

‘Celebrating Women in the Law’
Foley’s List function - 23 October 2012

‘*A Woman’s place is at the Bar*’

Justice Pamela Tate¹

Let me start with an admission. I am Martha Costello’s biggest fan. For those whose work precludes them from watching Television drama, let me explain. Martha Costello is a criminal defence barrister in Shoe Lane chambers at the Inns of Court in London who aspires to take Silk. The impeccably produced BBC series, aptly titled *Silk*, shows her in court every day. It also shows her having conferences in prisoner cells with her clients, and even more realistically engaging in the hard slog of preparation the night before. With highlighters and tabs at the ready, she battles against disorganised papers and the unending transcript, with a barrister’s desire for order and mastery of the material. Her discipline is effective. In court she is entirely at home. She occupies the space of the Bar table with confidence and grace. She is agile in cross-examination and intense in her exchange with the Bench. It could not be said that, as a woman, she is ‘*out of her place*’ at the Bar.

The question of what is a woman’s ‘place’ has not yet received a universal answer. In the elections held in Greece earlier this year you might recall a debate in which a member of the extreme right group, Golden Dawn, lost his temper after a verbal stoush with a female MP. He struck her. He also threw a glass of water at another female politician. He later blamed them for having provoked him. Opinion was divided on whether he was justified. A professor of political science at Athens University said:

A man beating up a woman is not acceptable in Greece, but beating up a woman who is a politician, that’s OK. This is because [people think that] as a woman she is *out of her place* to be in politics.

Politics in Greece may seem a long way away from the Victorian Bar.

It was at the Victorian Bar, however, that many years ago I found myself on the wrong end of a conversation with a male Silk with whom I’ve never worked. I was a

¹ Court of Appeal, Supreme Court of Victoria.

baby barrister and was in the company of half a dozen other barristers, some juniors, some Silks. We were at an up-market restaurant celebrating something that now eludes me. I was the only woman in our party and keen to get a sense of my newly adopted profession. Having enjoyed the commitment to equality that pervades at law school, I was aghast when one of the Silks seriously proffered the proposition that women were inherently unsuited to the Bar.

The proposition that was put was that women don't have the nerve, or the aggressive forensic muscle, to go for the jugular in cross-examination or to exhibit the theatrical showmanship required of counsel at the Bar table. Women were simply *out of their place* at the Bar, and they ought not even to try to gain a foothold there. There were two things that amazed me at the time. The first was that I came to realise, as the debate developed, that the Silk, let me call him 'my contradictor', was serious. The second was that the others around me treated him, and what he said, seriously – not to say that they agreed but rather that they thought the debate needed to be had.

My immediate response was to attack the premise that there was a single ideal of a barrister to which all aspiring counsel had to conform. I invoked the names of some senior women who had been very successful at the Bar, including those who had an appellate practice dealing with some of the most complex areas of law. 'Good for them' was the response, 'but they are the exceptions – they might survive in the rarefied and polite atmosphere of the higher courts but not in the battleground of a real contest', the implication being that, in a real contest, women were simply *out of their place*.

Now looking back from the perspective of a judge, and with 19 years as a barrister, there are many things I wish I had said to my contradictor, and even more things I wish I had known. I'd like to take the opportunity tonight, as the focus of my speech, to say a few of them.

The lunch took place before the days when women were rising *en masse* through the ranks of the Bar. It was a time before the first woman was elected to chair the Bar Council, Justice Crennan, in 1993; it was a time when there had never been a woman appointed to the Supreme Court, the first being Justice Rosemary Balmford in 1996,

and no woman had ever sat on the Court of Appeal, the first being Justice Susan Kenny in 1997. Although much has changed, I suspect the proposition that women lack the qualities necessary to make a good barrister, namely, aggression and theatrical showmanship, has never quite died. I suspect it continues at times to marginalise, and to undermine the confidence of, the very talented women who are drawn to the Bar.

