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THE LEGACY OF MAGNA CARTA: JUSTICE IN THE 21ST CENTURY

SPEECH TO THE LEGAL RESEARCH FOUNDATION

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Introduction

1. It is both a pleasure and a privilege to have the opportunity of speaking at the Legal Research Foundation today, in the year in which the 800th anniversary of Magna Carta is celebrated, in which New Zealand celebrates the 25th anniversary of its Bill of Rights Act and in which the Legal Research Foundation celebrates its 50th anniversary.

2. At this late stage of the 800th anniversary year, I hope you will forgive me if I skip over all attempts at a history lesson, for the use of Magna Carta by the judges of the courts of common law in the seventeenth century and its influence in the bills, charters, declarations and constitutions worldwide are so well known and have been much worked over this year.

3. I will therefore turn at once to the two best known clauses - clauses 39 and 40:[1]

> (39) No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.
>
> (40) To no one will we sell, to no one will we deny or delay right or justice.

4. These clauses embody principles that no one now disputes: due process and equality before the law and access to justice. I hope it will be of greater interest if I concentrate on the latter, given the shape of today's programme. In any event, without proper access to justice, other rights to due process and equality before the law and the detailed principles contained in bills of rights cannot be vindicated. It is also opportune not to overlook what is happening in our contemporary society to access to justice; many unfortunately do.

5. In examining the issues relating to access to justice today, the legacy of Magna Carta is not found only in clauses 39 and 40. I will therefore consider the principles underlying some of the other clauses of Magna Carta to see how they should influence our future thinking so as to safeguard access to justice and the vindication of the other rights.

[1] Translations of Magna Carta are taken from: A Arlidge and I Judge, *Magna Carta Uncovered*, Hart, 2014.

The context

6. I can only look at the present position in relation to access to justice as a common lawyer based in Europe. In that European context and given developments since the 2008 financial crisis, I think it helpful to look at three significant issues which have to be addressed if access to justice is to be properly available, so that the other rights set out in Magna Carta and its "offspring" can be vindicated and developed:

    i. financing access to justice at a time of tightening of state budgets;
    ii. setting the proper scope of the private sector provision of justice; and,
    iii. strengthening access to justice in the courts through technology and reformed processes.

7. It is not apposite for a judge to welcome or regret reduced state budgets, the growth in the private sector provision of justice or the advent of new technology, but it is essential to address each of these if we are to safeguard our legacy and to provide the values embodied in Magna Carta for future generations. This is particularly important so as to preserve the centrality of justice in terms of the maintenance of the prosperity, democratic government and good order of our nations.

Access to justice and the financing of the courts.

8. Along with executive and legislative functions, the provision of a justice system through which the judicial function is exercised is generally accepted as a core duty of the state. Clause 40 embodies what we have come to regard as a fundamental function: the provision of an

expeditious and effective system of justice available to all. However, it has certainly in England and Wales never been a system, unlike our National Health Service, that has been free at the point of delivery. The user has always had to make a contribution to its cost through the payment of fees, which have always been charged.

9. There have been philosophical objections to this. Bentham described them as a tax on litigation. He railed against that policy in trenchant terms:

> Justice is the security which the law provides us with, or professes to provide us with, for everything we value, or ought to value for property, for liberty, for honour, and for life. It is that possession which is worth all others put together: for it includes all others. A denial of justice is the very quintessence of injury, the sum and substance of all sorts of injuries. It is not robbery only, enslavement only, insult only, homicide only – it is robbery, enslavement, insult, homicide all in one.
>
> The statesman who contributes to put justice out of reach, the financier who comes into the house with a law-tax in his hand, is an accessory after the fact to every crime; every villain may hail him brother, every malefactor may boast of him as an accomplice. [2]

10. Although the principle of charging fees was much debated well into the nineteenth century as a result of Bentham's influential abhorrence of the practice, the charging of a fee as a contribution to the cost of providing a system of justice has become so well-established that it would be sterile to question it. Nonetheless the principle set out in clause 40 should never be forgotten. On the last major anniversary of Magna Carta, the 750th in 1965, it was invoked by the then Lord Chancellor in correspondence with the Finance Ministry to mitigate a proposal to raise fees. In the conclusion to a letter, he simply stated:

[2] *A protest against law taxes,* 1795, page 574.

