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## The Scope of Canadian Defamation Injunctions

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*Free speech is engaged when courts enjoin defamatory or allegedly defamatory speech on an interlocutory or permanent basis. This paper explores the justifiable scope of defamation injunctions and compares that to what courts do.*

*The study reveals that Canadian defamation injunctions regularly go far beyond what is justifiable. For example, 16% of defamation injunctions involved orders not to speak about the plaintiff at all, which is overbroad since that includes true and otherwise lawful speech. Other orders prohibit saying disparaging (as opposed to unlawful) things—again overbroad. Orders not to defame may be vague because it is unclear whether, in context, a future publication will be defamatory. There are narrow circumstances in which orders not to defame may be justified but such orders are often made when a narrower injunction—or none at all—would be appropriate.*

*La liberté d'expression est engagée lorsque les tribunaux ordonnent l'interdiction d'un discours diffamatoire ou prétendument diffamatoire sur une base interlocutoire ou permanente. Cet article examine dans quelle mesure les injonctions en matière de diffamation sont justifiables et compare cela à ce que font les tribunaux.*

*L'étude révèle que les injonctions canadiennes en matière de diffamation vont régulièrement bien au-delà de ce qui est justifiable. Par exemple, 16 % des injonctions en diffamation consistaient en des ordonnances interdisant de ne pas parler du tout du plaignant, ce qui dépasse la mesure puisque cela inclut des propos vrais et par ailleurs légaux. D'autres ordonnances interdisent de dire des choses désobligeantes (par opposition à illégales), ce qui également dépasse la mesure. Les ordonnances de non diffamation peuvent être vagues parce qu'il n'est pas clair si, dans le contexte, une future publication sera diffamatoire. Il existe des circonstances limitées dans lesquelles les ordonnances de non diffamation peuvent être justifiées, mais de telles ordonnances sont souvent rendues lorsqu'une injonction de portée plus limitée voire aucune, serait appropriée.*

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*Introduction*

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*Introduction*

This article assesses the appropriate and actual scope of injunctions in Canadian defamation actions. While I argue that defamation injunctions can be appropriate if narrowly tailored, the case law demonstrates that unnecessarily broad and vague defamation injunctions are commonly ordered in Canada.

Until recently, there was controversy in the United States as to whether defamation injunctions—that is, court orders prohibiting speech alleged or proven to be defamatory, or ordering its removal—were *ever* constitutionally permissible.<sup>1</sup> Canadian law has long permitted such injunctions, especially where a court has found the speech to be defamatory, while recognizing the potential threat they pose to freedom of expression. Freedom of expression is an important Canadian value and receives

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1. David Ardia begins his paper on defamation injunctions by stating: “It has long been a fixture of Anglo-American law that libel plaintiffs are not entitled to injunctive relief; their remedies are solely monetary” (“Freedom of Speech, Defamation and Injunctions” (2013) 55 W & Mary L Rev 1 at 4). The well-known phrase “equity will not enjoin a libel” is frequently cited. See e.g. *Kramer v Thompson*, 947 F (2nd) 666, 677, 677 (3d Cir 1991); Erwin Chemerinsky, “Injunctions in Defamation Cases” (2007) 57:2 Syracuse L Rev 157; Rodney A. Smolla, *Law of Defamation*, 2nd ed (Toronto: Thomson Reuters, 2012) at § 9:85; Ann Motto, “‘Equity Will Not Enjoin a Libel’: Well Actually, Yes, It Will” (2016) 11 Seventh Circuit Rev 271. Specifically, in the US, such injunctions are thought to be a form of prior restraint prohibited by the First Amendment of the US Constitution. That said, there is “an emerging modern trend” that permanent (as opposed to interlocutory) defamation injunctions are permissible where they only prohibit the repetition of specific imputations that have been found to be defamatory (*McCarthy v Fuller*, 810 F (3d) 456 at 464 (7th Cir 2015)). As we shall see, these are Ardia’s *Type IV* injunctions.

significant legal protection.<sup>2</sup> And although the common law of defamation is not subject to constitutional scrutiny in Canada, any restrictions on expression by the courts should be justifiable.

There are several ways in which defamation injunctions can unjustifiably interfere with free speech. They can be ordered in inappropriate circumstances, provide inadequate guidance as to what not to say, and can be broader in scope than necessary. This article addresses these last two issues, which together reflect the appropriate scope of defamation injunctions. The appropriate scope must be considered in light of the internet's ability to de-contextualize—for example, through search engine results—and the ability of online statements to spread rapidly and to persist. The way in which information flows is relevant to the permissible scope of injunctions because speech initially published in one context may be repeated in another, such that the meaning and effect of that speech may be different. My research suggests that most cases in which an injunction is sought involve digital communication.<sup>3</sup>

Certain kinds of injunctions are improper and should never be ordered. Most obviously, overbroad injunctions that enjoin lawful as well as unlawful speech should constitute legal error, reversible on appeal. Unclear injunctions are also problematic, as the defendant is not put on notice as to what speech is enjoined. This is considered in the context of enjoining further “defamatory” statements. Yet the case law shows that judges regularly order unnecessarily broad defamation injunctions and sometimes order vague ones. This may be more likely where defendants are self- or unrepresented.<sup>4</sup>

I conclude that injunctions prohibiting repeating imputations already found to be defamatory, or requiring takedowns of such publications, are sometimes justifiable. Particularly given the potential effects of internet

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2. For example, freedom of expression is protected in s 2(b) of Canada's *Charter of Rights and Freedoms* (*The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11). And while defamation law is not subject to *Charter* review, it must evolve in accordance with Canadian values, including *Charter* values. Freedom of expression is therefore often explicitly mentioned when judges make incremental changes to the law of defamation. See e.g. *Grant v Torstar Corp*, 2009 SCC 61 at paras 42-57.

3. As discussed in Section 3 below, I identified 54 cases between 2007 and 2017 in which defamation injunctions were ordered and there was sufficient detail in the reasons to permit categorization. 44/53 of these, or 83 per cent, concerned publication on the internet. (The denominator is 53 because for one case it was unclear whether internet publication was involved.) Another 6/53 (11 per cent) involved email publication. Only 3/53 (6 per cent) involved neither. And while I cannot say what percentage of defamation cases in that time frame generally involved online publication, a study of a cases from 2003-2013 showed only 14 per cent of cases involved internet publication and a further 9 per cent involved email. See Hilary Young, “The Canadian Defamation Action: An Empirical Study” (2018) 95:3 *Can Bar Rev* 591 at 605.

4. See page 24 below.

publication, I also conclude that under certain narrow circumstances it is justifiable to enjoin a defendant from further defaming the plaintiff. However, injunctions granted in Canada regularly go far beyond these justifiable circumstances.

