

Standing in public law cases

This is a written version of my talk to the [Scottish Public Law Group annual conference](#) on 7 June 2010¹. A note on vocabulary; I take the word 'standing' from English law to wrap up both title and interest to sue; and 'locus standi' is simply the Latin for standing.

Standing in Public Law Cases

It is a truth almost universally acknowledged that the Scottish law of title and interest to sue in public law matters is over-restrictive and in need of reform². It seems to me, indeed, that this area of law is obsolete and unfit for purpose; that is simply a polite way of saying that it is in a mess. There is not universal agreement on this: the few who seem to think that our rules of standing are actually adequate seem for the most part to be members of the College of Justice. Yet it is that group who are responsible for the law being in the state it is in.

I wish to put, and answer, three questions as to this teenager's-bedroom-like mess:

- How did things get into this state?
- What is hidden underneath the debris?
- How can it get cleaned up?

How did things get into this state?

On 14 December 1906 the first U-boat was commissioned into the Imperial German Navy. Twelve days later, the world's first feature film³ was released. Between these dates, Lord Ardwall gave his opinion in the case of *Swanson v Manson*, 1907 SC 426. The Imperial German Navy and black-and-white silent film have passed into history. Yet this opinion remains, the leading Scottish authority on the principles to be applied to the question: when does a petitioner have an 'interest' which the law will recognise in bringing proceedings for judicial review⁴. The answer to that question is decided by much the same test as in private law: if the question involves the rights or the status of the petitioner, there is interest to sue; but if not, not.

The leading case on 'title' to sue is of similar age: *D & J Nicol v Dundee Harbour Trustees*, 1915 SC (HL) 7⁵. In a much-quoted passage, Lord Dunedin said this:

By the law of Scotland a litigant, and in particular a pursuer, must always qualify title and interest. Though the phrase "title to sue" has been a heading under which cases have been collected from at least the time of

Morison's Dictionary and Brown's Synopsis⁶ , I am not aware that any one of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but I think it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies.

This is judge-made law, made long before modern concepts of public law had been dreamed of. It is often said that modern public law does not rely on ancient authorities. Yet we see here a reliance on a tract of authority of great antiquity. *Swanson* had in fact nothing whatsoever to do with public law; it was an action for reduction of a will. *D & J Nicol* appears to be a public law case; yet the concepts and language are those of private law. The pursuers had the right to complain of the allegedly ultra vires actings of a local authority not as citizens, but because they were a business which paid rates. Would Lord Dunedin have held that a Lithuanian day-labourer had that right? The language of his opinion is the language of property rights, of private law.

Scots law as to standing is judge-made, yet it has not been consistently developed by the judiciary. There are occasional ventures into modernity, of which *Wilson v IBA*, 1979 SC 351 particularly deserves a mention for its early recognition that campaigners had both title and interest to complain of activities which affected likely voting patterns; their interest in law coming from their political interest in broadcasting, and not from any good it might do them as persons. Lord Ross there said:

In Scotland I see no reason in principle why an individual should not sue in order to prevent a breach by a public body of a duty owed by that public body to the public".

This in principle would apply to both title and interest. And there are a number of cases in which the 1906 concept of pecuniary rights or status has been broadened. But on the whole the law has remained fixed as it was when it was first effectively noticed, a legal version of Schrödinger's cat. It is not systematically helpful that there are cases in which a liberal approach has been taken to be set against cases in which a restrictive approach has been taken. Potential petitioners require some degree of confidence that they will be listened to. To quote Frances McCartney of the [Environmental Law Centre](#)⁷

...a lack of clarity can be a barrier if only in respect of the uncertainty

raised, and the fear of wasting campaign resources by being turned away on what groups will perceive as a 'technicality'.

Forbes v Aberdeenshire, 2010 CSOH 1, was immediately followed by *AXA General Insurance v Scottish Government*, 2010 CSOH 2. What advice can anyone give a potential petitioner as to the attitude the court is likely to adopt, in the face of such radically different judgments?

