



## **The Law Society's Annual Lecture at the National Eisteddfod Montgomeryshire and the Marches**

### **LEGAL SERVICES: The challenge of the next five years.**

1. I am very pleased and honoured to be invited to give the Law Society lecture at the National Eisteddfod this year. The lecture is always an important event. For me, it is a particular pleasure for three main reasons. One, it is the first time I have given such a lecture at the Eisteddfod. I have been a visitor many times. I have served tea in Maes D. I have the T-shirt. But I have not before spoken. Two, it is the first time that I have given such a lecture in the Welsh language. Perhaps I should be wearing my T-shirt today. I am grateful to the Welsh Language Unit of HMCTS for their help. Three, as Lowri Morgan said when extending the invitation to me, Meifod is in my “square mile.” I was born and brought up just a few miles down the road in Llanllwchairan.
2. I was fortunate to be brought up on a farm, the youngest of five brothers. In my childhood, there were all sorts of animals on the farm; a dairy herd, fat cattle, pigs and sheep, and all sorts of crops. As the years went by, one by one the various activities became unviable, until in the end only the sheep were left. The younger members of the family pursued other careers. I chose the law. It seemed like less work than farming. My late brother Gwyn, when he saw me with textbooks, used to say to me “Slog now or slog all your life.” But it has meant that there was no one to carry on the farming. The land has now been sold or let to neighbouring farmers as part of larger agricultural holdings. Farming in Wales has changed.
3. So too, has the provision of legal services. I was named after a well known Mid Wales solicitor, Milwyn Jenkins. We had no connection with the law. My parents liked the name. I now share it with a few other men, and women, and one sheepdog. His firm, like most others in those days, provided all types

of legal services as the family solicitors. There were such firms, as well as criminal and civil courts, in most towns.

4. Not long after I started in practice I was briefed to appear for a defendant in a case due to be heard in Welshpool Crown Court by a High Court judge, Mr Justice Anthony Evans, who later became Lord Justice Evans. In those days the court was held upstairs in the Town Hall. When my late parents learned of this they asked if they could come and see me in court, as they had several times previously when I had made excuses. In those days the appearance of a High Court judge in Welshpool as in many other towns was a grand occasion. On this day, there was a procession, which included the High Sheriff wearing his sword, and also the mascot of the Royal Welch Fusiliers, a goat accompanied by the Goat Major. The goat himself was accorded the rank of corporal. I could not refuse my parents' request this time, and so they came. Before the cases were heard, the Royal Warrant, was read out in court. Afterwards the judge, lawyers and officials were invited by the High Sheriff to a buffet lunch at the Royal Oak Hotel. I was however surprised to see amongst those present not only the goat, but also my parents who had managed to slip in.
5. My namesake would see a very different legal landscape now. At the start of this Millennium, fifteen years ago, the picture looked rosy in Wales. New courts were being established here to deal with cases which formerly had to be heard in London, for example the Mercantile Court to deal with commercial disputes and the Administrative Court in Wales to deal with public law disputes. Functions were devolved to the newly established National Assembly for Wales. In the first directory of barristers on the Wales and Chester Circuit, published that year, the foreword was given by the then Senior Presiding Judge of the Circuit, Mr Justice John Thomas. He is now the Lord Chief Justice of England and Wales. He said this:

“With the new courts and the possibility that in the areas of devolved functions the law applicable in Wales will differ from that applicable in England and the need to consider Welsh texts of all Assembly subordinate legislation, there is a real need and there are clear opportunities for the growth of the Bar in Wales and Chester. This

directory will make it clear to all the breadth of the skills and specialisation available not only to those in Wales and Chester but to those in London and elsewhere in our unitary legal system."

