

**Gertie's Law
Episode 14 – Judge, You've Got More Mail**

Evan Martin

With the first season of Gertie's Law coming to a close, we've been asking you to send us questions for a judge, and we've received some doozies.

Listeners

Do you ever fear personal retribution from parties?

Do funny things ever happen in court?

What differentiates a good barrister from a great barrister?

You've seen so many murders from your time being a judge. Would you know how to commit the perfect murder and get away with it?

Evan Martin

Now it's time to get the answers.

I'm Evan Martin.

Greg Muller

I'm Greg Muller.

Evan Martin

And this is Gertie's Law.

[Main theme]

Greg Muller

To kick us off, here's a question from Peter.

Peter (listener)

Where does criminality come from? I might imagine bad parenting, mental health issues, substance abuse issues, etc, but surely the judges have their own views based on having seen so many offenders. Would love to hear what they think.

Justice Whelan

I'll leave that to the philosophers, I think.

Greg Muller

Justice Whelan was a judge in the Criminal Division for eight years before being appointed to the Court of Appeal in 2012.

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Justice Whelan

All of those things, we see - mental illness, drug abuse, greed, selfishness, all human frailty can lead to - and human disability - can lead to crime.

I wouldn't venture to suggest there's any single cause or any unifying factor.

Greg Muller

I guess it's that question, is it in all of us?

Justice Whelan

Well, yeah, I think so. I do, yes. I think it is. In given circumstances, we could all make a bad decision, I suspect.

Justice Champion

You've asked a really complex question here, because no person and no crime is the same.

Greg Muller

Justice Champion, was appointed to the court in 2017 after serving as Director of Public Prosecutions for six years.

Justice Champion

It's very tempting to think that people are born bad. It's very tempting to think that an explanation might be that they had a dreadful start in life and that their early years were beset by all sorts of difficult problems.

It's far too simplistic to talk like that, because it's an exceptionally complex area that we're talking about, and you just, I think, need to step back and think about the types of crimes that are being committed, and there's not one answer to this question.

We get many crimes that might be committed for financial motivation - your white collar criminal who might be someone who's got a completely clean background who simply is attracted by vast amounts of money.

People in the street, typically young men, come under the influence of peer-group pressure, perhaps combined with alcohol, who otherwise might be people who've never been affected by criminal activity at all.

Murders and manslaughters might occur on the spur of the moment, for all sorts of motivations.

And taking it to its extreme, if you look at offences like genocide, genocide is committed often through political motivation.

So, there are all sorts of motivations, all sorts of reasons why people commit the crimes they do. And that's a very long way of saying 'There's no simple answer to that particular question.' They are all potentially contributing factors to the answer that you're seeking.

Greg Muller

Justice Taylor, trial judge in the Criminal Division since 2018.

Justice Taylor

Well, criminality encompasses a very broad spectrum, and obviously background, if you're brought up in an environment where you're not taught to take responsibility for your own actions, you're not taught to respect authority and interactions with other people, that can influence your worldview.

On the other hand, there are people who come before the courts, often on the most serious of matters like murder, who undo a life of decency by one act in one moment, and it's hard to explain that. It can often be quite inexplicable.

Personally, I think that education is absolutely key to the way that we operate as a society, and the more funding and development we have of that earlier in life, irrespective of the socioeconomic background of the child, the less people that we would see before the courts.

Evan Martin

Our next question is from Deb.

Deb (listener)

You mentioned drugs and mental health, but how big of an issue is alcohol? How often is it implicated in crime?

Evan Martin

I put this first to Justice Tinney, who worked as a Crown Prosecutor for 12 years before being appointed to the court.

Justice Tinney

Oh, alcohol is implicated in crimes incredibly frequently in our courts. I mean, it's a combination of alcohol and other drugs, but we're mainly dealing with murders here - there aren't too many murders that occur where there isn't some input of either alcohol or drugs, and obviously alcohol causes a great deal of misery in the community, as well as a good deal of pleasure as well, but it's certainly a very common feature in our courts to see involvement of alcohol.