### I. *Values in drafting injunctions: Minimal impairment and precision*

It is important to get the scope of defamation injunctions right. Freedom of expression is implicated, but so is the plaintiff's reputation. To determine the appropriate scope of injunctions, we must understand their purpose. The main purpose of injunctions in defamation cases, whether they be prohibitive (e.g. do-not-say-x orders) or mandatory (e.g. takedown orders), is to prevent additional irreparable reputational harm. For mandatory orders, the expectation must be that without such an order new audiences will see the libel, either in its original location or because the statement may spread more widely. For prohibitive injunctions, the expectation must be that the injunction is necessary to prevent a new libel, including a repetition. However, in these cases, judges should still consider the necessity of making a speech-infringing order. Publishing a libel is already unlawful, and if the threat of a damages award serves as a deterrent there is no need to resort to injunctions and potential contempt proceedings. Sometimes, however, injunctions are necessary to prevent reputational harm.

In other words, injunctions seek to prevent future harm to reputation<sup>5</sup> where such harm is likely and irreparable, and perhaps only where an injunction would be effective.<sup>6</sup> They are not punitive; they are not substitutes for future defamation actions; and they cannot undo reputational harm that has already occurred. The scope of injunctions should reflect this narrow goal of preventing additional irreparable reputation harm.

Overbroad orders risk proscribing lawful speech and potentially punishing speakers with penalties including imprisonment. While it may be difficult to decide exactly how broad a particular order should be, the

5. "It may be that the granting of an injunction should be distinguished from the assessment of damages. The latter compensates for harm that has already occurred. The former, while relying on publications that have already taken place, is directed to limiting the harm that has been done by preventing prospective damage that has not yet taken place." *Canadian National Railway Company v Google Inc*, 2010 ONSC 3121 at para 13.

6. I do not address in this paper the issue of whether injunctions should be ordered if they are likely to be ineffective, but judges have sometimes disagreed about this. In *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Equustek*], the dissenting judges would have refused to grant the injunction sought in part because it would not be effective (at paras 77-79). And while there is a general rule that equity should not support ineffective orders, the Ontario Court of Appeal refused to therefore simply "throw up their collective hands in despair" whenever a libel is published on the internet (*Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 at para 75, 239 DLR (4th) 577 (ONCA) [*Barrick Gold*]).

principle that orders should be minimally impairing of speech is, I think, uncontroversial. According to the Ontario and British Columbia Courts of Appeal, “injunctive relief must be broad enough to be effective but no broader than reasonably necessary to effect compliance.”<sup>7</sup>

In particular, orders should rarely enjoin lawful speech. This is not because lawful conduct may not be enjoined,<sup>8</sup> but rather because there is no compelling reason to enjoin lawful speech—a narrower injunction is usually available. The extent to which injunctions should enjoin unlawful speech that isn’t the subject of litigation is discussed below. As a starting point, however, orders should be as narrow as possible to achieve the legitimate ends the injunction seeks to achieve.

In addition, injunction orders should be clear and precise. “Since a breach of an injunction may have the consequences of a fine and imprisonment, the language of an injunction should clearly set forth what is prohibited.”<sup>9</sup> Thus, for example, where it was not clear *when* a party was supposed to make a payment ordered, failure to pay did not constitute contempt.<sup>10</sup>

Scope issues are not limited to the breadth and precision of the order itself but also include the application of injunctions to third parties and the extra-territorial scope of injunctions. However, these issues are beyond the scope of this paper.<sup>11</sup> I focus here on the kind of speech an injunction should prohibit, rather than where or to whom the order should apply.

## II. *Canadian defamation injunctions*

I searched the defamation case law between 2007 and 2017 in all Canadian provinces other than Quebec<sup>12</sup> and identified cases in which an injunction was granted.<sup>13</sup> These included permanent and interlocutory injunctions,

7. *Cambie Surgeries Corp v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para 39, cited in *Labourers’ International Union of North America, Local 183 v Castellano*, 2020 ONCA 71 at para 18 [*Labourers’ International*].

8. See e.g. Doug Rendleman, “The Defamation Injunction Meets the Prior Restraint Doctrine” (2019) 615 San Diego L Rev at 672: “An injunction may govern a defendant’s conduct that the civil law doesn’t.”

9. *Campbell v Cartmell* (1999), 104 OTC 349 (SCJ) at para 60, 1999 CarswellOnt 2967.

10. *Skybound Dev Ltd v Hughes Properties Ltd*, [1988] 5 WWR 355 at para 38, 24 BCLR (2d) 1 (BCCA). See also *Dare Foods (Biscuit Division) Ltd et al v Gill et al* (1972), [1973] 1 OR 637, 1972 CanLII 506 (ONSC).

11. Note, however, that the Supreme Court of Canada has recently showed itself willing to impose injunctions with extra-territorial effect and injunctions that bind third parties. See *Equustek*, *supra* note 6.

12. Quebec has a civil law system and its defamation laws are somewhat different than those in other provinces. Its case law was therefore excluded from the search.

13. The methodology was to search three different databases, Quicklaw, Westlaw and CanLII, using search terms appropriate to those platforms. They usually included “defam” with an expander, ie, defamation, defamatory, defaming, defamed. To gather preliminary data, the search terms “injunct”

though most were permanent. This does not mean more permanent injunctions are ordered than interlocutory ones. Rather, this likely reflects a greater tendency to report final decisions than interlocutory ones. That said, the very high threshold for obtaining an interlocutory injunction in defamation cases<sup>14</sup> may also be a factor. The data set consisted of 62 orders from 54 cases.<sup>15</sup> These do not reflect all the orders that would have been made during this time period because some cases with orders would not have been reported, and some may have been reported without mentioning the order or setting out its terms in sufficient detail to permit categorization. Yet others may not have been caught by the search terms.<sup>16</sup> While the data set is necessarily incomplete, there is no reason to think the injunctions studied are not representative. The data set is therefore helpful in assessing the kinds of orders that are made and their relative frequency, though given the small size of the data set, caution is warranted.<sup>17</sup>

To analyze Canadian injunctions, I adopt a typology created by US scholar, David Ardia, which categorizes injunctions based on differences in both breadth and clarity.<sup>18</sup> First, I set out Ardia's typology of speech injunctions, considering the justifiability of each kind in the Canadian context. I then categorize Canadian defamation injunction orders according to this typology. Finally, I consider whether Canadian injunction orders are unnecessarily broad or vague. I found that in many cases, a narrower and clearer injunction was possible and apparently appropriate.

