

“Meet your PJ”: Hon. Elizabeth A. Garry, Appellate Division, Third Department

John Caher:

The Appellate Division, Third Department, based in Albany is unique among the four Appellate Division Departments for the simple reason of geography. Since it's based in Albany, the Capital, it hears the bulk of the cases involving state government and its agencies. It also admits the largest and most diverse class of attorneys each year.

Welcome to “Meet Your PJ,” a production of the New York State Judicial Institute. This series is designed to introduce you to the four Presiding Justices of the Appellate Division departments. The courts have the last word and are really the courts of last resort for most cases in New York since the Court of Appeals accepts only a small percentage of those cases.

I'm John Caher, Senior Advisor for Strategic and Technical Communications.

Today we're honored to have as our guest the Honorable Elizabeth A. Garry, Presiding Justice of the Third Department. Justice Garry grew up on a dairy farm in the Hill Towns of rural Albany County. She graduated with honors from Alfred University and Albany Law School. She practiced law for a dozen years. She served as a law clerk and a member of a town of New Berlin Planning Board. She was elected and reelected town justice and elected to Supreme Court in 2006.

Two years later—just two years—she was promoted to the Appellate Division by Governor David Patterson. On January 1st, 2018, she was named Presiding Justice by Governor Andrew M. Cuomo. Justice Garry is a commissioner and past co-chair of the Richard C. Failla LGBTQ Commission of New York Courts.

Judge, thank you so much for joining us today. Let's first discuss your background, if we could. What do you learn on a dairy farm that's applicable to life in general, and perhaps the practice of law?

Justice Garry:

Thank you, John, for that intro and starting right there with my deepest and fondest roots. My father always said that I would be so grateful to have been raised on a family dairy, and as a teenager particularly, I found that a very doubtful proposition. My friends had this thing called free time, and I envied them terribly. But the lessons that I learned in that cyclic process of what all agriculture is, the returning to very hard work

season after season, but also seeing the accomplishment when you have prepared a field for planting, or you have done the hay, cut the hay, and prepared the hay, and stacked the hay in the barn. When you've done those tasks, you get a deep feeling of the value of hard work, and that has carried me.

My father, back to my father, he loved the farm. He would say to me, "Oh, you'll be so grateful." He's passed now, some many years, and he was so right, John. I am so grateful for that background and all of the attachment that I still hold to the natural world springs from that. It's predominant in my personal life and my enjoyment of our amazingly beautiful planet.

John Caher: So, there must have come a time when you decided you'd rather be a judge than a farmer?

Justice Garry: It's such hard physical work. Quite literally, there was a time when I thought long and hard about what is the future. It's so physically demanding every single day. We owe a tremendous debt of gratitude to our nation's farmers and people who work in agriculture of all sorts. A lot of our population tends to be more urban or suburban, of course, but the work they do is just so challenging in every way. Most of us, we watch a weather report with some interest. "Oh, should I carry an umbrella when I go the few feet from the parking lot to the office?" It's just such a different life experience.

John Caher: Your Department covers an enormous and very, very diverse part of the state. You've got, I think, 28 counties stretching from Kingston to Canada. You've got medium-sized cities. You've got the state Capital. You have some of the most remote, most rural areas of the state. How is that reflected in the type of cases that you review?

Justice Garry: The thing that I think every single judge and maybe every person who works at the Third Department might share, John, is the thing that is so amazing about it is the scope and the diversity of what comes before us. The breath of what we get to grapple with, in a very deep way, is just stunning. The learning curve for a new judge on my court is — no matter what background and life experience you bring to it— the learning curve is sharp and steep. It's really demanding because that geographic diversity brings such a different array of problems and disputes, as you say, the urban, the suburban, the rural, and all the types of law that we grapple with. The state cases. I know we'll get into more depth with some of that, but everything is based on geography, John. Everything at its heart is local as it works its way up, and as you've said, we're the mid-

level court deciding things that have been through a legal process, but what we see is just vast in its basis and background.

John Caher: While the range of cases that you take, certainly, is extremely diverse, your court has never been diverse in one particular way, through no fault of your own, of course. Until just a few years ago, when Justice Sharon Aarons was appointed, there had never been a judge of color. Justice Aarons came from outside the department. The problem, of course, is that in 27 of those 28 counties, they have never, ever elected a Supreme Court justice of color. What are your thoughts on this?

