

Otago Bar Dinner

Hon Justice Stephen Kós

Dunedin Club, 17 August 2018

President John Farrow, Your Honours, members of the inner and outer bars

I drew the short straw to speak tonight. As I was holding the straws, it's yet another presidential management failure to add to the list. But the truth is it's a real pleasure to speak to you tonight. The first thing I wish to say - on behalf Justices French & Miller, but also on behalf of all members of my Court – is thank you for the warmth of your welcome. We really are delighted to be back, and to be among you.

Mr Andersen: Thank you for the generosity of your remarks. It is always a pleasure to hear from you, here or in court. That pleasure was enhanced this week by an exemplary cross-examination.

Judge Crosbie: Thank you too my old friend for your kind and thoughtful remarks, and for all you have done to accommodate my court this week. It is always a pleasure to have your work before us, Judge, demonstrating all the workings of an original mind.

It must be said that our trip to Dunedin began slightly unpromisingly. First, the flight attendant wished us an enjoyable flight *to Auckland*. Then French J knocked over the takeaway coffee cup I'd accidentally left in the overhead locker of the plane as I was getting in to my seat. There was a squeak of dismay and she produced the offending, dripping item to the cabin attendant, saying that "some person had left a coffee cup in the locker..." The tone left no doubt that the person was an utter imbecile.

At this point I confronted one of those moral quandaries life offers from time to time. Did I immediately confess responsibility, or did I take a sudden, urgent interest in the baggage handling procedures outside the window? I decline to be precise about the course I took, as I feel it doesn't reflect well on me.

It was sheer forgetfulness, and that comes to us all in our 50s. Bob Fisher tells a lovely story about his barrister colleague, the late Roger Fenton – editor of *Garrow and Fenton on Personal Property*. Roger always took the bus from Herne Bay into his chambers in Auckland's High Street. But one day – perhaps it had rained – he took the family car. That evening after work, following the habit of a lifetime, he took the bus home. Said Mrs Fenton, "Where's the car, Roger?" So Roger took the bus back in to town to collect the car. But he stopped in at his chambers for a few minutes to do a bit more work on the textbook. An hour later he came out again. And caught the bus home...

Well we are back here – after a gap of exactly 60 years – again conducting regular sittings of the Court of Appeal in Dunedin. We never forgot you, and you never wanted to lose us. You fought harder than anyone else against centralisation. In the late 1940s Otago was the branch that led opposition to the creation of a permanent Court. Only in 1956 did consensus emerge for a national court based in Wellington. A reform, it may be observed, the Wellington branch had led. The Court, based permanently in Wellington from 1958, did not sit again in Dunedin until 1982.

In this century the Court started sitting in Auckland. Half the Court's workload came from there, after all – although the heavyweight commercial work has always been done in Wellington where the permanent Court is concentrated. About a decade ago a permanent hearing centre was leased in a small Queens Street commercial building. The entrance is via a food court. I am only grateful the Ministry forgot that fact when it built the Christchurch Justice Precinct.

But we are a national court. If we travel to Auckland, how can we not do so to the South Island also? As soon as Christchurch and Dunedin had courts that could cope with us, we resolved to come. As far as Dunedin was concerned, I made that decision on 26 January when I attended the re-opening of the

historic courthouse. We sat again in Christchurch in April, and now we are here in Dunedin. Henceforth we will come to Christchurch twice a year, and Dunedin once.

The last time the CA sat here was on 7 April 2004. They came for a day, and (I am told) brought their appeals from other districts only. That strikes me as rather like going to a bar dinner with a Tupperware container of sausage rolls. We have not needed a Tupperware container. Not least because we have been so generously hosted – by Knox College, the Law Faculty, our fellow Dunedin Judges (who have an odd proclivity for brightly iced cakes, and for donuts) and now by you here tonight.

And we brought no Tupperware container because we have had more than enough work from Dunedin. Two and a half of the four days have been Otago appeals. Best of all, it has been very interesting, demanding work, well-argued. We conducted three seminars with the Otago Law School. One – for staff and graduate students – concerned the role of an intermediate appellate court in New Zealand. The other two we did for students in criminal justice and evidence courses. And we did them with your help. We had them in the morning sessions on Wednesday and Thursday – sitting in the jury and press boxes and at the spare counsel's table. Together with counsel we explained the appeals they were to see and what the issues they were going to hear argued. We've had good feedback about it. We think it is important law students spend time watching the courts. Of course the Otago Law Faculty used to be housed in the courthouse here.

But one thing we have noticed is this: the courthouse here is an integral part of the community and the profession. The doors at the back are constantly opening and practitioners, students and the public pop in for a while. This seems different to our experience in other places. But it is the civic role a courthouse should play. Since the time of the Romans, the courts have been a place of public debate. That debate is richer and better informed if the community attends, and watches.

