



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RIGHT HON. THE LORD THOMAS OF CWMGIEDD
LORD CHIEF JUSTICE OF ENGLAND AND WALES

THE STATE OF JUSTICE IN WALES

3 NOVEMBER 2014

CARDIFF BUSINESS CLUB
CHECK AGAINST DELIVERY

Introduction

1. It was as long ago as 18 January 1999 that I had both the pleasure and privilege of speaking to this Club. That was at the dawn of devolution.
2. It was also the dawn of two important changes to the delivery of justice in 1999 to which my lecture drew attention. First, the largest procedural reforms in civil justice that had been undertaken since the great 19th Century reforms culminating in the Judicature Acts of 1873; and second, the proposal for the establishment of a Mercantile Court in Cardiff. The objective of the reforms to civil procedure was to provide speedier and cheaper civil justice; a specific objective of the reforms for Cardiff and for Wales was to ensure that civil justice was available locally and in particular for the business community without the need to go to London.
3. I described what Wales had enjoyed from 1536 to 1830 from Wales' own courts – the Courts of Circuit Session; and what had been enjoyed under the unitary system from 1875 until the early 20th century when heavy commercial litigation was heard in Cardiff. The intention of the reforms was to restore what Wales had enjoyed. The reforms to civil procedure were carried through in 1999. The Mercantile Court was established. Excellent judges have been provided. It was, and remains, up to the businesses and people of Wales and their lawyers to use that court and the other specialist courts to the full.

The present state of justice in Wales

4. Tonight, half a generation later and at the third stage of devolution, I want to look more broadly at the present state of justice in Wales in the light of what has happened since 1999. I want to focus on the role justice plays and should play in the economic prosperity of Wales, its society and its governance.
5. The one overriding objective must be to ensure that Wales has a system for the delivery of justice where the hallmark must be excellence; its status must be regarded as second to none. That is the standing that the delivery of justice across England and Wales currently enjoys, despite the effects of fiscal cutbacks and the retrenchment of the State. So far England and Wales have managed to maintain that standard of excellence. But as those of you who use the courts or legal services know, severe problems face justice in Wales. I shall try to group these under three headings with particular relevance to Wales.
 - (1) **The cost of litigation and legal advice.** For the overwhelming majority of the population who have never been entitled to any legal aid or assistance, the cost of litigation is likely to be entirely disproportionate to the sums in issue. Many businesses, even the largest businesses, are being dissuaded from litigation by similar considerations. Much the same, with a few notable exceptions, applies to the obtaining of legal advice and much transactional work. These problems, however, provide a real and significant opportunity for lawyers in Wales.
 - (2) **The curtailment of legal aid.** First, the scope of legal aid for civil and family cases was substantially reduced by the Government through legislation which passed through Parliament in 2012. Under the present Lord Chancellor the amount of remuneration paid to those who carry out the work which is still within the scope of legal aid is being curtailed. There appears now to be no material difference in the policies of the main political parties in regard to the remuneration paid for publicly funded legal aid work. There is therefore an urgent need for practitioners, particularly in Wales, to see how they should address this issue.
 - (3) **The state of court administration that underpins the delivery of justice.** The computer systems used in courts, save for one recent innovation in the courts which deal with business litigation in London, date from the mid-90s. The urgent need to produce a modern system was obvious when I spoke in 1999, as was recognised by the Government then. A new system was promised.

The promise was never kept. Until March of this year, when the Lord Chancellor announced that HM Treasury had agreed to a significant investment, nothing had happened except failed projects and court closures. The court estate and court administration had all the reality of what is sometimes described as managed decline. To give you an illustration, the 2003 version of Word provided to the judiciary is supported by the XP Microsoft Operating System of the same period; it is a system no longer generally supported by Microsoft and which therefore required special arrangements. The court system has remained largely paper-based but paper-based systems require good filing and a high level of competence and dedication to keeping it going. Although I have nothing but praise for the court staff, there can be no doubt that the policy of reducing pay in real terms in the public sector has had a significant effect on morale, retention and recruitment. This is particularly so where there is strong competition from the private sector in those parts of England and Wales where private sector wages are now significantly higher. The Lord Chancellor has made a remarkable and significant achievement in securing the agreement of HM Treasury in March of this year to provide funds for substantial investment in the court administration through modern technology and an up-to-date estate. This provides significant opportunities for Wales.

