

**DINNER SPEECH**  
**THE SECOND NEW ZEALAND LABOUR LAW SOCIETY CONFERENCE**  
**22 NOVEMBER 2013**

I recall agreeing readily to speak to this dinner out of an enormous sense of relief that I had not been asked to write a paper and present it at the Conference. Over the last few weeks I have come to regret that hasty response to Pam Nuttall's blandishments. Until literally very recently, I have been completely stumped to know what to talk about. Coming from someone who expresses himself in words constantly and, many would say, over-fulsomely, that is a particularly frightening admission. It was clear that I would not be able to add to, or improve upon, the papers that we have heard today about decent work. I resisted the urge to speak about indecent work, if that is the corollary of decent work which I suspect it isn't.

Employment law is not the stuff of fascinating stories, at least those that a Judge can tell, or laugh-a-minute repartee. It finally dawned on me that I could coin a neologism and speak, for not very long you will be relieved to hear, on a topic that might span the diverse audience that you are.

My new phrase is "legal creep". Legal creep is not the name of your opponent's representative in a recent case in the Employment Relations Authority which you have lost. Legal creep is more the first cousin of Fiscal Creep, who is of course a half-sibling of Fiscal Drag. Delighted with the neologism, I thought I should just check whether I really have had a stroke of genius. A Google search disappointed me. The Law Society Gazette (of the UK) of 18 October 2013 contains a headline: "LEGAL CREEP THREATENS TO PARALYSE MILITARY, SAYS THINK TANK". Apparently, the Ministry of Defence in the UK is about to be paralysed by a sustained legal assault which could have catastrophic consequences for the safety of the nation. The costs of litigation against the British armed forces are now said to have risen out of all proportion with 5,827 claims being brought against the Ministry of Defence in the last financial year, with an average payout of £70,000 to the 205 people who made successful claims. If only 205 claims out of 5,827 represent "legal creep", then it must be proceeding at a snail-like pace. And, Professor Ewing, you will be interested to know this: The report of the Think Tank which is called Policy Exchange, says that the main weapons used in legal

challenges to UK military operations are the European Convention on Human Rights in the 1998 Human Rights Act.

Our legal creep is, I fear, somewhat more rapid although I cannot claim that civilisation as we know it is under immediate threat, as appears to be the claim in the United Kingdom. And I haven't noticed a plethora of awards equivalent to £70,000 Stg, but levels of compensation is not the subject of this address.

Legal creep is the inexorable advance of legalism to colonise new territories including, especially, those from which they have been previously evicted which is where I come back to employment relations in New Zealand. You will note that I have deliberately used the phrase "legal creep" and not "lawyer creep". However much some may like to associate the words "lawyer" and "creep", I hope to persuade you that our problem is legal, but not lawyer, creep. Hence, I will refer to those who indulge in legal creep as "legalists", not as lawyers.

Employment or labour or industrial relations (the names have changed over the last century) and the adversarial legal system, have not ever been entirely sympathetic bedfellows ever since 1894 and in respect of the common law, even before that. But if we have statutory employment law, or even common law, rules prescribing and enforcing employment practices, it is inevitable that these are a part of our legal system. If we are to regulate for decent work as has been advocated today, this will remain and will probably need to be embedded in law. Attempts have been made, with varying degrees of success, to exclude the law that legalists bring with them to disputes by excluding the lawyers. That is, however these days, simply unrealistic, even if only at the point of trying to define who to exclude and what constitutes being a lawyer. Other associated questions include the perennial and vexed one of where specialist courts and tribunals end and general courts assume appellate roles.

I understand that Professor Margaret Wilson, who is of course with us today, albeit in her former incarnation as Minister of Labour, flirted with the idea of excluding lawyers from mediation and even perhaps from the Employment Relations Authority. Even if, however, she had been able to ignore what would no doubt have been howls of protest, boundary drawing was always going to be problematic. Would you exclude the senior, skilful, but defrocked lawyer who is not a "lawyer" and might best be described as a former lawyer? By the same token, would you exclude the senior manager of a large public body employer (in

the same city coincidentally as the defrocked lawyer) who is also a qualified and skilled lawyer although manages the employer's human resources and its legal compliance obligations overall?

I am confident that many amongst us, including the Chief Mediator Judith Scott, would confirm that good lawyers are often an asset to everyone in mediations or Authority investigations while bad legalistic advocates, who are not lawyers, are a hindrance. As I have said, the target of my criticism is legal creep, not lawyer creep.

Now comes my personal confession. The results of legal creep are alluring and even seductive to lawyers. We don't need to worry about inconvenient issues of credibility of witnesses, inconvenient contradictory facts, inadequate proof of issues, and all of the other imperfections we see in the presentation of cases. Legal creep allows us the chance to develop the law rather than simply apply it and, before you know it, you are a secret admirer and supporter of legal creep even if you do not usually confess this.