Justice Champion

That's a major factor within our community that brings about such misery.

Evan Martin

Justice Champion.

Justice Champion

We forget alcohol, because it's been around for such a long time and I suppose we're forced to think more about the role of the new drugs like methamphetamine and those things, but in the end – I mean, my 40 years' experience in the law has really demonstrated to me that the drug that we really need to be concerned about is the abuse of alcohol. It has caused a lot of misery over the years, absolutely.

Evan Martin

Is that dealt with in any different way to illicit drugs?

Justice Tinney

No, I don't think it is. Although in a sense, I suppose, although there's no legal basis for it, people often who have committed crimes where there's an input of drugs, illicit drugs, may seek to point to the drug use as something that excuses them, which of course it doesn't do.

I think that's probably less common in the case of alcohol. No one thinks that being drunk and then committing an offence under the influence of that goes any distance towards an excuse. But there shouldn't really be any difference in the way they be approached, alcohol as compared with illicit drugs.

Greg Muller

Okay, next question.

Listener

Do funny things ever happen in court?

Justice Whelan

Oh, they probably do, but I never find them funny.

Justice Richards

My answer is going to sound quite impossibly prim or pompous, but there's very limited role for humour in court, I think.

Greg Muller

Justice Richards, a judge in the Common Law Division.

Justice Richards

Certainly out of court, there's plenty of laughter and lightheartedness, but in court, you're dealing with serious stuff. It's a stressful, possibly alienating experience, and I really have reservations about mirth, frivolity, lightheartedness in that setting.

I think parties are entitled to have their matters taken seriously, and joking around between bar and bench is a bit of a problem.

Greg Muller

Justice Hargrave has been at the court for 14 years and was appointed to the Court of Appeal in 2017.

Justice Hargrave

It must be remembered that courts are dealing with people's lives in a profound way, whether it be whether or not they go to jail, or whether or not they might lose their house, for example, or their business might fail.

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It's not really a place for humour. Although, of course, from time to time, it spontaneously happens - there is laughter in the courtroom.

Greg Muller

Justice Whelan.

Justice Whelan

I tell judges, new judges, 'Don't make jokes,' because jokes are very dangerous for people in authority to be making. If you have power over people, don't bring jokes into the process because it can very easily be misinterpreted, and I think let the other people do the funny stuff in the courtroom, if there is any to be done.

Justice Richards

It also has to be said that there's a risk in judges making jokes because people feel they are obliged to laugh, and judges jokes are not often very good.

Justice Whelan

You get laughter in court, but typically it's a release of tension rather than anything else.

Justice Hargrave

Funny things often happen in court, but not very often in the Commercial Court, where I've had most of my experience.

It's certainly not the role of the judge to be humorous, but sometimes witnesses are, sometimes barristers are, sometimes just the facts of the case are humorous.

I suggest you speak to common law judges.

Greg Muller

So that we did - and we went right to the top.

Justice Dixon, Principal Judge of the Common Law Division.

Justice Dixon

Funny things do happen in court.

Civil cases, you do get more humour. Sometimes there can be passages that are boring, relieved by humour. With jury trials, civil jury trials, it kind of creates a little bit of a family-feeling of people being involved if there's a joke every now and then.

People say to me, you must see funny things all the time, and I don't see it all the time, but I do see it, and they say, 'Oh, tell me.'

'Oh, I can't remember.'

Greg Muller

But we did get one good story out of him.

Justice Dixon

When I was a barrister, I was appearing before a judge who was unfailingly polite. It was his trademark characteristic.

Resisting my application was a self-represented litigant, and the judge decided the matter on the spot and was explaining his reasons for deciding the matter.

As he did, the self-represented litigant became increasingly agitated and started to make noises and interrupt the judge a bit, and he just went back to announcing what his reasons were, until the self-represented litigant noisily pushed back his chair, which screeched on the floor, and he stood up out of his chair and huffed and walked to the door.

