Interlocutory Injunctions to Restrain Speech[1]

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The purpose of this paper is to consider and criticise a well-established exception to the general rules by reference to which Courts of Equity will grant interlocutory injunctions. The exception arises principally in relation to defamation cases, although it has implications in other areas of the law, for instance in cases concerning allegedly misleading conduct within the meaning of the Commonwealth and State electoral legislation. The rule, shortly stated, is that only in exceptional circumstances will the Court restrain by interlocutory injunction the apprehended publication of a defamatory statement.

Statements of the Rule

Let me begin by setting out some typical recent formulations of the rule. The first two statements are taken from decisions of the Supreme Courts of Queensland and Victoria, the third from a recent English case.

In *Shiel v Transmedia Productions Pty Ltd*,[2] Moynihan J, delivering the leading judgment of the Full Court, adopted the earlier statement of the law of Walsh J in *Stocker v McElhinney (No 2)*:[3]

> "I consider the following propositions to be in accordance with the authorities:
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> (1) Although it was one time suggested that there was no power in the court, under provisions similar to those contained in the *Common Law Procedure Act*, ss 176-179, to grant an interlocutory injunction, in cases of defamation, it is settled that the power exists in such cases.
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> (2) In such cases, the power is exercised with great caution, and only in very clear cases.
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> (3) If there is any real room for debate as to whether the statements complained of are defamatory, the injunction will be refused. Indeed, it is only where on this point, the position is so clear that, in the judge's view a subsequent finding by a jury to the contrary would be set aside as unreasonable, that the injunction will go.
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> (4) If, on the evidence before the judge, there is any real ground for supposing that the defendant may succeed upon such

[1] Transcript of seminar given on 20 March 1991.
[2] [1987] 2 Qd R 199.
[3] (1961) 79 WN (NSW) 541.

ground as privilege, or of truth and public benefit, or even that the plaintiff, if successful, will recover nominal damages only, the injunction will be refused."[4]

In *National Mutual Life Association of A/asia Ltd v General Television Corporation Pty Ltd*, the Victorian Full Court (Fullagar, Hampel and McDonald JJ) stated the law in these terms:

> "In our opinion, the correct approach in Victoria to an application to restrain publication or re-publication of defamatory matter is, and always has been, to make the broad inquiries traditionally made by a court of equity, viz — whether there is a substantial question to be investigated at the trial, and whether the balance of convenience, sometimes called the balance of justice, favours the grant of the injunction. In other words, the principles applicable are those which are applicable to all applications for interlocutory injunctions ... In the case of an application to restrain a libel, however, the very great importance which our society and our law have always accorded to what is called free speech, means that equity exercises great care in granting injunctive relief and does so only where it is very clear that it should be granted. It has been said in high places, and said on high authority from the Bench, that it is by no means rarely a benefit to society that a hurtful truth be published. It has been felt, we think, that it is usually better that some plaintiff should suffer some untrue libels for which damages will be paid than that members of the community generally, including the so-called news media, should suffer restraint of free speech. The judges over the centuries have also been well aware how easy it would be for a tyrant to stifle all opposition by deciding what was 'genuine' free speech, to be allowed, on the one hand and that was an unjust or unfair or dishonest taking advantage of free speech, to be repressed, on the other hand. When the court enjoins, it must be extremely clear that no unacceptable repression is taking place. It has thus been laid down that it is only in a clear case that the court will intervene by injunction."[5]

Finally, In *Herbage v Pressdram Ltd*, the English Court of Appeal (Griffiths and Kerr LJJ) restated the orthodox rule in these terms:

> "First, no injunction will be granted if the defendant raises the defence for justification. This is a rule so well established that no elaborate citation of authority is necessary ...
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> Secondly, no injunction will be granted if the defence raises privilege, unless the evidence of malice is so overwhelming that the judge is driven to the conclusion that no reasonable jury could find otherwise; that is, that it would be perverse to equip the defendant of malice. Thirdly, in the face of this long-established practice in defamation actions, the principles enunciated by the

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[4] Supra, n 2, at 204-205.
[5] [1989] VR 747 at 764.

House of Lords in *American Cyanamid Co v Ethicon Ltd*[6] relating to interim injunctions are not applicable in actions for defamation

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These principles have evolved because of the value of the court as placed upon freedom of speech and I think also upon the freedom of the press, when balancing it against the reputation of a single individual who, if wrong, can be compensated in damages."[7]

The Origins and Development of the Rule

The origins of the rule can be traced to a series of decisions which occurred in the years shortly following the passage of the *Judicature Act* 1873 (UK).[8] The last of those cases can be considered to have marked the final establishment of the rule — so much so, indeed, that it is now often referred to as "the rule in *Bonnard v Perryman*".

