THE INTERLOCUTORY INJUNCTION AND IRREPARABLE HARM

Paul M. Perell*
Toronto

The concept of irreparable harm is a critical element in the test for granting an interlocutory injunction. This article shows that irreparable harm was originally a manifestation of the principle that equity would not act if the common law remedy was adequate. In the context of injunctions, irreparable harm is concerned with the adequacy of damages. The article explores the adequacy of damages in the particular context of interlocutory injunctions, showing that the meaning of irreparable harm is that the plaintiff's injury, combined with the effect of the delays inherent in the administration of justice, cannot be compensated for or overcome by an award of money or other remedy at trial. The article argues and demonstrates by a detailed review of the case law that without ignoring the other elements of the test, a plaintiff should be granted an interlocutory injunction if, and only if, the remedy at trial, whatever it might be, will come too late to do justice.

L'idée de mal irréparable est un élément essentiel quand il s'agit de décider s'il faut accorder une injonction interlocutoire. Dans cet article, l'auteur démontre que le mal irréparable était à l'origine une manifestation du principe selon lequel l'"equity" n'entrait pas en jeu si le recours en "common law" était adéquat. Quand on parle de mal irréparable dans le contexte des injonctions, on parle de compensation adéquate des dommages. L'auteur de l'article explore ce qu'est une compensation adéquate dans le contexte particulier des injonctions interlocutoires et montre que mal irréparable signifie que le préjudice fait au plaignant, auquel vient s'ajouter l'effet des délais inhérents à l'administration de la justice, ne peut être ni compensé ni surmonté par l'octroi d'une somme d'argent ou d'un autre recours accordé par le tribunal. L'auteur de cet article, grâce à un examen détaillé de la jurisprudence, démontre que, sans laisser de côté les autres éléments nécessaires à la prise de décision, il faut accorder au plaignant une injonction interlocutoire au cas où, et seulement au cas où le recours offert par le tribunal, quel qu'il soit, arrive trop tard pour être juste.

*Paul M. Perell, of the Ontario Bar, Toronto, Ontario.

Introduction

In recent years, in case law[1] and academic commentary,[2] lawyers and judges have argued about the proper test for an interlocutory injunction. The debate has focused on the issue of whether a party seeking an interlocutory injunction must demonstrate a strong *prima facie* case or only that there is a serious question to be tried. The argument, however, has left unchallenged the old principle that an interlocutory injunction is not available unless the party seeking the injunction has suffered or clearly will suffer irreparable harm; that is, an injury that cannot be adequately compensated by an award of damages.[3] If anything, the recent case law has emphasized this factor.

In *American Cyanamid Co.* v. *Ethicon Ltd.*,[4] the case that began the recent debate, Lord Diplock pointed out that the possibility of irreparable harm is the reason for interlocutory injunctions. He stated:

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action. . .

In *Hoffman LaRoche & Co. A.G.* v. *Secretary of State for Trade and Industry*,[6] Lord Wilberforce expressed a similar view:

> The object of [an interim injunction] is to prevent a litigant, who must necessarily suffer the law's delay, from losing by the delay the fruit of his litigation; this is

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[1] *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504 (H.L.); *N.W.L. Ltd.* v. *Woods*, [1979] 1 W.L.R. 1294, [1979] 3 All E.R. 614 (H.L.); *Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1986) Ltd.* (1977), 80 D.L.R. (3d) 725, 17 O.R. (2d) 505 (Ont. Div. Ct.); *C-Cure Chemical Co.* v. *Olympia & York Devs. Ltd.* (1983), 33 C.P.C. 192n (Ont. C.A.); *Chitel* v. *Rothbart* (1982), 141 D.L.R. (3d) 268, 39 O.R. (2d) 513 (Ont. C.A.).

[2] R.G. Hammond, Interlocutory Injunctions: Time for a New Model? (1980), 30 U.T.L.J. 240; A. Gore, Interlocutory Injunctions—A Final Judgment? (1975), 38 Mod. L. Rev. 672; P.S.A. Lamek, Equitable Remedies, [1981] L.S.U.C. Special Lectures 125; B.M. Rogers and G.W. Hately, Getting the Pre-Trial Injunction (1982), 60 Can. Bar Rev. 1; P. Carlson, Granting an Interlocutory Injunction: What is the Test? (1982-83), 12 Man. L.J. 109; D. Stockwood, The Status of American Cyanamid in Ontario: A Practical Analysis, The Law of Injunctions—An Update, C.B.A.O. Seminar, May 3, 1985; J. Sopinka, Interlocutory Injunctions and Mandatory Orders, Pre-Emptive Litigation—Winning Before Trial (1985); J. Leubsdorf, The Standard for Preliminary Injunctions (1977-78), 91 Harv. L. Rev. 525; W. Baker, Interlocutory Injunctions—A Discussion of the "New Rules" (1977-78), 42 Sask. L. Rev. 53; J.W. Castles III, Interlocutory Injunctions in Flux: A Plea for Uniformity (1978-79), 34 The Business Lawyer 1359.

[3] *Aetna Financial Services Ltd.* v *Feigelman*, [1985] S.C.R. 2, (1985), 15 D.L.R. (4th) 161; *Johnson* v. *The Shrewsbury and Birmingham Railway Company* (1853), 3 De G.M. & G. 914, 43 E.R. 358 (L.JJ.); *Hopkins* v. *Anderson* (1904), 4 O.W.R. 118 (Ont. H.C.); *Thompson* v. *Cheeseworth* (1920), 18 O.W.N. 419 (Ont. H.C.); *C.A.P.A. of Canada Ltd.* v. *A.B.C. Ltd.*, [1949] O.W.N. 549 (Ont. H.C.); *Cohen* v. *Congregation of Hazen Ave. Synagogue* (1918), 46 N.B.R. 152 (N.B. Ch. D.).

[4] *Supra*, footnote 1.

[5] *Ibid.*, at pp. 406 (A.C.), 509 (All E.R.).

[6] [1975] A.C. 295, at p. 355, [1974] 2 All E.R. 1128, at p. 1146 (H.L.).

called "irreparable" damage, meaning that money obtained at trial may not compensate him.

Irreparable harm, however, is more than a rationale. Irreparable harm is a critical factor in testing the claim for an interlocutory injunction. In *Chesapeake and Ohio Railway Co.* v. *Ball*,[7] McRuer C.J.H.C. stated:

> The granting of an interlocutory injunction is a matter of judicial discretion, but it is a discretion to be exercised on judicial principles. I have dealt with this matter at length because I wish to emphasize how important it is that parties should not be restrained by interlocutory injunctions unless some irreparable injury is likely to accrue to the plaintiff. . .

In *American Cyanamid*, irreparable harm was made the operative ingredient in the balance of convenience, another critical element in the test for an injunction. Lord Diplock explained that for the balance of convenience, the governing principle is first to consider whether damages at trial would adequately compensate a plaintiff for the loss caused by the absence of an interlocutory injunction. If so, and if the defendant was financially sound, then an interlocutory injunction should normally be refused. If damages would be inadequate, then the court should consider whether damages at trial would adequately compensate a defendant for the loss caused by an interlocutory injunction. If damages would redress the defendant and if the plaintiff was financially capable of honouring the undertaking as to damages, then the interlocutory injunction may be granted.[8]

The nature of irreparable harm, however, is not easy to define. As Sharpe writes:[9]

> The rationale for requiring the plaintiff to show irreparable harm is readily understood. If damages will provide adequate compensation, and the defendant is in a position to pay them, then ordinarily there will be no justification in running the risk of an injunction pending the trial. While it is easy to see why this requirement should be imposed, it is difficult to define exactly what is meant by irreparable harm.

