COMMENTS ON RECENT DEVELOPMENTS IN THE LAW

GOURIET'S CASE IN THE HOUSE OF LORDS

The public has an interest in the enforcement of the criminal law. But do members of the public have the right to apply, on the basis of that interest, for an injunction or declaration in respect of threatened breaches of the law? Traditionally, the answer has been to direct the public-spirited citizen to the good offices of the Attorney-General. With the Attorney-General's consent, an action could be brought in his name as guardian of the public interest "at the relation of" the citizen concerned. But what if the Attorney-General refused to consent to relator proceedings? Could the citizen take the matter any further? The question is clearly an important one, not only in law but in constitutional theory. In New Zealand, as in England and most other common law jurisdictions, the Attorney-General is a member of the government of the day: should a member of the government have absolute control over citizens' access to the courts in this sort of situation? In the landmark case of *Gouriet* v. *Union of Post Office Workers*,[1] the legal world was treated to the impressive spectacle of the House of Lords considering explicitly and at length not only what the law is on this question but also whether the law on this question is wise.

The result is by now well known. The House of Lords unanimously upheld the absolute and exclusive right of the Attorney-General to control the initiation of suits for injunctions and declarations in the public interest. Just as the Attorney-General has in general no right to interfere with the assertion of private rights so, it was said, no private person has the right to represent the public in the assertion of public rights.[2] Thus the applicant, Mr Gouriet, was held not to be entitled to the relief which the Court of Appeal[3] had granted him; namely, an interim injunction restraining the union from procuring a ban on postal services to South Africa and declarations that the ban and its procurement were unlawful. The approach which the Court of Appeal had taken in granting relief was rejected as wrong not only in law but also in principle.

On traditional principles of locus standi Mr Gouriet's claim had little chance of success. He asserted no right or interest in the proposed postal ban over and above those of a concerned member of the public: there was no special interest to be protected by an injunction, no private right for a declaratory judgment to vindicate. The Attorney-General had been asked to lend his name to relator proceedings and he had refused. There was

1 [1977] 3 W.L.R. 300 (H.L.).
2 Ibid., 310 per Lord Wilberforce.
3 [1977] 2 W.L.R. 310 (C.A.).

strong authority for the proposition that the exercise of the Attorney-General's discretion on this matter is final.[4] Clearly, Mr Gouriet's only hope lay in a head-on challenge to the traditional principles. Counsel admitted that the law in this area was so well-established as to form a "mould" in to which all public interest litigation must be set. The gist of his submission, however, was that the House of Lords should use its power to reshape the mould or, failing that, to break it. Not surprisingly, their Lordships declined to do so.

Central to Mr Gouriet's claim was the argument that the traditional relator procedure was largely a matter of technical fiction. The role of the Attorney-General was simply to filter out vexations and frivolous claims; once his consent was granted, the conduct of the case was left in the hands of the relator. Therefore, in a sufficiently important case, the courts should be able to override the technical obstacle posed by the Attorney-General's refusal to lend his name to the proceedings; a citizen should be able to put the case for the public interest before the court and the court, in its discretion, should decide what action was to be taken.

In rejecting this submission, the House of Lords combined two distinct lines of argument. The first line was based on the theoretical difficulties arising from the use of injunctions in aid of the criminal law. The second line of argument was based on the complex considerations of public policy which were likely to arise in this area. Together these arguments convinced their Lordships that the Attorney-General's place in the relator procedure was not only very real – it was also very necessary.

To understand the first line of argument, it is important to appreciate that the declaration and the injunction sought related not to breaches of civil or administrative duty but to threatened breaches of the *criminal* law – statutory offences for which statutory penalties were prescribed. What the officers of the Union of Post Office Workers were doing, and what they were urging their members to do, constituted offences against the Post Office Act 1953 (U.K.) punishable by up to two years' imprisonment.