There are two things to be noticed about the circumstances in which the rule developed. First, much of the early learning on the subject arose in the context of the debate as to the extent of the powers of the courts of common law — where defamation cases were tried — to issue interlocutory injunctions. Secondly, the principles by reference to which interlocutory injunctions were granted in the late 19th century were considerably more stringent than is the case today.

Recent Limitations on the Scope of the Rule

In recent years, it is evident that at least some judges have become uneasy about the scope of the rule. That disquiet has manifested itself in two ways: the "frontal attack" and the "back door".

An example of the frontal attack on the rule is the important decision of Hunt J in the Supreme Court of New South Wales in *Chappell v TCN Channel 9 Pty Ltd.*[9] In that case, the plaintiff was Greg Chappell, the famous sportsman. TCN Channel 9, broadcaster of the "Willessee" programme, proposed to broadcast a segment which alleged that the plaintiff had, in his Honour's words, "committed adultery by having sexual intercourse with one Samantha Hickey or that he had engaged in sexual activities of an unusual nature".[10] It is important to note that the allegation had already been made in another medium, the Melbourne *Truth* newspaper, which his Honour was pleased to describe (to take judicial notice of?) as "Australia's sleaziest newspaper".[11] His Honour simply refused to follow the rule in *Bonnard v Perryman.* He said:

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[6] [1975] AC 396.

[7] [1984] 1 WLR 1160 at 1162; [1984] 2 All ER 769 at 771.

[8] See *William Coulson & Co v James Coulson & Co* (1887) 3 TLR 846; *Armstrong v Armit* (1886) 2 TLR 887; *Saxby v Easterbrook and Hannaford* (1878) 3 CPD 339; *Liverpool Household Stores Association v Smith* (1887) 37 Ch D 170; *Bonnard v Perryman* [1891] 2 Ch 269.

[9] (1988) 14 NSWLR 153.

[10] Ibid, at 156.

[11] Ibid, at 171.

> "That this 'rule' does exist and has for a long time existed (in England) in relation to interlocutory injunctions in defamation cases cannot be denied. It could not, however, amount to a rule of law in the face of the statutory provision — both in England and here (the *Supreme Court Act* 1970 (NSW), s 66(4)) — that an interlocutory injunction may be granted 'in any case in which it appears to the Court to be just or convenient to do so'. In my view, the description of the rule by Davey LJ [in *William Coulson & Co v James Coulson & Co*][12] as one of practice is correct. And therein appears to lie the key to its application in this day and age in New South Wales."[13]

A less rebellious, but nevertheless equally effective means of judicial resistance to the rule — what I have called "the back door method" — is illustrated by an important decision of Williams J in *Emcorp Pty Ltd v Australian Broadcasting Corporation*.[14] That case also concerned an interlocutory injunction to restrain the apprehended publication of a defamation by television broadcast. The programme in this case was "The Investigators". A camera team from the Australian Broadcasting Corporation (all of whom were made defendants to the proceedings) entered upon the plaintiff's premises for the purpose of interviewing officers of the plaintiff. They had no appointment and refused to leave when asked to do so. Film was shot during the intrusion. The plaintiff applied for an interlocutory injunction to restrain the broadcast of audiovisual material taken upon the premises. It was clear that the material contained statements defamatory of the plaintiff. However, the plaintiff formulated its case not in defamation, but in injurious falsehood. Williams J, after considering the statement of the law by the Full Court in *Shiel v Transmedia Productions Pty Ltd*,[15] said:

> "In this case the plaintiffs do not allege defamation, but assert that if the audiovisual material is published the tort of injurious falsehood would be committed by the respondents ... Whilst the torts of defamation and injurious falsehood are entirely separate — issues relevant to one are irrelevant to the other — there are nevertheless some common features. In particular, each tort involves the dissemination of material by the defendant which causes or is likely to cause damage; to that extent each tort may involve a consideration of the constraints which ought to be placed upon a person's right of freedom of speech."[16]

His Honour went on to consider that in this case the defendant's right to freedom of speech had to be balanced against circumstances in which the videotape had been obtained, in flagrant violation of the

