

Gertie's Law

Episode 2: The Bar Table

Evan Martin

In season one of Gertie's Law, we explored most corners of the courtroom. The judge's bench, jury box, witness stand, the dock, and even the press gallery.

But there's one area of the court we didn't go to. The Bar table, where the lawyers sit.

Evan Martin

I'm Evan Martin.

In the Supreme Court, you'll find two different types of lawyers - barristers and solicitors. There'll be at least one of each for both sides - prosecution and defence in criminal trials, or if in common law, plaintiff and defendant.

They all sit around the bar table, which is a big table in the middle of the court.

In Victoria, the barristers sit on one side, facing the judge, while the solicitors sit on the other, facing their barrister, their backs to the judge.

Melinda Walker

My name is Melinda Walker. I'm also known as Mel Walker. I'm a solicitor in Melbourne, sole practitioner and I've been in the industry for almost 25 years.

Evan Martin

And what is the role of a solicitor?

Melinda Walker

Well, I like to see it as the first port of call, really, for somebody who has come into contact with the criminal justice system.

Evan Martin

While lawyers can and do work across multiple areas of law, most specialise in a specific field.

Melinda Walker

I solely practise in crime, so it's usually when somebody has had contact with the police.

So, I will be contacted by somebody who's in a police station or somebody who's in a prison, who will ask for assistance and usually who are either about to be charged or they have been charged with criminal offences. What happens then, is that, upon obtaining all of the information from the police, any of the evidence that they intend to rely upon, we'll assess that evidence and provide an opinion to the person who I'm representing. They can reject it or they can take that opinion in order to make an informed decision about which course that they want to take, whether that be to plead guilty to something or whether it be to plead not guilty to something or whether to find some middle ground or some compromise that suits them, at the time.

Evan Martin

A solicitor typically begins working for a client from the point of arrest or when somebody thinks they've been wronged and are seeking resolution through the courts. The relationship continues until the conclusion of the trial or any appeal process.

This means, particularly in the Supreme Court, that relationship could extend over years.

Barristers, however, are 'briefed' by the solicitor, bringing them on board closer to the court date.

Dr Matthew Collins AM QC

The role of the barrister is one of advocacy. Our system is an adversarial system of justice and the theory is this, I stand up in court representing my client and I put every argument which I can fairly put in my client's interests, and the judge or the jury sits and listens to those arguments.

Evan Martin

Dr Matthew Collins AM QC has been a barrister for more than 20 years and was President of the Victorian Bar between 2017 and 2019.

Dr Matthew Collins AM QC

My opponent, representing the other side of the case, stands up and puts every argument which can be fairly put in the defence of their client. And then the judge or the jury who are independent, having listened to the arguments, decides who wins and who loses. Now, that's to be contrasted with the way in which the justice system works for example in continental Europe where instead of an adversarial system, they have an inquisitorial system where the judge plays a much more active role in finding the facts and determining the outcome. We think our system is superior because it enables both sides to put every argument which can be fairly put in support of their client's cause.

Evan Martin

Many barristers - especially ones which appear here at the Supreme Court - have a post-nominal of QC or SC, and they get these via a process known as 'taking silk.'

Dr Matthew Collins AM QC

Taking silk is the expression we use for becoming a Senior Counsel or becoming a member of Queen's Counsel. So this dates back to, I think, the 1500s. Originally QCs were named personally by the monarch of the day in England, so the Queen or the king of the time. Nowadays, it's a mark which is awarded in this state by the Chief Justice to barristers who have reached a level of integrity, seniority and learning which merits being given the mark. So, it's a mark of accomplishment as a barrister. In Victoria, we've got roughly 2,100 practising barristers and I think just under 250 QCs or SCs. So about, a bit over 10%.

Now, there's absolutely no difference in terms of prestige or method of appointment between a QC and an SC.

Evan Martin

New South Wales did away with the title of Queen's Counsel in 1993 - but in Victoria, barristers can choose which title they want - QC or SC.

Evan Martin

Does that have an actual impact in the courtroom or is purely ceremonial?

Dr Matthew Collins AM QC

No, it does have an impact in the courtroom. So, generally speaking, a silk will appear at the bar table with a junior barrister, won't appear on their own. That's partly a result of history. Historically there was a time when QCs were not allowed to appear at the bar table without a junior. That's no longer the law. But the sorts of cases that silks, QCs and SCs do, tend to be

much more complicated cases and cases where there's a real advantage in having a bigger team.

Evan Martin

So, what makes a good barrister? Perhaps the best people to ask are solicitors who brief them, giving them their work.

When you're briefing a barrister, what kind of qualities are you looking for?

Rob Stary

Well, the first thing is, they've got to have the relevant expertise and experience.

Evan Martin

Rob Stary has over 30 years' experience as a criminal defence solicitor.

Rob Stary

They've got to show some level of empathy towards the client. Doesn't mean that they have to subscribe to their views. This is particularly true in terrorism, as an example. And they, you know, usually, if it's a trial, we want them to be fearless and be prepared to run, run the trial, if it's necessary. Courage is an important component.

Melinda Walker

You're also looking at the personality of the accused, of your client and whether or not they're going to fit the personality of barristers, because at the end of the day you want to ensure that there's a positive working relationship between the barrister and the accused. And that goes for me as well. If a client of mine and I don't hit it off, then best they go somewhere else because you want to ensure that you have open communication, you have trust and that you can get proper instructions from them so that you can work together.

