the stuff that was written 20, 30, 40 years ago. That was as salacious, as detailed, perhaps more. There might be some details we don't actually do anymore so I do take your point – the pressures are definitely there and to be noticed and to get clicks – there's all those pressures, you're absolutely right, but I do think that there's always been a great interest in these kinds of stories and I think perhaps we're all still having teething problems in the new digital age. We are. We're under so much pressure in the media to justify what we're doing and how we're doing it to our editors and the like but I think that the emotion has always been there and the dirty details have always been in there.

Shannon Deery

I think the internet plays a big part though because stories don't go away anymore. So, I can only imagine if you are a lawyer and you see a story in a newspaper 30 years ago that affects your case you can think, well, it's there for a day. The jury may not see it. It will be gone tomorrow and used as fish wrap. But now, that story's there forever and it doesn't go away so I think that's a big issue as well.

Justice Riordan

Is there any reconcilability with our respective positions because if we take sentencing for example. I think that the media has been very successful in satisfying most of the community that judges are soft on crime and any survey will tell you that they under sentence all the time as a matter of generality. And I think that' because, not surprisingly, because the media will zero in on any case that they think can be sold as the court's been soft on crime.

Karen Sweeney

I think I disagree with you there. We cover cases because they're interesting, because we think people wasn't to know about them, need to know about them. And often its commentators or people on social media who will say that sentence was too light or that sentence was too harsh and we will report on it if it's appealed by one of the parties or the

other. So I'm not sure that we focus on – we never know what a sentence is going to be so we can't necessarily focus on something that we think will be too light or...

Justice Hollingworth

I think it's interesting though because you draw, each of you draws a distinction between what you do as journalists and what others in the media might do, like the editor writing an editorial, somebody making a decision not to publish a letter, social media. To us you're all 'the media' and so I can understand that you quite rightly think, 'that's not me. I don't do that.' But to a certain extent from our point of view it's what 'the media' as some enormous mass do.

I think the other thing – because I do agree with what Justice Riordan's saying, we have had repeated surveys done and I know one of them was mentioned in an earlier Gertie's Law. They've been repeated surveys in Australia and overseas about when you give jurors or members of the public the same information as the judge had. In every one of these surveys, without doubt, actual members of the public would give lighter and not heavier sentences, and a number of my colleagues have over the years tried to get these sorts of results published in the paper and when I think of the push back – and I won't name individual publications – but the push back they've had in trying to even get reported the fact that there is all this research to the contrary – as I say, I'm sure no-one at the table's involved in that but you represent this amorphous mass to us I'm afraid as we probably represent an amorphous mass to you.

Karen Percy

I think there is a sense that it's not all media, not all time. Not all judges not all the time but that doesn't help his discussion.

Karen Sweeney

There's a point there you just made that when juries have the same information that the judges have. And that is something that the media don't have. We will go to a plea hearing and we will hear bits that are pulled out. The highlights from a report but we never see the entire report. Obviously there's privacy issues there but it does mean to an extent we are flying blind and it happens in criminal matters, it happens in commercial matters, happens in civil matters. Is there any way that things could be worked so the media have greater access to information?

Chief Justice Ferguson

I think there are some restrictions on us giving access, especially in criminal cases for a variety of reasons and where we can we try and give you what we can early so that you've got a bit of time because we do recognise that you're just doing your job and you've got this always moving deadline – is what I'd call it. What information we can do we do try to get out there as quickly as we can to all of the media.

There's also though, I think, not an appreciation of what's going on outside court for the judges and for their staff. So, you get out of court and to deal with some of the requests that are coming in for information when you've got work that you've got to do, sometimes you've got to pick the balance to get it right. So, I think that's a problem but we're certainly very keen to do what we can do to help you to do your job and the reason we want to do that is because we want accurate reporting and if we don't do what we can to get that information

to you we're more at risk of there being inaccurate reporting which leads to a whole lot of other work that has to be done and it's got the risks associated with it in the worst case scenario of a trial goes belly up.

Adam Cooper

Justice Riordan, just on the issue for the commercial court, we know that there's plenty of great interesting stories in the commercial court and unfortunately we're often restricted in terms of resources we can send. I know general reporters tend to focus more on crime stories. We do have finance reporters who go to commercial court cases but is there some way that we can in the media go in and get access information about commercial cases where we have a general idea about what the story is or what the case is as opposed to needing to be there right at the start in order to pick it up.