The aims of this article are to examine critically the illusive concept of irreparable harm in the context of interlocutory injunctions and to discuss a variety of related questions. How did irreparable harm come to be a fundamental element in the criterion for interlocutory injunctive relief? What precise function does irreparable harm have and why is it so important a factor? As a legal concept, how does and should it operate? Are its present nomenclature and definition satisfactory or do they obscure rather than enlighten? As a factor in interlocutory injunctions, should irreparable harm be replaced by new devices that better carry out its functions?

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[7] [1953] O.R. 843, at p. 854 (Ont. H.C.).

[8] *American Cyanamid Co.* v. *Ethicon Ltd.*, *supra*, footnote 1, at pp. 406 (A.C.), 09 (All E.R.).

[9] R.J. Sharpe, Injunctions and Specific Performance (1983), p. 77.

In order to answer these questions and to understand irreparable harm and the interlocutory injunction, it is necessary to consider briefly some aspects of legal history and to analyse the role of the interlocutory injunction in the administration of justice. It is also necessary to study the role of irreparable harm in the context of other kinds of injunctions and other kinds of equitable remedies.

A. *Historical Background*

Historically, an injunction, a court order that a person act or refrain from acting, was a remedy first introduced by the courts of equity. Until the Judicature Acts[10] fused the administration of justice, the courts of equity were a separate jurisdiction from the courts of the common law. Courts of equity had developed in medieval times because of inadequacies in the inflexible and very formalistic common law. The development began when individual citizens, unhappy with the result at law, would petition their sovereign for a personal or *in personam* remedy against another citizen. The sovereign power, which included the sanctions of imprisonment and sequestration of property, eventually was delegated to the Court of Chancery. The sovereign power would be exercised equitably; that is, with discretion, on grounds of conscience and to do justice for the particular parties.

Given the historic reason for equity's development, one of its fundamental principles was that equity respond only to inadequacies in the common law. Conversely stated, the principle was that a court of equity would not act if the common law rule or remedy was adequate. This principle was originally necessary in order to maintain the general rule of law, to establish comity between the courts of the common law and equity and to mark out their jurisdictional boundaries.[11]

In equity, the injunction served a variety of different purposes.[12] First, the injunction was one of the means by which equity provided a remedy to enforce its own independent doctrines; examples are the law of trusts and the law of fiduciary duties. It may be noted that these independent doctrines developed because of inadequacies or limitations in the common law. Second, the "common injunction" was the means by which equity achieved predominance over the common law.[13] Where the legal result was unjust, the court of equity could enjoin a party from

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[10] Judicature Act (1873), 36 & 37 Vict., c. 66 (U.K.), (1875), 38 & 39 Vict., c. 77 (U.K.); Ontario Judicature Act (1881), 44 Vict., c. 5.

[11] E.A. Farnsworth, Legal Remedies for Breach of Contract (1970), 70 Col. Law Rev. 1145, at p. 1154.

[12] Leubsdorf, *loc. cit.*, footnote 2, at pp. 528-531.

[13] F.W. Maitland, Equity and the Forms of Action at Common Law (1913), pp. 257-258.

resorting to the common law courts or from executing a common law judgment. Since equity and the common law are now administered in one court, this purpose for an injunction is no longer relevant.[14] Third, the injunction was one of a number of means by which equity, exercising what has been described as its auxiliary jurisdiction, could provide a remedy where the legal remedy was inadequate to do justice.[15]

As may be noted from the definitions of irreparable harm set out in the introduction, irreparable harm focuses on the inadequacy of the common law remedy of damages. Thus, the major point to note from the historical background is that the concept of irreparable harm originally arose as an aspect of the general principle of jurisdiction that equity act only in response to inadequacies in the common law.[16] In a modern context where law and equity are administered in one court, the question that emerges is whether this historic principle of jurisdiction remains useful or whether, like the common injunction, it should be abandoned.

B. *The Meaning of the Inadequacy of Damages*

As a concept, irreparable harm responds to the principle that equity act in response to inadequacies in the common law with a formula or definition based on the inadequacy of common law damages. The definition, however, only identifies and does not elucidate the operative principle. What precisely is meant in the theory of equity by the inadequacy of the damages? Put more simply, why and how are damages inadequate? An investigation of these questions may begin with the example of specific performance, another equitable remedy, the availability of which has also been explained by the inadequacy of the damages.[17]

Specific performance provides "specific" relief for breach of contract. The defaulting party is ordered actually to perform his or her promises. Specific relief has the advantages of avoiding the difficulties of and possible inaccuracies in calculating damages and of better responding to the innocent party's expectation interest by delivering the very thing bargained for. It has the disadvantage of requiring a high degree of court supervision, including, on occasion, orders compelling the cooperation of the defaulting party. By comparison, the common law provides "substitutional" relief for breach of contract. The innocent party is required to mitigate his or her injury and the defaulting party is ordered to pay money, called damages, to substitute for his or her failure to perform. Substitutional relief involves less court intervention and manifests a faith

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[14] The Judicature Acts, *supra*, footnote 10, expressly prohibited the use of an injunction to restrain a cause of action.

[15] Maitland, *op. cit.*, footnote 13, pp. 17, 18-19. See also C.W. Chute, Equity Under the Judicature Act or the Relation of Equity to Common Law (1874).

[16] *London and Clackwall Ry. Co.* v. *Cross* (1886), 31 Ch. D. 354 (C.A.).

[17] Sharpe, *op. cit.*, footnote 9, pp. 271-285.

in the philosophy of free enterprise and the marketplace as the place for a remedy.[18]

Viewed from a different analytical perspective,[19] the common law's remedy of damages provides a liability rule to protect the parties' entitlements while equity's remedy of specific performance provides a property rule. A liability rule means a person may take another's entitlement—in this instance, the benefit of the contract—at the cost of the court's assessment of value. A property rule means that a party may take another party's entitlement only if that other party is prepared to sell or release the entitlement at an agreed upon price.

With this background it is possible to show how equity staked out its jurisdiction to award specific performance based on the "inadequacy" of the common law remedy of damages. Equity regarded substitutional relief and a liability rule as adequate for some but not all types of contracts. For example, for contracts for the sale of common goods, a damage award was considered to be adequate since the injured party could easily use the money award to purchase an identical or near identical substitute in the marketplace. Thus, damages are the "ordinary" remedy for breach of contract for the sale of goods. However, as opposed to most goods, every parcel of land was viewed as a unique product, and thus, for the purchaser of land, the specific and "extraordinary" equitable remedy of specific performance was required.[20]

A similar analysis of the inadequacy of damages underlies injunction cases involving negative covenants. For these cases, the purchase in

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[18] Farnsworth, *loc. cit.*, footnote 11, at pp. 1149-1155. The economic argument in favour of damages is that, by requiring the innocent party to mitigate his or her injury while obliging the defaulting party to pay for the loss of the benefit of the original bargain, an award of damages will adequately and fairly protect the expectation interest without placing a disproportionate economic burden on the defaulting party who may move on to more profitable commercial activity. As Sharpe describes it: "Damages allow sour commercial relationships to be severed, the price to be paid and the past to be forgotten", *op. cit.*, footnote 11, p. 278.