What is hidden underneath the debris?

My concern at this point is as to the practical effect of our restrictive rules. In a very perceptive speech in 1990⁸, Mr Justice Schiemann (as he then was) said this:

The obvious effect of locus standi rules in any legal system is to exclude some people from obtaining the assistance of the courts in declaring and enforcing the law in circumstances where others could obtain that assistance. It follows that wherever someone is excluded by reasons of locus standi rules, the law regards it as preferable that an illegality should continue than that the person excluded should have access to the courts.

It is important in any examination of this subject that this basic fact should be appreciated.

As Schiemann points out, this exclusionary effect is analogous to that of any time bar restriction; I would also point in this regard to the rather covert introduction of a leave requirement into Scottish judicial review procedure in recent years⁹. In each case, someone who wishes to persuade the court that a public body is acting illegally is told 'You will not be allowed to persuade us of this'. If, as the *Civil Courts Review* suggested¹⁰ (following in this regard a self-serving and largely misleading submission from the Home Office), a three-month time limit were to be introduced into judicial review, this would although in a rather different way eliminate genuine complaints from the courts. Strict time limits, of course, tend to penalise the poor, the inarticulate, and those without good access to specialist lawyers. The effect of strict standing rules is to some extent to penalise different groups: the articulate, concerned, and public spirited.

The one thing everyone knows about our law of standing in judicial review is that pressure groups and NGOs cannot in general seek judicial review in Scotland as they can in England. *Age Concern Scotland* (as I am afraid I insist on calling it rather than *Scottish Old People's Welfare Council*; it was after all my client), 1987 SLT 179, is

a well-known example. Another is the slightly less well-known¹¹ saga of how in 1995 Greenpeace came to litigate in England, not Scotland, as to the disposal of the Brent Spar oil platform; an entirely Scottish matter with nothing to do with England, as the English court indeed held, which could not have been litigated in Scotland.

But the far more general exclusion in Scotland is of all citizens or groups who act, not in their own private and selfish interest, but in the public interest or out of altruism or concern for the rights and freedoms of others. Scots law, by its insistence that there be a *private* interest to seek the *public* law remedy, excludes such cases. A very recent example is the decision in *Forbes v Aberdeenshire*. Here, in a matter of obvious general public importance (the Trump development), Mrs Forbes was told by the court that her claim to standing was defective because she lived as much as a kilometer from the development and indeed, it was said as if it mattered, could not see it from her bedroom window. Why should this matter? The law here has indeed retreated since the nineteenth century, when the [Scottish Rights of Way Society](#) established the public right to litigate public rights of way. The court then held that a resident of Jerusalem might sue to declare a right of way in Perthshire; there was no requirement of near neighbourhood or visibility.

We see here, as effects of our rules, that the altruistic and public spirited are excluded from court while selfish and private interests are permitted to litigate. This will indirectly tend to penalise those who the public spirited seek to champion. A good example is *R v Secretary of State for Social Services ex parte Child Poverty Action Group*, [1990] 2 QB 540, which challenged the treatment of many thousands of claimants whose claims were being unlawfully delayed rather than decided¹². Such a case simply could not have been brought in Scotland by anyone, because any directly affected claimant (the only person who could have brought it) would have been identified and had their personal interest bought off. Thus it is a further effect that some classes of cases of public importance are entirely excluded, and I shall return to this.

The knock-on effect is that some such cases are taken out of Scotland, their natural jurisdiction, to England. I have already referred to the example of Greenpeace. There, the English court refused to hear the case¹³. More commonly, perhaps, an English court will accept jurisdiction. This is bad for Scotland and the Scottish legal system; and it is bad for those forced into the most expensive jurisdiction in Europe. There can be a remarkable insouciance about this on the part of English lawyers and politicians. In a [rather depressing exchange in the House of Lords](#) in March this

year, Lord Wallace, now Advocate General, moving an amendment to the Child Poverty Bill, said this:

In Scotland, judicial reviews do not tend to run in the name of a special interest group, unless that group is an association involving members who have title and interest in the particular case. Also, an individual will have such title to sue only if he or she is a party to some legal relationship giving him or her a right that has been infringed or denied... If the duty is to be enforceable in all parts of the United Kingdom, it is important that people should have access to the courts where they live and should not have to travel to find somewhere where they could raise an action.

