

RELATOR ACTIONS: THE INJUNCTION AND THE ENFORCEMENT OF PUBLIC RIGHTS

GEOFFREY A. FLICK*

On few occasions has there been a greater invitation to review an area of the law than that which exists since the decision in July 1977 of the House of Lords in *Gouriet v. Union of Post Office Workers*.¹ Whilst that case was solely concerned with the right of a mere member of the public to seek declaratory and injunctive relief in anticipation of a breach of the criminal law,² it raises issues that call for a wider reconsideration of (1) Locus standi requirements for public interest actions generally; (2) Relator actions; and (3) The desirability of legislative reform.

1. LOCUS STANDI REQUIREMENTS

When one is seeking to restrain the continuance of a public nuisance³ or the interference with a public right;⁴ or seeking to restrain a public authority from acting ultra vires; or seeking to prevent the repeated commission of a statutory offence by any person, the proper plaintiff in an application for injunctive relief is normally the Attorney-General.⁵ In other words, just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown.⁶

To the above proposition, however, there are two exceptions. First, a member of the public will be held to have standing to restrain the breach of a public duty whenever it can be deduced that the intention of a statute

* Ph.D., LL.B. (Cantab.), LL.B. (Syd.); Lecturer in Law, University of Sydney Barrister-at-Law of the Supreme Court of New South Wales.

¹ [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70; noted [1978] 12 *U.B.C. Law Review* 320.

² The comments of this paper will be directed solely to the use of the injunction as a public law remedy.

³ As to what constitutes a "public" nuisance, see *A.G. v. P.Y.A. Quarries Ltd* [1957] 2 Q.B. 169.

⁴ As to the nature of "public rights", see S. A. de Smith, *Judicial Review of Administrative Action* 404 (3rd ed. 1973).

⁵ *Ibid.* at 401-2.

⁶ *Gouriet v. Union of Post Office Workers* [1977] 3 W.L.R. 300 at 310, [1977] 3 All E.R. 70, 80 per Lord Wilberforce.

was to give a private plaintiff a cause of action,⁷ or whenever the case falls within either of the conditions formulated by Buckley J. in *Boyce v. Paddington Borough Council*.⁸ Those conditions enable a plaintiff to sue without joining the Attorney-General where the interference with the public right is such that some private right of his own is simultaneously affected, or where, although no private right has been infringed, the plaintiff has suffered special damage peculiar to himself from the interference with the public right.⁹ Unless a plaintiff can bring himself under one of these two heads his action will be dismissed for want of standing.¹⁰ The former of these alternatives provides little difficulty and it has thus been held that an injunction will issue to protect a private right irrespective of whether that right is of a proprietary¹¹ or statutory¹² origin. Any suggestion that the right must bear some resemblance to a proprietary right has long since been rejected in Australian law.¹³ By way of contrast, the notion of "special damage" has prompted much discussion and litigation.¹⁴ Leaving aside the fact that the cases are by no means consistent,¹⁵ it has been pointed out that the notion itself is ambiguous.¹⁶ It is by no means clear whether the damage must be of a kind intrinsically different from that suffered by other members of the public¹⁷ or whether there "must be special damage within the same class of damage as the public suffers as a whole"¹⁸ but damage to a greater degree.¹⁹ Moreover, it has also been pointed out²⁰ that the rule in *Boyce* suffers from the defect

⁷ E.g. *Roodeport-Maraishburn Town Council v. Eastern Properties* [1933] A.D. 87. But note the difficulties involved in persuading a court of this intention; H. Whitmore and M. Aronson, *Review of Administrative Action* 328 (1st ed., 1978).

⁸ [1903] 1 Ch. 109.

⁹ *Ibid.* at 114.

¹⁰ E.g. *Thompson v. Council of the Municipality of Randwick* (1953) 90 C.L.R. 449; *Thorne v. British Broadcasting Corporation* [1967] 1 W.L.R. 1104.

¹¹ *A.G. v. P.Y.A. Quarries Ltd* [1957] 2 Q.B. 169; *Thompson v. Council of the Municipality of Randwick* (1950) 81 C.L.R. 87.

¹² *Ariansen v. Bromfield* (1957) 57 S.R. (N.S.W.) 24; *Howes v. Gosford Shire Council* (1961) 78 W.N. (N.S.W.) 981; *Dajon Investments Pty Ltd v. Talbot* [1969] V.R. 603.

¹³ *Cooney v. Ku-ring-gai Municipal Council* (1963) 114 C.L.R. 582.

¹⁴ For a similar principle in the law of tort, see *Benjamin v. Storr* (1874) L.R. 9 C.P. 400; *Winterbottom v. Lord Derby* (1867) L.R. 2 Ex. 316. *Original Hartlepool Collieries Company v. Gibb* (1877) 5 Ch.D. 713.

¹⁵ Compare, *Grand Central Car Park v. Tivoli Freeholders* [1969] V.R. 62, and *Dajon Investments Pty Ltd v. Talbot* [1969] V.R. 603.

¹⁶ Access to Courts: Public Interest Suits, para. 2.7 (Australian Law Reform Commission Working Paper No. 7, 1977).

¹⁷ As was the case in *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109; *Smith v. Warringah Shire Council* (1962) 79 W.N. (N.S.W.) 436.

¹⁸ *Helicopter Utilities Pty Ltd v. Australian National Airlines Commission* [1962] N.S.W.R. 747, at 755 per Jacobs J.

¹⁹ Support for this approach is found in that line of cases denying standing to competitors who complain of a trade rival who is breaking the law and thus obtaining a competitive advantage: *Californian Theatres Pty Ltd v. Hoyts Country Theatres Ltd* (1959) 59 S.R. (N.S.W.) 118; *Helicopter Utilities Pty Ltd v. Australian National Airlines Commission* [1962] N.S.W.R. 747; *Grand Central Car Park v. Tivoli Freeholders* [1969] V.R. 62. See also, *Stockport District Waterworks Company v. Mayor of Manchester* (1862) 7 L.T. 545.

²⁰ Access to Courts, *supra* fn. 16, para. 2.7.

that the more widespread the damage occasioned by illegality, and therefore the greater the need for an injunction to restrain the defendant, the more difficult it is for the private plaintiff to establish "special damage".

The second exception to the general proposition that the Attorney-General is the proper plaintiff to enforce public rights is found in those situations where a public authority is given an express statutory right to bring such proceedings in its own name. Quite frequently, for example, a local authority is given these powers.²¹ In the absence of statutory authorization a public body or official stands in no better position than a member of the public.²² Early statutory provisions in the United Kingdom were drafted narrowly and consequently were restrictively interpreted to deny standing to the relevant authority,²³ but redrafted versions of these provisions have since been held to confer the requisite locus standi on the authority.²⁴ The same broad interpretation has been given to Australian legislation.²⁵ Thus, for example, in *Cooney's* case a municipal council was held to have sufficient standing under section 587 of the *Local Government Act, 1919* (N.S.W.) to approach the court for an injunction restraining the continued use of the defendant's premises for the purpose of a trade or business contrary to a residential proclamation. Section 587 provided that in any case in which the Attorney-General might take proceedings the Council shall be deemed to sufficiently represent the interest of the public and may take proceedings in its own name. Commenting on the jurisdiction of the court to award an injunction and on section 587, Menzies J. observed:

"It seems to me that one object of endowing municipal councils with the capacity to take proceedings which the Attorney-General, representing the public generally, might take to secure the observance of provisions made by or under the Local Government Act (see s. 587) was to enable councils to take the kind of proceedings which the council has taken here and in proper cases to obtain injunctions to ensure the

²¹ E.g. *Local Government Act 1919*, s. 587 (N.S.W.); *Local Government Acts 1936-59*, s. 52(8) (Qld) (as to which see, *Lynch v. Brisbane City Council* (1960) 104 C.L.R. 353, 359-60); *Local Government Act 1972*, s. 222 (U.K.).

²² Cf. *Thorne Rural District Council v. Bunting* [1972] Ch. 470.