[19] See, Guido Calabresi and A. Douglas Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral (1972), 85 Harv. L. Rev. 1089.

[20] *Adderley* v. *Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239 (V.C.); *Flint* v. *Corby* (1853), 4 Gr. 45 (U.C. Ch.). This general availability of specific performance for land recognized the subjective, aesthetic and emotional factors attached to the ownership of a particular parcel of land and the difficulty of quantifying these idiosyncratic factors as part of the market value of the lands. While the same case for inadequacy of damages cannot be made for the vendor, the remedy of specific performance was nevertheless made available on grounds of mutuality. Recently, there has been a reconsideration of the supposed inadequacy of damages for sale of land transactions: *Chaulk* v. *Fairview Const. Ltd.* (1977), 33 A.P.R. 13, 3 R.P.R. 116 (Nfld. C.A.); *McNabb* v. *Smith* (1982), 132 D.L.R. (3d) 523, 44 B.C.L.R. 295 (B.C.C.A.); *Tanu* v. *Ray* (1981), 20 R.P.R. 22 (B.C.S.C.); *Heron Bay Investments Ltd.* v. *Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338 (Ont. H.C.). See also P.M. Perell, Remedies and the Sale of Land (1988), chap. 8.

the marketplace of a true substitute is not possible. It may be difficult, if not impossible, to quantify the value of the promise, especially in cases outside of a commercial context where idiosyncratic factors may be involved. Further, for negative covenant cases, an injunction provides a property rule to protect the entitlement and this allows the owner to determine its value.

Moving the investigation outside the law of contracts, the law of nuisance sheds light on the nature of the inadequacy of common law damages when compared to an injunction.[21] In the case of a continuing nuisance, while damages are difficult to calculate and do not prevent future injury, a permanent injunction recognizes the full extent of the plaintiff's property rights and stops the continuance of injury. Further, in these cases, damages may be regarded as a cost of doing business and the courts are understandably adverse to allowing the wrongdoer to buy, or in effect expropriate, the innocent party's right to enjoy reasonably his or her property. Viewed in this way, common law damages and a liability rule may be seen to be inadequate when compared to equitable relief and a property rule.

With the benefit of the above examples, it is now possible to give some meaning to the concept of the inadequacy of damages and to the role of irreparable harm. The first point is that the inadequacy of damages is a comparison with other available remedies. Irreparable harm simply means that in a particular context an equitable remedy is better than damages. Indeed, damages remain a viable alternative remedy in all cases.[22]

The second point is that the inadequacy of damages means different things in different contexts. It follows that as a matter of legal analysis or synthesis, particular care must be taken before applying the lesson of one case to another type of case.

The third point is that irreparable harm's modern purpose is as a device to determine from a choice of remedies the best remedy to do justice. With the courts now exercising a fused common law and equita-

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[21] See *Duchman* v. *Oakland Dairy Co. Ltd.* (1928), 63 O.L.R. 111 (Ont. App. Div.); *McKinnon Industries Ltd.* v. *Walker*, [1951] 3 D.L.R. 577 (P.C.), affirming, [1950] 3 D.L.R. 159 (Ont. C.A.), which varied, [1949] 4 D.L.R. 739 (Ont. H.C.); *Walker* v. *Pioneer Construction Co. (1967) Ltd.* (1976), 56 D.L.R. (3d) 677, 8 O.R. (2d) 35 (Ont. H.C.); *Colls* v. *Home and Colonial Stores*, [1904] A.C. 193, [1904] All E.R. Rep. 5 (H.L.); *K.V.P. Co. Ltd.* v. *McKie*, [1949] S.C.R. 698, [1949] 4 D.L.R. 497.

[22] In the case of a sale of land, the purchaser has the right to elect between the alternative remedies of damages or specific performance: *Dobson Winton & Robins Ltd.*, [1959] S.C.R. 775, (1958), 14 D.L.R. (2d) 110. Damages are capable of calculation and are only inadequate in the sense that specific performance might be better because of the perceived uniqueness of every parcel of land.

ble jurisdiction, there is no need to use irreparable harm as a device to ground jurisdiction. To fulfil its modern role, irreparable harm solves the problem of determining the best remedy by analysing the comparative capabilities of the remedies to do justice in the particular circumstances of each case or type of case.

C. *The General Availability of Injunction Relief*

Before considering the particular example of interlocutory injunctions, it is helpful to consider the extent to which injunctions are generally available. This investigation should provide further insights into the nature of the inadequacy of damages and hence into irreparable harm.

In cases involving a continuing nuisance, although common law damages remain an alternative remedy and although the courts are empowered by statute to grant damages in lieu of an injunction,[23] the permanent injunction is the preferred remedy and the onus is on the wrongdoer to show that another remedy is adequate. The "working rule" as to the substitution of damages comes from the case of *Shelfer* v. *London Electric Lighting Co.*[24] where A.L. Smith L.J. stated:

> In my opinion, it may be stated as a good working rule that —
> (1.) If the injury to the plaintiff's legal right is small,
> (2.) And is one which is capable of being estimated in money,
> (3.) And is one which can be adequately compensated by a small money payment,
> (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction: —
> then damages in substitution for an injunction may be given.

It is clear from this articulation of criteria that the working rule does little to reduce the general availability of injunctive relief.

Outside the law of nuisance, courts have granted permanent injunctions to prevent or to end a variety of infringements of property rights. Thus, a permanent injunction is an available remedy for injuries caused by passing-off, trespass to real and personal property, misappropriation of trade secrets, slander of goods (malicious falsehood), copyright infringement, and patent infringement.[25]

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[23] Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 112.

[24] [1895] 1 Ch. 287, at pp. 322-323 (C.A.). Applied in *Duchman* v. *Oakland Dairy Co., supra*, footnote 23; *Denison* v. *Carrousel Farms Ltd.* (1981), 129 D.L.R. (3d) 334, 34 O.R. (2d) 737 (Ont. H.C.), appeal dismissed (1982), 138 D.L.R. (3d) 381, 38 O.R. (2d) 52 (Ont. C.A.).

[25] Sharpe, *op. cit.*, footnote 9, pp. 180-218, 226-230; H.G. Fox, Canadian Law of Copyright and Industrial Designs (2nd ed., 1969), pp. 637-646. For these cases, a liability rule may fail to recognize adequately the entitlement and a property rule may be necessary to recognize and, indeed, to establish the property interest.

In the area of contracts, permanent injunctions are granted to enforce non-competition and restrictive covenants that are reasonable between the parties and not contrary to the public interest in unrestrained trade.[26] The extent to which the courts rely on injunctions to enforce a negative covenant is demonstrated by cases where permanent injunctions have been granted even when the contract also provides for a remedy by way of liquidated damages.[27]

The leading case on negative covenants is *Doherty* v. *Allman*[28] where Lord Cairns stated:

> . . . in such a case the injunction does nothing more than give the sanction of the process of the Court to that which is already the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain, which the parties have made, with their eyes open, between themselves.