6. Some of those opportunities have been realised. More and more litigation with a connection to Wales is heard in Wales, and more and more of this work is being undertaken by local lawyers. This is my own experience and is suggested by academic research which I refer to later on. In its recent document "Financial and Professional Services" the Welsh Government identifies the strengths of legal service provision in Wales as a talented legal labour pool of some 3,700 lawyers, 15,000 paralegals and 5 law schools producing just under 2,000 graduates each year. It points out that world renowned firms are based in Cardiff, and that Wales provides a cost effective and talented base for outsourcing legal process.
7. The process of devolution continues at speed. The possibility that the law applicable in Wales differs from that in England has become a reality. To give just a few examples, the Housing (Wales) Act 2014 introduces a new regime of registration for landlords of private property in Wales. The Renting Homes Bill provides for a much simplified system for renting private residences. This was as a result of a recommendation by the Law Commission for England and Wales, which was accepted by the Welsh Government but not the UK Government. In this year, when we commemorate the signing of the Magna Carta 800 years ago, it is fitting to mention that this represents a significant return to the situation provided for in that great document, that "English law shall apply to holdings of land in England, Welsh law to those in Wales."
8. The Planning (Wales) Act 2015 has just received Royal Assent and provides a streamlined process to promote the delivery of homes, jobs and infrastructure in Wales. There is now a new Planning Court in Wales as part of the Administrative Court in Wales.
9. In the recent Queen's Speech, the UK Government announced its intention to introduce a Wales Bill which is likely to increase yet further the powers of the National Assembly for Wales, by moving from a conferred to a reserved powers model.

10. Yet, there are signs that some of the opportunities envisaged in 2000 have still to be realised. In that year, there were some 300 barristers on the Circuit, including some 30 Queen's Counsel. Those numbers have since fallen significantly to 264 and 15 respectively. There has also been a reduction in the number of firms of solicitors in Wales, and in particular sole practitioners. The main areas of work carried out by such firms until recently were: residential conveyancing, family law and criminal law. They are now: business, probate and general litigation.
11. In their 2006 report to the Law Society, Professors Iwan Davies and Mainwaring set out findings comparing the provision of over fifty types of specialist skills in private practice law firms in Wales compared to London and the English regions. Amongst other things, the number of specialists per business firms was looked at. Wales does poorly in business law compared to all these regions.
12. In publically funded work too there are concerns about access to justice in England and in Wales. In Wales, such factors as poor transport links, deprivation in post-industrial and other communities, large distance between communities in rural areas, and the language issue give rise to particular concerns.
13. As a result of restrictions in the availability of Legal Aid introduced in 2012, we have seen a reduction in the number of family legal aid providers and in the volume of new family legal aid cases. This has led to more litigants who cannot afford to pay for lawyers, representing themselves in court, sometimes in complex cases. In a family case in the Court of Appeal three months ago, *Re K and H*, the Master of the Rolls, said that in some complex civil cases, lack of legal representation may mean the lack of a fair hearing and that consideration should be given to providing by statute for the appointment of and payment for a lawyer to conduct cross-examination, as there is in criminal proceedings.
14. There are concerns too in respect of access to criminal justice in Wales. Criminal law is becoming more and more complex. Legal aid fees have recently been cut by 17.5% and a further similar cut is proposed. To continue to provide full bilingual police and criminal court services in some rural areas in Wales such as Ceredigion and Gwynedd is becoming increasingly difficult,

if not unviable. Sometimes a request for a duty solicitor visit to a client at a police station involves a long round trip, for example from Aberystwyth to Caernarfon. Some criminal solicitors in such areas are, entirely understandably, looking to retrain in other fields of the law or to move to larger firms elsewhere. Who then will provide these services in such areas?

15. There are now few civil cases where legal aid is available. Lawyers who are prepared to enter into conditional fee agreements provide access to justice to litigants who could not otherwise afford them. But this does not provide a solution in every case, and the number of litigants who represent themselves in civil proceedings is growing. Recent research by Sarah Nason in Bangor University into Justice outside London suggests that in above half of the cases of what are termed ordinary civil judicial review claims, the claimant remained unrepresented throughout. The upward trend towards unrepresented litigation is confirmed in my own experience where this occurs most weeks, sometimes in complex cases such as those involving property, wills, or businesses.
16. Why is this? It must be said that in part it is due to the growth of unmeritorious claims in which lawyers quite rightly refuse to accept instructions, but that is only a small part. Sarah Nason's research suggests that the legal aid reforms may be another partial explanation. She has also found that the number of judicial review claims per population continues to be lower outside London and the south east of England, particularly in Wales and the Midlands and suggests that in part this may be due to lack of access to specialist lawyers and distance from courts.
17. Another reason is likely to be the length and cost of civil litigation in England and Wales which tends to be significantly higher than in many other countries such as the United States of America, Australia and Germany. In an effort to reduce costs, there was introduced last year for the first time budgetary control of civil litigation by the courts. This enables litigants to see from the outset how much the litigation will cost. At about the same time there was a significant increase in court fees. There followed a period in which the number of civil claims being issued in Wales and elsewhere fell noticeably. This is in no doubt due in part to the increase in fees, but practitioners have expressed the view that once clients see the cost budget for the litigation, it encourages