And he turned around and looked at the judge and said, 'You're a [BLEEP]ing [BLEEP]!'

And the judge looked up in complete horror that he'd been spoken to in that way, and then the self-represented litigant perhaps had a sense of horror because he said, 'No, not you. You!' and pointed at me,

And then he left, and after he left, the judge continued to announce and complete his reasons.

Greg Muller

Do funny things ever happen in court?

Justice Taylor

They happen all the time.

Greg Muller

Justice Taylor.

Justice Taylor

Sometimes unintentionally, sometimes intentionally. And it's not a bad thing. It can relieve tension in a very high-tension environment.

Sometimes it's just funny things that occur.

When I was a very, very young solicitor in Canberra, in the Magistrates' Court waiting to do my plea, there was a matter that got called on and a man had been charged with using offensive language.

The very young constable had got in the box to give the evidence about this, and he explained what had happened. That he was proceeding down a road in a northerly direction and he came across the defendant who was acting badly and he said something to the defendant. To which the defendant said, 'Well, you can F-off, Mr Watermelonhead.

At which point, everyone in the courtroom, including the Magistrate, turned to the constable, who happened to be a young man with a very large head, and everyone, including the Magistrate, sniggered.

And when the Magistrate recovered himself, without intending any pun, he said to this young constable, 'Is that it?'

He said 'Yes.'

'Well, I'm going to dismiss this charge. I think you need to develop a thicker skin.'

Evan Martin

This next question comes from Ahmed.

Ahmed (listener)

What differentiates a good barrister from a great barrister?

Justice Taylor

Well, I think a good barrister is someone who is always prepared, pays exquisite attention to detail, is always reasonable and friendly and polite.

But for me, a great barrister has three things.

One is that they have an authority from speaking entirely in their own voice, as opposed to what they think they should sound like.

Two is a love of language, which translates to them using precisely the right words, not merely to describe something but to capture and convey its essence, and that applies both in writing and orally.

And the third thing is brevity. And that is that they have the confidence in their own ability and they respect the intelligence of their audience enough not to repeat themselves.

Evan Martin

Justice Dixon.

Justice Dixon

I think great barristers understand what the judge is doing and know how to focus on the judge's task and how to direct the way that they advocate for their client's position into the task that the judge is undertaking. So, they intuitively understand the judicial role and are able to tailor their advocacy to it.

Evan Martin

Chief Justice Anne Ferguson.

Chief Justice Ferguson

Getting to the heart of the matter and explaining to the judge that they're before why the case is simple in their client's favour.

Evan Martin

Brevity?

Chief Justice Ferguson

Yeah, brevity. Anyone who knows me knows that I like brevity.

Justice Richards

There are a few who really stand out because they've been able to, with some very clear communication and some direct analysis, been able to put a completely different complexion on a case.

Evan Martin

Justice Richards.

Justice Richards

So, I've gone onto the bench thinking 'Alright, this is the question and I'm pretty sure I know the answer', and they've just very deftly reframed it so I've gone off the bench thinking 'That wasn't the question at all, and now I think that the answer is something different', and that takes real skill.

Evan Martin

Justice Whelan.

Justice Whelan

I think a great barrister will accurately be able to identify the point which will decide the case. In other words, the point that the judges will think is the critical issue.

Now, that sounds easy, but it's actually very, very difficult, and often it's something that only comes with great experience. Which I suppose is why the barristers who have enormous experience are in demand, because they have that capacity to know what it is that is likely to turn the case.

So, I think that's the difference.

Evan Martin

What about the theatre?

Justice Whelan

I don't believe the theatre really plays much of a role before judges. I think it might impress some people, even some solicitors, but I don't think it has much effect on the outcome or little effect on the outcome.

The behaviour of the barristers can affect juries, but I don't think the effect is what might generally be imagined. I don't think juries are swayed by great rhetoric and high emotion and so on. I don't think they are swayed by that, but a person who they feel they can relate to, a person who seems to address the issues they see as important, will probably get better results than someone who they don't feel that about, but that's just my impression.