Ardia identifies four types of defamation injunction:

- **Type I** is the broadest and prohibits the defendant from making any statements at all about the plaintiff.<sup>19</sup>
- **Type II** prohibits making any defamatory statements about the

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and "enjoin" (with expanders) were used. Each case was read and categorized, with duplicates and false positives excluded.

14. Interlocutory injunctions in defamation should be granted only in the "rarest and clearest of cases." *Canada Metal Co Ltd et al v Canadian Broadcasting Corp et al* [1975], 7 OR (2d) 261 at para 2, 55 DLR (3d) 42 (Ont Sup Ct) [*Canada Metal*]. This rule has been "universally and consistently" applied since *Bonnard v Perryman* and other nineteenth century cases: *ibid* at para 3.

15. Where a case resulted in orders of more than one type, according to David Ardia's typology of defamation injunctions, they were counted as distinct orders. There are many other ways of counting orders and many orders had multiple terms. The purpose of counting in this way was to be able to classify orders according to Ardia's typology, which is described below.

16. The large number of false positives suggests the search terms were not too narrow.

17. Thus, for example, while I find that 15 per cent of injunctions in the data set were of one type and 42 per cent were of another, we cannot at this point conclude either that that is true of Canadian injunction orders generally or that the second type of orders is more than twice as prevalent as the first. What we can say is that in this data set, which we have no reason to believe is not representative, the second type of order was more than twice as frequent as the first.

18. Ardia, *supra* note 1 at 52.

19. *Ibid*.

plaintiff.<sup>20</sup>

I divide this category into *Type IIa* and *Type IIb*.

- *Type IIa* enjoins any defamatory statements in the sense of disparaging statements or those that satisfy the defamatory meaning element of the tort.
- *Type IIb* prohibits statements that are defamatory in the sense of satisfying all elements of the tort and none of the defences.
- **Type III** injunctions enjoin the publication of words with a particular imputation, where that imputation has not been found to be defamatory.<sup>21</sup>
- **Type IV** prohibits making statements whose imputations have been found to be defamatory.<sup>22</sup>

### 1. *Type I*

*Type I*, which prohibits all speech about the plaintiff, is obviously overbroad as it enjoins not only unlawful speech but also lawful speech. For example, it would prohibit the defendant from saying true things about the plaintiff, such as telling people that the defendant had been engaged in litigation with the plaintiff. It would even prohibit the defendant from retracting her original libel. This is because saying that she was wrong all along and that the original libel was untrue are statements about the plaintiff.

As a practical matter, it may be that the defendant would be found in contempt of court only for speech that was actually defamatory, but this cannot be assumed since lawful acts may be enjoined.<sup>23</sup> Courts have noted defamation law's chilling effect and have made the law more defendant-friendly to prevent this effect. To proscribe all references to a plaintiff risks chilling even lawful speech. The breadth of *Type I* injunctions results in serious interferences with free speech. It is always feasible to craft a narrower injunction without unreasonably risking a plaintiff's reputation. *Type I* injunctions should never be ordered.

And yet surprisingly, *Type I* injunctions are relatively common in Canada. Of the 62 injunction orders in my data set, ten (16 per cent) were *Type I* injunctions. For example, in *Beidas v Pichler*, Himel J. ordered the following, which includes mandatory and prohibitive terms:

20. *Ibid* at 53.

21. *Ibid* at 54.

22. *Ibid* at 56.

23. See note 8 above.

1. ... an order until trial of this action prohibiting the defendants from publishing any materials which may tend to identify the plaintiffs Beidas, Davies and Pallister.
2. The defendants shall delete all references to Beidas, Davies or Pallister from any publications to which the defendants have, or can obtain access.<sup>24</sup>

The order is overbroad and was ultimately dissolved for that reason.<sup>25</sup> If the defendants were to say: “I’m being sued by Beidas,” that would violate the injunction, though it would obviously not be defamatory because it does not impugn Beidas’ reputation and is true. Similarly, saying “Jennifer Pallister died” would violate the order, even though it is true and not defamatory. The defendants would also violate the order if they refused to take steps to remove *lawful* content about the plaintiffs from sites they have access to.

Lest one think this was simply a one-off mistake caught on appeal, consider *Craven v Chmura*, in which the Ontario Superior Court turned its mind to the scope of the injunction and found support in the case law for *Type I* injunctions. Then, citing *New York Fries*, the court justified the breadth of the injunction in *Craven v Chmura* “to avoid the cost and other consequences of future litigation between the parties.”<sup>26</sup>

The order in *New York Fries* was as follows:

Consequently, the defendants shall be permanently restrained from publishing or broadcasting, or causing to be published, broadcast or otherwise disseminated, any statements or other communications concerning New York Fries or any of its directors, officers or employees, except if made in court documents or open court as required to litigate Court File No. 1543/10 against New York Fries.<sup>27</sup>

That said, the Ontario Court of Appeal recently amended a *Type I* defamation injunction on the basis that it was overbroad, stating that:

Absent evidence that prohibiting the appellant from making non-defamatory statements is reasonably necessary to address the identified likelihood of future defamation, the injunction should not have been cast

24. See *Beidas v Pichler (Legassé)* (2008), 294 DLR (4th) 310 at para 40, 2008 CanLII 26255 [ON SCDC].

25. A three-judge panel of the Ontario Superior Court agreed and dissolved the orders as being too broad. They replaced them with an order enjoining the defendants from “in any way publishing, continuing to publish or otherwise disseminating the article or statement known as ‘A Silhouette of Doom’” (*ibid* at para 71). While narrower, this may still be too broad since the article presumably contains lawful as well as unlawful speech.

26. *Craven v Chmura*, 2016 ONSC 2406 at para 20.

27. *122164 Canada Limited v CM Takacs Holdings Corp et al*, 2012 ONSC 6338 at para 37.

so broadly that it captured non-defamatory statements.<sup>28</sup>

In my view, this statement does not go far enough, since it implies that such broad orders may sometimes be necessary to prevent future defamation. I do not believe this is the case. Regardless, the circumstances in which a *Type I* order would be necessary must be exceedingly rare. These orders go far beyond what should be necessary to prevent unlawful reputational harm to the plaintiffs. They would prevent all manner of true speech, including speech on matters of public interest. The judge in *Craven* was presumably concerned that the defendant would not be silenced and his speech could not be predicted. He stated he was concerned about the costs and inconvenience of future litigation. But if a defendant is not prepared to abide by a narrower order (for example, a *Type II* “do not defame” order), it is unclear why she would abide by a broader one. Further, enforcing contempt orders is costly too. More importantly, the injustice of proscribing legal speech is not justified by efficiency-based arguments. Although *Type I* orders have the benefit of clarity, they are overbroad and should not be permissible.