This is obviously correct, but the Minister seems to have been bemused. Why, he pondered, should Scots not litigate in England?

Even if the organisation operates only in Scotland, a challenge could be brought against the Secretary of State in the English courts. The group would have to show standing in the same way as a UK-wide or England-only interest group would... It is true that-and this is a quote from the correspondence- "because of the differences between the two legal systems, it may be more difficult for an interest group to bring a judicial review in Scotland than in England and Wales". [But] if a claimant meets the normal means and merits tests for legal aid, there would be nothing to prevent a Scottish claimant from getting legal aid to pursue a claim in the English courts.

English law, equally judge-made¹⁴, has not taken the approach that an interest must be personal. The test is whether the petitioner for judicial review has a 'sufficient interest'. This may be private or public. In the leading case of *Feakins, R (On the Application Of) v Secretary of State for Environment, Food And Rural Affairs* [2003] EWCA Civ 1546, 2004 1 WLR 1761, the Court of Appeal said:

environmental pressure groups such as Greenpeace, ... are routinely permitted to make public law challenges in cases of this kind"

and went on:

21. In recent years, there has unquestionably been a considerable liberalisation of what is required to found a sufficiency of interest for the purposes of standing. That is why it is accepted by Mr Parker (rightly in my view) that, if the claimant had genuinely made the application in the

public interest, the judge would have been right to hold that he had sufficient standing to proceed...

23. In my judgment, if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing merely because he raises an issue in which there is, objectively speaking, a public interest. As Sedley J said in *R v Somerset County Council and ARC Southern Ltd, ex p Dixon* [1997] Env LR 111, when considering the issue of standing, the court had to ensure that the claimant was not prompted by an ill-motive, and was not a mere busybody or a trouble-maker. Thus, if a claimant seeks to challenge a decision in which he has no private law interest, it is difficult to conceive of circumstances in which the court will accord him standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill-will or for some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances. If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but some other reason, then that is material to the question whether he should be accorded standing.

The point as to motives is also made, perhaps more clearly, by Sir Stephen Sedley in the passage referred to in *Somerset CC*, also referred to (but not followed) by Lady Smith in *Forbes v Aberdeenshire* :

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the Courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the Court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the Courts only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out that everything relevant to the applicant's standing will be weighed up, whether with regard to the grant or simply as a form of relief.

Thus, in effect, in England it is enough either to have a genuine private interest, or to have a genuine public motive. The reason for this is clear: as the Court of Appeal

said in *Land Securities Plc v Fladgate Fielder* [2009] EWCA Civ 1402

There is a public interest in bringing judicial scrutiny and remedies to bear on improper acts and decisions of public bodies.

But in Scotland only a genuine private interest will do. Our public law, it seems, is not at base about wrongs but about rights. Cases such as *R v Secretary of State for Foreign Affairs ex p. The World Development Movement Ltd* [1994] EWHC Admin 1, or *Hasan, R (on the application of) v Secretary of State for Trade & Industry* [2007] EWHC 2630¹⁵, could never have been brought in Scotland. As Lord Hope said¹⁶, commenting on the decision in *Rape Crisis Centre* 2000 CSOH 183, 2000 SC 527, the decision on the merits there

tends to mask the point that, if that argument had been well-founded, there would have been no means under the Scottish system of obtaining from the courts an effective remedy. Mike Tyson's visit to Glasgow may, after all, have done some good if it has revealed that the Scottish approach to standing in judicial review is itself in need of judicial review as soon as possible.

How can it get cleaned up?

