

## **JUDGE KIRKPATRICK SPEECH - Derek Nolan**

Your Honours, especially Environment Judge Kirkpatrick, Environment Court Commissioners, the Kirkpatrick family and other distinguished guests, ladies and gentlemen,

I am honoured to be able to speak for the New Zealand Law Society and the Resource Management Law Association. On their behalves may I congratulate you, Judge Kirkpatrick, on your appointment.

It is not altogether clear that you were destined to be the top lawyer you ultimately became. On the one hand, I am told that there were early signs of your effective communication style. At one of your very first teacher appraisals when you were a small schoolboy in Oregon, in the United States, the teacher apparently told your mother "David is the politest boy..." (which got your mother beaming)... "at saying no".

The advocacy skill of putting the best light on a subject was also demonstrated soon after moving from the USA to New Zealand and starting at Christ's College, when you came home, proudly announcing, that you were "top of the bottom five".

On the other hand, despite these signals and having a long line of lawyers in your family, it has been said that you only vaguely applied yourself at school and at university, and that you dawdled so long in completing your dissertation that your family despaired of you ever graduating.

At that time, your focus appeared to be more on music, and you had already developed a strange habit of loving music that was fashionable with everyone else about ten years before. I imagine in another decade Judge, you'll be discovering "Lorde" or worse, twerking to Miley Cyrus. You had also become a student politician at the University of Auckland.

Something in all of that background clearly appealed to Simpson Grierson who hired you as a law graduate. Your career there will be covered by other speakers, but suffice to say that as a young lawyer you soon stood out and were noticed by the rest of the legal profession. I can attest to that myself, because I quietly tried to persuade you to leave Simpson Grierson and join Russell McVeagh to specialise in the environmental law field. But at that stage you were not only working in the local government and planning area, but also had an interest in intellectual property law and wanted to keep that wider focus. You had a period with Baker & McKenzie in Singapore where you practised more in that IP area, before returning to Simpson Grierson.

When Mark Cooper, now Justice Cooper, left Simpson Grierson to go to the bar, you stepped up at a young age, to effectively become the City Solicitor for Auckland City, North Shore City, Rodney and Franklin Districts, as well as helping out your Wellington Partners with council work elsewhere.

Again, others will speak to that. But my observation as a lawyer engaging with your councils is that your rise to become their senior advisor more or less coincided with an increasing phenomenon around the country of some councillors no longer routinely doing what they were recommended by their lawyers. Instead, there was a tendency to only follow legal advice if that suited the politics of the day. So the rest of us watched you in action, Judge, and admired your professionalism and independence during what may sometimes have been a difficult period.

In mid 2004, you went to the Bar.

During your years at Simpson Grierson and at the Bar, you enjoyed a varied career across a broad range of subjects, including environmental and resource management law, local government law, rating and valuation, the Building Act, and insurance issues arising out of earthquakes.

You appeared as counsel in around 70 reported decisions; and a search on Brookers Briefcase (where not all earlier cases are recorded) shows that you are listed as a legal representative 237 times, including around 60 High Court and Court of Appeal cases.

Earlier in your career you had the experience of appearing in the Privy Council with Alan Galbraith QC on a rating and valuation case. You were clearly impressed with that Court and I am sure it was a highlight. You were pleased therefore to have had the opportunity to appear in our own Supreme Court, shortly before the announcement of your elevation to the bench. You represented the Environmental Defence Society on the *New Zealand King Salmon* case. As counsel, along with James Gardner-Hopkins, for New Zealand King Salmon, in opposition to your appeal, I was naturally less pleased that you had that opportunity. I would have preferred the announcement to have come a couple of weeks earlier!

In addition to those two cases in our highest courts, some others or other topics, are worth mentioning today to demonstrate the breadth of experience you bring to the Environment Court.

