

# Silence is golden: Injunctions in defamation law

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It is well settled that monetary damages are the primary remedy available to the plaintiff in a defamation action. It is just as clear, however, that for many plaintiffs and would-be plaintiffs, damages are really no remedy at all. Indeed, there is a long line of commentary, dating back to the 19th century, in which scholars and lawyers question the adequacy of money as compensation for harm to reputation.

As the prominent American law professor Robert A. Lefflar commented more than 50 years ago:<sup>1</sup>

The inescapable fact is that the Anglo-American genius for justice has not yet produced a generally available remedy for defamation that will give aggrieved persons the vindication which they deserve. The substituted relief of damages in tort is usually the only remedy which our law affords, and that often, for social and psychological reasons, is a remedy available only theoretically, not actually.

Indeed, it might fairly be said that many prospective libel plaintiffs would be content to simply silence their defamer, even if it meant foregoing damages. And almost all would, if it were possible, turn back the clock so that they could take legal steps to ensure that the offending words were never published. In short, most plaintiffs would, if possible, choose an injunction over an action.

That preference makes sense when one considers the practical consequences of pursuing an action in defamation. In commencing an action, the plaintiff may bring broader attention to the defamatory allegations, possibly aggravating the harm to his reputation. He then faces the ordeal of discovery and further engagement with his tormentor. Defamation trials are usually long and expensive and may, in some cases, draw still more attention to the words at issue. If the plaintiff wins, his primary

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vindication will be contained in a judgment that few outside of the legal community will read. And while the money might be nice, there is a good chance, at least in Canada, that the damages and the costs awarded by the court, even if recoverable, will not exceed the expense of pursuing the remedy.

A preliminary injunction, on the other hand, has immediate effect. The harm is limited, and the defamer put in his place. The silence is golden.

There is one small difficulty. As we will discuss below, it is extraordinarily difficult to obtain a preliminary injunction in a defamation action. Obtaining a permanent injunction is far easier, at least in Canada. However, in other jurisdictions, notably the United States, there is an ongoing debate as to the availability of that remedy.

### The rule in *Bonnard v. Perryman*

The question of whether an injunction is available in defamation cases is, in the history of the law, a relatively recent subject of discussion. The issue only arose in the 19th century, some years after common law courts were first granted the power to issue injunctions. Prior to that time, only the judges of Court of Chancery could issue injunctions, but they did not have jurisdiction to try libel actions.<sup>2</sup>

The seminal decision on the issue of interim injunctions to prevent defamation remains the English Court of Appeal's decision in *Bonnard v. Perryman*.<sup>3</sup> In that case, the plaintiff sought and obtained an injunction to silence what, in the eyes of the court, was clearly a libelous statement. The Court of Appeal set aside the injunction, noting that "libel or no libel" was a matter reserved for the jury and that, accordingly, the jurisdiction to enjoin speech before that matter was determined by a jurisdiction "of a delicate nature". The court went to say of that jurisdiction:<sup>4</sup>

It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant. It followed

from those three rules that the Court could only on the rarest occasions exercise the jurisdiction.

English libel counsel have made frequent attempts to avoid the high bar set by the rule in *Bonnard*. Recently, both celebrities and high-profile companies have sought and obtained injunctions by claiming that the stories would violate the right to privacy guaranteed by European human rights law, or that publication would result in a breach of confidence. These injunctions have been described as “super-injunctions” in that they prohibit not only the publication of certain information, but also the existence of the injunction.

Among the beneficiaries of these super-injunctions were the oil-trading company Trafigura and English football stars John Terry and Ryan Giggs.

In 2009, Trafigura obtained a super-injunction barring the press from both reporting the contents of an internal report on waste dumping and the existence of the injunction itself. According to *The Guardian* newspaper, Trafigura’s counsel advised the paper that the injunction was so broad that it could not even report the content of a question asked about it in Parliament.<sup>5</sup>

Terry, captain of the English national team, obtained an injunction to keep secret his extra-marital affair with the fiancé of a teammate. The injunction, however, was quickly set aside by Mr. Justice Tugendhat, who said, referring to Terry by the pseudonym used in the application, “it is likely that the nub of LNS’s complaint in this case is the protection of reputation, and not of any other aspect of LNS’s private life”.<sup>6</sup> The same judge, however, upheld an injunction granted to Giggs and barring the publication of information relating to his affair with a contestant on the Big Brother reality show, despite the fact that it had been undermined when questions about it were raised, under the protection of Parliamentary privilege, in Parliament, and when thousands of people, in England and elsewhere, breached the injunction by naming Giggs as its beneficiary on Twitter and other social media.

## Interim injunctions in Canada

In Canada, the rule in *Bonnard* remains the standard for granting interim injunctions.<sup>7</sup> In seeking to strike a balance between the potential harm that may accrue to the plaintiff should the defendant be permitted to continue to publish his or her remarks against a defendant’s right to freedom of expression, the court will generally favour the latter.

