

FALLEN FROM
THY LIPS

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BRENDAN
BROWN KC

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For Corin, Eleanor, Vera, Beatrix and Morgan

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Foreword

Sir Stephen Kós¹

At the conclusion of each hearing in the New Zealand Court of Appeal, the Judges immediately go into conference in a meeting room. An intense discussion follows about the case, and whether the appeal should be allowed. While the duration can vary, the intensity rarely does.

Justice Brendan Brown was an assured presence at these conferences. Always well-prepared; thoughtful and clear in expressing his views. Yet the attention of even this paragon of appellate judicial craft could wander. A twinkling eye briefly betokened the disinterred memory of an aphorism or anecdote, and then he'd get back to the business in hand. Then, at the end of the conference when the work was done, he would offer a diffident observation about that disinterred memory:

“You know, that reference to *X* reminds me ...’

No one seemed to have a deeper fund of stories. We called it “Brendan’s anecdotage”. Even more diffidently, he admitted he had a lot of them written down. For his own pleasure, and by instalment, ours. We told him to publish them – and here they now are.

“The life of the law has not been logic; it has been experience”, Oliver Wendell Holmes Jr once said. Textbooks are logic. This book is experience. Textbooks present the law as if on graven marble tablets. Ordered and precise. This book is about the humanity in the law. Chaotic, sometimes wise, sometimes foolish, sometimes courageous – and often humorous.

¹ Judge of the Supreme Court of New Zealand 2022–, President of the New Zealand Court of Appeal 2016-22, Benchers of the Middle Temple.

The law would be dull stuff if all we did was read textbooks and law reports. Duller still if we got AI to do that for us. Every lawyer's library needs both logic and experience. Texts and reports furnish the former, but experience is captured in works of social research, biography and commonplace books of anecdote like those compiled by Sir Robert Megarry, and by Keith Mason in Australia. To which may now be added this fine book, with its own areas of emphasis.

Selection and compilation of these works requires a special eye – for both example and absurdity. The law is full of the latter. A private common lawyer's casebook would be pretty empty if people failed to make mistakes. The witness who with great self-satisfaction produced a late-discovered spreadsheet, only to gift a young lawyer – who may have been me – a cross-examination opportunity to prove the witness's fraud off the same piece of paper. (The man burst into tears.) The lawyer who wrote back to say that the plaintiff's claim “would be tenuously defended”. The *liveliness* of the law certainly lies in experience.

The greater strength of this book lies not so much in anecdote but in its illumination of the bright threads of literature that light up the heavy tapestry of the law. Here, then, are Jane Austen (whose wit so entranced the Berlin-born contract scholar, Sir Guenter Treitel) and Conan Doyle's creation Sherlock Holmes (who bewitched Lord Bingham into rare error in *The Popi M* – an error so very encouraging for us lesser mortals). Here too are fairies, monsters, heffalumps and horses, Albus Dumbledore, J Alfred Prufrock, Eliza Doolittle and Little Dorrit.

Writers and speakers concerned with the law will gain rich reward – and material – from these pages. Others will read them just for fun. For here are sense and silliness arrayed alongside each other in that unique way only the law guarantees. This book is a delight. It is full of wisdom, and full of humanity. I celebrate its arrival in my library.



The author with Sir Stephen Kós (left)
and Justice Simon Moore (right)

CHAPTER ONE

Ratio Scribendi¹

“When in doubt, go to the library”². Long before JK Rowling put those words in the mouth of Ron Weasley I was already a disciple of the law library. As a white wig³ I vividly recall accompanying a senior lawyer to the library late one afternoon to research an issue which had unexpectedly emerged in court. He stood at the entrance, looked about and said: “The answer’s in here somewhere”. And in the sense that from the many texts, journals and law reports it is usually possible to cobble together a respectable argument, he was probably right.

Over the years the law library became not only a source of inspiration but also an oasis of calm. I could retreat there for what my three year old grandson would call “a piece of quiet”. Of course, even when the library was deserted, one was never entirely alone. Ghosts aside, an abundance of insect life resided among the shelves. This population became familiar to me when researching the law relating to the formalities for taking oaths in preparation for argument in *Customs Department v Meates*⁴. From the pages of aged tomes such as *Braithwaite on Oaths* (4th ed, 1881)⁵ there emerged more than the law on the subject.

While the pursuit of the promised “answers” was the focus of research, I found myself distracted by the elegant (occasionally scathing) language in the judgments and intrigued by the frequently obscure allusions to literature. I was not alone in that respect. Lord Blackburn’s reference in 1883⁶ to the Aesop’s

1 Liberaally translated as “Why I wrote this book”.

2 *Harry Potter and the Chamber of Secrets*, p 189.

3 A white (new) wig was the sign of a junior barrister. As wigs aged they became yellowish or greyish in colour.

4 *Customs Department v Meates* [1982] 2 NZLR 500 (HC).