By granting a permanent injunction in the above types of cases and by defining working rules that minimize damages as a substitute, the courts, expressly or implicitly, have resolved the historic principle governing the availability of equitable relief and have determined that damages are inadequate in a wide range of cases. The how and why of the inadequacy of damages varies or, as Professor Sharpe describes it, "takes shape depending on the context".[29] Given the amorphous nature and breadth of the concept of inadequacy and although still subject to the restraint of other equitable principles,[30] the remedy of an injunction becomes a generally available remedy for a wide range of cases.

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[26] *Denison* v. *Carrousel Farms Ltd., supra*, footnote 24. Interlocutory injunctions have also been granted to enforce negative covenants: *Hampstead & Suburban Properties Ltd.* v. *Diomedous*, [1969] 1 Ch. 248, [1968] 3 All E.R. 545 (Ch. D.); *Ernest's Char Pit Ltd.* v. *Demendeiros* (1970), 15 D.L.R. (3d) 663, [1971] 1 O.R. 481 (Ont. H.C.); *Hardee Farms International Ltd.* v. *Cam & Crank Grinding Ltd.* (1973), 33 D.L.R. (3d) 266, [1973] 2 O.R. 170 (Ont. H.C.). But see *contra*, *Heinke* v. *Can. Credit Men's Trust Ass'n.* (1956), 4 D.L.R. (2d) 298 (B.C.S.C.); *Canada Safeway Ltd.* v. *Kesmark Ltd.* (1981), 21 R.P.R. 148 (Ont. H.C.).

[27] *Mills* v. *Gill*, [1952] O.R. 257 (Ont. H.C.); *Toronto Dairy Co.* v. *Gowans* (1879), 26 Gr. 290 (U.C. Ch.).

[28] (1878), 3 App. Cas. 709, at p. 720 (H.L.).

[29] Sharpe, *op. cit.*, footnote 9, p. 5. As already suggested by the discussion, the inadequacy may be: that damages do not in whole or in part recognize the value of the damaged right or interest; that damages undervalue the incidents of property ownership especially the subjective factors and the right of the owner to determine the property's use, enjoyment and disposition; that damages do not prevent future injury; that damages are difficult or impossible to calculate accurately; that it is impossible to purchase an identical or near identical substitute in the marketplace; or that, given the property rights involved, it seems unfair to force the innocent party to do so.

[30] Examples of equitable principles are laches, acquiescence and the doctrine of clean hands. These doctrines may prescribe the availability of equitable relief.

In his text, The Principles of Equitable Remedies,[31] Spry describes the result this way:

> Gradually there has developed a tendency not to regard damages as constituting an adequate remedy for prospective injury to existing property of the plaintiff or to his person.

In his text, Sharpe comes closer to the point and states:[32]

> . . . where injunctions are sought to restrain interference with property rights or to restrain breach of negative convenants, injunctions are in fact so strongly favoured that it is more accurate to say that the injunction is the presumed remedy.

In *Evans Marshall & Co. Ltd.* v. *Bertola SA*,[33] Sachs L.J. comes closer still:

> The standard question in relation to the grant of an injunction, "Are damages an adequate remedy?", might perhaps, in the light of the authorities of recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"

Pausing here, it is possible to conclude that injunctions and other equitable remedies are now no longer extraordinary in the sense of being unusual or rarely available,[34] and that in the comparative sense discussed above damages are inadequate for many cases.

I. *The Role of the Interlocutory Injunction*

From the observation that irreparable harm means different things in different contexts, it follows that the entry point for the investigation of irreparable harm and the interlocutory injunction must be found in the general context or general circumstances of the interlocutory injunction.

While it may sound trite, the most salient feature of an interlocutory injunction is that it is interlocutory. It is a provisional remedy made pending a final decision. The interlocutory injunction exists because delay in final adjudication is inherent to the administration of justice. The interlocutory injunction's role is to ensure that the final judgment is not too late to do justice. This role is vital because it maintains the integrity of the whole system. The dilemma of the interlocutory injunction is that its effect may be contrary to its purpose. Depending on the result at trial, an interlocutory injunction may frustrate and not preserve the court's ability to dispense justice. Without a final hearing on the facts, an inter-

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[31] I.C.F. Spry, The Principles of Equitable Remedies (3rd ed., 1984), p. 367.

[32] *Op. cit.*, footnote 9, p. 6.

[33] [1973] 1 W.L.R. 349, at p. 379, [1973] 1 All E.R. 992, at p. 1005 (C.A.).

[34] Equitable remedies remain extraordinary in the sense that they are remarkably powerful, effective and potentially intrusive remedies that should be dispensed with care. For example, in *Thompson* v. *Cheeseworth, supra*, footnote 3, at p. 420, the injunction was described as "a drastic remedy, and vested in the Courts as a discretionary jurisdiction to be cautiously exercised"

locutory injunction grants a powerful remedy to a party who may ultimately be found undeserving. By comparison, a damage award is coincidental with the trial judgment and obviously does not run the risk of interlocutory error.

Leubsdorf describes the dilemma of the interlocutory injunction as follows:[35]

> A court considering a motion for interlocutory relief faces a dilemma. If it does not grant prompt relief, the plaintiff may suffer a loss of his lawful rights that no later remedy can restore. But if the court does grant immediate relief, the defendant may sustain precisely the same loss of this rights. . .
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> The dilemma, of course, exists only because the court's interlocutory assessment of the parties' underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached. The danger of incorrect preliminary assessment is the key to the analysis of interlocutory relief. It requires investigating the harm an erroneous interim decision may cause and trying to minimize that harm. And it decisively distinguishes the preliminary from the final injunction.

If this is the context of an interlocutory injunction, then the meaning of irreparable harm or the inadequacy of damages must be that the plaintiff's injury combined with the effect of the delays inherent in the administration of justice cannot be compensated for or overcome by an award of money or other remedy at trial. In these circumstances, but only after giving equal consideration to the interests of the defendant, an interlocutory injunction may be necessary in order to do justice. If, however, the circumstances are such that a damage award at trial is adequate to compensate for the combination of the injury and the delay, then an interlocutory injunction with its potential for interlocutory error should be avoided. To repeat the words of Lord Wilberforce:[36]

> The object of [an interim injunction] is to prevent a litigant, who must necessarily suffer the law's delay, from losing by the delay the fruit of his litigation, this is called 'irreparable damage,' meaning that money obtained at trial may not compensate him.

This context also explains the importance given on an interlocutory injunction to maintaining the *status quo* in the sense of preserving the court's ability to be fair to both sides. However, in the sense of keeping the parties in their places, the concept of maintaining the *status quo* has been severly criticized as misleading and harmful. As Leubsdorf observes:[37]

> To freeze the existing situation may inflict irreparable injury on a plaintiff deprived of his rights or a defendant denied the right to innovate. The status quo shibboleth cannot be justified as a way to limit interlocutory meddling, because a court interferes just as much when it orders the status quo as when it changes it.

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[35] *Loc. cit.*, footnote 2, at p. 541.

[36] *Hoffman-La-Roche & Co. A.G.* v. *Secretary of State for Trade and Industry, supra*, footnote 6, at pp. 355 (A.C.), 1146 (All E.R.). The passage was quoted in the text at footnote 6.