Given the statutory prohibition, the House of Lords asked what purpose, if any, an injunction or a declaration could serve in this situation. From one point of view, the answer was "None". As Viscount Dilhorne pointed out, the Act of Parliament prohibiting the threatened conduct was itself an injunction. The order sought by Mr Gouriet simply repeated the words of the statute and said that they must be obeyed. But if the statute was disobeyed, was there any reason to suppose that an injunction would fare any better?[5]

In fact, the interim order granted to Mr Gouriet had been sufficient to prevent the ban. Before the proceedings, there had been some doubts expressed by union officials as to whether the relevant provisions of the Act were anything but ineffective anachronisms. But, as Lord Fraser of Tullybelton pointed out, it was not necessary to invoke the machinery of the courts to correct that impression. Any legal authority could have clarified the matter without difficulty.[6]

4 *London County Council* v. *Attorney-General* [1902] A.C. 165, 168-169 (H.L.).
5 Supra n. 1 at 322.
6 Ibid., 350.

From another point of view, however, a civil injunction could be seen as a very unwelcome addition to the statutory prohibition. Parliament, in prohibiting the actions in question, had also set the maximum penalty that could be awarded for an offence. But if a civil injunction were added to the situation, an offender would face the double jeopardy of liability for contempt as well as criminal liability. The intention of Parliament would, in effect, be defeated by the imposition of an unlimited liability for contempt over and above the maximum penalty laid down in the statute for breach of its provisions. Furthermore, proceedings for contempt might prejudice later criminal proceedings, perhaps undermining some of the safeguards of the criminal process. The jurisdiction to grant injunctions in aid of the criminal law was therefore regarded by their Lordships as "anomalous" and "dangerous", one to be exercised with great delicacy and caution, and confined, if at all possible, to truly exceptional circumstances.[7]

With respect, it is difficult to see how this line of argument leads to the conclusion that no proceedings of this kind should be initiated without the Attorney-General's consent. The dangers of adding a civil injunction to the statutory prohibition seem to be dangers in principle. They are arguments against *any* such use of injunctions apart from exceptional circumstances, rather than merely arguments against their use in a case brought by a public-spirited citizen.[8] To be sure, the citizen may be blissfully unaware of the dangers whereas the Attorney-General is almost certain to have them in his contemplation. But nothing has been said so far to indicate why it should be for the Attorney-General rather than the courts to make the final decision on this matter.

One can certainly envisage exceptional circumstances (e.g. dangers to the public safety) where the dangers of not granting an injunction would outweigh the dangers of using injunctions in support of the criminal law. The case of *Attorney-General* v. *Chaudry*[9] is perhaps a good example. But, with respect, surely the courts are capable of weighing these factors. The relevant considerations do not seem to be so necessarily political as to require that the decision invariably be left in the hands of the Attorney-General. Devlin J. (as he then was) had argued in his judgment in *Attorney-General* v. *Bastow*[10] that it was up to the Attorney-General as first law officer of the Crown to survey the different methods available for seeing that the law was not defied and to come to a conclusion as to which would be the most appropriate in each particular case. He considered that the court should not look behind the Attorney-General's decision. But, with respect, this was not a statement which the House of Lords need have accepted uncritically, especially in the light of the strong objections in principle to this use of injunctions which their Lordships had outlined.

The second main line of argument used by the House of Lords is more cogent and persuasive. Particularly in cases of industrial action but also, one imagines, in other cases as well, the enforcement of the law may be just one

7 Ibid., 313-314 per Lord Wilberforce, 322-323 per Viscount Dilhorne, 329-330 per Lord Diplock, 350-351 per Lord Fraser of Tullybelton. This line of argument did not appeal to Lord Edmund-Davies: ibid., 340.

8 See the dissenting judgment of Bray C. J. in *Attorney-General* v. *Hunter* [1971] 2 S.A.S.R. 142, 159-172 for an eloquent development of this line of thought.

9 [1971] 1 W.L.R. 1614.

10 [1957] 1 Q.B. 514, 521 et seq.

of several public interests to be balanced in a particular situation. The risk (in terms of law and order) of allowing a threatened offence to take place must be balanced against the possible risk of industrial or political confrontation, opportunities for martyrdom, disruption of negotiations, and a decline in public morale if an injunction is granted. An injunction and contempt proceedings may well have long-term repercussions that are simply not apparent to an irate citizen intent on seeing that the law of the land is enforced.