This is judge-made law; so in principle it should be possible for the courts to reform it. The English courts, it should be noted, did this themselves. But I am pessimistic that this can be done. The law is too well settled at Outer House level, albeit there are cases which show a willingness to push at its edges; thus very recently *AXA General Insurance*, with its useful comments (paragraph 52 onwards) on artificiality, its concern for the practical implications of a restrictive view of standing, and the equiparation of political with property interests. Even at Inner House level, the prospects of success of an argument that a hundred years of authority should be reshaped in favour of a modern approach modelled on a neighbouring jurisdiction may not be high. In any event, one would need a litigant with, at present, doubtful title and interest to pursue a case on this issue, as opposed to the substantial issues in a litigation, at least all the way to the Inner House if not the Supreme Court. Why would anyone want to do this? If they really want to raise the substantive issue, why get sucked into this expensive and time-consuming satellite litigation? And could one in conscience ask a public-spirited client to do so? It may be that such a case will never come along.

Nor does it seem likely that a legally-aided petitioner will come forward. SLAB,

indeed, effectively imposes a separate and higher test of standing. As its Guidelines on Reasonableness in Civil Legal Aid Cases state:

1.16 Applications involving public interest

It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him. Examples could be fluoridation of public water supplies, noise generated by a large social or cultural event, closure of public leisure facilities. Any applications of this nature should be referred to the Legal Services Sub-Committee.

1.19 Insufficient interest

Every applicant must show that s/he has a right, title and interest to be a party to the proceedings. Even where such an interest is demonstrated, the amount of interest the applicant has may not justify the expenditure of public funds. As a general proposition, litigation which would have little or no material benefit to the applicant or is brought simply to satisfy vague demands for justice or principle should not be encouraged.

'Vague demands for justice or principle.....' indeed! The sneer is almost palpable. In cases where there is genuine widespread public interest, accordingly, it is likely to be more difficult to obtain legal aid than in cases of no public interest. Thus legal aid will rarely be available to challenge a school closure; and in *Forbes v Aberdeenshire* I understand that SLAB continues to question whether the RSPB, which was not in fact a party and had no wish to be, should not fund Mrs Forbes in SLAB's place. So we cannot expect to see much reform in legal aid cases either. At this moment, in any case, although matters may change, legal aid for judicial reviews in the Court of Session is on a life-support system and may collapse by July; counsel will not be found to conduct actions if fees are slashed to the national minimum wage. But that is another subject.

There has, in fact, been some recent statutory modification of the rules of standing in environmental cases, following Article 9 (2) of the Aarhus Convention: thus, for example, the [Environmental Impact Assessment \(Agriculture\) \(Scotland\) Regulations 2006](#), SSI 2006/582, provide:

21. Any non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10a(a) of the EIA Directive and rights capable of being impaired for the purposes of Article 10a(b) of the EIA Directive.

And a potentially useful route is the ability of the [Equality and Human Rights Commission](#) to appear as interested persons or to intervene¹⁷; the Commission has, in effect, near-universal title and interest in terms of section 30 of the Equality Act 2006. In one ongoing petition raising important issues under section 77 of the Race Relations Act, I drafted answers for the EHRC, who had been called as an interested person, which contained this passage:

The EHRC ..., does not propose to make submissions to the Court that any particular remedy should or should not be granted. Its role in these proceedings is to assist the Court, in furtherance of its general duties under the Equality Act 2006. If however the respondents make submissions in support of their first plea in law [that the petitioner had no title or interest to sue], it may adopt, for the purposes of closing argument on that matter and focussing attention on the substantive issues in the case, the challenge made by the petitioner, as to which it has title and interest in terms of section 30 of the said Act. For those reasons, it does not at present state pleas in law.

Thus, in some cases at least we have a modern law of standing, albeit only for 'organisations' and not for natural persons.

