

# 1

## Low-level Lawyer

### About my clients

I'm sitting in the interview room outside Court 3. It's a bare cubicle with a table and a couple of chairs. Facing me across the table sits my client Darren. He's a likeable hoon with a boyish grin and hair as if he's been through a wind tunnel. He lounges back in his chair, professing not to know anything about the case against him. I've got a copy of the allegations in front of me and offer to read them to him.

'Go for it,' he says. 'What are they alleging this time?'

I read aloud: '*The accused forced the sliding door using a screwdriver ...*'

'That's bullshit,' he says. His expression is a mix of bravado and incredulity.

'... and entered the study.'

'Is that what they say? It's bullshit!'

'*He ransacked the drawers and removed a wallet containing \$400, a portable disc drive and a set of Bose headphones.*'

'Crap.'

'*He placed them in a grey backpack.*'

'Complete crap!'

'*He started to disconnect the computer from the monitor.*'

'It's all bullshit! Where's their witnesses?'

'They won't need witnesses,' I say. 'It's all on security video.'

'Fuck, is it?'

'Afraid so.'

Darren goes quiet, then shrugs cheerfully. 'Okay, maybe I done it after all.'

So begins my working day.

I'm a barrister who specialises in criminal law. I represent people charged with committing crimes and I go to court to defend them. Mainly, I appear in Magistrates' Courts, which form the bottom rung of our legal system.

My clients aren't the high achievers of the criminal world. They don't commit murders or billion-dollar company frauds; in any event stuff like that is way beyond my expertise. To run those sorts of cases you need to be a real high-flyer, a Queen's Counsel\* – which is like a black belt in law.

A few of my snootier colleagues disdain the Magistrates' Court as some sort of sheltered workshop for barristers. I don't agree. Lowly as Magistrates' Courts may be, they're where the vast majority of Australia's criminal cases are heard. They're where most people who've had a brush with the law end up, and where even the most hardened crims generally began their careers.

My cases don't go on appeal to the High Court. They don't make headlines. To some onlookers they may seem inconsequential. Not to my clients, though, and not to me.

My court work gives me a unique opportunity to observe human behaviour. The people I deal with are people under pressure; they're either contesting their cases or answering for their failings – for their dishonesty, violence, carelessness and lack of self-control. Their cases are full of human interest. This book was written because I wanted to record and share what I've spent much of my working life doing.

Who are my clients then, and what are they like? The answer is that in many ways they're just ordinary people like you and me. During World War I the philosopher Bertrand Russell was sent to jail for opposing the war and spent six months locked up with common criminals. In his opinion his fellow prisoners were no worse morally than the public at large; they were just less intelligent, as proved by their having been caught.

Yet others of my clients *are* different from the rest of us. While you and I are at work, this group are still in bed. They think people

\* Also termed an SC, or Senior Counsel. The two are the same; QC is the term the monarchists prefer.

who work for their living are freakish goody-goodies. They're too busy to have a job themselves; they have 'issues' instead. They have 'a lot going on' in their lives which preoccupy them to the exclusion of things like holding down a job, obeying the law or getting up in the morning.

Unlike us, clients like these have a circle of acquaintances who offer them lifts in stolen cars, lend them dodgy mobile phones and borrow their ID to sell someone else's digital camera at Cash Converters.

Curiously, they rarely know each other's names – not when speaking to the police, at any rate. The best they can offer is a nickname or two: Plugger, Wingnut, Corky or Animal (not *the* Animal, just Animal). Surnames are out of the question. So are addresses; often they don't even know their own. 'Sorry, Sergeant, can't remember the street name, I've only lived there six months. I just know how to get home.'

Events are mostly beyond their control. Things just happen to them. They're always on the receiving end, tossed like corks on the ocean of life. Their whole lives are spent being in the wrong place at the wrong time.

As they walk past car yards late at night, chain-wire fences come unravelled. Gaps appear, just wide enough for a bloke to wriggle through. Windows turn out to be unlocked. Factory doors pop open of their own accord. The clients take a peep inside, just out of curiosity. Who wouldn't?