them to take part in alternative dispute resolution, such as mediation or joint settlement meetings.

18. Such methods often have great advantages over proceedings in court, and tend to be cheaper, quicker and less stressful. Parties can agree resolutions which courts cannot impose. Lawyers of course have their part to play. But, these attempts are not always successful and not always likely to be successful, and serve then only to add to the cost, length and stress. There will continue to be a need for civil courts. The new budgetary controls and focussed lawyers are helping to make the costs of civil litigation more proportionate. Far too often however, litigants increase costs unnecessarily by failing to comply with court orders, making unnecessary applications and raising issues which do not in the end assist in the determination of the dispute, and resources are applied to such cases unnecessarily. In an adversarial system, some of this may be inevitable, but not to the extent that is still seen in some cases. The focus on proportionate budgeting should not be seen as another attack on lawyers. It is likely to encourage parties who need to litigate their disputes to engage legal assistance or representation to do so. Resources can be applied more proportionately to a greater number of cases.
19. Legal services provision in Wales involves a bilingual service. In case management conferences, I am still asked for permission for a party or witness to give his or her evidence in Welsh. It's a right to do so, not a privilege. Witness statements are often filed in English when the maker's first language is Welsh and, for example, when the statements refer to important conversations which turn out to have been in the Welsh language. The Welsh Language Unit provides an excellent translation service for such statements and other documents in court proceedings and parties and witnesses should be encouraged to use the Welsh language if they wish to do so.
20. The Silk Commission made a number of recommendations in respect of policing and justice in Wales. In the St David's Day Command paper, there was no consensus in respect of the devolution of policing, criminal justice, the court service, legal aid or the judiciary. Nor was there consensus upon periodic reporting to the UK Parliament and the National Assembly on how access to justice is improving in Wales, but there was consensus that the UK Government should fully consult with the Welsh Government to ensure that

the operation of legal aid reflects Welsh circumstances. There was also consensus that the High Court and Court of Appeal should sit in Wales regularly to hear cases that arise in Wales, and that there should be improved access to all legislation in areas of devolved powers.

21. This access is widely accepted to be essential. It is a fundamental principle of the rule of law that the law should be clear and accessible, to citizens, to their advisers, and even to judges. Clause 45 of Magna Carta, which is still in force, provides “We will appoint as our justices, constables, sheriffs, or other officials only men that know the law of the realm and are minded to keep it well.” Last month, the Welsh Government, no doubt with that provision uppermost in mind, launched the Law Wales website. As more powers are devolved, the greater will be the need to improve access.
22. At about the same time, The Law Commission launched a consultation document as to the form and accessibility of the law applicable to Wales. It is a document which is remarkable for the breadth and depth of research and the innovative approach which is behind it. This is a hugely important consultation exercise for the people of Wales, and indeed elsewhere in the UK. It is likely to inform how the next generation of law in Welsh is formed and published, and this will significantly impact upon legal services in Wales and access to justice.
23. Radical proposals are considered, such as Welsh codification to bring the common law into statutory form, and/or reorganise statute law. It examines the approach to legislating in New Zealand, where a Legislation Advisory Committee issue guidelines to ensure best practice in drafting legislation and that it respects fundamental principles such as natural justice and access to the courts. It sets out some 74 consultation questions on these issues as well as on such issues as publishing the law, and the Welsh language. Legal services providers and users should be encouraged to take part in the consultation, which has just over two months left to run and to contribute to this vital process.
24. There is also consensus that Welsh Ministers should continue to have competence on tribunals in devolved areas of policy and that there should be clarity in the relationship between devolved and non-devolved tribunals. The Welsh Government is currently working to take this recommendation forward.