Justice Riordan

I think that's a really good point. Plainly you have to rights to go in and access the court documents, particularly the pleadings and those matters. You currently are able to get copies of affidavits and that sort of thing as well. And I think we should encourage you to be able to get summaries of these matters that would be of assistance to you in determining of what might be of interest to your readers. I'd be interested in what more I can do about that.

Justice Whelan

I would have thought in crime we are quite a bit better now than we used to be on that score. There's a lot more summaries. I hope there's access to transcript and that sort of thing. We'll give ourselves a pat on the back for that. When Liz and I started it was terribly difficult even to get judges to do the sentencing remarks in writing. Very difficult. There was a lot of resistance to that and so you had to scribble it down as they were talking. I hope those days are all gone.

Shannon Deery

That seems par for the course for you guys now. You've always got sentencing remarks...

Justice Whelan

I hope that's right

Shannon Deery

It seems to be.

Justice Hollingworth

Most people do. We certainly try to if we can. And we're also looking more over the last year or two at expanding more into televising significant ones and certainly audio recordings fairly standard now so that that's available for all but the most exceptional sentences as well.

Shannon Deery

Do you think the media plays as an important role as it once did in promoting the work of the court given now the court's now have their own twitter feed and their own websites and you can push, you can run your own livestreams for big cases. You can push your own information out there. Do you think we play that role and if we don't is that maybe where that

breakdown in trust is coming from because we don't really need each other as much as we once did?

Chief Justice Ferguson

For my part I've never seen it as the media's role to promote the court for want of a better word. I don't see that that's part of your remit. To the extent that you talk about what's going on in court I'm very pleased about that if it's accurate because that does show the work of the court to a broader range of people than would otherwise know about it. But I, for my part have never seen it as part of your role to promote the court or do anything like that. Certainly doesn't hurt to have the description of the work we do and how we go about it and that's important...

Shannon Deery

That's maybe poorly phrased, promote the work of the court but surely, making the community aware of sentencing is important because otherwise things like general deterrence don't really work if no-one knows how the courts are operating. Do you know what I mean?

Chief Justice Ferguson

Yeah, I do. You're really getting to the need for the institution to be accepted by the community as a valuable part of our democratic society, which it is. To the extent that your job is consistent with that message being part of it, I'd say, "Great, go for it."

Adam Cooper

A long time ago we wouldn't have reported domestic abuse as we do now. And now it's not uncommon for reporters to go in and cover the case of a murder, like a husband accused of murdering his wife so I think it's probably appealing to readers it's probably appealing to editors to get a really juicy story on that one day but I still think also that court reporting's got a vital part to play for the community in terms of holding people to account, seeing that justice is being done and also reporting what's happening in the community, how prevalent these issues are.

23:35

Justice Riordan

Adam, you asked me a question before about the commercial court and speaking for the commercial court, I think it's important that the press reports that we're not just a criminal court. And most people only think of crime when they think of the courts.

23:53

Chief Justice Ferguson

That's why we had The Iceberg episode.

Karen Percy

Can I ask each of you, when you see reporters in your courtroom does your heart sink or are you pleased about it?

Justice Hollingworth

Am I allowed to say it depends on who the court reporters are?

Chief Justice Ferguson

And can I say, I wouldn't recognise you. I will now, but I wouldn't recognise you unless there was someone that was taking notes in an old fashioned way. I shouldn't say it's old fashioned, you might do that still. But you're actually not focussed on who's in the courtroom. You're actually focussed on the people at the Bar Table because you're listening to them and you're watching them and if you've got a witness in the box you're whole attention's focussed on them. You're just concentrating on what you're doing. You're not thinking about who's there and who's not there. I certainly don't.

Karen Sweeney

Do you actively seek out and read stories about things that you've had – decisions you've made or sentences you've handed down.

Chief Justice Ferguson

I have a practice of reading the paper and I don't alter that practice and if there's a case that I'm in then I will read those articles but I don't go and search more broadly outside whatever I would usually do.

Justice Hollingworth

If I've got a jury criminal trial I make sure, through the news clipping services that I am checking what's out there so that if there's any juror that's been exposed to something, some inaccurate reporting that I'm on top of it. So I do it not as a vanity exercise – and did they spell my name right? What did they say about what I said yesterday? But joking aside it's to actually see what's been reported about yesterday's court proceedings in case it might have affected a juror or there's something I've got to say to the jury in case they inadvertently came across some of the media.