Some of my clients make a habit of finding number plates by the side of the road. On the spur of the moment they attach them to their own unregistered cars, then fill up with petrol and forget to pay. They come across bags of jewellery and foreign currency on nature strips and form every intention of handing them in to their nearest police station. Somehow, though, weeks or months pass and the cops pay them a visit before they've got around to it.

I appeared for a fellow once who was caught at 3 a.m. by the roadside, standing next to a locked office safe weighing a quarter of a ton. He'd noticed a carload of strangers struggling to move it out of the path of traffic, and lent them a hand. Just being a Good Samaritan he was, but the others left suddenly when they noticed a blue light approaching.

Strange things like this happen all the time to some of my clients. How did the safe make its way onto the road in the first place? A mystery. Truly, their lives are full of the inexplicable. Even the bloke with drugs up his rectum said they weren't his and he didn't know how they'd got there!

Occasionally, my clients have second thoughts. They realise they're doing the wrong thing and try to distance themselves. One bloke was pinching an outboard motor from someone's ute when he had a change of heart. Yes, his conscience got the better of him and he was in the act of putting the outboard back when the police turned up. In this scenario 'conscience' means that inner voice telling him he was about to be caught.

There's one thing that does apply consistently to my clients: they're selective in what they tell me. They draw my attention to whatever favours their case but leave me to find out the adverse things myself. These days police interviews are recorded on disc and the accused is given a copy. If the fellow has lost his disc or 'forgotten' to give it to me, it's a sure bet that what's on it is unhelpful. Clients turn up protesting their innocence when they've already confessed to everything on the disc.

While they do seek my advice, many of my clients think they know better than I do. One bloke was facing a mandatory jail sentence but in his opinion he could get a good behaviour bond. 'The police say I can get a bond,' he insisted.

'Well, you can't.'

'The police say the judges can let me off. They can change the law.'

'Sorry, mate, but they can't. I'm telling you.'

'My mother's checked it all out. She should know, she works at Craigieburn Police Station.'

'In what capacity?' I ask.

'She's the cleaner.'

You may have noticed my use of the masculine pronouns 'he' and 'him' in referring to my clients. I'm not being sexist, just accurate. Like airline pilots and civil engineers, the majority of law-breakers are males. According to the statistics, women form only about 18 per cent of criminal offenders. A similar gender

imbalance used to apply to judges and magistrates, but not any more. The number of male and female judicial officers is now about equal; indeed, in Victoria female magistrates currently outnumber males.

Among ourselves, we lawyers abbreviate the word ‘magistrate’ to something we pronounce ‘madge-oh’. I use the word in this book though there’s no way to write it without breaking the rules of English spelling. The best I can manage is to write it as ‘mago’.

I hope what follows doesn’t seem cynical. I hope, too, that it won’t wholly undermine the mystique of the legal profession. Lawyers are not as arrogant, devious and money-grubbing as people believe. And lest these pages suggest otherwise, many lawyers stick up for the underdog. Many defend people’s civil liberties and human rights, and strive to reform bad laws. Many give their time and skill free of charge to help the disadvantaged. I do so unintentionally when my clients fail to pay me.

Finally, I should mention that what passes between a client and his barrister is privileged, which means it’s private and confidential. While everything I recount in this book is true and actually happened, to preserve that confidentiality no names in this book are true ones. I have also changed places, times, dates, sometimes descriptions and occasionally gender. If you think you recognise yourself – or someone you know – in these pages, you are mistaken.

Apart from those who have consented, the only person identifiable in this book is me.

## 2

### Copping it Sweet

#### Pleas of guilty

Many people in the wider community are interested in the legal system. Those who know I'm a barrister\* give me the benefit of their opinions. Some tell me society's ills are all the fault of the legal system. Most tell me sentences are too lenient and harangue me about the latest crime wave as reported in the *Herald Sun*.

It turns out, though, that a lot of these armchair experts have never actually been in a court. The only courtroom they've seen is the one on 'Judge Judy' on Channel 10. For their benefit, then, here's what a Magistrates' Court is like.

