

WILLIAM & LONSDALE – Lives in the Law

Ep 16: Judge John Smallwood

Voiceover [00:00:05] This is William and Lonsdale, a podcast about the legal ecosystem in Victoria and the fascinating people and stories that make it tick. This week, your host, Michael Green, speaks with the delightful and singular Judge John Smallwood. John's life in the law began with the now defunct Articled Clerks Course saw him running back to back murder trials for over a decade, spending many years on circuit and in the Koorie Court, and even included breaks early on to hitchhike around America and run a second hand store in Richmond called the Zucchini Sisters. John was well known for his unique advocacy style, which he honed over many years. But when he started out, it was observing some outstanding barristers that really opened his eyes to what was possible in a courtroom.

John Smallwood [00:00:45] I juniored Vernon, and I just never seen anything like it. I'd been told what a great advocate he was. But to see Bobby Vernon talk to a jury was just... His power of simile and stuff. It was just... he moves around the courtroom and just his whole... He took over the room, and was talking to the jury, it was just fantastic. What was happening, was the prosecutor in those days at the Supreme Court had the chairs, but they had rollers on them, they got rid of the benches, but there were chairs, with rollers. Anyway, Bob's talking to the jury, and I had been told by another barrister, don't go anywhere near the bar table while he's addressing. Just stay away from him while he was addressing. He can do anything. So, he walks up to the prosecutor from behind and the prosecutor, and the prosecutor is looking at the jury, he's only about five feet away. And Bob says to the jury "ladies and gentlemen, is that little man looking at you?" And they all started nodding, he said, "is that little man making faces at you?" and they all nodded, so Bob goes up to prosecutor, didn't know who was coming because he couldn't hear him coming on the carpet, he gets his chair and throws the chair down the bar table with him sitting in it, and yells "behind me, Satan".

Michael Green [00:02:14] Today, our guest in Lives in the Law is His Honor, John Smallwood of the County Court of Victoria. Welcome, John.

John Smallwood [00:02:20] Yeah, thanks mate.

Michael Green [00:02:22] John, you're a Bush kid from the small town of Foster in Gippsland. Your dad was the local pharmacist and your mum worked in the pharmacy and did some school teaching. Sounds like an idyllic childhood.

John Smallwood [00:02:32] Yeah, it was sort of, you know, before I was sent to boarding school and she sort of changed there for a while. Look, I primary school and stuff. I still got lots of mates from primary school. And it was just even the teenage years I went to Xavier got thrown out of there, as you probably know. But then I went down to St. Pat's in Sale, and that was just, I was basically a Footy Ground with some classrooms. So, I just spent til I was 18, just did nothing but, you know, play cricket and footy. And that was great. It was good.

Michael Green [00:03:00] It's not a bad childhood, is it? A boy in Victoria at that time to be able to play cricket and footy all the time. Now, when you finished secondary school, at St. Pat's in Ballarat.

John Smallwood [00:03:08] Sale, sale mate.

Michael Green [00:03:08] Ah, St. Pat's Sale?

John Smallwood [00:03:11] The Christian Brothers never got at me.

Michael Green [00:03:13] The Maris Brothers, yeah, righto, apologies. You didn't get into uni.

John Smallwood [00:03:17] No.

Michael Green [00:03:17] But you did the Articled Clerks course at RMIT. Now, as someone who did Law at university, I thought the Articled Clerks course was a far better preparation for legal practice than university. And I think it's a real pity that it no longer exists. Can you tell us about the course?

John Smallwood [00:03:32] Yeah, it was difficult. My recollection is that there were 120 of us started in the first year and went for five years, and I think 13 of us finished it within that time frame. Now, a number transferred to Monash during it. But what you did was you worked at the office from nine to five, then you had your lecture starting six o'clock in the morning, tutes at seven o'clock at night, nearly all from barristers, so that the standard of teaching was fantastic. It was all practical. So, it was pretty hard. In retrospect, I got married very early and I reckon if I hadn't been married, I wouldn't have got through it, which is that stability and also, of course, teamed up so that one person goes to a lecture and take really copious notes just because you just couldn't... You couldn't do it. But I've got no doubt that I walked out of that basically with the experience of a 50 year solicitor.

Michael Green [00:04:22] And that's what I thought when I when I was an article clerk. And there were guys who I'd been for years at university and in a year articles, they spent five years doing the Articled Clerks Course, and they were light years ahead of me in terms of being competent practitioners.

John Smallwood [00:04:35] Yeah, but I was dealing with clients at 19 years old, you know, and I had a breach of promise. action and I was only 19. You had to sort of pretend you had some qualifications

Michael Green [00:04:49] in looking through your time at RMIT doing the Articled Clerks Course. According to my memory, one of your lecturers, a barrister, practicing barrister, finished up a high court judge, Darrell Dawson.

John Smallwood [00:05:02] Yeah.

Michael Green [00:05:02] Another one finished up a federal court judge. Edward Woodward.

John Smallwood [00:05:06] Yep.

Michael Green [00:05:06] And Hartley Hansen on the Supreme Court. Now, they're just three.