²³ E.g. *Public Health Act 1875*, s. 107 (U.K.), discussed in *Wallasey Local Board v. Gracey* (1887) 36 Ch.D. 593; *Tottenham Urban District Council v. Williamson & Sons Limited* [1896] 2 Q.B. 353. The narrow interpretation given to s. 107 in these two cases is founded on the restrictive standing requirements to seek damages in the law of tort for a public nuisance. Between them they serve as a reminder of the danger in too readily transferring locus standi requirements for the purposes of private law into the field of public law. See also *Local Government Act 1933*, s. 276 (U.K.), discussed in *Hampshire County Council v. Shonleigh Nominees Ltd* [1970] 1 W.L.R. 865; *Prestatyn Urban District Council v. Prestatyn Raceways Ltd* [1970] 1 W.L.R. 33, distinguishing *Warwickshire County Council v. British Railways Board* [1969] 1 W.L.R. 117. These two provisions have since been repealed by the *Public Health Act 1936*, s. 100 (U.K.), and the *Local Government Act 1972*, s. 222 (U.K.).

²⁴ *Solihull Metropolitan Borough Council v. Maxfern Ltd* [1977] 1 W.L.R. 127 (discussing *Local Government Act 1972*, s. 222 (U.K.)).

²⁵ *Cooney v. Ku-ring-gai Municipal Council* (1963) 114 C.L.R. 582.

observance of such laws. A proper case is, I think, made out when it appears that some person bound by what may be described as a municipal law imposing a restriction or prohibition upon the use of land in portion of a municipal area for the public benefit or advantage has broken, and will, unless restrained, continue to break, that law for his or her own advantage and to the possible disadvantage of members of the public living in the locality. The wide discretion of the Court is an adequate safeguard against abuse of a salutary procedure."²⁶

With these comments in mind it will be realized that the law has consistently denied standing to a member of the public when all that he is voicing is a general public interest. To this state of affairs, however, Lord Denning M.R., with the concurrence of Lawton L.J., has tried to create a third exception.²⁷ The learned Master of the Rolls recognized that an aggrieved subject should normally request the Attorney-General to intervene in respect of public rights and that it would be undesirable to multiply suits by permitting every man a separate right of action in respect of a complaint that damnified him only to the same extent as the rest of his fellow subjects.²⁸ But, to allow for the exceptional case, Lord Denning M.R. was prepared to permit a member of the general public to seek injunctive relief if it could be shown that the Attorney-General had refused his leave in a proper case, or had improperly delayed giving leave, or if his machinery worked too slowly.²⁹ All of these comments, however, were obiter as the applicant had originally approached the Court without first even requesting the Attorney-General's consent and by the time the case was restored for further hearing his consent had in fact been obtained.

At the time this case was decided it received the attention of the late Professor de Smith who saw in it a liberalisation of the law relating to locus standi and a possible impetus to the trend of placing the injunction alongside the declaration as a public law remedy.³⁰ Had the Professor lived to see the decision of the House of Lords in the *Gouriet* case he may well have been disappointed.

The facts leading up to the litigation in the *Gouriet* case can be simply stated. On Thursday 13th January, 1977, it was publicly announced via a 9 o'clock news bulletin relayed by the British Broadcasting Corporation that the Executive Council of the Union of Post Office Workers had unanimously resolved that day to call on its members not to handle mails to South Africa as from midnight 16th January. On 14th January, The Times newspaper reported this resolution and also reported that the Post Office Engineering Union had said that it would instruct its members not to provide or maintain circuits to South Africa except in a matter of "life

²⁶ Ibid. at 605.

²⁷ *A.G. ex rel. McWhirter v. Independent Broadcasting Authority* [1973] Q.B. 629.

²⁸ Ibid. at 646.

²⁹ Ibid. at 649. See Lawton L.J. at 657. The third member of the Court, Cairns L.J. expressed himself more cautiously (at 654).

³⁰ de Smith, supra fn. 4, App. 3 at 529.

and death". Slightly after mid-day on 14th January, John Prendergast Gouriet applied to the present Attorney-General, the Rt. Hon. Samuel Silkin, for an injunction restraining the former Union from endeavouring to give effect to its resolution on the basis that any wilful detention of the mails was a criminal offence under the *Post Office Act* 1953. Whatever his reasons (and to this day those reasons remain a matter of speculation)³¹ Silkin refused his consent a few hours later. Thereupon Gouriet in his own name, and claiming relief as a member of the general public,³² issued a writ against the Union of Post Office Workers but Stocker J. refused the injunctive relief sought. Not to be deterred, Gouriet then appealed and, because of the urgency involved, the Court of Appeal³³ sat to consider the case on Saturday 16th January. On that date the Court granted an interim injunction against both Unions, gave the plaintiff leave to join the Attorney-General as a defendant, and adjourned the further hearing for three days. When the hearing was resumed Silkin argued, as had many of his predecessors, first, that his discretion to grant or withhold consent to a relator action was absolute and reviewable only by Parliament, and, second, that the Court had no power to grant a final injunction to a private plaintiff who had suffered no special damage. By the time the Court rendered its judgment the threatened ban had passed, but considered judgments as to both of the above arguments were still given.³⁴

As far as remedies were concerned the Court reached two conclusions. First, by a majority (Lawton and Ormrod L.JJ.) it was held that, consent having been refused to bring relator proceedings, the plaintiff was not entitled to a permanent injunction. Lord Denning M.R. dissented. And second, all three members of the Court held that the plaintiff could claim declaratory relief and, pending a decision on this claim, the Court could grant interim injunctions as sought.

From this decision all of the parties appealed on various points to the House of Lords. If the views expressed by the Court of Appeal in the *McWhirter* and *Gouriet* cases had continued, a third exception to the general role of the Attorney-General as the enforcer of public rights would have emerged. But the unanimous decision of the House of Lords in the present case has considerably inhibited such a development. The need for caution at this point is prompted by the fact that what was in issue was an attempt to restrain an anticipated criminal act. No reference was made

³¹ Whilst the Court of Appeal in *Gouriet* was critical of the decision of the Attorney-General, those comments now have to confront the observations of the only former principal law officer to deal with the case, Viscount Dilhorne ([1977] 3 W.L.R. 300, 319-24; [1977] 3 All E.R. 70, 88-92).

³² Gouriet did not himself sue as a person suffering special damage, or seek to join as a plaintiff a person who had so suffered, because of s. 14 of the *Trade Union and Labour Relations Act* 1974 (U.K.).

³³ *Gouriet v. Union of Post Office Workers* [1977] Q.B. 729; [1977] 1 All E.R. 696. The Court was composed of Lord Denning M.R., Lawton and Ormrod L.JJ.

³⁴ The argument as to discretion will be discussed *infra* at pp. 141-2.

by any of the Law Lords as to whether, for example, an environmental protection group or a consumer protection organization would be granted standing in an appropriate case when they were alleging no special damage but only their special interest in those fields.

Nevertheless, the result of the decision of the House of Lords was that all of their Lordships agreed that the overwhelming weight of authority clearly established the necessity for the Attorney-General's fiat to be obtained to enable a private citizen claiming no special damage to obtain an injunction, or a declaration, in respect of compliance with the general law. Moreover, it was only Lord Edmund-Davies who considered that it was not necessarily in the public interest to deny standing to a member of the public.³⁵ The remaining Law Lords thought that it was "wise" that the Attorney-General should be given the exclusive right to represent the public interest—even where individuals might be interested in a larger view of the matter.³⁶ All of the following arguments were rejected:

- (i) that the use of the Attorney-General's name in relator actions was only fictional and that the form of action should be departed from or modernised;³⁷
- (ii) that just as a private citizen in the United Kingdom can commence a prosecution for a criminal offence that has already been committed, he should also be permitted to apply in advance to the civil courts for an injunction in an endeavour to prevent the commission of the offence;³⁸
- (iii) that the whole matter should be discretionary and that it could be left to the courts to prevent vexatious, or frivolous or multiple actions;³⁹
- (iv) that the courts have allowed liberal access by individuals by way of the prerogative writs and that analogy between the writs and the injunction requires a similar and equally liberal right to bring relator actions;⁴⁰ and
- (v) that unless a private plaintiff is given standing to bring proceedings in those cases where the Attorney-General has refused to do so without giving his reasons, the Attorney-General could in effect suspend the operation of the law involved.⁴¹

³⁵ [1977] 3 W.L.R. at 340; [1977] 3 All E.R. at 107.

³⁶ See, for example [1977] 3 W.L.R. at 312-3; [1977] 3 All E.R. at 82-3 per Lord Wilberforce, citing Lord Westbury L.C. in *Stockport District Waterworks Company v. Mayor of Manchester* (1862) 7 L.T. 545 at 548.

³⁷ [1977] 3 W.L.R. at 311-3 per Lord Wilberforce.