Justice Garry: It must change. Yesterday would have been soon enough. Really. That must change.

As we tape this, we are living in a period of tremendous change which brings tremendous opportunity. In my rather optimistic view, we are on the brink of moving in a much more profound way toward realizing the dream of our country, the unrealized dream. It has never been achieved. The heart of our nation is the promise of fair, and just, and equal treatment of people. We might be in the place right now where that will be coming. It's right around the corner, isn't it? We are not there yet. As you said, any look at the data will show that we have not reached a level of equality.

Representation in our government is a critical value on that path. I have always expressed, in regard to making that happen, given the scenario that you described in your opening remarks. I've always been open to appointments from other Departments, for the moment, so we can reach that as we currently have. But really, all sorts of groundwork has to be done within the political structures that exist. Getting to be a judge is a political achievement. I call upon the political leaders to make changes in the ways that they evaluate candidates for these positions.

One of the things, as you know, pending, the Chief Judge has an initiative to expand the courts that are opportunities for advancement to the Appellate Division. One of the clear benefits of her plan is that it will expand the potential pool of people serving in the mid-level Appellate courts.

John Caher: That would instantly make a whole lot more people, a much more diverse group of people, eligible for the Appellate Division too.

Justice Garry: Yes. Qualified and having the important skills in every way, but coming from a broader swath of our society and also in every way. Diversity is

across all sorts of measures. It's not simply race. It's not simply sexual orientation. It's not any single item. It is the more diverse the group, the more people are represented, and the more sound the decision-making process is.

John Caher: We certainly see that in your court. You have people from the major cities on your court. You have people like you, who are from rural areas. You have people on your court, really from many parts of the region, who come with much, much different life experiences.

Justice Garry: Yes, and that's actually really important. Frankly, if you were to look at the map, John, the 28 county region, it's important to me when we fill committee positions, as well as the court, to have representation from the different areas, to not just have people serving from one particular region. No matter what, people will have a what's-in-my-backyard perspective. The legal system, although it's uniform, there're different ways of approaching things in my Sixth District than the Third and the Fourth. So all of that matters.

John Caher: One commonality that Albany, and by virtue is your location, as I said in my open remarks, is you hear, I imagine, the bulk of the cases involving state government. You also admit, last year, 33,000 new attorneys. Those factors make the Third Department different from any of the other three.

Justice Garry: We take great pride in both. You know what one of the people I revere, and I did a little movie segment with him, the Honorable Leonard Weiss, and his great quote is that "The Third Department is the crown jewel of the New York State court system." Those two factors, both of those things you so well identified, are things we take great pride in. We do a tremendous admissions program nationally and internationally with a very small staff. Let me mention that! We have good, hard working folk, who make that all happen, and I'm grateful to them. The state government cases are in many ways the most interesting things, in my personal view, that we get to grapple with. Yes.

John Caher: How so?

Justice Garry: As soon as I say that, I think, "Uh oh. Now did I just discount criminal, or family law, or environmental cases?" They all have their own drama, their own pull, their own structure of law, which is at its heart what I personally love the best. But the state cases are deeply interesting because it's where you see the law of our societal interests and the individual concerns, and balancing those two things. So in many cases, they're very sensitive cases, and they are in the law in its most "how do

we structure our society so that it achieves the proper ends?" They also involve the balance of the powers. It's where the Judiciary really is fulfilling its role as in the checks and balances, if you will. I would be remiss to not bring that forward. That's also why those cases are so interesting.

A lot of them come up in an administrative setting, of course. That's where we see that separation of powers in action. We're well instructed by precedent that we're not to unduly interfere with the executive power. Some of those cases are a little standoffish if you will, in a judicial way, to put it in plain English.

John Caher: One of the things that's always stuck me about your court is the number of people your decisions effect because you're dealing with state government and policies like that. If you're just deciding, I don't know, a person injury case, unless you're making some pronouncement of law, it really affects two parties. Your cases on state government policies may affect millions of people.

Justice Garry: Thank you. Thank you for bringing that forward because I hadn't expressed that, but of course that's true. Thank you, John. Yes.