## 2. *Type II*

*Type II* injunctions are more defensible as they are limited to *defamatory* speech about the plaintiff. They proscribe any further defamatory speech, meaning speech not yet determined to be defamatory (unlike *Type IV* which, as we shall see, is limited to speech already judged to be defamatory). This might seem unproblematic, in that only illegal content will be enjoined. There are, however, two potential problems with *Type II* injunctions: they may be vague and are arguably overbroad.

While *Ardia* treats all injunctions prohibiting future defamation as *Type II*, it is useful to distinguish between two kinds of *Type II* injunctions, since they raise different issues.<sup>29</sup> First, there are injunctions that enjoin any further communications with disparaging or defamatory meaning, regardless of whether other elements or defences are made out.<sup>30</sup> I refer to these as *Type IIa*. Alternatively, *Type IIb* injunctions prohibit future defamation in the sense of making out the tort—satisfying all of the elements and none of the defences. For reasons set out below, *Type IIa*

28. *Labourers' International*, *supra* note 7 at para 20.

29. I am grateful to Norman Siebrasse for suggesting this approach.

30. While purists may consider this the only *true* meaning of defamatory, the word is commonly used to refer both to the defamatory meaning element of the tort and to the tort itself. Given this, the term on its own is ambiguous, much like “negligence” is. What’s more, the analysis of *Type II* injunctions below reveals that judges differ in whether they mean defamatory in the sense of defamatory meaning or in the sense of all of the elements and none of the defences being made out.

orders are never defensible while *Type IIb* are at least arguably sometimes defensible.

Where an order simply proscribes “defamatory” communications, it is unclear whether this is a *Type IIa* or *Type IIb* order. This is because there is an inherent ambiguity in the word “defamatory.” “Defamatory” can mean that the tort of defamation is made out, or only that the element of defamatory meaning is made out—that is, that the communication would make an ordinary person think less of the plaintiff. This ambiguity is in itself problematic as it does not put the defendant on notice as to what conduct will breach the injunction. The ambiguity also makes enforcing such an order challenging, as it is harder to prove the *mens rea* or intent required for contempt when the order is unclear. Ambiguity was one reason why the judge in *Seikhon v Dhillon* refused to order the requested *Type II* injunction.<sup>31</sup>

Ambiguity is not the only problem. An order prohibiting disparaging or defamatory (in the sense of defamatory meaning) communications is overbroad. It captures lawful speech, including true speech, since truth is a defence. Like *Type I* orders, this is problematic and easily avoidable in most, if not all, circumstances and so *Type IIa* orders should effectively never be made.

Given the ambiguity in the word “defamatory,” one might wonder whether *Type IIa* orders actually exist. That is, we might give the benefit of the doubt to judges that their *Type II* orders are all *Type IIb* orders that enjoin the tort of defamation. In the study, 26/62 or 42 per cent of orders were *Type II*, making it the most common type of injunction. While most (19/26 or 73 per cent) *Type II* orders were ambiguous as to whether they were *Type IIa* or *Type IIb*, it is clear that some orders are, indeed, *Type IIa* orders.

For example, in *Zall v Zall*, an injunction was granted on the following terms:

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31. *Seikhon v Dhillon*, 2017 BCSC 2525 at para 173:

Further, I have concerns about the form of the order sought, which would simply enjoin Mr. Dhillon from “the publication or distribution... of any defamatory statements about... the plaintiffs.” This language fails to make clear whether it would be a breach of the order for Mr. Dhillon to publish a statement about the plaintiffs that would tend to lower their reputation in the eyes of a reasonable person if that statement was true. In other words, it is not clear, as proposed, whether it would be necessary to determine the truth of any such statement in order to know whether the order had been breached. Ascertaining the truth would almost certainly require a trial. In my view, this is likely to give rise to more problems than it resolves, including protracted litigation about whether Mr. Dhillon is in contempt of court in circumstances where he says something derogatory about the plaintiffs but then pleads truth.

1. The defendant, Tammi Zall, is enjoined and restrained from the publication or distribution on the internet, or by any other method or medium, of any defamatory statements about or referring in any other way to the plaintiff, John Zall...

...

3. For the purposes of this order, “defamatory” means any publication which tends to lower a person in the estimation of right-thinking members of society or to expose a person to hatred, contempt or ridicule...<sup>32</sup>

A similar clause, clarifying that “defamatory” means “defamatory meaning,” was found in *Rodrigues v Rodrigues*.<sup>33</sup> Three other *Type II* orders were clearly *Type IIa* orders.<sup>34</sup> One enjoined “accusatory or disparaging allegations,”<sup>35</sup> another “disparaging” comments.<sup>36</sup> Note that the latter order was made following a discussion of an earlier order, which the judge found vague because it referred simply to “defamatory” statements:

I asked counsel in argument whether it was possibly ambiguous to use the term “defamatory”. That is a term that is very meaningful to lawyers and judges, and has a legal meaning as a term of art. Not everyone knows that our law of defamation provides a true statement can be defamatory, and that whether it is true or not is part of the consideration of whether there is a defence to the defamation.<sup>37</sup>

This suggests an awareness of the problem with vague orders, but not the problem of enjoining disparaging but lawful speech, such as statements that are true, privileged or fair comment.

Thus, 7/26 *Type II* orders (27 per cent) were identifiable as *Type IIa* orders. This amounts to 13 per cent of all orders in the data set.

The other 19/26 (73 per cent) of *Type II* orders, which enjoin defaming the plaintiff, are ambiguous,<sup>38</sup> but let us assume that they are *Type IIb* orders that enjoin committing the tort of defamation. They are

32. *Zall v Zall*, 2016 BCSC 1730 at para 99.

33. *Rodrigues v Rodrigues*, 2013 ABQB 718 at para 49.

34. See *Gee Nam John et al v Byung Kyu Lee et al*, 2009 BCSC 1157 [*Gee Nam John*] at para 2; *Passey v Henry*, 2016 BCSC 1766 [*Passey*] at para 26; *Hutchens v SCAM.COM*, 2011 ONSC 56 at para 105. In addition, two others were *Type IIa* because they enjoined “false or malicious” statements rather than unlawfully defamatory ones. See *Kim v Dongpo News*, 2013 ONSC 4426 [*Kim*] at para 63; *Emerald Passport Inc v MacIntosh*, 2008 BCSC 1289 at para 6.

35. *Gee Nam John*, *supra* note 34 at para 2.

36. *Passey*, *supra* note 34 at para 26.

37. *Ibid* at para 22.