³⁸ *Ibid.*, at 314 per Lord Wilberforce; at 324-6 per Viscount Dilhorne; at 338-9 per Lord Edmund-Davies; at 350-1 per Lord Fraser. A member of the public whose private rights are threatened by the commission of a crime may obtain an injunction: *Springhead Spinning Company v. Riley* (1868) L.R. 6 Eq. 551.

³⁹ [1977] 3 W.L.R. at 314-5 per Lord Wilberforce.

⁴⁰ *Ibid.* at 314 per Lord Wilberforce.

⁴¹ *Ibid.* at 323-6 per Viscount Dilhorne.

The decisive rejection of *Gouriet's* arguments has the consequence that even a plaintiff who is seeking to enforce a non-criminal statutory duty will have an extremely difficult case to make out if he does not show either the interference with a private right or special damage to a right he shares in common with the rest of the public. The dicta of the Master of the Rolls in the *McWhirter* case were dismissed by the Law Lords as without authority.⁴² There is no reason to believe that the decision of the House of Lords does not also reflect the correct position in Australian law as well.⁴³

2. RELATOR ACTIONS

Reference has already been made to the relator action. This is a procedural device whereby a private plaintiff who has suffered no special damage may approach the Attorney-General and ask for his consent or fiat to institute proceedings for declaratory or injunctive relief in his name.⁴⁴ Reference has also been made to the rejection of the argument that the Attorney-General's role in such actions has nowadays become fictional. The following words are those of Lord Wilberforce when he directed his mind to these issues during the course of his judgment in *Gouriet*:

"But the Attorney-General's role has never been fictional. His position in relator actions is the same as it is in actions brought without a relator, with the sole exception that the relator is liable for costs. . . . He is entitled to see and approve the statement of claim, and any amendment in the pleadings; he is entitled to be consulted on discovery; the suit cannot be compromised without his approval; if the relator dies, the suit does not abate. For the proposition that his only concern is to 'filter out' vexatious and frivolous proceedings, there is no authority—indeed, there is no need for the Attorney-General to do what is well within the power of the court. On the contrary he has the right, and the duty, to consider the public interest generally and widely."⁴⁵

Whilst this comment serves as a useful summary of the functions in theory of the Attorney-General, it remains to be discussed: (a) whether his decision to grant or withhold consent to the use of his name in a relator action may be reviewed by the courts; and (b) the effect of the status of the Attorney-General and the interests of the relator on the exercise of the court's discretion to grant or withhold injunctive relief.

⁴² *Ibid.* at 315 per Lord Wilberforce; at 326 per Viscount Dilhorne; at 333 per Lord Diplock; at 341-2 per Lord Edmund-Davies; at 350-1 per Lord Fraser.

⁴³ Recent decisions in New South Wales must be regarded as simply wrong; *Benjamin v. Downs* [1976] 2 N.S.W.L.R. 199; *Branch v. The Council of the Municipality of Port Macquarie*, unreported, 30th June 1977.

⁴⁴ See J. Edwards, *The Law Officers of the Crown* 286-95 London, Sweet & Maxwell (1964); H. W. R. Wade, *Administrative Law* at 509-17 (4th ed. 1977); Whitmore and Aronson, *supra* fn. 7, at 337-8; de Smith, *supra* fn. 4, at 400-1; G. Robertson, *Civil Proceedings by and against the Crown* 487-90 (1908).

⁴⁵ [1977] 3 W.L.R. at 311. Contrast the comments of Ormrod L.J. [1977] Q.B. at 778.

(a) *Reviewability of the Discretion of the Attorney-General*

The decision of the Attorney-General on an application for a relator action is the exercise of a prerogative discretion derived by reason of the Attorney-General's position as first law officer of the Crown. Holders of this high office have consistently argued that their discretion was reviewable only in Parliament and not by the courts. And in the following passage, which is now obligatory citation, Lord Halsbury L.C. supports such an argument:

"The initiation of the litigation and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General."⁴⁶

But it is also clear that it is the duty of the Attorney-General to represent the public interest with complete objectivity and detachment and that he must act independently of any external pressure from whatever quarter it may come. Above all, he must exclude from his mind any advantage or disadvantage that may assist or beset his own political party.⁴⁷ His decision must be based on such conflicting policy considerations as: Will the law best be served by preventive action?; Will the grant of an injunction exacerbate the situation?; Is the injunction likely to be effective or futile?; Will it be better to make it clear that the law will be enforced by prosecution and to appeal to the law-abiding instinct, negotiations, and moderate leadership, rather than provoke the people along the road to martyrdom?⁴⁸

Such was the position in English and Australian law until the decision of Lord Denning M.R. in *Gouriet*. In that case his Lordship suggested that a distinction could be drawn between those cases where an applicant gains the Attorney-General's consent and those cases where consent to a relator action is withheld.⁴⁹ Can such a distinction be maintained?

(i) *Cases where consent is obtained*

In *London County Council v. Attorney-General*⁵⁰ the Lord Chancellor was quite explicit in stating that the Attorney-General ought not to put into operation the whole machinery of the first law officer to bring into court some trifling matter. His Lordship, however, was equally clear in stating that if the fiat was obtained in such a case it would not go to the jurisdiction of the Attorney-General; questions may well be raised in

⁴⁶ *London County Council v. A.G.* [1902] A.C. 165, 169.

⁴⁷ *A.G. v. Independent Broadcasting Authority* [1973] 1 All E.R. 689, 697; *Gouriet v. Union of Post Office Workers* [1977] Q.B. 729 at 758.

⁴⁸ *Gouriet v. Union of Post Office Workers* [1977] 3 W.L.R. 313-4 per Lord Wilberforce.

⁴⁹ [1977] Q.B. at 758.

⁵⁰ [1902] A.C. at 168.

Parliament as to the conduct of his office, but it was not for the courts to determine whether he ought to initiate litigation in that respect or not.

Similarly, it is of no concern to the court whether the Attorney-General has granted his fiat to a relator who has suffered no damage beyond that suffered by every other member of the public or even to a relator who has suffered no injury at all;⁵¹ to a relator which is a local authority;⁵² or even to a relator who may be a business competitor of the defendant.⁵³ Occasionally the courts express some bewilderment as to why the Attorney-General has given his consent, but ultimately they all conform to the views of Lord Halsbury. For example, in *Attorney-General (on relation of Prudential Staff Union) v. Crayford Urban District Council*⁵⁴ the defendant council was operating a scheme whereby it could collect from its tenants certain insurance premiums at the same time as it collected the rents. After deducting its commission, the council then paid directly to Municipal Mutual Insurance Ltd the monthly premiums in respect of the policies as they became due. The Prudential Staff Union represented a rival insurance business and its argument was that the scheme was ultra vires the council's powers. Declaratory and injunctive relief were sought by way of a relator action. When the case came before the Court of Appeal, Lord Evershed M.R. "expressed some curiosity in regard to the action" because the scheme was clearly for the benefit of the tenants and imposed no burden on the ratepayers. Nevertheless, the Master of the Rolls was forced to concede that once the Attorney-General had initiated the proceedings no question could be raised as to the interest of the relators.⁵⁵

To the above propositions the present Master of the Rolls does not dissent.⁵⁶

(ii) *Cases where consent is refused*

The only reported instance of an English court dealing with an express refusal by the Attorney-General to consent to relator proceedings is the *Gouriet* decision itself. And in that case, as we have already seen,⁵⁷ the central issue was whether *Gouriet* had sufficient locus standi as a mere member of the public to sue without the Attorney-General. The case, however, did afford Lord Denning M.R. the opportunity to comment on

⁵¹ *A.G. v. Logan* [1891] 2 Q.B. 100, 103. See also, *A.G. v. Codner* [1973] 1 N.Z.L.R. 545.

⁵² *A.G. v. Garner* [1907] 2 K.B. 480; *A.G. v. Ashborne Recreation Ground Company* [1903] 1 Ch. 101; *A.G. v. Sharp* [1931] 1 Ch. 121; *A.G. v. Harris* [1961] 1 Q.B. 74.

⁵³ *A.G. v. Crayford Urban District Council* [1962] Ch. 575; *London County Council v. A.G.* [1902] A.C. 165; *A.G. v. Sheffield Gas Consumers Company* (1853) 3 De G.M. & G. 304; *A.G. v. Lees and Courtney* [1932] 3 W.W.R. 533. Note that business competitors have frequently been held to suffer no "special damage", see cases cited *supra* footnote 19.