Evan Martin

Justice Champion.

Justice Champion

There's nothing like either being the opponent, or being a judge now that I have that experience, of coming out of court and thinking you have just heard brilliance in the way that someone has either cross-examined a witness or addressed a jury.

It's a fantastic feeling to come out of court having seen someone doing great work and being a great advocate.

Evan Martin

When you were a barrister, were you ever intimidated or scared to go up against particular people?

Justice Champion

Oh, certainly. Over the years, of course, when you're younger, you get intimidated by people who you know have been around for 20, 30 or 40 years, and who have the experience and have the reputation and the ear of the court.

I think you do tend, as you develop your own experience, you get less intimidated by people. But there are always some who, because of either their particular persuasion or their ability, that will intimidate you along the way. Some people are very robust, indeed, to the point where you can feel quite intimidated by their physical presence in a courtroom.

Some people can do it by physical presence, some people by argument and persuasion. But yeah, certainly, you can be intimidated.

Justice Richards

I think it might be disconcerting to barristers to understand how little difference they make, often. People win their cases in spite of their barristers and they can lose their cases with the very, very best of representation because it's actually not about the barristers.

The barristers are really there to facilitate the understanding that the judge and jury have of the evidence and the law and the issues in the case, and the really good ones are the ones who sort of make that happen and get themselves out of the way.

Greg Muller

The next one comes from Jess.

Jess (listener)

How much preparation goes into a judgment before actual handing down?

Justice Dixon

Well, the preparation starts before you even start the case.

Greg Muller

Justice Dixon again.

Justice Dixon

You work out what are the issues that need to be determined, because when you write a judgement, you just decide the issues, enough of the issues that need to be determined to give the parties the result that's required to settle the controversy.

So, you work out what the issues are at the start and that helps to focus your mind on what you're going to write about.

Then, of course, you go through the process of the trial itself, where you try and collect all of the necessary evidence to decide those issues and sort that out in your mind.

Then, after you've heard the trial, you've then got a collection; you've got a transcript of all of the evidence which you've heard and which you've got notes about, you've got the exhibits, which is all the documents and other things that have been tendered to you, and you have to consider all of that.

You work out what is the issue, what is the legal principle that resolves that issue that may require you to do research. It may be the law's controversial or hasn't been quite firmly settled, or Parliament's been ambiguous in the way that they've expressed the relevant statute, and you have to work through that and identify what is the principle you're going to apply.

Then you go back to the evidence and you work out what the evidence is about the issue, and you write all this up. And then you write the answer.

Quite often, in doing that, what you want to write about is an explanation for the loser about why they lost. You often hear the colloquial expression, 'reasons are for losers,' because the winners don't care. They've won. They don't even bother to read the reasons. All they want's the result. They collect their money and go home. But the losers want to know why they lost.

Greg Muller

With some judgements being hundreds of pages long and filled with complex legal argument, they can be an intimidating read.

Justice Hargrave.

Justice Hargrave

Some civil judgements are long and complex simply because there are many, many issues and the law is complex, and the facts are complex and get more complex as we get more information. We have information overload.

In the old days, of course, there were letters and oral testimony. Now, every email gets examined and every single document is there, we have electronic databases. There's just more information. There's more law available because it's all electronic now, not just in law reports as it used to be.

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Having said that, the job of a civil judge is to try and write as concisely and clearly as possible, to the people affected and also the public, but also in a style which is easy to read. And we hope that assists the community and the media to understand our reasons.

Greg Muller

So, has that changed recently, the simplicity of writing?

Justice Hargrave

I think it's fair to say that over the last 10 years in particular, there has been an increased focus on judges writing in a structured way which is easy to follow, with lots of headings, and in clearer and accessible language.

Justice Dixon

Which brings to mind the celebrated observation of, I think, Mark Twain, where he said 'I would have written a shorter letter, but I didn't have the time.' And that's often the case.