John Smallwood [00:05:10] Oh, yeah, Jeff Byrne

Michael Green [00:05:12] Supreme Court.

John Smallwood [00:05:12] Yeah, County Court. I can't think as I sit here, but there are a bunch of them.

Michael Green [00:05:16] So you had... And the teaching was all practical. It wasn't too theoretical?

John Smallwood [00:05:21] I wasn't, it was very practical like, I mean when we did actually, you'll appreciate this, when we did like Magistrates Court crime we got Ray Dunn. And that was just and boy was that an education.

Michael Green [00:05:34] Now we should say Ray Dunn was the president of the football club at which I played football.

John Smallwood [00:05:40] And Ray Dunn used to stack the Richmond Magistrates Court whenever Richmond Football Club was charged with nine JP's turn up and outvote the magistrate.

Michael Green [00:05:51] Now, you get admitted, I think in 1976, you've done the Articled Clerks Course you've been in the profession for five years and you take off for 12 months! Hitchhiking around the US with your wife, a gap year. You're ahead of your time, actually, John in having a gap year back then.

John Smallwood [00:06:05] I'd had enough. Yeah, I guess that's. Yeah, it looks that way. It is. I got some money from being pranged up in a car accident, instead of using it as the deposit on a house, we thought just go to America, you know, cost free, we just hitchhiked, before we got to America I went and watched a Test match at Lord's. And then we just went and wandered around the states for 8, 9 10 months.

Michael Green [00:06:23] And you enjoyed it?

John Smallwood [00:06:24] Yeah, it was fascinating just getting picked up by people, I reckon we would have spent in the whole 11 months, maybe ten nights in paid accommodation. The rest was... We camped one night. The rest was in people's houses. If you hitchhike in Georgia, they're taking you home. Just such generous people, that's what's so sad when you see what's happening there at the moment. But because the country people are just so generous, I loved it, I had hair down to my waist and you wouldn't believe it.

Michael Green [00:06:49] I would believe it actually, absolutely. And now you come back.

John Smallwood [00:06:54] Yep.

Michael Green [00:06:54] You join a small firm in Beaumaris. Think maybe a sole practitioner in Beaumaris.

John Smallwood [00:06:58] Yep. Adrian McKay.

Michael Green [00:06:59] And you do injuries law.

John Smallwood [00:07:01] Yeah, a bit of everything. Everything that moved.

Michael Green [00:07:03] But you got sick of it after a few years. And so, you and your wife open a secondhand store in Richmond.

John Smallwood [00:07:08] Yep.

Michael Green [00:07:08] What was it called?

John Smallwood [00:07:09] Zucchini Sisters.

Michael Green [00:07:11] Why did you call it the Zucchini Sisters?

John Smallwood [00:07:12] Because she originally, she was going to do a gardening business with another girl that she knew they were going to call themselves Zucchini Sisters, so the name was registered. So, once it was registered, we just thought we decided to do it. And then it was more of a junk shop in a second hand shop. But the beauty of it was that the sign Zucchini Sisters, we'd get up and there would be donations left at the door. They thought we were nuns I think. For a while there we got donations, but there wasn't much getting sick of it. My first child was born and I just wanted to do parent after that, which was very little. We just thought, this is not on, what can we do together so we can... that's what we decided to do. Both of us had, I'm an inveterate collector. Yeah. So that was what we did there, was there for a few years.

Michael Green [00:07:48] And did it work out? I mean, commercially?

John Smallwood [00:07:51] I don't know. The books were fantasy. It was hand to mouth. But yeah, we sort of we survived, you know, and after a year or so I realized we just can't go on forever. So, I started teaching up at the RMIT. So, I was teaching legal studies to ...

Michael Green [00:08:05] In the Articled Clerks Course?

John Smallwood [00:08:06] No, no, no, no. I didn't do that. I was teaching year 12 when they do it through TAFE. I was teaching legal studies to and I had a bunch of blokes that work for the railways actually, who used to come up and do... And they were fantastic, I did that and that made enough money to sort of make sure the rent got paid.

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Michael Green [00:08:51] So, John, after a quite a circuitous route, you become a barrister in 1985. You lucked out with a very good mentor.

John Smallwood [00:08:58] Yeah.

Michael Green [00:08:59] Colin Hillman.

John Smallwood [00:08:59] Yeah. I mean, when I was doing the whole class course, Colin had been my tutor in evidence and also property. And I just felt there was somebody for some reason or other I could communicate with. His nickname at the bar, he had gone

to the bar to do equity, believe it or not, and it ended up doing crime only prosecuting, his nickname was The Smiler because he didn't do it all that often. But the thing with Colin, was that he was just meticulous and very, I think, almost proud of being a mentor in that readers roll. He would, every night, I would be given an area that you weren't taught about, you never did at uni. He might spend two hours with me, teaching me how to tender documents. He might spend two hours with me explaining all the rules relating to records of interview, and basically wouldn't let me leave until he was satisfied that I understood. Colin was very meticulous and very... Almost mathematical about it in some ways. And he always made sure that when I was on my feet in a courtroom, I never had to say, can you give me five minutes while I look it up. That practical on your feet stuff he taught me in that first nine months. So, well, we did get on really well in the sense of just of understanding each other. And I mean, it was no other choice, because I knew I could learn from him, but I didn't know how excellent he would be for me and be able to listen to him at that stage I was in my 30s, wasn't as if I was a kid and we were able to do it. And I understood what he was doing and had no difficulty with that sort of, you know, literally stay two hours, you know, seven o'clock at night just getting something right.