> Magna Carta, whose 750th anniversary we are about to celebrate, provides that we will not sell justice to the people…. I think that in this respect the principle of Magna Carta ought to be maintained. [3]

11. Clause 40 has therefore been generally understood as permitting the charging of fees, provided that the charging of fees does not fetter or impede access to justice. Therefore the issue for debate has been understood as one of balancing the amount which the general tax revenue ought to contribute (because of the duty of the state to provide access to justice and its interest in ensuring an effective system for justice) and a reasonable level of charge to persons who use the courts. However the starkness of the issues have at times been masked through charging fees for a court process that is often formal but which many have to use. The classic example has been probate fees which, when inheritance taxes were high, made little impact on the administration of an estate, but provided a handsome source of revenue which sustained the court system in England and Wales for many decades.

12. However, much better transparency in state accounting and a tendency to treat access to justice as another public service, combined with increased pressures on public finances, has made this balancing exercise acute. We have seen in England and Wales significant increases in court fees and the introduction in April of this year of mandatory fees to be paid by those convicted of crimes (either by plea or verdict). Whilst the judiciary has taken the view in modern times that modest fees in civil, family and tribunal cases are permissible and in accordance with the provisions of Magna Carta – and has made powerful submissions about the level of fees – it has left the balance as a matter for Parliament to determine.

[3] 26 January 1965, NA/T 227/3446.

13. Nonetheless the scale of court fees together with the cost of legal assistance is putting access to justice out of the reach of most, imperilling a core principle of Magna Carta. It is something that the judiciary, working with the executive and legislative branches of the state, needs to address. Overhauling the administration of justice is one way of overcoming these challenges, a topic to which I will return.

14. This concern about access to justice also leads to the next issue: the private provision of justice which some have seen as a possible alternative to the provision of justice by the state through the courts.

The proper scope of the private provision of justice

15. I will first return to Magna Carta. The state has always permitted a degree of the private provision of justice, but made clear that the state has a vital interest in litigation. For example, clause 24 provided:

> No sheriff, constable, coroners, or other of our bailiffs may hold pleas of our Crown.

16. This clause concerned the protection of the Crown's interest in the trying of those accused of serious crime and the reservation of such matters to itself, instead of leaving trials in the hands of local barons – essentially a form of non-royal or private justice. Although the nature of the state's interest in litigation has changed with time, it must remain a vital interest.

17. Over the centuries, the courts and Parliament have recognised that there are proper reasons why disputes should be resolved other than through the state justice system. For example, in the case of arbitration, it has

been long accepted that the role of the courts where the parties have agreed to arbitrate can be restricted to determining points of law and providing enforcement for awards. In recent times, the private provision of alternative dispute resolution (ADR) has again been encouraged as a means for the private resolution of disputes where litigation is too costly or is inappropriate.

18. Even more recently, ombudsman schemes for sectors of business have gained popularity as another means of private dispute resolution, as an alternative to arbitration and ADR. In the UK, the most developed scheme is that for the financial services and insurance sector. This scheme is entirely free to the consumer customers, and has successfully dealt with vast numbers of claims arising out of either one-off disputes or major systemic mis-selling by the sector. Its work is independent and its decisions binding on the business, but not on the consumer who, if dissatisfied, is free to go to court.

19. I mention this scheme by way of example as it has been so successful and is backed by statutory authority.[4] Its success might suggest that ombudsman schemes for different business sectors could provide a proper alternative to the courts as a means of access to justice. Some have even considered whether the enforcement of such decisions can be implemented without recourse to the courts, either through business-wide agreements or through the use of the powers regulators have over industrial sectors.

[4] Financial Services and Markets Act 2000 (c.8); Part 16.

20. However, there are serious issues as to whether an attempt to provide access to justice by such means is in any way an alternative to the provision of justice by the state through or under the supervision of public courts and tribunals. I will take four by way of example:

    i. By and large, the proceedings and processes of regulators or ombudsman are not in public. An essential facet of justice is that it should be open, unless there is good reason for privacy.

    ii. The development of the law requires open and public decision making which can be reviewed by an appellate court. Indeed our law cannot develop without it. The provisions of the Arbitration Act 1996 which, since their first enactment in 1979, have permitted opt-out agreements barring recourse to the court and severely curtailing rights of appeal to the court in cases where there is no opt-out have been seen by some as stifling the development of some aspects of English commercial law. It is a danger that must be taken into account more generally – we do need future cases about snails in ginger beer bottles.

    iii. Any proper resolution of a dispute has to be by an independent decision maker who is not subject to "industry capture". Regulatory capture is a well-known phenomenon.

    iv. Without the courts and tribunals, through their decisions clarifying and developing the law, the ability of any private dispute resolution mechanism to operate is lost. Such systems depend upon the "shadow of the law"[5] if they are to operate effectively.