⁵⁴ [1962] Ch. 575.

⁵⁵ *Ibid.* at 584-6.

⁵⁶ *Gouriet v. Union of Post Office Workers* [1977] Q.B. at 758.

⁵⁷ *Supra* at pp. 136-9.

the general proposition of the Lord Chancellor in the *London County Council* case.

According to the present Master of the Rolls, the dictum of Lord Halsbury was not intended to cover the case where consent had been refused—the dictum was only directed to the unreviewability of the Attorney-General's discretion when he had granted consent.⁵⁸ Where consent had been refused, it was a direct challenge to the rule of law⁵⁹ (at least in the opinion of his Lordship) for the courts to deny themselves any power of review and the extent of intervention he proposed was as follows:

“his discretion to refuse is not absolute or unfettered. It can be reviewed by the courts. If he takes into account matters which he ought not to take into account, or fails to take into account matters which he ought to take into account, then his decision can be overridden by the courts. Not directly, but indirectly. If he misdirects himself in coming to his decision, the court can say: ‘Very well then. If you do not give your consent, or your reasons, we will hear that complaint of this citizen without it.’”^{59a}

These comments, however, did not meet with the approval of the other appellate court judges,⁶⁰ or, on appeal, any of the Law Lords.⁶¹

It has now, therefore, been conclusively stated that the decision of the Attorney-General to withhold his consent to a relator action is equally as unassailable as his decision to grant his consent or his refusal to prosecute.⁶² Indeed, to hold otherwise would be to give insufficient weight to the phrase of Lord Halsbury “to determine whether he ought to initiate litigation in that respect or not”. And to allow a private plaintiff who has suffered no special damage to sue on his own behalf would involve an implied overruling of the law as stated seventy six years ago by the learned Lord Chancellor.

(b) *The Attorney-General as Nominal Plaintiff in a Relator Action*

It is hornbook law that injunctive relief is discretionary and that, whilst an applicant who makes out his claim will normally be granted the remedy,⁶³ a court may refuse to intervene on any one of a number of well settled grounds. Thus an injunction may be withheld on the ground that

⁵⁸ [1977] Q.B. at 758.

⁵⁹ *Ibid.* But see [1977] 3 W.L.R. at 322 per Viscount Dilhorne; at 329-30 per Lord Diplock.

^{59a} [1977] Q.B. at 759.

⁶⁰ *Ibid.* at 768 per Lawton L.J.; at 772 per Ormrod L.J.

⁶¹ Before the House of Lords the argument that the Court could review the discretion of the Attorney-General was not pursued, per Lord Wilberforce [1977] 3 W.L.R. at 308. See, Viscount Dilhorne at 320; Lord Edmund Davies at 336-7; and Lord Fraser at 348.

⁶² Cf. *Ex parte Newton* (1855) 4 E. & B. 869. See generally, B. M. Dickens, *The Attorney-General's Consent to Prosecutions* (1972) 35 M.L.R. 347.

⁶³ *Imperial Gas Light and Coke Co. v. Broadbent* (1859) 7 H.L.C. 600, 612 per Lord Kingsdown.

the plaintiff has suffered only very small or nominal damage; or if the injury complained of has ceased or was only of a temporary nature; or if the plaintiff has either delayed in bringing the conduct complained of to the attention of the courts or has acquiesced or waived his rights; or if the defendant gives an undertaking to the court to abstain from the act of which the plaintiff complains.⁶⁴

Of present concern is the issue whether this discretion operates in a different manner when one moves from the arena of private law into that of public law.⁶⁵ This is perhaps best dealt with under the following sub-headings.

(i) *Attorney-General not entitled to injunction as of right*

At one time it was suggested by Kekewich J. that when the Attorney-General came to the courts alleging that a public body was exceeding its powers or was committing a statutory offence he was entitled as a matter of right to an injunction if he proved his case.⁶⁶ Such a proposition, however, could not long survive because at the point of time when the Attorney-General decides to bring a case before the courts he has heard only one side of the matter and it is for the court itself to decide, after it has heard both sides, whether relief should be granted.⁶⁷ Consequently, on this issue the comments of Kekewich J. were expressly reversed by the Court of Appeal where Farwell L.J. was tempted to observe:

“it is startling to be told that it is sufficient for the Attorney-General to institute proceedings alleging a breach of the statute and that there is an end of the matter. It is for the Court to say, acting as His Majesty’s judges, whether an injunction is the proper remedy.”⁶⁸

These same views have been reproduced in the Australian case law.⁶⁹ Thus, by way of illustration, in *Attorney-General v. B.P. (Australia) Limited*⁷⁰ Jacobs J. was firmly of the view that on the facts of that case an injunction should not issue at the suit of the Attorney-General to restrain the defendant from erecting on certain land a service station. Such use of the land had been approved by the local council and the Cumberland County Council and thereafter the company had proceeded to spend in excess of £5,206 upon the land by way of filling it in, building a retaining wall, and also installing petrol tanks below ground level.

⁶⁴ See generally, R. Megarry and P. Baker, *Snell’s Principles of Equity* 630-3 (27th ed. 1973); P. Pettit, *Equity and the Law of Trusts* 400-4 (3rd ed. 1974).

⁶⁵ Note the comment of Lord Diplock in *Gouriel’s* case, [1977] 3 W.L.R. at 327.

⁶⁶ *A.G. v. Birmingham, Tame, and Rea District Drainage Board* [1908] 2 Ch. 551.

⁶⁷ *A.G. v. Harris* [1961] 1 Q.B. 74, at 94 per Pearce L.J.

⁶⁸ *A.G. v. Birmingham, Tame, and Rea District Drainage Board* [1910] 1 Ch. 48, at 60. See also, Cozens-Hardy M.R. [1910] 1 Ch. at 53; and *A.G. v. Bastow* [1957] 1 Q.B. 514, 520, [1957] 1 All E.R. 497, 501.

⁶⁹ *A.G. v. Greenfield* [1962] S.R. (N.S.W.) 393, 399 per Evatt C.J., Herron and Collins JJ.; *Associated Minerals Consolidated Ltd v. Wyong Shire Council* (1974) 48 A.L.J.R. 464, 470.

⁷⁰ (1964) 83 W.N. (Pt. 1) (N.S.W.) 80.

Difficulties began when the Minister and the Department of Local Government disapproved of the council's actions and attempted to prevent the construction of the service station by way of a proclamation issued by the Governor pursuant to the provisions of clause 47 of the *County of Cumberland Planning Scheme Ordinance*. As a matter of construction, Jacobs J. held that clause 47 had no application to buildings but, as has already been indicated, his Honour thought that in the exercise of his discretion no remedy by way of an injunction should issue. Because the matter in issue was a divergence of views between the responsible authority, the Cumberland County Council, and the Minister (or those advising him), Jacobs J. held that it was not proper for the court to intervene when the result of the conflict was that a considerable damage or loss would be incurred by a citizen who had carried out all the obligations of law imposed upon him.⁷¹ No doubt the result of the dispute may well have been different in those jurisdictions which possess a comprehensive system of administrative law, but this was not a sufficient reason for the equity court to attempt to adjust legal rights and administrative powers.⁷²

Moreover, on those rare occasions when the Attorney-General has been persuaded to seek relief which would not be in the public interest it follows almost as a matter of course that the discretion will be exercised against him. Consequently, it has been held that a court may look beyond those interests which are asserted in the name of the Attorney-General and may act upon the reality that the litigation has been instituted by business competitors of the defendant and that a great preponderance of those members of the public concerned are in favour of the conduct of the defendant.⁷³ At the extreme point of its operation this discretion of the court may be exercised against the Attorney-General even where the activities of the defendant are manifestly in breach of a statutory prohibition provided the interests of the public will be thereby served and provided the purposes behind the statute are not violated.⁷⁴ Obviously such an exercise of discretion must be approached with a great deal of caution lest the courts be accused of setting themselves above the law or declining to act in accordance with law.⁷⁵

(ii) *Discretion and the public interest*

The significance of the public interest asserted by the Attorney-General may also require a moulding of those grounds upon which the discretion is normally exercised in cases as between individuals.

⁷¹ *Ibid.* at 88-9.

⁷² *Ibid.* at 89.

⁷³ *A.G. v. The Sheffield Gas Consumers Company* (1853) 3 De G. M. & G. 304; *Stockport District Waterworks Company v. Mayor of Manchester* (1862) 7 L.T. 545, 548.

