

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU  
CANADIEN

Vol.88

2009

No. 3

## INTERLOCUTORY INJUNCTIONS AND IRREPARABLE HARM IN THE FEDERAL COURTS

Norman Siebrasse\*

---

*Federal Court of Appeal jurisprudence has established that an interlocutory injunction will not be granted unless the plaintiff can show it will suffer irreparable harm on the basis of evidence that is “clear and not speculative.” In consequence it is now common in the Federal Courts for interlocutory injunctions to be refused without consideration of the balance of convenience. This approach to interlocutory injunctions is important both in the Federal Court itself and because its influence is being felt in other Canadian jurisdictions. This article argues that this high threshold for irreparable harm should be rejected, as it is not justifiable in principle or by the leading authorities.*

---

*La jurisprudence de la Cour d’appel fédérale a établi qu’une injonction interlocutoire n’est pas accordée à moins que la partie demanderesse démontre qu’elle subira un préjudice irréparable, en s’appuyant sur une preuve « claire et non-hypothétique ». Par conséquent, les juges de la Cour fédérale refusent souvent d’accorder des injonctions interlocutoires sans se pencher sur la prépondérance des inconvénients. Cette façon d’aborder les injonctions interlocutoires a des répercussions au sein de la Cour fédérale, ainsi que dans d’autres juridictions canadiennes. L’auteur de cet article soutient que le critère exigeant du préjudice irréparable doit être abandonné puisqu’il ne peut être justifié, ni sur le plan des principes, ni par des arrêts de principe.*

---

\* Professor, Faculty of Law, University of New Brunswick

### 1. Introduction

In *American Cyanamid Co. v. Ethicon Ltd.* the House of Lords granted leave to appeal because a “technical rule” had “stultified” the discretion of the courts to grant an interlocutory injunction, with the result that the injunction would often be refused without regard to the balance of convenience.<sup>1</sup> The rule in question was the requirement that the plaintiff establish a *prima facie* case on the merits before an interlocutory injunction would be granted. The House of Lords substituted a much lower threshold of “a serious question to be tried” as the first stage of the test for the grant of such an injunction. Since then, a new rule restricting the discretion of the court has emerged from the Federal Court of Appeal. The jurisprudence in that Court has established a high threshold at the second stage, the irreparable harm requirement, so that it is now common in the Federal Courts for interlocutory injunctions to be refused without consideration of the balance of convenience.<sup>2</sup> The effect is to replace the old high threshold on the merits that was rejected in *Cyanamid* with a new high threshold for irreparable harm.

The Federal Courts’ high threshold approach is important both in areas of Federal Court jurisdiction and because its influence is being felt in other Canadian jurisdictions.<sup>3</sup> This article argues that a high threshold for

---

<sup>1</sup> [1975] A.C. 396 at 405-06 [*Cyanamid*].

<sup>2</sup> See e.g. *Nature Co. v. Sci-Tech Educational* (1992), 41 C.P.R. (3d) 129 (F.C.A.) [*Nature Co.*]; *Somerville House Books Ltd. v. Tormont Publications Inc.* (1993), 53 C.P.R. (3d) 77 (F.C.A.) [*Somerville*]; *Friends of the West Country Association v. Canada* (Minister of Fisheries and Oceans), [1998] F.C.J. No. 1690 (C.A.) [*Friends of the West Country*]; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2004 FCA 161, (2004), 31 C.P.R. (4th) 210 [*Apotex*]; *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FC 815, (2005), 40 C.P.R. (4th) 210 [*Aventis*]; *Haché v. Canada* (Minister of Fisheries and Oceans), 2006 FCA 424, 161 A.C.W.S. (3d) 12 [*Haché*]; *Laboratoires Servier v. Apotex Inc.*, 2006 FC 1493, (2006), 55 C.P.R. (4th) 435 [*Laboratoires Servier*]; *Bayer HealthCare AG v. Sandoz Canada Inc.*, 2007 FC 352, (2007) 157 A.C.W.S. (3d) 169 [*Bayer HealthCare*]; *Choson Kallah Fund of Toronto v. Canada* (M.N.R.), 2008 FCA 311, [2009] D.T.C. 5012 [*Choson Kallah*]; *Millennium Charitable Foundation v. M.N.R.*, 2008 FCA 414, [2009] D.T.C. 5038 [*Millennium Charitable Foundation*]; *Western Steel and Tube Ltd. v. Erickson Manufacturing Ltd.*, 2009 FC 791, [2009] F.C.J. No. 1017 (QL) [*Western Steel and Tube*].

<sup>3</sup> See e.g. *Mark Anthony Group, Inc. v. Vincor International Inc.*, (1998), 80 C.P.R. (3d) 564 (B.C.S.C.) [*Mark Anthony*] aff’d [1999] 58 B.C.L.R. (3d) 124 (C.A.) [*Mark Anthony CA*]; *Kanda Tsushin Kogyo v. Coveley* (1997), 96 O.A.C. 324 (Div. Ct.); *Traynor v. Unum Life Insurance Co. of America* (2003), 65 O.R. (3d) 7 (Div. Ct.) applying a very similar standard at 11, though without citing any authorities, and note the dissent on this point by Kurisko J. discussing Federal Court authorities; *Islamic Society of North America v. Teherany* (2007), 61 C.P.R. (4th) 78 (Ont. S.C.); *Rogers Communication v. Shaw Communication* (2009), 63 B.L.R. (4th) 102, though the balance of convenience was also considered; *UL Canada Inc. v. Procter & Gamble Inc.* (1996), 65 C.P.R. (3d) 534

irreparable harm is not justifiable in principle or pursuant to the leading authorities. Like the old requirement of a *prima facie* case on the merits, its effect is to fetter the flexibility of the courts to grant an interlocutory injunction in light of all the circumstances. The old merits threshold was rejected in *Cyanamid* for that reason, and the new irreparable harm threshold should be rejected as well. Twenty years ago Douglas Laycock proclaimed “the death of the irreparable injury rule.”<sup>4</sup> It should not be resurrected.

## 2. The Federal Courts’ High Threshold Approach

In *Cyanamid* Lord Diplock set out a test for the grant of interlocutory injunctions which was subsequently entrenched by the Supreme Court in *RJR-MacDonald v. Canada (A.G.)*.<sup>5</sup> It is a three-part test, requiring the applicant to establish that: (1) there is a serious question to be tried on the merits; (2) the applicant would suffer irreparable harm if the application were refused; and (3) the balance of convenience favours granting the injunction.<sup>6</sup> The Federal Court of Appeal readily embraced the “serious question” threshold on the merits set out in *Cyanamid*.<sup>7</sup> At the same time, in a series of decisions in the late 1980s and early 1990s, the Court established a stringent standard for establishing irreparable harm, requiring the plaintiff to establish that it “will actually” suffer irreparable harm on the basis of evidence that is “clear and not speculative.”<sup>8</sup>

---

(Ont.Gen.Div.), where again the balance of convenience was also considered; *Ontario v. Shehrazad Non-Profit Housing Inc.* (2007), 85 O.R. (3d) 81 (C.A.) at 87, noting the rule though without applying it on the facts.

<sup>4</sup> Douglas Laycock, *The Death of the Irreparable Injury Rule* (New York: Oxford University Press, 1991). A preliminary version of parts of the book appeared as Douglas Laycock, “The Death of the Irreparable Injury Rule” (1990) 103 Harv. L. Rev. 687.

<sup>5</sup> [1995] 3 S.C.R. 199 [*RJR-MacDonald*].

<sup>6</sup> *Ibid.* at 257.

<sup>7</sup> *Turbo Resources Ltd. v. Petro Canada Inc.* (1989), 24 C.P.R. (3d) 1 (F.C.A.) [*Turbo Resources*].

<sup>8</sup> The seminal case in the Federal Courts’ irreparable harm jurisprudence is *Cutter Ltd. v. Baxter Travenol Laboratories of Canada, Ltd.* (1980), 47 C.P.R. (2d) 53 (F.C.A.) [*Cutter*], though the rule only became entrenched in consequence of the Court of Appeal decisions in *Apotex Inc. v. Imperial Chemical Industries PLC* (1989), 27 C.P.R. (3d) 345 (F.C.A.) esp. at 351 [*I.C.I.*]; *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 (F.C.A.) esp. at 135 [*Syntex*]; *Nature Co., supra* note 2 esp. at 366; and *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 (F.C.A.) esp. at 52 [*Centre Ice*]. A convenient summary is provided by Rothstein J. in *Ciba-Geigy Canada Ltd. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 289 (F.C.T.D.) at paras. 117-118 [*Ciba-Geigy*]. For a recent reaffirmation of the approach see *Aventis, supra* note 2 esp. at para. 74 re: “will actually,” aff’d 2005 FCA 390, (2005), 44 C.P.R. (4th) 390 [*Aventis FCA*].

