

**Gertie's Law
Episode 11 - The Judges**

Content warning

This episode contains descriptions of real, violent crimes and references to suicide.

Evan Martin

Supreme Court judge. It's one of the most senior positions in the law, yet perhaps also the most publicly criticised.

'Judges are out of touch' is something you often hear in the media and on the street.

And there's also a lot of mystery and conjecture surrounding judges.

Like how they're appointed.

Justice Taylor

Of course, rumours are always very strong, so you just have to, you know, be Cheshire Cat-like and not say anything.

Evan Martin

How they deal with bias.

Justice Neave

I think there was a bit of concern that the fact that I was self-labelled as a feminist might mean that I was incapable of deciding cases without reference to ideology.

Evan Martin

How they cope with dealing with violence and death, day in, day out?

Justice Whelan

You do cut yourself off to some extent from the brutality of it all. Never entirely.

Evan Martin

This episode is about the role of a Supreme Court judge.

[Opening theme]

Evan Martin

I'm Evan Martin and this is *Gertie's Law*.

Judges have been steeped in the law for decades, but their journey to the bench can vary widely.

Justice Whelan.

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Justice Whelan

Well, I had the traditional career. I was a barrister and a QC and then was appointed as a judge. So, I'm of the completely traditional path.

The traditional path's not the only path anymore.

Justice Hollingworth (court recording)

I sentence you to imprisonment of 20 years. I fix a period of 15 years as the period you must serve before becoming eligible for parole.

Evan Martin

Justice Hollingworth has been a judge at the Court since 2004 and was recently appointed Principal Judge of the Criminal Division.

Justice Hollingworth

When I initially thought of becoming a lawyer – this is back – way back when, there was a show called *Perry Mason*, who was an American lawyer who always defended innocent people who had been wrongfully framed by a corrupt system. And as a 17-year-old who liked arguing and debating and loved the English language, that struck me as a pretty good thing to do.

Then during my university holidays I had a couple of jobs at criminal law firms and came to the realisation that most of the people who had been charged weren't innocent people wrongfully framed by a corrupt system, were perhaps people who may well have committed these particular offences, and I thought, well, if I wanted to help them in many of their cases, short of becoming a social worker and changing their life 20 or 30 years earlier, I wasn't sure that I would be helping them. And this was a very young and immature point of view, but at that stage I rather turned off criminal law. And I practiced for most of the time as a commercial and civil lawyer almost by default because I wasn't sure what else I wanted to do, and I got a very good training, I had some very interesting cases.

But at the back of my mind there was still a burning interest in criminal law and when I was offered an appointment at the court, the opportunity to come to a court where I could slowly develop a criminal practice was very appealing. And so over the last 14-odd years I've been gradually increasing the amount of crime I do to the stage now that I don't do civil cases any more and I just do crime. So, in a funny way it has taken quite a few years but I've finally come back to the part of the law that attracted me to the law in the first place.

Evan Martin

Unlike Justice Hollingworth, Justice Macaulay didn't leave school with ambitions of becoming a lawyer.

Justice Macaulay

I went to university thinking I might be a journalist or I might be a diplomat, and ultimately I did law, and even then wasn't sure that I would use my law degree as a lawyer, but ultimately that's what I did.

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I thought I would have a go at being a barrister, not being entirely sure that's what I wanted to do, but ultimately I liked it. I think I like doing the talking bits. And then once I was a barrister, I wasn't sure what particular area I wanted to go in to. I had no set direction. I thought it might be personal injuries, I thought it could have been criminal law. But as it turned out, I ended up being a commercial lawyer – commercial litigator.

Justice Taylor

I was an Australian lawyer and I was doing mostly criminal law work.

Evan Martin

Justice Taylor was appointed a judge in the Criminal Division in 2018.

Justice Taylor

I became very interested in international humanitarian law and international criminal law, and I went initially and worked in Freetown in Sierra Leone for two years, with the Office of the Prosecutor at the Special Court for Sierra Leone.

So, I was prosecuting war crimes and crimes against humanity. That was an incredibly formative experience for me.

It is a difficult place sometimes, but it is an amazing place. One of the things that Africa, I think, does is to strip away pretence fairly quickly, because it's just a bit hard sometimes to live there, and what that meant is that the working relationships were very authentic. You got to know people very well, very quickly, and some of the subject matter was, of course, incredibly difficult. The atrocities in Sierra Leone were horrendous.

I think I learnt or had reinforced, at least, the importance of really listening to people and really giving people time to tell their stories, and not assuming that I always knew the best way forward because I'd read all the papers.

Evan Martin

Do you think that experience has affected how you perform your role as a judge?

Justice Taylor

I think those experiences probably made me a better lawyer. They certainly made me a more patient person. I hope both of those things might contribute to the way that I behave as a judge, but it also gave me... I suspect it just broadened my mind.