38. Surprisingly, given the inherent ambiguity in the words “defamation” and “defamatory,” and given the need in enjoining conduct to be clear about what is prohibited, *none* of the *Type II* orders specified that they enjoined defamation in the sense of satisfying all the elements and none of the defences.

essentially do-not-defame orders or “obey the law” orders. They prohibit future instances of the tort of defamation against the plaintiff, including statements that were unrelated to the one that was litigated and which were not foreseeable. Given that defamation is unlawful, some might think such orders unproblematic. However, they transform what would otherwise be tortious conduct into civil or criminal contempt. For this reason, Ardia, Chemerinsky and Rendleman, discussing US law, view *Type IIb* injunctions as impermissible prior restraints on speech.<sup>39</sup> As discussed below, however, they are sometimes, though rarely, justifiable in the Canadian context.

As noted above, *Type IIb* orders are vague, in that what is defamatory is notoriously difficult to assess in advance.<sup>40</sup> Allegations may not be defamatory if they are true, if they lack credibility, if they were published responsibly or if they were privileged. Thus, the same words might be defamatory in one context (e.g. published in a newspaper) and not in another (e.g. spoken in the House of Commons). To know what is defamatory, and what they are therefore enjoined from saying, defendants may need to know how their speech will be interpreted by ordinary people, whether it can be proven to be true (as opposed to whether they believe it to be true), whether they took sufficient steps to verify before publishing, or whether publication was on an occasion of privilege. Contempt of court requires that intent to violate the order be proven beyond a reasonable doubt. This only means, however, that defendants must have spoken deliberately with knowledge of the existence of the order. They need not have knowingly breached the order.<sup>41</sup> Vague orders are therefore problematic and should be avoided unless absolutely necessary. In the US context they are likely unconstitutional: Ardia cites Chief Justice Hughes of the United States Supreme Court as stating that *Type II* injunctions are the “essence of

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39. For *Ardia* see *Ardia*, *supra* note 1 at 53-54. Chemerinsky considers *all* defamation injunctions that prevent future speech to be constitutionally impermissible in the United States, see Chemerinsky, *supra* note 1 at 173. For *Rendleman*, see *Rendleman*, *supra* note 8 at 674: “A court today ought to rule that a “no-defamation” injunction is both too broad and too vague. It forbids the defendant’s expression that had not already been found to be defamatory, and it provides the defendant with insufficient notice of expressions that would violate it.”

40. While a *Type II* order need not, in theory, involve *future* publication, where the issue is taking down content already published, the order tends to be specifically aimed at that publication, rather than at defamatory statements generally.

41. “The core elements of civil contempt are knowledge of the order and the intentional commission of an act which is in fact prohibited by it.” Robert Sharpe, *Injunctions and Specific Performance*, 5th ed (Toronto: Thomson Reuters, 2017) at 6-18. For criminal contempt, there must be “intent, knowledge or recklessness as to the fact that the public disobedience will tend to deprecate the authority of the court.” *Ibid* at 6-4.

ensorship,”<sup>42</sup> and Chemerinsky refers to “deep-seated American hostility to prior restraints.”<sup>43</sup>

Consider, for example, the permanent injunction in *Barrick Gold v Lopehandia*. It prohibits the defendants from: “disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees.”<sup>44</sup> It does not just prohibit communicating the imputations that have been found to be defamatory. It prohibits all future libels. Usually, plaintiffs must sue in relation to new libels, since the usual procedure and remedy for defamation is a tort action and damages rather than contempt of court and fines or a prison sentence.

Thus, if an “obey the law” order is justifiable, it must be because it is necessary and there is presumably no less speech-infringing way to achieve the desired end. This is sometimes thought to be the case where there is a likelihood that the defendant will continue to defame, in unpredictable ways,<sup>45</sup> despite having been held liable and despite the prospect of future tort liability. While a plaintiff could bring another defamation action in such circumstances, this has costs and litigation may already have proven ineffective, in that the defendant is judgment-proof or outside the jurisdiction. Some judges have considered *Type IIb* injunctions necessary because impecunious defendants will not be deterred by the possibility of further litigation and damages awards that they cannot pay.

For example, in one case, the judge justified a *Type IIb* injunction as follows: “Mr. Zakharia’s conduct establishes the likelihood that he would, absent a permanent injunction, continue to defame the plaintiffs. There is also the real possibility that the plaintiffs will not realize on their respective awards.”<sup>46</sup> In another case, the judge stated:

it is very likely that the defendant will continue to publish defamatory statements despite the finding that he is liable to the plaintiffs for damages...

This likelihood is justified on the basis that despite having an interim injunction in place requiring the defendant to remove certain specified defamatory statements from his internet blog and enjoining him from publishing further defamatory statements about the plaintiffs,

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42. *Ardia*, *supra* note 1 at 54 citing *Near v Minnesota*, 283 US 697 (1931) at 713.

43. Chemerinsky, *supra* note 1 at 166.

44. *Barrick Gold*, *supra*, note 6 at para 78.

45. The existence of unpredictability is what might justify a *Type IIb* order rather than a *Type IV* order, enjoining the repetition of specific imputations found to be defamatory. The Ontario Court of Appeal in *St. Lewis v Rancourt*, 2015 ONCA 513 [*St. Lewis*] may have had unpredictability in mind when it referred to “a campaign of defamation and a likelihood that it will continue,” which would justify a “broad ongoing injunction” (at para 16).

46. *British Columbia Recreation and Parks Association v Zakharia*, 2015 BCSC 1650 at para 98.

he failed to remove the specific defamatory statements... Furthermore, he made new defamatory statements in a blog posting on the internet against the same plaintiffs only a few days before the hearing of this matter.<sup>47</sup>

The question is whether the likelihood of further defamation, in unpredictable ways, justifies a *Type IIB* order. As noted above, in the US the answer has tended to be “no.”

In my view, *Type IIB* injunctions are sometimes justified, but only in narrow circumstances. First, the conditions for *any* equitable relief should obviously be satisfied. For interlocutory orders, this includes the likelihood of irreparable harm.<sup>48</sup> Permanent injunctions must be necessary, meaning there are no adequate alternative remedies,<sup>49</sup> and there is likely to be continued wrongdoing: “A wrong committed in the past that has little or no chance of continuing does not need to be remedied by an order enjoining future behavior.”<sup>50</sup> Second, such injunctions should be as narrow as possible in scope.<sup>51</sup>

Given this, to justify an injunction, the scope of anticipated further defamation must be different than that already litigated—otherwise a narrower *Type IV* order, which requires a defendant not to repeat the specific imputations already found to be defamatory, would be appropriate. It must also be unpredictable, or else a narrower *Type III* injunction would be more appropriate. Finally, it should be the case that the threat of further litigation would not deter the defendant from defaming. This will usually be because defendants are judgment-proof but it could also be that they are sufficiently wealthy to pay any damages award, including an order for punitive damages. The possibility of contempt prevents wealthy defendants from effectively purchasing a license to defame.