There are two aspects to this requirement which should be distinguished for analytic convenience, though both are typically invoked together. First, the harm itself must be established on the basis of clear evidence. For example, if the harm claimed turns on the way the product market will develop if an injunction is refused, the course the market will take must be established on a non-speculative basis.<sup>9</sup> In a trade-mark case, evidence of actual confusion does not allow an inference to be drawn that irreparable harm will flow from that confusion.<sup>10</sup> Secondly, the threshold for showing that the harm is irreparable is high. If it is “possible” to calculate damages, they will be considered adequate; harm will be irreparable only if damages are so uncertain as to amount to a “guess.”<sup>11</sup> It is difficult to find a recent case in which the court has held damages to be inadequate except when there is some positive reason to know that damages will be insufficient, as when the defendant will be unable to pay any damages that might be assessed. These two aspects are in principle independent bases for concluding that the irreparable harm has not been established: the harm may be irreparable in nature, and yet uncertain to occur; or it may certainly occur, and be possible to assess. I will refer to the first aspect as the certainty requirement, and the second as the incalculability requirement. Together they constitute the high threshold approach to irreparable harm. The consequence is that in Federal Court practice it is common for an injunction to be refused without consideration of the balance of convenience.<sup>12</sup>

In the next section I will show that the Federal Courts’ high threshold is inconsistent with the approach to irreparable harm that was used in Chancery, where the requirement originated. In the two subsequent sections I consider the certainty and incalculability requirements in turn. The certainty requirement, and the “clear and not speculative” standard in particular, is the aspect of the Federal Courts’ approach which appears to be having the most impact on other courts,<sup>13</sup> while the incalculability requirement is the Court of Appeal’s primary justification for its high threshold approach. I will argue that these requirements are not sound in principle or on the modern authorities. I then consider the origin of the high threshold in the Federal Court of Appeal itself before concluding.

---

<sup>9</sup> See e.g. *Aventis*, *ibid.*

<sup>10</sup> *Nature Co.*, *supra* note 2 at 367.

<sup>11</sup> *Aventis FCA*, *supra* note 8 at para. 5; and see cases cited *infra*, note 65 and accompanying text.

<sup>12</sup> See e.g. *Nature Co.*, *supra* note 2; *Somerville*, *supra* note 2; *Friends of the West Country*, *supra* note 2; *Apotex*, *supra* note 2; *Aventis*, *supra* note 2; *Haché*, *supra* note 2; *Laboratoires Servier*, *supra* note 2; *Bayer HealthCare*, *supra* note 2; *Choson Kallah*, *supra* note 2; *Millennium Charitable Foundation*, *supra* note 2; *Western Steel and Tube*, *supra* note 2.

<sup>13</sup> See cases cited *supra* note 3.

### 3. Irreparable Harm in Chancery

The irreparable harm requirement originated in the courts of equity. Equity emerged in response to the deficiencies of the common law, particularly limited remedies and the ossification of the writ system. Aggrieved litigants would appeal by a petition to the King, who could be persuaded to offer relief when justice had not been done in the common law courts. Eventually the King delegated this work to his Chancellor, and the system became formalized into a separate court system. There was intense rivalry between the courts in the late sixteenth and early seventeenth centuries, in which the courts of law and the Chancery would each claim jurisdiction and issue conflicting orders in the same case. This clash culminated in the formal triumph of Chancery, when King James I confirmed the power of the Chancellor to entertain a suit even after a final judgment at law. Strong personalities on both sides had provoked this clash. Subsequent chancellors did not exploit their victory, but took pains to foster comity with the common law courts by exercising their superior power with restraint. In order to induce the Chancery to exercise its superior jurisdiction, the plaintiff would have to produce some reason why recourse at law would not do. As equity had emerged partly in response to the limited remedies granted by the courts of law, a common plea was that the remedies at law were not adequate.<sup>14</sup>

Thus the original principled basis for the irreparable harm requirement was that it served as a mechanism for restricting forum shopping and minimizing the case-load in equity. It was not equitable remedies that were extraordinary, but rather access to the courts of equity: “The explanation for the ‘hierarchical’ approach to remedial choice is largely historical. . . . [E]quitable principles, originally developed to define the relationship between the two systems of courts, became frozen in the substantive law when those courts were merged.”<sup>15</sup> The fact that remedies such as injunctions were not originally available in the courts of law is not due to any feature of the remedies themselves. It was simply a historical accident of the ossification of the common law – a mistake, in effect. Practical limitations meant that this mistake could not be remedied simply by

---

<sup>14</sup> See generally Sir John Baker, *The Oxford History of the Laws of England* (Oxford: Oxford University Press, 2003) c. 9 esp. at 173-79; Sir John Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002) c. 6 esp. at 108-09; Laycock, *supra* note 4 at 19-22. Chancery’s subsequent restraint seems to have been partly due to a principled recognition of equity’s supplementary role, and partly to practical constraints on the Chancellor’s workload; see John Brunyate, ed., *Maitland’s Equity*, 2nd ed. (Cambridge: Cambridge University Press, 1936) at 18-19; Baker, *The Oxford History*, *ibid.* at 182; Laycock, *ibid.*

<sup>15</sup> Jeffrey Berryman et al., *Remedies: Cases and Materials*, 5th ed. (Toronto: Emond Montgomery, 2006) at 661.

allowing all plaintiffs free access to Chancery. That was a sound functional consideration at the time, but there is no good reason to treat equitable remedies as extraordinary after the unification of the courts.<sup>16</sup>

Furthermore, even though there was a good reason for giving substantial weight to the adequacy of legal remedies prior to the fusion of the systems, the courts of equity did not in practice use irreparable harm as a strict threshold requirement. In particular, the Federal Courts' practice of refusing an injunction without consideration of the balance of convenience was unheard of. It is difficult to prove a negative, and so I cannot say that there was never a case decided in the courts of equity in which an injunction was refused solely on the basis of lack of irreparable injury to the plaintiff without consideration of the balance of convenience. What can be said is that none of the nineteenth century cases cited by the leading treatises as authority for the irreparable harm requirement were decided without consideration of the balance of convenience.<sup>17</sup>

Adequacy of the plaintiff's remedy at law was undoubtedly an important consideration in deciding whether Chancery would exercise its superior jurisdiction, but it was always considered as one factor in the circumstances as a whole, rather than as a strict rule. This should not be surprising, as it was the Chancery itself that determined its own jurisdiction. The notion of an equitable rule applied acontextually is almost self-contradictory. Adequacy of damages has drawn particular attention because it is a factor considered in almost every case and also because of its conceptual significance in regulating the relationship between law and equity. It is a short step, but nonetheless a misstep, to go from recognizing

---

<sup>16</sup> See to the same effect Paul M. Perell, "The Interlocutory Injunction and Irreparable Harm" (1989) 68 Can. Bar Rev. 538 at 542; Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, November 2008) at para. 1.90; I.C.F. Spry, *Equitable Remedies*, 6th ed. (Australia: LBC, 2001) at 383.