⁷⁴ *A.G. v. North Shore Gas Co. Ltd* (1930) 10 L.G.R. 30.

⁷⁵ *Ibid.* at 32.

By far the most common source of litigation in this area is the effect of *laches* or delay and there is authority to support the view that *laches* cannot be imputed to the Attorney-General.⁷⁶ And the three reasons of principle isolated by Professor de Smith why this should be so are: first, because the Attorney-General represents the Crown as well as the general public, and the maxim is that time does not run against the Crown; second, because an action by the Attorney-General may be the only possible means of questioning an excess of power, and if his action were to be defeated for delay the usurpation of power would then be unchallengeable; and third, because it would be improper or unseemly to use the term "*laches*," in this context.⁷⁷

However, the great bulk of such obiter comment as there is is to the contrary⁷⁸ and the way in which the above three principles operate allow delay to be a circumstance to be considered by the courts, although it will be a factor that will not affect the Attorney-General to the same extent as a private individual.⁷⁹ It therefore follows that delay may preclude a private plaintiff from obtaining relief and yet not have the same effect upon an action brought by the Attorney-General, whether he be proceeding *ex proprio motu* or *ex relatione*. As the delay of a relator is not necessarily to be attributed to the Attorney-General, this may well be one reason why a private plaintiff could be well advised to seek the Attorney-General's consent to a relator action.⁸⁰ In *Attorney-General and County Council of Down v. Newry No. 1 Rural District Council* a delay of about eighteen months prevented the success of an application by a council for a mandatory injunction directing the removal of a building that was creating a public nuisance, but such an injunction was still granted to the Attorney-General because there was no sufficient evidence of his knowledge of the proposed infringement of the rights of the public. After reviewing the authorities, Andrews J. concluded

"These cases in my opinion establish that the *laches* of a relator is not necessarily to be attributed to the Attorney-General; and that, whilst delay on his part with knowledge of the alleged violation of his rights cannot be ignored, and is a circumstance which must always be considered, especially where the relief sought is by mandatory injunction, the Courts are somewhat slower to deny the Attorney-General, as the custodian of the public rights, relief on this ground than in the case of an individual."⁸¹

⁷⁶ *A.G. v. Scott* [1905] 2 K.B. 160, 169.

⁷⁷ de Smith, *supra* footnote 4 at 392.

⁷⁸ *A.G. v. Wimbledon House Estate Company, Limited* [1904] 2 Ch. 34, 42; *A.G. v. Mescalf and Greig* [1907] 2 Ch. 23; *A.G. v. South Staffordshire Waterworks Company* (1909) 25 T.L.R. 408.

⁷⁹ *A.G. v. The Sheffield Gas Consumers Company* (1853) 3 De G.M. & G. 304, 324.

⁸⁰ *Attorney-General and County Council of Down v. Newry No. 1 Rural District Council* [1933] N.I. 50.

⁸¹ *Ibid.* at 71; approved by the Privy Council in *Associated Minerals Consolidated Ltd v. Wyong Shire Council* (1974) 48 A.L.J.R. 464, 470.

In those cases where the effect of refusing relief to the Attorney-General will have the de facto result of authorizing conduct which is ultra vires the statutory powers of the defendant⁸² or where the environment may be damaged by a mining company that has not obtained consent for its operations from a local council,⁸³ one can understand why the delay of a relator should not of necessity be attributed to the Attorney-General. Any undue hardship to the defendant may in some cases be avoided by suspending the operation of the injunction for an appropriate length of time.

But just as there are rare cases in which the court may exercise its discretion and refuse relief to the Attorney-General, even though there may be a clear breach of some statutory prohibition,⁸⁴ there may also be isolated instances in which the conduct of the defendant has caused no harm to the public and has gone on for so long that a court should not intervene. The only clear illustration of such a case is *Attorney-General v. Grand Junction Canal Company*.⁸⁵ In that case a canal had been completed in 1837 and, pursuant to the authority of an 1810 Act, water for the purposes of operating the canal could be taken from a nearby river provided the flow of the river was not reduced below a certain average. For the next sixty years no complaint as to the operation of the canal was received, but in 1901 the plaintiff council was authorized to supply water to its district by drawing from the river at a point below the canal works. This council then alleged that the construction of the canal did not comply with the 1810 Act and that the canal company was diverting from the river more water than was permitted. The court, however, denied injunctive relief to both the council (suing in its own right) and to the Attorney-General (acting on the relation of the council). With reference to the relator action, Joyce J. was of the opinion that had the Attorney-General approached the court at an earlier date he may have succeeded. But here he had allowed too long a period of time to elapse and during this time the costly works which had been originally constructed had been maintained at considerable expense.

In summary, the principle which emerges from these cases is that the delay of the relator should be irrelevant to the issue whether an injunction should issue. Just as the interest or lack of interest of the relator is normally irrelevant in an action brought by the Attorney-General,⁸⁶ the balance which has to be struck in the present context is the interest of the public in the protection or enforcement of a public right on the one hand against the hardship caused to the defendant by prohibiting a course

⁸² *A.G. v. South Staffordshire Waterworks Company* (1909) 25 T.L.R. 408.

⁸³ *Wyong Shire Council v. Associated Minerals Consolidated Ltd* [1972] 1 N.S.W.L.R. 114, 142-4, aff'd (1974) 48 A.L.J.R. 464, 470.

⁸⁴ *Supra* at pp. 144-5.

⁸⁵ [1909] 2 Ch. 505.

⁸⁶ *Supra* at pp. 140-1. Contrast those cases discussed in fn. 73.

of conduct that he has engaged in for a long time. Whether a private plaintiff may be precluded from obtaining an injunction has nothing to do with the rights of the public; the relevant question is whether the public has slept on its rights.

(iii) *Alternative remedies*

As a general rule it may be stated that where a statute creates a new right and goes on to provide how that right is to be enforced, it will be held that the specified remedy is the only means of enforcement.⁸⁷ To acknowledge this principle is merely to say that where Parliament has created new rights and duties and by the same enactment has nominated a specific tribunal or body for its enforcement, recourse must normally be had to that body alone.⁸⁸ And yet competing with this general rule is the presumption against impliedly taking away the jurisdiction of the superior courts and this presumption operates with considerable force when, for example, the procedure contemplated by Parliament has for some reason proven to be inadequate.⁸⁹

The operation of these principles, however, is largely restricted to the field of private plaintiffs.⁹⁰ Whilst the existence, therefore, of alternative remedies always remains a factor for the consideration of the court in the exercise of its discretion as to whether to grant an injunction, it follows that where the Attorney-General has considered it necessary to come into court by way of a relator action to ask for the assistance of the court in enforcing compliance with a statute, the court ought to be very slow to say that the first law officer of the Crown ought to have first exercised other remedies.⁹¹ And it matters not that the relator may be a trade competitor of the defendant as distinct from a public body.⁹² This concession to the Attorney-General may be supported by recalling that the Attorney-General is not the representative of private rights but rather the representative of the public interest in compliance with statutes; the normal irrelevance of the interest of the relator in the proceedings and the consequent irrelevance of alternative remedies that may be open to the relator; and, finally, by recalling that the Attorney-General has an extremely wide discretion when considering whether a case is appropriate for his intervention.

Instances when the Attorney-General has sought an injunction to enforce a statutory provision that has penalties ascribed to it for breach

⁸⁷ *Barracrough v. Brown* [1897] A.C. 615; *Argosam Finance Co. Ltd v. Oxy* [1965] Ch. 390; *Pasmore v. Oswaldtwistle Urban District Council* [1898] A.C. 387.

⁸⁸ See generally, de Smith, *supra* fn. 4 at 315-8; Wade, *supra* fn. 44 at 564-6; J. Garner, *Administrative Law* 169-71 (4th ed. 1974).

⁸⁹ E.g. *Sivyer v. Amies* [1940] 3 All E.R. 285.

⁹⁰ *Institute of Patent Agents v. Lockwood* [1894] A.C. 347; cf. *Californian Theatres Pty Ltd v. Hoyts Country Theatres Ltd* [1959] S.R. (N.S.W.) 188, 191.

⁹¹ *A.G. v. Bastow* [1957] 1 Q.B. 514, 521 per Devlin J.