Justice Riordan

I think I probably get it brought to my attention from family or friends. So recently it was reported that I'd said something or done something and there was a photograph of an Irish judge and that came through on my Whatsapp.

Chief Justice Ferguson

What about you Simon?

Justice Whelan

Well, look media attention is a bit of a no win thing for us. It might be neutral. It's unlikely to be happy experience. It might not be a happy experience so I suppose we're naturally cautious. Especially, in the days when I was running criminal trials, what Liz is doing now, your main concern is that something will go wrong in the trial. That's what you're mainly worried about. You're pretty cautious as a result. In the court of Appeal – yes I suppose the truth is if you want the quiet life, it's better if you can make your decision without lot of fuss. On the other hand, judges who always decide in such a way as to not cause a fuss are probably not doing their job. So a bit of fuss is part of the job really.

Karen Percy

Speaking of the fuss and the fuss that was happening in this particular courtroom not so long ago. It just struck me as part of this whole process – the appeal process – and reviewing a jury verdict more generally, not this one specifically but how do you find as appellate judges, putting yourself in the shoes of the jurors. You've got decades of judicial experience, lawyers, the kinds of decisions and experience you have – how do you put ourselves in the shoes of 12 ordinary men and women who don't have that kind of experience?

Justice Whelan

Do we do that?

Chief Justice Ferguson

No.

Justice Whelan

We don't do that.

Karen Percy

I guess that's an assumption as part of the reviewing of a jury verdict. You're trying to listen to what they've listened to. Your reading what they've read. Can you really review a jury verdict given that you've got this extensive knowledge of the system and the law and they would not have and did not have during that process?

Justice Whelan

Well when we're looking at errors – you know - the judge admitted this evidence, and he shouldn't have or something went wrong in the charge or some such thing, well the jury don't, that doesn't enter into it. We're just dealing with what the judge did.

Karen Percy

But I'm talking specifically about...

Justice Whelan

But on the unreasonable ground..

Karen Percy

Yep

Justice Whelan

..or what used to be called unsafe and unsatisfactory. On the unreasonable ground, well, we're only asking ourselves was the jury bound to have a doubt. We look at the evidence ourselves. Was the jury bound to have a doubt, and so we're not second guessing the jury. And frankly, we're not better qualified than them on these sorts of issues. Factual issues about the sort of things which arise in criminal trials, ordinary people are just as capable as assessing that as we are, and there's 12 of them and that gives them a big advantage over one or two or three of us. So we're not putting ourselves in their place. We're not supplanting them. It's just a - the ability to go to the court of Appeal and say the verdict was unreasonable is just a safeguard against a situation where a jury reaches a decision which in all the circumstances was not open for them to reach. And we have confidence in the juries

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and I don't think many judges will say that confidence has been shown to be misplaced over the years. But it's a human system and it will have flaws.

Karen Sweeney

Do you know what juries are thinking and what they focus on when making a decision, because obviously we've got a system where it's an offense to even ask a juror what they base their decision on. Compared to the US where once the trial is over it's a free for all.

Justice Hollingworth

The US system always unnerves me because you've got this unseemly race, even sometimes before the jury have returned their verdict, everyone's busy trying to line them up for talk shows and book deals and this sort of thing. In my mind, when I see what happens in America, it rather undermines my confidence in the system because this sort of jockeying if jurors and ex jurors for their moment – their 15 minutes of fame – their moment in the spotlight tends to lead to them saying things which may or may not reflect what happened in the courtroom. So, I certainly wouldn't look to America as an example of what we'd want to do. I'm not sure what we would gain as judges necessarily asking them what their reasoning was. I think what has relaxed in recent years is that researchers increasingly get permission to speak to the jury. So what used to be a strict prohibition on us finding out has relaxed and I think there's been a lot of really good research done by good researchers into the way juries think. I'm more satisfied personally as it being done as an academic exercise rather than asking individual, "now why did you do that? And what did you think of that piece of evidence?" I mean of course at a human level you want to know, "did you think that witness was strange as we did, or did you believe that person?" But that's just pure curiosity, but at a professional level, personally I'm happy to leave it to the academics to explore when we're looking for thematic issues and otherwise just keep my curiosity to myself and my associates.