The flaw in the proposition espoused by my contradictor is the claim that the qualities that make a good barrister are aggressive forensic muscle and theatrical showmanship. Not only do I want to show that those qualities are almost always *out of place* for a barrister but, more importantly, I want to suggest that there is a characteristic that women typically have in abundance that renders them especially suitable to be barristers.

Before I expand on that, may I make a preliminary observation about my contradictor's contention that appellate advocacy is not a true expression of a barrister's craft. In my experience, the atmosphere of the higher courts is neither rarefied nor polite. A contest in the Court of Appeal, or even the High Court, has at its heart the clash of each party's case.

In the High there is the added dimension that the Bench is likely to have its own case. Sometimes, on a bad day, you'll face perhaps seven different conceptions of the deficiencies in your case and the answers that can be made against you. In those circumstances, the huff and puff of a dramatic presentation won't get you very far.

In an appeal, the matter will most likely have become more complex as it proceeded up the hierarchy and it may have gathered some extra parties, or interveners, all of whom want to attack some feature of your case or, sometimes worse, give it qualified support.

There is the baggage of the history of the litigation – the matter may have gone on for years – with some rulings, even at an interlocutory stage, that were so damaging your client can never truly recover. The stakes are likely to be high – commercially, or politically, or because the appeal is close to the end of the road for an individual.

Maintaining intellectual and forensic control over an appeal requires a capacity for sustained and agile thinking under pressure. This requires real barristerial proficiency of a very high order. It is rare that the theatrical qualities so beloved of the Rumpoles of the world are desirable in the higher courts or, more importantly, effective.

Showmanship gets you little change when you are facing the likes of Justice Gummow or, for that matter, Justice Nettle.

Appearing as a barrister in an appeal requires a sense of calm, and a constant equilibrium, the very antithesis of a testosterone-charged performance. Perhaps in this sense the male Silk was right to say – albeit unwittingly – that women are at home in the higher courts.

Appellate advocacy is a rich and intense forensic experience. If you ever get the chance to appear in an appeal, I urge you to jump at it.

Let me now return to the characteristic that renders women especially suitable for advocacy.

First some caveats. I am not suggesting that all women have this characteristic, nor that men do not. I do not want to enter the gender wars. Further, I am not suggesting that there is a biological basis for this characteristic – it may well be a social construct. But on the basis of my honest empirical observations of women it seems to me that women *typically exhibit a capacity to see things from another person's perspective*; that is, a capacity to place themselves in another person's shoes.

I point to this as a cognitive capacity. I am not drawing on emotional qualities of sympathy or compassion – rather, I am speaking of the cognitive capacity to understand the way in which someone else might be perceiving a state of affairs, how it will affect them, what consequences will flow to them, what perspective they have.

In my opinion, the ability to see things from another person's perspective gives rise to three qualities that are necessary to be a good barrister:

The first attribute is a capacity to see where the interests of your client lie – to see the litigation from your client’s perspective. In a multi-party matter, including a Royal Commission, this may involve playing a major part and summoning the intensity of a Martha Costello, or, closer to home, a Rachel Doyle, or it may involve adopting a more conciliatory position. A woman who understands the interests of her client is likely to be able to choose successfully between the variety of possible approaches, because she knows what it is the client wants from the matter.

Genuinely understanding your client’s case means that the client’s interests are put first, as they should be, and other motivations are kept in check, including any desire for personal showmanship, or the desire to establish oneself as a major player at the Bar, or to create, or meet, an expectation that one will dominate the case if one is briefed in it. Recognising that there are a variety of approaches to any matter, and that the choice must reflect what furthers the interests of the client, is critical.

The best barristers – male and female - are aware of this.

The second quality that flows from being able to see a matter from another’s perspective is a capacity to identify the strengths of your opponent’s case.

This requires an understanding of how your opponent and their client see the matter.

Until you have fully absorbed how it is your opponent is resisting your claim, or why they consider their claim has genuine prospects of success, then, in my book, you have not fully understood your own case.

Their strengths are your weaknesses.

Once you understand the weaknesses in your own case, you can start repairing them and your case will be that much the stronger.