(4) **The context of devolution.** There was no logic to the powers that were transferred to Wales; the powers transferred were simply powers that had been accumulated by the Secretary of State for Wales. Save in some respects, the Secretary of State had no powers in respect of justice. Justice was not generally devolved; the Assembly acquired no functions and a unitary court system was retained.

6. However, the ability to deal with outcomes that are not logical is a hallmark of a lawyer. As Oliver Wendell Holmes observed in his seminal work *The Common Law* that was the milestone in the transformation of a relatively unknown Massachusetts lawyer into one of the greatest US jurists and judges:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

7. We must use experience to overcome the lack of logic. We must put in place what is necessary to ensure there are first class arrangements for the proper delivery of justice in Wales, including proper provision for the enforcement of Welsh legislation and above all excellent support for the Welsh economy.
8. I shall in a moment address what needs to be done.

The centrality of justice

9. But before doing so, I regret that I think it is necessary to explain why justice and the delivery of justice actually matters; why it is central to our society in the widest possible sense. You may be a little surprised to hear me say this 799 years after the sealing of *Magna Carta*.
10. However, it is becoming apparent that the centrality of justice in our society is taken for granted or perhaps not even properly understood. For example:
 - (1) Clear, modernised law to keep pace with business practices and dispute resolution systems underpin economic prosperity.
 - (2) A just society requires not only the fair trial and appropriate punishment of those who commit crime but the resolution of issues that arise ever more frequently as the structure of family life changes.
 - (3) Democratic and accountable government requires courts to ensure that the Government deals fairly with the citizens and acts within the law.
11. Justice does indeed matter. It is indispensable to the maintenance in Wales of each of the above. I fear that this is not widely understood. Nor is it seen as an urgent matter to address the issues to which I refer. Nor is it seen why a failure to do so has long term consequences. Nor is it understood that there is an opportunity here and now: and opportunities only last a short time. The task is an urgent one requiring vision, vigour and vitality.
12. Let me then return to the four issues I outlined: to explain why in Wales (as elsewhere) justice is central to our society. There is much to be done and done now.

Justice underpins the Welsh economy

13. The first issue about which I spoke was the disproportionate cost of litigation and the high cost of legal advice. To be successful businesses need access to legal advice and the ability to safeguard their rights and obligations by an ability to litigate. There are two aspects to this.

14. First, the indigenous technological and life sciences industries which are being established in Wales need legal services to safeguard their development in the modern world. They need them at proportionate cost and at the highest level of expertise. If such industries have to go to London, Manchester or Birmingham for such legal advice, that is at an adverse cost to the Welsh economy, as a material part of the benefit of developing indigenous industries is lost. Fees charged by lawyers are ploughed back into an economy that is not the economy of Wales. Employment of the highest expertise is lost to Wales.
15. Secondly, as is very clear from statistical evidence and the actions of other States, such as Singapore and Dubai, the provision of an efficient dispute resolution service at an affordable cost is very good business and makes a significant contribution to overall prosperity. I do not suggest that a place in Wales, such as Cardiff or elsewhere, becomes an international centre like Singapore, but there is no reason why lawyers based in the cities of Wales should not participate fully in this business. It is now widely understood how important a business it is; it is so important to Singapore that they have amended their constitution to establish an international court; so important is it to Dubai and Qatar that they have spent significant sums to establish courts of the first rank. Perhaps, even more telling, is the contemplation by the Netherlands and Germany of establishing courts that conduct litigation in English.
16. How is Wales to sustain both types of legal services? It is clear that the legal services provided must be excellent and of quality second to none. It is also clear that this must be at an affordable cost. Lawyers in Wales should be able to achieve this by taking advantage of several factors. First there is much innovative thinking as to how law firms should be structured. It is powerfully argued that the model which evolved in the 1970s is no longer the optimal model and is unsustainable in the medium term. If this is right, and there is powerful evidence from the continent and elsewhere that it is, then it is easiest to make such innovations when a firm is not burdened with the structures that may be outdated. Second there is the affordability and attraction of living in Wales. Thirdly, the staff and services needed to support modern legal practice should be available at lesser cost. Fourthly, there are law schools in Wales which have developed strong international links through innovation. Their work must be harnessed to support the development of law firms with the right expertise.