The experience of living in a country that is so unlike your own is just actually thoroughly good for you, in terms of your growth as a person, and judges are ultimately individuals who do the best they can to dispense the law correctly, and those kinds of experiences, I hope, help me with very broad understanding of what justice means.

Evan Martin

Here's Chief Justice Anne Ferguson, speaking at a panel during Courts Open Day earlier this year.

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Chief Justice Ferguson

I haven't got any lawyers in my family. I have now, actually, because I married one. But before that, I didn't have any lawyers in my family, nobody had been to university. So, I was the first one to do that. I was going to be a school teacher, and that was really what I thought I would do, but I liked crime novels.

One of my girlfriends was going out with someone who was studying law. I needed another subject when I got to what's now year 11. I did legal studies and carried on.

Our profession is broken into two parts. The solicitors mainly do the written work, in terms of dealing directly with the clients. The barristers are the ones that you see standing up in court.

So, I was always a solicitor. I was never a barrister. That's a pretty unusual thing for a judge to be someone who's not been a barrister.

Evan Martin

It's so unusual, that Anne Ferguson is the first Victorian Chief Justice who never worked as a barrister.

Chief Justice Ferguson

If anyone had suggested to me years ago that I'd be here today, I'd have thought they were crackers. You know, it just wasn't on my radar at all.

Evan Martin

Somebody else who experienced a bunch of firsts throughout her career is now-retired judge, Betty King.

Justice King

I joined the Bar in 1975, August 1975, and I was 24-years-old. I was equally the 24th woman to ever sign the Bar roll, which had been going for, I think, a hundred-plus years.

We were very few in number, about seven women at the Bar, at the time. And you were expected to do family law, because that's what women did. It was an acceptable area for women. I didn't do it. I did crime.

So, I did that for a long time, and then I became prosecutor for the Queen. I was the first female to do that, and that was '85 or '86. I did three years there and then left and was appointed prosecutor for the Commonwealth, and that was the first position they'd ever – first time they'd ever created that position. So I did that for two years, and then came back to the Bar. I took silk in 1992, appointed to the County Court in 2000 and to the Supreme Court in 2005, and retired in 2015.

Evan Martin

When a barrister 'takes silk', it refers to them being appointed as Queen's Counsel or Senior Counsel.

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You can spot a QC or SC by the rosette, a ruffled piece of black silk, which looks like a flower, worn on the back of their robes.

You were a judge of both the County and Supreme Courts. Was there a difference between those as far as being a judge goes?

Justice King

Very much so. The difference in the County Court is that it wasn't a court of record. So not everything you did was going to be scrutinised in the same way as the Supreme Court.

Evan Martin

The Supreme Court, unlike the County, records and transcribes every word spoken in open court.

Justice King

So, if I did a trial in the Supreme Court, I expected there would be an appeal if there was a conviction, and every word I said would be scrutinised carefully. So, you have to be a lot more cautious in terms of no off-the-cuff remarks, although I wasn't very good at doing that, being cautious, but it was – humour was not able to be injected in quite the same way, and humour helps lighten a load in criminal trials. It makes everyone let their breath out and breathe.

Justice Neave

My career path is a little strange.

Evan Martin

Marcia Neave sat on the Court of Appeal from 2006 until she retired in 2014.

Justice Neave

I did my law degree, practiced for a short time and then I went back and was an academic for a long long time, but I also had time out of academe as a law reformer.

So I've always had an interest in public policy and social policy and that fits well with being an academic because you can write articles about how the law should change. And then I was given the opportunity to accept an appointment on the Court of Appeal and then I was asked to chair the Royal Commission into Family Violence, which I think melded together my interest in public policy, my interest in gender issues and probably some of the experiences that I'd had as an appellate judge.

Evan Martin

And you were the first academic to be appointed a judge in Victoria? Is that right?

Marcia Neave

There were certainly judges both in the Federal system and in Victoria who have had - who have been academics at certain stages of their lives but most of them have had a much more significant period at the bar than I have had. And I didn't have any time at the bar. So I wasn't a barrister, and I was apprehensive about that when I went to the court. One of my friends was an academic at ANU who went to the Federal Court and was regarded by

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everyone as a very successful Federal Court judge so I thought, 'well if he can do it perhaps I can too'.

Evan Martin

What was the reaction like across the profession to your appointment?

Justice Neave

Well, I think a bit of shock and surprise. I got some very, very nice, supportive letters from people who had worked with me in other areas. I got a couple of very unpleasant communications, a couple of anonymous letters and there were a few letters to the newspapers about how this was a disaster, but I don't think it was a disaster.

Evan Martin

Judicial appointments to the Supreme Court are decided on by the Attorney-General of the day.