5 Also *Brooke’s Notary* (8th ed, 1925) and *Stringer’s Oaths & Affirmations* (4th ed, 1929)

6 *John Cory & Sons v Burr* (1883) 8 App Cas 393 (HL) at 402.

fable of the bat and the weasels⁷ was described 85 years later by Donaldson J as “a delightful passage”⁸.

When emphasising that what constitutes appropriate grounds for granting a retrial can only be understood by reference to the history of the law, the plurality judgment in *Conway v The Queen* included this footnote⁹:

As Counsellor Pleydell, the Scots lawyer, tells Guy Mannering, on taking him into the library at Pleydell’s home: “A lawyer without history or literature is a mechanic, a mere working man; if he possesses some knowledge of these, he may venture to call himself an architect”. (Sir Walter Scott, *Guy Mannering*, (1815) at 270.)

I have no pretensions to architecture but I confess to being something of an archivist (my family would say a hoarder!). Over many years at the Bar I accumulated a treasure trove of references to literature, stage and screen – from fairy tales to Shakespeare, Greek mythology to Gilbert and Sullivan, Alice in Wonderland to Mrs Malaprop, Noel Coward to Philip Larkin – the bounty of acute peripheral vision coupled with a vulnerability to distraction by interesting or amusing asides. As time passed I worked with younger (and more intelligent) lawyers and clerks whose on-line research techniques were admirably focused but who seemed correspondingly less likely to stumble upon the material which had fascinated me.

So, in retirement, as I confronted the task of decluttering my study, I conceived the idea of publishing at least some of my collection¹⁰. The result is this book. The altruistic motive was that, somewhat akin to my collection of out-of-print humorous legal books, such a publication might provide both a source of inspiration for students and practitioners and a useful resource.

A subsidiary advantage was that at some future date it might relieve my

7 See p 69 below.

8 *Star Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd (The Mandarin)* [1968] 1 WLR 1325, at 1334.

9 *Conway v The Queen* (2002) 209 CLR 203 (HCA) at [5], footnote 4.

10 The decisions are confined to the courts and tribunals of New Zealand, Australia and the United Kingdom, save for the occasional reference to the European Court of Justice or a Canadian decision.

lawyer children of the burden of consigning to oblivion my piles of jottings and notes. An unexpected therapeutic benefit from revisiting and marshalling the material was the joy of continued engagement with the magic of the law as, in the course of navigating retirement, I “sailed away from the safe harbour”¹¹ of the law library and the courts.

References to the utterances of English judges in earlier times were sometimes graced with the words “fallen from your lips” – a phrase thought to have its derivation in *Romeo and Juliet*¹². However the reason for adopting the phrase for the title of this book is closer to home. Witty publications about the law are replete with robust exchanges with judges that no counsel today would dare to contemplate. A well-known instance is recorded in the judgment of Sir John Donaldson MR in *The Goring*¹³:

At the end of the hearing my state of mind was such that I recalled the possibly apocryphal story of the judge who, at a similar stage in the proceedings, had the temerity to tell counsel that he felt none the wiser, only to be met with the retort, “Possibly not, my Lord, but far better informed”¹⁴. I was very much better informed but needed time to become wiser and accordingly we reserved judgment.

A similar antipodean exchange was the inspiration for my title. It occurred in the New Zealand Court of Appeal in *McCarthy v Wellington City Council* which concerned a claim for damages for personal injury suffered by a young boy whose hand was blown off by a detonator taken from a safe on a construction site¹⁵. The source of the account is my late friend and mentor, Tim Fookes, who appeared in the case as junior to E D Blundell¹⁶. Sir Alexander Turner was plainly sceptical that a duty of care should be recognised in the circumstances: he put

11 See Sir Alan Ward in *Reeves v Northrop* [2013] 1 WLR 2867 (CA) at [30] discussed at p 186 below.

12 William Shakespeare, *Romeo and Juliet*, Act 3, Scene 3: Friar Lawrence to Romeo: “a gentler judgement vanished from his lips”.

13 *The Goring* [1987] 1 QB 687 (CA) at 699.

14 John Campbell, *F E Smith First Earl of Birkenhead* (1983), p 112.

15 *McCarthy v Wellington City Council* [1966] NZLR 481 (CA).

16 Later Sir Denis Blundell, Governor General of New Zealand. Both Blundell and Fookes were partners in my old firm Bell Gully & Co.

to Blundell the extreme scenario of the boy instead sending the detonator to his penfriend in China who then had the misfortune to lose a hand. “What do you say to that?”, he asked. Blundell replied:

What I say to that is this: if it had fallen from the lips of anyone but Your Honour I would have said it was absolute nonsense.

With perhaps a few exceptions I do not believe that Blundell’s challenge could fairly be levelled at the various allusions that are a focus of this book. While some have a whimsical quality, not infrequently their deployment was either to dispatch a line of argument or, where the court was not unanimous, to diplomatically highlight the nature of the divide. Sometimes the motive was simply to provide an oasis for the weary reader saddled with the task of digesting a long judgment.

