The Supreme Court fifteen years on: continuity and change.

It is a great pleasure and a privilege to have the opportunity to address you in the Senned in Cardiff this evening. I was not one of the Justices who sat in Cardiff when the Supreme Court came here in 2019 and it is therefore a particular pleasure to be here now.

The Supreme Court has just had its fifteenth birthday, and I have been privileged to be part of its story in the last eleven years.

My themes this evening are of change and continuity between the work of the former court of final appeal, the House of Lords, and the Supreme Court, and why the court matters to Wales. Determining the extent of continuity and change in a given historical period is an imprecise art, a matter of impression rather than an exercise of measurement.

I had left practice and joined the bench several years before the Supreme Court began its work at the start of the legal year in October 2009. My memories of appearing in the apex court are accordingly of working my way through the labyrinth of corridors in the Palace of Westminster and along the long upstairs corridor parallel to the river at the end of which was the committee room in which the Law Lords heard appeals. I also recall appearing in the rather cramped room in Downing Street in which the Judicial Committee of the Privy Council used to hear appeals.

As you know, now there is a separate building on the West side of Parliament Square which is dedicated to the Supreme Court and the JCPC, which advertises its excellent café by a billboard on the pavement and contains an exhibition centre for the public in the basement.

Perhaps more significantly, the court makes a great effort to reach out to the public to explain its work. We live in an age in which people do not accept public authority without question and the court, like other public institutions, has learned to explain itself to those members of the public who wish to enquire about our work. In contrast with the secluded location of the Appellate Committee of the House of Lords, the Supreme Court has made itself an outward-looking institution which seeks to explain its constitutional role and the importance of the rule of law to the wider public.

We have a website on which much information about the make-up and work of the court, including our judgments and press releases, and information about forthcoming appeals.

The court from the outset has broadcast its hearings by live streaming and recording of the hearings are available after the event. I have little doubt that the ability of people to watch the court's proceedings contributed to the more temperate response to its decision in the *Gina Miller (1)* case than that which was afforded to the Divisional Court when a daily newspaper called the judges "Enemies of the People". People who watched the proceedings could readily see that they involved a legal debate and not a political discussion or judicial policy-making.

When a judgment is handed down, a Justice will give to camera a short oral, non- technical presentation of the judgment, and the court also provides press summaries to explain its judgments as soon as they are handed down.

Our explanatory work is not confined to such judicial activity. For many years now, the Justices have reached out to universities and other academic institutions by giving extra-judicial lectures

on topics of legal interest. We also host university mooting competitions in the Supreme Court, which are chaired by a Justice and a Judicial Assistant.

Reaching out to students who are still at school, we have operated an "Ask a Justice" programme, which involves a remote meeting between one of the Justices and students in their final year at school. The school submits ten written questions to the court concerning legal and constitutional issues, and in a remote meeting lasting up to 45 minutes each student asks one of the questions which the Justice then answers. Each of the Justices takes part in this programme which we have found to be a good way of engaging with young students.

In the last financial year, 1.4 million people used the websites of the court and the JCPC; over six thousand students participated in tours, and we had over 58,000 visitors. The Court also reaches out to new audiences through social media posts describing our work and giving notice of cases and events. In the last year financial year we had over 293,000 followers on X, 17,000 on Instagram and 50,000 on Linkedin.

We seek to promote diversity and inclusion in the legal profession and to encourage aspiration by people from disadvantaged backgrounds by providing internships as part of the English Bar's "Bridging the Bar" scheme.

Currently we are reaching the end point in a three-year Change Programme which has redesigned our websites and introduced an online portal through which people will communicate with the court. Litigants and lawyers will lodge documents with the court electronically; documents will be served by one party on another through the portal, doing away with the personal and postal service of documents. The reform will give the court a very useful tool in case management as there will be an accurate record of the progress of each case from the application for permission to appeal to the conclusion of an appeal if permission is granted. The website and portal are in the final stages of trials and we hope to launch the portal in December.