In *Compass Group Canada (Health Services) Ltd. v. Hospital Employees’ Union*,<sup>8</sup> Madam Justice Garson (as she then was) affirmed that injunctive relief to restrain alleged defamation is an exceptional remedy granted in only the “rarest and clearest of cases”. The burden lay with the plaintiff to demonstrate that the material complained of is so “manifestly defamatory that any jury verdict to the

contrary would be considered perverse by the Court of Appeal”.<sup>9</sup> In addition, evidence that the alleged defamation would continue was necessary.

This high standard has been applied in numerous other British Columbia cases, including *Seafarers’ International Union of Canada v. International Longshore and Warehouse Union Canada, Local 400*,<sup>10</sup> *Friesen v. Chiu*,<sup>11</sup> and *Interior Health Authority v. Sellin*.<sup>12</sup>

Other Canadian jurisdictions have taken a similar approach, holding that relief is warranted only where the plaintiff can establish that the impugned words are clearly defamatory and impossible to justify. In *Hutchens v. SCAM.COM*,<sup>13</sup> for example, the plaintiff’s application for an interlocutory injunction was dismissed because the court found that the allegations were not impossible to justify. Citing the Supreme Court of Canada’s decision in *Canada (Human Rights Commission) v. Canadian Liberty Net*,<sup>14</sup> the court in *Hutchens* noted that the “balance of convenience” factor that applies to the usual application for an interim injunction does not apply to a plaintiff who seeks to restrain allegedly defamatory speech.

While the fact that the defamatory material was disseminated through the Internet may impact the order for a permanent injunction, the same does not appear to be true in the case of interlocutory injunctions.

In *Beidas v. Pichler*,<sup>15</sup> a majority of the Divisional Court held that an order to remove all references to the plaintiffs and prohibiting the posting of any materials which may tend to identify the plaintiffs was too broad in its scope because it captured non-defamatory speech in addition to defamatory speech. In concluding that the order was an unwarranted restraint on the defendants’ freedom of expression, Justice Murray held that the breadth of the order could not be justified simply because the Internet was involved. While the Internet poses unique problems, it should not be any less free of expression than other media.

*Canadian National Railway Co. v. Google Inc.*,<sup>16</sup> concerned a blog hosted by Google in which unknown authors made a wide variety of allegations regarding CN Rail’s business practices, safety standards and the honesty of its executives. After attempts to identify the authors proved fruitless, a motion was brought to force Google to remove the site, which it did not oppose should the court order it done. No one appeared on behalf of the creators; but it was clear from their postings they were aware of the proceedings. Justice Lederer had no trouble concluding the statements were defamatory, especially in light of the fact the creators did not file a response and showed no intention to justify their statements. He ordered the website taken down until a determination of the issue could be made on its merits.

## Permanent injunctions in Canada

While the availability of permanent injunctions remains a subject of controversy in the United States, where defamation law has a heightened constitutional aspect, they are a well-established remedy in Canada.

Recently, the Ontario Superior Court in *Astley v. Verdun*,<sup>17</sup> noted that permanent injunctions have regularly been ordered against a defendant who has been found to have defamed a plaintiff in one of two situations: first, where the evidence indicates a likelihood that the defendant will continue to publish or make defamatory statements despite the finding of liability to the plaintiff; or secondly, where an award for damages is unlikely to compensate the plaintiff because of the defendant's impecuniosity.

In *Astley*, the defendant was found by a jury to have engaged in a "deliberate, concerted and relentless campaign" over a number of years to injure the reputation of the plaintiff. The evidence showed the plaintiff to be a "remarkable individual and businessman with high ethical and moral standards" who was targeted by the defendant for his alleged destruction of an insurance company of which he was previously the CEO. The defendant voiced slanderous statements at several annual general meetings, wrote letters, published a book defaming the plaintiff and posted similar statements on his blog. He refused to stop and vowed to continue to discredit the reputation of the plaintiff despite the jury rejecting outright any of his defences. It was clear the defendant met the first situation warranting a permanent injunction. He was ordered to cease all posting on the Internet or publishing in any manner whatsoever, directly or indirectly, any statements or comments about the plaintiff.

One of the cases referred to by the court in *Astley* is the decision of the British Columbia Supreme Court in *Hunter Dickinson Inc. v. Butler*,<sup>18</sup> in which the plaintiffs brought a summary trial application claiming defamation against the defendant and seeking a permanent injunction in addition to damages as a result of ongoing statements published by the defendant under various pseudonyms on an Internet discussion board. The statements alleged serious fraud on the part of the plaintiff company's officers and directors and were held to be clearly defamatory in nature. The plaintiffs sought a permanent injunction on the basis that a request to stop was entirely ignored and on the fact that the defendant's conduct suggested that he was intent on continuing his campaign. As well, an award of damages against the defendant was essentially meaningless because he possessed no significant assets and was at the time a resident of Mexico.