Greg Muller

This is a special edition of Gertie's Law where we have four judges of the Supreme Court and four working court reporters. The Judges are: Chief Justice, Anne Ferguson Appeal court judge Justice Whelan Principle of the Criminal Division Justice Hollingworth and Principle judge on the commercial court, Justice Riordan.

And the reporters are: Adam Cooper from The Age, Karen Sweeney from Australian Associated Press - or AAP, Shannon Deery from the Herald Sun and Karen Percy from the ABC.

Adam Cooper

The Supreme Court and the County Court often loses juries and has to start again for whatever reason. Can you envisage one day that there might be judge alone criminal trials?

Justice Hollingworth

I don't know if the Chief Justice wants to speak to that first or would you like me to.

Chief Justice Ferguson

You speak and if we've got a different view – then we've got a different view.

Justice Hollingworth

There are two different things. I don't necessarily see that judge alone trials would come about because we keep losing juries. The reasons we keep losing juries can be many and varied. They can be something happening within the courtroom that has meant that the fair trial process can't continue, somebody says something that shouldn't have been said, a witness is interfered with or it can happen if something is happening to the jury themselves – someone does some impermissible research online and you become aware of it, somebody realises they knew one of the witnesses etc. So, the current reasons we discharge juries wouldn't lead me to think we should have judge alone trials. They make us a bit more cautious about who we put on the juries and they make us cautious, as Simon has said, about trying to fiercely protect what's happening in the trial to stop it going off the rails. If we were ever to move to judge alone trials and I'm not expressing a preference or a view one way or another – I suspect the driver for that would be that in the modern world the amount of information that might be out about a particular accused or a particular crime might be perceived to have reached a stage where it would be very hard to find 12 ordinary people who could actually – even with all our directions – give that person a fair trial. I suspect that that would be the sort of high notoriety case that might lead governments to look at it, as I say, I'm not advocating for or against it but I think it would be that sort of momentum rather than the fact that we sometimes lose juries or we have to start a trial again.

Justice Riordan

But what about Liz's situation where you're say two weeks into a trial and the jury has to be discharged and both parties say, "Look we've only got a few days to go. Why don't you do it?" It seems hard to imagine why a judge shouldn't in those circumstances. It's just such an enormous waste.

Justice Hollingworth

Yes and no. It's perhaps a waste of court time but for the amount of time a judge would take to write reasons for a decision beyond reasonable doubt would more than consume the time it would take to empanel another jury. And that's because we don't require a jury to give reasons. We require them to come to a verdict. They're often out deliberating for 2 or 3 or 4 days. They come back with a verdict and that's the end of the matter. If I had heard the first three weeks of a four week murder trial discharge the jury and then continue on for the last week, it would take me a month or two afterwards with nothing else on – I'd have to clear my diary. It would take me a month or two to write the reasons for the decision. So the verdict wouldn't be as quick and I wouldn't be hearing other trials for that month, month and a half. So the perceived efficiency I think's a bit illusory. I think if it happens it won't be for efficiency reasons. If it were to happen I think it would be because of the need to deal with a very high profile accused.

Justice Whelan

I'm not sure that judges are necessarily as immune from unconscious bias as ordinary members of the public. I'm not sure that's been proved to be the case.

Prior convictions, for example, have an effect on your view of the trial, and I'm not sure that judges are immune from that so that it would represent a solution to that problem, but anyway.

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Chief Justice Ferguson

And there's all sorts of applications that are made along the way to exclude evidence. So, if the judge who's hearing the trial has heard the application to exclude, that can create problems. You get that in civil cases as well, where a judge will hear a case about whether or not a document can be admitted or whether it's privileged.

Some judges prefer not to hear the application if they're going to be the trial judge. Others do both, but I think there's those issues, and you do lose one of the benefits of the jury, which I think you, Simon, mentioned before. You're getting people with a broader range and diversity of life experience. It might be that you end up with 12, now, should I choose a particular group? Twelve people who say, were lawyers in a different circumstance. So, you get 12 people of the same discipline. But that's probably not very likely, although we don't, you know, know.

Justice Whelan

I think the public have confidence in juries more than in judges, actually. Jury verdicts are sometimes the subject of controversy, but pretty rarely. I think by and large, the public have faith in the fact that it's 12 members of the public who've made the decision.

Justice Riordan

I agree Simon. They would very readily think that the Ivory Tower people had taken over... What do you think about that? Don't you agree?

Justice Hollingworth

Would you prefer to see judge-alone trials? How do you view juries?