Justice Whelan

Someone would ring you up and say, 'The Attorney-General wants to have a chat,' and you'd go up and talk about... you might even talk about other things for a while and they would say, 'Do you want to go on the court?'

So, it's a kind of headhunting thing. In the Supreme Court, it's still like that, really, but in the lower courts, it's becoming more like a normal job application, I think, because the Attorney-General's not going to necessarily know everybody. They're going to need, not quite references, but they're going to need a lot of advice. Obviously, the Chief Justice and the Chief Judge, I imagine, have a lot of input into who gets appointed. Hopefully they do.

Justice Taylor

The process is all a bit shrouded in mystery sometimes.

Evan Martin

Justice Taylor.

Justice Taylor

I was offered the position by the Attorney-General of Victoria, which is how it is done, and when I accepted I then spoke to the Chief Justice, and then there's a period of time where things have to happen and you have to declare interests, and there's probity checking and that kind of thing.

Then the appointment is ultimately made by the Governor in Council, and when it's made by the Governor in Council it can then be public. But until then, it has to remain secret. So, it's quite a number of weeks of discomfort where you're allowed to tell your nearest family, but no one else. So, you have to engage in this pretence of giving your briefs back and getting rid of work without telling anyone, really, why you're doing it.

Of course, rumours are always very strong, so you just have to, you know, be Cheshire Cat-like and not say anything.

Evan Martin

What's that transition like? From appearing before the bench to sitting behind it?

Justice Taylor

It's very big, the transition. I was a barrister for 20 years, a lawyer for 25-26 years in total, and the walk across William Street from chambers to the Supreme Court never felt so big as when I came here as a judge.

It's an entirely different process. Being a judge, you're not partisan at all. You're not beholden to a client. The whole point of what you do is to be impartial and fair, and reach the best result and the correct result, as opposed to advocate for a particular position or a particular result.

You always know what a judge does, even when you're a barrister. But the doing of it is surprisingly different from being counsel.

Evan Martin

For Justice Macaulay, that change in focus was a surprisingly welcome one.

Justice Macaulay

It's a bit like stepping through the mirror and looking back the other way. It's a very familiar environment because you've been in it for all of your career, if you've been a barrister, so it's not an unusual place, but it's a different perspective.

If you had asked me whilst I was a barrister was I dissatisfied with being a partisan, I would have said, "Of course not. That's what barristers do and that's part of my blood," but having stepped through the mirror and become the independent non-partisan decision-maker, I did find that liberating and very satisfying.

Very satisfying to be the one who owns the outcome, rather than being professionally distant from the outcome.

Evan Martin

Before being appointed to the Court in 2018, Justice Tinney served as a Crown prosecutor for 12 years.

Justice Tinney

I remember when I received the call from the Attorney. I'd been given some warning that it might happen, and I didn't really want it to happen, I must say, but I had decided I would do it, but I was concerned that I might be leaving a job that I loved and going to a job I may not end up loving.

I said many times in my career as a barrister that that was the best gig in the world, and why would you want to do anything different?

That's not the way things have turned out. I've loved it just as much.

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Evan Martin

You said you didn't want it to happen, but you'd decided you were going to say yes anyway. Was that out of any kind of obligation you felt?

Justice Tinney

Perhaps a bit of an obligation. I obviously was honoured at the thought or the idea that the Government would like me to go to the Supreme Court.

It's obviously a very important job, and I'd been working for many years in that court, appearing in front of many judges who I respected and admired, and so the idea of being one of those certainly had appeal to it. But I felt, I think, that I was qualified in a sense to do it with my experience, and that someone needed to do it, and I felt that I should. I felt that if I didn't, I might live to regret that. I also knew that for the rest of my career, I'd be appearing in front of the person they appointed instead of me, and so hopefully not with any conceit to it, I believed that I might be ready for the honour and the responsibility, and so I was happy to take it up in the end.

Evan Martin

With judges being exclusively appointed from the legal world, they're prone to critical public commentary.

What do you say to the criticism that judges are out of touch?

Justice Champion

The community, I think, perhaps doesn't really understand that judges are just people out of the community.

You know, judges do normal things. They have families. The kids go to school. Judges go and watch the kids play footy at school. Judges catch trains and trams and do all of the things that normal people do, or that, you know, everyone does.

Evan Martin

After serving as Director of Public Prosecutions for six years, Justice Champion was appointed a judge in the Criminal Division in 2017.

Justice Champion

I think that the days are gone where people might have the impression that judges sit around, you know, in nice robes and have lacy cuffs and wear strange shoes and things like that and have a carriage or a car to pick them up and take them home at night. Those days are all gone.