And, although section 16 of the Tribunals Courts and Enforcement Act 2007 applies only to English judicial reviews in the Upper Tribunal, the nature and practices of the Tribunal may well have the practical effect that the English test will be applied by English judges hearing Scottish judicial reviews.

The need is, however, for primary legislation¹⁸. This could, as judicial review is devolved, come from either the Westminster or Scottish Parliament. Lord Dunpark's working party called for this in 1984. That was twenty-six years ago, at the dawn of modern public law in Scotland. Since then the need has become more clamant. The [Civil Courts Review](#) repeated this call, in Chapter 12 paragraph 25, recommending the abolition of the separate tests of title and interest and their replacement by a single test: '*whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings*'. That formula ought to be sufficient; it mirrors that of the Senior Courts Act 1981, section 31 (1). But the Review then rather spoils this by further recommending that the court should, in assessing this, apply existing authority. This has the effect of confining reform of the 1906 test of interest to sue to cases already within the case law and in which there is a '*real issue between the parties*'; that formulation seems to mean a private interest. A proper reform would

allow issues of real public importance to be litigated by bona fide and public spirited petitioners.

1. As always, republication is permitted under the terms of the [applicable Creative Commons licence](#), but the original version to which changes may be made is available only at [my own site](#), where comments may also be made. [\[back\]](#)
2. See, for some weighty examples of this view, the Dunpark Report in 1984; '*Judicial Review in Scotland*', Mullen and others, 1996, at page 52; '*Mike Tyson Comes to Glasgow: a Question of Standing*', Lord Hope, 2001 Public Law 294; '*Towards Good Administration: The Reform of Standing in Scots Public Law*', Cram, 1995 Public Law 332; '*Public Law in Scotland*', Lord Clyde, 2008; '*Civil justice: where next?*', Lord Rodger, 2008. [\[back\]](#)
3. *The Story of the Kelly Gang*. [\[back\]](#)
4. It was overturned on the question as to when that interest must exist, the Inner House holding that it must exist at the time the action is raised. [\[back\]](#)
5. There is in fact a better report at 1915 1 AC 550, which records the arguments. [\[back\]](#)
6. That is to say, 1808 and 1827 respectively. [\[back\]](#)
7. '*Paths to Justice; Essays prompted by the Gill Review*': SCOLAG 2007. [\[back\]](#)
8. 1990 Public Law 342. [\[back\]](#)
9. To some extent, although I think there are different rationales to be considered in the case of leave requirements and they may indeed simply work as filters of hopeless cases: see discussion in *E Y*, 2009 CSOH 100, currently the subject of a reclaiming motion. [\[back\]](#)
10. Chapter 12, paragraph 39. [\[back\]](#)
11. But see '*Judicial Review 20 Years On- Where Are We Now*', Blair and Martin, 2005 SLT (news) 31 and 173; '*Sparring at Oil Rigs: Greenpeace, Brent Spar and challenges to the legality of dumping at sea*', Poustie, 1995 JR 542; and '*Decommissioning the Brent Spar*', Rice and Owen, 1999. [\[back\]](#)
12. A rare example, incidentally, of *Age Concern Scotland* being cited to an English court as potentially useful authority on sufficiency of interest. [\[back\]](#)
13. *R v Secretary of State for Scotland and Another ex parte Greenpeace*, unreported, 24 May 1995. Popplewell J. [\[back\]](#)
14. Although the test is now statutory, under section 31 of the Senior Courts Act 1981 (Renamed by the Constitutional Reform Act 2005, schedule 11, this was formerly known as the Supreme Court Act). [\[back\]](#)
15. Standing not questioned on [appeal](#). [\[back\]](#)
16. '*Mike Tyson Comes to Glasgow: a Question of Standing*', Lord Hope, 2001 Public

Law 294; [\[back\]](#)

17. Chapter 94 of the Rules of Court; contrast with Chapter 95 and Rule 58.8. [\[back\]](#)
18. It is possible, but doubtful, that the Court of Session might have the power of reform by Act of Sederunt. [\[back\]](#)