As we are a court serving the whole of the United Kingdom, we have sat not only in London but also in Edinburgh, Cardiff and Belfast and in Manchester. If our budget will allow it, we hope to sit outside London again in the future.

Another aspect of the work of the court which has grown in importance in recent years is international engagement with other jurisdictions. We host many visits from judges and officials responsible for justice from many countries. The visitors usually meet Justices or officials for a discussion and are given a tour of the court building. We have bilateral meetings in person with the judges of courts of final appeal, principally from European jurisdictions but also further afield, including Canada and the USA. We have also held "remote" bilateral meetings with the High Court of Australia and the Supreme Court of Japan. Lord Reed visited Japan for a week last year at the invitation of the Chief Justice. Our Justices also take part in meetings of international judicial bodies and organisations. Each year very gifted young lawyers from the USA come to the UK for a month as interns in the Royal Courts of Justice and the Supreme Court under the Temple Bar and Pegasus Scholarship schemes. The British judiciary welcomed this year's scholars only last week.

In recent years the JCPC has sat in Mauritius, The Bahamas and The Cayman Islands on the invitation of those jurisdictions, building personal relationships with the judges and officials of those jurisdictions. We aim to extend the membership of the JCPC to include distinguished retired judges from the jurisdictions which we serve and are delighted that Dame Janice Pereira

has been appointed a Privy Counsellor and will sit on the JCPC in London for a week in December.[1]

Those have been the principal changes following the move from the Palace of Westminster to the other side of Parliament Square, as we seek to adapt the court and the JCPC to the changing needs of the societies whom we serve.

As for the rest of our work, and in particular our judicial work in deciding appeals the leitmotif is continuity with the work of the House of Lords rather than change.

Some commentators, particularly during the troubled and divisive times when the people's decision in the Brexit referendum was being implemented, have accused the Justices of a power grab. Some have suggested that giving the new court the title of "Supreme Court" had caused a rush of blood to the judicial brains causing us to seek to emulate the constitutional role of Supreme Court of the United States. In my experience on the court, there was no truth in such accusations.

On the contrary, it appears to me to be obvious that the judicial work of the Justices is marked by continuity with the past and not by change. Most of the devolution legislation for Wales, Scotland and Northern Ireland, which gave judges a new role in upholding the boundaries of devolved competences, predated the creation of the Supreme Court. So too did the Human Rights Act of 1998, which has involved judges in assessing the proportionality of interferences with fundamental rights. Indeed, the court inherited developed jurisprudence on these subjects from the House of Lords, not least from the pens of Lord Bingham of Cornhill and Lord Hope.

The judicial task is to clarify the law and to develop the law incrementally and interstitially, adapting it to the changes in our social and commercial life. The media tends to focus on appeals which have political consequences, whether it be the two Gina Miller cases connected with the Brexit process or the reference on whether the Scottish Parliament had the power to legislate for an independence referendum. But the vast majority of our work does not concern such politically sensitive matters.

In the last five legal years the Supreme Court has heard in the range of 47 to 74 appeals annually and the JCPC has heard between 35 and 62 appeals annually. The balance of work between the two courts shifts year on year. In the 2023/2024 legal year the Supreme Court gave 51 judgments and the JCPC gave 39. In that legal year, the principal areas of work on which Supreme Court issued judgments were public law and human rights (8), negligence (6), tax including VAT (6).

Turning to our case load over the last fifteen years, I look first at cases of political significance which have originated in Wales. The Court has heard three devolution references from Wales. The first reference concerned the first Bill which was passed by the Welsh legislature: *the Local Government Byelaws (Wales) Bill*.[2] This Bill removed the Secretary of State's confirmatory powers in relation to certain byelaws. It was held to be within competence as this effect was incidental to, and consequential on, the primary purpose of the Bill. Lord Hope discussed procedure in devolution references and clarified the respective roles of devolved governments and legislatures.

[1] The JCPC announced the appointment on 12 September 2024.
[2] [2012] UKSC 53.