<sup>17</sup> In addition to Sharpe, *ibid.*, I have considered Roderick Meagher, John Heydon, and Mark Leeming, *Meagher Gummow & Lehane's Equity: Doctrine & Remedies*, 4th ed. (Australia: Butterworths, 2002); James Mackay, ed., *Halsbury's Laws of England*, 5th ed., vol. 11 (London: Butterworths, 2009) [*Halsbury's* 5th ed.], and I have examined the first edition of *Halsbury's Laws of England*, vol. 17 (London: Butterworth & Co., 1911), Injunction, Pt. II, s.2, ss. 1, §483 as a representative early authority. It is closer to the heyday of equity and is cited in some of the early Canadian cases, and so provides a useful reflection of a view of the irreparable harm requirement that is more contemporaneous with the development of the doctrine itself. My review of the cases is more modest in scope than that of Laycock, *supra* note 4, but it is also differently focused. While Laycock examined a very large representative sample of modern United States (US) cases covering all equitable remedies to show that the irreparable harm requirement was essentially never determinative, my inquiry focuses on Chancery cases cited by modern authorities for the irreparable harm requirement in the context of interlocutory injunctions.

it as a factor of particular importance to supposing it to be a separate and distinct requirement. For example, Sharpe states, “The traditional rule is that an injunction will be granted only where damages would provide an inadequate remedy.”<sup>18</sup> In support he quotes Lindley L.J. in *London & Blackwall Ry. Co. v. Cross* who says, “The very first *principle* of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy.”<sup>19</sup> This is not the same thing – a principle of equity would not be applied without regard to context – and Lindley L.J.’s very next words were “If we look at the principle of the thing, it appears to me that...it would, upon a balance of convenience in proceedings under the Lands Clauses Act, be more inconvenient to entertain the question of authority now, than to leave it to be disposed of in the ordinary way by an action on the award.”<sup>20</sup>

Regardless of how irreparable harm came to be thought of as a distinct requirement, it is clear that it was not treated as such in equity. On the contrary, the leading equity judges of the era, such as Knight Bruce L.J. and Turner L.J., consistently treated the parties symmetrically in balancing the harm to each.<sup>21</sup> For example in *Garrett v. Banstead and Epsom Downs Rly. Co.*, after holding that there was a serious question on the merits, Turner L.J. continued:

Then comes the question of comparative injury; whether the greater injury would be done to the contractor by taking the contract out of his hands, and the railway company themselves completing it, or whether the greater injury would be done to the railway company by allowing the contractor to continue the completion of his contract.<sup>22</sup>

---

<sup>18</sup> Sharpe, *supra* note 16 at para. 1.60. This passage discusses permanent injunctions, but, as discussed in the text, the rationale for the requirement is the same for all equitable remedies.

<sup>19</sup> (1886), 31 Ch. D. 354 (C.A.) at 369 [*London & Blackwall Ry.*] [emphasis added]. The same case is cited in *Halsbury’s* 5th ed., *supra* note 17 at para. 356 (online version accessed 11 Sept 2009) and by Meagher, Heydon and Leeming, *supra* note 17 at 712 for similar propositions, although, in contrast to Sharpe, the point is not phrased as a rule.

<sup>20</sup> *London & Blackwall Ry., ibid.* [emphasis added]. The case in fact illustrates equity’s reluctance to permit forum shopping, as the injunction sought was to prevent the defendant from proceeding to arbitration on a commercial contract. It must be emphasized that Sharpe himself has never been an advocate of treating irreparable harm as a strict requirement. On the contrary, he has consistently emphasized the need to consider it in context; see e.g. Sharpe, *supra* note 16 at at para. 2.600 and the same passage from his first edition of the same work (Aurora, Ont.: Canada Law Book, 1983) at 186, quoted with approval by the Court of Appeal in *Turbo Resources*, *supra* note 7. The point is that even as careful a scholar as Sharpe has slipped into characterizing irreparable harm as a rule rather than as a factor.

<sup>21</sup> See Spry, *supra* note 16 at 2-3.

<sup>22</sup> (1864), 4 De G. J. & S. 461, 46 E.R. 997 at 999.

This emphasis on “comparative injury” – considering the harm to the plaintiff in comparison with the potential harm to the defendant – is a consistent feature of the cases.<sup>23</sup> Even *A.-G. v. Hallett*,<sup>24</sup> and *Johnson v. Shrewsbury & Birmingham Railway Co.*,<sup>25</sup> which along with *London & Blackwall Ry.* are the cases most commonly cited for the irreparable harm requirement, are consistent with this approach. In *Hallett*, Parke B. and Alderson B. refused the injunction on the basis that damages would be an adequate remedy, but both also noted that refusing the injunction would preserve the status quo. It seems clear on the facts that the injunction would have been refused on the balance of convenience, with Rolfe B. remarking that “It should be recollected that irreparable injury may, in many instances, be occasioned as easily by granting as by refusing an injunction.”<sup>26</sup> Knight Bruce L.J. and Turner L.J. decided *Shrewsbury & Birmingham Railway*, and, not surprisingly given their views described above, it is very weak authority for irreparable injury as a distinct threshold requirement. Knight Bruce L.J. held that damages would be an adequate remedy, but this was expressly in comparison with the “inconvenience and mischief to the Defendants, to say nothing of the interest of society at large.”<sup>27</sup>

The words of Turner L.J. in *A.-G. v. Sheffield Gas Consumers Co.* provide an accurate reflection of the traditional view of equity:

The question therefore which we have to consider appears to me to be whether this is a case in which the remedy at law is so inadequate that the Court ought to interfere, having regard to, the legal remedy, the rights and interests of the parties, and the consequences of this Court's interference.<sup>28</sup>

<sup>23</sup> See *Dyke v. Taylor* (1861), 3 De G. F. & J. 467, 45 E.R. 959 at 961 *per* Knight Bruce L.J.; *Hilton v. Earl of Granville* (1841), Cr. & Ph. 283, 41 E.R. 498 at 504 (Ch.) *per* the Lord Chancellor; and *Wilkinson v. Rogers* (1864), 2 De G J & Sm 62, 46 E.R. 298 at 301 *per* Turner L.J. and at 300 *per* Knight Bruce L.J.

<sup>24</sup> (1847), 16 M.&W. 569, 153 E.R. 1316 [*Hallett*].

<sup>25</sup> (1853), 3 De G. M. & G. 914, 43 E.R. 358 [*Shrewsbury & Birmingham Railway*].

<sup>26</sup> *Supra*, note 24 *per* Parke B. at 1321, *per* Alderson B. at 1318 and at 1321, and *per* Rolfe B. at 1322. The plaintiff Crown sought an injunction to prevent the defendant from cutting wood on land to which it claimed title, while the defendant claimed that he and his predecessors had cut the wood by right for at least twenty years.

<sup>27</sup> *Supra* note 25 at 364. The railway had contracted with the plaintiffs to work the railway line and maintain the rolling stock, and had purported to terminate the contract according to its terms. The case was brought by the contractors to compel the railway to allow them to perform the contract. Knight Bruce L.J. treated the case as essentially requesting an injunction to compel specific performance of a contract for personal services. Turner L.J.'s brief opinion is to a similar effect.

<sup>28</sup> (1853), 43 E.R. 119 at 126 [*Sheffield Gas*]; and similarly, *per* Lord Chancellor Cranworth at 131: “[I]t is a question of degree whether the Court will interfere or not.” On



Inadequacy of damages was not considered a threshold to be surmounted before other factors could be considered; on the contrary, inadequacy of damages was defined only in the context of the other relevant factors. The concept of adequacy of damages was relative, not absolute. When the courts of equity declined to provide a remedy to the plaintiff, they would often say that this was because the remedies at law were adequate, but this was in effect a statement of the conclusion on the balance of convenience, rather than a distinct condition precedent to taking jurisdiction.

The general modern practice is consistent with the approach taken by the courts of equity. Sharpe summarizes the modern cases by saying that “the test [for irreparable harm] is a relative and flexible one,” in which irreparable harm “can only be defined in the context of the risk-balancing exercise.”<sup>29</sup> In most jurisdictions it has been rare for an injunction to be refused without consideration of the balance of convenience.<sup>30</sup> Sharpe goes on to say that “attempts to make irreparable harm, and hence a condition precedent, and hence a threshold test, have been rejected,”<sup>31</sup> but without citing any of the numerous Federal Court decisions which use irreparable harm as a true condition precedent. It is clear that the course being charted by the Federal Court of Appeal is new; the question is whether it is wise. That is the subject of the following parts of this article.

#### *4. Certainty and Risk of Injustice*

The Federal Courts’ standard of proof for irreparable harm is high. The requirement that the harm be established by evidence that is “clear and not speculative” means that it is not sufficient that the plaintiff “might well” or even that it “is likely” to suffer irreparable harm; the evidence must show that the plaintiff “would,” “will” or “will actually” suffer such harm.<sup>32</sup> This is a difficult standard to meet, as any finding of fact at the interlocutory stage will necessarily be speculative. The Federal Court of Appeal has nonetheless held that the occurrence of the harm must be established to a high degree of certainty: “This evidence goes only to the extent of stating

---

the facts both Turner L.J. and the Lord Chancellor were against the injunction, but it was expressly on the basis that the inconvenience on the facts was very minor, amounting to little more than the usual interruption to traffic that would be expected in the normal course of public use of the streets. Knight Bruce L.J. would have granted the injunction.

<sup>29</sup> *Supra*, note 16 at para. 2.450.

<sup>30</sup> See Meagher, Heydon and Leeming, *supra* note 17 at 712-13 and 776; Spry, *supra* note 16 at 457; *Halsbury’s* 5th ed., *supra* note 17 vol. 11, ch 12, §451.