Often the judges are sort of highly educated and highly experienced, but that's as it should be. And in one sense that's part of, I guess, being independent: that the community expects judges to maintain their independence and their unbiased approach to judging, but that still doesn't take away from the fact that judges, magistrates and members of tribunals are really ought to be regarded as members of the community like everyone else.

Chief Justice Ferguson

We are part of the community, and in a sense, we see more of society than a lot of other people get the opportunity to. We see the best, we see the worst, and we see it on a daily basis.

Evan Martin

Chief Justice Anne Ferguson.

Chief Justice Ferguson

And particularly the judges that sit in the criminal jurisdiction, they have been working in that area since most of them were in their, you know, early to mid-twenties. They're now all probably over 50 in this court, and they've been seeing that - That has been their life, day-in, day-out. So they're in a really good position to make an assessment of where, if it's a criminal matter, the particular crime and the way it was committed fits by comparison to other crimes.

Justice Hollingworth

Look, it's an interesting criticism that judges are out of touch with the ordinary people because no one ever actually defines who the ordinary person is or what it means to say we're out of touch with the community. To a certain extent it's true that judges still, by and large, come from perhaps a more educated and perhaps more affluent cross-section of the community than the statistically average person, but I'm not sure what that actually means in terms of our understanding of day-to-day existence.

Evan Martin

In some countries, such as the US, judges are elected by the community, similar to politicians. Do you think this would change the public's perception of judges?

Justice Hollingworth

I don't know that the average person thinks that politicians are any more in touch with the community. I mean, one's always hearing people criticising politicians as being out of touch.

I don't think election would be a solution to anything. One of the strengths of being a judge in Australia is that, unlike in America, we're not elected. And what that means is that we are responsible to a higher calling – and that sounds a bit pious, but we have higher values in mind than just whether or not we are personally going to get elected and have a job at the next election.

And what that means is that values such as the rule of law and the application of consistent principle and doing the right thing can feature in our decision-making far more so than if what we were most concerned about was getting elected next time we were up for election.

Sometimes the criticism about judges not responding to the people misunderstand the different roles that the judiciary, the legislature and the executive play in the Westminster system of government. We actually have a system of government which has three separate, independent arms, and the judiciary is one of those arms. Just because it's not elected it doesn't mean it's not equally important.

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And the reason that the Westminster system developed and we have these three arms is historically to avoid kings and governments from being tyrants. And the idea of having the judiciary as the independent third arm who hold the government and the King or the President accountable is a fundamental part of why a democracy works.

Because we live in a relatively stable political country like Australia, we tend to lose that perspective and tend to forget that that's why we developed an independent judiciary. You've only got to look at so many countries in the world where there are corrupt politicians and where the judiciary are completely disempowered and they're appointed and sacked at the whim of a government to realise how important an independent judiciary is.

Evan Martin

Justice Niall, judge on the Court of Appeal.

Justice Niall

Unpopularity doesn't weigh on me at all. I don't try to discern or divine a sense of what would be the more popular or the more likable or the more agreeable outcome. You're not indifferent and you can't be indifferent to the outcomes that your decisions and orders make for the parties who are involved or for the broader community.

So you're not blind or immune to the fact that the decisions we make are important and have general – and might have general repercussions for members of the community and always have repercussions for the parties. Some of them quite severe and life-changing. But it's partly the training that we have over a long period of time to be objective.

But it's partly the conscious recognition of the role that we play, that our job is to hear both sides of the argument or a case and to try and come to the right result at the end of it. So I'm never really conscious of it being popular. I am conscious of it being important.

Evan Martin

As their job title not-so-subtly suggests, it's a judge's job to sit in judgement. Whether it's in the Criminal Division, deciding how long to imprison someone for a crime, the Common Law Division, perhaps ruling who is responsible for a workplace injury, or in the Commercial Court, such as determining where the fault lies in a business dispute, judges are constantly making potentially life-altering decisions.

One question we get asked a lot by listeners is 'How do judges deal with their biases?'

Justice Dixon

It's generally fairly easy to deal with bias.

Evan Martin

Justice Dixon is the Principal Judge in the Common Law Division.

Justice Dixon

First of all, if there is any actual bias, or even the appearance of actual bias, you declare it to the parties and recuse yourself and get somebody else to hear the case.

Evan Martin

Just like jurors, judges can't sit on cases involving family, friends of acquaintances.

Justice Dixon

But then the question's probably directed more to the notion of personal attitudes, political attitudes, even philosophical attitudes that you have about the way the community should be shaped or the way people should lead their lives, rather than obvious bias of knowing the witness, or knowing the parties who are involved in the case, and that kind of thing.