In granting the injunction, Justice Wedge concluded that the court could infer that the defendant would repeat the defamation where the defendant continued to assert the truth of his or her remarks and continued to publish them. The loss to goodwill suffered by the company may

never be recovered and compensation by way of damages is no adequate remedy when a defendant is undeterred and judgment-proof. Justice Wedge also acknowledged the need to broaden the scope of her order in light of the defendant's use of various pseudonyms over the Internet in order to prevent the defendant from publishing any statement in his own name or under any other name.

Although not addressed by the court, the fact that the defendant resided in Mexico presented an interesting challenge with respect to the enforcement of the permanent injunction. This issue was at least partially addressed by the Ontario Court of Appeal in *Barrick Gold Corp. v. Lopehandia*.<sup>19</sup> In *Barrick*, the defendant, a resident of British Columbia, was found to have posted defamatory statements on a Yahoo! Investor bulletin board. The motions judge declined to issue a permanent injunction on the basis the court lacked jurisdiction because service was not properly made with respect to Ontario's *ex juris* rules and the claim for injunctive relief, being an *in personam* remedy, depended on the exercise of control over the person of the defendant.

On the enforceability question, the court noted that there is a reluctance to grant injunctive relief against defendants who are outside the jurisdiction because of concerns regarding the enforceability of such orders. However, the court identified the "highly transmissible nature of the tortious misconduct" as a factor to be addressed in considering the merits of a permanent injunction. The court was determined not to simply "throw up" its hands in the face of Internet defamation and acknowledged it could at least prevent further misconduct from re-occurring in its own jurisdiction. The nature of the transmission of information over the Internet meant that it was possible that the defendant's postings were transferred through servers physically present in Ontario or that the defendant was making his posts from a downtown Toronto Internet cafe. If that were the case, the act was arguably done in Ontario and the injunction could at least restrain such conduct. The court also noted in *obiter* that given the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*,<sup>20</sup> the principles of comity and reciprocity may make the order enforceable in British Columbia where the defendant resided.

Those aggrieved by defamatory comments circulated over the Internet should not be deterred from seeking a permanent injunction because defendants actively try to hide their identity or engage in defamation from outside the jurisdiction. The decisions in *Hunter* and *Barrick* highlight that courts are alive to the consequences of Internet defamation and will where appropriate prevent the Internet from being used as a tool to anonymously victimize persons from afar.

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- <sup>1</sup> Robert Leflar, "The Social Utility of the Criminal Law of Defamation" (1956), 34 Tex. L. Rev. 984.
- <sup>2</sup> *Greene v. Associated Newspapers Ltd*, [2004] EWCA Civ 1462, at para. 44.
- <sup>3</sup> [1891] 2 Ch. 269 (C.A.).
- <sup>4</sup> *Supra*, at p. 284, quoting from Lord Esher in *Coulson v. Coulson* (1887), 3 Times L.R. 846.
- <sup>5</sup> "Parliament and free speech: The right to know", *The Guardian* (October 14, 2009), available online at [www.guardian.co.uk/commentisfree/2009/oct/14/parliament-free-speech-trafigura](http://www.guardian.co.uk/commentisfree/2009/oct/14/parliament-free-speech-trafigura).
- <sup>6</sup> *Terry v. Persons Unknown*, [2010] EWHC 119 (Q.B.), at para. 95.
- <sup>7</sup> The term "interim injunction" is used in this article to refer to any preliminary injunction, whether styled as an interim or interlocutory injunction.
- <sup>8</sup> 2004 BCSC 51, 128 A.C.W.S. (3d) 578.
- <sup>9</sup> *Supra*, at para. 62.
- <sup>10</sup> (2009), 77 C.P.C. (6th) 268, 181 A.C.W.S. (3d) 349, 2009 BCSC 1269.
- <sup>11</sup> 2006 BCSC 2104, 183 A.C.W.S. (3d) 218.
- <sup>12</sup> 2005 BCSC 1810, 146 A.C.W.S. (3d) 349.
- <sup>13</sup> 2011 ONSC 56, 196 A.C.W.S. (3d) 1131.
- <sup>14</sup> [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385, 6 Admin. L.R. (3d) 1.
- <sup>15</sup> (2008), 294 D.L.R. (4th) 310, 238 O.A.C. 103, 166 A.C.W.S. (3d) 752 (S.C.J. (Div. Ct.)).
- <sup>16</sup> (2010), 76 C.C.L.T. (3d) 154, 2010 ONSC 3121, 189 A.C.W.S. (3d) 822.
- <sup>17</sup> 2011 ONSC 3651, 203 A.C.W.S. (3d) 624.
- <sup>18</sup> 2010 BCSC 939, 191 A.C.W.S. (3d) 1009.
- <sup>19</sup> (2004), 239 D.L.R. (4th) 577, 31 C.P.R. (4th) 401, 71 O.R. (3d) 416 (C.A.).
- <sup>20</sup> [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, [1991] 2 W.W.R. 217.