The second reference related to the *Agricultural Sector (Wales) Bill*.[3] The Bill was held to be within competence as it related to agriculture. In context the word "agriculture" did not refer solely to the cultivation of the soil or the rearing of livestock but designated the industry or economic activity of agriculture in all its aspects. Looking at the consultation process that led to the Bill and the legal and practical effects of the Bill, it was clear that the purpose and effect of the Bill should be classified as relating to agriculture.[4]

In the third reference, *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*[5] was held to be outside the competence of the legislature. There were two relevant provisions in the Bill. Section 2 of the Bill made persons by whom or on whose behalf compensation payments were made to victims of asbestos-related diseases liable to the Welsh Ministers for the cost of NHS services provided to such victims, and section 14 extended the scope of the compensators' liability insurance policies to cover the sums which they would have to pay under section 2. The Court unanimously held that the Welsh legislature lacked legislative competence to enact the Bill in that form. The leading judgment was written by Lord Mance, with whom Lord Neuberger and I agreed. It held, first, that the Bill was not sufficiently related to the organisation and funding of the NHS which was a devolved competence. The charges were imposed on compensators and their insurers rather than patients and lacked direct or close connection to the provision of Welsh NHS services. In effect, the Bill sought to impose new tortious liabilities on third parties to pay for Welsh NHS services. Secondly, the Bill infringed the rights of the compensators and their insurers under Article I of Protocol No 1 of the ECHR as the retrospective effect of the Bill required special justification which was absent.

The involvement of Welsh interests in constitutionally important cases has not been confined to those three references. The First Minister or the Counsel General has intervened in several important hearings in the Supreme Court. The interventions were made in both of the *Gina Miller* appeals,[6] the first of which was significant to the devolution settlements in holding that the Sewell Convention was not justiciable. There were also interventions by the Counsel General in three Scottish cases: *AXA General Insurance Ltd v Lord Advocate*,[7] the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*,[8] and the *UNCRC Incorporation Bill Reference*.[9]

But, as I have said, the vast bulk of the court's work does not concern cases of constitutional significance. I cannot do justice to the range of work undertaken over the last fifteen years in the 1112 cases which we have heard in that time. I will instead draw on several themes in which we see the court clarifying or developing the common law of contract and tort and I will point out important cases relating to Wales which fall within the scope of those themes and have contributed to our jurisprudence.

Commercial work forms a significant part of the Court's workload. One of the areas in which the court has been engaged is the restatement of the approach to the interpretation of contracts. There has been a broad continuity in the approach of English law to the interpretation of contracts since the 1970s when two judgments of the House of Lords[10] set out the ground rules. In a

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[3] [2014] UKSC 43.
[4] Judgment of Lord Reed and Lord Thomas paras 49 and 50.
[5] [2015] UKSC 3.
[6] [2017] UKSC 55 and [2019] UKSC 42.
[7] [2011] UKSC 46.
[8] [2018] UKSC 64.
[9] [2021] UKSC42.
[10] *Prenn v Simmonds* [1971] 1 WLR 1381 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989.

momentous judgment in the *Investors Compensation Scheme* case[11] in 1998, Lord Hoffmann set out an approach to the interpretation of contracts which ignited a debate in legal circles on the scope for the court to use its perception of business common sense when considering the meaning of the words which parties used in their contract. In three cases the Supreme Court has revisited the interpretation of contracts in an attempt to clarify, at a high level of generality, the correct approach to contractual interpretation.

In *Rainy Sky SA v Kookmin Bank*,[12] Lord Clarke, giving the unanimous judgment of the court, explained that where there were two possible interpretations of a provision it was generally appropriate to adopt the construction that was most consistent with business common sense. In his lead judgment in *Arnold v Britton*,[13] Lord Neuberger set out an approach which reemphasised the need to have close regard to the wording of the contract. He stated that, when interpreting a written contract, the court must identify the intention of the parties by referring to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean, focusing on the meaning of the relevant words in their factual and commercial context.