You were counsel in some of the earlier transitional cases after the enactment of the RMA, such as the *Goldfinch* litigation, and *Voullaire v Jones*; reverse sensitivity issues came up in two of your High Court cases, Ports of Auckland with the late Robert Fardell QC, and the ARC and Auckland City Council case over air discharges, and with your client Winstone Aggregates in an Environment Court decision involving the Matamata-Piako District Plan.

You were counsel in permitted baseline arguments in cases such as *Smith Chilcott*; appeared in numerous decisions involving financial contributions, such as *Retro Developments*, and you have well known expertise in both financial and development contributions. You acted for *Carter Holt Harvey* with Gill Chappell on proposed regulatory controls on nitrogen discharges for rural land uses around Lake Taupo. You had your share of judicial review cases over decisions not to notify resource consent applications, including the *Urban Auckland* case involving the development on the St James Theatre site. You were counsel for the *speedway promoter* in the Western Springs litigation and for the helicopter base in the *Dome Valley* Environment Court and High Court cases that were significant in terms of the scope of the RMA applying to aircraft operations. You became an expert in compost in the *Living Earth*; acted for the council on a single house on Waiheke in the *Man of War* cases, and over a proposal for many new houses in Waimauku; and were counsel for *Landco* in what is now the Stonefields residential development. You secured consents for the Tairua Marina, which is now under construction, completing a project that was started many years ago by the late Trevor Gould.

I know that you found it particularly satisfying that among your clients were people or organisations who you had acted as counsel against in earlier cases, and later they asked you to represent them. My research for this address unearthed that it was an organisation who had seen you in action against them, who recommended you be retained by Queenstown Airport Corporation, a major recent instruction of yours.

I must mention that you had a mini specialisation in what might be described as the sex industry. You acted with Brianna Parkinson for Auckland City Council on the judicial review of the new brothel bylaw in the High Court, with the hearing well attended by ladies from Club 574 and the Prostitutes Collective. That made you a natural choice as commissioner for the recent Chow Brother's brothel opposite Sky Tower. Your fellow Judges will no doubt be pleased to direct all such cases to you in future.

In more recent years you have made yourself available to be a Hearing Commissioner and have been appointed regularly by councils, usually as the chairman. In addition to the Chow Brothers hearing, some of the more significant hearings have included the Christchurch Arts

Centre, the Hunua Quarry expansion at Symonds Hill in Papakura, the major retail expansion at Massey North and you recently chaired the hearing on the plan changes to rezone land at Drury South for industrial activities.

Throughout your practising career you have also generously assisted community groups or individuals, on a pro bono or reduced charge basis. For example, several of your reported cases have been for community groups based around the Rotorua lakes, such as Lakes Okareka and Tarawera. I have already mentioned work for EDS.

Working for community and environmental groups can involve many challenges. You no doubt found on some occasions that you were asked to advance arguments in Court that your clients felt strongly about, but which from a legal perspective, were pretty hopeless. Here you were a natural. As your own family have known for years, you can make something wrong, sound right. You may be speaking rubbish, but you make it sound fabulous. All those of us who have appeared opposite you in hearings have experienced this, to our bemusement. What's worse - we sometimes see the Court nodding along with you!

Another typically Kirkpatrick event happened a couple of years ago where you agreed to act for a group of local residents who were opposed to an adjacent school's proposal to build a performing arts centre. This was altruistic of you. The problem was that your daughter, Elizabeth, was a pupil at the school! It must have been a difficult dinner time conversation.

The school's neighbours had a longstanding grievance over school parents parking temporarily in their driveways while dropping off or collecting their girls at the school. As part of the preparation of their case against the performing arts centre, the local residents mounted a survey to gather evidence of such activity, which they predicted would get worse with the new facility. Unfortunately for the neighbours, their survey captured their own barrister offending in this way!