You could work out more efficient ways of saying things and reduce it from 50 pages to 30 pages, but you haven't got the time. You have to get on to the next case.

Greg Muller

Jess would also like to know...

Jess (Listener)

Have you or do you ever fear personal retribution from parties after handing down lengthy or harsh sentences?

Justice Whelan

I don't think I've ever feared retribution. Certainly, I've received angry correspondence from people involved and people not involved who've heard about it or read it in the paper.

I don't worry about that. I just pass it on to the relevant people. I was stalked by someone for a while, but that situation was resolved.

So, yes, I guess you do have experiences of being confronted, but I don't think it's common and it hasn't ever really worried me.

Justice Taylor

No.

Greg Muller

Justice Taylor.

Justice Taylor

I often see people who are upset or disappointed. I have never felt personally threatened. I don't believe my staff have ever felt personally threatened. My tipstaff has occasionally removed someone from the courtroom because they're not behaving, but that is his job.

I certainly don't have a sense that I'm in any personal danger, partly I think because I'm wearing a judge's robe and I'm seen as being a judge. I'm not seen as being a person.

Evan Martin

Kenny has asked if we can touch on the role of court interpreters and how they're used in the courtroom.

The topic of court interpreters came up at a Courts Open Day panel we ran earlier this year.

Chief Justice Anne Ferguson.

Chief Justice Ferguson

Yes. I spoke before a little bit about how we talk in shorthand. The other thing that we do is, we're all used to listening for very long times, and that's part of our training, how we go about it.

When I first became a judge, I just assumed that everybody could listen for as long as I could, and I didn't take breaks and I didn't think about those things. I had a case that had an interpreter in it and if I knew who that interpreter was now, I would apologise to them, because we just sat for the whole of the morning.

After that though... we have a Judicial College that is an education body for judges - and I attended a session about interpreters, and I realised that I had done the wrong thing, and that I should have been giving a break every 30 to 40 minutes to the interpreter and I should have been slowing some things down. So, we do get education, is the short point.

Evan Martin

In greater Melbourne, one in three people speak a language other than English at home. So it's not surprising that interpreters play an increasingly important role in the justice system.

Justice Dixon.

Justice Dixon

The primary way you interact with a court interpreter is that they are like a literal translation box. They translate the barrister's question, literally, and then they translate the witness's answer, literally.

No private discussion between the two of them about how's the best way to answer it, or what the question means, or where the question's going, or all of those kinds of things.

Sometimes you see a long question asked or a long answer given in the other language, and then the translator is really short, and then you think to yourself, 'There's just no way that that was a literal translation of what was said.'

There has been an interpretation of the answer in the response that's been given.

Occasionally, you'll have someone in court who speaks the language and you'll get an argument. With more common languages, second languages that are common in this

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country like Greek and Italian and things like that, the instructing solicitor will speak Greek and say, 'Hang on, that's not what you said!' and a debate will erupt about what's going on and whether the translation is proper.

Evan Martin

What about body language and demeanor? You often hear the judge directing the jury about how it's not just the evidence given but how it's given.

Justice Dixon

Well, you watch the body language of the witness as they relate to the interpreter, but body language is overblown as an indicator of how you should receive evidence. I always tell juries they should listen to the answer.

With the popularity of psychology studies over the last 50 years, that they do research projects on everything. So, you get research projects on how to pick a liar, and the psychology studies have all kind of gone through this and got all the uni students going through lying and working it all out, and they finally worked out that the best way to determine whether somebody is lying is a process called cognitive overload. A classic psychologist's term.

Lawyers have called it cross-examination, and lawyers invented that hundreds of years ago. It's just a process of testing the story with what they describe as a cognitive overload. How does the story come out?