Judges frankly acknowledge their use of this technique. In their article about judicial humour¹⁷ Oakley and Opeskin refer to an interview given by Dyson Heydon shortly after his retirement from the High Court of Australia in which he spoke of his practice of introducing a little bit of wit to retain the attention of readers. The same article cites an exchange in the course of argument in the High Court where, Callinan J having drawn attention to a reference by Kirby J to the New Testament, the latter responded that it was not the ratio of the decision, adding: “It is just a literary [allusion] that I put in to wake people up.”¹⁸ In similar vein is the observation of Hirst LJ in *Halki Shipping*¹⁹:

I now turn to consider *Hayter v Nelson* ... which Mr Waller portrays as having discerned and expounded judicially for the first time the essential meaning of the word “dispute” in the arbitration agreement, in contrast to its meaning in the [Arbitration Act 1975]. If I may be permitted a slightly flippant comment in a long judgment, Mr Waller’s perception of *Hayter v Nelson* is reminiscent of Alexander Pope’s vision of Sir Isaac Newton in his famous epitaph:

Nature, and Nature’s laws lay hid in night:
God said, *Let Newton be!* And all was light.

17 “Banter from the Bench: The use of humour in the exercise of judicial functions.” (2016) 42 Australian Bar Review 82 at 97

18 In *Cattanach v Melchior* (2003) 215 CLR 1 (HCA).

19 *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 (CA) at 742.

To my mind at least, the sparing use of such citations has much to commend it. Appropriately done it does not distract but provides rejuvenation in a challenging reading assignment. It is not dissimilar to the common practice of employing metaphors and colloquialisms in judgments, a subject touched upon in chapter 11.

The literary references span the spectrum from verbatim quotes with precise attribution to fleeting asides capable of being easily overlooked, such as Danckwerts LJ's characterisation of the Revenue's contention as the famous arrow shot in the air²⁰. I hope that readers will not feel patronised by my offering some footnotes of elucidation for the latter category.

The book is divided into three parts. Part One is anthological in nature, comprising a selection of references assembled by genre: mythology, Shakespeare, the stage, poetry and prose, and the Bible. It commences with a chapter that I hope may appeal to younger readers. I am conscious that as a source of raw material a more functional format might simply have listed the various passages under the names of the authors, poets and playwrights. However most of the references bear some relation to the subject matter of the relevant part of the judgment. Their significance, and in some instances their poignancy, would be lost if read in isolation. As Lord Steyn observed in *Daly*, in law, context is everything²¹. I have sought to mitigate the position by compiling an accessible index.

While also featuring a variety of literary sources, Part Two is different in nature. For the benefit of non-lawyers who are sufficiently courageous to open this book, the broad theme of the second part is the judicial resolution of disputes. Chapter 9 provides a glimpse of the perils of litigation while chapter 10 examines the judicial perception of the rules which constrain the retail level of the law²². Chapter 11 explores the artistry and diplomacy which are features

20 *Inland Revenue Commissioners v Parker* [1965] 1 Ch 1032 (CA) at 1049, a reference to the poem of Henry Wadsworth Longfellow, *The Arrow and the Song*. The first verse reads:

I shot an arrow into the air,
It fell to earth, I knew not where;
For, so swiftly it flew, the sight
Could not follow it in its flight.

21 *R (Daly) v Home Secretary* [2001] 2 AC 532 (HL) at [28].

22 Felix Frankfurter – see p 255 below.

of fine judgment authorship. The Part commences with chapter 8 which delves into the human dimension of the judicial persona, in other words “thy lips”.

I can imagine that some might be moved to ask: to whom are such chapters addressed? Law students? Vexatious litigants? Those for whom LAWS 101 is now a distant memory? In the case of chapter 10 one might respond that in a laissez-faire environment there are certain fundamental principles that merit recollection, especially when conveyed in memorable terms by revered judges. However I have adroitly evaded the question by nominating a certain notional visitor to the courts as the addressee of Part Two.

The derivation lies in one of my favourite judgments of Lord Scarman when sitting as the third member of the Court of Appeal in *Rose v Plenty*²³. Following the delivery of Lord Denning’s judgment and the dissent by Lawton LJ, Scarman LJ began in this way²⁴:

Should there be an attentive visitor from Mars sitting in court at this moment, he might be forgiven for thinking that he was witnessing the exposure of an irreconcilable breach between two lines of authority in the English common law.

The theme was then reprised in his conclusion²⁵:

It is for those reasons that I agree with Lord Denning MR; and if that visitor from Mars is still in court after this long judgment, he will return to his planet conscious that one member of the court sees no irreconcilable difference opening up in the common law.

Those comments were the inspiration for the heading: “An aide-memoire for a Martian visitor”. Even for those whose ardour for Glanville Williams’ *Learning the Law* remains undampened, I am confident that some gems will be found in Part Two.

And so to Part Three. To explain its provenance it is necessary to take you

23 *Rose v Plenty* [1976] 1 WLR 141 (CA), a case about a boy falling from a milk float, the details of which are explained in chapter 8.

24 At 146

25 At 150