

***Auckland University Law Review 50th Anniversary
Alumni Dinner Speech***

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Chief Justice, retired judicial colleagues, editors and friends of the Auckland University Law Review:

It is an honour to be asked to speak at this dinner, especially so since this year is the 50th anniversary of the Auckland University Law Review. When they wrote to me, this year's Editors-in-Chief Kayleigh Ansell and Jayden Houghton said that generally previous speakers at the dinner had reflected on their time with the Review and any influence it has had on their careers. When I responded accepting the invitation I indicated that would not do in my case, since I had no involvement whatsoever in the affairs of the Review. I did however write a piece which appeared in the Case Comments section of the 1978 Review.¹ So my admission to this august company hangs on this rather slender thread, of which more later. What follows are simply a few random thoughts prompted by this occasion and arising from my time at the Law School, which was a long time ago. My last year was 1978, so it is almost 40 years on, and some of those to whom I will refer are sadly no longer with us.

The 50th Anniversary tag is itself interesting, because if you check the bound volumes of the Review, at least as they exist in the Auckland High Court Judges' Library, Volume 1(1) was published in 1968. The 50th Anniversary arises because the first volume was preceded by what is called a "Special Issue — May 1967." In that edition, JR Holmes wrote on the fragmentation of Māori land,² Grant Hammond on privacy and the press,³ and John Priestley on personality and status in the womb.⁴ There were also articles on restrictions on overseas investment in New Zealand⁵ and judicial comment on the failure of an accused to give evidence.⁶ This list I think shows that the Law Review began with a focus on practical subject matter, as well as issues of current concern, likely to appeal not only to an academic readership, but more widely to those engaged in the practice of the law.

A debate flares up from time to time in the Court of Appeal about whether our subscription to the Harvard Law Journal should be maintained.

* The Hon Justice Mark Cooper QC, of the Court of Appeal. This speech was given at the 2017 50th anniversary alumni dinner for the Review, hosted on 17 August 2017.

1 Mark Cooper "Case Comment: *Cook Islands Election Petitions (No 2)*" (1978) 3(3) Auckland U L Rev 325.

2 JR Holmes "Fragmentation of Maori Land" [1967] Auckland U L Rev 1.

3 RG Hammond "Privacy and the Press" [1967] Auckland U L Rev 20.

4 JM Priestley "Personality and Status in the Womb" [1967] Auckland U L Rev 33.

5 Peter Neil "Some Restrictions on Overseas Investment in New Zealand" [1967] Auckland U L Rev 53.

6 David AR Williams "Judicial Comment on the Failure of an Accused to Give Evidence" [1967] Auckland U L Rev 69.

One of my colleagues is particularly hot on the subject, asserting that nothing of any practical utility has ever been published in the Harvard Journal. This is a criticism that could not be levelled at its Auckland University counterpart.

I mentioned the 1967 article on “Judicial Comment on the Failure of an Accused to Give Evidence”. The Chief Justice referred to this this afternoon. The author of that article was David — now, Sir David, Williams, and the article was prompted by the enactment of the Crimes Amendment Act 1966, which for the first time contemplated comment by a judge on the fact that a person charged with an offence did not give evidence at the trial. The tenor of the article was critical of the way in which that reform had been dealt with in the legislative process and of the fact that arguments that may have been advanced against the change had not been able to be marshalled given its swift passage through Parliament.⁷ The author said it was disturbing that the New Zealand Law Society’s submissions were very hastily prepared, as unfortunately the Law Society had no prior notice of what was proposed before the introduction of the Bill.⁸ He also commented on what he referred to as a low standard of debate in the House of Representatives, singling out for special mention one Parliamentary contribution in the following terms:⁹

I support the proposals in the Bill. Let Members on both sides of the House look at it with the utmost care, as we all will, but why on earth should we help so much these people who are criminals? Everybody knows they are, and they are able to get away with crime because of some silly provision in the law.

Prior to his entry into Parliament, Sir Leslie Munro had a remarkable career in many respects. Between 1938 and 1951 he was the Dean of the Law Faculty at this University. He managed to combine that with being editor of the Herald between 1942 and 1951, and prior to that he was President of the Auckland District Law Society between 1936 and 1938. Subsequently, he became New Zealand’s representative at the United Nations and rose to be the President of the General Assembly of the United Nations. It was Sir Leslie who was responsible for the remarks criticised in the Williams article. Earlier in his speech he had reported his concern, shared he claimed by some judges and practitioners, about what he described as “this tender anxiety to help people who are committing crimes”.¹⁰ He seemed to overlook the fact that the legislative reform was of course one which related to the trial of an accused person whose guilt was yet to be determined. I once practised with a partner of an older generation whose firmly expressed opinion was that the criminal trial process was a waste of time and money, but it is disconcerting

7 At 70.

8 At 70, citing New Zealand Law Society “Submissions to the Statutes Revision Committee on the Crimes Amendment Bill 1966”.