[37] *Loc. cit.*, footnote 2, at p. 546.

Sharpe states:[38]

> Properly understood, the phrase merely restates the basic premise of granting an interlocutory injunction, namely, that the plaintiff must demonstrate that unless an injunction is granted, his rights will be nullified or impaired by the time of trial.

A. *Analysis of the Case Law*

In the context of the interlocutory injunction, there are many subtleties and a number of unique problems associated with irreparable harm or the inadequacy of damages. These subtleties and problems may be explored by an analysis of some of the judgments.

In *Tradeland Agencies Ltd.* v. *MacKinnon*,[39] the defendant sold his real estate brokerage and general insurance business to the plaintiff. As part of the transaction, the plaintiff hired the defendant as an employee and the defendant signed a non-competition agreement. There eventually was a falling out of the parties and the defendant left his employment and started a competing business in obvious violation of his agreement. The plaintiff sought an interlocutory injunction.

In the result, Noble J. restrained the defendant's activities as a general insurance agent but refused to restrain his activities as a real estate agent. He reasoned that the record keeping requirements of the real estate industry meant that it was possible to keep track of the defendant's activities as a real estate agent. Should the plaintiff succeed, then damages could be calculated with relative ease. However, the court felt that the defendant could interfere in an undetectable way with the plaintiff's insurance agency. In granting a limited injunction, Noble J. made it clear that he was not expressing any opinion on the validity or otherwise of the restrictive covenant.

The *Tradeland Agencies Ltd.* case illustrates a number of points. Separating the real estate and general insurance activities of the defendant, it may be noted that if the plaintiff went on to succeed at trial, then the plaintiff would be entitled, on the authority of *Doherty* v. *Allman*,[40] to a permanent injunction to restrain the defendant from competing as a real estate agent and this in a case where the court's ability to calculate damages remains a constant throughout. This result illustrates the significance of context to the meaning of the adequacy of damages. Here, in the interlocutory period, damages were adequate to overcome the impact of the law's delay in restraining the defendant's activities as a competing real estate agent. However, once the spectre of interlocutory error was removed, then, although still calculable, damages were in a comparative sense inadequate to give the plaintiff full value for his negative covenant.

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[38] *Op. cit.*, footnote 9, pp. 84-85.

[39] (1979), 47 C.P.R. (2d) 99 (Sask. C.A.).

[40] *Supra*, footnote 28.

If successful at trial, the plaintiff would also be entitled to have the interlocutory injunction restraining the defendant's activities as a general insurance agent made permanent. For this part of the case, the concept of the adequacy of damages has a slightly different meaning. Here, damages were inadequate at the interlocutory level because they could not be identified or calculated, and damages were inadequate at the judgment stage both for these reasons and because the plaintiff was enforcing a negative covenant.

In *General Mills Canada Ltd.* v. *Maple Leaf Mills Ltd.*,[41] the plaintiff sold a cake mix known as "Super-Moist" and sought an interlocutory injunction to restrain the defendant from introducing a competing cake mix known as "Moist-Plus". The plaintiff advanced passing-off and copyright infringement as the grounds for the interlocutory injunction. Grange J. refused the injunction and stated:[42]

> The plaintiff may lose sales because of the advent of the defendant's product on the market and that loss may be difficult to calculate. Difficulty in calculation of damages is however no bar to their determination and their recovery. Moreover, the defendant is a substantial solvent company and has undertaken to maintain records of its sales.
>
> For the defendant an interlocutory injunction would be a major hardship. It has invested time, effort and money in the design, production and promotion of the package and will inevitably lose customers and goodwill if the injunction should go. The fact that [it] is only a change to or an additional packaging of its product does not radically alter the matter. If it should eventually lose the action it will of course suffer more loss but that is a risk it is prepared to take and it must be remembered that it may eventually be successful. In my view the balance of convenience lies in leaving the matter until trial in *status quo*.

The result in *General Mills* may be usefully compared with the result in *Source Perrier (Société Anonyme)* v. *Canada Dry Ltd.*[43] In this case, the plaintiff sold mineral water in a distinctive green bottle and sought an interlocutory injunction to restrain the defendant from introducing a competing product in a similar bottle. The plaintiff advanced passing-off as the grounds for the interlocutory injunction. Anderson J. granted the interlocutory injunction. He reasoned that sales lost by the plaintiff and gained by the defendant would be difficult to calculate. Further, the plaintiff would suffer irreparable harm: (a) because the plaintiff's right to register its bottle as a distinguishing guise might be prejudiced by the defendant's use during the period of the delay until trial; and (b) because the plaintiff's reputation might suffer, since confused customers might wrongly attribute any dislike for the defendant's mineral water to the plaintiff's product, although little weight should be

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[41] (1980), 52 C.P.R. (2d) 218 (Ont. H.C.).

[42] *Ibid.*, at p. 219.

[43] (1982), 36 O.R. (2d) 695 (Ont. H.C.).

given to this factor. On the issue of comparative hardship or balance of convenience, Anderson J. favoured granting the injunction and stated:[44]

> The sale by the defendant of this particular product in this particular guise is in its infancy. The defendant, however, is a major producer and distributor of such goods and must, I think, be looked upon as a potentially formidable competitor by anyone engaged in the sale of similar wares. The plaintiff has an established position in the market with what it alleges to be a distinctive get-up. The defendant is, as I have indicated, new to the market with its present get-up. I am prepared to assume that deferral of further production and sales by the defendant of its product in that get-up may fairly be assumed to cause some loss. I point out, however, that the defendant could still market its product either in a bottle of the shape and colour of the bottle which it previously used or in a bottle of the new shape and in a different colour.

From the perspective of an investigation of irreparable harm and as a matter of legal argument, it is possible to argue that *General Mills* and *Source Perrier* are factually similar or, conversely, that the cases are factually distinguishable. It is also possible to argue that as a matter of law, one, both or neither case was correctly decided. For present purposes, however, it is not necessary to resolve these arguments. The cases, rather, may be juxtapositioned in order to gain further insights about irreparable harm and interlocutory injunctions.

If, for the sake of argument, it is assumed that *General Mills* and *Source Perrier* are factually similar, then the first insight is that, despite the fact that their legal results are different, it does not follow that one of the cases must have been wrongly decided. The difference in the results may rather be explained on evidentiary grounds. The plaintiff in *General Mills* may simply have failed to lead sufficient evidence to show that its injury combined with the law's delay would make damages at trial inadequate to do justice. The lesson that follows from this explanation is that in applying the case law of irreparable harm, care must not only be taken to note the significance of context but care also must be taken to ascertain whether any failure to establish irreparable harm was a matter of principle or a matter of evidence.

If, for the sake of argument, it is assumed that *General Mills* and *Source Perrier* are factually similar and the difference in their results cannot be explained on evidentiary grounds, it would appear that one of the cases was wrongly decided.

The argument against the decision in *General Mills* and for the decision in *Source Perrier* is that, unlike Anderson J. in *Source Perrier*, Grange J. in *General Mills*, in refusing the injunction, failed to appreciate fully the difficulty in calculating the plaintiff's damages and further erred by overstating the losses the defendant would suffer if its planned

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[44] *Ibid.*, at pp. 702-703.

entry into the marketplace was delayed.[45] The defendant's potential losses in *General Mills* were overstated because, unless there was only one escaping moment of opportunity, the defendant could get into the market later with damages for the interlocutory period.