17. By these observations I do not mean Wales should strive for the establishment of a back office or departments staffed by paralegals with the best law students being exported across the border. Such an outcome would rightly be characterised as great misfortune for the legal profession in Wales, as it would have very serious adverse long term consequences. The aim should be to encourage the development of more agile firms to support the new industries and to compete for international business. Such firms must be able to give advice through lawyers living in Wales on subjects from intellectual property and patents to competition law and state aid; the quality of the advice must be second to none. If litigation is to be a focus, the firm should be proud that it is conducting it openly from Wales (and not as a back office) with the same approach as to quality as London, but at a cost significantly less.
18. Some work is being done by the Welsh Government to encourage the firms based in Wales. But the effort needs the boldness and the vision I have outlined. It needs an approach to the provision of legal advice and litigation based on excellence and innovative thinking. Many perceive a real risk to the current model of law firm; many complain to me of its exorbitant charging basis and the excessive profits made by partners; most businesses seek greater flexibility and agility in the way advice is provided and litigation conducted. I cannot therefore stress too highly the need for the Government here to enable Wales to be different, to face the reality of what the new industries need and the flexible requirements of modern international commerce.

Access to justice for the citizen

19. I suspect the community in which I grew up in Wales was pretty typical. There was the doctor, there was the lawyer, there was the bank manager, there was the teacher, there was the person who ran the local industry and the local businesses and there was the optician. May I take the last?
20. The way in which opticians now practise is beyond recognition to that of my youth. We are now in the age of companies such as Specsavers and Boots rather than the sole local practitioner. But I am told that even that is changing with the development of services over the internet. When the present legal aid reforms were being contemplated, one Minister horrified a meeting he had with lawyers when he referred to Specsavers as an example of the way services could be provided. He was, with the benefit of hindsight, percipient in questioning whether the current model

for the provision of legal services to the citizen is sustainable, even though the Specsavers model may not be the right one.

21. The reality of the reforms to legal aid are now clear. Save in a few respects, no political party has a materially different policy. There can be no doubt therefore that those in the legal profession in Wales, as elsewhere, who have not embraced change, need to move rapidly to a new and sustainable model for the provision of legal services to the citizen in matters such as crime, family work and low value civil claims.
22. Until steps were taken recently by some in the professional bodies, there was little creative thinking amongst many lawyers as to the future. It appeared that they merely hoped to hang on to the past in circumstances where public funding in the way in which it was hitherto provided was no longer an option from any political party. But what of the thinking as to the needs of Wales?
23. It is not for me to suggest a model for the delivery of such services in Wales, but I again welcome the work of some practitioners and of the Welsh Government in facing up to the necessity of fundamental change. There is a real future, but it will only be a future that can be attained by a willingness to create new models of practice in Wales for the provision to the citizen of legal advice and the resolution of disputes.
24. What would be most unfortunate for Wales would be the provision across most of Wales of a service by groups that have designed the business model elsewhere. Wales would then be merely a place to establish branch offices of a model designed for other communities. The damage to Wales and to the Welsh economy does not need spelling out – again this would be rightly characterised as a long term misfortune. Thus lawyers in Wales must again be bold, be innovative and be at the forefront of this second area of legal development. This is an opportunity, but it is one that will not be there for long. Urgent action is needed.

The provision of a court infrastructure

25. As I have mentioned, a really significant achievement of the present Lord Chancellor has been the securing of the agreement of the Treasury to make substantial investment for the modernisation of the system that supports the delivery of justice in England and Wales.