25. These developments are likely in my view to increase the demand for legal services in Wales. So too will the operation of the recently established Welsh Language Tribunal, which will hear challenges to the standards for use of the Welsh language set by the Welsh Language Commissioner. A good number of parties in such challenges are likely to require legal advice and/or representation.
26. All this comes at a time when there is already an unmet demand for some legal services in Wales, and when the numbers of lawyers in Wales are declining. Moreover, in my view we have to be realistic and accept that the downward trend in the number of small practices is likely to continue, with rising overheads such as cost of compliance requirements and insurance putting further pressure upon such practices.
27. There are those who strongly take the view that only a separate legal jurisdiction in Wales will properly address these and other problems. I cannot here express a view on that political issue, but this development if it is to take place is unlikely to do so for a number of years. Whether it does so or not the citizens of Wales are entitled to expect effective access to justice and to legal services.
28. When considering how this can be improved, it is impossible to overstate the huge changes that advances in information technology are likely to bring in the next five years. It is widely predicted that by 2020, the average desk top computer will have the processing power of a human brain.
29. In saying this, I am only too aware that the courts and tribunal system still operates with cardboard files, rubber bands, and a software system which is 12 years old. Some reforms are already in place. Next October the Crown Court at Cardiff will begin using a digital system in place of the current paper system. In March of last year the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals announced a five year programme of information technology reform which is seen as a once in a generation opportunity to provide better justice for court and tribunal users. The business case has been presented and last month the new Lord Chancellor spoke of his personal commitment to the reforms. It is recognised that not everyone will be able or will want to enter information, file documents, or even attend hearings

online, and that appropriate assistance will have to be provided to those who need it.

30. As part of those reforms, there is currently a consultation process ongoing as to the future of courts and tribunal estates. It is proposed in the consultation document that 11 courts in Wales should be closed. That is in addition to those which have already closed, but this is put forward as a first step to providing better and more cost effective access to justice. Those responding are encouraged to put forward specific proposals for alternative venues, particularly in rural areas, to improve access to justice. In my view great care will be needed in finalising these proposals, to ensure that access to justice is improved not only for rural communities, but for deprived communities. Even where there are frequent public transport services available in such areas, and in many areas in Wales they are not, it is not always affordable by the most disadvantaged in society. Sometimes proceedings will involve many trips to the hearing centre.
31. The breathtaking pace of advance is also likely to have a significant impact on the way legal services are accessed. Professor Richard Susskind advises the Lord Chief Justice, amongst others, on information technology. In his most recent book, *Tomorrow's Lawyers*, he predicts that such technologies will in the next few years come to dominate not only substantive legal work but also the way in which legal services are selected, for example by price comparison systems. In respect of the former, he gives examples of what he sees as becoming available online not only to the lawyer but to the citizen, namely; legal guidance, standard legal documentation, diagnostic systems and automatic alerts to the changes in the law. Not everyone agrees how soon these developments may happen or whether they will at all, but there can be little doubt in my view that in the next five years or so the advances in technology will bring very significant changes to the way legal services, as well as the courts and tribunals, are accessed.
32. These advances may provide some answers to some of the concerns I have mentioned, but are unlikely to provide complete answers. It is already happening in some cases that court or tribunal users do not meet their lawyers before the day of the case but deal with them electronically. One of the proposals for review is online dispute resolution for cases with a value of

under £25,000. This may be appropriate for some dispute resolution, but will not be appropriate for all, such as complex cases or those involving vulnerable users.