The argument for the interlocutory decision in *General Mills* and against the interlocutory decision in *Source Perrier* is that the absence of the injunction pending trial would be unjust only if the permanent injunction came too late to restore the plaintiff in the marketplace. If the permanent injunction remained timely, then damages were adequate for the interlocutory period. Viewed in this light, *General Mills*, in refusing the interlocutory injunction, was correctly decided, and *Source Perrier*, in granting the interlocutory injunction, was wrongly decided because in both cases there was no reason to doubt the timeliness of the permanent injunction.

As already noted, it is not necessary here to resolve actually any contest between *General Mills* and *Source Perrier*. Rather, the purpose of the debate is to highlight the fundamental importance to the determination of whether to grant an interlocutory injunction of focusing on the issue of the anticipated effectiveness and timeliness of the trial remedy. This is, of course, just another way of saying that in the context of an interlocutory injunction, irreparable harm means that the plaintiff's injury, combined with the effect of the law's delay, cannot be compensated for by an award of money at trial. If attention is given to this issue, it is also possible to identify and classify a number of common themes that emerge from the case law of irreparable harm and the interlocutory injunction.

In one group of cases, the existence of the plaintiff's business or a major part of it is inextricably tied to and actually dependent upon the defendant. An example of this type of case is *Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd.*,[46] where the plaintiff was the distributor of the defendant's franchises. Another example is *Evans Marshall & Co. Ltd.* v. *Bertola S.A.*,[47] where the plaintiff was the English distributor of the defendant's wine products. The alleged misconduct in these cases was wrongfully severing the tie that sustained the plaintiff. The plaintiff was thus put out of business and could not survive the interlocutory period without an injunction to restrain the defendant's allegedly

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[45] Lines of reasoning similar to that in the *General Mills* case may be found in *Bendix Home System Ltd.* v. *Clayton* (1975), 22 C.P.R. (2d) 132 (B.C.S.C.); *Rothmans of Pall Mall Canada Ltd.* v. *RJR-Macdonald Inc.* (1982), 17 B.L.R. 263 (Ont. H.C.).

[46] *Supra*, footnote 1. Other examples of this type of case are: *Baxter Motors Ltd.* v. *American Motors (Canada) Ltd.* (1973), 40 D.L.R. (3d) 450, [1973] 6 W.W.R. 501 (B.C.S.C.); *Prairie Hospitality* v. *Renard Hospitality* (1980), 118 D.L.R. (3d) 121 (B.C.S.C.); *Pasen* v. *Dominion Herb Distributors* (1968), 67 D.L.R. (2d) 405, [1968] 1 O.R. 688 (Ont. H.C.), aff'd (1968), 69 D.L.R. (2d) 651, [1968] 2 O.R. 516 (Ont. C.A.).

[47] *Supra*, footnote 33.

wrongful conduct. Because the permanent order would have come too late, there were compelling circumstances for an interlocutory order, especially so because the defendant was basically being directed to continue until trial a consentual relationship that used to be satisfactory.

In a second group of cases, the plaintiff's business is vulnerable and its existence or a major part of it is imperilled by the defendant's alleged misconduct of starting up a competing business. Here again, the permanent order may come too late. This group differs from the first because the claimant is not absolutely dependent on the defendant. These cases present very great difficulties for the court since the existence of the defendant's business may also be imperilled by the granting of the interlocutory injunction.

An example of this second type of case is *Professional Maintenance Systems of Canada Ltd.* v. *Smits*.[48] In this case, the plaintiff was a new company that had developed a machine to clean carpets. The plaintiff contacted the defendant about becoming a manufacturer of the carpet cleaner. After negotiations broke down, the defendant planned to sell carpet cleaners in competition with the plaintiff. The plaintiff sought an interlocutory injunction to restrain this competition, claiming that there had been a misappropriation of confidential information. Callaghan J. granted the injunction reasoning that "even if assessable [damages] would not adequately compensate the plaintiff as early competition may have a detrimental effect upon the fledgling company, so much so that it might have difficulty surviving".[49]

In a third group of cases, the plaintiff's business suffers from the defendant's allegedly wrongful competition, but the plaintiff's business is not actually imperilled by the competition. Now, an interlocutory injunction must be a necessity. The injunction will not be granted simply because it will do the defendant no harm.[50] Given that the plaintiff does not need the interlocutory injunction to survive while, on the other hand, the injunction may harm or actually imperil the business or occupation of the defendant, interlocutory injunctions are refused in these cases. In these cases, the permanent order will not come too late. *General Mills*[51] falls into this group. Another example is *Levitz Furniture Corp.* v. *Levitz*

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[48] (1978), 40 C.P.R. (2d) 160 (B.C.S.C.). Other examples are *House of Faces, Inc.* v. *Leblanc* (1984), 2 C.P.R. (3d) 177 (Ont. H.C.); *Tenatronics Ltd.* v. *Hauf* (1971), 23 D.L.R. (3d) 60, [1972] 1 O.R. 329 (Ont. H.C.); and perhaps, *Source Perrier, supra*, footnote 43, where the defendant was described as a "formidable competitor".

[49] *Ibid.*, at p. 163.

[50] *Aetna Financial Services* v. *Feigelman, supra*, footnote 3; *Playter* v. *Lucas* (1921), 51 O.L.R. 492 (Ont. H.C.); *Law Society of Upper Canada* v. *MacNaughton*, [1942] O.W.N. 551 (Ont. C.A.).

[51] *Supra*, footnote 41.

Furniture Ltd..[52] In this case, the plaintiff carried on a furniture business in Seattle but was well known in Vancouver and had plans to open a store there. The defendant had no connection with the plaintiff's name and used it to establish a furniture store in Vancouver. Although concluding that a *prima facie* case of passing-off had been established, Berger J. refused the interlocutory injunction and stated:[53]

> How will they [the plaintiffs] suffer in the meantime if an interim injunction is not granted? The defendants may sell some furniture on the strength of the Levitz name, but a claim for an accounting of profits can be made by the plaintiffs.

In a fourth group of cases, the courts grant an interlocutory injunction because of injury to the plaintiff's reputation or goodwill or because damages may be incapable of calculation. An example is *Sony of Canada* v. *Hi-Fi Express Inc.*,[54] a case of alleged passing-off. In this case, the plaintiff, an exclusive distributor of Sony products, was granted an interlocutory injunction to restrain the defendant from selling without the manufacturer's warranty. Another example is *Mario's Spaghetti House & Pizzeria Ltd.* v. *Italian Village Ltd.*[55] In this case, the plaintiff carried on a restaurant business called "Mario's". Within a distance of two blocks, the defendant proposed to open a restaurant business to be called "Mario's Place". In reversing the lower court decision and in granting the injunction on grounds of passing-off, MacKeigan C.J.N.S. noted:[56]

> . . . it appears . . . that deception is likely if the name is used, [and] that irreparable harm in the sense that if no injunction is granted damages may be suffered which are difficult or impossible to assess, and that the balance of convenience