A panelled desk runs the full width of the room. The polished timber looks expensive and the trim is brushed aluminium. Sometimes there's even smoked glass in the decor. If it wasn't for the state crest on the back wall, you'd think it was the counter of some fancy wine bar. But that's no friendly barman sitting up there, nor an obliging barmaid. No, that stern-faced figure is a magistrate and he or she has the power to send you away for anything up to five years.

The courtroom's hushed, like churches used to be. A name is called and a young bloke slouches to the front row of seats. His jacket's open and the slogan on his T-shirt shows: it reads 'Born to be Pissed'. His lawyer, in dark suit and conservative tie, advances to the bar-table and announces his appearance. Let's say his name is Cox (mainly because it is).

\* Solicitors and barristers are both lawyers, but barristers specialise in court work. Many solicitors appear regularly in court but they do other legal work as well – drawing wills and contracts, transferring land, etc. The distinction is something like that between a medical GP and a specialist.

‘Thank you, Mr Cox,’ says the mago. She knows Cox’s name because it’s been entered on the court’s computer. Besides, he’s appeared before her dozens, if not a hundred times, usually saying pretty much what he’s about to say today.

The mago studies her computer screen. ‘Five charges,’ she says, glancing at the police prosecutor. ‘All proceeding?’

The prosecutor is female too. She sits on the right, the side nearest the witness box. Today she’s handling sixty cases and she’s dragged the briefs of evidence into court in a black-wheeled suitcase so big she’d have to pay excess baggage to get it onto a plane. She’s arranged the briefs in rows and they cover her end of the table like a big, bumpy tablecloth. She runs her fingers across them and finds the right brief. She glances at the cover sheet. ‘Charge 4 to be withdrawn, Your Honour,’ she says.

Charge 4 is resisting police. It’s coming out because charge 3, assaulting police, encompasses the resistance as well. That’s how it works: overlapping charges are withdrawn or multiple charges rolled into one. Police methodology deems a crime solved once an arrest is made, so it doesn’t matter that twenty charges are reduced to one, or even that the accused is found not guilty. According to law enforcement records it’s still twenty crimes solved! No wonder those police stats look good when they want them to.

‘Charge 4 is struck out,’ says the mago. ‘The rest?’

‘Pleas of guilty, Your Honour,’ sighs Cox sadly.

This is called the Mention Court. It’s for those who are pleading guilty. No case here should take longer than ten minutes. It’s like the express queue at the supermarket.

The procedure is this. The prosecutor reads an agreed summary of what happened. The mago pronounces the charges proven and, if the accused has prior convictions, they’re read aloud or handed up. Then the accused or his counsel makes a plea for leniency and the magistrate imposes a sentence. It’s how most criminal charges are dealt with. In the Magistrates’ Court, about 95 per cent of accused persons plead guilty. There’s a good reason for this: most of them *are* guilty.

The police summary is written by the informant, the police officer who laid the charges. It’s supposed to be a fair account of

how the accused broke the law. If the summary isn't fair and the accused disputes it, the case gets adjourned to a later date and the witnesses have to come and give evidence.

Now nobody wants that: not the informant who's got other work to do and isn't even here today, nor the prosecutor who's got her other 59 cases to get through, nor the accused, who's owning up and wants to put the whole business behind him. Not even the magistrate, who might be able to squeeze in some shopping if the list finishes early. So everyone has an interest in the summary being fair and balanced. It gives the accused's lawyer scope to negotiate a few changes.

Today's summary is typical. In its original form it went like this.

At 11.15 p.m. on 18 July police were called to a disturbance in Reserve Road, Bundoora. The accused was in the company of four other youths and threw an empty stubby onto the roadway where it shattered. When spoken to by the informant, he replied, 'Why don't you fuck off? You're just a prick.' The accused was cautioned about his language and replied, 'Fuck off!'

The accused was unsteady on his feet, his speech was slurred, his eyes were glazed and he smelt strongly of intoxicating liquor. The informant formed the opinion he was drunk.

Without warning the accused swung a punch at the informant which failed to connect. Other police in attendance then attempted to restrain the accused, who struggled violently. Before he was subdued and handcuffed, the accused struck numerous blows with his clenched fists. He also kicked Senior Constable Murdoch on the left leg causing him extreme pain.