Evan Martin

Do you ever get sick of barristers getting all the glory in the courtroom?

Melinda Walker

Not really. I think they work extremely hard and certainly, the barristers that I work with - and I hope they're listening - we work together and they may ultimately get the glory, I'm more than happy to remain in the shadows. I'm more than happy for them to have cameras shoved in their face instead of mine. I don't need the glory.

Rob Stary

They've got their role to play, we've got our role to play and they're different roles. We manage the case, we prepare the case, we do the research, we do the further investigations and the barristers have got a limited role, that is to present the case. So, I'm happy for them to get the glory.

Evan Martin

So, according to the barristers, what makes a good solicitor?

Felicity Gerry QC

Well, I think really good instructing solicitors have a really good relationship with the client. Regardless of who the client is or where they come from or whether they're paying or on legal aid, forget all of that.

Evan Martin

Professor Felicity Gerry QC is a barrister who works both in Melbourne and in London, specialising in crime.

Felicity Gerry QC

Have you got a good relationship with them? Can you communicate with them? Can you understand the instructions that they're giving? Can you give them advice and be sure that they understand? Often a lot of that work's been done before they come to you as a barrister. So, instructing solicitors who can client manage are an absolute godsend, and most criminal instructors know that that's their best skill, if you like.

The second is where the instructor has already managed to identify the issues. So, they're not coming for you to do everything. They've already focused the case and they'll be able to see the wood from the trees, the decisions that need to be made, so that when you come to the case and you come to discuss strategic approaches, they've already thought about those questions in advance.

And overall, it's an ability to work with you as well. It's got to be someone that you can get on with and that doesn't mean you're going to be best pals for the rest of your career, but you are with some.

Evan Martin

When I started sitting in on court regularly, one thing I was surprised by was how well the prosecution and defence barristers seem to get along. Maybe I've watched too many films, but I thought there'd be a bit more animosity between the parties, but during breaks, there's often a lot of friendly chat and even a bit of laughter.

Felicity Gerry QC

Courtesy, dignity and respect is what courts are about. Whether it's the person sitting in the dock, the person giving evidence or the people working in the room and I think it's most unfortunate where courts are not run in that way. If you're sitting in the dock watching everybody arguing, falling out, or you're a judge and you're seeing incompetent counsel, or the prosecution and the defence are just bickering with each other all the time, it can be a very unpleasant experience.

And if courts are not run with dignity, courtesy and respect, and we don't all treat each other professionally, then it all takes 10 times longer. It's a miserable experience.

You're part of a profession and those people on the other side are part of your same profession. Now, you might not like them as a person outside court, but you're still going to get on with them for the purposes of presenting the case as well and as efficiently and as cleverly as possible. You need to be able to respect their abilities the same as your own.

Occasionally we laugh it off as well. There's some dark humour, a bit like medics. You occasionally do laugh these things off when no one else would. And members of the public might be a little bit horrified and we try not to, but every so often there is a bit of a release and the only people who really understand that are the people who also work in the same system.

Evan Martin

Once a lawyer-to-be has finished their many years of studies and training, before they start practising, they first have to be admitted.

Chief Justice Anne Ferguson

You can't practice as a lawyer unless the court says that you can, and so the admissions ceremony is what that process is. You have to have a formal order of the court saying you can practice as a lawyer.

Evan Martin

Chief Justice Anne Ferguson was appointed as a Commercial Court judge in 2010 and moved to the Court of Appeal in 2014. In 2017, she became the first solicitor to be appointed as Chief Justice, a position typically held by former barristers.

Chief Justice Anne Ferguson

The ceremony starts, really, before you get into the court, because to be admitted, you have to have a certificate from a body called Victorian Law Admissions Board that says you've done the study, you've got the qualifications and also that you're a fit and proper person to be a lawyer. So, it starts with that.

The ceremony itself is a process where each person has a lawyer that represents them. They stand up and say a few words.

Court recording

If the court please, I appear to move that Terri Pollard, of the Wurundjeri Nation, be admitted to the legal profession as an Australian lawyer and officer of this honourable court, and I so move, on the certificate and recommendation of the Admissions Board.

Chief Justice Anne Ferguson

And then I ask the person whether they're in court. They stand up, they bow, and that happens for all of the usually about 60 applicants.

After we've gone through that process, the court official, called an associate, asks the applicants to take the oath or affirmation of office, and they then take their oath to say that they're going to do what they're supposed to do as a lawyer and as an officer of the Supreme Court of Victoria.

Court recording

You and each of you swear by almighty God that you will well and honestly conduct yourselves in the practice of your profession, as members of the legal profession and officers of this honourable court, to the best of your knowledge and ability.

Court recording

I swear by almighty god to do so.

Evan Martin

Due to the COVID-19 pandemic, lawyers are currently being admitted to practice without any formal ceremony.

But I did manage to attend a ceremony in March this year, before the restrictions were in place.

Following the ceremony, the newly admitted lawyers gathered in the court's courtyard to celebrate and take photos with family and friends.

Phoebe Le

My name's Phoebe Le.

Evan Martin

What's been the path to this point?

Phoebe Le

A long one. Started off doing arts and switched to a law degree. Decided that's what I really wanted to do at that point. Spent a few years in university and the College of Law. Was doing that while I was doing my graduate program, so I felt like it's been a really long journey.

Evan Martin

Law wasn't what you always wanted to do?