It's a fiction that those kinds of considerations are completely absent, but judges are highly trained decision-makers. We have a lifetime of commitment to the oath of office that we take to make sure that we reach the fair result on the facts, as they are presented in court, in accordance with law. And we know that we can certainly be overturned if we misstate or misapply the law, but we can also be overturned if we misstate or misapply the facts in conjunction with an error of law and expose the decision to being reviewed. So there are checks and balances throughout the system that are not always brought into play, but the fact that they exist creates a standard. And so, in many respects, bias is – is rarely a problem.

Justice Hollingworth

One of the problems with the concept of bias is that it's only in recent times we've become aware of just how much unconscious bias there is.

Evan Martin

Justice Hollingworth.

Justice Hollingworth

I think we're all acutely aware of the potential for actual bias, but what we are only just becoming more aware of are the ways in which our life experiences give us unconscious bias. Fortunately the Judicial College has in the last decade or so spent quite a lot of time on training and developing courses to make us aware of some of these unconscious bias aspects.

Justice Taylor

It doesn't mean that judges remain unaffected by what they see and hear, but the law is an intellectual exercise and, as juries are told, you need to put aside sympathy and prejudice, and decide matters entirely on the material that is before you.

Evan Martin

That sounds like a learnt skill.

Justice Taylor

It probably is a learnt skill. I think anyone who practices as a lawyer soon understands that it's not about them, and if you don't understand that, you're not going to be a very successful lawyer. You have to be able to dispassionately analyse what the issues are and apply the rules. Again, that doesn't mean that, at the end of the day, you don't have some emotional response to it, but you do your best to make your decisions rational and objective.

Evan Martin

So, how much of your upbringing, or your background, or your view of the world is reflected in the judgements you formulate?

Justice Taylor

Of course, you can't ever divorce yourself from your own environment. We're all creatures of – of – of those things, but you look at the material before you. You make objective assessments as best you can according to the rules, and both legislation and previous cases, and according to those precepts, you give the best sentence that you possibly can.

Will there be differences between judges? Probably. But not so much as to indicate that the fact that someone came from a particular place or a particular upbringing would give a different sentence from someone who came from an entirely different place or a different upbringing.

Evan Martin

Retired Court of Appeal judge, Marcia Neave.

Justice Neave

I think there was a bit of concern that the fact that I was self-labelled as a feminist might mean that I was incapable of deciding cases without reference to ideology and, of course, what you believe affects the way you hear matters and the way you interpret facts and so on, but that's so for all of us. It's not just the case for women – I mean, men are influenced by their life experiences and so I sometimes think that the discussions that we had among the other judges who were sitting on a case was helpful – helpful for me because I heard their experiences but also helpful for them in the sense that I would sometimes say that, "Well I don't see it in that particular way" and that was often a product of my own experience.

I think that having a diverse bench is really good. And having people who have come out of different areas.

Evan Martin

Justice Macaulay.

Justice Macaulay

Look, ultimately, it's about trying to be as honest as you can about where you come from, analysing yourself as to whether you have some starting position that you need to challenge about yourself, and sometimes there are decisions which, if it was – you know, you recognise if it was left to your personal discretion you would choose something else, but you recognise that parliament, through its statute or the common law through its principles, have gone in a different direction and you must adhere to that. And I think, having been a lawyer for so long, that's something which we just take for granted and we don't find that so difficult as people might imagine to apply.

Evan Martin

How do you go about upholding a law you don't personally agree with?

Justice Macaulay

So it's not that often that you get a decision you have to make where you have a strong personal inclination which comes into conflict with the way in which the law goes. And that's probably because, at its root, the common law in particular develops along common sense grounds, and if there is such a thing as general common sense or learned common sense, it's not that often that your personal common sense deviates from the learned common sense that's come down over the ages.

So it's not as often as people might think that you are confronted with a decision which challenges your personal inclinations.

Justice Hollingworth

One of the fundamental things you sign on to when you are sworn in as a judge that you will uphold the law and in doing that you know that there will be times when you're going to have to come to a decision that's contrary to the one that you would prefer to come to.

I think the point is this. If the decision was something so fundamental that it contravened your basic principles then I think your only option would be to retire as a judge.

For example, I am a strong opponent of the death penalty. I don't see that as acceptable. So if, for instance, the state introduced the death penalty I would either not sit on criminal cases or resign as a judge. But absent that sort of point of principle so profound and so deep that you couldn't continue to be a judge, I think it's part and parcel unfortunately of the job you sign on for that you will uphold the law and the law is not my personal idiosyncratic view of what it should be.

It's actually a deeper and more fundamental set of principles that have evolved over time and that operate because they're not just the whimsey of an individual judge or the preference of an individual judge. They're deeply based and founded.

Evan Martin

I've sat in on a large number of cases now, and it can be confronting. You're hearing about some of the worst people do to each other, in a really intimate environment. There's a lot of sadness, and a lot of anger.