<sup>31</sup> *Supra*, note 16 at para. 2.450.

<sup>32</sup> See the cases cited *supra* note 8 re: “clear and not speculative” and “will actually;” *I.C.I.*, *supra* note 2 at 351 re: “might well;” *Syntex*, *supra* note 8 at 135 re: “is likely;” *Nature Co.*, *supra* note 2 at 367 re: “would” and “will.”

that such use ‘may well’ have that effect. . . Although a determination of irreparable harm occurring in the future is prospective in nature, it remains for a moving party to show that harm of that kind will befall him if an interlocutory injunction is denied.”<sup>33</sup>

The difficulty with this position is that the very point of interlocutory injunctions is to reduce the risk to the plaintiff that flows from the uncertainty inherent prior to trial. As Lord Diplock has explained:

My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff’s legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. *It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction...*<sup>34</sup>

While Lord Diplock was addressing uncertainty respecting the merits, the extent of the harm suffered by the plaintiff is equally speculative. That is most evident in a *quia timet* application, as harm that has not yet taken place cannot be proven with certainty.<sup>35</sup> But it is not only prospective harm that is speculative. The uncertainty that arises is inherent in the interlocutory nature of the application; Lord Diplock observed that “where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination,” and “[i]t is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts.”<sup>36</sup>

Of course the risk to the plaintiff is mitigated by the prospect of damages, and the defendant also faces a risk of injustice if the injunction is granted and the plaintiff’s right is not established at trial, though that risk is also mitigated by damages on the undertaking normally required of the plaintiff if an injunction is granted. Accordingly, the court in granting an injunction should balance all of these risks, as Lord Diplock explained in *Cyanamid*:

---

<sup>33</sup> *Nature Co.*, *ibid.*

<sup>34</sup> *Cyanamid*, *supra* note 1 at 406 [emphasis added].

<sup>35</sup> See e.g. *Ciba-Geigy*, *supra* note 8 at para.120 distinguishing *Centre Ice*, *supra* note 8 on this basis.

<sup>36</sup> *Cyanamid*, *supra* note 1 at 407.

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.<sup>37</sup>

It is implicit that risks are to be balanced, and not certainties – the central point of *Cyanamid* is that the courts should not attempt to resolve the risk at an interlocutory stage by having a preliminary trial on the merits. This was made explicit by Hoffmann J. in *Films Rover International Ltd v. Cannon Film Sales Ltd.*:

The principal dilemma about the grant of interlocutory injunctions. . . is that there is by definition a risk that the court may make the "wrong" decision. . . . A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong."<sup>38</sup>

The lower risk principle provides a coherent approach to the grant of interlocutory injunctions, with a compelling logic. The premise is that in the absence of a full trial on the merits, neither party can be considered inherently more worthy. The parties are therefore treated symmetrically. The applicant may be injured if an injunction is wrongly refused, to the extent of the difference between the value of damages and the value of the injunction. The defendant may be injured if the injunction is wrongly granted, to the extent of the difference between damages on the undertaking and the value of being free to act. The court should grant or deny the injunction so as to minimize the risk of that injury.<sup>39</sup>

---

<sup>37</sup> *Ibid.* at 406.

<sup>38</sup> [1986] 3 All E.R. 772 at 781 (Ch.). This is similar to the principle of minimization of irreparable harm advocated by John Leubsdorf, "The Standard for Preliminary Injunctions" (1978) 91 Harv. L. Rev. 525 and restated by Posner J. in *American Hospital Supply Corp. v. Hospital Products Ltd.* (1986), 780 F.2d 589 esp. at 598 (7th Cir.). The difference is that the Leubsdorf/Posner approach draws a difficult distinction between irreparable and reparable harms which Hoffmann J.'s formulation avoids; see generally Laycock, *supra* note 4 at 118-23. Laycock ultimately endorses a rule that is essentially the same as Hoffmann J.'s lower risk principle; see Laycock's "restatement," *ibid.* at 273.

<sup>39</sup> See also *N.W.L. Ltd v. Woods*, [1979] 3 All E.R. 614 at 625 (H.L.) [*Woods*], *per* Lord Diplock explaining that "[i]n assessing whether . . . the balance of convenience lies in granting or refusing interlocutory injunctions . . . the judge is engaged in weighing the respective risks that injustice may result from his deciding one way rather than the other at

This emphasis on balancing of risk, not certainties, is consistent with the leading cases outside the Federal Court of Appeal, which confirm that speculative harm may be considered. In *RJR-MacDonald*, for example, the Supreme Court held that the potential harm to the applicant was irreparable as “the uncertain state of the law regarding the award of damages for a Charter breach” made it impossible to determine whether damages would be adequate.<sup>40</sup> In contrast, in *Cutter Ltd. v. Baxter Travenol Laboratories of Canada Ltd.*, a seminal case in the development of the Federal Courts’ high threshold, the potential harm alleged included so-called “springboard damages,” which comprise loss of market share in the period immediately subsequent to the expiry of a patent. At the time it was not clear whether such damages were recoverable in Canadian law, and Thurlow C.J. held the harm not to be irreparable, in part because “I doubt. . . that it is a relevant consideration since protection beyond the expiry of the patent is not something to which the patentee is entitled under the patent.”<sup>41</sup> In other words, in both cases the plaintiff’s right to recover damages in respect of the harm in question was uncertain as a matter of law. In *RJR-MacDonald* this uncertainty was a reason for holding the harm to be irreparable; in *Cutter* it was a reason for holding the contrary.

*Cyanamid* itself provides a particularly striking contrast with the Federal Courts’ standard, as the main head of harm to the plaintiff was wholly speculative. The trial judge, whose decision on the facts was wholly affirmed by Lord Diplock, stated, “Although there is *not at present any evidence* to that effect in this case, it seems to me likely” that the plaintiff would suffer harm due to loss of market share.<sup>42</sup> Indeed, *Cyanamid* goes beyond a mere verbal contrast. The interlocutory injunction was sought by a patentee to prevent the defendant from selling an allegedly infringing product. The main harm to the plaintiff that would be prevented by the injunction was the “[loss] of its chance of continuing to increase its share in the total market.”<sup>43</sup> It is now well-established in Federal Court case-law that exactly this “loss of an opportunity to increase

---

a stage when the evidence is incomplete;” see also the opinion of Megaw L.J. in *Hubbard v. Vosper*, [1972] 2 Q.B. 84 at 97-98 (C.A.).

<sup>40</sup> *RJR-MacDonald*, *supra* note 5 at 269.

<sup>41</sup> *Cutter*, *supra* note 8 at 57. Such damages are recoverable in US and English law; see *Bic Leisure Products v. Windsurfing International*, (1988) 687 F.Supp 134; and *Gerber Garment Technology Inc. v. Lectra Systems Ltd.*, [1995] R.P.C. 383 (Pat. Ct.), aff’d [1997] R.P.C. 443 (C.A.). It now appears that they are also recoverable in Canadian law; see *Baker Hughes Inc. v. Galvanic Analytical Systems Ltd.* (1991), 37 C.P.R. (3d) 512 (F.C.T.D.); *Wellcome Foundation v. Interpharm* (1992), 41 C.P.R. (3d) 215 (F.C.T.D.); *Whirlpool Corp. v. Camco Inc.* (1995), 65 C.P.R. (3d) 63 (F.C.T.D.).

<sup>42</sup> *American Cyanamid Co v. Ethicon Ltd.*, [1974] F.S.R. 312 at 320 (Ch.) [emphasis added].

<sup>43</sup> *Cyanamid*, *supra* note 1 at 409-10.

market share” by a patentee does *not* constitute irreparable harm and an injunction will be refused for that reason basis without consideration of the balance of convenience.<sup>44</sup> Thus it is clear that the injunction granted in *Cyanamid* would be refused under the Federal Courts’ high threshold approach.

*Cyanamid* and *RJR-MacDonald* are consistent with the other leading cases. In the House of Lords decision in *N.W.L. Ltd v. Woods* the requirement was satisfied in light of harm that “may well” be irreparable.<sup>45</sup> In the Supreme Court decision in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*<sup>46</sup> it was satisfied on the basis that if the injunction were refused and a first contract imposed, this “may” give the union extra bargaining strength, without any evidence at all as to the likelihood that this would occur.<sup>47</sup> Most recently, in *LEO Pharma Ltd. v. Sandoz Ltd.*, the English Court of Appeal has held that it is proper to take into account “a possibility which is more than fanciful” and “the question here is whether there is a realistic possibility” of the harm in question, and that “the simple common sense of it” can be a sufficient evidentiary basis.<sup>48</sup>

The contrast with *Cyanamid* requires emphasis, as the Federal Court of Appeal has justified its approach on the basis that *Cyanamid* itself established irreparable harm as an independent threshold test, or at least shifted the emphasis from the merits to irreparable harm.<sup>49</sup> This view is supported by a well-known sentence:

If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.<sup>50</sup>

---

<sup>44</sup> *Aventis*, *supra* note 2 at para. 66; and see *Bayer HealthCare*, *supra* note 2 at para. 51ff.