Phoebe Le

No, actually, I think ever since I did legal studies in high school. I know that sounds a bit cheesy, but I think after I did legal studies, I thought, 'this is something that I could do.' Unfortunately, I didn't get the marks for it initially, but I got to where I did in the end.

Evan Martin

What attracted you to the law?

Phoebe Le

Good question. I think that's probably the hardest question to answer sometimes. I think it's just the idea of the system and just the process and being able to work, to represent the interests of a client.

Evan Martin

Newly admitted lawyer Terri Pollard was able to represent her culture at the ceremony.

What's today been like?

Terri Pollard

Today was really good for me. I was admitted into law and was able to wear the traditional possum-skin cloak, and was really proud to do that today.

It's been a tough gig studying law, especially as a mature-age. And also, not even just finishing your law degree. You've then got to go on to College of Law. You know, it's pretty tough, but it's well worth it in the end.

Evan Martin

When did you decide you wanted to get into law?

Terri Pollard

I think coming from an Aboriginal background, there was always one black sheep in the family, and I had a brother like that. So, he was always in trouble with the law, and I did justice studies and thought I needed to know more about the law to help him and my culture.

Evan Martin

And what's the next step for you?

Terri Pollard

Currently, I'm working at Djirra, the Aboriginal Family Violence Legal Service. We do child protection, family law and intervention orders.

Dominic Anselm Sabater Fajardo

I'm Dominic Anselm Sabater Fajardo.

Evan Martin

What's today been like? You've got your family and friends here.

Dominic Anselm Sabater Fajardo

They actually flew in from Singapore. Yeah. So, it's a huge deal for us. They flew in on Thursday and I've been spending the weekend with them. And my friend from law school, we started law school together and he's actually moved my admission. It's crazy. Yeah, really, really happy that this has all gone so well today.

Evan Martin

How were you feeling in court, waiting for your name to be called?

Dominic Anselm Sabater Fajardo

Honestly, pretty nervous. I thought I was going to mess it up. You say the simplest sentence, but you feel like you might mess it up. But it went okay. Yeah, I had butterflies.

Evan Martin

It turns out some things never change.

Do you remember when you were admitted?

Chief Justice Anne Ferguson

Very clearly. It was a long time ago. I was terrified. I only had to say two words, I think it was, but I was terrified.

Evan Martin

Melinda Walker was admitted to law in the 1990s.

Melinda Walker

I had left school at 15 and I was a single mum at a very early age. And so, I returned to school, and I had escaped a family violence situation. Given that I was a survivor of family violence, I'd been through a number of experiences with the court system that I was unhappy about. And so, when I then joined the Fitzroy Legal Service, one of my goals was to address that disparity between the services and the court user. So, I started a program to try and integrate those services with a one-stop phone contact for women who were trying to escape family violence. I was at uni throughout that time, with my young kids, and I worked in a practice in Collingwood for about eight and a half years and then started my own practice back in 2003. And here I am.

Evan Martin

You've been in the gig for a long time. Do you have any particularly memorable cases or career highlights?

Melinda Walker

I think, probably the most memorable case would be the case of Luke Middendorp who was charged with murder of his ex-partner. And it was at the time when the homicide laws had recently changed, and the creation of a defence of defensive homicide.

Evan Martin

We'll be delving deeper into this in a later episode on manslaughter, but defensive homicide was a controversial offense where the culpability fell somewhere between murder and manslaughter.

The conviction of defensive homicide was available if you had a genuine belief that you were acting in self-defence, but that belief was unreasonable.

Melinda Walker

So, there were all of those aspects in that particular case and Mr Middendorp who was charged with murder, was ultimately found guilty of defensive homicide.

Evan Martin

Luke Middendorp was sentenced to 12 years in prison.

Melinda Walker

It caused significant debate in not only the legal community but the academic community and has been analysed to death, I think, to try and, personally, I think, further demonise Mr Middendorp. The defence was available to him at the time, whether or not that be right or wrong on a modern view, now. He was entitled to be found guilty of that offence and not of murder. So, I think that that was memorable because it certainly showed me how the case was then manipulated through academia and also popular comment.

So, it was a difficult one to reconcile, certainly as a survivor of family violence, as well. And, I think that that's where your professional shield becomes extremely important, as well.

Other memorable ones, I think, it's usually the first opportunity, sometimes, for people to get assistance through whatever means that the criminal justice system can provide to them.

When they first come to you, they may be distant from their family or completely detached from any education or any employment, find themselves homeless, A lot of young women that I've looked after find themselves in and under the influence of older, more influential males. That then, again, brings them in touch with the criminal justice system.

And I think they're probably some of the most memorable because that's given that young person the opportunity back, to get their life on track and make something of their life, at a stage in their life, in their early teens or in their early 20s where it could really go one way or the other.

Evan Martin

Solicitor Rob Stary always knew he wanted to work in criminal law.

Rob Stary

I grew up in the Western suburbs of Melbourne and it was always a social justice issue, primarily, for me. And, in fact, that's the way I've maintained my practice, largely. Curiously my father and grandfather studied and practised law in Hungary, before the Second World War. And then they came here in 1949, as post-war immigrants, never practised.

I always supported the underdog. It's the individual against the full resources of the state. And, you know, to be blunt about it, I've always had an ideological and philosophical position in supporting accused people, individuals against, as I say, the full resources of the state.

Evan Martin

Are there any cases you're particularly proud of?