33. As I have already said, some individual service providers have made great efforts over the last few years to fill some of the gaps identified in Wales. But in my view the need is now such that it is no longer fair to expect individuals alone to fill all of those gaps. That was recognised by Professor Davies in taking forward the 2006 report. He proposed a purpose built facility combining skills development at postgraduate and professional level with research teams specifically for the benefit of legal service providers and users, with the aim of supporting the knowledge economy and to inform the development of the law in Wales. He saw the need to develop legal knowledge which is relevant to the knowledge economy as being for the public good.
34. Individuals, advice centres and charitable organisations also provide very important free legal services throughout Wales. LawWorks Cymru is a project based in Cardiff and co-ordinates the provision of free legal advice to voluntary organisations and individuals in Wales who need it. It is supported by the Law Society. Three months ago, the Cardiff Employment Law Pro Bono Advice Centre was launched. It is the 200<sup>th</sup> free legal advice Centre to join the network across Wales and England. As important as these services are, they cannot and should not be expected to provide an answer to concerns regarding access to justice.
35. It is already happening that faced with these challenges, local authorities, financial institutions and some private law firms are collaborating with their rivals to save money and resources in dealing with such matters as compliance and training issues.
36. It is my view, given the particular requirements of the people of Wales and the likely increase in such requirements in the foreseeable future, that the scope and need for such a new approach is all the more obvious in Wales. There is nothing new in this suggestion. When I started in practice in Cardiff many years ago, there was a serious proposal that there should be a Welsh Inn of Court established in Cardiff. This did not happen, partly for reasons of loyalty to the Inns of Court in London and to individual Chambers in Wales. There is still no permanent presence of any of the Inns of Court in Wales. However

each of the Inns provides training and other events in Wales. The Law Society does have its Wales Office based in Cardiff, and this annual lecture is one example of the important work which it undertakes here. Now of course, it is possible to train as a solicitor or barrister in a number of law schools throughout Wales, something which was not possible when I undertook my training. Then people from Wales who wanted to train for the Bar had to do so in London.

37. But there are examples of how such an approach can help. When I first started in practice, in 1980 there was no chancery court in Wales. Parties with disputes in the Chancery Division of the High Court had to go to one of the courts in the major cities in England for a hearing. That changed some years later when the Chancery Court was established in Cardiff. It is the court of which I am now the judge. The first judge was His Honour Hywel Moseley QC. He had taught me mercantile law when I was a student at Aberystwyth. Because it was a new court in Wales, there were not many barristers in Wales who undertook chancery work. Litigants went to cities in England for such services. In the early days, the list was shared with the chancery court which had been established in Bristol. Barristers in both cities established a Chancery Bar Association. There were those in Wales who were concerned about whether this would mean simply a higher profile of those who could provide such services in Wales from Bristol and London. It did this, but in my view it also gave a higher profile to those who could provide those services from Wales, in Wales and elsewhere. It helped provide a meaningful choice for those in Wales looking to access such services.
38. There are other examples of how providers of legal services in Wales have responded to particular developments in Wales, such as the establishment of the Wales Commercial Law Association in the wake of the Mercantile Court being set up here, and Public Law Wales in response to devolution. Legal Wales, now the Legal Wales Foundation Board, was established by the first Counsel General of Wales, Winston Roddick QC. It brings together all stakeholders in Legal Wales, solicitors, barristers, legal executives, local and national government lawyers, academics and judges. It is, as far as I am aware, the only institution of its type in the UK. Its annual conference has become an established feature in the Welsh legal landscape.

39. These are just some of the examples which demonstrate the ability and willingness of such providers to co-operate to meet particular needs in Wales. They demonstrate also that there is a particular scope in Wales, partly because of its size, for such co-operation.
40. In my view, in the next five years, the increasing emergence of Welsh law, the increasing legal obligation to use the Welsh language, and the breathtaking pace of advance in information technology are likely to combine to make the need for far greater co-operation much more compelling. In the past, understandably, this has tended to happen in response to particular developments. However, as already indicated, there remain identifiable gaps in the provision of legal services in Wales. Some of these are due to factors which are not peculiar to Wales, but some are due to factors which are so.
41. As Professor Davies has suggested, it is for the good of the people of Wales that the existing gaps in service provision are filled. But in my view, the time has now come to acknowledge that what is essential in order to ensure real access to justice in Wales in the years ahead, is an approach to the provision of legal services which is more proactive than reactive, and more cohesive than piecemeal. It is not fair or realistic to expect individuals alone to achieve this, and all stakeholders, including the Welsh Government, will have an increasingly important part to play.
42. I know that a number of concerns which I have referred to today are shared by a number of others including some of you who have been kind enough to attend today. The views which I have set out are mine and do not necessarily reflect those of my colleagues. I do take the view however that those who share my concerns may allow themselves a little room, as I do, for hope and even for excitement.
43. Thank you for your attention and for your patience.