To these existing requirements I would add that the predicted future defamation should not only be defamatory (in the *Type IIB* sense of contrary to defamation law, including defences). It should also be likely to cause serious harm. This requirement, as applied to *Type IIB* injunctions, would help ensure the judge turns her mind to whether the defendant is merely an annoyance to the plaintiff or whether he is credible and risks doing serious reputational harm. While Canadian defamation law does not require serious harm (unlike English defamation law),<sup>52</sup> the potential chilling effect of a

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47. *Lord Selkirk School Division et al v Warnock*, 2015 MBQB 195 at paras 53-54.

48. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385.

49. *Nalcor Energy v NunatuKavut Community Council Inc*, 2014 NLCA 46 at para 65.

50. *Ibid* at para 56.

51. *Ibid* at para 65.

52. *Defamation Act 2013* (UK), c 26, s.1.

broad “do not defame” order is such as to warrant additional safeguards on the remedy. If the defendant is unlikely to cause serious harm through future publication of libels, the remedy of an injunction should not be invoked to restrict the defendant’s right to speak. It is therefore my view that the law should evolve so as to require likely serious harm before speech injunctions should be ordered.

Publication on the internet *may* result in serious harm, but it should not always be inferred that serious harm will result solely because something is published on the internet. Courts often exaggerate the harmful effects of internet defamation on reputation.<sup>53</sup> Publication on the internet does not inevitably lead to widespread and perpetual dissemination, nor is it necessarily credible and what is not credible does not threaten reputation.<sup>54</sup> Nevertheless, publication on the internet creates at least the potential for dissemination that is broad, in both time and space, in ways that were not previously technologically feasible. In addition, search engines help decontextualize online content and may more readily connect a libel to an individual. Thus, internet publication may help justify the need for a *Type IIb* injunction. This is not to suggest that it is *sufficient* to warrant such an injunction.

For example, many of the defendants who would be subject to *Type IIb* injunctions are not credible precisely because they make a wide range of unrelated and unpredictable defamatory statements. While on their face these statements may allege serious impropriety, all things being equal, the more varied the allegations a defendant makes against a plaintiff, the less credible they will be. This is true regardless of whether publication is on the internet. Courts should carefully consider whether such allegations are actually a threat to the plaintiff’s reputation. Courts are often not inclined to seriously consider issues of credibility and persuasiveness in assessing whether disparaging remarks are defamatory.<sup>55</sup> *Barrick Gold v Lopehandia* is an example in which a narrowly tailored injunction would likely not have been effective, given the wide range of allegations made. However, in my view, the accusations were not credible and thus not defamatory precisely because the defendant was accusing Barrick Gold of “fraud bigger than Enron,” genocide, misrepresentation to government officials, arson, attempted murder, and manipulating world gold prices.<sup>56</sup>

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53. For example, I find convincing Robert Danay’s article, “The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation” (2010) 56 McGill LJ 1.

54. See e.g. Hilary Young, “But Names Won’t Necessarily Hurt Me: Considering the Effect of Disparaging Statements on Reputation” (2011) Queen’s LJ 37.

55. *Ibid* at 1-37.

56. *Barrick Gold*, *supra* note 6 at paras 15-16; see also Young 2011, *supra* note 54 at 14-15.

I have suggested that for a *Type IIb* injunction, there should be a likelihood of future defamation, the anticipated imputation(s) should be unpredictable and different than those already litigated, and there should be no adequate alternative remedies. This simply reflects the existing rules governing equitable remedies. I have additionally suggested that the law should evolve to require serious harm, and this would not be satisfied solely on the basis of online publication.

Yet *Type IIb* injunctions are regularly ordered in circumstances in which these requirements are not met. As noted above, they constituted 19/26 (73 per cent) of *Type II* injunctions or 19/62 (31 per cent) of all injunctions in my study. They were the most common type of injunction.

I examined each *Type II* injunction to see whether the criteria above (excluding serious harm, since the law does not require it) were made out. I wanted to know whether a narrower order could reasonably have been drafted. Because these determinations are subjective and, in my case based solely on the reasons for judgment, I erred on the side of finding the broader injunction to be justified. Specifically, I categorized each of the 26 *Type II* injunctions as either one in which a narrower injunction could *clearly* have been crafted, or one in which it was less clear that a narrower injunction could have been crafted. I categorized conservatively, placing any case in which a wide range of defamatory statements had been made in the latter category unless it seemed there was no likelihood of repetition.<sup>57</sup> When in doubt, I assumed an injunction was appropriate and simply focused on whether the scope of the injunction could be narrowed. Of course, it is always the case that a narrower injunction is possible. For example, *Type IV* injunctions are limited to the specific imputations found to be defamatory. But again, the point was to see whether, if one thinks *Type II* (that is, *IIb*) injunctions are justifiable where it is hard to predict how the defendant will continue to defame, these particular *Type II* injunctions are justified.

I found that 14/26 (54 per cent) of *Type II* orders could easily and reasonably have been narrowed to enjoin the repetition of specific imputations. For the other 12/26 (46 per cent), it was either difficult to say or there was a range of defamatory imputations at issue.

An example of a clearly unnecessary *Type II* injunction is that in *Michie*:

Jodi Lynn Guthrie-Waters a.k.a. Jodi Lynn Michie is hereby restrained from publishing, or causing to be published, on the internet or by any other

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57. See e.g. *Farallon Mining Ltd v Arnold*, 2011 BCSC 1532 at paras 74, 116.

method or medium, whether by name, pseudonym, address, photograph or other means of identity, any defamatory statement referring in any way to James Alexander Michie.<sup>58</sup>

In this case, the defendant had published one specific allegation (that her husband had committed fraud) by e-mail to one person who had, at the time of publication, already published an article containing the same imputation. The court found this warranted damages of only one dollar.<sup>59</sup> The court did not mention any evidence of likely repetition, nor was there any issue of content removal, since publication was by e-mail. Based on information available in the judgment, the test for *any* permanent injunction was not met. But even if it were, the fact that there was a single narrow imputation made by the defendant, and no evidence of likely repetition, means that a *Type IIb* injunction was not justified.