<sup>45</sup> *Woods*, *supra* note 39 at 624. The injunction was ultimately denied on the basis that the defendants had a very strong case on the merits.

<sup>46</sup> [1987] 1 S.C.R. 110.

<sup>47</sup> There was no evidence as to the likelihood of harm as the trial judge held that such harm was irrelevant as being a consequence of the object of the legislation in question: *Metropolitan Stores v. Man. Food Wrks.* (1985), 36 Man. R. (2d) 152 at para. 7 (Q.B.).

<sup>48</sup> [2008] EWCA Civ 850 (C.A.) at para. 10 and 13 [*LEO Pharma CA*], aff’g [2008] EWHC 541 (Pat) [*LEO Pharma*].

<sup>49</sup> See e.g. *Cutter*, *supra* note 8 at 56-57; *Centre Ice*, *supra* note 8 at para. 6; and see *Perell*, *supra* note 16 at 540.

<sup>50</sup> *Cyanamid*, *supra* note 1 at 408.

Even taken in isolation this statement does not mandate a significant irreparable harm requirement, as it turns on whether damages would be adequate. We will see below that Lord Diplock was of the view that damages are adequate only in “the simplest cases,” so that a low threshold is implied.

This is not a narrowly technical reading of this passage; it is inconsistent with the decision as a whole to see this sentence as establishing a strong irreparable harm requirement. The main issue in *Cyanamid* was the requirement of a *prima facie* case on the merits. Irreparable harm had not previously played a central role in English law,<sup>51</sup> and it reads a great deal into a single phrase to suppose Lord Diplock thereby intended to change the law on a point that was not in issue. We have seen that Lord Diplock’s most general statement of principle describing “[t]he object of the interlocutory injunction” emphasizes the importance of assessing the risk of harm to each party: “The court must weigh one need against another and determine where ‘the balance of convenience’ lies,” and “[i]t is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.”<sup>52</sup> Lord Diplock did not invoke irreparable harm separately from the balance of convenience.<sup>53</sup> Rather, he stated that once it was established that there was a serious question to be tried, “it was clearly incumbent on [the trial judge] and on the Court of Appeal to consider the balance of convenience.”<sup>54</sup> This emphasis on the balance of convenience was confirmed in Lord Diplock’s subsequent explanation of *Cyanamid* in *Woods*:

*American Cyanamid Co. v. Ethicon Ltd.*, enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried. . .<sup>55</sup>

*Woods* was the first significant discussion of *Cyanamid* in the House of Lords, coming less than five years later. If Lord Diplock had intended to emphasize the irreparable harm requirement, one might have expected to see it at least mentioned in his synopsis of *Cyanamid*.<sup>56</sup>

---

<sup>51</sup> In addition to cases in equity discussed above, see e.g. *Beecham Group Ltd. v. Bristol Laboratories Ltd.*, [1967] R.P.C. 406 (C.A.).

<sup>52</sup> *Cyanamid*, *supra* note 1 at 406 and 408.

<sup>53</sup> This is pointed out by Stone J.A. in *Turbo Resources*, *supra* note 7 at 22.

<sup>54</sup> *Cyanamid*, *supra* note 1 at 409.

<sup>55</sup> *Woods*, *supra* note 39 at 625.

<sup>56</sup> In *Woods* Lord Diplock did mention irreparable harm *ibid.* at 624, but only in the context of the balance of convenience, and only by saying that the harm likely to be suffered by the plaintiff “may well be irreparable.”

It is one thing to balance off one statement of principle against another, but the true measure of a principle is in its application to the facts. In addressing the facts, Lord Diplock, like the motions judge whose reasons on the facts he largely paraphrased and explained, did not even address the question of whether the harm to the plaintiff was irreparable. This is sufficiently surprising that it bears repetition: both the motions judge and Lord Diplock considered the potential harm to the plaintiff, but neither at any point assessed whether that harm was irreparable or whether damages would be inadequate. Lord Diplock addressed the potential injury to the defendant if the injunction were granted, then considered the potential injury to the plaintiff if it were withheld, and concluded that “I see no ground for interfering in the learned judge's assessment of the balance of convenience.”<sup>57</sup> *Cyanamid* cannot possibly stand for a strong irreparable harm requirement when the point is not even mentioned in the decision on the facts.

In summary, the modern leading cases, like the leading nineteenth century decisions in Chancery, reflect Lord Diplock's point that the purpose of the interlocutory injunction is to mitigate the risk to the parties. Uncertainty is no reason to refuse an interlocutory injunction; it is the reason interlocutory injunctions exist. When there is uncertainty as to whether the damages are recoverable in law or will be suffered in fact, it is necessary to consider the balance of convenience so that the risk to the plaintiff may be weighed against the risk to the defendant. In contrast, the Federal Courts' approach means that an injunction may be denied even though the risk of harm to the plaintiff substantially outweighs the corresponding risk to the defendant.

### *5. Incalculability and Irreparable Harm*

The primary justification offered by the Federal Court of Appeal for its approach to irreparable harm is that “[a]n applicant who suffers no irreparable loss because damages would be an adequate remedy could not normally show that the balance of convenience lies with him.”<sup>58</sup> It is well accepted that whether harm is irreparable refers to the nature of the harm rather than its magnitude,<sup>59</sup> but what it is about the nature of the harm that makes it irreparable is difficult to define precisely. Fortunately, the Court of Appeal's rationale turns only on a straightforward and defensible view of the nature of irreparable harm. The goal of damages is to put the wronged party in the position it would have been in but for the wrong.<sup>60</sup>

---

<sup>57</sup> *Cyanamid*, *supra* note 1 at 410.

<sup>58</sup> I.C.I., *supra* note 8 at 357.

<sup>59</sup> *RJR-MacDonald*, *supra* note 5 at 268.

<sup>60</sup> This principle is broadly applicable. Perhaps the most widely-cited general

Damages are inadequate to the extent that they fail to achieve this objective. If damages are considered adequate only when they in fact put the defendant in the same position it would have been in but for the wrong, then there will be no risk to the plaintiff if the injunction is denied. If that is true, the plaintiff will not be able to show that the balance of convenience lies with it. This argument is independent from the certainty requirement; we may admit speculative harm, yet be confident that damages will be adequate for harm of that type, whether or not it eventuates.

A narrower concept of the nature of irreparable harm is sometimes suggested, to the effect that harm is irreparable only if it is inherently incapable of quantification.<sup>61</sup> I will not pursue this narrower formulation. It finds support in some verbal descriptions of irreparable harm, but not in others.<sup>62</sup> It has no obvious principled support, while the broader definition is based directly on the fundamental purpose of damages. The narrow definition is also inconsistent with the general rule that harm will be considered irreparable, regardless of its nature, if the defendant is unlikely to be able to pay damages that might be awarded at trial.<sup>63</sup> Most importantly for present purposes, the Court of Appeal itself does not rely on a narrow definition to justify the high threshold.

I will therefore proceed on the basis that damages are adequate to the extent that they in fact put the plaintiff in the position it would have been in but for the harm. Correspondingly, a risk of irreparable harm is a risk that the harm actually suffered will not in fact be fully compensated.

---

statement is *Livingstone v. Rawyards Coal Co.* (1880), 5 A.C. 25 (H.L.) at 39. In tort law see *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32; in accounting of profits see *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902 at 938; in equitable compensation see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 556 per McLachlin J., and at 568 per La Forest J.; and *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at 194 [*Cadbury Schweppes*]; in contract law see Stephen M. Waddams, *The Law of Damages*, looseleaf (Aurora, Ont.: Canada Law Book, December 1999) at para. 5.20.

<sup>61</sup> The broader definition encompasses this narrower one; if the injury cannot be compensated in damages, then it will not in fact be compensated in damages; see *RJR-MacDonald*, *supra* note 5 at 268.

