

Untethered: ruminations of a common law barrister

By Kavita Balendra

I am sitting in Dubbo in my solicitor's conference room across the table from my client and her mother.

My client was injured in a motor vehicle accident. Badly. She's a 19 year old Aboriginal woman with three young children. The accident occurred when she was 16 and she's never been the same. Her mum greets me and after a moment tells me that she's sorry but she can't stand to look at me. She says that I look 'the spit' of the Aboriginal driver that caused the accident.

I'm a Sri Lankan Tamil.

It's a jarring note to commence a conference, but this is not the first time something like this has happened. So I do what I usually do and just talk....

I came to Australia when I was nine. I'd lived in three different countries before coming here and visited several others, but Australia was the first country I'd been to that had a winter. We lived in the western suburbs of Sydney and I grew up surrounded by first and second generation immigrants of various backgrounds. My first degree is in science and I spent my honours year doing research in the psychiatric units of two hospitals. Consequently I'd never thought of myself as a 'diverse' person because everyone was diverse.

It was only after coming to the Bar that I realised that not everyone who grew up in Sydney had lived in an area where it was usual to take your shoes off before entering someone's home. I have been mistaken for an instructing solicitor, a paralegal or on at least one memorable occasion, the plaintiff. I have been patronised, been informed that I don't understand my case, and have had opponents (and a mediator) kindly try to explain the applicable law to me. I realised very early on that tick-a-box diversity made me stand out at the Bar.

Yet to me, the Bar is actually quite a diverse place. There are few workplaces that accommodate such a range of misfits. There is room for all sorts, silver tongued rogues rub shoulders with brilliant introverts and manic eccentrics. It is an egalitarian sort of club where the key to acceptance is not just passing the Bar exams but the possession of an amusing anecdote about a mishap in court, preferably



involving a witness in the box and garnished with a judicial dressing down. In many ways the Bar is a reflection of broader Australian society, it just doesn't look like it.

I consider myself fortunate to practise in common law. There is around the common law Bar an unfortunate air of fatalism. It is an aging jurisdiction, considerably 'top heavy' with ongoing legislative changes decimating available work, ensuring that fewer and fewer juniors are attracted to its practice. But one cannot escape the fact that the duty to care for one's neighbours and the regulation of each person's behaviour towards another is of fundamental importance in a civil society. Few who have travelled to our nearest neighbours and have seen the disregard for safe worksites, the lack of duty of care to passers-by, or the lack of regard for consumers of goods and services, will have any doubts over the need for robust tort and consumer law. After all when there is a breakdown of those duties of care, it is tort law that is used to hold institutions to account.

There are a number of surprising secrets to

practising at the common law Bar. One is that I have found that my version of diversity is a peculiar strength. I've bonded with a client over shared cultural expectations, while explaining to them why those cultural expectations do not translate into monetary compensation. I've extracted evidence from weeping men who are more comfortable talking to me than they would be to any male barrister. And I've held the hand of a client after senior counsel delivered the bad news that she had no basis for a claim for the death of her child. She thanked me for being there.

Another oddity of the common law bar is that it is one of the few civil jurisdictions which regularly requires practitioners to travel to the country. My Sydney based solicitors are always slightly apologetic when briefing me on matters that involves travel. The truth is that I find that there are few pleasures at the bar greater than being on circuit. My life is easier – I am paid to spend a few days away from my caring responsibilities and I even take extra work with me that I actually manage to complete.

While travelling through country NSW

I expect to stick out, and sometimes I do, though sometimes we forget how truly diverse the country is and how little the Bar reflects the rest of Australia. Generally I find country solicitors are genuinely welcoming and surprisingly grateful for your willingness to travel, and it is amazing how easily an opponent with a reputation for belligerence can become a friend over dinner and wine. And besides, where else would you get the opportunity to sit (with your opponent) and share a meal with a judicial officer presiding over your case and try to convince them that gaming is for everyone, they just need to try it?*

So now I am in Dubbo wrapped in my 'diversity', with a face that is too much like the driver that caused my client's accident, and I recognise that I may not be the barrister they expected to see. But when we settle her case and she calls me 'sister' and I receive a hug from them both, I hope that they are glad that I'm the barrister they got.

* Editor note - this practice of breaking bread with a judicial officer would have got the barrister into hot water in the long-distant past!