Thereafter, we faced another appeal on the general approach to the interpretation of contracts and Lord Neuberger asked me to write a judgment which might put an end to the revisiting of the issue. The judgment, *Wood v Capita Insurance Services Ltd*,[14] did not make new law but sought to show that there was no inconsistency between *Rainy Sky* and *Arnold*, emphasising that there are horses for courses in contractual interpretation and that the degree of respect which the court gives to the words of a contract will depend upon the nature of the contract and the circumstances in which it was entered into. No one interpretative technique has exclusive possession of the field of contractual interpretation.

We have revisited other areas in the field of contract. In *Cavendish Square Holding BV v El Makdessi*,[15] Lord Neuberger and Lord Sumption gave the lead judgment with which Lord Carnwath agreed, Lord Mance, Lord Toulson and I also gave judgments and Lord Clarke gave a short judgment agreeing with different aspects of his colleagues' judgments. Lord Toulson, in his partly dissenting judgment, not unfairly described the judgments as being "exceedingly long."[16] The appellants, Cavendish, argued as their primary submission that the court should abolish the rule that the courts do not enforce penalty clauses. In the alternative, they argued that the rule should be altered so that it did not apply in commercial transactions in which the contracting parties are of equal bargaining power and each acted on skilled legal advice. The court rejected both submissions as it did the submission on behalf of the respondent, Mr El Makdessi, that the rule against penalties should be extended to circumstances which did not involve a breach of contract. The court applying the rule asks whether the contractually stipulated remedy for a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract. Neither of the contractual terms which the court addressed in those appeals offended the rule against penalties.

The correct approach to the law on illegality of contract – ex turpi cause non oritur actio - has caused the court greater difficulty and it took several tries to obtain an authoritative ruling on the question. In those cases some of the Justices advocated a clearcut rule which renders a contract

[11] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.
[12] [2011] UKSC 50.
[13] [2015] UKSC 36.
[14] [2017] UKSC 24.
[15] [2015] UKSC 67.
[16] para 295.

unenforceable at the instance of the party who has to found on the illegal or immoral act in its claim, while others favoured a multi-factorial approach, which has regard to various considerations of public policy, and gives the court greater scope to achieve a just result.

In *Hounga v Allen*,[17] a panel of five Justices addressed a claim for the statutory tort of unlawful discrimination by a young illegal immigrant whom Mrs Allen employed unpaid to look after her children, physically abused and then dismissed and evicted forcibly from her home. Her claim failed before the Court of Appeal because Miss Hounga's immigration offences were inextricably linked to her contract of employment which was illegal. Lord Wilson, giving the lead judgment, rejected this approach, holding the defence of illegality rested on the foundation of public policy and it was therefore necessary to ask, first, what aspect of public policy founds the defence and, secondly, whether there is another aspect of public policy to which the defence would run counter. The concern to uphold the integrity of the legal system by not enforcing an illegal contract was wholly outweighed by the fact that Miss Hounga was the victim of trafficking at the hands of the Allen family.

Shortly afterwards, in *Les Laboratoires Servier v Apotex Inc*,[18] a different panel of five Justices addressed the question of what amounted to turpitude which could support the defence of illegality in the context of a patent dispute. The panel unanimously held that the infringement of foreign patent rights did not constitute a relevant turpitude for the purpose of the defence. Lord Sumption in the lead judgment rejected any reliance on questions of public conscience or a balancing of various considerations when deciding whether the defence was available. He argued that the decision of the House of Lords in *Tinsley v Milligan*[19] was a binding statement of an established legal rule notwithstanding that it could have draconian consequences. Lord Toulson concurred in the result but indicated a sympathy for the approach taken in *Hounga* and suggested that it might be necessary to reassess *Tinsley v Milligan* in the light of the criticisms of that decision by, among others, the Law Commission.

The question arose again in a seven-Justice appeal in *Jetivia SA v Bilta (UK) Ltd*,[20] which concerned a VAT carousel fraud, in which the panel was divided as to the correct approach. Lord Sumption adhered to the view that the defence of illegality was a rule of law and rejected the wider approach to public policy which Lord Toulson advocated and I supported. The other Justices reasoned that the case was not appropriate for deciding on a general basis the proper approach to the defence of illegality and suggested that the law on illegality be reviewed by the court in suitable case.