John Caher: Now, with the pure volume of cases that you have— the Court of Appeals here is 170, 180 appeals a year—you hear 600, 800 appeals a year. Is there a time and a place for your court to really delve into matters of law, or is the main focus, "Let's resolve the dispute, and let these people get on with their lives"?

Justice Garry: Oh, no. That would be so unfair. What we do is we delve in, frankly, in each and every case. I think anyone who reads our cases can see that we delve into matters of law. We give ourselves the opportunity to do that. The most complex cases, the cases in which we have diverging opinions, necessarily take us longer. I know the lawyers out there wait. They see other more straight forward, if you will, more single issues, more unanimous decisions come down, and they're waiting for theirs. But the ones that we really are grappling with take us longer because there might be multiple writings exchanged. That's all happening behind the scenes. We absolutely grapple with the cases before us.

The Court of Appeals, remember, hears the cases that we have really struggled with. The ones that are the most difficult for us are all that they ever get. The ones that are more ... I struggle for the right words... but that are a review of "Was the law correctly applied? Was there an error in this presentation?" are a more simple review process. You might have

to read a lot, but the answer will be clear, and those cases will be unanimous. The cases where you have opposing views, and perhaps differing legal approaches, those are the cases that we need to work through in that more lengthy process.

John Caher: It is my observation through the decades, and I just want to see if it's yours as well, that the Third Department, in my experience, tends to write more, write longer opinions. I mean, they're not long, usually, but they're longer than the other Departments in general. Is that by design, by culture, by tradition, or am I wrong all together?

Justice Garry: No. I focus on the law of our department, so I don't do a comparison, but I have heard that it is true, that we do issue more individually authored decisions, certainly, than I believe the other Departments do, and fewer of the memo kind. That is a part of our culture, a part of our tradition. It's a lot of effort, but for anyone who brings a matter to my court, our court, you have put such a lot of effort into it that it's clearly a grave concern. We try to address that both for the people or the parties that are in the dispute, and the sake of precedent and establishing a body of law. On the other hand, brevity is a good value, so we strive for some brevity in our writings and not issuing unnecessary dicta, but beyond that, we want to give a full explanation of the basis for the determination, and we strive to do that in culture and tradition.

John Caher: How many judges do you have currently?

Justice Garry: Ten, at the moment.

John Caher: You're short two?

Justice Garry: Two. We, ideally, would be a court of 12, John. That would be the really good number. When I joined the court, and it's been 11 years now, I was the 12th judge. But we have not been that fortunate through much of my time on the court. Ten is workable, but when we slip below 10, we have to take measures to address that lack of essential staff.

John Caher: The measure that is most noticeable to me is you go to four judge panels.

Justice Garry: We resist doing that to the greatest extent possible.

John Caher: I bet.

Justice Garry: It's less rich for us. All the reasons of diversity that we spoke about before, and having four colleagues to weigh in with their opinions. I can

speaking, I think, for every member of my court and clearly say that we prefer the five judge panels in every way.

John Caher: Sure. I'm sure.

Justice Garry: We do go to four judges. We'll go to four judges on occasion also if there's a recusal that a judge must step away. Maybe they see something as they were looking through the record. Maybe it's belated, and they realize, "Oh, I have a connection that might look like I'd be unduly influenced here." We're very liberal with our recusal policy because we can always pull someone in if necessarily to review. Our court rules allow for that specifically.

John Caher: Now with a four-judge panel, you always run the risk of a 2-2 tie. What happens when the court splits?

Justice Garry: We have a particular court rule that allows us to address that scenario. What we also instituted was that in the most recent round of, within the last year or so, when we were down to nine judges, at my request, we would signal at the earliest possible moment when it looked like there would be a divergence of opinion to get that fifth judge in to review the cases as submitted. We also have all of our arguments archived, for both the court and the public. So they could review. The only thing that a fifth judge would be lacking is the opportunity to actually ask their own questions, but they'd have the full material before them. We try to institute that at the first possible indication that it was not going to be a unanimous determination.

John Caher: How is it decided which judge sits on a panel, and is there a conscious effort to rotate to ensure that the same judges aren't sitting with the same judges all the time?