26. Steps are now in hand to design and deliver that modernised infrastructure. It will be underpinned by state of the art IT, internet based methods of communication and a restructuring of the court estate. Again in Wales we must look forward to this as a significant opportunity and take advantage of it.
27. I have no doubt Wales can. But it can only do so if it is strategic in its thinking and bold. When I was Presiding Judge in 1999, the Dyfed Powys police designed an IT system which was simple and worked; it was designed by a young IT expert who wanted his children to grow up in Wales. The system was unfortunately brought to an end in London. The systems used have neither worked nor provided what is needed. Similarly we tried in Wales to use and expand the video conferencing systems that the Universities had in Wales; they were at that time excellent. Again this was terminated in London. We had to use an entirely inferior system.
28. This must not happen again. The needs of Wales must be recognised and its resourcefulness harnessed. Wales has, like parts of England such as Cornwall and Cumbria, a very different demographic layout; it has a system of justice where the Welsh language has to be treated on a basis of equality under the provisions of the Welsh Language Act 1993. It needs, therefore, provision of an infrastructure for the court administration to provide access to justice in a way that takes into account the position in Wales. I have no doubt that it can, provided firstly that radical thinking prevails and secondly provided there is close work with the Welsh Assembly and Welsh Government. Again there is an opportunity, but one that will exist for under a year, as within that period, the timetable for reform will proceed apace.
29. I stress the need for the involvement of the Welsh Assembly and the Welsh Government not because of the general interest of the Government in Wales in ensuring access to justice for its citizens, but because one of the by-products of the way in which Welsh devolution came about was that one part of justice is devolved: the Welsh tribunals. Let me explain.
30. The functions which were devolved, as I have explained, had no logical coherence save that they followed what the Secretary of State had enjoyed in 1998. Responsibility for a number of tribunals, including the Mental Health Review Tribunal and the Special Educational Needs Tribunal, was therefore transferred to the Welsh Government and Welsh Assembly under the first Government of Wales Act. Thus several important tribunals within the tribunals system were never part of

the reform to the tribunals system that was carried out under the Courts and Tribunals Act 2007 for UK wide tribunals and other England and Wales tribunals.

31. The Welsh Tribunals are therefore not administered as part of the general court administration carried out by Her Majesty's Courts and Tribunal Service. The Welsh Tribunals are more akin to the Scottish and Northern Ireland Tribunals, but unlike Scotland and Northern Ireland, they are on their own. They are not part of the separate courts and tribunals system that exists in Scotland and Northern Ireland and therefore are not within the jurisdiction of the senior judiciary as they are in Scotland and Northern Ireland.
32. Wales is too small a nation to have two systems of court administration, one for the courts and UK and English and Welsh tribunals and another and different one for the Welsh tribunals. Wales could, of course, have a separate court system to which these tribunals could be added, as is the case in Scotland and Northern Ireland. It is solely for the politicians to make clear whether that is what they seek. I am Chief Justice of England and Chief Justice of Wales. It is not for me to express a view although, as in all other aspects relating to justice, I can give technical advice.
33. One of the present tasks must be to make the system of justice in Wales work so that the needs of the Welsh tribunals as an independent branch of the state are properly catered for in the reform to the court infrastructure. I am very glad to say that the illogicality of having a small part of the justice system devolved and the greater part not, is being addressed through practical experience. The judiciary, the Judicial Appointments Commission (chaired by Mr Christopher Stephens) and HMCTS (chaired by Mr Bob Ayling – also the chairman of Dwr Cymru) are working closely with the Welsh Government and Welsh Assembly to ensure that we plan together the way in which the Welsh tribunals and the courts and other tribunals work together for the benefit of Wales.
34. This close co-operation will be essential as decisions are made as to the provision of IT and the reconfiguration of the court estate. Like most of Western Europe, the court estate was designed for the age of the horse and cart. In the better administered states of Europe, it was realised that this was unsustainable and unnecessary. They planned a rationalisation and carried it through so that the citizens of those states are served well by a modern infrastructure. England and Wales did not. The attempts to put forward a strategy in Wales and elsewhere were rejected. A policy was pursued which had no rational coherence. It paid only lip

service to technological developments. It was, until this year, an entirely negative policy of cuts and court closures with no strategy for rational investment.

35. As I have said elsewhere and on other occasions, the current estate is unsustainable. We simply cannot go on with its present policy; it needs to provide appropriate access to justice, including for the population of rural communities. We need to promulgate a coherent strategy before going any further. Such a strategy will undoubtedly involve disposing of buildings used exclusively as courts where such use does not justify exclusive use. But it should provide better access to justice for communities in rural locations, for example through the use of technology, or by the use of buildings which are not exclusively used as courts, or by other means.
36. There is therefore a real opportunity. It cannot be lost through a reaction of bemoaning change or looking backwards. We cannot afford to do anything other than to embrace change. Again it is an opportunity that will be available for a very short time. It must be seized. It will not come again.