Lord Neuberger thereafter convened a nine-Justice panel in *Patel v Mirza*,[21] to resolve the issue authoritatively. I well remember the conference of the Justices which followed the hearing as it was the only case in which I recall frayed tempers and angry words being exchanged, based on strongly held views as to the correct approach. Lord Toulson's approach prevailed by a majority of 5:3, with the President, Lord Neuberger, also supporting Lord Toulson's approach as reliable guidance.

In other areas of contract law, the court has given guidance on the implication of terms into a contract,[22] Similarly, the Justices in their role as judges of the JCPC have ruled on the availability

[17] [2014] UKSC 47.
[18] [2014] UKSC 55.
[19] [1994] 1 AC 240.
[20] [2015] UKSC 23.
[21] [2016] UKSC 42.
[22] *Marks and Spencer plc v BNP Paribas* [2015] UKSC 72; Barton v Gwynn -Jones [2023] UKSC 3.

of a defence of contributory negligence against a claim in contract,[23] and clarified the law on remoteness of damage.[24]

Turning from the law of contract to the law of tort, the Supreme Court has made several important decisions which have, I hope, brought increased clarity to our law.

A recurrent theme has been the boundaries of the liability of public authorities for omissions, that is to say, for failing to intervene to prevent injury to other people or damage to their property. One of the leading cases is the Welsh appeal in *Michael v Chief Constable of South Wales Police*.[25] That case concerned an error by a 999 call-handler and the failure of South Wales Police to respond effectively to the 999 call by a woman who was the victim of serious physical domestic abuse. Immediately after a second 999 call, the police responded very promptly but by then, tragically, she had been brutally attacked and stabbed to death by her ex-boyfriend, who later pleaded guilty to murder. A seven Justice panel heard the appeal and by a majority of 5:2 upheld the decision of the Court of Appeal to strike out the claim in negligence against the police. Lord Toulson gave the majority judgment, in which he surveyed the relevant case law both at home and abroad. The duty of the police in public law to protect members of the public from harm caused by third parties did not give rise to a parallel duty of care in negligence. An alternative claim under article 2 of the ECHR was allowed to go to trial.

The court has considered the liability of the police further in *Robinson v Chief Constable West Yorkshire Police*.[26] In that case a vulnerable woman was injured when the police attempted to arrest a suspected drug dealer in a busy street in Huddersfield; there was a struggle in which the police and the man being arrested fell on top of her. The court analysed the case not as a claim for an omission but as a traditional *Donoghue v Stevenson* claim for the foreseeable consequences of a positive act - the decision by the police to make the arrest. The judgment is important also for its limiting of the role of the *Caparo* test to novel situations and for removing misunderstanding as to whether the police had immunity from suit for negligence. More recently, the court has returned to the question of liability for omissions in *Tindall v Chief Constable of Thames Valley Police*, a case concerning a fatal road traffic accident as a result of black ice, and will be handling down a judgment in that appeal shortly.

In two Scottish appeals on medical negligence claims the court addressed the circumstances in which a doctor would incur liability for failing to obtain the patient's informed consent. The former appeal, *Montgomery v Lanarkshire Health Board*,[27] is particularly significant as the court updated the law to reflect changing social attitudes in relation to individual autonomy by replacing the *Bolam* test with a test which focuses on what a reasonable patient would wish to know when considering whether to consent to a significant medical intervention. In the latter appeal, *McCulloch v Forth Valley Health Board*,[28] the court rejected an attempt to impose further liability on doctors in relation to the judgements which they have to make as to the alternative treatments of which they inform the patients when obtaining the informed consent of their patients.

We have had a string of cases on vicarious liability which extended the scope of such liability beyond the employment relationship, including an appeal from Wales. In *Cox v Ministry of*

[23] *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40.
[24] *Attorney General of the Virgin Islands v Global Water Associates* [2020] UKPC 18.
[25] [2015] UKSC 2.
[26] [2019] UKSC 4.
[27] [2015] UKSC 11.
[28] [2023] UKSC 26.