Justice Garry: There's a very conscious effort to rotate. There is a very conscious effort. In any given term, I should sit with exactly all of my colleagues at least at some point. There should be a full intermixing and intermingling of the court in all of its various potential patterns. There's a lot of factors that go in. The scheduling is a difficult with logistical issue each and every month. You have to take into account any particular judge's scheduling needs, if they have a particular appointment or requirements. We have to take into account their standard recusals. Each one of the judges has furnished a list of law firms or other connections in which it would be inappropriate for us to preside and sit. So you have to jumble all of that together and come up with various panels, but they are very deliberately ever

changing so that we all get to work with each other. So it's a very random, any litigant will get a random group of us.

John Caher: On a given afternoon, or a Friday morning, your court will hear four, five, six cases, then what? What's the process from there to a decision?

Justice Garry: I have to clarify that. There's really never a time that we hear four, or five, or six cases. We always hear, on any sitting day, virtually without exception, we hear 15 cases on a day. We sometimes will hear 16 cases, but we don't hear less than 15.

John Caher: Wow!

Justice Garry: When I say hear, and I'm joking a little bit with you, John, but when I say hear, you're referring to the oral arguments, which we'll have presentations of argument by council or litigants on maybe half of them on any given day. Now, repeat the question for me if you will. What ... after that? Was that the question?

John Caher: So, you hear oral arguments for a few hours, then what? How do you get from there to a decision? What goes on behind the scenes? Who decides who's going to write the majority opinion if there's going to be one? How does the whole process work from argument to decision, which is in my experience, quick frankly?

Justice Garry: In your experience it's what?

John Caher: Pretty darn quick.

Justice Garry: Oh, quick. Yeah. Usually-

Crew: Excuse me, John. Excuse me, Judge. Excuse me, Judge. I'm sorry. John, your words dropping out a little bit there. That's why the judge couldn't understand that. I couldn't either. Half of your last sentence. It's nothing to do ... I think it's just the bandwidth, or the internet, or whatever. It just dropped for a second. Can you re-ask the judge that last question so you can both ask and answer it smoothly? That would be great.

John Caher: Sure. Sure.

Crew: Go ahead. One other thing I wanted to ask, I keep hearing a chime like a calendar notification. Are you hearing that or is that on my end? Are you hearing the little chime like when you get a notification on your calendar or anything like that?

John Caher: Maybe it is. I will make sure my email is-

Crew: Yeah, close your email if it's open, John. You don't have anything open like that, do you, Judge, on your computer?

Justice Garry: I don't believe. I should probably check. Let me just go. I turned my other devices off, but-

Crew: I thought I remembered you saying that.

Justice Garry: Close email.

John Caher: One of the problems is that I asked six questions in that last question.

Crew: Yeah, that was quite a few of them in there. Although, I do like the judge's clarification. We'll leave that part. We'll leave that where she said, "We actually see 15," and so forth. But then your next one, right after that. If you could pick up right after that.

John Caher: Okay. Are you ready-

Justice Garry: Am I fully back on now? I went on and-

Crew: You are, Judge. Yes, you are. Perfect. All right, John. Here we go. Ready. Three, two, one. Go ahead.

John Caher: So after hearing the oral arguments, what goes on next? I imagine the case is conferenced, but what is the process from oral argument to a decision?

Justice Garry: Thank you. That's such a fascinating period. The thing I think I want to start with is one, we do know before we hit the bench who is assigned to any particular case. Depending on the assigned judge and their manner of practice, they may have already had a significant period of engagement with the real particulars, really sinking into the nitty gritty. Maybe, maybe not. We hear a lot of cases.

For my personal perspective, as long as I hit the bench, we strive to be a hot bench. If I hit the bench with a solid understanding of the factual underpinnings, that's good, and now I want the lawyers to tell me about the law. So we are preassigned to the cases, but we have not discussed the cases together in any way. The exception to that would be a very minor, a judge might say, "I'm troubled about this. Just so you know, I'm troubled about this." One aspect of a case, to give the assigned judge a

heads up on that. Or they might share that with the panel, but we don't have any pre-deliberation so that when the lawyers appear for oral argument, that's the first time that we have discussed the case together.