⁹² *A.G. v. Premier Line, Limited* [1932] 1 Ch. 303, 313 per Eve J.

abound.⁹³ Any suggestion that the courts lack jurisdiction to issue an injunction in such cases because the inadequacy of the penalty should be remedied by Parliament rather than by way of some supplementary process of the courts is effectively answered by the following observations of Pearce L.J.:

“It is not, of course, desirable that Parliament should habitually rely on the High Court to deter the law-breaker by other means than the statutory penalties instead of taking the legislative step of making the penalties adequate to prevent the offence which it has created. Especially is this so where the offences are of a trivial nature. Yet it is, on the other hand, highly undesirable that some member of the public should with impunity flout the law and deliberately continue acts forbidden by Parliament. And in cases where, under the existing law, this court alone can provide a remedy, it should, in general, lend its aid to enforce obedience to the law when that aid is invoked by the Attorney-General on behalf of the public.”⁹⁴

It follows that in some cases the very inadequacy of the statutory penalty provides the reason for the issuance of the injunction.⁹⁵ By way of illustration, in *Attorney-General (on relation of Manchester Corporation) v. Harris*⁹⁶ the two defendants had continually violated s. 102 of the *Manchester Police Regulation Act 1844* by selling flowers and fruit from stalls placed close to the gate of the Manchester Southern Cemetery. Their disregard of the section and their willingness to pay the fine imposed was made clear by the fact that Robert Harris had been convicted on a total of 142 occasions and his wife had been convicted on 95 occasions. Obviously the fine was not sufficient to oblige conformity with the Act and an injunction was issued. An even more extreme illustration of the same principle is found when an injunction is issued after both the imposition of fines and the imprisonment of the defendant has proved to be inadequate.⁹⁷ Even a power vested in a magistrates' court to make a prohibition order does not preclude a superior court from granting injunctive relief in appropriate cases.⁹⁸

Where no offence has as yet been committed the position is slightly more difficult, but on at least two occasions the courts have intervened.

⁹³ *A.G. v. Premier Line, Limited* [1932] 1 Ch. 303; *A.G. v. Sharp* [1931] 1 Ch. 121; *A.G. v. Wimbledon House Estate Company, Limited* [1904] 2 Ch. 34; *A.G. v. Lees and Courtney* [1932] 3 W.W.R. 533.

⁹⁴ *A.G. v. Harris* [1961] 1 Q.B. 74 at 93-4.

⁹⁵ Whenever there is a clear intention on the part of the defendants to continue a breach, there need not, however, be repeated offences before a court can conclude that the prescribed penalties are inadequate and that an injunction should issue: *Stafford Borough Council v. Elkenford Ltd* [1977] 1 W.L.R. 324.

⁹⁶ [1961] 1 Q.B. 74. Note the rejection of the argument that an injunction should not issue because the conduct of the Harris' was providing a public advantage; it could not be anything other than a public detriment for the law to be continually defied. Compare, *A.G. v. North Shore Gas Co. Ltd* (1930) 10 L.G.R. 30, discussed supra at fns. 74, 75.

⁹⁷ *A.G. v. Bastow* [1957] 1 Q.B. 514.

⁹⁸ *A.G. v. Chaudry* [1971] 1 W.L.R. 1614.

First, it has been held that an injunction may issue even though there is no present breach of the law if that relief is required to restrain the defendant from using the statutory machinery not for any genuine purpose but for the purpose of delay.⁹⁹ Second, the Supreme Court of South Australia has held that it has jurisdiction to entertain an application by the Attorney-General to restrain persons from committing breaches of the law.¹⁰⁰ In the case last cited three members of the general public had successfully obtained the fiat of the Attorney-General to an action seeking to restrain the performance of a musical revue named "Oh! Calcutta". Their ground of objection was that, if performed, the revue would be a violation of stated sections of the *Police Offences Act 1933-1967* (S.A.). Counsel for the producers sought to argue that the trend of the cases indicated that the intervention of the courts should be restricted to those cases where prosecutions have taken place; where the penalties imposed for past infringements have not served to deter the offender from further breaches of the law; and where the public interest required that there should be no deliberate and persistent flouting of the law and that the law should be obeyed. On the facts of the present case it was claimed that there was no evidence of any persistent and deliberate infringement of the law nor any indication that a prosecution would prove an ineffective means of enforcing the law. The argument, however, was rejected. It was considered equally as proper to call into operation the processes of the civil law and the equitable powers of the court to prevent anticipated illegal acts as it was to punish the offences thereby constituted after they had been committed.¹⁰¹

As foreshadowed earlier, the mere existence of other remedies available in the hands of the relator, or even in the hands of a third party,¹⁰² should not be conclusive of the question whether an injunction should issue. Thus, for example, an action may be brought to prevent the violation of local by-laws even though the relator may have the power to pull down or remove any works which contravene the by-laws.¹⁰³ But it is in this present context that the "fiction" involved in many relator actions (i.e., that the Attorney-General is anything more than a nominal plaintiff) is most vulnerable. Before the court issues relief by way of an injunction it must consider whether the existing means of enforcement have been proved to be, or are likely to be, inadequate and in many cases these means of enforcement are in the hands of people other than the Attorney-General.

⁹⁹ *A.G. v. Smith* [1958] 2 Q.B. 173.

¹⁰⁰ *A.G. v. Huber* (1971) 2 S.A.S.R. 142. Here the members of the public were more successful than Gouriet in gaining the co-operation of the Attorney-General.

¹⁰¹ *Ibid.* at 178-80 per Walters J.

¹⁰² E.g., in *A.G. v. Huber* the Attorney-General pointed out to the producers that even if he took no proceedings it was always open to a member of the public or the police to bring a prosecution under the *Police Offences Act 1953-67* (S.A.).

¹⁰³ *A.G. v. Ashborne Recreation Ground Company* [1903] 1 Ch. 101.

To submit that the Attorney-General's own review of these other remedies is conclusive of their inadequacy would be both contrary to precedent and principle. The balancing equation in such cases must remain with the courts. It may not be going too far, however, to suggest that the accepted hesitation of the court to interfere with the decision of the Attorney-General as to the need for injunctive relief¹⁰⁴ should be increased where the alternative remedy lies not in the hands of third parties or the relator but in the hands of the Attorney-General himself. Moreover, there is little difference between this situation and the decision of the Attorney-General to proceed by way of a relator action rather than *ex proprio motu*. Indeed, in these cases the issue lies on the very borderline between the ambit of the court's discretion and the very wide and perhaps unreviewable discretion of the first law officer. The one case which does give some indication of judicial attitudes is the *Huber* decision because in that case the Attorney-General also had the power under section 25 of the *Places of Public Entertainment Act 1913-1967* (S.A.) to prohibit the performance if he was of the opinion "that it is fitting for the preservation of public morality, good manners or decorum . . . so to do". Over eight months before the present action was commenced under the *Police Offences Act 1953-1967* (S.A.) the Attorney-General had written to the producers drawing their attention to the terms of section 25 but he had at that stage contented himself with the comment that he would only be obliged to proceed under that section if persons under the age of eighteen years were admitted to the performance. Bray C.J.'s response to these facts was to conclude that the relators were really using the nominal name of the Attorney-General to ask the court to do something he himself had the power to do but had refrained from doing. Such was a sufficient reason, in the view of the Chief Justice at least, why the discretion to grant an interlocutory injunction should be exercised against the relators.¹⁰⁵ But this result was the minority view as the other two members of the Court, Walters¹⁰⁶ and Wells JJ.¹⁰⁷ reached the opposite conclusion.

3. THE NEED FOR LEGISLATIVE REFORM

Of the remedies traditionally available in administrative law, it would seem that the most restrictive locus standi requirements are those imposed when one is seeking an injunction to restrain an interference with a public right. In such cases, as we have already observed, a mere member of the public must, generally speaking, obtain the consent of the Attorney-General to a relator action unless he can satisfy either of the conditions formulated

¹⁰⁴ *Supra* at p. 147.

¹⁰⁵ (1971) 2 S.A.S.R. 142, at 170.

¹⁰⁶ *Ibid.* at 186.

¹⁰⁷ *Ibid.* at 215-6.

in 1903 by Buckley J. in *Boyce v. Paddington Borough Council*.¹⁰⁸ And that formulation, it will be further recalled, was prompted not by present-day considerations of public law but by a concern to restrict the number of possible plaintiffs seeking damages for a public nuisance.