9 At 70, citing (1966) 346 NZPD 493.

10 (1966) 346 NZPD 493.

to see a former Dean of the Law School espousing views from a similar intellectual stable.

The Law School that I entered was led by a Dean in Jack Northey, with a far sounder grasp of principle; a great all-rounder, who did much to create a Law School of outstanding quality and reputation, and in particular contributed greatly to the development of administrative law in New Zealand. It is interesting to read the preface which appeared at the beginning of the 1968 Review in which the Dean wrote:¹¹

The first issue of this *Review* appeared in May 1967. It was so well received, within and outside the University, that those responsible for the second issue decided to publish it in a volume comparable with *The New Zealand Universities Law Review*. I am sure that their confidence in the future of the *Review* will be justified. The Editors and Business Manager have again demonstrated that an undergraduate publication can achieve high standards, both in content and presentation. Those responsible are to be congratulated.

In the 1970s, successive editors were to acknowledge the support and assistance received from the Dean and looking back I am sure that his encouragement and guiding hand must have been major reasons for its success. The late Michael Crew, whose life was to be tragically cut short just as his stature as an advocate was riding high, wrote at the outset of the 1976 edition: “My thanks, like those of all previous Editors, must go to Dr Northey for his patient criticism and guidance.”¹²

I can remember in my day hearing the Dean speak about the Review, and saying it would be easy to publish a journal based on the writings of professional academics, whether at the Faculty or by invitation from elsewhere. He said if such a Review were launched, there would be no problem in filling it. But the idea of a Review based on student work was more special, and this is the vision that he and no doubt others on the Faculty fostered.

To an extent that is perhaps difficult to convey to students of today, Jack Northey was a very strong personality who could, on occasions, take on quite a forceful, even fearsome aspect. My own dealings with him got off to a rather unfortunate start before I ever entered the Law School. I had come to Auckland from Whanganui, where I was brought up, as the proud recipient of the Lizzie Rathbone Scholarship for doing well in English and History in the Scholarship exams. But as Whanganui was within the normal catchment of Victoria University, where I was originally intending to study, there was an issue as to whether I could take the Scholarship up. I was summoned to see Dean Northey to receive his pronouncement on that issue. I can remember that day very well. The conversation, to give it a slightly inaccurate connotation, proceeded along these lines: “Ah, Mr Cooper, I see that you and people writing on your behalf think that you are qualified to take up a Lizzie Rathbone Scholarship at the University of Auckland. But

11 Jack Northey “Preface” (1968) 1(1) Auckland U L Rev v at v (emphasis in original).

12 MP Crew “Editorial” (1976) 3(1) Auckland U L Rev xi at xi.

you can't because you didn't go to school in the Auckland province. Carry on." The last was accompanied by a wave of the hand and I left the presence. I wanted to say "well, just asking", but the meeting was emphatically over, before I could say anything.

My University engagement at that stage consisted principally of failing as a first year medical student, and then repeating the first term in the following year (we had three terms a year in those far off days) before deciding to face the inevitable, and give up. I decided to enrol in Law Intermediate. This involved enrolling in both the Faculty of Arts and the Faculty of Law. The former involved an interview with Professor Musgrove, Head of English, who in a kindly and avuncular fashion inquired into my circumstances and wished me well. I then needed to settle matters with the Dean of Law, and once again came into his presence.

Unbeknownst to me, my ability to repeat the first year of medicine (a course with strictly limited numbers) had itself been the subject of legal debate within University circles, and was a matter on which the Dean had been consulted. He told me about that as soon as I entered the room. "Hah", he said, with fire in his eye, "you're the young man who I had to write an opinion about and I concluded that you could not be denied the right to repeat the first year of medicine. And now you've changed your mind!" There was further commentary about the undesirability of conduct such as mine, and the observation was made that "some of the things you students get up to these days make my hair stand on end." A grudging acceptance of my enrolment was eventually given and that was that. Again I remember this encounter vividly, including my own role as an auditor. That is, as the dictionary puts one relevant meaning, as "a hearer, a listener". Perhaps equally apt, the meaning which the Shorter Oxford says is from North America, "auditor-a person who attends a lecture, course etc., without intending to receive credits."