Justice,[29] the claimant was a catering manager in HM Prison, Swansea whose duties included supervising prisoners who worked in the kitchen alongside civilian catering staff. A prisoner negligently dropped a sack of rice onto Mrs Cox's back causing her injury. The court, upholding the order of the Court of Appeal, found the defendant liable for the prisoner's negligence. Lord Reed in the lead judgment explained the significance of the five factors identified by the court in the earlier *Christian Brothers* case[30] as the test for imposing such liability outside employment relationships and commented on the relative weight of those factors in that assessment.

Turning to the tort of nuisance, the court gave general guidance on the tort in *Coventry v Lawrence*.[31] More recently, the court wrestled with the question whether the owners of the Tate Modern Gallery in London could be liable to the neighbouring residents of flats which had walls made substantially of glass, as a result of their being overlooked by the public viewing platform in the gallery: *Fearn v Board of Trustees of the Tate Gallery*.[32] The court was divided 3:2 on the issue, the majority holding that the inviting of the public to admire the view from the viewing platform was not a common and ordinary use of land and that constant visual intrusion of that nature amounted to a nuisance. The minority did not accept the distinction between ordinary and extraordinary use of land but sought to answer the question by reference to principles of reciprocity and compromise and an objective standard of reasonableness having regard to the nature of the locality. Again, last year, the court addressed the question whether an offshore oil spill was a one-off or continuing nuisance.[33] The court also discussed the relationship between the common law tort of nuisance and the legislation governing the water industry in an important case which we heard in Manchester in 2023*: The Manchester Ship Canal Co Ltd v United Utilities Water Ltd*.[34]

In a Welsh case this year, *Davies v Bridgend County Borough Council*,[35] the court addressed a question of causation in nuisance. The case concerned the encroachment on land by Japanese knotweed. Mr Davies purchased his land in 2004. At some date well before then, the knotweed had spread from land owned by the Council. By 2013, the Council knew or ought to have been aware from publicly available information that knotweed posed a risk of damage and loss of amenity. The Council failed to implement a reasonable and effective treatment programme on its land until 2018. Mr Davies sued the Council in nuisance. The court unanimously allowed the Council's appeal, overturning the Court of Appeal's award of damages for residual diminution in value of Mr Davies' land. The court reasserted established principles of causation, holding that the claimant had to establish that the Council's breach of duty in fact caused the loss suffered. It applied the "but for" test to eliminate irrelevant causative factors. As the diminution in value of his land occurred long before the Council was in breach of its duty, that breach of duty did not cause the loss and the claimant was not entitled to an award of damages.

In the time available I have not covered appeals on public law, criminal law, taxation, company law and insolvency, shipping and public international law among others which have occupied the court. Nor have I discussed other cases which address legislation of the Senned.[36] But I hope that

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[29] [2016] UKSC 10.
[30] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56.
[31] [2014] ULKSC 13 and [2014] UKSC 46.
[32] [2023] UKSC 4.
[33] *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16.
[34] [2024] UKSC 22.
[35] [2024] UKSC 15.
[36] See *R (Forge Care Homes Ltd) v Cardiff and Vale University Health Board* [2016] UKSC 56 and *Re T (A Child)* [2021] UKSC 35.

I have given you a flavour of our work in explaining and developing the common law and the significant Welsh cases which have contributed to our jurisprudence.

Conclusion

In its fifteen years the court has sought to provide a service to the whole of the UK.
This service is the social service of resolving private and public disputes in a reasoned manner by the application of the law rather than allowing visceral reactions and violence to determine outcomes. It is promoting coherence in the common law. It is developing the common law to keep it up to date and to accommodate the needs of our changing society. In constitutional law and public law, the court is an important part of the constitutional structure of checks and balances which is critical for the health of a democratic society. Those are the functions of the judicial branch of the state.

Returning to my opening theme of continuity and change, we have seen great changes in the way in which the court reaches out both domestically and internationally; but we have seen continuity in the judicial function. Long may that continue.

Thank you.