Michael Green [00:10:27] And that's another example of something we've heard about before in this series. And that is the enormous spirit of generosity at the bar.

John Smallwood [00:10:35] There's an ethics at the bar that I think people just have no concept of. Oh, I'll give you a really simple example of that and Colin's ethics were like everything else with him meticulously, he barracked for Essendon, that was a bit of a problem. But Colin was prosecuting a murder trial. And Bob Kent was representing the accused. I'd been reading with Colin so I'd watched him prepare, he told me how he was going to prosecute it, what he thought Bob would do and what he was going to try and do to counter it. He explained the whole way he was going to prosecute it to me. I said to Colin, how do you reckon Bob will go? And he said why don't you go and ask him. So, the next day I went around, sat down with Bob and said, look, I'm reading with Colin Hillman. He explained to me how he's going to prosecute. And I asked him what he thought you'd do. I said, can you tell me what you're going to? And Bob said, yeah, of course. Bob explained the whole way how he was going to run the defense to me. And neither of them said, don't tell the other bloke. They just knew I wouldn't. I thought, well, this is just at this level, this is dead body stuff. You know, they just inherently knew, they knew the rules and they knew that I was old enough to know them. And I really recall that day or two days. I went home and said to my wife, I love this place. I'd only been there like a month.

Michael Green [00:11:43] How did you get a start? I mean, it's not as if you've been practicing for ten years, you've got a whole stack of contact and people are going to brief you. I'm assuming a lot of the profession wouldn't have known John Smallwood, and so how did you get a start?

John Smallwood [00:11:55] I virtually knew nobody. I didn't get a brief for the first month. And the first brief I got was off my sister. It was a smash and bash, and do they still do smash n bash?

Michael Green [00:12:05] Crash n bash? Absolutely!

John Smallwood [00:12:05] In the Magistrates Court. Oh, I didn't know. Yes, that was the first one. And then I was really lucky that I started to get work off of Fitzroy Legal Service, got a lot of Fitzroy legal service. And then by dealing with them and finding out just how relaxed I felt was like up at the Melbourne Magistrates Court with all the deros and stuff

like that. Then I started to get a lot of Aboriginal Legal Service and then Slades and Parsons, in St Kilda. And then Simon English. So, and then obviously with the legal aid start started trials probably in 1987, I started doing trials and from then on and it was pretty much al...

Michael Green [00:12:36] That's pretty... I mean, two years at the bar and you're into trials?

John Smallwood [00:12:39] Yeah, I was 35 though.

Michael Green [00:12:40] Yeah.

John Smallwood [00:12:40] You know, it's one of the reasons that my oldest daughter didn't start actually practicing till she's in her 30s and she's going really well. Just that maturity, you know, you sort of you've got kids and you see the world a bit differently. Don't walk in with that gung ho. Yeah. So, I started doing trials then and yeah, the trials went pretty much straight away. What I'd done before that was for one month, for one week in every month I'd prosecute appeals for the, for the crown. That got me friends with the judges because I always leave them alone, you know.

Michael Green [00:13:08] I mean, you haven't got the reputation of being a prosecutor.

John Smallwood [00:13:11] No I prosecuted murder trials mate.

Michael Green [00:13:13] Did you really?

John Smallwood [00:13:15] Yeah, a couple, but the first one I was really worried about doing it because of the crooks. But the crown said will you do one? I said yeah. Okay. I'll have a go, money was better. Not anymore. But I said yeah but you've got to guarantee it's not going to get any publicity. It'll do me, you know, out in the yard. So, they promised me it wouldn't. And the next thing and I was on the bloody front page of the Herald Sun, you know, prosecutor John Smallwood. So, I was at a Pentridge on the weekend...

Michael Green [00:13:41] To see a client?

John Smallwood [00:13:42] To see a client, and he said, oh, jeez, that was funny. The Herald Sun got to name round the wrong way. They had you as the prosecutor, Johnnie. I said yeah, I saw that! So, I didn't do a lot of it but did a bit of it. Main thing with that was that I think from my point of view as a defense barrister, it gave me the trust of a number of the County Court judges that those days mattered. And you'd remember them. Jimmy Gorman. And yeah, those guys, you know, Leo Hart and the really good criminal judges that existed then. MacNab, Nixon I'd with them for a week, and they got to trust me so that when I was defending, they knew I was briefing to the point and they let me go. So, it had that sort of had that effect. But from then on in from 87 on, it was pretty much all trials.

Michael Green [00:14:28] You were briefed as junior to Bob Vernon in a murder trial in 1991, and you said it really opened your eyes to what could be done in a courtroom.