When I made it through Law Intermediate and into the Law School, relations improved somewhat, although there was a minor blip when I had to confess I had not read one of the cases assigned for the Dean's Administrative Law class which he taught, as one of its pioneers, by the Socratic method. However I survived that incident too, albeit not without some difficulty. He said, after a quite significant pause (I think he must have been composing himself) "Well, you won't be able to say that again, will you?"

Another leading exponent of the Socratic method in my time at the Law School was the late and much lamented Richard Sutton, who lectured us in Equity, and spent the first two terms questioning the class about readings in the subject in a pleasantly probing sort of way. I've always thought that Richard, erstwhile NZ Chess champion, was one of the most intelligent people I have met, and his questions were always thought provoking and often penetrating. Memorably, one student who had engaged with him in a back and forth process, eventually asked in a kind of despairing way "Oh, Dr Sutton, why do you always answer one question by

asking another? There was a pause, followed by the characteristic broad grin, and the response: “Do I?”

But these are digressions really. I need to come to Volume No 3, the 1978 issue of the Review. The articles that year continued to combine the academic, and the topical and the practical. There were pieces on marine pollution,¹³ tort liability between persons in contractual relations,¹⁴ the Territorial Sea and Exclusive Economic Zone Act 1977,¹⁵ the use of conditions attached to planning consents,¹⁶ Māori land development¹⁷ and a very lucidly written piece on the proper purposes doctrine by one Paul Heath.¹⁸

My role was as one of those contributing to the case comment section, which also included among others, comment by Alistair Brown¹⁹ (Andrew Brown QC’s younger brother, who later disappeared I think to Switzerland), who wrote about the decision of the Court of Appeal in *Coleman v Myers*,²⁰ and Mike Taggart,²¹ writing outside what was to become his speciality, commenting on a judgment of Lord Denning MR in *Levison v Patent Steam Carpet Cleaning Co Ltd*.²² In that case, the plaintiff had arranged for the defendant to collect a carpet for cleaning. The contract deemed this very expensive carpet, in small print, to have a value of no more than £2 per square foot. Another clause stipulated that all merchandise was accepted at the owner’s risk and recommended that the owner insure. The defendant later admitted that the carpet could not be found, and said that its liability, calculated in accordance with the clause, was limited to £44. The Court of Appeal held that the defendant had failed to discharge the onus of proof that it was not guilty of a fundamental breach and so it could not rely on the limitation clause. In the course of this judgment, Lord Denning anticipated a legislative reform which had been introduced, basing his judgment on a common law doctrine that an exemption or limitation clause should not be given effect if it was unreasonable.²³

In the Auckland Law School, this was heresy. Professor Coote was undoubtedly the country’s leading expert in the field of contract. His reputation was international. He regarded the concept of fundamental breach as an anathema, and lectured us accordingly. On one occasion he shared with

13 HA Versteeg “The International and National Response to the Problems of Marine Pollution” (1978) 3(3) Auckland U L Rev 209.

14 DA Free “Can Parties in Contractual Relations be Liable to Each Other in Tort?” (1978) 3(3) Auckland U L Rev 243.

15 PJ Ridings “Interpretation of the Territorial Sea and Exclusive Economic Zone Act 1977” (1978) 3(3) Auckland U L Rev 261.

16 GJ Thwaite “Use of Conditions Attached to Planning Consents for Non-Predominant Uses” (1978) 3(3) Auckland U L Rev 279.

17 W Galvin “Maori Land Development with Particular Reference to Land Development at Poutu, Northland” (1978) 3(3) Auckland U L Rev 291.

18 P Heath “The Proper Purposes Doctrine — The Law and its Implications” (1978) 3 Auckland U L Rev 308.

19 AS Brown “*Coleman v Myers* — A Strong Case for Restitution?” (1978) 3 Auckland U L Rev 338.

20 *Coleman v Myers (No 2)* [1977] 2 NZLR 420 (CA).

21 MB Taggart “*Levison v Patent Carpet Cleaning Co*” (1978) 3 Auckland U L Rev 330.

22 *Levison v Patent Steam Carpet Cleaning Co* [1978] QB 69 (CA).

23 At 79.

us the results of correspondence on the subject with other members of the English Court of Appeal and apologetic excuses one of them had evidently felt compelled to give about being only newly appointed and much under the influence of the Master of the Rolls when he agreed with Lord Denning in a case involving fundamental breach. That was, as I recall it, the then Scarman LJ. Not a bad scalp.