This may seem like a very basic proposition but the failure to absorb it is what leads barristers in court to make the fatal mistake of overstating their case, or to declare that

the merits of their own case are so obvious or overwhelming that they barely require argument. To consider that showmanship is a pre-requisite to effective advocacy is to fall into precisely this mistake. It is a mistake women can readily avoid.

The failure to understand the merits – whatever they may be – of your opponent's case can also lead to a scornful approach towards the other side, sometime verging on hostility. It leads, in the Court of Appeal, to failures by the parties even to arrive at an agreed summary of the core facts, creating a most unwanted impression that there is no more than a street fight before the Court.

It also leads to failures by the parties to arrive at a settlement in circumstances where that is clearly in both their interests.

In addition, identifying the strengths of your opponent's case means one can identify precisely where the issues in dispute lie.

Understanding the force of a concession can lead to a much more effective use of court time.

It is not unusual in the Court of Appeal for a barrister to spend some considerable time developing a well-crafted set of submissions on a matter that is not contested. When we ask sweetly – and sometimes not so sweetly – 'That issue is not in dispute, is it Mr Bloggs?' – we are almost invariably met with the response 'No it's not, your Honours' followed by another 20 minutes of submissions on the same uncontested issue, just to ensure a beautifully crafted point does not go to waste.

Understanding the other side's case, as women have the capacity to do, means that one's advocacy is targeted exactly where it should be – at those issues which are in dispute and which the Court has to adjudicate upon.

The third area is one where the capacity to see one's own case from another perspective is perhaps the most important. This is the interaction a barrister has with the Court.

It is axiomatic that the role of a barrister is to persuade.

That is what solicitors pay a barrister to do and what a client expects of the person they have put their faith in.

An ability to persuade depends upon being able to read the reaction of the Bench to the evidence you rely upon, and to the submissions you are making.

Most importantly, it requires barristers to persuade the Bench to adopt the perspective they want them to adopt. Put shortly, as a barrister, you want the Bench to see the dispute through your client's eyes.

That doesn't require denunciation of your opponent or a display of entertaining theatrics – almost invariably counter-productive. Rather, it requires an understanding of where the Bench is coming from, identifying what is troubling them about your case and meeting that with precision. Reading your bench is a skill which is built upon a sophisticated ability to put yourself in another's shoes. It is exactly the same quality which is needed to read and persuade a jury.

These three qualities, understanding where the interests of your client lie, identifying the strengths of your opponent's case and the scope of the issues in contest, and reading your Bench, all flow from a characteristic which women typically possess. They render women especially suitable to be barristers – and to be amongst the best of them.

This should come as no surprise. Historically the common law was considered a woman. Justice and wisdom too were traditionally represented as women.

President Maxwell, at an awards dinner this year, commented that traditionally the common law is seen as a woman and her proper title is 'Our Lady of the Common Law'. Our Lady has been heralded throughout history as an antidote to arbitrary rule, requiring those who serve in her name to apply the law without fear or favour.

Sir Frederick Pollock, in his 1911 lectures collectively entitled 'The Genius of the Common Law', described Our Lady of the Common Law as blind to differences in power or status. He said:²

Our lady does not, in truth, care much by what name the chief magistrate is called, whether his office is elective or hereditary, whether he has much active discretion of his own as the President of the United States or as little as a modern King of Great Britain. What she does care for is that government, whatever its forms, shall be lawful and not arbitrary ... She looks for trusty servants who will stand by her in the day of need. She demands fearless and independent judges drawn from a fearless and independent bar.

It is no accident that the abstract conceptions of Justice and the Law are, when personalised, female. Whether history saw it in quite this way or not, the characteristic that I consider to be typically exhibited by women actually confers on them a practical advantage.

I hope you see why to me Martha Costello is not fictional. I know that many like her, and many who will grow to be like her, are standing in this room.

Finally, let me say to my contradictor something he would not wish to hear. It is important that more and more barristers are women, for, indeed, a *woman's place is at the Bar*.

² Sir Frederick Pollock, *The Genius of the Common Law* (New York: Columbia University Press, 1912) Chapter IV: Enemy in the Gate.