John Smallwood [00:14:38] I'd done trials, I'd always been fairly not limited is not the right word, but straight in terms of how I went about it. And with juries, I like talking to juries. You know, just like having a beer in a pub, you know, sometimes I used to start my phone addresses with Mr. tipstaff go get us 13 beers it's time, me and the jury had a yarn about

all this, and I'd go and a shandy for the prosecutor. Yeah. In the end I was doing that sort of stuff that the first few I was pretty dead straight with it, you know, like I never wrote an address or anything, I was straight with what I said to them. And then I junior'd Vernon, I just never seen anything like it. I've been told what a great advocate he was. But to say Bobby Vernon talk to a jury was just his power of simile and stuff. It was just... And he moved around the courtroom - he took over the room. I remember I was told Frank Gallbally used to do a very similar thing that Frank could just take the room over, you know, just sheer force of personality. So, I always talked to Frank Vincent about it, I watched Frank do a few trials. And he wasn't too bad let me tell you. Vernon in that trial was just astonishing. I had to cross-examine every witness. Bernie Balm was instructing me, I was terrified Bob wasn't even going to do the final address. At that stage, I think he was living on his boat, the "not guilty" or something, I can't remember. He was talking to the jury and he just it was just fantastic. And what was happening was that the prosecutor in those days, the Supreme Court had the cheers, but they had rollers on them they got rid of the benches. But there were chairs with rollers and they had to be you know, Bob's talking to the jury. And I'd been told by another barrister, don't go anywhere near the bar table while he's addressing. Just stay away from him while he's addressing. Right. He can do anything. So, he walks up to the prosecutor from behind and the prosecution is looking at the prosecutor, looking at the juries only about five feet away. And Bob says to the jury says, "ladies and gentlemen, he said, is that little man looking at you?" And they all started nodding, "is that little man making faces at you". And they all nodded at Bob. So, Bob goes up. The prosecutor didn't know it was coming because he couldn't even come in carpet, you know, gets his chair, throws the chair down the bar table with him sitting and yells behind me, Satan. Oh, this is crazy stuff.

Michael Green [00:16:38] Can I can I just clarify for.

John Smallwood [00:16:40] I just love that sort of stuff.

Michael Green [00:16:41] Would an experienced judge have allowed him to do that sort of thing?

John Smallwood [00:16:45] I think an experienced judge would have known Bob too well to try and stop him. See Vernon, Supreme Court judges who at that stage had only just started to come from crime. I'm pretty sure Frank Vincent was the first Supreme Court judge with a criminal background.

Michael Green [00:16:57] Pretty close. Think you might be right

John Smallwood [00:17:00] Anyway, him and Johnny Cauldrey, Phil Cummins they were the first with criminal backgrounds and that all they all knew Vernon and they all enjoyed him. So, a middle range judge, might have to stop it and copped it. And Bob would say things to a jury like, he said. Look, this is one of the witnesses or his mates had a prior for hitting coppers, you know, and he had prior for fighting with a Maori bouncer. And the bouncer given evidence that night about having thrown him out and all this sort of stuff. You know, and it's just his power of analogy. Bob said to the jury, "listen, he fought that young Maori fella, do you see that Maori? The size of a suburb size of Elsternwick." I was watching the reaction that Bob got. Just encouraged me that you can do that. I really got that. The clinical aspect of it I got from watching Vincent, he was just so precise.

Michael Green [00:17:50] Did you change your style of advocacy after seeing Bob then?

John Smallwood [00:17:54] I dunno if I had a start at that point, Liz my wife at that stage, one day she was expecting to start the jury a gumleaf. So, I put the foot up and, you know, used to smoke. I had a pack of Champion Ruby sticking out of the bar jacket, you know, that type of stuff. So, I'd play up the Aussie bit. But that was the one where I realized that you can really, no matter how bad it is, you can really engage. So, it wasn't so much a change of styles, more being game, enough to do a final address as if I was talking to someone in a pub and that was what I tried to do. And you can't take somebody else's style

Michael Green [00:18:25] Now, you haven't shaved in 45 years from the day you were admitted you got a marked similarity to Ned Kelly.

John Smallwood [00:18:31] Used to have - trying to get the old sea dog look now rather than that.

Michael Green [00:18:36] But you talked about having a Bush Ranger approach to your advocacy.

John Smallwood [00:18:41] Yeah, well.

Michael Green [00:18:42] What do you mean by that?

John Smallwood [00:18:43] Leo Hart once said to me years and years ago, everybody, every Australian male has got a bit of the bush Ranger, you know, just that sense of just that sense of renegade, you know? And I always tried with a jury to sort of say hey look it's OK, you know, did a jury to think that, look, it's okay to be you know, it's okay to sort of done the wrong thing. It's not as bad as it sounds. Yeah, there's sort of that to it, you know, getting a jury feel comfortable letting your client go. It was usually the hardest bit to get them feel comfortable with. It would never try that stuff on it they killed a kid or something. And in the end, I had to do a lot of I mean, that's what really made me stop. But when you had your punch ups, yeah, you know, just like a, you know, bushranger, I reckon Leo's right, most Australian males have a bit of that.

Michael Green [00:19:23] Knockabout stuff.

John Smallwood [00:19:23] Yeah. Yeah.