Perhaps influenced by the professor, Lord Denning's reasoning was excoriated by Mike Taggart in language which did not quite measure up to the more academic detachment he was later to attain (although he did remain pretty forthright). He began by asking the "obvious" question as to whether Lord Denning's proposition that an unreasonable exception clause had no legal effect was supported by precedent.²⁴ He observed that Lord Denning had modestly referred to only one of his several own dicta to support the proposition. And he concluded it was unsupportable in principle. He continued.²⁵

However, it would be to fly in the face of past experience to suggest, because there is no support in contractual principle or precedent for Lord Denning's view (other than his own), that this will hinder its acceptance.

And so the article continued, in critical vein. Mike is another sadly no longer with us, a very great loss.

My own article was about the Cook Islands election petition. I was studying the law about challenging Parliamentary elections for the purposes of my LLB Honours dissertation. I had been intrigued to discover that corrupt and illegal practices were such a common feature of elections in 19th century Britain that there was a large body of case law on the subject. This was evidenced by a specific series of reports, *O'Malley & Hardcastle*, referring to the names of the reporters in the style of those days, devoted exclusively to election cases. These covered the period from 1869 to 1929 and ran to seven volumes.

Successive statutes, both in England and here, have built upon this rich history, but the basic trilogy of corrupt practices, bribery, treating and personation, have their origin in the United Kingdom's Corrupt Practices Prevention Act 1854. In broad terms, if you can think of a way in which an election might be skewed by improper conduct, the English thought of it first.

The Cook Islands election petition concerned a scheme in which Cook Islanders living in New Zealand were flown in to vote at the Cook Islands General Election. Apart from a charge of \$20 per head towards food and drink to be supplied on the journey, the transport was provided free, and a good deal else as well. How was this financed? Sir Albert Henry, the Premier, had entered into an arrangement with an American called Finbar Kenny. Mr Kenny was the principal of the Cook Islands Development Company, which had entered into a partnership with the Government in a

24 At 331.

25 At 332.

joint venture known as the Cook Islands Philatelic and Numismatic Bureau. A company was formed in which all of the members of the Cabinet were shareholders. Then Sir Albert wrote to the Director of the Philatelic Bureau requesting \$327,000 to assist in the financing of a major project for the Cook Islands. That sum was to be regarded by the Philatelic Bureau as an advance to the Government of the Cook Islands against philatelic revenue that would become payable to the Government. In other words, government revenue to be derived from the sale of postage stamps was offered as security for the purposes of funding this grand scheme in which people were flown to the Cook Islands and well treated on the way. It was “treating” on a grand scale.

The Chief Justice of the Cook Islands, a New Zealander, Gavin, later Sir Gavin, Donne determined that this had affected the election, unseated nine of the members who had been elected on Election Day and in each case substituted the candidate from the opposing party.²⁶ The result was to bring down the Government and substitute a new one. I am not aware of any other election case that has resulted in such a spectacular outcome. The Judge observed that after extensive research, he had been unable to find any reported instance in the history of electoral laws of New Zealand, Australia or the United Kingdom, where the corruption was of the magnitude evidenced in that case.²⁷ I used that statement as a snappy opening for my piece.

I enjoyed re-reading that article for the purposes of this speech. I should say add that enjoyment was somewhat tempered by the memory that the diligent editor of that volume, Bill Manning, had to spend quite some time with me in a rather painful yet very necessary editing process.

My dissertation was eventually completed and came to the attention of one Ted Thomas, then leaving Russell McVeagh to embark upon his career at the Bar with a brief from the New Zealand Labour Party in his pocket instructing him to act for one Malcolm Douglas, who had won the seat of Hunua in the 1978 General Election. Malcolm was the more famous Roger’s brother. John Prebble, who was in those days at the Auckland University Law School, yet to defect to Victoria, was my dissertation supervisor. He asked if Ted could have a copy of it and I agreed. I had several meetings with him as the case unfolded, but his efforts were not attended by success, and if you were to ask him he might give an interesting response as to why that was. So far as I know he does not blame my dissertation. I know that John Priestley claims it was due to his involvement on the other side of the case, led by one Paul Temm QC.

In any event, the result of that case ushered into New Zealand politics one Winston Peters, who became the newly minted National member for Hunua replacing Malcolm Douglas. And now we find ourselves in the middle of another election campaign and who knows what role Winston may have in the formation of the next government.

26 *Re Te-Au-O-Tonga Election Petition* [1979] 1 NZLR S26 (HC) at S68.

27 At S66–S67.

I wish the Auckland University Law Review well on its 50th Anniversary. It has been a great success and I have no doubt that will continue.