Following the argument, we have a robbing room discussion. We have a public discussion with the lawyers and each other there on the bench. Then we have the private discussion about where do we think ... "I heard you ask this. What are you thinking about that?" ... We have that discussion in a conference immediately after. We then will retire ultimately to our individual chambers. We'll talk with our law clerk. We process the case. The assigned judge will present a draft of a potential statement. We gather together. We have informal conversation about that, telephone, emails. We discuss the potential draft. We gather in, typically, when we're not in this crazy time of history, but we'll gather. Now we do the same thing with these virtual tools, but we'll speak together about our concerns. Then ultimately after the conference, if it's necessary, we will engage in exchanging differing writings.

John Caher: That was very helpful. Let's move on to dissent.

I haven't looked at the numbers, but a great majority of your opinions, as all the Appellate Divisions, are unanimous. But there are dissents. What is your view of dissents? Do you write a dissent every time you don't agree, or is there a certain threshold or a certain level where you think a dissent is important or necessary?

Justice Garry: We collaborate relative to the writings so that it's really quite possible that one of my colleagues might put in a sentence, a few words, a paragraph with which I will differ. That process of discussion that I just described would result in revisions to the writing. That adds to that unanimity. We're not necessarily unanimous on the first writing. We might be unanimous on the third or fourth writing. That's what that process is.

Once that's said and done, if there are truly diverging opinions based in conscience and law and our sense of justice, those are going to be apt to be when there's really a difference, not in the presentation, John, because that's an individual author's product, but in the disposition, in the real outcome, the heart of the case. Then, we write separately.

I encourage dissent. In my view, there are two sides to a case. Even though we will often come down in the same place on that, be it a reversal or an affirmance, if there's a place of real departure, I don't discourage separate writings on that, particularly because we are a mid-

level court. If it's strong enough, it gives the litigants, the parties, the opportunity to bring that point forward to the highest court. I'm open to that.

On the other hand, by operation of the way the law works, many of our cases, frankly, have an answer. The question posed is, "Was there an error in the procedure here?" In many cases, John, you'll see the answer is, "No." On the other hand, if there was an error, we issue a fair number of modifications, where we say, "Well, this was an error, but the overall outcome was proper and correct in accord with the rules."

John Caher: You mentioned cases that go to the Court of Appeals. There are, of course, a couple of ways of getting there. One is a couple of dissents from your court. Another, the usual method, I think, is that the Court of Appeals grants leave. But the Appellate Division can also grant leave. This Chief Judge, and pretty much all of them in my memory, have at least on some level discouraged that practice. When do you think it is appropriate for your court to grant leave, rather than just let the Court of Appeals decide its own calendar?

Justice Garry: There is sound policy, and for the Third Department, there is sound policy in allowing the Court of Appeals to choose their own calendar. There are good, strong, underlying reasons why they are better poised to do that than we are. So that said, I am continuing in what is really a tradition and custom in the Third Department in that we typically do not grant leave, particularly in civil cases. The reason for that is that the parties can present their request to us. They can then go and present their request to the Court of Appeals. Those sound policy reasons are that the Court of Appeals is better poised to do a comprehensive overview. It's very common, John, for the same legal issues to be percolating up in various venues. What the Court of Appeals has the opportunity to see, which we do not as much, is maybe this same legal issue is presented in a case from one of our sister departments, but the issue is more squarely posed. It's maybe better preserved, which allows them to reach it. There are things, and maybe you see them do this all time, they may take two or three cases together, and hear and address that issue. That's their function and the distinction between their role as a court of law and our role as a mixed court of fact and law really plays into that.

On the criminal side, that's a different analysis to some extent because it's a one court review. Those we might be more willing to grant leave. There it would be an issue of seeing, "Is it a substantial legal issue? Is it something we think the court should grapple with?" People will confuse the factual and the legal review to the extent that it's clearly the weight

of the evidence. If you look at our criminal docket, you'll see a lot of cases fail to preserve some of the critical issues in criminal cases. They come to us unpreserved. We'll still do an analysis of all the factual issues before us, but there's really nothing there for the Court of Appeals to work with.

John Caher: Because the Court of Appeals doesn't have fact finding jurisdiction?

Justice Garry: Exactly.

John Caher: Now, in addition to your judicial responsibilities, you have considerable administrative responsibilities on several different levels. You've got administrative responsibilities in Albany. You have other local, if 28 counties is local, responsibilities, and you're also a member of the Administrative Board which includes the other Presiding Justices and the Chief Judge, which has administrative responsibilities state wide. What sort of issues does the Administrative Board tackle? And how often do you get together?