Those that work in the criminal division, from barristers and solicitors to judges and tipstaves, are faced with this day in, day out, and in much more detail.

Justice Hollingworth

Look, criminal courts certainly deal with trauma every day. We don't face the same frontline trauma, the same direct trauma that people like police and ambulance officers, paramedics, other frontline responders do.

We face what I call secondary or vicarious trauma. We have to deal with, usually, a violent death and the impact it's had on so many people. That's not only the family and friends of the deceased person, but also of the accused, of witnesses, of people who have inadvertently got caught up in this whole drama.

And all of these people are trying to make sense of what happened.

Justice Tinney (court recording)

Yours was not an entirely spontaneous, unplanned and unpre-meditated crime.

It was not lost on you how totally unacceptable and reprehensible your intended conduct was. You had ample time to reflect upon what you were doing, but you allowed your anger and sadness to overwhelm all reason.

When you carried out the murder, the method chosen by you was at the very serious end of the spectrum. You took a double-barrelled shotgun to a defenseless man, your son, lying on his bed, from close range.

Yours was a shocking, senseless and inexcusable crime.

Evan Martin

Justice Tinney.

Justice Tinney

In my time as a barrister, whether it was defence counsel or prosecuting, although I've done lots of cases that involve death, including the death of children and terrible violence, I was able to compartmentalise my life okay, and as an example, whenever I was preparing a murder case, one of the first things I'd do, and it might sound a bit morbid, but I'd get the book of autopsy photographs and I'd have a look at them and see what the scenes were depicted in there, or for that matter, the crime scene photographs. And I would then just take that on board and it was always just work. It didn't ever trouble me deeply, the sort of cases I was doing.

I suppose one exception to that would be cases concerning the death of young children if you're at a time in your life, as I was not that long ago, of having young children. And you could dwell on that a little bit, but I've never really found my work to trouble me too much or cause me to lose too much sleep.

Evan Martin

Former judge Betty King.

Justice King

I'd done crime for 40 years. So it was just part and parcel of it. You start off – it sounds really strange, but you start off doing very minor crime: thefts, assaults in the Magistrates' Court, and then you just and, ultimately, do more violent crime.

And what happens is you start to do bigger cases, like armed robberies, some homicides, and you just, sort of, build up almost like a resistance to it, in that you know what's coming, but you don't take it on board in terms of – personally.

Justice King (court recording)

Your crimes were horrific, they were motiveless, a desire to kill just to see what it was like.

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The result is that two decent, caring, helpful people, who were asleep in their own home, have been woken, come to the aid of a neighbour and been brutally murdered.

Justice King

I've got a friend who is – a really good friend who is an oncologist, and how he describes it to me, because you can imagine what he does – he describes it as it's not your tragedy and you have no right to take it as your tragedy. It's theirs.

Evan Martin

Justice Champion.

Justice Champion

It is what it is and there's no avoiding it. And in order to perform your job effectively, I think, you've got to be able to just try and emotionally remove yourself from those circumstances. And that's not to say that there aren't some cases that do deeply affect you and sometimes you're sending people to jail or, in my previous role, prosecuting people that you feel great sympathy for.

Evan Martin

Reserve judge Justice Lasry has sentenced many people in his 12 years since being appointed as a judge.

Justice Lasry

Oh, it's not easy. There is no judge that I know of who gets any pleasure or satisfaction out of doing that. I find it very stressful, but it has to be done. It's a part of the job. It's – you just – the important thing is to think that it's the right result. You have to believe that. If you don't believe that, then it's even worse, but sentencing is a very stressful activity.

The thing about sentencing in Victoria is that it is a process whereby the judge talks directly to the accused. So you're looking them in the eye and speaking to them, and looking someone in the eye and saying, "You are never to be released", is a very emotional thing to do.

Justice Lasry (court recording)

Given the nature and circumstances of the offence of murder, I have no hesitation in concluding that the total effective sentence I should impose on you is a sentence of life imprisonment.

Justice Lasry

But as I say, it's, um – I mean, sometimes it just has to be, and I've never – I don't think I've ever carried a – I don't think I've ever, sort of, suffered a PTSD type effect from doing the work I've done.

Some people do, and I understand. I've just been lucky. Maybe it's because I've got other things in my life that I do that give me an outlet, and I think you need that. You need something that diverts your mind from the work that you do, otherwise you take a risk, I think.

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Evan Martin

Judicial wellbeing had never really been on the public's radar or seen as a serious issue, but as awareness of mental health increases, research has begun into the effects of vicarious trauma and stress on the judiciary.

Carly Schrever

My name's Carly Schrever, and I started my professional life as a lawyer, but after a few years, shifted – went back to uni to retrain in clinical psychology. Towards the end of my training, when I was doing my Masters of Clinical Psychology, I had a conversation with the then Chief Judge of our County Court of Victoria, Michael Rozenes.