<sup>62</sup> Compare “such an injury as could not be compensated in damages” in *Hallett*, *supra* note 24 at 1321 per Parke B, with “the remedy of damages is not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood,” in John Melvin Paterson, *Kerr On Injunctions*, 6th ed. (London: Sweet & Maxwell, 1927) at 17-18, applied in *MacMillan Bloedel Limited v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.) at 591 per Seaton J.A., quoted by McLachlin J. in *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331 at 344 (B.C.C.A.).

<sup>63</sup> See e.g. *RJR-MacDonald*, *supra* note 5 at 268.



To return to the main question, when will damages in fact put the plaintiff in the position it would have been in but for the wrong? If the balance of convenience is not actually assessed, we must be satisfied that damages will be close enough to full compensation for the harm actually suffered that the balance would not favour the plaintiff regardless of how small the harm to the defendant may be. In other words, the absolute accuracy of the damages is important if irreparable harm is to be used as a threshold test. This means that in order to know how to set the threshold for adequacy of damages, we need to know how accurately the damages assessment captures the true harm to the plaintiff.

Damages fall along a spectrum in terms of difficulty of assessment. At one extreme, it is impossible to accurately assess non-pecuniary loss flowing from serious physical injury. At the other extreme, the loss in a breach of contract for delivery of fungible goods that are actively traded in a spot market can be assessed with considerable accuracy. Most cases fall somewhere in between. For example, a common scenario in a patent case, such as *Cyanamid*, is competition between a small number of firms in a restricted market where short-term entry can have long-term effects on market dynamics that can only be estimated. If the alleged infringement contributes only some part of the value of the product as a whole, as with a patented feature of a software package, damages will be more difficult to assess than if the value is entirely due to the patented product, as is largely true in pharmaceutical cases.

At what point along the continuum will damages be sufficiently accurate that we can be confident that they will effectively amount to full compensation? This is the crucial question. If the courts can assess most types of loss with considerable accuracy, then most injunctions can be refused without risk to the plaintiff. If assessment of damages is approximate even in routine cases, however, then there will normally be risk to the plaintiff that should be weighed against the risk to the defendant in the balance of convenience.

The Federal Courts' case-law is clear that the threshold for establishing irreparable harm lies near the most difficult end of the spectrum. We have seen that the Court of Appeal has said that if it is "possible" to calculate damages, they will be considered adequate, and damages must amount to a "guess" for harm to be considered irreparable.<sup>64</sup> In other cases it has been said that difficulty in assessing the quantum of damages is not sufficient to establish irreparable harm so long as there is

---

<sup>64</sup> *Aventis FCA*, *supra* note 8 at para. 5.

some “reasonably accurate” way of calculating those damages.<sup>65</sup> Injunctive relief will be denied unless the dynamics of the product market are “so different from the dynamics of other relevant markets that available damage quantification methodologies cannot yield an acceptable result,” and “[t]heoretical complexity in calculation is not in itself clear evidence that damages are not capable of reasonable quantification.”<sup>66</sup> Another court, relying on Federal Court case-law, has suggested that harm is irreparable only “if the damages are of a nature that will be impossible to assess.”<sup>67</sup> The threshold is high in practice as well as in verbal formulation. The Federal Courts routinely refuse interlocutory injunctions on the basis that the plaintiff has not established irreparable harm in patent cases of moderate complexity.<sup>68</sup>

Thus the Federal Courts’ approach is justified by the balance of convenience argument only if damages are essentially full compensation in fact in all but the most unusual cases. Is this true? Certainly the fact that damages will be awarded is in itself no guarantee that they will be adequate; the courts will not refuse damages or grant merely nominal damages simply because quantification is difficult or even impossible.<sup>69</sup> The usual view is that damages are rarely, if ever, perfect compensation. As noted, the Federal Courts routinely deny injunctions in patent cases, yet in that context Lord Buckley in the English Court of Appeal has noted that “the whole subject-matter [of the calculation of damages] is one that is not capable of being mathematically ascertained by any exact figure.”<sup>70</sup> Similarly, in a well-known passage adopted by the Supreme Court, Lord Shaw remarked that “[t]he restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe.”<sup>71</sup> On the routine matter of how many of the defendant’s infringing sales would have been made by the plaintiff

---

<sup>65</sup> See *Cutter*, *supra* note 8 at 55. The usual current citation is *Merck & Co. v. Nu-Pharm Inc.* (2000), 4 C.P.R. (4th) 464 (F.C.T.D.) at para. 32; see also *Aventis*, *supra* note 2 at para. 61; *Bayer HealthCare*, *supra* note 2 at para. 58.

<sup>66</sup> *Aventis*, *ibid.* at paras. 75 and 67.

<sup>67</sup> *Mark Anthony*, *supra* note 3 at para. 19, *aff’d Mark Anthony CA*, *supra* note 3 at para. 20.

<sup>68</sup> See generally the pharmaceutical jurisprudence cited *supra* note 12. In one respect pharmaceutical cases are simpler than the leading cases discussed in the text, as the patented part supplies almost all the value of the product; on the other hand, there is significant difficulty in calculating “springboard” damages relating to the effect of early entry on market share.

<sup>69</sup> *Cadbury Schweppes*, *supra* note 60 at 197.

<sup>70</sup> *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1911), 28 R.P.C. 157 at 166 (C.A.).

<sup>71</sup> *Watson Laidlaw Co. Ltd. v. Pott, Cassells and Williamson* (1914), 31 R.P.C. 104 at 117-18 (H.L.) [*Watson Laidlaw*], cited and applied in *Colonial Fastener Co. v. Lightning Fastener Co.*, [1937] S.C.R. 36 at 41.

patentee, both the House of Lords and the Supreme Court of Canada agree that “[t]his is not a matter which in the nature of things can be ascertained with any certainty.”<sup>72</sup> Similarly, in a recent English case, in which the patent was ultimately held to be invalid, the Court forthrightly stated that “[t]here is no point in attempting spurious precision,”<sup>73</sup> in assessing damages on the plaintiff’s undertaking. The cases in which these statements were made were not the simplest to determine damages, but neither were any of them particularly complex. They were routine cases of medium complexity, with two competitors, where the infringing part provided some, but not all, of the appeal of the defendant’s product.

*Cyanamid* itself supports the view that damages will not normally provide full compensation to the plaintiff. Lord Diplock explained:

*Save in the simplest cases*, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff’s undertaking would not be sufficient to compensate him fully for all of them.<sup>74</sup>

In other words, “save in the simplest cases” each party will suffer irreparable harm. This is a striking contrast with the Federal Courts’ approach, in which the harm is considered irreparable only in the most complex cases. Furthermore, from this passage we see why *Cyanamid* did not in practice establish a true threshold approach to irreparable harm. As noted above, Lord Diplock had said that if damages are adequate, no injunction should normally be granted. Here he is saying that this will be true only in the simplest cases. Taken as a whole, this means that while irreparable harm may be a threshold requirement, that threshold is very low. This is consistent with the *Cyanamid* approach to the merits; it is only in the most clear-cut cases that the injunction should be refused because the plaintiff has not established a sufficiently strong case on the merits. Similarly, it is only in the simplest cases that the injunction should be refused because the plaintiff has not established irreparable harm.<sup>75</sup>

---

<sup>72</sup> *Watson Laidlaw, ibid.* at 112. On the same question in *Colonial Fastener, ibid.*, the Supreme Court stated that “this is clearly a case where the broad axe referred to by Lord Shaw in *Watson v. Pott* should be applied.” Similarly, in *United Horse-Shoe & Nail Co. Ltd. v. Stewart & Co.* (1888), 5 R.P.C. 260, L.R. 13 App.Cas. 401 at 413 (H.L.) Lord Watson stated, “[I]t is impossible to ascertain with arithmetical precision what in the ordinary course of business would have been the amount of the patentees’ sales and profits.”

<sup>73</sup> *Laboratoires Servier v. Apotex*, [2008] EWHC 2347 at para. 45; see also para. 60.

<sup>74</sup> *Cyanamid, supra* note 1 at 408 [emphasis added].