[5] Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, (1979) 88 Yale L.J. 950.

21. Therefore, whilst measures that seek to promote compromise over contest so as to avoid unnecessary litigation are to be welcomed, the principles set out in Magna Carta make clear the public interest in the proper provision of justice through the appropriate court. In the modern era, this includes confining private provision of justice to its proper scope and maintaining the role of the courts and tribunals in supervising any such provision.

Strengthening access to justice through the use of modern technology to recast our delivery of justice

22. These matters combined compel us to consider how access to justice can best be made available through the courts. Of critical importance is recasting our system of justice through the use of technology. It is again helpful to consider other provisions of Magna Carta which set out some underlying principles.

The availability of a court

23. It is clear that in 1215, the barons were concerned about access to the courts. This is first reflected in clause 17:

> Common pleas shall not follow our court but shall be held in some fixed place.

24. The clause exemplifies the fact that a state can unnecessarily impose costs on a litigant by its failure to provide readily available courts. The tale of Richard d' Anesty illustrates the problems caused to those litigating in the royal courts of justice as they were forced to follow the

King as he moved around his realm with the royal judges.[6] In brief, Richard was in dispute with his uncle as to rights over land. As it was necessary to follow the King's Court, resolution of this dispute, whilst successful, took some five years and journeys to Normandy and London via Rome and Lincoln, to name but a few. The remedy that Magna Carta provided was to require a fixed location for the Court of Common Pleas.

25. The second reflection is to be found in clause 18 and 19 which dealt with the demand for local justice. A pledge was made to send royal justices four times a year on assize. As a further nod to the importance of local justice, royal justices would sit with local representatives elected by the county.

26. Underpinning these three clauses is the clear principle that justice must be made available through the most effective means that the circumstance of the age permit. The local court house specially designed for the different types of case was the nineteenth and twentieth century solution; it is the legacy we have inherited and of which we are rightly fond. However, we have to question whether such provision is necessary today when technology allows us to make justice available in a much more cost effective way.

27. We are therefore considering the introduction of Online Dispute Resolution (ODR) through an Online Court. The concept has initially been analysed in a Civil Justice Council Report with the suggestion of a three-stage approach: i) avoidance (through information and case analysis); ii) resolution (through online facilitation and mediation); and,

[6] I set out the tale in the Birkenhead Lecture, Gray's Inn (November 2013). See: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-birkenhead-lecture-21102013.pdf.

iii) litigation (by an online court and with a reduced need for lawyers).[7] Although the initial development has been in the arena of civil justice, many take the view that such a system can work for most family disputes and many types of tribunal case.

28. Similar thinking can be seen in Sir Brian Leveson's report into Efficiency in Criminal Proceedings,[8] which advocates the greater use of telephone and video technologies to facilitate remote hearings in appropriate cases at the pre-trial stage.

29. If this is feasible, and the work being done suggests that it is, then we can move away from the provision of the much beloved local court and its specially designed features for the majority of small cases. Even where cases require court hearings, we are also questioning whether we really need to maintain the number of designated local court houses. Can we not use ordinary rooms in public buildings to maintain local justice, and access to that local justice, whilst reserving the use of permanent, purpose built court buildings to larger towns and cities?

30. Going hand-in-hand with this thinking in relation to the physical availability of courts, we are examining how best to use IT to recast our procedures. Instead of using IT to support pre-existing paper-based procedures, which has largely been the approach in the past, we are seeing how IT and digitisation can be used to change the way in which the justice system operates.

[7] See: https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.
[8] See: https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf.