Another example is the order in *Kim v Dongpo News*. In this case, a journalist was found liable for defaming the plaintiff in an article. The libel related to a description of a specific altercation and resulting lawsuit. As such, any order could have been restricted to specific imputations already held to be defamatory (i.e. a *Type IV* injunction). Further, there was no indication of a likelihood of repetition of this libel, let alone of any others. On the contrary, there was a partial correction and an attempt to remove the incorrect content from the internet.<sup>60</sup> As with *Michie*, based on the information in the judgment, no injunction should have been granted at all but certainly one could have been more narrowly tailored to the kind of imputations the impugned publication made.

Examples where the resort to *Type II* injunctions is at least arguably justifiable include *Griffin v Sullivan*:<sup>61</sup>

[35] Included in the many statements published by the defendant of and concerning the plaintiff, are statements which I find convey the following meanings:

- (a) that the plaintiff has verbally abused many persons and has enjoyed doing so;
- (b) that the plaintiff is a sadist who likes to see young girls and women cut and bleeding;
- (c) that the plaintiff is “a sexual psychopath”;
- (d) that the plaintiff has abused many women, both physically and mentally;
- (e) that the plaintiff is mentally disordered;

58. *Michie v Guthrie-Waters*, 2012 BCSC 793 at para 61.

59. *Ibid* at para 60.

60. *Kim*, *supra* note 34 at para 56.

61. *Griffin v Sullivan*, 2008 BCSC 827 at paras 35-36.

- (f) that the plaintiff is a liar;
- (g) that the plaintiff is “true evil”;
- (h) that the plaintiff is a coward;
- (i) that the plaintiff has committed criminal offences in Canada and in the United States, and is being investigated by the police for offences in the United States, Canada and Australia;
- (j) that the plaintiff offered to help a woman to commit suicide by cutting her throat;
- (k) that the plaintiff made death threats and threats of violence to other persons;
- (l) that the plaintiff is a predator who stalks and harasses people over the internet, many of whom are vulnerable and suicidal;
- (m) that the plaintiff is an alcoholic and a user of illegal drugs;
- (n) that the plaintiff is dangerous and poses a risk to persons living in the United States;
- (o) that the plaintiff has committed the crimes of forgery, fraud and extortion; and
- (p) that the plaintiff is a paedophile, a sexual pervert, a sexual predator and a date rapist.

[36] In my opinion, all of the above meanings conveyed by the statements published by the defendant are defamatory of the plaintiff, in their natural and ordinary meaning. The plaintiff testified that all of these imputations were false, but did admit that he suffered mental stress requiring treatment.

While it is possible to craft a *Type IV* injunction enjoining repeating these imputations, the breadth of allegations and evidence that the defendant is likely to continue defaming in the absence of an injunction may justify a *Type II* injunction. As noted above, however, I would like to see a serious harm threshold met before *Type II* injunctions are granted.

### 3. *Type III*

*Type III* injunctions are narrower than *Type I* and *Type II* but are still overbroad. Recall that these are orders not to say x, where x has not been found to be defamatory. For example, they may require a whole website to be taken down when only part of the site is defamatory. Or they may enjoin publication of an imputation not yet found to be defamatory. All interlocutory injunctions that refer to specific imputations (as opposed to enjoining defamatory speech or all speech about the plaintiff) are *Type III*. Like *Type I* they may capture lawful speech and like *Type IV*, discussed below, they do not reflect the fact that the law is highly context-dependent, such that the same imputation may be defamatory in one context and not in another.

There is little, if any, justification for permanent *Type III* orders which enjoin speech not found to be defamatory despite an adjudication on the

merits. If an imputation is alleged to be defamatory and is sought to be enjoined, it should be proven to be defamatory before it is permanently enjoined. If the risk is of future libels, the order can be narrowed to refer to defamatory imputations—either *Type IIb* or *Type IV*. Interlocutory *Type III* injunctions are more justifiable, but the very high threshold for such injunctions should nevertheless be met.<sup>62</sup>

*Type III* injunctions effectively presume that a particular imputation will be defamatory if published in the future, regardless of the context, but this need not be established for an order to have been violated. Caution is therefore warranted. One cannot assess whether something is defamatory from words or their imputations alone. Context is vitally important. A statement thought to be false today may turn out to be true tomorrow.<sup>63</sup> A statement that is libelous when spoken at a press conference may be privileged when spoken in the Legislature. A statement made by a notorious liar may not be credible while the same words spoken by a respected public figure may be devastating. Context is even more important now that a defence of responsible communication is available. In such circumstances, liability may be avoided because of the defendant's due diligence, regardless of what imputations were made. All this to say, permanent *Type III* injunctions are problematic because they assume that a court can determine in advance, and without any context, whether a statement will be defamatory. This is simply false. However, the one advantage of *Type III* orders over *Type II* orders is that they give the defendant notice of what they must not say. Thus, where a specific imputation is predicted, and it would be defamatory in most contexts, a *Type III* injunction may be the least speech-restrictive, yet effective, order. Yet even then, the court should be convinced: a) of the likelihood of publication; b) that irreparable harm would result; c) and that the statement would be defamatory, in the sense of all elements and no defences being made out, in the context in which it is likely to be published. This comes close to an order not to defame, like a *Type IIb* order, except that it is specific to particular imputations.

*Type III* injunctions were rare in the reported decisions: 9/62 or 15 per cent. *Palen v Dagenais* included the following term:

- (1) Pending judgment at trial or until further order of this court, the defendant Arthur Dagenais is hereby prohibited and enjoined from:
  - (a) making further criminal or discipline complaints against Palen to any authorities provided such complaints stem from the vehicle

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62. *Canada Metal*, *supra* note 14.

63. More likely, a statement that was always true but could not be *proven* to be true in one case may be proven to be true in another.

inspection on October 26, 2007; and  
 (b) making accusations to anyone that Palen assaulted him using a taser device or attempted to murder him on that date;...<sup>64</sup>

This order is much narrower than many others discussed in this article and it should be noted that the plaintiff had sought a *Type II* injunction. However, the judge considered that too broad because the original publication was limited to “police circles,” because of the speech-infringing nature of a *Type II* injunction and because of the difficulty of wording the order so that the defendant knows what is prohibited.<sup>65</sup>

And yet the ordered injunction was still unnecessarily broad. The relevant defamatory statements were that a police officer assaulted and attempted to murder Dagenais. The order enjoins all allegations of criminality and discipline complaints arising from the vehicle inspection, not only that the officer tried to assault/taser/kill the defendant. As such it includes specific imputations not found to be defamatory.