By way of contrast, the prerogative writs have always as a matter of form been proceedings at the suit of the Crown and the element of public interest consequently involved has thus from a very early date¹⁰⁹ to the present time¹¹⁰ led the courts to adopt a very flexible attitude towards the standing of applicants.¹¹¹ Even the declaration, which (like the injunction) had its origin in the sphere of private law as developed by the Court of Chancery, has long since rid itself of any restrictions such as that the applicant must have an independent cause of action.¹¹² Moreover, the use of the declaration in public law has expanded rapidly. Whereas in 1971 it was probably correct to say that an applicant for a declaration in respect of public rights had to satisfy the *Boyce* requirements,¹¹³ the most recent text on judicial review has submitted that all that an applicant need now prove is a "real interest" in the suit.¹¹⁴ Factors which contributed to the development of the declaration as a public law remedy include the fact that the issue of that remedy has no self-executing effect and the fact that few public authorities would willingly disregard the reasoned judgment of one of the courts of the land. More importantly, the declaration was free of many of the restrictions and complexities which surrounded the prerogative writs.¹¹⁵

Given the restrictive standing requirements for the injunction, it is less of an answer in Australian law than it is in English law to argue that a member of the public who is sufficiently interested in a dispute always has the option of approaching the Attorney-General to seek his consent to a relator action. Leaving aside the unreviewable nature of his discretion (which is common to both jurisdictions),¹¹⁶ in Australian law added concern is generated by the frequent position of the first law officer of

¹⁰⁸ [1903] 1 Ch. 109. Discussed supra at pp. 133-5.

¹⁰⁹ *R. v. Justices of Surrey* (1870) L.R. 5 Q.B. 466 (certiorari and prohibition). Compare, *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd* [1966] 1 Q.B. 380, 401 per Lord Denning M.R.

"The court will not listen, of course, to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done."

¹¹⁰ *R. v. Commissioner of Police, Ex parte Blackburn* [1968] 2 Q.B. 118 (mandamus).

¹¹¹ See generally, B. Schwartz and H. W. R. Wade, *Legal Control of Government* 293-4 Oxford, Clarendon Press, 1972.

¹¹² de Smith, supra fn. 4 at 453. E.g., *Dyson v. A.G.* [1911] 1 K.B. 410.

¹¹³ D. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* 236-7 (4th ed. 1971).

¹¹⁴ Whitmore and Aronson, supra fn. 7 at 479, citing, inter alia, *Johnco Nominees Pty Ltd v. Albury-Wodonga (N.S.W.) Corporation* [1977] 1 N.S.W.L.R. 43; *Green v. Daniels* (1977) 51 A.L.J.R. 463, 13 A.L.R. 1.

¹¹⁵ See generally, Zamir, "The Declaratory Judgment v. The Prerogative Orders" [1958] *Public Law* 341.

¹¹⁶ Discussed supra at pp. 140-3.

the Crown as a member of the government of the day.¹¹⁷ Whilst his decision must be in theory uninfluenced by party political considerations,¹¹⁸ speculation as to motive is naturally aroused when the Attorney-General refuses to take proceedings against an instrumentality of his own government.¹¹⁹ This speculation is only heightened by a refusal on the part of the Attorney-General to give reasons for his decision.¹²⁰

Flowing on from the last mentioned point is the growing significance to be attached to the sorts of interest being protected by way of the injunction. At that point of time when the injunction was used to protect property or rights of a proprietary nature,¹²¹ a decision as to standing had little political content; but, now that the courts are willing to use the injunction as a means of enforcing statutory duties,¹²² it is possible that political ramifications may arise from complaints about the failure to fulfil public duties.¹²³

With these considerations in mind, the two final questions that must be asked are: (i) Should a private citizen be allowed to apply for injunctive relief with a view to enforcing a public statutory right?; and (ii) Can the retention of different locus standi requirements for each of the remedies be justified any longer?

(a) *Injunctions and the Enforcement of Statutory Provisions*

One of the most substantial arguments advanced by Gouriet in the course of his progress through the courts was that as English law accorded him sufficient standing to bring a prosecution once the *Post Office Act* 1953 had been breached, why should the same law deny him standing to seek an injunction to prevent that Act being breached in the first place? In principle this argument has an initial attraction but it was ultimately rejected because of the value the Law Lords placed on the judgment of the Attorney-General and his control over the proceedings. Thus Lord Fraser observed:

“But the analogy is not exact because a private prosecution is always subject to the control of the Attorney-General through his power to enter a nolle prosequi, or to call in any private prosecution and then offer no evidence. By the exercise of these powers the Attorney-General

¹¹⁷ The position is otherwise in Britain: Sir Elwyn Jones, *The Office of Attorney-General* [1969] C.L.J. 43.

¹¹⁸ *Supra* at p. 140.

¹¹⁹ E.g., *Helicopter Utilities Pty Ltd v. Australian National Airlines Commission* [1962] N.S.W.R. 747. And if he does grant permission he may be later forced to resign if cabinet decides to overrule his judgment—as was the case with the Tasmanian Attorney-General's decision to restrain the flooding of Lake Pedder (discussed in *Access to Courts* *supra* fn. 16, at para. 2.22).

¹²⁰ E.g., Samuel Silkin Q.C., A.G. in *Gouriet v. Union of Post Office Workers* [1977] 1 Q.B. 741-2.

¹²¹ *A.G. and Lumley v. T.S. Gill and Son Pty Ltd* [1927] V.R. 22. See also *Rigby v. Connol* (1880) 14 Ch.D. 482.

¹²² *Cooney v. Ku-ring-gai Municipal Council* (1963) 114 C.L.R. 582.

¹²³ *Access to Courts*, *supra* fn. 16, at para. 2.74.

can prevent the right of private prosecution being effectively exercised in any particular case. The need to obtain the Attorney-General's consent to relator proceedings is the means of enabling the Attorney-General to exercise an equivalent control in the public interest over a private application for injunction against crimes. In relator proceedings the Attorney-General is dominus litis; his right of control is not a fiction but it can be made effective at any stage of the proceedings."¹²⁴

And Lord Wilberforce observed:

"More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, involving as it does the interests of the public over a broad horizon, is a decision which the Attorney-General alone is suited to make."¹²⁵

Such comments obviously carry considerable weight and support the proposition that there exists a category of cases which should never be brought before the courts or, if they are initiated, should never be allowed to proceed.¹²⁶

Even apart from these considerations, it should always be borne in mind that the use of the injunction (i.e., a remedy awarded by the civil courts) to prohibit conduct in breach of a statutory provision of a criminal nature is a quite recent development and is in many respects an exceptional power. As was pointed out by a majority of their Lordships in the *Gouriet* case,¹²⁷ it is a power fraught with difficulties. For example: the effect of issuing an injunction is to add a discretionary penalty for contempt of court to the criminal penalty; breach of an injunction will be dealt with in the civil court by a judge alone, whereas in the criminal court the accused may be entitled to be tried by a jury; and, if an injunction were to be refused because the civil court considered that the threatened conduct would not be a criminal offence, a subsequent prosecution for the same conduct might be inhibited although it would have been justified on its merits.¹²⁸

In those cases where the statutory provision does not involve the imposition of criminal penalties, the above considerations are inapplicable. But even in these cases it should always be regarded as exceptional for a court to supplement a statute by granting an injunction and thereby expose a defendant to unlimited sanctions, including imprisonment.

To say in the present context that injunctive relief is of an exceptional nature, however, only emphasises the care with which a court must exercise its discretion as to whether or not it should make the order

¹²⁴ [1977] 3 W.L.R. at 350.

¹²⁵ *Ibid.* at 314-5.

¹²⁶ This point is developed *infra* at pp. 156-7.

¹²⁷ The majority were Lords Wilberforce, Dilhorne, Diplock and Fraser. Lord Edmund-Davies was not convinced of the difficulties involved [1977] 3 W.L.R. at 340.