Michael Green [00:19:25] Now, I read that in preparing your cases, you always eliminated. You never added. What does that mean and why did you do it?

John Smallwood [00:19:34] Yep, the hardest thing for young defense barristers to get through the head is that they don't have to prove anything. They feel a need to prove so that you start off with a crown case. My whole focus would be I'm not going to call any new evidence. I've called my client twice in twenty years, because I had no defense without it. But they're the only two times I ever did it. And what you would do is you would just work out what the crown needed

Michael Green [00:19:56] Because they've got to prove their case beyond a reasonable doubt.

John Smallwood [00:19:58] That's right. So, what you're trying to is work out, which is the things I had to prove they were weakest on and then try and eliminate. That is get rid of

that. Fence things in encircle them so that you haven't got this amoeba type thing growing out around you and you've got you're putting out one bushfire at a time. So, you're just making as tight as you can zeroing in. And so that I would never go in an area I didn't need to. I mean, occasionally my state of Spottfire just to watch a prosecutor panic, send him down a burrow. But it was a precision thing. And all the prosecutors I faced over the years, probably the two that were best at doing that, back to you were Nige Parkinson, because Nige, he knew exactly what he had to prove and that's what he set out to prove and everything else you could forget about. And he was really difficult. And Graham Nicks.

Michael Green [00:20:42] Graham, who's now on the County Court with you.

John Smallwood [00:20:45] Yeah, he's retired now. Just a little while ago. Hicksey was like that too, you know, just straight out. It does not say the prosecutor didn't do the job properly. But what I'm saying at all but done Nigel and I once was told, has just told somebody, true story, Nigel and I once had a kid stabbed a woman in a nursery. And Nigel and I sat down to examine and he was prosecuting him. Obviously, we sat down and worked out what we needed and what we didn't need. And we can both be quite straight with each other. So, when we worked out what we needed and what we didn't need, we ended up with no witnesses. Yeah, I was admitting he stabbed her, you know, everything was getting admitted. So, all we ended up was the jury watching and listening to a record of interview and then deciding whether he meant to kill her or not. But, yeah, that's what I mean by the refining to what it was really about. And then you then you can talk to a jury about what it's really about and you can focus on how it's okay. You can let him go it's okay. You might not like it, but it's okay.

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Michael Green [00:21:57] John, for over a decade, you did what is called back to back murder trials.

John Smallwood [00:22:02] Very much.

Michael Green [00:22:03] That is after finishing one trial, you'd immediately start another trial, having been preparing the latter trial while running the former trial.

John Smallwood [00:22:12] Yeah.

Michael Green [00:22:13] This must have been absolutely brutal for you. How did you do it and what were the effects upon you?

John Smallwood [00:22:19] I did it at expense of a lot of things. What I always tried to do is only have the one in my head at the one time. So, I'm running a trial. I expel everything else from it. I would then on weekends took up seven days a week, 12 hours a day type of thing. It was more like a compartmentalizing in my own head so it did not get confusing. So, I'll be running the one trial and the other trial I'll be getting ready for, but not in an emotional sense. I used to have a real sense of commitment to that trial. So, I'd look through it and technically I'd prepare the second trial, but only technically I'd look at the evidence and see where it needed to go. So, I had the battle plan drawn out. I would then also be running the trial that I'm running and emotionally committed to that one. When that

one ended, Supreme Court judges were pretty good to me. If I lost, they give me a couple of days. They understood that. Let me go. Give me a couple of days off type of thing. I would then prepare the next one. Now, murder trials tend to go at a relatively leisurely pace, if I can put it that way, so that I'd know in advance which witnesses were going to be called. I know which witnesses were a problem. So, again, I've got a battle plan ready. So usually the first day or so of a murder trial is empaneling openings. In those days, most defense barristers didn't open, but I did again, Supreme Court judges would let me do it, only speak for thirty seconds, used to call it Station ID. You know, I'm here to represent him. And see how we travel. But the problem with that was that and it is something I spoke about with Frank Vincent after he retired from the bar. It came at massive expense. Nothing else in your life seems that important. It reduced the important stuff. The kids have a problem yeah alright, certainly increased by drinking. I mean, seriously. So that would just be this total focusing, you know, and unable to properly communicate with the kids and stuff like that. I mean, I tried to, but it cost again, I'm talking about Frank Vincent all the time but he's one of my main mentors, really even though I never read with him, I think it was all him as a judge, me as a barrister. When you run him like that, every time you walk out, win or lose, you leave a bit yourself in there because you've committed emotionally.

Michael Green [00:24:15] Did Frank say that to you?

John Smallwood [00:24:17] Said that to me. Yeah. He said to me one day after I'd lost a trial and I was really quite stricken by it. I was sitting in the body of the court. I couldn't I just, you know, I just froze in the body of the court, I stood about twenty minutes after the court had emptied. And Frank just came down and sat with me for about ten, fifteen minutes and said, you know, you do what I did and it's going to do you. But and that's what he was saying, that it just takes a bit out of you. And once you've done it dozens of times, there's a lot gone. You don't get it back. It's tiring. Freddy James already said to me one day at the Essoing club, get outa there by the time you're 50 but no one lives, anyone is doing murder trials in their 50s doesn't make the distance. Vincent sort of say the same thing to me, too. It's a young man's sport. Unless you care, and like, hard and you're doing it a young man's sport.