Unlike the difficulties raised in the first line of argument, these are no longer matters of principle – they are matters of day-to-day political pragmatics and a fortiori not matters which should be entrusted to the discretion of a court. Lord Wilberforce summed up the attitude of the House of Lords on this point:[11]

> The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas.

This argument seems to have been accepted as conclusive by all members of the House.[12] The injunction and the declaration would remain, of course, remedies subject in the last resort to the inherent discretion of the courts. The nature of the issues involved, however, dictated that a preliminary discretion should be exercised by the Attorney-General to relieve the courts of the burden of having to deal, at the behest of a well-intentioned public-minded citizen, with all the discretionary features of this complex area of law and policy.

It is by no means unusual for such a discretion to be vested in a Minister of the Crown. Their Lordships went further, however, and reaffirmed the unreviewability of the Attorney-General's discretion. In his Court of Appeal judgment, Lord Denning M.R. had argued that the court's recognition of a complaint such as Mr Gouriet's constituted a form of indirect judicial review of the Attorney-General's refusal to consent to relator proceedings.[13] He had attempted to restrict the application of the principle of unreviewability, laid down by the House of Lords in 1902 in *London County Council* v. *Attorney-General,*[14] to affirmative exercises of discretion only. By the time *Gouriet's* case reached the House of Lords, the applicant had abandoned the argument that the Attorney-General's discretion was reviewable in any sense, and no arguments appear to have been put to the House of Lords on this point. Nevertheless their Lordships emphatically rejected Lord Denning's attempt to distinguish the *London County Council* case both as a statement of law and as a suggestion of principle. Neither an

11 Supra n. 1 at 314-315.
12 Ibid., 321, 326-327 per Viscount Dilhorne, 330 per Lord Diplock, 342 per Lord Edmund-Davies, 353 per Lord Fraser.
13 Supra n. 3 at 328.
14 Supra n. 4.

affirmative nor a negative exercise of the Law Officer's discretion can be challenged in the courts.[15]

With respect, and bearing in mind that the point was not canvassed in argument, their Lordships' position on reviewability seems a strange one. Viscount Dilhorne (himself a former Attorney-General) recognised at least one consideration which he said would be quite improper and irrelevant as the basis for an exercise of the discretion: namely, the political repercussions of a decision one way or the other on his own or his party's fortunes.[16] But if it can be stated in advance that exercise of the discretion for a particular purpose would be improper, why should such a decision be immune from judicial review? It will not do to cite the arguments already outlined above (the delicacy of the issues involved, etc.) for these provide justification only for the *existence* of the Attorney-General's discretion, not for its *unreviewability.* Clearly, it is one thing to say that the courts shall not exercise a discretion because of the delicate policy matters involved; it is quite another thing to say that they are incapable of detecting abuses in the exercise of it. It seems, with respect, to be a clear implication of the decision of the House of Lords in *Padfield* v. *Minister of Agriculture, Fisheries and Food*[17] that the principle of judicial review of a Ministerial discretion may survive even though the discretion itself could not have been exercised by a judge.

The foregoing discussion has focused primarily on the permanent injunction sought by Mr Gouriet. Some comments must be made about the other remedies claimed: a declaratory judgment and the interim injunction that had been granted by the Court of Appeal.

It is a great pity that the Lords of Appeal confined their examination of principle to the field of the injunction. They did not consider at any point whether the "mould" of relator procedure should be broken or reshaped so far as applications for declaratory judgments are concerned. Obviously, neither of the two lines of argument developed above apply in the case of a declaration. The declaration, as such, cannot be enforced and thus involves none of the difficulties arising out of injunctive interference in the criminal law. Nor can it have any political effects as such: a declaration merely states the law on a particular point. In the particular circumstances of *Gouriet's* case, it seems that an unequivocal declaration of the continued validity of the relevant sections of the Post Office Act would have been sufficient to put an end to the proposed ban.