Karen Percy

I think it depends on the circumstance. I think your point is right, that when there are some very high-profile cases where you either have to put off proceedings to such a time down the track that people might have forgotten about it, but it's highly unlikely in those cases. But I do think there is a robustness in the jury system, because things have to be simplified so that ordinary people can understand it, and I think if it's judge-only, you've got an understanding and a level, certainly of the law and certain matters that are different, so I think they'd be very different beasts.

So, I could see them perhaps having an application in some circumstances, but not across the board.

Adam Cooper

And the human drama of watching a jury is ... let's face it, we just love the drama of, yeah, watching everyday people come in and decide someone else's fate. Yeah, it's incredible.

Justice Hollingworth

I think it's good for them too. In that, you know, you see over the course of a trial, the day they're empaneled, you can look at all these 12 or 13, 14 very reluctant looking people, arms crossed and their body language, and still praying that there's still some way they'll be miraculously sort of zapped off the jury, and then over the next day or two they start to settle in. And then by the end of the first week, they're really getting into it and starting to ask

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questions, and they're getting some ownership of it, and I know from what they say to our staff insofar as they're able to discuss things, most of them end up feeling a degree of pride, in a sense, that they've been part of something, and I think in terms of our relationship with the community and the justice system's relationship with the community, it's actually really important that members of the community are involved in that sort of way.

Karen Sweeney

There was an appeal recently. I can't remember what the case was, but one of the issues that the defence had taken was that there were jurors asking questions, and they weren't going through the judge to ask the questions. It kind of reached a point where they were just going directly to the witness. Would you like to see more of juries doing that? Should they be an active participant in that way?

Justice Whelan

That's one of the suggested ways of addressing the problem of juror research. That part of the reason why jurors maybe do research, which they're told not to do, is that they don't feel they can ask in the courtroom. So, I think the psychologists would tell us we should be encouraging them to feel they can ask in the courtroom because it will make it more likely they will comply with the direction not to look themselves. I don't know. Liz, what do you think? When I did criminal trials, the law was, you've got to do it through the judge. Whereas I don't think that's necessarily the case anymore.

Justice Hollingworth

I still do that, but they can do it with a note passed up. I don't encourage them to call out for a variety of reasons. They may ask impermissible questions or unfair questions or questions that someone's going to come to, and I don't want them to become another presence in the questioning process, because that actually isn't their role. They're a decision-maker. I think it is important that we make sure that if they've got concerns or questions, they're addressed, but I always encourage them, and they regularly do hand to me questions, sometimes quite furiously.

I remember a trial I had a couple of years ago which was a very complicated DNA case, and it involved not only looking at the DNA science, but also the algorithms that underlay the mathematics behind the computer program, and we had a couple of computer programmers on the jury. They kept handing these notes up. They were just sort of tearing off strips of paper, and I'd read them out and they were brilliant. You know, ask about whether the coefficient, such and such. And the barristers and I would just look at each other and I'd just turn to the witness and say, you know, 'What do you say?'

I have never found that they felt hesitant using that format, but I do think them putting them on a piece of paper and giving to me just allows me to screen in case there's something impermissible, and I think as long as you're in an encouraging environment where they know they can do it, but just not by yelling out across the court. I think we can accommodate everybody's needs in that regard.

Shannon Deery

Slightly off-topic, but given we're talking about juries and power in numbers and working together, can I ask each of you, do you ever feel the need, or can you confer with each other about different things you might be struggling with? Either to work out or 'Have I got this

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right?' Not necessarily sentencing, but decisions that you're making in court. Do you ever speak to each other about things that go on?

Justice Whelan

All the time.

Shannon Deery

Really?

Justice Hollingworth

Absolutely.

Shannon Deery

I think that's something that people wouldn't know. I think that's quite interesting.

Justice Whelan

Oh, no, we do walk around the corridors saying 'What do you think about this?' Yeah. All the time.

Of course, in the Court of Appeal, you know, there's three of us. So all the three of us will talk about it, and we exchange drafts and so on. But even in ... I would often, if I'm...

It's more just to articulate in your own mind, you know, to talk to someone who doesn't necessarily know as much about it as you, but comes from a similar perspective, it just clarifies the issues for yourself. But yeah, judges talk to each other all the time.

Can I ask you then, Shannon, do you write a story and then the editor says 'Oh, come on. Beef this up a bit. Put the complaints by the victim's family up the front rather than down the back.'