<sup>75</sup> The Federal Court of Appeal has even indicated that if there is uncertainty as to whether the plaintiff will prevail on the merits, it is uncertain as to whether there will be

Consistently with Lord Diplock's view, the irreparable harm threshold set by the English case-law is low. So, in *LEO Pharma*, the trial judge, in an approach the Court of Appeal found "entirely orthodox," determined damages for potential harm due to changed market to be inadequate as this "is not a loss which can easily be computed and in respect of which it is necessarily right to leave [the applicant] with damages as its ultimate remedy," and "which cannot be easily quantified."<sup>76</sup> Thus damages are considered adequate only when particularly easy to quantify. This contrasts with the Federal Court approach in which damages are considered inadequate only when they are particularly difficult to quantify. In English practice the fact that damages are of a type that are commonly encountered and awarded does not suffice to establish that damages are adequate.<sup>77</sup> It is unusual for an injunction to be refused solely on the basis that damages are an adequate remedy without proceeding to consider the balance of convenience. Indeed, it is not uncommon for courts to ignore irreparable harm as a separate requirement and to consider the harm to the plaintiff only as a matter of comparative injury, in comparison with the harm to the defendant.<sup>78</sup>

---

harm, and therefore the irreparable harm requirement is not established; see *Syntex*, *supra* note 8 at 137. This is tantamount to reintroducing a substantial threshold on the merits in the guise of the irreparable harm requirement.

The decision of the English Court of Appeal in *The Boots Company Ltd. v. Approved Prescription Services Ltd.*, [1988] F.S.R. 45 [*Boots*] is sometimes cited as holding that damages are adequate in a passing off case; see Mark Anthony, *supra* note 3 at para. 30. This is incorrect. In *Boots*, the trial judge refused the injunction on the basis that the balance of convenience favoured the defendant; adequacy of damages was but one factor considered by the trial judge. The Court of Appeal expressly affirmed on the balance of convenience, at 47 and 51 *per* Templeman J. Megaw L.J. in his brief concurrence emphasized at 57 that "save in the simplest cases" both parties will suffer harm for which damages will not be adequate compensation, quoting Lord Diplock in *Cyanamid* on this point.

<sup>76</sup> *LEO Pharma CA*, *supra* note 48 at para. 7; *LEO Pharma*, *supra* note 48 at paras. 34 and 36. Two different heads of damages related to market dynamics were being considered. Mann J. did indicate at para. 32 that "simple lost sales" would be considered adequately compensated by damages. The injunction was ultimately refused on the balance of convenience.

<sup>77</sup> For example, in the pharmaceutical context at least, it is now established that market disruption due to generic entry constitutes irreparable harm; see *SmithKline Beecham plc v. Apotex Europe Ltd.*, [2002] EWHC 2556 (Pat) esp. paras. 61-63, *aff'd* [2003] EWCA Civ 137 [*SmithKline Beecham CA*].

<sup>78</sup> In addition to *LEO Pharma*, *supra* note 48 and *SmithKline Beecham*, *ibid.*, *Nude Brands Ltd. v. Stella McCartney Ltd & Ors* [2009] EWHC 2154 (Ch) [*Nude Brands*] is particularly illuminating. In *Nude Brands* Floyd J. considered harm to the plaintiff as a threshold consideration in deciding whether to order an expedited trial at paras. 44-49. The expedited trial was refused on the basis that "the risk of irreparable harm occurring to NBL's business or mark in the period between now and a trial is fairly small," but he did

The difficulty of correctly assessing damages is also reflected in the rule strongly favouring an injunction as a final remedy for infringement of a property right. In that context damages assessed by a court are considered an inadequate substitute for the plaintiff's right to bargain with the defendant to fix the value of the right.<sup>79</sup> The nature of the harm is exactly the same in the interlocutory context. It was at one time routine for the Federal Court to remark on this parallel in holding that the irreparable harm requirement was satisfied when infringement of an intellectual property right was alleged.<sup>80</sup> This view is evidently inconsistent with the high threshold approach to interlocutory injunctions; if the damages are inadequate compensation for infringement of a property right as a final remedy, why are they adequate in the interlocutory context? Consequently this parallel is no longer raised in the interlocutory context in the Federal Courts.<sup>81</sup> To ignore the parallel does not impair its logic, however.<sup>82</sup> Of course, because of the uncertainty regarding the merits in interlocutory

---

not refuse the injunction on that basis. He went on to consider harm to the defendant before holding that the injunction should be refused on the balance of convenience; see para. 53. See *Les Laboratoires Servier v. Apotex Inc.*, [2006] EWHC 2137 (Pat) esp. paras. 20-23, and *Novartis AG v. Dexcel-Pharma Ltd.*, [2009] EWHC 336 (Pat), for cases in which irreparable harm is not treated as a distinct requirement. *Heeling Sports Ltd. v. Youngsters Ltd.* [2007] EWHC 2405 (Ch) is one of the few recent English cases which clearly treats harm to the plaintiff as a threshold matter. The injunction was refused on the basis that damages would be adequate as a remedy, without detailed consideration of the balance of convenience.

<sup>79</sup> See Sharpe, *supra* note 16 at para. 4.590 regarding trespass; and for intellectual property see *R. v. Lorimer*, [1984] 1 F.C. 1065 at 1073 (C.A.), stating that refusing an injunction in favour of damages as a final remedy "is tantamount to the imposition of a compulsory licence." In *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126 at 136, in which Holt C.J. famously said that "it is a vain thing to imagine a right without a remedy," he went on by way of example to say that "a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there."

<sup>80</sup> See *Maple Leaf Mills Ltd. v. The Quaker Oats Co. of Canada Ltd.* (1984), 82 C.P.R. (2d) 118 (F.C.T.D.) at 126; *Selection Testing Consultants International Ltd. v. Humanex International Inc.* (1987), 15 C.P.R. (3d) 13 at 19 (F.C.T.D.); *Lubrizol Corp. v. Imperial Oil Ltd.* (1989), 22 C.P.R. (3d) 493 at 505 (F.C.T.D.) aff'd (1989), 26 C.P.R. (3d) 461 (F.C.A.) [*Lubrizol*]; *Louisville Bedding Co. v. Kwilt-Kraft Industries Ltd.* (1994), 56 C.P.R. (3d) 269 (F.C.T.D.) at 275; *Duomo Inc. v. Gifteraft Ltd.* (1984), 1 C.P.R. (3rd) 165 (F.C.T.D.) at 169; *Syntex Inc. v. Novopharm Ltd.* (1989), 26 C.P.R. (3d) 481 (F.C.T.D.) at 502, rev'd *Syntex*, *supra* note 8.

<sup>81</sup> See *Syntex*, *ibid.* and the discussion in *Merck & Co. v. Nu-Pharm Inc.* (2000), 4 C.P.R. (4th) 464 (F.C.T.D.) para. 32-33, distinguishing *Lubrizol*, *ibid.* on the basis of the evolving Court of Appeal jurisprudence. See also *A. Lassonde Inc. v. Island Oasis Canada Inc.*, [2001] 2 F.C. 568 (C.A.) at para. 26 acknowledging the shift in the case-law.

<sup>82</sup> See *SmithKline Beecham CA*, *supra* note 77 at para. 14, recognizing the parallel, and *LEO Pharma*, *supra* note 48; see also Laycock, *supra* note 4 at 125, stating that "Courts

proceedings, an interlocutory injunction should not be granted in a case simply because infringement of a property right is alleged, without considering the balance of convenience. Nonetheless, it is inconsistent to hold that the damages are inadequate in the context of a final remedy but adequate in the interlocutory context, when the harm itself is the same in both cases.

The view that damages are rarely accurate compensation is also supported by academic literature. In their famous 1972 article Calabresi and Melamed introduced the distinction between property rules and liability rules.<sup>83</sup> Property rules protect an entitlement by injunctive relief and so allow the owner of an entitlement to set its price, while liability rules allow one person to take another's entitlement on payment of a price, damages, determined by a neutral third party, namely the court. The basic advantage of property rules is that a person knows better than the court what his entitlement is worth to him, so damages are always inaccurate to some degree. The disadvantage of property rules is that in many contexts transaction costs will prevent reallocation of the entitlement. A substantial scholarship explores the contexts in which the transaction cost advantage of liability rules outweighs the valuation advantage of property rules.<sup>84</sup> While liability rules are often superior in contexts where the transaction cost advantage outweighs the valuation disadvantage – it is not possible to bargain in advance over the value of my right to avoid being hit by your car as a result of your negligence – this does not impair the basic insight that damages are systematically inaccurate. As Richard Epstein has put it, “Do we allow one business to take some key equipment from the other in the dark of night if it is willing to pay full compensation? Do we allow one person to take the wedding ring of another simply by paying its market

---

should recognize that even in preliminary injunction cases nearly all injury is irreparable, citing the precedents from permanent injunction cases.”

<sup>83</sup> Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (1972) 85 Harv. L. Rev. 1089.