Rob Stary

One highlight was applying for bail for Jack Thomas, the first person to be prosecuted in Australia for a terrorism offence.

Evan Martin

Jack Thomas, better known in the media as Jihad Jack.

His conviction was overturned by the Court of Appeal because the evidence relied on to convict Thomas was obtained under torture in Pakistan. The Court of Appeal deemed this evidence inadmissible and Thomas was released.

He was later convicted on passport offenses. Thomas was also the first Australian to be placed on a control order under the 2005 Anti-Terrorism Act.

Rob Stary

And Jack Thomas was, to use the terms of the psychologist, was a concrete thinker. He was not a sophisticated person. He'd been a convert to Islam. He had cooperated with the intelligence community when he returned to Australia.

And I knew the case was contaminated because there was a legal problem with, about the way the record of interview had been conducted with him, when he was arrested in Pakistan. And, I thought that had the risk of contaminating the whole of the proceedings. And, that's the view the chief magistrate took when he released him on bail. we ran the application and he was released on bail. And ultimately acquitted.

Evan Martin

Felicity Gerry QC.

Felicity Gerry QC

So I've been at the bar 25 years. Before that I taught people to ride horses and I dropped out of school, so there's a whole heap that you could unpack there, but focusing on my life as a lawyer, I went to what was then known as Bar School in London in the Inns of Court, off Fleet Street, in the temple. Very Dickens.

I did a general common law pupillage, eventually specialising in crime, particularly involving women and children. And I was a member of the independent bar, which means you could be sent a prosecution brief one week and a defence brief another. I used to do 30,000 miles in a car a year going to different courts centres and you develop a practice that sort of suits you as a barrister. So, mine was going to court and having an argument every day, whether that's in a trial or on appeal, and I've sort of carried that into taking silk.

So, I'm now what's known as Queen's Counsel, and I'm a woman Queen's Counsel, which means I'm a very rare bird.

I tend to get really difficult cases or really difficult clients or a combination of the two and I enjoy the challenge.

Evan Martin

I first saw Felicity in court in 2018, when she was defending Hamza Abbas in a long, complicated terrorism trial involving three accused and eight barristers in court. Abbas was

ultimately found guilty and sentenced to 22 years imprisonment. This sentence is currently being appealed.

Felicity Gerry QC

I'm just really proud of doing that case. It had so many difficult aspects to it, including a very vulnerable client. It not only tests your skill, but it also tests the judiciary, the public, the jury, everybody, on how do we deal with these very difficult cases where you've also got some vulnerability in the dock.

We're very used to hearing about vulnerable witnesses, but cases where you've got somebody vulnerable in the dock and it's a really serious allegation and it's the sort of public nightmare trial. It's a terrorism trial. People are frightened. To keep that type of case on track, to keep all counsel friendly, we managed to do the case in a friendly way with the judge as best we can - professionally friendly, you know, we didn't go out as friends or anything - but you know, to ensure that we made the best legal arguments that we could and for the judge to be able to manage all of these barristers and all of the issues that arise. You have to be proud of that, to be involved in something so complicated.

Evan Martin

Felicity, Rob and Melinda all work as criminal defence, but just along the same bar table, mere feet away, sits the prosecution.

Pat Bourke

My name's Pat Bourke. I'm a Crown Prosecutor and I've been in that role for almost three years now, but otherwise at the Criminal Bar for about 15 years.

We appear on behalf of the Director of Public Prosecutions. We prosecute a person who's been charged with criminal offenses. So, in that sense, we're opposed to the defense barrister who's representing the accused person, so there's that competition, if you like, or contest.

Evan Martin

I spoke to Pat over Zoom, coincidentally the day after it was announced he would be taking silk.

Congratulations on the news!

Pat Bourke

Thank you.

Evan Martin

How long have you known?

Pat Bourke

No, we only find out at the same time everybody else does, so it was a good day.

Evan Martin

Did you always know you wanted to sit on that end of the bar table?

Pat Bourke

No. I started off as a defence solicitor advocate for a long time, and then went to the bar and initially I was a defence barrister. I moved to prosecutions and now it's all I do, is prosecute. It's just developed that way.

I think it's useful to have experience of both sides of the bar table. I think it makes you a better barrister. So, I think it's a plus if you do both.

Evan Martin

So the defence works in the interest of the accused person. Who are you working for?

Pat Bourke

If the prosecutor had a client, which they don't, it would be the police informant, who's the police officer who's investigated the offence, has charged the person with a particular criminal charge, and that's the police officer who's put together all of the evidence, some of which the prosecution will present to a jury, endeavouring to have the person found guilty of that offence.

Although the police are the closest thing to our client, it's an unusual relationship because prosecutors, I think, have lots of various duties to various - I hate to use the term 'stakeholders', but the police informant is only one of those.

Evan Martin

Is the victim, or family of the victim, another?

Pat Bourke

Yeah, look, they're certainly a stakeholder. I don't consider the victims as close as the police informant in a prosecution. The victims are often, for me - are to some degree, not in all cases, some cases - are a motivation that you always have in the back of your mind, that these people have suffered what can sometimes be a terrible experience, losing a loved one and things like that.

But it's important, I think, to remain detached from that, because juries, judges, the legal practitioners are a step away from those people who have been directly involved in this, what is often a sad event. And so it's those people who are detached that can make better judgements as to how it should all be sorted out. If you're too close to victims, I think that can be compromised a little bit.