Shannon Deery

If he's going to change it, he'll just change it. He doesn't check with me.

No, that really is a misconception that we're instructed to write in a certain way. It's really not the case. And you're looking like you don't believe me. It really is not the case.

Justice Whelan

I know. It's those subbies, though. I don't know. Are there subbies anymore? There probably aren't. But I find it's the headline that makes us more cross than the article.

Shannon Deery

Which we have nothing to do with. That is the subbies. Exactly.

Justice Whelan

And of course, their job is to grab people's attention. So, they'll do what they need to do to do that, I suppose.

Shannon Deery

But seriously, the four of us all have offices in this court, which is very generous of the court, and we don't... well, I personally never, ever go to my head office down in Southbank. So,

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the only way I communicate with my boss is over the phone or email. And, of course, he's never in court to see what I'm seeing, so he trusts what I am telling him is, you know, the story of the day. And that the line that I tell him is the line. So, they trust that we're doing the right thing. So we actually have to take responsibility for the stories that run, because generally, they're run exactly as they're filed.

Justice Whelan

How do you do it? I mean, you've got the Magistrates' Court with hundreds of cases, you've got the County Court with scores, and then you've got big cases here. How do you keep abreast of it? How can you do a story about three or four, which I know sometimes you do, three or four hearings in a day. What do you actually do, physically? Do you run backwards and forwards, or?

Shannon Deery

Well, we've still got three or four court reporters at the Herald Sun dedicated to this round. So, we're sort of lucky. We can place people around. I think other organisations are the same. So, that's really the way to do it, you know.

If there's a serious case happening, there's an obligation, I think, for us to be in court as much as we can. In the same case, you know, and sit there as much as possible.

Justice Whelan

So you would often sit in a case for a whole day yourself? Or not necessarily the whole day –

Shannon Deery

Absolutely.

Justice Whelan

But do nothing but one case for a day?

Shannon Deery

There's a case this year which I sat in for well over 10 weeks and wasn't able to write anything, you know, and sat there all day, every day. So, you know, we do dedicate ... there's a lot of talk about the media being, under-resourced, which is absolutely true, but I don't think that necessarily equates to the criticism that we don't spend enough time in court. I think for what we regard as very important stories, we definitely dedicate the time that is needed.

Karen Percy

Can I pick up what you were saying about the headline?

I think we have to give consumers, readers, listeners, viewers some credit that they can look through the headline, too, and they know when they've kind of been sold something that isn't quite what it is.

Chief Justice Ferguson

I'm a headline reader, and if I'm not taken by the headline, I'm not going any further.

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Chief Justice Ferguson

I mean, you'd like to think, and that's sometimes, when you read the whole of the article, yeah, you think 'That's fair and accurate', but we all know that the first bit of it, and you know that. That's your job. The first bit of it's got to be the entice.

Karen Percy

But if it's totally and utterly inaccurate, by the time someone gets to the end of the story, they're saying 'That's not the story that I...'

Chief Justice Ferguson

But they don't. That's the thing.

KAREN PERCY: I think maybe people do.

Chief Justice Ferguson

Mmm. Not my personal experience.

Karen Percy

We might have to agree to disagree.

Adam Cooper

We're obliged to write stories in an interesting way. I mean, that's how we attract people and, yeah, if our stories aren't grabbing someone, and people switch off and go elsewhere, then we're ... you know, that's part of our job too, so it's that juggling act between obviously making it right and accurate, and making it appealing to someone. So, there can be times where an editor might say 'I like this,' and we have to push back and say 'Well, this is better.' But, what always sort of appeals to me are the circumstances, not necessarily the emotion. I mean, the remarkable stories you're hearing in this building are good enough, so that's what sort of grabs me.

Karen Sweeney

I'm one of those more unusual journalists who does actually write the headline. And I can tell you it's the part of the job that I hate the most. Because there's always someone who's going to take issue with what you write, but you've got a limited amount of space and you can't fit it all in.

Karen Percy

Well, there's the elephant in the room, which is...

Shannon Deery

Suppression orders, and you've got the folder there.

Justice Whelan

I've got the folder.

Karen Percy

'I came prepared!' I love it. Very good.

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Justice Whelan

Alright, I'll say my bit.

Shannon Deery

Can I ask a question though, I was just going to ask. Do you think the Open Courts Act has actually helped reduce the amount of suppression orders?