And that tells you far more about the reliability of a witness than trying to see whether they've got darting eyes or a sweaty brow or all these kinds of things. Most of the time, you never see it, because it never looks that way. People are just normal. And polished liars don't give those kinds of things away and are very convincing, whereas somebody who's nervous, never been in court before but is being genuine, will give away body language that's associated with something else, like their nerves or their inexperience in the process that they're going through.

So, you've got to be careful about that one.

Greg Muller

The next question comes from Geoff

Greg Muller

What is the process by which the three judges sitting as the Court of Appeal come to their decision? Do they each write up their own provisional judgements and then consult with each other with a view to reaching a consensus or do they write individual judgements and the majority rules?

Justice Whelan

Well, there is no formal process other than there are three of us and we all have to make our own decision, and all of those different alternatives might happen in any particular case.

Greg Muller

Justice Whelan.

Justice Whelan

Basically, there are no rules in the sense that, save for the fact that we all have to reach our own conclusion, there's a number of ways we can end up getting to that point.

Greg Muller

We also put this to the Chief Justice, Anne Ferguson, who was one of three judges who presided over one of this court's most high-profile cases: the appeal of Cardinal George Pell.

Chief Justice Ferguson

So, it might be that three judges will write three separate judgements, but more frequently, what happens, particularly in this court, is that the judges will hear what the submissions are from the parties. They'll have had written submissions before they'll have gone into court.

They'll then talk about what they think their individual views are, so they're independent of one another. And if they're all thinking pretty much the same way, then ordinarily it would be one person that would write the judgement with the other two people having to agree with it, but not writing their own separate judgements.

Justice Whelan

If the reasons of the three are essentially the same, then it's best to have a single judgement if that can be done, because it gives greater clarity to subsequent cases and also to the litigants in that case.

So, we do strive to have unanimity where we agree and not to have separate judgements all reaching the same conclusion in different ways.

Chief Justice Ferguson

But three judges don't have to agree, and so you do sometimes get three separate written judgements.

Greg Muller

And then it's the majority rules?

Chief Justice Ferguson

And then it's majority rules. So, two out of the three.

Justice Priest

On occasions, there are dissents so that you'll wind up with a split, 2-1.

Greg Muller

Justice Priest has also sat on the Court of Appeal since 2012.

Justice Priest

But to try and answer your question more directly, I think usually there is a great collaborative effort. Most judgements that come across my desk from others, I tend not to

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make too many suggestions. But occasionally you'll make a suggestion – obviously, about substance and not about style, usually. And I think we cooperate very well together.

Evan Martin

Our next question is from Remy.

Remy (listener)

On TV, sometimes we see people who are not guilty being pressured into taking a guilty plea because the evidence against them looks bad and it will reduce their overall sentence. Do you think this really happens, and is there a way to avoid it?

Evan Martin

Justice Champion.

Justice Champion

I think it's very difficult to accept that people who have not committed an offence are overborn to the point where they plead guilty. I really hope that doesn't happen in this country. I suspect that it happens from time to time in other countries, but ours, we have a very good system, which I think works against that sort of thing happening.

Justice Whelan

I don't think it does happen much. I would have thought the more significant issue which does arise is people pleading guilty to things less than what they've done. I think that's more likely the practical consequence of these negotiations.

Evan Martin

Justice Whelan.

Justice Whelan

I don't think many people, if any, plead guilty to things they haven't done because they think the evidence looks bad and there'll be a reduction in sentence as a result. I don't think that happens much.

When I was a barrister, I did have instances where people maintained, especially in things that weren't very important, that rather than having a big fuss about it, they would plead to something which they felt they didn't do.

But I'm talking about in the context of traffic offences and that sort of thing.

I don't think in serious offences that happens much. Under our current system, anyway. Notwithstanding what might be seen on TV.

Evan Martin

Justice Taylor.

Justice Taylor

The key question there, or the key word in that for me, is pressure.

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If you are defending someone and you read the brief of evidence and you form the view objectively on the basis of that evidence that the case against them is overwhelming, you have a duty to tell them that. You have a duty to explain to them where the strengths and weaknesses in the prosecution evidence is. You have a duty to say that there are benefits to entering a plea of guilty to appropriate charges. That does not amount to pressure. It amounts to fulfilling your duty.