Next year we will be back in late May, in the week of Otago University's sesquicentennial celebrations. The bench will be Justices French, Miller and Lang – all members of the same graduating class at Otago.

Alas, I am not an Otago graduate. Although I did spend a lot of time here at Winter Tournaments. And also because I had two girlfriends in Dunedin. I hasten to say, not at the same time. But I think the *Otago Daily Times* got precedent right this week when it reported that I "hailed from Mosgiel" – and then reported that the other two Judges were Otago graduates, lumping them together. It is clear that hailing from Mosgiel *trumps* graduating from Otago. Perhaps the editor is from the Taieri plains.

All your bench are Otago/Southlanders. Me from Mosgiel, French J from Invercargill, and Miller J is from Balclutha. The next most senior member of the Court, Cooper J, was also born in Invercargill. Miller J was unkind enough at morning tea (donuts) to suggest that "hailing from Mosgiel" implied a rude sort of gesture. He went on to say Mosgiel was a bogan town. At that point Coroner Robinson pointed out that he too came from Mosgiel. "What sort of car do you drive?" asked Miller J. The answer disappointed him. Not enough cylinders.

I left Mosgiel at 3 years of age, though I still have a few hazy memories of the place. On a recent trip back to Dunedin I diverted at Saddle Hill and drove my rather startled wife on an impromptu trip into Mosgiel, looking for the house in Green Street I grew up in. It's now the kindergarten, and Coroner Robinson's children went there. The ride-on cars in the play area are perfectly ordinary and don't have ostentatious fins or any other obvious pimping.

My old house proved to be the highlight of the visit to Mosgiel. We passed on going to Wal's Plant and Fun Land and instead I drove through the city and on out to Seacliff. You might ask why. Well, as Judge Crosbie noted, I'm a frustrated architect. Seacliff's a place that has always fascinated me. There's absolutely nothing to see there – and that's the whole point. It's an extraordinary example of a terrible professional fall from grace; an utter disaster really. Failure is always so much more interesting than success. You are the locals, so you know what happened and I can be brief.

Robert Lawson, the finest and most fashionable architect in the city, architect of First Church, Knox Church, Otago Boys High, Larnach Castle and those lovely classical white stone bank buildings in Oamaru, designed the new gothic Seacliff Lunatic Asylum in the 1880s. It was huge. It looked like Walt Disney's Fantasyland Castle. In Norman Ledgerwood's terrific book about Lawson there's a fabulous photograph of staff and inmates playing cricket on the great lawn in front of the building.

But Lawson hadn't done his geotech work. The land was mudstone over schist. It was prone to slumping and had done so for years. Like "a giant ball bearing" one expert said. In his enthusiasm Lawson had ignored the risk. The building lasted just three years before a huge slip wrecked the north wing. It was gradually shut down and the last bit was demolished in 1957. And today there is this eerie great lawn – doubled in size without the asylum – on which one senses the presence of ghostly cricket players, bowling large ball bearings.

I sometimes think that one of the great things about being an architect is that by their buildings they can speak long, and loud. We Judges, no matter how bellicose in life, just end up whispering from the pages of dusty law reports. It is the triumph of the tangible.

If Seacliff was a disaster, casting Lawson into silence, your inner city is a triumph. By a canny conspiracy of good fortune followed by bad, and then by good again, you have avoided the depredations of the developers who destroyed Wellington and Auckland. And when good fortune came again, the old buildings were ready for re-occupation. As French J, who now hails from the broken city of Christchurch, observed as we walked through town, your buildings are magnificent.

We are staying in your old Post Office, now restored as a fine hotel. By curious coincidence, the site of your law courts before the present building was erected at the turn of the century. On the walk from the hotel to the Court, starting in Bond Street, and diverting via Dowling Street and Moray Place, past First Church all wreathed in scaffolding, one elegant edifice after emerges, most now looking spruce or ready to become spruce again. (I exclude from this the rather giddy "House of Pleasure", past which we walk. It gaily advertises in large pink letters the fact that it is "Under New Management". I wouldn't myself have thought that it was managerial talents that the Pleasure-seeking punters were after.)

Each lunch time we walk up and down Stuart Street. That was the walk we made in January when we processed from the Town Hall to the Courthouse. It replicated the procession in 1902 for the opening of the new Courthouse. The procession recalled now for the fact that no one would walk with the person now Otago's most famous law graduate, Ethel Benjamin. No one that is until John Gallaway stepped up and stepped out with her. How things have changed. And, bearing recent events in other places in mind, how little they have changed.