Justice Whelan

A bit.

Shannon Deery

Right.

Justice Whelan

I mean, I've gone on the record about this before. It hasn't had the effect that was hoped. The numbers didn't drop as much as was hoped, but they did drop. They dropped in the Supreme Court and in the County Court. But there's probably still too many. I don't think... that's only my opinion.

I do think the Vincent report... the big concern is, is there a real problem in the sense that we don't have justice as open as it should be in Victoria....

Greg Muller

Just a note here. Former Court of Appeal Judge, Frank Vincent QC, recently oversaw an independent review of the Open Courts Act 2013, looking closely at suppression orders.

Justice Whelan

The Vincent report, although it revealed an unacceptable extent of non-compliance with the Open Courts Act, especially in the lower courts, its fundamental conclusion was that criminal proceedings in Victoria are overwhelmingly open. That's what he said, and the media all jumped on the Vincent report, especially the passages about non-compliance, and ignored that, which is when he addressed the real issue; do we have a problem in the sense that we don't have open justice? He said 'No. It's overwhelmingly open.'

And nobody reported that, because it doesn't fit your narrative, which is the 'secret state' thing. And that was very disappointing, because that's surely the most important thing. I know you find the suppression orders annoying and you think we could create a world where they don't exist, but I think that's unlikely.

Then other aspect of it that upsets – not upsets us, but you know, is a bit of a grate – is the idea that Victoria's worse than everywhere else, when the truth is that we're better than everywhere else because we're the only people who comprehensively compile them. Again, as Justice Vincent pointed out, nobody except South Australia maintains records comprehensively like we have, and South Australia makes more orders per head than we do, but even if you take the New South Wales Supreme Court, they make at least as many orders as we do, but you can't even be sure how many they make because they don't keep a comprehensive record of them, so...

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Adam Cooper

One of the problems I have with suppression orders, and I understand the need for them... you know, for whatever reason they're imposed, but often we can feel a bit frustrated when we're not given notice. We're required under the act to be given plenty of time so we can prepare and, if necessary, get our own legal counsel. I've sort of been frustrated in the past at lawyers, both prosecutors and defence lawyers, and like you say, they can support each other in their application, but often it seems like there's no pushback from the judge or magistrate, particularly if an application is frivolous. How do you respond to that?

Justice Whelan

Well, yeah. I think it's a legitimate concern. I mean, the notice requirements are mandatory, and I would hope they're being complied with, but you couldn't be ... I wouldn't be 100% confident that they are.

As with most things in the law, if you don't have someone contending for the opposite proposition, things tend to slide through.

Karen Percy

But it's extremely difficult. You know, at the ABC, we very rarely contest them because we just don't have the budget to do it. I've got up on a number of occasions myself and tried to argue them – not terribly successful, I might say, but at least tried to talk about the kinds of points that we need. But they just seem to come up again and again.

Justice Hollingworth

I think that's a valid concern. I think that goes back to something we discussed earlier on, that we're dealing with you as a mass, recognising that there are some experienced court reporters who do understand sub-judice, and people who we regularly see reporting here who don't even know what the word is. I sometimes mention the word and you can see this blank expression, and that is part of the problem we're dealing with.

We're not just dealing with qualified court reporters, so I think that is a... that's probably a fair comment, that some of them are made simply as an abundance of caution to make sure that this trial doesn't go off the rails because some citizen journalist or somebody who's just been sent down by their organisation for the day doesn't inadvertently publish something.

Justice Whelan

I think it's going to be a struggle, a constant struggle. You know, Parliament's trying to help you. They're sort of on your side on this one. They keep passing legislation trying to push back against suppression, making the point you did, that you shouldn't be making an order when it's covered anyway by the Judicial Proceedings Reports Act or some other prohibition.

Shannon Deery

I think we'll never agree, courts and media, because you need information held back to run your trials and we're curious and we like getting information out there, and you know, that's always going to clash, isn't it?

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Justice Whelan

Oh, yeah, yeah. There's always going to be tension and it's always going to be a struggle. I hope things are getting better, but I don't know. You tell us. Are things getting better or are they staying the same or are they getting worse? What?