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[52] [1972] 3 W.W.R. 65 (B.C.S.C.). Other examples are: *General Mills Fun Group Inc.* v. *International Games of Canada Ltd.* (1974), 15 C.P.R. (2d) 204 (Fed. Ct.); *Canada Decal (Western). A Division of Canada Decalomania Co. Ltd.* v. *Peters* (1982), 64 C.P.R. (2d) 232 (B.C.S.C.); *Dialadex Communications Inc.* v. *Crammond* (1987), 34 D.L.R. (4th) 392, 57 O.R. (2d) 746 (Ont. H.C.); *Mercury Marine Ltd.* v. *Dillon* (1987), 30 D.L.R. (4th) 627, 57 O.R. (2d) 746 (Ont. H.C.); *Aluma Building Systems Inc.* v. *J.G. Fitzpatrick Construction Ltd.* (1974), 17 C.P.R. (2d) 275 (Fed. Ct.); *Empire Stevedores (1973) Ltd.* v. *Sparringa* (1978), 19 O.R. (2d) 610 (Ont. H.C.), application for leave to appeal dismissed May 19, 1978; *Teledyne Industries Inc.* v. *Lido Industrial Products Ltd.* (1978), 19 O.R. (2d) 740 (Ont. C.A.); *Nelson Burns & Co.* v. *Graham Industries Ltd.* (1981), 59 C.P.R. (2d) 113 (Ont. H.C.).

[53] *Ibid.*, at p. 68.

[54] (1983), 138 D.L.R. (3d) 662, 38 O.R. (2d) 505 (Ont. H.C.). Other examples are: *Hoffman LaRoche Ltd.* v. *Pan Chemicals Ltd.* (1963), 38 D.L.R. (2d) 105 (Alta. S.C.); *Indal Ltd.* v. *Halko* (1976), 28 C.P.R. (3d) 230 (Ont. H.C.); *Canadian Board for Certification of Prosthetists* v. *Canadian Pharmaceutical Association* (1985), 5 C.P.R. (2d) 236 (Ont. H.C.); *Hi-Fi Express Inc.* v. *Walsa Ltd.* (1981), 61 C.P.R. (2d) 71 (Ont. H.C.); *Ottawa-Carleton Regional Transit Commission* v. *Gala Hospitality (International) Inc.* (1982), 19 M.P.L.R. 153 (Ont. Co. Ct.); *Cartwright & Sons Ltd.* v. *Carswell Co. Ltd. and Gaunt* (1958), 14 D.L.R. (2d) 596 (Ont. H.C.), where injury to goodwill was not proven.

[55] (1976), 29 C.P.R. (2d) 257 (N.S.C.A.).

[56] *Ibid.*, at pp. 259-260.

> between the parties is strongly tipped in favour of the . . . [plaintiff]. That being so, the requirements for an interlocutory injunction are amply met . . .

In this fourth group of cases, to be consistent with the meaning of irreparable harm in the context of an interlocutory injunction, the underlying rationale must be that during the interlocutory period, the losses incurred or the injury to reputation or goodwill suffered by the plaintiff are such that the permanent order will come too late. There is a significant element that should not be lost sight of in this rationale. The irreparable harm must occur during the interlocutory period. It is, however, frequently not clear from the cases whether this element is actually appreciated.

Sony of Canada[57] provides an illustration. In that case, assuming the tort of passing-off were established at trial, then the plaintiff's reputation or goodwill would be permanently or irreparably harmed unless the defendant's conduct were permanently restrained. It does not follow, however, that the defendant's identical misconduct, during the interlocutory period but not extending beyond it, must necessarily inflict an injury amounting to irreparable harm. In other words, the fact that the defendant's conduct would eventually constitute harm not compensatory in damages, does not mean that at any given time, the defendant's conduct has caused harm not compensatory in damages.[58] At the interlocutory level, the injury to the plaintiff's reputation and goodwill may be trifling or modest and, having regard to the possibility of interlocutory error, insufficient to ground any interference with the defendant's affairs. On the other hand, the effect during the interlocutory period of the defendant's misconduct may be such as to inflict a serious injury to goodwill or reputation not compensatory in damages. It is only in the latter case that there is justification for the interlocutory injunction.

In a fifth group of cases, the issue is whether during the interlocutory period, the plaintiff must suffer a nuisance that, if proven at trial, would ground a permanent injunction. This group of cases is analytically similar to the fourth group. Again, it is problematic whether conduct that will constitute irreparable harm at trial constitutes irreparable harm during the interlocutory period. The point may be illustrated by comparing *Radenhurst* v. *Coate*[59] with *Bolton* v. *Forest Management Institute*.[60] In *Radenhurst*, the plaintiff suffered from noxious and offensive vapours emitted from the defendant's neighbouring soap and candle

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[57] *Supra*, footnote 54.

[58] The experience of the manufacturers of the drug, Tylenol, demonstrates that it is possible to come back successfully from a serious injury to reputation, in that case, the sabotage of its product.

[59] (1856), 6 Gr. 139 (U.C. Ch.).

[60] [1985] 6 W.W.R. 562, (1985), 66 B.C.L.R. 126 (B.C.C.A.).

factory. The plaintiff sought an injunction to restrain the continuance of the nuisance. Since the plaintiff had put up with the nuisance for some years, Spragge V.C. refused to grant an injunction that would put the defendant out of business before a trial that might vindicate him. Spragge V.C. stated:[61]

> Ordinarily, relief of this nature is only granted at the hearing. It is granted upon interlocutory application, where the injury complained of is irremediate in its nature, so that there is a necessity for anticipating the regular formal disposition of the matter at the hearing for the protection of the property in the interim from irreparable damage, and in cases of this nature the court considers whether the balance of inconvenience is in granting or withholding an injunction.

In *Bolton*, the plaintiffs sought an interlocutory injunction to restrain an experiment to test the toxicity of a herbicide on fish and wildlife. The plaintiffs alleged that the fish and game of their fishing licence and registered trapline were imperilled if the program went ahead. In this case, the injunction was granted. If the plaintiffs were denied an interlocutory injunction, their success at trial would come too late to prevent an irremedial loss and damages were difficult, if not impossible, to calculate.[62]

A sixth group of cases that demonstrates an aspect of the nature of irreparable harm in the context of an interlocutory injunction are cases where during the interlocutory period, although the plaintiff loses or may lose something permanently, nevertheless, the loss does not seriously impair the court's ability to do justice at trial. An example of this type of case is *Stevenson* v. *Air Canada*[63] where the plaintiff, a commercial airline pilot, sought an injunction to restrain his mandatory retirement at age sixty. The court refused to grant an interlocutory injunction. Assuming that the plaintiff succeeded at trial, then his career could resume although he could, of course, never recover the loss of time for his occupation. However, having regard to the risk of interlocutory error and to the fact that the court retains the ability to fashion a remedy for the period after the trial, damages seem adequate for the loss suffered during the interlocutory period.

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[61] *Supra*, footnote 59, at p. 144.

[62] However, compare *Bolton* with *Stein* v. *City of Winnipeg* (1974), 48 D.L.R. (3d) 223, [1974] 5 W.W.R. 484 (Man. C.A.), where perhaps the threat to the environment was less clear.