Evan Martin

Once the trial's over, and let's say the accused has been found guilty, is it the prosecution's role to push for the highest possible sentence?

Pat Bourke

I think that's a really good question, and the answer might depend on who you ask.

It's not my view. I think the prosecutor's role, both in the trial and in the sentencing process, is to assist the court to arrive at a result that's correct in law, is unlikely to be appealable, and no matter how experienced the judge might be, I think he or she always seeks and appreciates that assistance, that guidance, as much as they can be guided.

So, I think the proper position is to make an assessment as to what an appropriate sentence is. That's not always the most harsh sentence that's available. There must be, just in logic, many cases where the most harsh penalty is not necessarily the appropriate one.

So, I think prosecutors need to be careful about having a default position - 'more jail is a better result'.

Evan Martin

Do you think the public perceives the prosecution as, I guess for lack of a better word, the 'good guys' in the courtroom?

Pat Bourke

Look, I think that's probably fair. The majority of the community don't commit offences, so I suppose they have a view of people that do.

I think it's also perhaps, I hope, somewhat based in the community's understanding that the prosecution forms an important part of the process. Part of the machine that seeks to protect them by dealing with offenders and hopefully outcomes - serves some kind of rehabilitation to reduce the risk into the future and issues like that.

So, the community want people prosecuted, but they want them prosecuted fairly and within the rules, and you know, that's very important. There's, quite properly, rules to be abided by, and I think most people would say that's a good thing.

Evan Martin

While, murder and manslaughter and terrorism may first come to mind when you think of the Supreme Court, the majority of its work is in the Common Law Division.

Margaret Kent

I love Common Law.

Evan Martin

Margaret Kent has been a common law solicitor for the last 20 years.

Margaret Kent

The common law is old in a good way and also ever new in a good way. So, it's obviously based on some very old principles of people trying to nut out solutions to problems for hundreds of years but it's constantly finding new ways to respond to new problems.

Evan Martin

In a sense you're in an area of the law which can change depending on which way your case goes?

Margaret Kent

Well, the law's always changing and that's the pleasure of it and if you do the job well then you can be involved in changing it and hopefully for the better and I think that's part of the pleasure of doing the kind of law that we do is we're not just trying to bring cases that fit within existing law but we're always striving to make, hopefully, the legal system better for the people that we represent. That's really what we aspire to.

Evan Martin

What are the kinds of cases you do?

Margaret Kent

I have a dual role. I work in both dust diseases with a particular focus on asbestos-related diseases and silicosis and other silica-related diseases and also in class actions.

Asbestos-related diseases are often have a very long latency from exposure to diagnosis so most of our clients will have been exposed to asbestos 40 years before diagnosis so in order to find out where they were exposed, how they were exposed and to get evidence we often have to do a lot of investigation and I enjoy that work.

Evan Martin

And we're still seeing a lot of dust disease cases, just not as many from asbestos?

Margaret Kent

Cases have been stable in the asbestos area for some time but they certainly haven't started to go down yet in numbers. They reached a stable peak if you will but we've yet to see significant decline, unfortunately.

But what sadly we're seeing now is the rise of a new type of silicosis so if anything, we just have more dust related diseases and that's particularly tragic in Australia where we have known about the dangers for decades and decades.

Evan Martin

It's a particularly harrowing area of the law. How do you cope with that?

Margaret Kent

I think most personal injuries are pretty hard-going I would say. I suppose in our area a lot of the clients die, and a lot of those people are incredibly brave and they stick in your mind, and I guess you cope with it by remembering what your role is.

You can't solve people's health problem, what you can do is get them the best legal result and if you remain clear about what you can offer them then that helps and also good colleagues help - good supports help. Important to work in a good team.

Evan Martin

Matt Collins QC was admitted to practice as a lawyer in 1994.

Dr Matthew Collins AM QC

I did a law degree in Adelaide which was my hometown and then I moved to Melbourne and became an associate to a judge in the Federal Court.

Now, that is an unbelievable job. As a young lawyer, you sit in the courtroom all day and you just absorb what goes on around you. You get to see outside court the way judges think about cases and you get to watch different styles of barristers. And I knew pretty much in the course of being an associate that this was where I wanted my career to progress. So, after being an associate for about a year and a half, I went to work for a major law firm where I stayed for about six years as a solicitor before coming to the bar.

Evan Martin

And you specialise in common and commercial law.

Dr Matthew Collins AM QC

That's right. Historically, when we were still a colony, for example, barristers would do every kind of case from criminal cases, commercial cases, common law cases. As the world has become more complicated, Melbourne has become bigger, the stakes are higher. Most barristers, like most solicitors, tend to specialise nowadays in one or a small number of areas of law. So, I've gravitated towards commercial law and common law. Very occasionally, we'll dabble in a bit of criminal law. Most criminal lawyers specialise in criminal law and don't cross over terribly much.

But you know, some of our greatest advocates going back, you know, decades were all-rounders who could stand up and do a murder trial one day and then the next day do a big

commercial case. I think we're the poorer for the fact that barristers find that increasingly difficult but it's a consequence of the increasing complexity of the market in which we operate.

Evan Martin

It's not unusual that common law trials are the ones that attract the most media attention, and Matt's worked on some of Australia's most notorious cases.

Is there a bit of an adrenaline rush being involved in such high-profile cases?

Dr Matthew Collins AM QC

Look, I think there's an adrenaline rush in being a barrister, generally. You know, you're not doing your job if you don't feel nervous when you stand up at the bar table.