He said that, you know, there's really no research looking into how judges experience stress and what the stress of judicial office is, and so he really encouraged me to undertake the research which ultimately led to my PhD.

Evan Martin

Outside of the obvious personal concern for judges, why is judicial wellbeing important for the community?

Carly Schrever

That's a really good question. So obviously stress can impact the psychological and physical wellbeing of the person experiencing it, but when that person's in a position of responsibility and authority, their personal stress can have a broader impact, and that's because – we know from a lot of research that's just been done in human psychology generally – that stress has the potential to adversely impact things like decision-making and impulse-control and emotion regulation, and the kinds of, I guess, difficult tasks that judges have to perform on behalf of the community in the courtroom.

So, stress has the potential to impact upon those things. That said, though, I want to make very clear that stress does not necessarily equal impairment. I think that's often an erroneous assumption that's out there in society, and it's very clear to me that judges and magistrates – it's inevitable, given the nature of the work, that they're going to find themselves distressed from time to time, but that does not mean necessarily, and even in most cases, that that will have any adverse impact on their ability to perform their function in the role.

Evan Martin

Is there a reason why the community hasn't been historically as concerned with judicial wellbeing as they have been first responders - police, ambulance?

Carly Schrever

Yeah, I think there is, and I think it's largely because it's only recently that the judiciary itself has been prepared to talk about this issue.

So, the first person to go on the public record suggesting that judicial stress is a topic worth talking about was actually Michael Kirby back in the mid-90s when he was newly a High Court judge. And he presented and published a paper entitled "Judicial Stress, An Unmentionable Topic", where he basically put the issue on the table. And his choice of

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language was certainly vindicated, because he was swiftly and resoundingly criticised by a number of fellow judges for raising the topic, most notably a Supreme Court judge from Queensland who published a reply piece entitled “Get Up Off the Ground”, in which he accused Michael Kirby of jumping on the stress bandwagon, and basically saying that judges need stress or adrenaline to produce their best work, and “there’s nothing to look at here”.

Michael Kirby published his own reply. He was never one to let an opponent have the final word. But then the judiciary and Michael Kirby himself remained silent on the topic for the best part of 20 years. And just in the last 5 or so years, the conversation’s really opened up, this time to a much more welcoming reception.

And tragically, one of the events that did open up the conversation around judicial stress within the public domain was when, within a fairly short period, a five-month period, two magistrates from Victoria tragically took their own lives. And, of course, we don’t know all the factors that led to that, but it did certainly catapult this discussion to top priority within the courts, and it definitely attracted a new kind of interest in the public domain.

Evan Martin

The headline finding of Carly’s study was that judges and magistrates experience elevated rates of ‘non-specific psychological distress.’

Carly Schrever

So, 52 per cent scored in the moderate to severe range of non-specific psychological distress. So this is, kind of, generalised feelings of stress. That places them – slightly higher rates of that compared to barristers and the general population; slightly lower than lawyers and law students.

However, when I measured symptoms of mental health concerns – so symptoms of depression and anxiety – judicial officers’ rates were considerably lower than the legal profession, and even slightly lower than the general population. So what that says to me is that judicial officers are experiencing stress. It’s a stressful role. But, unlike the rest of the legal profession, this elevated stress does not seem to be translating to a widespread mental health problem among the Australian judiciary.

Evan Martin

There’s one associate judge at the court who takes a proactive and quite public approach to her mental health.

Associate Justice Ierodionou

My name is Mary-Jane Ierodionou.

I suppose I am very proactive about managing my own wellbeing. So the things that I do include keeping fit. So I get to the gym a couple of times a week and I try and maintain exercise during the day, including taking the stairs.

Also I meditate each morning and also each evening as well for about 15 minutes at a time. And I’m an early riser and my creative outlet – one of them – is writing. So I do creative writing each morning for around about 20 minutes before I come into work. It’s an itch that I

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need to scratch. I thought I probably didn't have the time to do it but that became counterproductive when I stopped doing it and I actually realised I need to do it. It makes me be the person that I am, really. It's part of who I am.

Evan Martin

Do you think it's something which judges are starting to take more seriously?

Associate Justice Ierodionou

I think maybe before it was a situation where people reacted to it, rather than were proactive about it and people, I think, now are much more proactive about it. Even things like being aware of nutrition and exercise on a very basic sort of level. So I think possibly in the past, people only really talked about it when something went wrong. But now I think people are being much more proactive about what we can do to enhance our own wellbeing, which of course is contagious because if we are well and calm, then that can have a very calming effect of the people we work with and those who appears before us.