¹²⁸ [1977] 3 W.L.R. at 350-1 per Lord Fraser; at 313-4 per Lord Wilberforce; at 322-3 per Viscount Dilhorne; at 329-30 per Lord Diplock.

sought; it does not answer the question as to whom the proper plaintiff should be to bring a case before the courts. The court has to consider the same factors whether the plaintiff is the Attorney-General or a private citizen.¹²⁹

(b) *The Retention of Different Locus Standi Requirements*

Having previously noted the relaxed locus standi requirements for the prerogative writs and even the declaration,¹³⁰ why in principle should different requirements now be imposed upon applicants seeking an injunction? Why, for example, should the courts be prepared to grant Raymond Blackburn standing to apply for a writ of mandamus to compel the Commissioner of Police to enforce the *Betting, Gaming and Lotteries Act* 1963 (U.K.)¹³¹ and yet not be prepared to grant injunctive relief in respect of a public right to an applicant who suffers no greater damage than the rest of the community? Or, to phrase the same problem on a broader level, why should an applicant be denied standing to seek one remedy and yet be granted standing to seek another?¹³² The time has long since arrived when the practical results of each of the remedies overlap and when one remedy may be called upon to do the work once reserved for another.¹³³

These comments are, of course, far from novel. In March 1976 the English Law Commission filed its report on remedies in administrative law and recommended that the existing remedies should be abandoned and replaced by an "application for judicial review".¹³⁴ Furthermore, a person should have sufficient standing to apply for this relief if he has "such interest as the Court considers sufficient in the matter to which the application relates".¹³⁵

More recently, in November 1977, the Australian Law Reform Commission published its working paper on access to the courts and public interest suits.¹³⁶ Unlike the English report, the Australian paper does not profess to be yet another condemnation of the prerogative writs; as its title foreshadows, its main thrust is, an examination of those ways in which

¹²⁹ Access to Courts, *supra* fn. 16, at para. 2.14.

¹³⁰ *Supra* at p. 151.

¹³¹ *R. v. Commissioner of Police, Ex parte Blackburn* [1968] 2 Q.B. 118. Of the earlier cases, compare and contrast: *R. v. Cotham* [1898] 1 Q.B. 802; *R. v. The Guardians of the Lewisham Union* [1897] 1 Q.B. 498.

¹³² E.g., *Gregory v. London Borough of Camden* [1966] 1 W.L.R. 899 (declaration refused but it was suggested certiorari may lie).

¹³³ In English and Australian law consider the present scope of the declaration. At the federal level in the United States the prerogative writs have been all but abandoned and the injunction and the declaration have taken their place, Schwartz and Wade, *supra* fn. 111, at 220-2.

¹³⁴ Report on Remedies in Administrative Law (Law Com. No. 73, Cmnd. 6407, 1976).

¹³⁵ *Ibid.* at para. 48. Note in passing the comment in para. 13: "The trend of more recent decisions is towards the development of a single concept of locus standi applicable to all the prerogative orders."

¹³⁶ *Supra* at fn. 16.

locus standi requirements can be simplified. Proceeding from the assumption that the existing standing rules should be liberalised and that there is considerable virtue in adopting a single standing rule which is applicable to any of the relevant forms of review,¹³⁷ the Australian Commission envisages that there are three choices available to reformers. First, it may be argued by some that any person whatever should be entitled to take proceedings in the public law area and that reliance may be placed upon the discipline of costs to limit actual cases to those in which a plaintiff has a real interest.¹³⁸ Second, perhaps a general formula could be drafted so as to enable the courts to screen plaintiffs as part of their determination of the merits of a particular case.¹³⁹ And the final suggestion is that a preliminary screening procedure could be devised in order to determine standing in advance of the substantive issues.¹⁴⁰

After a perceptive examination of each of these avenues of development the Commission was uncertain whether to adopt the "open-door policy" or a standing formula to be applied by the courts, but it ultimately favoured the "open-door policy" on the basis that it was more consistent with the proper interest of all citizens in the performance of public duties.¹⁴¹ However, consideration of the desirability of maintaining the same standing requirements for the traditional remedies and those for statutory appeals from administrative bodies led the Commission at a later stage to shift its ground and favour the prescription of a general formula which could be applied to both situations.¹⁴² If this recommendation for reform is implemented the desired result could be that the same form of words regulating locus standi will apply irrespective of whether one is appealing from an administrative decision pursuant to some statutory provision, or applying for a prerogative writ, an order of review under the *Administrative Decisions (Judicial Review) Act 1977*,¹⁴³ or a declaration or an injunction.

The form of words considered adequately to capture this tentative recommendation of the Commission is that suggested by Dr G. D. S. Taylor—i.e., that the issues be a "matter of real concern to the plaintiff".¹⁴⁴ It is intended that this phrase will avoid any requirement of actual damage to a

¹³⁷ *Ibid.* at paras. 2.70 and 2.72.

¹³⁸ *Ibid.* at paras. 2.73 and 2.74.

¹³⁹ *Ibid.* at paras. 2.75-2.80.

¹⁴⁰ *Ibid.* at paras. 2.81-2.92.

¹⁴¹ *Ibid.* at para. 2.93.

¹⁴² *Ibid.* at paras. 3.51-3.62.

¹⁴³ At present this Act restricts applicants for an order of review to "persons aggrieved", s. 3(4). As an illustration of how the words "any person . . . whose interests may be affected by the decision" in s. 27(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) may be interpreted see: *Re McHattan and Collector of Customs* (1977) 18 A.L.R. 154.

¹⁴⁴ Access to Courts, *supra* fn. 16, at para. 2.79. As an illustration of how the words "any person . . . whose interests may be affected by the decision" in s. 27(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) may be interpreted see: *Re McHattan and Collector of Customs* (1977) 18 A.L.R. 154.

plaintiff and will have the effect that the number of cases where standing is refused to persons with a genuine interest in the subject matter will be few.¹⁴⁵

Any general formulation, however, suffers a common defect. The courts and individual judges will make of any phrase that which they desire. If a single phrase is adopted in respect of all forms of review it will no doubt be difficult for judges to openly apply relaxed standing requirements for one form of relief and yet more stringent requirements for another. But otherwise a conservative court will be free as a matter of reality to continue applying stringent standards and a liberal court will be free to construe the very same phrase as entitling it to hear any member of the public who is genuinely concerned with the issues at stake.¹⁴⁶ At one extreme it may be said that neither a conservative court nor a liberal court will be prepared to listen to a mere intermeddler or a troublemaker, but beyond this few other limitations can readily be provided.

If speculation is permissible, it is submitted that the phrase "matter of real concern to the plaintiff" will obviously lead to two interpretations. The present relaxed standing requirements that characterize the prerogative writs will continue to prevail and will be carried over to the injunction. In such cases every member of the public who is a bona fide plaintiff will probably be regarded as having a real concern in the matter. Equally obvious is that category of cases where only readily identifiable persons are concerned with an administrative determination—e.g., an ordinary citizen will have no "real concern" in the accuracy of X's taxation assessment. In this latter category the phrase will not be as open-door as was formerly suggested. This divergence of interpretations does not call for the rejection of the Commission's recommendations but only leads to the realization that the courts are not going to retreat from the generous locus standi standards already established for some remedies and that these existing standards are tantamount to an "open-door policy".

A final point which should be raised relates to attempts to enforce statutory rights and some of the comments made by the Law Lords in the *Gouriet* case. At an earlier point it was noted that their Lordships placed considerable value on the function of the Attorney-General as the protector of the public interest and in fact yielded to the wisdom of his judgment in some cases as to whether litigation should be commenced or even continued.¹⁴⁷ If there is a lesson to be learned from these comments it may be that whilst it is desirable to allow a bona fide and interested member of the community standing to seek an injunction to enforce a

¹⁴⁵ *Ibid.* at para. 2.80.

¹⁴⁶ This is much the same criticism the Australian Law Reform Commission levelled against the recommendation of the English Law Commission's recommendation, *ibid.* at para. 2.71.

¹⁴⁷ *Supra* at pp. 152-3.

public statutory right, it may also be desirable to create by statute a right in the Attorney-General to take over those proceedings and prevent their continuance. Such a power would obviously bear some analogy to his present power to enter a nolle prosequi in prosecution cases in the United Kingdom.¹⁴⁸ To prevent any unmeritorious exercise of this contemplated power, the legislature could also impose upon the Attorney-General a statutory obligation to furnish reasons for his decision to discontinue.

CONCLUSIONS

The result of the decision of the House of Lords in *Gouriet v. Union of Post Office Workers* was to contain locus standi requirements for injunctive relief in respect of public rights to those conditions formulated for a social environment far different from that presently existing. It also had the effect of setting the injunction apart from the other remedies and to curtail its development as a public law remedy. The relator action is admittedly one way of overcoming some of the difficulties, but the unreviewability of the Attorney-General's discretion may mean that public rights can go unenforced without any explanation being given. Rationalization of standing requirements for all of the remedies is long overdue, but the retention of a test first propounded in 1903 and the unreviewability of the Attorney-General's discretion combine to make the position with regard to the injunction particularly regrettable.

¹⁴⁸ Edwards, *supra* fn. 44, at 227-37.