Our lunchtime walk takes us past the building at 111 Stuart Street – built in 1928 by the Chief Justice's grandfather-in-law - where poor James Ward was killed by a parcel bomb on 5 February 1962. He wasn't the only New Zealand lawyer to be so favoured. In July 1937 Dickie Singer, a rumbustious Auckland criminal barrister, was struck down by a gelignite bomb set off by a trip wire in his garden. Singer survived. No arrest was made in either case, and Ward lies now in Anderson's Bay cemetery with the remains of seven children – six stillborn and a seventh who died at two years. The Ward family were no strangers to tragedy.

And then down Stuart Street to the Courthouse itself. You know the famous photo – the one on the cover of Michael Cullen's fine history of the Otago Branch. The one in which Ethel Benjamin, now redeemed and reinforced by John Gallaway's courtesy and propriety, is now front and centre. She is standing between a benign looking Sir Joshua Williams and a chagrined looking Joseph Ward – the Minister of Finance who pinched the pennies so hard in the construction of the courthouse that he proudly claimed it to be the cheapest courthouse of its kind to be built. Nineteen thousand pounds all found. Bargains have a habit of kicking you in the eye later in life.

The funny thing about that photo – when you look at the names on the back – is that not only is Ethel Benjamin's name not on it, but neither is John Gallaway's. I'd rather hoped to look that fine man in the eye. His son is there, but not him.

One only has to look at the other names to sense the weight Dunedin has brought to the law. Sir Joshua, who looks down on us – still benignly – in our courtroom this week. Sir William Sim, from that fine legal family – a later generation robbed of the Chief Justiceship by political interference – Mr Justice Hosking, Sir Thomas Sidey, the father of daylight saving, Downie Stewart, William McGregor, AS. Adams and his son FB.

But ruling supreme at the front was your then-President, A C Hanlon. Taller than the others, muscular, broad-chested; arms apart and almost akimbo. The cameraman might have quailed beneath the ferocity of his gaze. New Zealand's Edward Marshall Hall. I don't want to talk about his successes, because you know those already. Nor his rare failure in the Minnie Dean trial when Sir Joshua less benignly told the jury manslaughter would be a weak-kneed compromise. These are your stories.

But I bought and read Hanlon's memoir, *Random Recollections*, when I was 22, and it was these words about *failure* that always stayed with me – because they were so very encouraging:

The outlook was hardly inviting. I had no money to buy myself into a partnership, and so had no alternative but to commence practising on my own account. After a lot of searching I found a small vacant room in Eldon Chambers in Princes Street, and I immediately arranged a tenancy. With capital almost nil, the furnishing of the room had for a long time to remain an unsolved problem. From an auction room I bought a plain deal kitchen table, three cane chairs, and a letterpress. I covered the table with oilcloth and purchased an inkstand, pens, pencils, and paper, and laid in a stock of forms of complaint, summonses, and other official documents. These, with my students' law books, comprised my stock in trade and practically the whole of my assets. It remained only to put up a plate bearing my name and profession at the door and then sit down and wait for clients. This I did with more assurance than I can credit at this stage.

The first week went by and then the second without a solitary caller. I was not greatly perturbed then, but when the fifth and the sixth and tenth week passed without a single visitor except the debt collectors who wanted payment for the professional cards I had had published in the *Otago Daily Times*, the *Evening Star*, and the *Tairi Advocate* I began to be worried. My position seemed hopeless, and things went from bad to worse. Three months went by and then four, and still no business and no income. I was now thoroughly daunted, and I think that at times I almost hated the office and all its associations.

Little wonder then that I could not dissemble my eagerness whenever I heard a footstep outside the door. The months dragged hopelessly by, and still boy enough to be moved at their passing, I bade each a melancholy farewell. It came to this, that every time I heard a step I trembled. Would it reach my door? With feverish haste I would fling my largest law book – "Benjamin on Sales" – on to the table, and when the knock came my too studiously casual "Come in" arose from a head buried in the large tome. But it was all to no purpose. My carefully staged scene made no impression, because the caller was always another debt collector. Those confounded cards in the newspapers were still unpaid for, and who knew when the rent of my small room would not be made the subject of similar visits?

The man's talents were not just oral advocacy. And as I say, failure is always so much more interesting than success. In Hanlon's case it was not failure for long. But that so great a career could commence in such abject failure caught my imagination when I first read those words, 37 years ago.

Our visit, this week, has been no failure. You are heirs to a wonderful tradition in the law, and you have exhibited that this week. You live in as fine a city as one could live in. You have just anticipated global warming a little early. But there you are, Dunedin, ahead of the curve yet again. You have rewarded us this week with fascinating and complex issues and fine advocacy. Advocacy we have been able to share with a new generation of lawyers. And you have treated us with wonderful and generous hospitality. We thank you with all our hearts.

Thank you, God bless, and good night.