I think one of the areas that we know a lot more about now is vicarious trauma and that is something, again, which people need to proactive about. Not just judges but lawyers and others who work in that area. So unlike, say, health workers who learn about these issues when they're at university, at law school, you don't learn about the dangers of vicarious trauma. Now people are talking about it and we know that if you are working in an area where you're exposed to traumatic material that there can be vicarious trauma and so there's practical steps that people need to think about taking.

Evan Martin

Justice Hollingworth.

Justice Hollingworth

I think there would be very few cases we have that don't stay with you in some aspect or another and what's interesting is what stays with you can vary very much from case to case. So in some cases it might be the offending itself and in other cases it might be some little act of heroism or bravery by sometimes a quite peripheral player in the whole story. Sometimes it's the image one gets of the deceased person or the sense of what a loss they've been to others. Sometimes it's just the great tragedy that this happened in what can often have been an avoidable circumstance.

Justice Whelan

You do cut yourself off to some extent from the brutality of it all. Never entirely.

Evan Martin

Justice Whelan.

Justice Whelan

Perhaps the effect that it has on judicial officers and other court officers hasn't been sufficiently addressed and understood in the past.

I think it's more a problem in the lower courts, in the Magistrate's Court, where there's an enormous number of sad and difficult cases. You know, apprehended violence orders

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stacked up one after another, scores of them. Or in the County Court, incest and sex offender cases one after the other. I think there are genuine causes for concern there.

Evan Martin

Here's an excerpt from a speech the Chief Justice gave at a forum this year about wellbeing in the legal profession.

Chief Justice Ferguson

High levels of judicial stress is problematic; it's terrible for the individual judges who are experiencing these levels of stress, and it's also an issue of serious concern for the justice system and the community. Judicial stress can impact the quality of judges' work and the experience of litigants, practitioners and other users of our courts.

It is clear to me that we're making progress. I hope those listening today will take away that wellbeing is an area that I'm passionate about. It will continue to be a priority for me and I look forward to seeing what the efforts of everyone involved in the project will produce.

Evan Martin

Carly Schrever believes that a lot of good progress has already been made.

Carly Schrever

The State of Victoria is absolutely leading the way nationally in Australia, and from what I can gather, may well be leading the way internationally. I'm yet to find another jurisdiction that is further progressed in this work. So all of the courts in Victoria have a range of initiatives in place to support judges and magistrates in the work that they do, from access to 24/7 counselling. Also, most of the courts now have a system of proactive debriefing and counselling, so the judges and magistrates, at regular intervals, meet with a professional to discuss and debrief the pressures of the job without having to wait until they feel impacted.

The Judicial College of Victoria also is a nation-leader in providing training in this area; so to raise awareness and teach judges and magistrates skills, both in managing the irreducible sources of stress for themselves, but also supporting each other.

And then all of the courts are also looking at certain structural changes that they can put in place to limit, I guess, the unnecessary exposure to stress. So one example is, in the County Court of Victoria, which is the court that hears all of the worst sex crime, a lot of which involves child sex crime and child pornography cases, and judges frequently say that it's those cases that are the most disturbing. But because there's so many of those cases coming before the court, it is entirely possible that a judge could hear nothing but sex crime for an entire year, you know, without a break. And so what the court is doing now is very carefully looking at how many of those cases a judge has heard in a row before they make sure that they mix it up with something else.

Look, there's one thing I could say, if you want me – my research also suggests that, while stress is a problem for judges and magistrates, there's a deep sense of job-satisfaction alongside experiences of stress, and it's clear to me that stress and wellbeing are not mutually exclusive in judicial office.

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So, while most judges will talk about feeling frequently stressed and sometimes acutely stressed by the work that they're doing, they also talk of finding it very meaningful and loving their job and feeling a real sense of professional pride in being able to fulfil an important social and democratic function.

Evan Martin

Chief Justice Anne Ferguson.

Chief Justice Ferguson

We are really fortunate in the role that we have. We've all had successful careers as lawyers, and then we get this opportunity to really give back, and I think that's a huge privilege, to be able to give back to the community by being a judge.

The responsibility is that every single decision you make is going to affect someone, and most times it's going to affect more than one person. So in crime, it's going to affect the victim, the victim's families, the accused, the accused's family, and society generally, and that's a huge responsibility to get that right. In a commercial matter, it's the same thing. You're still affecting people, because there may be significant amounts of money that are involved.

You're always affecting someone, and that's a real heavy responsibility, no matter what decision you're making as a judge.

Evan Martin

Gertie's Law is produced by the Supreme Court of Victoria.

If you've got a question you'd like to ask a judge, now's the time to send it in, as we've only got a couple of episodes left.

Just shoot us an email at gertie@supcourt.vic.gov.au and we'll try to get it answered.

On next week's episode, we're delving into the world of court reporting.