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[12] Supra, n 8.
[13] Supra, n 9, at 159-160.
[14] [1988] 2 Qd R 169.
[15] [1987] 2 Qd R 199.
[16] Supra, n 14, at 175.

plaintiff's property rights. His Honour considered that as the defendant proposed to abuse its freedom of speech, an injunction should issue.[17]

More recently, the Victorian Full Court has considered the matter in *Animal Liberation (Victoria) Ltd v Gasser*.[18] In that case, the plaintiff was a circus; the defendants were animal liberationists who protested against cruelty to animals allegedly occurring at the circus. The Victorian Full Court overturned the decision of the judge at first instance to grant an interlocutory injunction to restrain the allegedly defamatory words being uttered outside the circus by the protesters. In doing so, the Court adhered to the traditional formulae as set out in *National Mutual v GTV*.[19] However, the Court nevertheless granted interlocutory injunctions to restrain demonstrators from protesting on the ground that by doing so they were committing the torts of nuisance and intimidation. A similar result had earlier been achieved in the celebrated case of *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia*,[20] although in that case no defamation was alleged at all. The practical effect of the decision of the Full Court in the *Animal Liberation* case was to stifle the publication.

What those authorities demonstrate is that if a plaintiff is able, without artificiality, to formulate its case on the footing of a cause of action other than defamation, the court will much more readily grant an interlocutory injunction notwithstanding that an effect of that order will be to stifle speech. However, even in such cases it should always be borne in mind that, as Williams J observed in *Emcorp*, freedom of speech is nevertheless a relevant consideration for the court to take into account.

The Policy and Rationale of the Rule

The cases reveal three principal justifications for the existence of the rule. Those are:

(a) the impossibility of determining, on an interlocutory basis, the likelihood of success at trial;
(b) freedom of speech;
(c) the adequacy of damages as a remedy.

As I observed before, it is important to note that the rule in *Bonnard v Perryman* emerged in the late 19th century, when both the ambit of interlocutory injunctive relief was less certain than it is now, and interlocutory injunctions were much more difficult to obtain. Until the 1980s, the principles governing the grant for refusal of interlocutory injunctive relief in Australia were those stated by the High Court in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*. In that case, the Court stated the principles to be observed in dealing with applications for interlocutory injunctions in terms of two tests:

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[17] See also the decision of Hunt J in *Church of Scientology of California Inc v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344, and of Young J in *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457.

[18] [1991] 1 VR 51.

[19] [1989] VR 747.

[20] [1986] VR 383.

> "The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is, there is a probability that at the trial of the action the plaintiff will be held to be entitled to relief . . .
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> The second inquiry is directed to . . . whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted."[21]

The 1980s have seen, however, the final acceptance in Australia of a lowering of the threshold of the first test, from prima facie probability of success, to "serious question to be tried". The lower threshold test, adopted by the House of Lords in *American Cyanamid Co v Ethicon Ltd*,[22] has now been accepted by the Full Court in this State, in *Queensland Industrial Steel Pty Ltd v Jensen*,[23] and by the High Court in *Murphy v Lush*[24] and *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board*.[25]

Now, it is easy enough to understand how, under the higher threshold test, a court sitting on an interlocutory application would find it impossible to determine whether there was a prima facie probability of success. The same cannot, however, be said of the difficulty of determining whether a serious question to be tried exists. In any case in which the impugned statements are prima facie defamatory, one would have thought that ex hypothesi, a serious question to be tried has arisen. The impact of the changed test for interlocutory injunctions has been argued in several of the recent cases. Notably in Australia, in the *GTV* case,[26] the Victorian Full Court attempted (with respect, uneasily) to accommodate the rule in *Bonnard v Perryman* within the new categories. The other approach, evident in the decisions of the Court of Appeal in *Herbage v Pressdram*[27] and *Khashoggi v IPC Magazines*,[28] has simply been to assert as a matter of law that the rule in *American Cyanamid v Ethicon Ltd* does not apply to injunctions in defamation cases.