Whether people feel pressure is another question, and often in that situation, people who of course are under a great deal of stress will say 'How can I trust you? You don't believe me.' It's never the role of counsel to believe or disbelieve their client. It's to assess the evidence.

I would hope that there's never an example of someone being told 'You must plead guilty.' I would doubt that that happens, but giving a reality check as to prospects of success is actually part of counsel's job.

Evan Martin

And here's another one from Remy.

Remy (listener)

For what type of trials is there no jury? Do you think bench trials or jury trials are more rigorous?

Evan Martin

Firstly, let's address this question from a criminal trial standpoint.

Justice Champion.

Justice Champion

Well, in Victoria, in the indictable stream, which really means cases that are more serious than those that might have been regarded as misdemeanors or less serious offences, a jury is always involved. We don't have judge-alone trials in Victoria, although there is always some debate as to whether or not that should change.

Offences that are less serious in nature are dealt with in the Magistrates' Court. There's no jury that sits in the Magistrates' Court. Juries only get involved in trials in the County Court and the Supreme Court, indictable jurisdiction.

Evan Martin

So, in this court, all criminal trials have to have a jury, but things get a bit more interesting when it comes to civil trials.

Justice Richards.

Justice Richards

In the civil jurisdiction, defamation proceedings and claims for damages for personal injury can have a jury. Certainly in the personal injury space, there's an element of choice. Either the plaintiff or the defendant can choose to have a jury. Sometimes it's the defendant who

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chooses that this particular trial should have a jury where the plaintiff would prefer that it doesn't, and sometimes it's the other way round.

Evan Martin

What kind of cases do you think would encourage somebody to ask for a jury?

Justice Richards

My observation is in a case where the emotion of it or the ... there's some aspect of it that's not just about the rational application of the law to the facts that is important.

So, in a personal injuries case where there's some aspect of the plaintiff that the defendant thinks is very unattractive or very undeserving, they might choose a jury trial. Claimants in asbestos matters almost always choose a jury trial, because the situation of their client is so very sympathetic.

It's possible as a judge to overthink things. I think the risk of that happening in a jury trial is less, and because juries are put in a position where they have to make a decision relatively quickly, it's possible for their intuition to play a bigger role than a judge would allow to play in decision-making, which is not necessarily a bad thing.

So, there are cases where a judge can decide that it should be decided by a judge alone and not by a jury.

Justice Dixon

The judge can say 'I'm not going to let this go to a jury, because I think it's too complicated for a jury,' or there might be particular reasons.

Evan Martin

Justice Dixon.

Justice Dixon

For example, in class action cases, they can be personal injury cases like, say, the bushfire cases, but they involve findings being made that affect all of the thousands of people who were injured in the bushfires. Juries don't give reasons, whereas judges give reasons for all their findings, so it helps to apply the cases that's actually heard to all of the other victims of the fire if the judge has given reasons as to why he's made particular decisions. So, it's just thought to be a much better system and a much more efficient system in the modern era.

Evan Martin

And just that second part of the question, do you think bench trials or jury trials are more rigorous?

Justice Dixon

No, I think that there's a high level of rigour in jury trials. There's also a high level of rigour in non-jury trials.

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But simply, the fact that the jury doesn't publish reasons for it doesn't mean the trial's not hard-fought, that every stone is turned over and examined closely. They're all quite rigorous. I wouldn't draw any distinction in that respect, between the two different modes of trial.

Evan Martin

How much does whether there's a jury or not change the job of the barrister in the courtroom?

Justice Richards

I think in a jury trial, counsel tend to get to the point more quickly and really deal more directly with the issues. There's an expectation that a judge, perhaps because judges have more time to think, and have to explain their reasoning in writing, there's a tendency to think that judges can deal with more complexity than a jury can, but equally, it's very refreshing in a jury trial to see such focus on the real issues, which might be as simple as, 'Well, do you believe the plaintiff or not?'