During this whole time he continued to use offensive language in a loud voice, including such expressions as 'You're dead, cunt', 'Fuck off' and 'Fucking pigs'. The accused was conveyed to Heidelberg Police Station

where he was lodged in the cells for four hours.

Asked his reasons for committing the offences, the accused replied:

For offensive language: 'Fuck off.'

Drunk in a public place: 'You've got to be joking.'

Assaulting police: 'You cunts assaulted me.'

A few days earlier, Coxy had to read through this summary and thought it was a bit one-sided. He arranged a case conference with the prosecutors' office. 'Look here,' he said, 'my bloke denies smashing the bottle; he reckons it was one of the other louts.' The prosecutor was dubious, but Cox had a point. After all, the accused wasn't charged with smashing the bottle; why should the summary say he did? So the wording was changed to read: 'A bottle was broken by one of those present.' Every little helps.

Then there was the bit about Senior Constable Murdoch's pain. In written summaries police always feel 'extreme pain' whether they receive a thump on the head or a slap on the back. There was no mention of the copper seeking medical treatment, nor details of his injuries. So 'extreme pain' gets deleted.

'And what about this offensive language?' asked Cox. 'My bloke was mouthing off, sure, but do you have to keep repeating it? Can't we moderate that part a bit? One "Fuck off" is enough, surely?'

By the time Coxy finished negotiating, the summary wasn't nearly as lurid. Toning it down like this is always worthwhile. Indeed, a defence lawyer who quibbles long enough can get dramatic improvements. Occasionally I've virtually written my own summary after the police have lost interest.

I once appeared for a parent involved in a fracas at a school council meeting. The internal politics had been simmering for a long time and one evening tensions came to a head. My man had a wrestling match with a female council member and the police summary was a classic. It had him rolling around the floor with the woman, shouting obscenities and ripping out tufts of her hair.

Now you can't always tell from appearances but my client was a bantam-weight who looked as mild and inoffensive as they come. He told me his opponent was twice his size and had got him in a

stranglehold. He said he would have been a goner if the treasurer and vice-president hadn't come to his rescue. He conceded his language was on the strong side, but said hers was just as bad, if not worse.

What with the political in-fighting and the factions taking sides, the cops were sick of the whole incident. And, of course, nobody wanted bad publicity for the school. After lengthy negotiation I got the summary amended so the brawl became a 'disagreement', the obscene language became 'disparaging remarks' and the violent struggle was described as a 'brief scuffle'. Lucky the English language is so rich in synonyms.

Today's example, though, even in its modified form, doesn't sound too flash. 'Is the summary accepted?' asks the magistrate and Cox nods solemnly. Shortly he'll be assuring the court his client actually holds the police in high esteem and deeply regrets his conduct on the night.

Generally, evidence before a court has to be given on oath. Pleas of guilty are an exception. The police summary isn't on oath and is sometimes taken with a grain of salt. The accused's submissions aren't on oath either. Sometimes they're taken with several grains of salt.

So Cox stands to present his plea in mitigation. Courts take a dim view of assaults on police, and anyone with a previous conviction for violence might even be looking at a short holiday for an incident like this. Cox's job is to come up with a reason not to send this bloke to jail.

He tells the court of his client's personal background: good family, schooling to Year 10, started an apprenticeship – the usual stuff. The bloke's between jobs at the moment (they often are). He's got one lined up, starting next week (they often have) but nothing in writing from the new employer (they never do). I notice the kid's jacket is buttoned up now: the T-shirt doesn't show. Good move.

Another good move: the kid's mum is there with him, looking worried. A parent's presence is imperative for a young offender because you want the court to see there's some adult influence and

concern. And it's always harder for a mago to send a kid to jail when his mum's sitting beside him on the point of shedding tears. I remember one young client of mine who was on bad terms with his parents. They were sick to death of his escapades and refused to come to court. He asked me, 'Can I bring along another lady and we just say she's my mother?'

Cox offers his client's explanation of how the incident happened. There are no surprises here. For street offences like this, an accused's excuses usually include any or all of the following:

- (a) he was led astray by bad company;
- (b) it was out of character;
- (c) it happened on the spur of the moment;
- (d) he panicked;
- (e) he'd had too much to drink.