In dealing with Mr Gouriet's claim for a declaration, their Lordships confined themselves to a consideration of the authorities; they did not consider whether the authorities should be followed. The decision of the House in *London Passenger Transport Board* v. *Moscrop*[18] is clear authority for the proposition that the courts have a very wide jurisdiction to make declaratory judgments, but that the jurisdiction exists to declare the *rights* of plaintiffs, not to declare the law generally. Their Lordships were unanimous in concluding that a private citizen was not competent to seek a

15 Supra n. 1 at 308 per Lord Wilberforce, 319-320 per Viscount Dilhorne, 336-337 per Lord Edmund-Davies, 348 per Lord Fraser.
16 Ibid., 321.
17 [1968] A.C. 997.
18 [1942] A.C. 332.

declaration of public rights.[19] The only argument advanced in favour of following this authoritative proposition was an implicit argument by analogy from the Attorney-General's position in respect of injunctions. But, as we have already seen, the two remedies differ in such a way as to make this analogy inappropriate.

The case of the interlocutory injunction is more straightforward. The Court of Appeal had held by a majority (Lord Denning dissenting) that Mr Gouriet was not entitled to a final injunction but that he was entitled to an interlocutory injunction pending final determination of his claim for a declaration. This anomaly (making him more successful at the interim stage than he could possibly be at the final stage) appears to have stemmed from a misinterpretation of section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.) which empowered the High Court to grant an injunction by interlocutory order in all cases where it appeared just and convenient to do so. Lord Edmund-Davies was the only member of the House of Lords to consider this matter in any detail. The grant of an interlocutory injunction must be *just* as well as convenient, he said, and the word "just" indicated a reference to the plaintiff's right to seek injunctive relief in the first place. But since the majority of the Court of Appeal had acknowledged that Mr Gouriet had no right to final injunctive relief, it followed ipso facto that an award of interlocutory injunctive relief would not be "just".[20]

Finally, to sum up the state of the law after *Gouriet.* Clearly, the law on relator proceedings for injunctions and declarations must now be regarded as settled for the time being. It is the exclusive and absolute prerogative of the Attorney-General to seek injunctions and declarations in the public interest. He may do so ex officio or ex relatione, but in either case the action is his. When he grants his consent to relator proceedings, he is enabling an action to be brought which could not otherwise be brought. When he refuses his consent, he is not denying the right of any individual to have access to the courts, for an ordinary member of the public would have no such right apart from his consent.[21] Consequently, Lord Denning's comments about urgency and delay in *Attorney-General ex rel. McWhirter* v. *Independent Broadcasting Authority*[22] must now be recognised as incorrect. Lord Denning's suggestion had been that a member of the public might be able to apply for an injunction in a sufficiently important case if the Attorney-General improperly or unreasonably delayed in giving leave, or if his machinery worked too slowly.[23] None of these hypotheses applied in *Gouriet's* case, but nevertheless the House of Lords cast considerable doubt on Lord Denning's dictum.[24] In any case, it can hardly survive their Lordship's view that the Attorney-General is the real, not just the nominal, plaintiff in a relator action. So long as the joinder of the Attorney-General was regarded as a mere technicality, then Lord Denning's approach made

19 Supra n. 1 at 316 per Lord Wilberforce, 327 per Viscount Dilhorne, 333 per Lord Diplock, 345 per Lord Edmund-Davies, 352-353 per Lord Fraser.
20 Ibid., 346.
21 Ibid., 326 per Viscount Dilhorne.
22 [1973] Q.B. 629 (C.A.).
23 Ibid., 649.
24 Supra n. 1 at 315 per Lord Wilberforce, 326 per Viscount Dilhorne, 342 per Lord Edmund-Davies, 351 per Lord Fraser.

sense. But if the Attorney-General is in reality the only rightful plaintiff, then no amount of delay on his part can entitle any other party to step into his position.