John Smallwood [00:25:03] So you're rescued from this what could rightly be called a murderous work regime by a call from the then Attorney-General, Rob Hulls, offering you a spot on the County Court.

John Smallwood [00:25:13] Yeah.

Michael Green [00:25:14] Was that why you accepted? Because you thought you're just about there was no more petrol left in the tank?

John Smallwood [00:25:18] Yeah, yeah. OK, I was tired, Michael. it was making me sick. And I knew that. At that point in time, in the preceding two years, I'd probably done on five or six murders of little kids. And you'd have to sort of study the photos and, you know, you know, it was really starting to get to me. I start to feel sick. Winning the trial was becoming a relief as opposed to a sense of achievement. You and Rob just rang up. Said mate put the feet up. You know, you don't look flash. Initially, I said, look, I have to think about it. Then I sort of sat down. I thought logically I was fifty. I had no super, like most criminal barristers. That played a part, one was the pension, I wouldn't have done it without that, I reckon.

Michael Green [00:25:59] Which I should point out is very common for a lot of judges, except for that reason to accept because of the judge's pension

John Smallwood [00:26:07] Criminal law judges. Yeah, the civil barristers, a significant loss of income, but for the old legal aid hacks like myself it's alright. So, the pension I would not have done it without it. But realistically, I was tired and it was a change of direction. There's a security to it. I knew I'd get time off as a barrister. I had virtually no... I lived it - don't worry about holidays. The whole holiday the next murder trial was going through my head, you know, and it got rid of all that stuff. I mean, now I very rarely come out of the building at lunch I worked through lunch, just don't have to take anything home. I mean, there's nearly twenty years now. But at that point, yeah, I was tired and I reckon it was a one way trip.

Michael Green [00:26:50] He'd had enough and that's had enough air. So, it was a good decision. For the past twelve years or. So, you've been the judge in charge of the Koorie court. Yes. Can you tell us what the court is and how it's different from the normal criminal courts or the County Court?

John Smallwood [00:27:04] Yeah, I'm not I'm not the judge in charge now, but I haven't done for a couple of years, but for about a decade I was. The first thing to understand is the rule of law is exactly the same. In a mainstream courtroom the barrister stands up and speaks on behalf of the accused. You know, you had a crown opening read out victim impact statements read out, the barristers does a plea. They have legal submissions, and the judge hands down a sentence. The only difference that occurs in the Koorie court and it's a big one, is that the accused comes out of the dock and comes and sits at the bar table. The judge sits in the middle, I used to just wear a shirt like I am now, I don't know, I just let em all go. It was their business, elder on either side.

Michael Green [00:27:40] So these are these are elders from Aboriginal communities an elder from the community of the accused?

John Smallwood [00:27:47] Try to. We started in La Trobe Valley. So at that point, I mean, there might have been there were certainly local people a couple of Yorta Yorta, most of the elders were Gunaikurnai. So they're all local elders who know the family history. If one of us is asked name, you know, your relatives going outwards you might get to about a dozen and start to struggle, they can give you 200. Almost never have gone in down there with an accused that the elders didn't know something about them. Their family, the mission. So, they know who the person is. And they then with me or would just sort of say, explain a couple of things, you know, like the court has to be smoked, that type of thing, a fresh start. I'd make it very clear that I was the one who passed the sentence, not the elders, that they're just there to assist, to get information to help him.

Michael Green [00:28:32] So the elders have no input into the sentencing of the accused.

John Smallwood [00:28:36] No.

Michael Green [00:28:36] And can I just clarify? It's only for pleas. It's not for contests.

John Smallwood [00:28:39] That's right. I couldn't do a contest - the local politics. Would get out of control, you know, so it's only for pleas. They've got to plead guilty. And no sex offending. In the ones in the regional areas are much more, I think, much more powerful

for a number of factors. Most of the regional ones are community related ag burgs, fights over things the Melbourne all tended to be ice armed robberies.

Michael Green [00:29:01] Really. So, the ones in, as you say, in the regions are a burglary of a of a home with violence or something.

John Smallwood [00:29:09] That's that type of thing. Yeah. These are gross generalizations but the ones in Melbourne tend to be more the ice affected twenty year old sticking up the 7-Eleven, you know, with the syringe, that type of thing, and jumping from no priors to a stick up, you know, it still worked well, you know, Koorie court still works well, but we were cornered. Gave no chance of rehabilitative sentencing, if you know what I mean, because the offending was just too serious. Yeah. So that I would just say who I was, introduce everyone around the table and just leave it to the elders and they would tag team. With the Koorie Court officer we'd work out whether you needed to female elders or a male or a female or two men or whatever it might be, and stuff that they wouldn't tell me obviously about, you know, blackfella stuff. That's none of my business. And we work that way. Now, what they'll do is that they will there's a communication that's show me. It's about body language to use, never fold your arms, this type of thing. Just sit back in a seat like that, I'd always push my seat back, let the elders come forward and I'd to say the kid listen I'm the gub, I know that, you don't have to talk to me. It's not a parole board meeting. You know, you talk to the elders and then they'll start talking to them and their eyes just fix in.