Drink plays a role in a lot of offending and of course it's no excuse. Nobody rammed a funnel down this kid's throat and forced him to ingest those fourteen stubbies and the bourbon and Coke. He's the one who got himself into that condition. A man, sober, has to answer for himself drunk.

But Coxy's had the kid do his homework. The fellow has curbed his drinking and there's a letter from a drug and alcohol counsellor about the progress he's made. His mum is full of praise too; the boy's pulled his socks up and even loads the dishwasher these days.

The other important thing is to give the background to the incident. Coxy can't contradict the summary but he can offer additional facts which help account for the accused's actions. For instance, this lad claims he didn't mean to resist; he only started struggling after he'd had his jugular squeezed by a policeman's hairy hand.

But Coxy offers something even better, which puts the offending into a new perspective. The kid's girlfriend had just announced she was turning lesbian and breaking up with him! That very night! Heart-breaking it was; no wonder he sought solace in drink. The girlfriend was the one driving and she took off in the car without him, leaving him with a gang of roughnecks he'd never met before.

By the way, he's got a new girlfriend now – very supportive, good influence, steadied him right down (no lesbian tendencies, one hopes).

So this young man gets comfortably over the line. A stern word from the mago but no jail. Community work and testing and treatment for alcohol problems. Coxy's earned his fee.

The plea of guilty was vital too. Owning up indicates remorse and entitles an accused to a discount on his sentence. Of course, remorse comes in two flavours: there's 'Sorry I did it' and there's 'Sorry I got caught'. But even when it's the second kind, an accused still receives a lighter sentence. Why? Because without an incentive to plead guilty, an accused might as well contest his charges. After all, he might win. He'd have nothing to lose by fighting every step of the way and we'd need about six times as many courts as we've got. Whatever the motivation, a guilty plea saves the community time and expense, and is something to be encouraged. The system depends on people copping it sweet.

Criminal barristers, then, spend a lot of time conjuring up extenuating circumstances. There's always something to be said for a guilty person and the barrister's job is to find it. A lousy upbringing? That's a reason for leniency: the accused has had to struggle to try and be a good citizen. A good upbringing? That justifies leniency too: the accused's already a decent citizen, he's just slipped up.

Accused persons are entitled to rely on their good character. They can draw on their credit in the community – if they've accumulated any. It's something the advocate always explores, though sometimes it's hard work.

'Have you made any contribution to the community?' I ask a client. I can see from his appearance he won't be a member of Rotary or the Lions Club.

'Like what?'

'Belong to the CFA? Help out at the Lost Dogs' Home?'

'Nuh.'

'Collect for the Salvos?'

'Nuh.'

'You a blood donor?'

‘Nuh.’

‘Rescued anyone from a burning building?’ I try that one when I’m running out of ideas.

But this bloke’s actually got a job. ‘I pay my taxes,’ he says, ‘and I put my empties out for recycling.’ Excellent! An upstanding citizen after all.

One important point: the advocate is there to present the facts, not to manufacture them. Often, of course, clients have an excuse for everything and won’t shut up. But there’s an opposite group who won’t volunteer anything. Some are so unforthcoming it’s like trying to draw teeth.

A colleague tells of a tight-lipped client charged with driving while disqualified. With his prior convictions, he’s at risk of going to jail, but he won’t offer any explanation at all.

The barrister says, ‘We’ve got to tell the court something about the circumstances.’

‘How do you mean?’ asks the client.

‘Why you were driving that day? Where you were going?’

‘Can’t remember.’

‘Just give me something to go on.’

‘Like what?’

The barrister remembers a recent example. He says, ‘The other day I had a client on the same charge as you. His missus was away and he was at home with the kids. All of a sudden the youngest one took sick with an asthma attack. The kid was struggling to breathe and the bloke couldn’t find the Ventolin. It was five minutes till the chemist closed and he figured he’d just have to take a chance and drive.’

The client listens in silence then gives a nod. ‘Come to think of it, mate, that’s exactly the way it happened.’