What this legal creep free-for-all has seen developed, however, is the intensive involvement of legalists and/or legalism in many industrial disputes from the get go. Legalism now frequently rears its head at the first hint of a problem, often whilst the employment relationship is still on foot. Particularly in the case of insured employers, insurance policies require advice about, and subsequently control of, the problem by the insurers (and therefore their lawyers) and it is not unusual to see lawyers taking over problems that are, at least in part, outside their fields of expertise, writing letters, arranging and attending meetings, and making and conveying important decisions. This is perhaps most marked in the education sector which school boards of trustees are frequently insured and what should be decisions on professional educational issues, or at least decisions taken about them with professional educational input, are being decided by reference to legal principles alone. Legal creep has crept into classrooms, into hospitals, and to a host of workplaces where professionals are employed but their professional employment standards are subsumed by legalism.

Legalists prepare and present mediation statements that they read to mediators. They take legalistic points about the admissibility of evidence in the Employment Relations Authority and then seek to take those on appeal and consequentially proceedings in the Authority in the

meantime. But, as I pointed out, it is not only lawyers who do so and many lawyers conscientiously refrain from doing so.

There are some, fortunately not too many as yet, cases that are still at an interlocutory skirmishing stage years after the employment relationship has ended, with requests for forensic analysis of computers, claims to and against such public officials as the Ombudsman and the Privacy Commissioner, and arguments over the relevance of literally thousands of documents. One could be excused for wondering where the employment issue is in all this.

Applications for security for costs are flavour of the month or, perhaps more accurately, now flavour of the year or decade. Despite signalling clearly that these will only be granted rarely and in exceptional circumstances, such applications are becoming increasingly frequent, especially in Auckland.

Believe it or not, in the last year I have been engaged in more cases of blackmail than I ever was in my former life as a lawyer practicing criminal law. I think I have had to examine and make decisions on the criminal law of blackmail in three cases in the last year. These were all on procedural issues involving confidentiality in mediation or other similar processes with litigants attempting to lift the veil of confidentiality on the grounds that they were blackmailed in mediation which should, on public policy grounds, allow them to tell the Court what happened. Having heard those allegations of blackmail, they seem to me to be of conduct a good deal more benign than some of the metaphorical arm twisting and head banging that go on in collective bargaining, or at least used to. But my point is that frequent resort to the criminal law of blackmail is a good example of legal creep. With one or two exceptions, it is rare these days to see unions taking personal grievances on behalf of single members, at least to Employment Court level. It is even rarer to find a non-lawyer union secretary conducting litigation in the Employment Court although there are exceptions. I know of one official of a small union who keeps the Authority and the Court in business, albeit relying on legalism in large part. Just last week this union secretary ran a complex estoppel argument before me despite, I suspect, the case turning on what will be much more old-fashioned principles as collective agreement interpretation and custom and practice.

What I see is my Court's lists being clogged with such matters, the avuncular response to which could in many cases be "So what?", or "What is the end game here?" These are in

some cases interesting questions for lawyers and academics but how they assist parties to resolve their problems is difficult to understand.

Have we reached the point where there should be imposed on parties to litigation limits on times and, therefore, resources expended on cases as is not uncommon in other courts? Limiting the time in which parties have to make submissions may focus minds away from legalism. And are we ready for more radical solutions such as banning parties' representatives from mediation altogether and banning practising lawyers from the Mediation Service and the Employment Relations Authority?

I suspect that both of those institutions depend upon representatives, including lawyers and other legalists, to actually participate. If they are not able to, the Employment Relations Authority at least would have to be much better resourced by Government to actually undertake investigations itself rather than to rely on parties' representatives to prepare cases for presentation to it, which bear a strong resemblance to adversarial litigation in court. Any such radical suggestion would, of course, be met with howls of protest and not simply by affected lawyers. There are important arguments of rights to advice and representation, equality of arms, and the like. On the other hand, it is worth remembering that people involved in proceedings in the Tenancy Tribunal and the Disputes Tribunal deal with those institutions largely without legal representation. Perhaps the answer lies in a less crude methodology than requiring all cases irrespective of simplicity or complexity, irrespective of amounts at stake, and the like, to begin life in mediation and then to be reborn in the Employment Relations Authority before a second coming in the Court. There are many cases in which will be entirely appropriate that lawyers are involved from the outset, so perhaps these should start life at least in the Employment Court where many of them are destined to end up anyway.

So, how does this all relate to decent work? Can those of us at the problem solving end promote, or at least support, decent work by having decent problem resolution mechanisms? There is no doubt that we should, and I think we can, do so. If we don't recognise and turn back, or at least curb, legal creep, there is a real risk to decent employment problem resolution. That risk is the prohibitive cost of it.

A dangerous consequence of legal creep is the cost associated with it and, in turn, the increasing inability of people to engage in the dispute resolution process and either their reluctance to try to find alternative ways of resolving their employment relationship problems or resorting to self-help revenge. So there is a very real and compelling incentive to curb legal creep because, if uncurbed, it will kill off by attrition tribunals and courts and even informal mediatory processes of dispute resolution.

Having decent work will not mean that employment problems will disappear. Indeed, they may increase as those currently without a voice, get one. But not being able to afford to address those problems decently, will itself put decent work at risk.

Graeme Colgan

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