Michael Green [00:30:15] When you say their eyes fix in, we often see, I guess, on television where indigenous people in that sort of a situation that their eyes will be to the ground and they won't engage with authority.

John Smallwood [00:30:28] Yes, exactly.

Michael Green [00:30:29] The Koorie Koories different to that?

John Smallwood [00:30:30] Very much. I tend to find that by the end of the conversation they will make eye contact with me. It's a respect thing. Also, a shyness thing, but the younger ones won't look into the eyes of an older one. I tell you at the table they do. When you get those elders, that's a bang. The sheer the need and seeing their faces as I talk to the elders that they need stuff you know they need. Their cultures what they need. You often have extreme violence as a child. You'll often have very, very dysfunctional families, alcoholism and the like. You'll nearly always have sorry, business that's never been dealt with.

Michael Green [00:31:05] Sorry, what? What is sorry business?

John Smallwood [00:31:07] Death in family, death of people that never gets dealt with. See one of the big things for black folks, is if you're in jail and can't get a funeral there's really quite massive depression because of stuff like that. So, a lot of undealt with sorry business. Sometimes a kid will come in all cocky, you know, come to Koorie Court because you'll get a lesser sentence. You don't - I reckon the first few years we're giving heavier sentences because we're so paranoid about, you know, what people will perceive of it subconsciously we give them too much or... They'll come in cocky as you like and then within half an hour, they're more than ten minutes are in tears as it starts to come out to someone who they know, loves and trusts them. What then occurs, they'll go through the whole process with him. Why is this. The sorry business, the alcohol, the drugs, they'll you

know, you've got to get a job. That conversation can take anywhere between with my courts I've sat there for two hours doing that, just listening to the elders and saying about death rates and you can die and what do you want and try to get acceptance like I know Lordi, one of the things he'll do is if we've got a kid there has been using ice, we've got a bunch of photos of ice addicts with teeth, you know, especially girls, teeth out Lordi makes em them sit there with the photos of ice addicts in front of you. If it's a belting, he'll make them sit there with the photos of the victim in front of them for the whole hour and a half - how'd you like that if that was done to your brother or just really make them accept personal responsibility for what they've done. That's the first thing. Once they do that is then the cultural. You'll feel better if. Yeah. So that's what happens right at the end of that conversation. I will then usually, you know, if they've done well, say I know how hard that is for you to do this in front of a white fella or anything else. And now I go back up there and we work out what we're going to do with you. And just reinforce that the sentence I'm about to hand down because the County Court give them 3s, 4s and 5s, you know, is from me, not them. So that finishes. I go back up on the bench. It's like a normal case again. A bit long winded sorry.

Michael Green [00:32:53] No no.

John Smallwood [00:32:55] That's how it works. Yeah, but

Michael Green [00:32:57] But then those that accused person get sentenced to a whitefella jail?

John Smallwood [00:33:04] Yeah. But you now have most of them seem to get sent to Fullam which has a Koorie unit that is properly resourced. We've had some fantastic turnarounds in Kourie Court blokes I was certain would be dead within 12 months of working. The first 60 we did right after two years one wanted reoffended and that was a drinking in the street in Bairnsdale. But yeah, that's what that's what it's about.

Michael Green [00:33:27] John, one of the criticisms I think, of the Koorie court is that it creates one law for blackfellas and one law for white fellas.

John Smallwood [00:33:35] Yeah. And that's just that's not right. That's just totally wrong. The law that's applied and the sentencing principles that are applied are exactly the same. What it is, is not many Aboriginals are going to tell a white barrister their story. They aren't going to do it. They might if they trust them. It's going to take a long time, but they can tell their story to the elders. So, you actually get the truth and you also get a greater confidence in the, now, we know it really improves their chances of rehabilitation, and that's all it is. It's as we get more information and I like the sense of one law for them. It's not it's not that at all. It's a means of obtaining information. In the community's point of view. You don't want these blokes offending again. Right. That's the that's a criticism that's been leveled plenty of times in media. And they were wrong,

Michael Green [00:34:22] John it started in the Latrobe Valley to where is it spread now? The Koorie court, where is it and how often does it sit?

John Smallwood [00:34:28] First La Trobe Valley we then incorporate a Bairnsdale into that. What we found was that the Bairnsdale people couldn't get them all. That's all very well for you and me, mate. But, you know, no one's got a driver's license, no money for the train you know, like, it's not that easy. So, I mean, it's started Bairnsdale so that families could come. And that changed everything. We had thirty people in the room. Next was

Melbourne, then Shepparton then Mildura. I'd already given away as chief judge and then after that was Warrnambool. So that that's the extent of it. It's better if you can do it on their own, on their own country and have their own elders, say in Mildura and Shep the same thing as the Gunnai. The elders are going to know who they are and what their families are. You know, that really makes a difference. Each of those groups has one or two seriously powerful elders. They're all good at it, but some of them are just astonishing.

Michael Green [00:35:15] You said that of all the crooks you've dealt with over the years, indigenous people best understand the impact of what they have done. Why is that?