Justice Garry: We gather physically 10 times a year. We meet and discuss somewhat more often than that. There are really two sorts of things, the formal administrative agenda, which is devoted to perhaps rules of conduct, court rules, those sort of issues. For instance, we just passed the Humanitarian Exception allowing lawyers to assist needy litigants. Those sort of things. Those are rules. We communicate together less formally on an ongoing basis, as needed, because the four Appellate Divisions are striving to work with a consistency, to reach consistency and uniformity to the extent that's possible. We have different populations and different needs, and as our world gets smaller, the legal community wants and asks for a greater uniformity of practice.

I think in response to that, the four PJs have been working in a very collaborative fashion, at least during my tenure. We try to make it so that it's not necessarily all the same, but pretty close, in terms of the rules. We just issued the temporary practice orders and if you were to look at those, you'll see they're almost entirely uniform right across the board. All four Departments, the same application. That was a process, the collaboration that I'm describing.

John Caher: I know there is also a concerted effort to make sure that the disciplinary processes are the same, and the same conduct that results in a disbarment in Buffalo will result in a disbarment in Albany. or not.

Justice Garry: Precisely. There was a collaboration that preceded my tenure as Presiding Justice. Karen Peters, my predecessor, was heavily involved in

trying to create uniform rules of practice before the Appellate Divisions, the uniform disciplinary rules. So I inherited some of that and have continued in that vein. The e-filing rules, we don't want you to have to do things so differently from one Department to the other because the underlying reality is that a lot of lawyers will practice in multiple Departments, and what's justice here should be justice there regarding the disciplinary proceedings.

They're not identical, John. They operate differently. The attorney grievance committee has a different manner of operation in regard to how it's approached, but the results shouldn't be grossly disparate. That's the aim.

John Caher: Two final fun questions. The first one, let's imagine that an attorney is about to argue before you for the first time. What is your advice? What should she do, and what she by all costs should she avoid doing?

Justice Garry: The key is preparation. The key to success in all things is preparation. Knowing the facts and the record is really the heart of it because we might ask questions that are not what you were fully anticipating. Your ability to describe what happened in the trial scenario that you're asking us to review, in the procedural history that you're asking us to review, your ability to give an answer to that, even though it wasn't briefed, is really critical. The thing to avoid, the most important word is civility. One must be civil and professional. This is not a personal business, and the one thing that I'd say every judge of our court ... We don't scold when we see it. We'll see it sometimes. Any kind of personal attack, whether it's in the brief or, heaven forbid, in the courtroom before us, any sort of disparagement of opposing council or the opposing party, really. We know it's a conflict. Our goal is to elevate it to a level of objective review and determination. That takes professionalism and civility.

John Caher: Great advice. It'll be very helpful to people. Finally, the trial judges. What do you wish that they better understood, or what should they know about the Appellate Division, and how important is the record on appeal?

Justice Garry: Oh. The record on appeal is our ... it's everything. The most important advice to trial judges, because they can overlook this, is they'll have a conference with the lawyers. Some agreement will be made, and everyone will be ostensibly on the same page. They go back into the courtroom, and if that's not put on the record, it didn't happen. So that's very challenging. Anything that a trial judge does should be, at some point, put on the record in a meaningful way to provide for review.

The other thing is, don't ever take reversals personally. Every single one of us spent time in trial courtrooms, in trial settings from a broad variety of perspectives, really. We served as lawyers and then as judges. We know how busy it is. We know how hard it is to juggle all the parties in the room, and you've got 20 minutes or half an hour. We are not unaware of that. Our role is to review and to see that decisions were made appropriately. But it is not a personal slight. It is part of the process. Please read the decisions, because we try to be instructive.

When I write a decision, John, I will include citations, and I do this very deliberately and intentionally. I include citations that will open the window to the primary foundations, and it will show sometimes the nuance of a compare. Like, "Well, here, this was a slightly different factual scenario, and look a different outcome." So you can literally see my cases, and read the cases I'm relying on, and understand whatever that arena is in its context.

John Caher:

That's great. Judge, thank you so much for your time.