<sup>84</sup> In their seminal article Calabresi and Melamed focused on the transaction cost advantage of liability rules, though the valuation advantage of property rules was also explicit; see *ibid.* at 1125. The valuation advantage of property rules was further highlighted by A. Mitchell Polinsky, “Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies” (1980) 32 Stan. L. Rev. 1075 and is now generally recognized; see e.g. James E. Krier and Stewart J. Schwab, “Property Rules and Liability Rules: The Cathedral in Another Light” (1995) 70 N.Y.U. L. Rev. 440. Richard A. Epstein, “Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective: A Clear View of The Cathedral: The Dominance of Property Rules” (1997) 106 Yale L.J. 2091 provides a particularly clear analysis of the advantages of property rules. Of course there is extensive debate as to exactly when one rule or the other is to be preferred; but, the basic advantages of each are generally uncontested.

value?”<sup>85</sup> There is no difference in kind here, only a difference in degree. In either case the court will prevent the taking of the entitlement by an injunction because the value to the owner of the entitlement can only be estimated by the court. Even when damages are objective rather than subjective in nature – the value of key equipment rather than the value of a wedding ring – investigating in detail the practical business ramifications of the invasion of a right is difficult and uncertain. That is why damages assessments are of necessity a “broad axe.”

Finally, there is a powerful pragmatic argument that if damages really were normally full compensation, interlocutory injunctions would not be as hotly contested as they are. Plaintiffs would generally be satisfied with the prospect of damages at trial, and if a motion were made, the defendants would be satisfied to have the injunction issue on the usual undertaking in damages by the plaintiff. When the injunction is contested, this must be because both parties view damages as inadequate compensation for restriction on their rights.<sup>86</sup>

None of this is to say that the plaintiff should always be granted an injunction because damages are always inadequate. Damages will almost never be perfectly adequate compensation for the plaintiff; but, for exactly the same reasons, damages on the plaintiff’s undertaking will never be perfectly adequate compensation to the defendant if the injunction is wrongly granted.<sup>87</sup> For this reason, “[t]he extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.”<sup>88</sup> It is very difficult to say how accurate damages are in absolute terms. It will be much easier to say whether damages to defendant or plaintiff will be more accurate, as this requires only an assessment of the relative complexity of assessment of the damages that are likely to arise. The question is not whether damages are adequate in some absolute sense; it is whether damages are “*so inadequate* that the Court ought to interfere,” having regard to the rights and interests of both parties.<sup>89</sup> Put another way, in order to be confident of doing justice, the Federal Courts’ high threshold requires the court to know the *accuracy* of damages in an *absolute* sense; the traditional standard in equity only requires the court to assess the *adequacy* of damages in a *relative* sense.

---

<sup>85</sup> Epstein, *ibid.* at 2093.

<sup>86</sup> See *Ciba-Geigy*, *supra* note 8 at paras. 139 and 151.

<sup>87</sup> *Ibid.* at para. 158; and see *LEO Pharma*, *supra* note 48 at para. 42.

<sup>88</sup> *Cyanamid*, *supra* note 1 at 409.

<sup>89</sup> *Sheffield Gas*, *supra* note 28 [emphasis added], quoted in full in text *supra* associated with note 28.

### 6. *Origin of the High Threshold*

I have argued that the Federal Courts' high threshold is unjustifiable in principle or on the authorities. Why then did it develop?

In each of the cases in which the Federal Court of Appeal developed its approach, an injunction granted by the motions judge was set aside on appeal. In each case it appears that the Court of Appeal was of the view that the balance of convenience was against granting the injunction. This was express in the seminal decision in *Cutter*, as Thurlow C.J. in the Court of Appeal did not treat irreparable harm as a strict threshold requirement. After holding that the trial judge had erred in finding irreparable harm, Thurlow C.J. went on to consider the balance of convenience, holding that the inconvenience to the defendants "far outweighs any inconvenience that may be caused to the [plaintiffs]." <sup>90</sup> In the second case, *Imperial Chemical Industries PLC v. Apotex, Inc.*, Heald J.A., giving the lead decision, did not expressly consider the balance of convenience. He held that irreparable harm had not been established, but he noted with apparent approval the argument that granting of the injunction would result in "enormous increased cost" to the provincial ministries of health in administration of drug benefit programs. <sup>91</sup> In the third case, *Syntex Inc. v. Novopharm Ltd.*, as in *Cutter*, the Court of Appeal did not treat irreparable harm as a strict threshold. Having held that it had not been established, the Court went on to hold that, as the balance of convenience did not favour either party, the injunction should be refused as that would preserve the status quo. <sup>92</sup> Similar points may be made in respect of the next two cases which cemented the high threshold approach of the Court of Appeal. <sup>93</sup>

These decisions may be contrasted with the decision of the Court of Appeal in *Turbo Resources Ltd. v. Petro Canada Inc.* <sup>94</sup> which was

---

<sup>90</sup> *Cutter*, *supra* note 8 at 58.

<sup>91</sup> *Supra* note 8 at 351. Also, the plaintiff's case on the merits was sufficiently weak that Mahoney J.A. held that it had not established a serious question to be tried. Together these indicate that the balance of convenience weighs against the injunction.

<sup>92</sup> *Syntex*, *supra* note 8 at 139.

<sup>93</sup> In *Centre Ice*, *supra* note 8, the plaintiff claimed to be the registered owner of the trade-mark "Centre Ice" and yet, as noted by the Court at 51, it did not produce any evidence to this effect. At the same time, the defendant had sold clothing with this mark for four years and was by the time of the hearing an established producer. While the decision at the Court of Appeal turned on irreparable harm, it appears that the balance of convenience, and particularly preservation of the status quo, again favoured refusing the injunction. The view of the Court of Appeal as to the balance of convenience is less clear in *Nature Co.*, *supra* note 2, which the Court of Appeal decided solely on the basis of irreparable harm.

<sup>94</sup> *Supra* note 7.



contemporaneous with *I.C.I.* and *Syntex*, with Heald and Stone JJ.A. sitting on all three panels. In *Turbo Resources* the trial judge had refused the injunction on the basis that the plaintiff had not established a *prima facie* case, without going on to consider the balance of convenience. Stone J.A., for the unanimous court, held that this was an error of law in light of *Cyanamid*, which at that time had not yet been definitively established in Canadian law, and he took the opportunity to discuss extensively the general principles applicable to the grant of an interlocutory injunction. There is no suggestion in his decision that irreparable harm is a threshold requirement. On the contrary, while he did state that if damages are adequate “it might normally be concluded that the case was not one for an interlocutory injunction,” Stone J.A. emphasized that “these factors do not constitute a series of mechanical steps that are to be followed in some sort of drilled progression.”<sup>95</sup> Taken as a whole, his discussion of the principles was a paean to a holistic balancing, which concluded with the statement that “considerable flexibility is called for, bearing in mind that *the balance of convenience is of paramount importance*.”<sup>96</sup> On the facts, even though he concluded that harm to the plaintiff could be adequately remedied in damages, he went on immediately to consider the harm to the defendant, and only then, “[a]fter weighing the various factors all in all,” did he conclude that the injunction should be refused.<sup>97</sup>

*Turbo Resources* is the road not taken in the Federal Court jurisprudence. It is difficult to avoid the conclusion that in the three leading cases establishing the “clear and not speculative” standard, the Court of Appeal set a high threshold for irreparable harm in order to provide a legal basis for reversing the decision of the trial judge on the balance of convenience, which would otherwise be owed considerable deference. In *Turbo Resources* this was unnecessary, and consequently a holistic emphasis on the balance of convenience was adopted. In the cases establishing the high threshold, the Court of Appeal may well have been justified in its view of the balance of convenience on the facts, but this does not justify the doctrine that emerged. It is time for a correction.

### 7. Conclusion

The object of the interlocutory injunction is to mitigate the risk of injustice to the plaintiff during the period of uncertainty prior to trial. More broadly, the risk to both parties must be assessed in determining whether an interlocutory injunction should be granted. I have argued that the high threshold applied to irreparable harm in the Federal Courts is inconsistent

---

<sup>95</sup> *Ibid.* at 20.

<sup>96</sup> *Ibid.* [emphasis added].

<sup>97</sup> *Ibid.* at 23.

with this goal. Nor is it justified by historical principles of equity or by the functional argument that a plaintiff who cannot satisfy the threshold could not show the balance of convenience lies with it. This is not to say that interlocutory injunctions should routinely be granted if the plaintiff shows a risk of loss. The traditional practice in Chancery remains sound today; when an injunction is refused, it should be done on the basis of comparative injury and not on the basis of a technical rule. This was the basic message of *Cyanamid*, and it bears repeating today.