John Smallwood [00:35:24] Yep. They're able to relate it to their own family circumstances. I always get the prosecutor read the victim impact statement to them. Not sitting in the dock where they can stare at the floor, but from three feet away. No, sorry, one point six meters away, like we are. I get em to read it, and the impact on them, they never shake their head in disbelief like some of these Galas down the back do. They cry, they apologize. They know effect. They have seen their family victims of this sort of thing. They are more prepared to take on personal responsibility. They'll will often start off trying to blame the drugs. The elders break that down in about ten seconds. A lot of records of interview are you would have only done it because of this, and the psychologist oh yeah, you know, the Koories, we keep using the expression, but sure it's no different throughout Australia. They are much more able to accept that personal responsibility for what they've done and to understand how it affects the person they did it to. They've had it done to them. They've had it done to their family, and they are ashamed that they've done it to someone else.

Michael Green [00:36:24] And it doesn't matter whether they've done it to a blackfella or a whitefella.

John Smallwood [00:36:29] No. They ... and it's the first place the elders always go as soon as the conversation, not always, but most of the time it's the first place, the elders go, how would you like it if this was done to your brother? How would you like this? If this is your mother, your father, how would you like it if I came home and all the property was gone? And bang, it's like literally thirty seconds. And they're in.

Michael Green [00:36:53] Now, John, what about you? What keeps you motivated? How come you're still going as a judge 20 years later and you've gone past one of your retirement dates?

John Smallwood [00:37:03] I got to go next year up until maybe up and up until the last well last 12 months we won't talk about that, the main thing that kept me going up until then was Koorie Court. I was going to retire about maybe five years ago when I could have at 65 as a point where a lot of the judges I never met to know who they were. They were not my peers almost all went, Duncan Allan might have been the last of my true peers in that sense. And then a new lot of great appointments the last 10 years or, you know, a whole bunch of appointments of people who I had been a barrister and they were very much junior or they were young solicitors who then became judges. And all of a sudden, I had a peer group back who would come and talk to me to discuss a sentence with me. And it's good for them to have the older judge there, you know, when the press goes them or the Court of Appeal go them. And that makes me feel useful. It's like in Thomas the Tank, you know, when he's done really well, they put him in. He's allowed to sleep in the useful, useful engine shed. Yeah. So that's that. That was the Koorie court kept me going. And then the last probably two or three years since I haven't been there has been circuit.

Been able to do the Koorie Court on circuit, know all the elders, all my mates, like up Mildura last year before they said hey Judge and I'm going to do what I can do a wallaby down the river riverbank, you know, Bake a wallaby down the river in the coals you wanna come down for tea, you know, so, you know, they trust me, you know, it's all right. So, I sent the message back. Yeah. Yeah. No, no worries, fellas. Tell me 8:00 anyway. I was talking somebody of Mildura, one of the one of the local blackfellas. I said this is you know, I just feel really good about this. He said judge they only want you down there so the coppers don't turn up.

Michael Green [00:38:31] And that's true.

John Smallwood [00:38:42] I just love that stuff. But yeah. So, circuits kept me going. I enjoy getting to know and I always make a point of getting to know the registry staff, find out what their problems are, make a point of finding out the local coppers problems are often a sense of team effort. Getting to know the local practitioners, you know, a few beers with the local practitioners, most of the barristers who go on circuit I've known for a long time, we get on well, understand, and their instructors usually. So, it's a social sort of thing. It's also one I always make a real point of talking to the local schools. I go to the school. I'm just sort of, you know, humanize the system. And all those country kids wouldn't even think about a tertiary education, wouldn't cross their minds.

Michael Green [00:39:21] It's a great thing to do.

John Smallwood [00:39:22] So, yeah. So that's what gets more nowadays, really. It's circuit that keeps me going. Yeah. So, I don't know how much longer, mate. You know, you reach a point,

Michael Green [00:39:32] John, it's been an absolute privilege having you here today. And for us to here to learn particularly about the Koorie court is a very valuable experience for us and anyone who listens to this podcast. Thank you very much.

John Smallwood [00:39:42] No, no problems mate good luck with it all.

Voiceover [00:39:52] Notes from today's episode can be found at [Greenslist.com.au/podcast](https://greenslist.com.au/podcast). There you'll find links to things talked about in this episode, a transcript of the show and some wonderful photos of our guests. If you're enjoying Lives in the Law, please tell your networks and subscribe, rate and review the show. It really helps others find out about us. Your host is former lawyer and Greens List clerk Michael Green. Our show is produced by me, Catherine Green, mixed and mastered by Windmill Audio and recorded by Alex Macfarlane, who also wrote and performed all the music for the series. With covid restrictions limiting numbers inside the County Court of Victoria. We are currently recording our shows at Owen Dixon Chambers on the corner of William and Lonsdale Streets in our beautiful city of Melbourne. We acknowledge The Wurundjeri People of the Kulin Nation as the traditional custodians of this land and pay our respect to their elders past and present. There is no doubt that conversations about justice have been taking place on this land for thousands of years, and we are privileged to continue the discussion here today.