I've had the great privilege of being involved in some of the most prominent cases of the last generation or so. I mean, the ones that stand out for me are things like former Treasurer Joe Hockey's case against the then-Fairfax Media, the Sydney Morning Herald, The Age and The Canberra Times. In those cases, the newspapers had written thundering headlines, Treasurer for Sale, and Joe Hockey, then the sitting Treasurer of Australia said that that was accusing him of corruption. What a fantastic case that was, as a barrister, to be involved in. Dreadful, obviously, for Mr Hockey. I acted for the Fairfax Media in that case and had an enormous career highlight of being able to cross-examine the sitting Treasurer of Australia for a day and a half.

I was cross-examining in the course of the afternoon and continuing the following morning. Overnight people were tweeting ideas about questions I should ask, most of them completely nutty but, you know, it's a sign of just how interested people can be in the running of these cases.

But you know, the high-profile cases, there is a buzz, absolutely, about being in court and then seeing the way in which you've performed in the course of the day scrutinised in the media, seeing caricatures of yourself in the cartoons. You know, they always make you look fat with a wig, I don't know why that is but that's what the cartoonists do. There's definitely a thrill about that.

Evan Martin

In 2018, Matt also represented Hollywood actress Rebel Wilson in her landmark defamation case against Bauer Media.

Dr Matthew Collins AM QC

I've never seen media coverage of that intensity of any non-criminal case in my career. I've never seen anything like it. A media scrum outside the court every day, Rebel and me being chased down the road with cameras in our faces. On one day, a quiz was being run on FM radio about what was going to happen in court that day. I mean, that's the courtroom as entertainment and, you know, as the barrister, the challenge is to remain focused on the only thing that matters which is what's happening in the courtroom and filtering out all of that extraneous stuff that's happening elsewhere.

And often in those high-profile cases, there's a bit of a temptation to play to the court of public opinion. That's always a mistake. In a courtroom, the only people that matter are the decision makers. In a case before a judge, the judge alone. In a case before a jury, the members of the jury, and a judge will know immediately if you're playing to the media gallery rather than addressing your submissions to the court.

Evan Martin

So, how do barristers select which cases to take on? Sometimes, they don't have a choice.

Dr Matthew Collins AM QC

Barristers have a thing called the cab-rank rule.,

What that means is that we can't refuse a brief. If a client wants to engage me and they can afford to pay me, and it's an area of my expertise, and I'm physically available to do it, I'm not allowed to say no, just as the cab driver can't refuse to pick you up for the fare.

Felicity Gerry QC

Look, I'm a taxi. I'll take the next brief that comes along, so yes, you get the next taxi in the road. Sometimes people want the comfort or the elite taxi. I suppose in the Uber world that we live in, you know, they might choose Barrister X.

Or they might choose the comfort or the elite, I suppose. So occasionally you're selected because of who you are or what you've done.

But that's the next brief for you. So, in terms of your cab-rank rule, that's the next one to come along. So, unless you've got a real ethical problem with not taking the case, then you just take it, provided you're available and there's no other impediment to you doing the case itself, then you just take it and say yes.

Evan Martin

When I visited solicitor Melinda Walker, she led me into her small office and showed me a huge bookshelf, filled floor-to-ceiling, wall-to-wall with folders.

Melinda Walker

I think there's four shelves which is probably about three or four metres long which is full of all of my current cases at the moment. Each person gets their own folder and they don't come down until their matters are finalised. So, it's always full. I've never had much space in there, at all.

Evan Martin

There must have been close to 100 there.

Melinda Walker

Yeah, I think, I run probably about 150 cases at one time, yeah.

Evan Martin

The cab-rank rule doesn't apply to solicitors. So, how do you decide what cases to take on?

Melinda Walker

I pretty much take on everything. It's probably a really bad idea, probably why I've got so many folders in there. But, I think, I'll take something on, certainly if I have the capacity to take it on. I will maybe not take something on if it's something that will require more than what I can provide such as, in time, given that I am so busy. How you remedy that, I suppose, is that you then enlist the assistance of a barrister, so then, you then work together on the case instead of having to work on your own.

Evan Martin

Lawyers can be expensive. It's the stereotype and it's undeniable. But Melinda, like many lawyers, takes on pro-bono work.

Melinda Walker

You end up doing a lot of pro-bono work in this industry because a lot of the more vulnerable people in our community come into contact with the criminal justice system. And the next tier up from that, are the people who cannot afford solicitor services, and the only way that they can be represented is through the funding of Legal Aid.

I always saw it as extremely important in my role which is really, quite a privileged role, to ensure that I can provide the same service to all people whether or not they are paying me or whether or not they are funded by legal aid. We're finding, certainly, that in terms of those more vulnerable people in our community, the homeless, people with severe mental illness, people with drug addiction, are in no way in a position that they could even dream about paying for legal services. And so, it's an important part of our function, I think, to ensure that those people are properly represented from all aspects of our industry, no matter how experienced you are.

Evan Martin

Solicitor Rob Stary.

Rob Stary

This first came up, actually, through my daughter, who's a teacher. And when she got a year 12 results and she did well, I was hoping that she'd study law and she said to me, you know what, it doesn't matter what my results are, I want to be a teacher. That's my vocation in life. You know, just that little statement had an impact on me because that's true. We look at our job as a vocation, rather than just as a way to generate income.