In the most recent English case in which the issue has been considered, the decision of the Court of Appeal in *Gulf Oil (Great Britain) v Page*,[29] *Herbage v Pressdram* was not followed. Rather, the principle in *American Cyanamid* was applied, *Bonnard v Perryman* distinguished, and an injunction granted. The *Gulf Oil* case is a little different, since in that case the cause of action was conspiracy to

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[21] (1968) 118 CLR 618 at 622-623.
[22] [1975] AC 396.
[23] [1987] 2 Qd R 572.
[24] (1986) 60 ALJR 523.
[25] (1982) 57 ALJR 425.
[26] Supra, n 19.
[27] [1984] 1 WLR 1160; [1984] 2 All ER 769.
[28] [1986] 1 WLR 1412; [1986] 3 All ER 577.
[29] [1987] Ch 327.

injury by the publication of a defamatory statement (the "back door method"). Hence, the Court did not find it strictly necessary to decide as a matter of law whether *Herbage v Pressdram* was wrong in holding that *American Cyanamid* did not apply to *Bonnard v Perryman*. One wonders, however, for how long the categorical exclusion of the rule and the general principles can be maintained.

The second rationale, freedom of speech, receives its most stirring recent statement in the Victorian Full Courts decision in the *GTV* case. But this rationale is anomalous too. It does not apply generally to injunctions to restrain speech. There are many categories of case in which interlocutory injunctions will, according to ordinary principles, be applied to restrain the publication of words. To take the most obvious example, injunctions will routinely be granted to restrain the publication of breaches of confidence;[30] to restrain contempts of court; to restrain attempts at the abuse of process; and to protect intellectual property rights.[31] As well, as I have already noted, the principles by reference to which the courts will restrain the publication of injurious falsehoods do not suffer the same restriction.

It being the case that ordinarily, a Court of Equity will apply the normal tests to the grant or refusal of an interlocutory injunction to restrain the publication of words in each of the foregoing cases, why should considerations of freedom of speech apply alone to defamation cases? If the question to be considered is a weighing of the relative interests of the parties who might suffer an injunction in engaging in the conduct sought to be enjoined, one would have thought that the interest of a person who claims to be the owner of an intellectual property right in being able to profit from (or even to earn a living from) the marketing of that right, is a more important interest than the desire of a television network to titillate a prurient public with revelations of the private lives of celebrities. Yet the former would suffer an interlocutory injunction were his right to deal with the intellectual property right disputed; but according to the rule in *Bonnard v Perryman* the latter would not.

Freedom of speech, then, is neither a principle of general application to the grant of interlocutory injunctive relief, nor is it the only interest to be considered. Why should it not merely be part of the equation according to which the court assesses the balance of convenience? In a case where, as in *Shiel v Transmedia*, the defendant has no bona fide interest in making the publication beyond that of catering to public curiosity, but the plaintiff has every interest in protecting his good name, it seems almost absurd that not only should an interlocutory injunction not be granted, but that the justification for its refusal should lie in the noble rhetoric of liberal democratic values. And a fortiori where the only effect of an interlocutory injunction will be to delay the publication of the libel, whereas its refusal will have the effect of causing the plaintiff to suffer all of the damage which he

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[30] See for instance *Argyll v Argyll* [1967] Ch 302.

[31] See for instance *Massam v Thorley's Cattle Food Co* (1880) 14 Ch D 748.

originally apprehended. Since the role of an interlocutory injunction is chiefly to preserve the status quo until trial, that seems to be a bizarre result.

This issue goes to the third justification for the rule in *Bonnard v Perryman*, that is that damages are an adequate remedy. Although this has often been asserted in interlocutory applications, it is simply not right. As the learned authors of *Gatley on Libel and Slander* (8th ed) say:

> "At the trial of an action for libel, or slander actionable per se, after the jury have found the verdict for the plaintiff, the court has jurisdiction to grant an injunction restraining any further or future publication of the words complained of or any similar defamatory matter. The court will grant such an injunction if it is satisfied that the words are injurious to the plaintiff, and there is reason to apprehend further publication by the defendant; and it may do so even though the plaintiff has not claimed such relief in his statement of claim." [32]

Conclusion

The rule in *Bonnard v Perryman* is anomalous. None of its purported justification has universal or compelling validity, in particular since the recasting of the principles according to which Courts of Equity will grant interlocutory injunctions after *American Cyanamid*. In recent cases, the courts have either (as in *GTV*) attempted Procrustean exercises in accommodating the rule within the new categories where plainly it does not fit (as in *Herbage v Pressdram*); asserted the existence of a special category independent of the ordinary rules by reference to which the Courts of Equity grant such relief; or (as in *Chappell v TCN Channel 9*) engaged in open revolt. Rather, it seems to me, the time has come to face squarely the fact that since the adoption of the *American Cyanamid* categories, the rule in *Bonnard v Perryman* no longer has any place in a rational system of equity jurisprudence.

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[32] *Gatley on Libel and Slander* (8th ed), pp 602-603.