31. For example, the difficulties with the our current form of civil procedure were illustrated in a lecture given by Lord Justice Richards in June this year,[9] in which he described the difficulties that our civil procedure rules committee experiences in its aim of simplifying our rules of court. As is well known, one of my predecessors as Lord Chief Justice, Lord Woolf, through his two Access to Justice Reports in the 1990s, attempted, amongst other things, to simplify those rules and to make the White Book, containing the rules and a detailed commentary, shorter and more user-friendly. The rules and the White Book grow each year in a less than literary echo of Proust or Joyce. Digitisation will hopefully provide the means to achieve true simplification, by using the tools of digitalisation to simplify processes and contain the length of court papers.

Use of persons other than judges

32. Magna Carta provided in clause 45:

> We will not make justices, constables, sheriffs, or bailiffs who do not know the law of the land and mean to observe it well.

33. Most of our systems have developed so that judges, at whatever level, are highly trained specialists. Even in less serious criminal cases, JPs are not allowed to make decisions without the advice of a qualified lawyer. The use of judges to make all decisions comes at an obvious cost.

[9] See: http://www.gresham.ac.uk/sites/default/files/25jun15stephenrichards_civillitigation.docx.

34. Moreover, our adversarial system and the processes we have developed work best when the parties have lawyers. It was no impediment to access to justice when the state provided legal assistance or the cost of lawyers was modest. That state of affairs has changed.

35. We have therefore begun to create a system which will remove certain judicial work from judges altogether and enable many cases to be dealt with by procedures which can function well, even if the parties do not have lawyers. [10]

36. A recent report by JUSTICE, a UK all-party law reform and human rights organisation which works to strengthen the justice system recommends an increase in the use of "registrars", who should be legally qualified and suitably trained for making case management and other decisions.[11] The Civil Justice Council Report on ODR to which I have already referred also suggests roles along these lines for persons who are not judges. That report uses the term "facilitators", with perhaps a slightly reduced remit of work. The JUSTICE report goes further, and points to the possible use of registrars in more than just low-value civil claims. Registrars already exist, to a point, in certain tribunals, and a pilot scheme is in operation in relation to smaller money claims. Clearly their use is an area for development in the coming years.

37. One of the other concepts underpinning both the JUSTICE and the ODR reports is a reduction in the need for legal representation. It is important to remind lawyers at times that the justice system is not there for them (although they unquestionably play an important part) but for

[10] In addition to a host of other reforms that are being put in place.
[11] See: http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf.

the public. Rather than concluding that lawyers are unnecessary, the reports recognise the reality that lawyers are too expensive for many people, notwithstanding attempts to open up the legal services marketplace. The justice system therefore needs to adapt to make sure that people can still access it without lawyers by a process designed to work without lawyers.

38. So, again, the potential use of registrars or facilitators in place of judges in the future is something entirely consistent with the principle of clause 45 of Magna Carta. Clause 45 was directed at was that dispute resolution should be in the hands of those who knew the law. That principle is preserved, but in a way that recognises that insisting on the very high level of qualification, skill and experience which our current judiciary provides for all the tasks it currently performs comes at a cost that impedes access to justice. We have to recognise that securing access to justice can be achieved in many cases at much lower cost by using others who know the law and can apply it well.

Conclusion

39. I will conclude by returning to those best known clauses – deciding cases according to law and delivering timely justice – which still carry the force of law today, by virtue of the 1297 enactment.[12]

40. Those principles, together with the principles to be derived from other clauses, looked at through a modern lens, are apposite to the task of refashioning the system of justice so that there is access to the fair, impartial and effective delivery of justice. And, for me, that is a vital part

[12] Magna Carta 1297 (c.9).

of the legacy of Magna Carta, a legacy that has been exported to justice systems worldwide. For without that, the other rights we shall discuss later today cannot be vindicated.

41. There is, as I have illustrated, a risk that access to justice is not being provided. The cost of accessing the justice system is often prohibitive, be that as a result of reduced spending on legal aid or the rising costs of privately funded legal representation. Many court buildings and many of the processes are outmoded, such that there is an impediment to the timely determination of legal rights and liabilities. All the while, it must be understood that private justice is not an alternative to a public courts and tribunals system.

42. It is therefore necessary to re-cast our justice system to equip it for the present, and to future-proof it so far as possible. Stabilising its financing, making effective use of its buildings, allocating work appropriately, and exploiting the advantages that technology and digitisation can bring are the only way to do this. To do this will be to ensure access to justice in the 21st Century and to safeguard one of the principal legacies of Magna Carta for now and for the future.

43. Thank you very much.