Adam Cooper

I think it depends on the issue. I think, generally, and it depends on the court as well. We've had our struggles with other courts, but I generally find that this court is good to work with in terms of access to transcripts and material. It's more the frustration, I guess, on last-minute suppression order applications, and it does feel sometimes that we can be penalised for something that becomes suppressed when in order to prevent a juror going online when a juror doing that is breaching your instructions. So, in a way, it does feel like we're being penalised for something that shouldn't be done. So, that's a frustration, but I think generally it's good.

Justice Whelan

You must come across this all the time though.

Shannon Deery

Suppression order issues? In which way?

Justice Whelan

Well, you probably report more cases than anybody else. How much of a practical impediment is it, do you think?

Shannon Deery

I mean, like Adam said, it's a huge problem when you're caught out on the spot, when you plan your day around covering a case and all of a sudden you walk into court, people recognise you and then all of a sudden there's a suppression order application. It happens all the time. The best thing about the Open Courts Act...

Karen Sweeney

I note there's media present.'

Shannon Deery

The best thing in the Open Courts Act is the three days' notice period for us, because we get that chance to prepare an application. For lawyers, it's a nightmare because they've got to give us three days' notice about a case, probably that they don't want us to know about. So, it sort of doesn't work.

Justice Whelan

Do people give you the notice, by and large?

Shannon Deery

Yeah, we do. We get lots of notice.

Karen Percy

But there are a lot that are sprung at the last minute.

Karen Sweeney

Yeah. There are a lot of cases where lawyers will walk into court and say ‘Your Honour, I’d like a suppression order and in the meantime, I’d like to give notice now. Can we have an interim order?’

Karen Percy

Mmhmm. And that’s usually granted. The interim stuff’s the, yeah...

Karen Sweeney

I don’t think I’ve ever come across a case where an interim order hasn’t been granted in that situation.

Justice Whelan

Well, this is the media and the courts’ different agendas, because for us, a day or two’s not important. For you, a day or two’s the difference between a story that’s worth reporting and one that’s old news, and I understand that.

Karen Percy

I want to go on my little high horse about the timeliness. One thing you often hear in suppression discussions is, ‘we’re not telling you can never report it – you just can’t report it now. And the timeliness is actually really important in the work that we do for accuracy – for starters – because it’s fresh you can actually read your notes that a day as opposed to trying to back afterwards and trying to figure out what that particular squiggle might be. We’ve got the ability amongst ourselves to be able to say what was that quote again and was it this? That kind of process is really important so to say it’s just a matter of the timing is just missing the whole important part of how the process works for us as journalists. And by the time – if you’re sitting in some of these split trials for example – if you’re trying to cover the first defendant and then another defendant and by the time you get to trying to write anything, half of what you’ve already written is superfluous – is out of date. I think that this idea that the timing isn’t important is a wrong notion from some in the legal fraternity and the judiciary.

Justice Whelan

But sometimes it works well. A lot of big trials – not mentioning any in particular when you haven’t been able to report things and clearly you’ve worked on massive stories and you’ve been waiting for the moment when you can just press the button and I must say in all of those cases I’ve had a really strong feeling that – no harm done. The big story comes out in full detail – miles better than you would have done if you’ve been doing it on the run.

Shannon Deery

I would agree with that unless your Australian media and your competing with international media and your

Justice Whelan

Well that’s a new component isn’t it?

Shannon Deery

Well, that's a serious point isn't it? In certain big cases this year – all the Australian media complied 100% with orders that were made and lots of international media didn't and we're then put at a disadvantage for that. And that's purely commercial.

Justice Whelan

Well that's going to be - the future is staring us in the face on that score because the capacity to control information is becoming more and more difficult. We've not got to the point yet where we have to give up but it's become impossible to quarantine juries from information but I think you can probably foresee a day when that will be the case.

We need to start thinking about how we're going to run trials when it's not possible anymore to quarantine juries from information. We'll have to run the trial accepting that they'll know.

Greg Muller

Thanks for listening to this special edition of Gertie's Law. And thanks to everyone on the panel:

Chief Justice, Anne Ferguson.

Appeal court judge, Justice Whelan.

Principle of the Criminal Division, Justice Hollingworth.

And Principle judge on the commercial court, Justice Riordan.

And the reporters are:

Karen Percy from the ABC.

Adam Cooper from The Age.

Karen Sweeny from AAP.

And Shannon Deery from the Herald Sun.

Gertie's Law is produced by the Supreme Court of Victoria. Thanks again for all your comments. If you can, please leave ratings and reviews. We'd love hearing what you think, and it helps others to find this podcast.

Ends.