Devolution and the administration of justice

37. Until the Assembly acquired in 2011 more general primary law making powers in the third phase of devolution, the divergence in the law in Wales from the law in England was largely confined to matters such as health, planning and education. These were subjects that, if litigated, were litigated in the Administrative Court in Wales. This was specifically established in 1999 for that purpose at the insistence of the then Lord Chancellor, Lord Irvine, despite obstruction from administrators who looked at so called “administrative efficiency” as trumping the need to do justice in places other than London.
38. However, now that the Assembly has acquired primary legislative powers and is pursuing policies in its legislation different to the policies pursued in England, we need to consider what needs to be done to accommodate the differences. As the devolution of justice is a matter for political decision, we must look at what needs to be done within a unitary court system – a term which I consider best explains the issue rather than term “jurisdiction” which has many different meanings.. We must arrive at a system for the delivery of justice that properly reflects and caters for the steady divergence between the law applicable in England and the law applicable in Wales.

39. Although there is a real need for a clear strategic vision as to the longer term future of justice in Wales by the executive governments and legislatures in Wales and London, there are three practical steps that must be taken now.

(1) There must be proper co-ordination between the three branches of the state in Wales: the judiciary, the legislature and the executive government. Let me explain why this is needed through the way we work with the executive government in London. This co-operation is carried out primarily through the Ministry of Justice, although the judiciary has close relations with other departments of State, particularly the Home Office and the Law Officers' Department. This is necessary not only to achieve legislation that is technically sound and practicable, but to ensure that the courts are in a position to implement it. It is necessary, for example, to ensure that there is adequate access to new law and a proper timetable for training. The judiciary has taken the decision that it is vital for the good governance of Wales that we offer to put in place similar mechanisms in Wales to ensure that the courts and tribunals which sit in Wales and the Welsh Tribunals are in a position properly to apply Welsh law, particularly where it differs from English law and that the single unitary court system can properly deliver justice in Wales. A number of matters have to be dealt with, including advice on technical aspects of legislation, making rules of court or providing practice guidance applicable to new legislative provisions, training judges, and to ensure that the judges appointed to positions in Wales have or can acquire an understanding of Welsh law.

(2) We must make sure that there is easy access to the law passed by the Assembly so that it is properly applied in the courts. We must make sure that judges who sit in Wales have or are willing to acquire knowledge of the law applicable in Wales.

(3) We must ensure that the ablest are appointed to the judiciary in Wales. They must develop a knowledge not only of the law applicable in Wales but an understanding of Wales, its society as a distinct nation and the issues that face it, so that such knowledge and understanding can be applied not only in the courts which sit in Wales, but in the Court of Appeal and in the Supreme Court, as they interpret statutes or develop the common law. The question has arisen as to whether like Scotland and Northern Ireland there should be a Welsh judge on the Supreme Court; Lord Neuberger addressed this in his speech to the

Legal Wales conference in Bangor last month. But what is meant by a Welsh judge? It is easy to identify a Northern Irish or Scottish judge, as such a judge will have sat in the court systems of Northern Ireland or Scotland and lived in those nations. But Wales shares the same court system as England. I leave it as an open question, but one that needs to be considered more widely than it is presently being considered, as consideration of the question is a key to answering some of the issues I have addressed.

Conclusion

40. We must recall that in the first great constitutional instrument, *Magna Carta*, the distinct position of Wales was specifically recognised in three clauses - clauses 56-58, conveniently set out in Judge Ivor Bowen's Statutes of Wales, published in 1909. I very much hope that before the 800th anniversary of *Magna Carta* has passed, Wales will be well on its way to finding a solution to the issues I have mentioned through a bold vision and tangible action.
41. There are opportunities to be seized now or they will be lost. The consequences of not seizing them will be severe: the prosperity and good governance of Wales will suffer.
42. I remain so far an optimist. The work I have outlined is not something a few can do on their own. It requires a recognition of the importance of the issues, and as I have stressed, boldness and urgency in solving them: vision, vigour and vitality. Without that recognition, that boldness, that urgency, that vision, that vigour and vitality, an opportunity for the future of justice and the legal profession in Wales will have been missed.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Communications Office.