Many people will see the decision in *Gouriet* as something of a general set-back to recent liberalising trends in the law of *locus standi.* But it is interesting that the House of Lords' decision was not based on any *general* policy considerations relating to standing as such. Indeed, Lord Edmund-Davies expressly disavowed any reliance upon the so-called "floodgates" argument as a basis for his decision.[25] Rather, their Lordships' reasoning was related much more closely to the specific issues raised by relator proceedings, particularly proceedings for injunctions. Therefore it cannot be assumed that the principles laid down in *Gouriet* will necessarily have any application to questions of standing for the prerogative writs. An analogy put forward by the applicant based on the more liberal requirements of *locus standi* for mandamus was rejected by Lord Wilberforce and Viscount Dilhorne and not referred to in the other speeches.[26] One presumes, therefore, that the analogy will not work the other way: there is no reason to doubt Lord Denning's observations on standing in *R.* v. *Metropolitan Commissioner of Police, ex parte Blackburn*[27] in the light of the decision in *Gouriet.*

Furthermore, nothing in the decision of the House of Lords derogates from the right of a plaintiff to seek injunctive or declaratory relief on the basis of any special damage he has suffered over and above the injury to the public at large.[28] Many offences are also private wrongs, said Lord Diplock, and the policy of the law has been not to deprive the victim of a wrong of his civil redress merely because the wrongdoer is also subject to criminal sanctions in respect of the same conduct.[29]

This distinction is of considerable importance in New Zealand. In *Harder* v. *New Zealand Tramways Union,*[30] decided after the English Court of Appeal decision in *Gouriet* but before the decision of the House of Lords was delivered, Chilwell J. described the Court of Appeal decisions in *McWhirter* and *Gouriet* as "refreshing" and "enlightened" attempts to "unshackle the procedural difficulties of the past and make it more readily available for a Plaintiff to be heard by the Court provided, of course, that he brings to the Court a matter worthy of the Court's attention". Inasmuch as the decision in *Harder* (where a law student was granted an injunction to restrain a threatened illegal transport stoppage) was based on the English Court of Appeal's decisions, it is submitted that it must now be regarded as wrongly decided.[31] However, Chilwell J. also drew attention to an element of special damage: because of the public transport stoppages, the plaintiff

25 Ibid., 340. The fallacies in the "floodgates" argument have been exposed many times: see e.g., *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, 423 per Farwell L. J.; *Thorson* v. *Attorney-General of Canada (No. 2)* (1974) 43 D.L.R. (3d) 1, 6 per Laskin J.

26 Ibid., 315, 326. Compare Lord Denning's use of the analogy in the Court of Appeal: supra n. 3 at 322.

27 [1968] 2 Q.B. 118.

28 *Boyce* v. *Paddington Borough Council* [1903] 1 Ch. 109, 174.

29 Supra n. 1 at 330.

30 Unreported judgment of Chilwell J., Supreme Court, Auckland, 28 April 1977, No. A. 441/77.

31 The decision of the House of Lords in *Gouriet* was applied by Casey J. in *The Royal Forest and Bird Protection Society Inc.* v. *Paynter Sawmills Ltd.,* Supreme Court, Christchurch, 1 September 1977.

was compelled to spend fourteen dollars per week in taxi fares in order to attend his university classes. The learned judge also drew attention to another recent decision of the New Zealand Supreme Court. In *Fitzgerald* v. *Muldoon*[32] a clerk in the public service had been held entitled to seek a declaration and an injunction against the Prime Minister on the basis of a loss of a loss of approximately one dollar a week as a result of the Prime Minister's illegal "suspension" of an employer-subsidised superannuation scheme.

The fact that these rather trivial sums have been accepted as constituting "special damage" would seem to indicate a willingness by the courts to extend *locus standi* to applicants who are, in reality, suing on the basis of the public interest.[33] To the extent that satisfaction of the special damage requirement can be seen to be the basis of *locus standi* in *Fitzgerald* and *Harder*, those decisions stand unaffected by the decision in *Gouriet*. It will be in this area, if any, that further relaxation of standing requirements by the courts can be expected to take place.

J. J. WALDRON

32 [1976] 2 N.Z.L.R. 615.

33 See also Black, "Enforcing Public Rights" [1977] N.Z.L.J. 185. But see *Williams* v. *McMillian and the Attorney-General* (unreported decision of Perry A. C. J., Supreme Court, Auckland, 9 June 1977) for a contrary view.