And the other big difference in a jury trial is the result comes very quickly. So, the jury retire to consider their verdict and within, usually within days - it's very rare for a jury to take longer than a day or two in a civil matter - there's a result.

So, as happens with a judge, reserves a decision and weeks, months, sometimes longer can go by before the decision's ready to be handed down.

Greg Muller

And finally, a question from my daughter, Alice.

Alice (listener)

You've seen so many murders from your time being a judge. Would you know how to commit the perfect murder and get away with it?

Justice Tinney

Well, I don't know how to answer this.

Greg Muller

Justice Tinney.

Justice Tinney

I think that if you thought enough about it and planned it and realised the sort of mistakes that can be made, I think the perfect murder could be committed, and I'm sure plenty of perfect murders have been committed that we don't know about or have not yet come before the courts.

So, I think the answer is probably 'yes'.

Justice Whelan

Well, I couldn't because I'd be hopeless. No, I couldn't do it.

Greg Muller

Justice Whelan.

Justice Whelan

I don't have the cold-blooded foresight and capacity to then carry it out and lie about it and so on. I just don't think I could do that. But you can see how people could do it.

The big problem murderers have, though, is there's usually a very powerful reason why they do it, and the police are looking for that person with the very powerful reason to do it, and they're, particularly with murder, they're pretty successful in finding who it is.

It'd be much easier to be a criminal of another kind, I think, where the motivation is purely financial, and murder, I think, is probably one of the more difficult things to get away with.

Greg Muller

Justice Taylor.

Justice Taylor

Well, there's two aspects to that.

One assumes that I could murder someone, the second is that I could do it well enough to get away with it.

Putting aside the first issue, I think 'no', in a word. No one is quite that clever, even if you had determined to beat the system.

Justice Champion

Oh God, I don't know how to answer that one.

[laughter]

Greg Muller

Justice Champion.

Justice Champion

I think it would be very difficult to get away with murdering someone, even though having been involved in many cases of murder, either as a defence barrister or a prosecutor or a judge.

My experience is there's always a trail left by a murderer, one way or the other.

Justice Hollingworth

Certainly doing this job has taught me a lot about police investigation methods and also about how much we leave a trace everywhere we go.

Greg Muller

Justice Hollingworth, Principal Judge in the Criminal Division.

SUPREME COURT OF VICTORIA

Justice Hollingworth

I'm constantly surprised by how many ordinary domestic households have CCTV cameras on their properties and how many cases which come before me where police have been able to trace through mixture of sometimes CityLink, records, CCTV cameras from neighbours, telephone movements, etc, have been able to trace fairly accurately who was where at what particular times. The other things of course is DNA forensic technology has improved enormously.

So I guess this job has given me some idea of ways to keep a bit cleaner, but I think there are still some challenges.

Justice Champion

I think it's going to be a very difficult task to get away with a murder, and, well, I'm not going to try it.

Justice Hollingworth

I hadn't actually thought about committing the perfect murder - is there someone you want me to get rid of for you??

[End theme]

Evan Martin

Gertie's Law is brought to you by the Supreme Court of Victoria.

That brings us to the end of our first season. We'd like to extend a huge thank you to everybody who has given us their time to be interviewed.

We'd also like to shout out two people who have been instrumental in the making of this show - our consulting producer Siobhan McHugh and of course, our incredible composer Barney McAll.

The biggest thank-you though, is for you, the listeners. We've just been blown away by the reaction and feedback.

But don't unsubscribe just yet! We're changing things up a bit, but we'll be back next year with more episodes and stories from the court.

We'll also be checking our email, gertie@supcourt.vic.gov.au, so if you've got a question for a judge or there's something you think we should cover, shoot us an email.

And please, if you've got some time, leave us a rating or review on Apple Podcasts.

Otherwise, see you in the new year. Thanks again for listening.