Both the Law Society and the RMLA would also like to thank you for your contribution to continuing legal education and to resource management law and practice, through papers delivered at seminars and conferences around the country. They hope you will be able to continue to assist in this way in the future. Particular mention should be made of your involvement in the Law Society's Intensives. The Intensives and other seminars have, in your own words, allowed you to "let rip" occasionally and "be opinionated". This will come to no surprise to your friends, chambers colleagues and family, as you are curious and knowledgeable on an array of subjects, both trivial and serious. What may not be widely known is that at some prior point during your legal career, you toyed with a complete change

in direction and commencing a media course at university. At that time your family suspected you harboured a secret desire to become a Bryan Edwards type figure on the radio, where you could have pontificated about all sorts of things to your listeners. So the profession will be on standby, your Honour, for Court decisions where you may "let rip occasionally and be opinionated". They are bound to be highly entertaining and even if they are wrong, we know from past experience that you'll be very persuasive and we may even nod along.

As counsel, your Honour was always courteous, respectful, articulate, well prepared and authoritative. You are known to be good on the law and up-to-date with current decisions. With opposing counsel, you have always been approachable, co-operative, adaptable and, formidable. You have an innate sense of fairness, coupled with a strong regard for due process, and you set standards of integrity and conduct for others to aspire to.

Younger practitioners who appeared with you on your cases found you generous with both your time and your knowledge of the law. You were an encouraging mentor. You took a light hand with all co-counsel, gave guidance in a constructive manner, had open exchanges of ideas and allowed them to develop the case.

Clients I have spoken to valued your advice, found you tempered, clear, pragmatic and that you approached matters in a focused manner. They considered your stature and voice made for a powerful delivery of your arguments and were always comfortable that the Court understood the points you were making, even if they might later rule against you - wrongly of course.

As a Commissioner you were outstanding. You have mentioned to me how early in your career you were impressed by Justice Thorp in the High Court who showed patience with counsel and was always helpful to those less experienced. You have sought to apply those skills yourself. All counsel and your fellow commissioners who I have spoken to have identified your patience with people appearing before you, as one of your great strengths. You are always polite, yet you have a great deal of command and respect. You get quickly to the issues, get a good grasp of the detail and look to resolve the dispute. You are never patronising to people who appear before you and are even in your treatment. You never get angry or hot under the collar, but your fellow commissioners and counsel know when you are not happy. You definitely adopt a different tone to your voice, and a slower pace. We will be on the look-out for that when you are on the bench.

If I may say so, as a decision-maker you are seen as having an intellectual self-confidence, and as a result, you display no ego, nor feel any need to impress the parties and counsel with your own knowledge or experience. That is seen as a great strength by the profession.

The Law Society and the RMLA believe that you have found your vocation. You will bring your wide experience as counsel and your outstanding skills as a hearing commissioner to the role. Indeed, you must be the first appointment as an Environment Judge of someone who has had this level of prior experience as a Commissioner. You mentioned to me that as a result of this experience, you feel that you have been "potty trained". I am going to have trouble getting that mental image out of my mind, when I next appear before Hearing Commissioners. I will be wondering what they are all sitting on!

You were undoubtedly the profession's first choice for the role of chairman of the Hearing Panel on the Auckland Proposed Unitary Plan. We were absolutely delighted when that announcement was made. That was only surpassed by the delight we all had upon the follow-up announcement that you had been appointed an Environment Judge. We are certain you will make an excellent Judge.

We are also sure you will be a great success in the Judges' common room, as you are sociable and great company, with a generous personality. Less clear is how you are going to cope if your new office is not the size of a basketball court like your old one, and if you cannot fit your enormous sound system which appears to comprise huge valve boxes, oversized speakers, pre amps, sub amps, sub sub amps and so on. We also wonder whether you can persuade Court staff to keep you supplied with chocolate. Apparently you devour packets of Tim Tams without shame.

In closing, may I on behalf of the profession thank your wife Sara, and your children Elizabeth and Francis, and your wider family, for the support they have given you in your career to date, which has so benefited you, the profession and the country. I am sure they are as delighted as we are, by your appointment.

May it please the Court.