[63] (1982), 132 D.L.R. (3d) 406, 35 O.R. (2d) 68 (Ont. Div. Ct.). See also: *Lamont* v. *Air Canada* (1982), 126 D.L.R. (3d) 266, 34 O.R. (2d) 195 (Ont. H.C.); *Boduch* v. *Harper* (1974), 64 D.L.R. (3d) 463, 13 C.P.R. (2d) 1 (Ont. H.C.); *Chambers* v. *Canadian Pacific Air Ltd.* (1981), 128 D.L.R. (3d) 673 (B.C.S.C.); *Thorsteinson* v. *Shebeski* (1974), 52 D.L.R. (3d) 734 (Man. C.A.); *Greenlaw* v. *Ontario Major Junior Hockey League* (1985), 48 O.R. (2d) 371 (Ont. H.C.); *Re Bregzio and Governing Council of University of Toronto* (1986), 53 O.R. (2d) 348 (Ont. H.C.); *Abouna* v. *Foothills Provincial General Hospital Board* (1975), 65 D.L.R. (3d) 337 (Alta. T.D.).

The "Mareva" injunction, a species of interlocutory injunction named after the case of *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.*,[64] is the subject matter of a seventh group of cases.[65] These cases constitute an exception to the rule that the court will not interfere with the assets or property of the defendant prior to judgment.[66] The rule manifests the court's reluctance to interfere with the rights of the defendant until there has been a full hearing and final determination of the facts. The exception to the rule arises from circumstances where the plaintiff has a strong *prima facie* case and there is a real risk that to avoid the possibility of a judgment, the defendant will remove assets from the court's territorial jurisdiction or dissipate assets out of the normal course of business. It may be emphasized that the conduct of the defendant, if unrestrained, threatens to stultify a monetary judgment for a plaintiff who has a strong claim.

The case law of Mareva injunctions does not use the terminology of irreparable harm. However, the same underlying principles are operative. Once again, the court is faced with the dilemma of preserving its ability to do justice with a mechanism that may yield injustice. Again, the interlocutory injunction is justified by the threat to the integrity of the administration of justice and to the court's ability to provide a meaningful or real remedy. Here, the remedy that may come too late to be practical is the judgment for damages.[67]

The absence of the terminology of irreparable harm perhaps may be explained by the fact that the adequacy of damages would have a sightly different meaning in the context of Mareva injunctions. Here, the plaintiff does not argue that damages are an inadequate remedy for the interlocutory period or for trial and, indeed, there may be no basis or claim for any other remedy; nevertheless, the interlocutory injunction is necessary to ensure that from a practical point of view damages are adequate. Put somewhat differently, unless protected by an interlocutory injunction, the judgment for damages is then inadequate.

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[64] [1980] 1 All E.R. 213 (C.A.). Although reported in 1980, this case was decided in 1975.

[65] *Aetna Financial Services Ltd.* v. *Feigelman, supra*, footnote 3; *Chitel* v. *Rothbart, supra*, footnote 1; *Nippon Yusen Kaisha* v. *Karageorgis*, [1975] 1 W.L.R. 1093, [1975] 3 All E.R. 282 (C.A.); *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [1978] Q.B. 644, [1977] 3 All E.R. 324 (C.A.).

[66] *Lister & Co.* v. *Stubbs* (1890), 45 Ch. D. 1, [1886-90] All E.R. Rep. 797.

[67] This concern for the value in practical terms of the damage award also may be noted as an aspect of the *American Cyanamid (supra*, footnote 1) test for an interlocutory injunction. Lord Diplock's articulation of the test included the factor that the defendant be "financially sound" or, in other words, able to pay the damages at trial that would make the interlocutory injunction unnecessary. This particular element of the defendant's capability to pay the judgment for damages, or for that matter, the plaintiff's

Conclusion

The introduction of yet another variation in the meaning of irreparable harm leads to the conclusion of this article and is a convenient launching point for addressing the issues of whether the present nomenclature and definition of irreparable harm are satisfactory or whether they obscure rather than enlighten and whether irreparable harm should be replaced by new devices that better carry out its function. These are questions raised at the outset of this article.

This part of the discussion may begin by recognizing that the role of irreparable harm as a limiting factor in the test for an interlocutory injunction is appropriate and important to the administration of justice. For an interlocutory injunction, irreparable harm requires circumstances where the effect of the plaintiff's injury combined with the delays inherent in the administration of justice cannot be compensated for or overcome by an award of money at trial. Given that a final determination of the facts is made only after a trial, then the idea that for an interlocutory injunction a plaintiff must go beyond showing potential merit to showing the necessity of the interlocutory injunction, is understandable and makes sense. Further, given (a) that prior to judgment the rights of the plaintiff and the defendant are entitled to equal respect; (b) that an interlocutory injunction is an extraordinary remedy in the sense of being powerful, effective and intrusive; (c) that interlocutory error is a real risk; and (d) that damages are awarded only after a trial and are thus not subject to interlocutory error, then it is also understandable and it makes abundant sense that the adequacy of damages be a measure of the necessity of an interlocutory injunction and a prerequisite to interlocutory relief. That all said, the problem is that the terminology of irreparable harm often fails to convey this meaning and worse, the terminology of irreparable harm sometimes obscures the important role played by the underlying principles.

The discussion in this article demonstrates a number of problems with the terminology of irreparable harm. There is the serious problem of a lack of precision. The inadequacy of damages means different things in the context of other equitable remedies, in the context of permanent injunctions and in the context of interlocutory injunctions, where it has a variety of meanings. This creates a serious problem of ambiguity. In some situations, damages are inadequate in the sense that compensation for the injury cannot be accurately calculated. In other situations, damages may be accurately calculated but still be inadequate on the compar-

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capability to honour the undertaking as to damages, however, has been subject to little analysis. The lack of attention may reflect the fact that often there is no issue as to the parties' respective financial means or, perhaps, it reveals the difficulties in proving the lack of financial means in an interlocutory proceeding. See Sharpe, *op. cit.*, footnote 9, pp. 12-13, 282-283; Lamek, *op. cit.*, footnote 2, pp. 140-141.

ative or theoretical grounds described above that are used to determine the best remedy for the circumstances. Thus, an interlocutory injunction may be refused because damages are adequate to displace the claim for a permanent injunction. Claims based on nuisance or on negative covenants demonstrate this phenomena. Yet in similar types of claims, damages will be inadequate for both the interlocutory period and for judgment, and in these cases both an interlocutory and a permanent injunction will be available. The discussion in this article has revealed other subtleties. The imprecision and ambiguity of meaning create other problems. In the resulting confusion, the parties may fail to appreciate the strengths and weaknesses of their cases. The result is lost opportunities and ill conceived applications and defences.

When tied to a definition of inadequacy of damages, the use of the word irreparable may be criticized as misleading since it leaves the impression that an injunction is only available if it is impossible for damages to provide a remedy. Yet damages may only be inadequate on theoretical or comparative grounds. The confusion is confounded because, in other contexts, for example as in tort claims for a wrongful death, damages are awarded for truly irreparable harm or injury.

There is, however, a simple answer to these problems. Without ignoring the other elements of the test for an interlocutory injunction and without introducing any new devices or concepts, the answer is to eschew the use of short forms and to say that a plaintiff should be granted an interlocutory injunction if, and only if, without one, the remedy at trial, whatever it might be, will come too late to do justice. In the context of an interlocutory injunction, when all is said and done, this is the meaning of irreparable harm.