That means, when, when individuals don't have either the resources or the support, or the finances to conduct a defence, then we, we assist them. And there are some groups, the environmentalists, we look after generally, and then other cases where people are just impecunious. They don't have any resources at all. They need to be represented, it impacts upon their future employability, their capacity to travel overseas. But, yeah, they're the sorts of cases we do pro bono.

Evan Martin

So, once a barrister is briefed by a solicitor, how much preparation goes into the case?

Tim Marsh

It's perhaps first important to understand what might form a brief of evidence.

Evan Martin

Tim Marsh was Chief Counsel for Victoria Legal Aid for seven years until 2020.

Tim Marsh

I practice primarily in crime, but in a criminal case, say in something like a homicide, that might consist of multiple lever-arch folders of material - witness statements, photographs, maps, transcripts of interviews, transcripts of telephone calls, phone records - a whole variety of information that could be produced in one form or another at the trial.

I guess the first part of this process is that you look at the charges. What's the person alleged to have done? Every charge is composed of elements. It's a bit like a recipe. It has essential ingredients, any one of which is missing, then the charge will fail, and I suppose the first pass you're doing through the brief is to get a sense of whether or not, or where, there might be some issues in the prosecution case. So, are there some matters that they can prove easily, are there other matters that they might struggle to prove?

Certainly, in the lead-up to a trial which is a murder trial in the Supreme Court, you'll spend many hours and days pouring over any individual statement, looking for any particular contradictions or flaws or inconsistencies, comparing to other statements in the brief to see if there are other sources of evidence that contradict it, preparing cross-examination, preparing your overall strategy to the case and your closing address to the jury.

All of these things could take, you know, in a complex case, anything from up to months of preparation before you step foot in court.

Felicity Gerry QC

I can give you my most recent experience.

Evan Martin

Felicity Gerry QC.

Felicity Gerry QC

I think I picked up a brief in July last year and finished off the trial in December last year. Now the trial didn't start until the October.

It's impossible, to say how much preparation do you do, because it's, how long is a piece of string? But you're not going to be able to represent someone properly unless you do the preparation.

It can be all-consuming for months. And other times it's an advice that you can knock out in half a day, depending on what it's about.

Evan Martin

With large, complicated trials - in all of the court's divisions, murder, terrorism, defamation cases for example - there can be an extensive pre-trial period, which involves both parties making legal arguments to the judge about how the trial is going to run.

With so much to discuss and the importance of the decisions made, pre-trial can go on for longer than the actual trial.

In fact, there is a case we've been watching in court which has been in pre-trial for the last two years.

Tim Marsh

That pretrial argument could relate to all manner of types of evidence. It could relate to the admissibility of phone records; it could relate to the accuracy of translations of conversations. It could also relate to entire ways in which evidence can be used.

As you're looking through a brief, you're looking for any issues that might mean the prosecution aren't able to lead a particular piece of evidence. Is this a piece of evidence that the prosecution ought be permitted to produce before a jury, or is there something about it that means it should never go to a jury?

So, let's say, for argument's sake, the police come into possession of a particular exhibit and there's a suggestion that your client's DNA is on that exhibit, but on a closer examination you realise that the police didn't have a warrant to search the premises at which the object was seized. So, there's an issue, perhaps, there of impropriety or unlawfulness, and then the pre-trial argument's going to focus on technical legal issues about, for example, whether or not

the level of impropriety on the part of police is outweighed by the probative value of the evidence.

Sometimes those sorts of issues about what evidence is admissible and what evidence is not admissible are really what the whole trial's about, and the entire nature of the course of the proceedings can turn on those rulings. It's not uncommon to see, for example, in a complex murder trial, that there might be three, four or five rulings from the judge in pre-trial argument about specific pieces of evidence, and depending on which way those go, you might see a matter proceeding to trial, it might be a guilty plea, it might be a plea to lesser charges.

Evan Martin

If the case does go to trial, it's then up to the barrister to turn all of the preparation, research and evidence into arguments for either the judge or jury.

In a judge-only trial, how much do your arguments change depending on the particular judge in the courtroom? Does that have a big impact?

Dr Matthew Collins AM QC

It's enormous.

Evan Martin

Matt Collins QC.

Dr Matthew Collins AM QC

The judge has complete control over the procedure in court and the styles, as with all of us, there are very often very different styles, so there are some judges who are notorious for intervening, not letting you get more than five words out before they're asking you questions. And that's usually because the judge is very well-prepared for the case and understands immediately the matters which are troubling him or her and wants you to focus on those.

Other judges will be much less interventionists, will sit back and just allow the arguments to unfold before them. So, it's quite a different art. You know, if you've got a judge who is going to allow the argument to unfold before them, you want to have structured it very carefully, in a way which is calibrated to persuade. If you know you've got a judge who is going to be firing questions at you all day, you need to have thought really carefully about, how do I answer one question that I really wish the judge wouldn't ask me.

Evan Martin

And when you're in front of a jury, how important is it to develop a relationship with the six people on the jury?

Dr Matthew Collins AM QC

It's really important. It's a different but related art. So, in civil cases, and defamation is one of my areas, they're mostly heard before juries of six members of the community.

Evan Martin

Remember, criminal trials have a jury of at least 12, but in common law, it's only six.

Dr Matthew Collins AM QC

So, obviously, members of the jury don't have the background in legal training that a judge has. And so, one needs to take that into account when presenting arguments.

I think there's a bit more room for rhetorical flourishes but you don't want to go too far. You don't want a jury to think that you're a show pony. You want the jury to take you seriously. But you don't, the other difference is, you don't get feedback from a jury in the way you get feedback from a judge. You know, I've often sat making arguments before juries and thought, gosh, I've really got no idea what the jury is thinking because often the jury is very careful not to give away those signals. A judge on the other hand, particularly an interventionist judge, will leave you in no doubt about what the judge is thinking about your case.

Evan Martin

Criminal cases tend to be the most controversial in the community - there's one question you must get asked a lot - 'How can you defend a monster like that?'

Melinda Walker

You always get asked that. You always get asked that and I think... look, I think the primary position is that everybody deserves to be defended.

Evan Martin

Melinda Walker.

Melinda Walker

So, there's a lot of cases that you will come across where the evidence would be strong against somebody and then that comes back to giving them an opinion about what their prospects of an acquittal would be and what the difficulties with their case would be.

At the end of the day, the decision to defend the case really comes down to that of the accused. It's not for me to judge whether or not they are guilty. It's for me to ensure that whoever determines, whether it be a judge alone or a magistrate or a jury, whoever decides that, is deciding it on admissible and relevant evidence and if a guilty verdict is handed down, then so be it.

I think you also tend to have a professional shield, as well, in order to do this job because you do come across some very challenging evidence. You do come across some very challenging personalities and clients, who are sometimes very difficult and confronting. And I think that you develop this shield in order to remain objective which is really what our job is, to ensure that they always get a fair trial.

Evan Martin

Tim Marsh.

Tim Marsh

When it comes to serious offending, I think it's often a very difficult thing for members of the public to get their heads around the nature of the job of a criminal defense practitioner. So, if I'm appearing in a plea for someone who has committed a terrible murder, what will be reported is me saying a lot of positive things on behalf of the person who's done a terrible deed. And I can well-understand how that's a difficult thing for a member of the public to sympathise with or understand, but it has to be seen in its full context, and that is that there's prosecutor up the other end of the bar table whose job it is to say all of the worst things about the offending.

Felicity Gerry QC

I call it the pub question.

Evan Martin
Felicity Gerry QC

How can you defend someone who's guilty? How can you defend a terrorism trial? How can you defend someone accused of child abuse? And there are lots of answers to that question, actually. Well, somebody's got to, is the easy one.

So my most recent three trials in Melbourne have been terrorism trials, two ISIS and one right-wing. You have to realise that this is one of the most serious allegations in the world, that someone convicted of that will go to prison for a very long time. If they're wrongly convicted, then that's a horrendous miscarriage of justice.

Evan Martin

But what if a lawyer thinks their client is guilty?

Rob Stary

I think something that most people don't understand, statistically, is that 90% of all people plead guilty.

Evan Martin

Rob Stary.

Rob Stary

Either because they plead to the charge they face or because the charges are negotiated. And so, most people plead guilty. There are a few people who say, "I'm pleading not guilty, no matter what."

We don't ask them whether they're guilty or not guilty. We say, "we'll look at the Crown case against you and we'll make an assessment, and we'll advise you."

Most times, they take our advice. Occasionally, they don't, and they'll run a case. We don't moralise about their behaviour, we don't make any value judgments and we know that they've got a presumption of innocence.

Evan Martin

Things get a little more complicated, however, if a client tells their lawyer they are guilty.

Felicity Gerry QC

If a client tells you they are guilty, you can't then put up a positive defence. Now, what does that really mean? You'll be told that by everybody.

You couldn't, for example, say that someone was acting in self-defence if they'd admitted to you that they weren't, that's the simplest one.

Or if they said they were there and wanted you to say they weren't there, those are what I mean by a positive defence. So, they say, well, I want to call this witness as my alibi witness to say that I was at home at the time of the offence. Oh, hang on a minute, you've told me you weren't at home, you were there. So, I can't call that witness. I can't put the case that you're running an alibi. I can't do that.

It's dishonest. It's a lie. You're lying to the court. You're presenting a lie on behalf of your client. So, the rules quite properly say you can't do that.

So, you can test the evidence. You don't leave somebody without any representation. You're there to make sure that the trial goes properly in terms of admissibility of evidence, procedure and so forth, and to make sure no-one's misrepresenting your client's case to the court.

It becomes fairly obvious to a judge pretty quickly that you're not putting a positive case. And it will be pretty obvious to the jury as well.

It's a really awkward situation to be in and it's why you have to think of yourself and the system as more important than the individual.

Felicity Gerry QC

So, your role as a barrister, as Queen's Counsellors, a team of barristers, is to ensure as best we can, that the jury are given the opportunity to make a decision based on properly admitted evidence where material has been properly disclosed to the defence. Decent legal arguments, decent arguments on the evidence, so the jury can understand the case without leaping to conclusions one way or another.

Providing someone with a fair trial, whoever they are, is a wonderful position to be in. My role is to ensure that the rule of law is correctly upheld. It's a community service. And we're very privileged to be able to do that, and not everyone can do it. And we have the skills to make sure that the court and the system and the rule of law is more important than all of us. More important than the judge, the barristers, the client, the allegation, even the victims.

You've got all these vested interests that, in a sense, are less important than the system itself.

Evan Martin

If you've got a question you'd like answered, shoot us an email at gertie@supcourt.vic.gov.au

Send your question in text, or even better, as audio, so we can hear you ask the question.

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