Another *Type III* injunction was even more problematic from a freedom of expression perspective. The judge in *Henderson v Pearlman* made the following order:

Accordingly, I enjoin the defendants from publishing or republishing:

- (a) any material in the specified articles;
- (b) any material derived from those articles;
- (c) any material pertaining to, or referencing those articles;
- (d) any information relating to the status, lifestyle, personal activities or business of the plaintiff; and
- (e) any other information that is defamatory of the plaintiff.<sup>66</sup>

In addition to including a *Type IIb* term, the order enjoins the entire content of articles and material pertaining to articles, not just their defamatory content. It also includes all information “relating to the status, lifestyle, personal activities or business of the plaintiff.” On its face this includes information that does not have a defamatory meaning, and defamatory information that is defensible because it is true, for example. The order is unjustifiably broad.

#### 4. *Type IV*

*Type IV* is the narrowest and least problematic type of injunction. It is like *Type IIb* in that *Type IV* injunctions only enjoin defamatory speech. However, such injunctions are narrower in that they enjoin only specific

64. *Palen v Dagenais*, 2012 SKQB 383 at para 40.

65. *Ibid* at para 36.

66. *Henderson v Pearlman*, 2009 CanLII 43641 at para 55, [2009] OJ No 3444.

words or imputations already found to be defamatory rather than the entire scope of what would be defamatory of the plaintiff. Thus, with mandatory *Type IV* orders, unlike *Type IIIb* orders, there is no uncertainty about whether the publication is defamatory in context because a court has already ruled on this. With prohibitive orders, there is still a possibility that what was found defamatory in one context is not defamatory in another.

In the American context, *Type IV* usually refers to orders not to *repeat* the specific words or imputations held to be defamatory. Because he focuses on prior restraint, Ardia does not seem to include, within *Type IV*, orders to take down, remove or delete defamatory speech that has already been published.

Ardia, while not necessarily opposed to *Type IV* (do not repeat) injunctions, notes that they may still be overbroad. His concern relates to how the defamatory imputation is defined. He provides an example from *Griffis v Luban* in which enjoining the imputation that the plaintiff was a liar was unnecessarily broad because it was not limited to lying in the particular context of the defamation litigation – in this case, whether the plaintiff had lied about her credentials as an Egyptologist. It could be, for example, that the plaintiff did or will lie about something else.<sup>67</sup> Prohibiting the defendant from calling the plaintiff a liar in any context is therefore too broad.

But this problem is not inherent to *Type IV* injunctions. If orders are well-crafted so as to make clear that they enjoin only the repetition of the litigated defamatory imputations, perhaps only in circumstances in which they remain libelous, the overbreadth objection disappears.

Doug Rendleman essentially argues in favour of *Type IV* injunctions.<sup>68</sup> Chemerinsky, as noted above, considers all defamation injunctions prohibiting future speech to be unconstitutional in the US. Specifically, he considers *Type IV* injunctions involving future rather than past speech to be unconstitutional because they're ineffective: "Any effective injunction will be overbroad, and any limited injunction will be ineffective."<sup>69</sup> While I agree that *Type IV* injunctions may sometimes be ineffective, there are other situations in which the defendant is likely to repeat her libel, or in which a publication found to be defamatory should be taken down, and an injunction could be effective. Since I have suggested that *Type IIIb* injunctions are sometimes necessary and should therefore be permissible,

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67. Ardia, *supra* note 1 at 57, citing *Griffis v Luban*, No CX-01-1350, 2002 WL 338139, (Minn Ct App Mar 5, 2002).

68. Rendleman, *supra* note 8 at e.g. 675.

69. Chemerinsky, *supra* note 1 at 171.

that must also be true of narrower *Type IV* injunctions, under similar circumstances.

To be clear, such injunctions should not be ordered as a matter of course where there is a finding of liability. The usual remedy for defamation is damages, not injunctive relief.<sup>70</sup> However, *Type IV* orders are minimally impairing. The main risks are that the injunction was unnecessary, because there was no harm of repetition, or that the same words or imputations, when published in a different context, will no longer be defamatory. In the former case the injunction is unlikely to be breached, and so the only harm is a chilling effect, rather than subjecting the defendant to contempt proceedings.

The latter risk raises the issue of whether one should be found in contempt for repeating an imputation that was earlier found to be defamatory, but that is not actually defamatory in the context of the repetition. For example, if between the time the injunction was ordered and the imputation was repeated, it became clear that the imputation found to be defamatory was in fact true, the order would be breached though the second publication is not defamatory. In my view, such repetition does, but should not violate the order.

A way to avoid that outcome is to make it an implicit or explicit term of the order that the repetition itself be defamatory. This could complicate contempt proceedings since there may be uncertainty as to what is defamatory, and it could be said that the defendant had insufficient notice of what she was not allowed to say. However, given that publishing only particular imputations is enjoined, the risk accompanying such injunctions is small.

For *Type IV* injunctions, as for *Type IIb*, there should be a likelihood of repetition (i.e. necessity), damages should be inadequate, and there should be the prospect of serious reputational harm. Unpredictability in what kinds of allegations the defendant will make is not necessary with *Type IV* injunctions since the scope of such orders is limited to imputations found to be defamatory.

Some courts have framed the rule around permanent injunctions<sup>71</sup> in defamation as requiring a likelihood the libel will be repeated, despite

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70. The primacy of damages is reflected in the fact that there is an entitlement to damages, while equitable relief is discretionary. For equitable relief, the harm must be irreparable, which is another way of saying that damages must be inadequate. “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” (*London and Blackwell Rly Co v Cross*, (1886) 31 Ch D 354 per Lindley LJ, 2 TLR 231).

71. I refer only to permanent injunctions since *Type IV* will necessarily be permanent injunctions. Strictly speaking this is not true, as a temporary order could be made after a finding of liability. But

a finding of liability, or a “real possibility” the plaintiff will not recover damages.<sup>72</sup> I am opposed to the rule that permits anti-speech injunctions based solely on impecuniosity.<sup>73</sup> For present purposes, however, I will simply say that a likelihood of repetition, despite a finding of liability, should always be required. So too should serious and irreparable harm. Given the way that content on the internet can spread and be de-contextualized by search engines, internet publications will often satisfy these criteria for a *Type IV* takedown order. So too, of course, may offline publications.

*Type IV* injunctions made up 17/62 or 27 per cent of injunctions. For example, in *Awan v Levant*, the court ordered that: “[t]o the extent that I have found the words complained of to be defamatory, they should be taken down from the defendant’s website.”<sup>74</sup> While the judge seemed attuned to the need to avoid an overly broad order, there was no discussion of whether damages would have been an adequate remedy.

An example of a do-not-repeat *Type IV* order is that in *Nazerali v Mitchell* prohibiting the defendant from “publishing on the Internet or elsewhere the defamatory words described in paragraph 3 of the Reasons for Judgment herein...”<sup>75</sup> Note that the original injunction in *Nazerali* was a *Type IIb* (do not defame) order, but this was narrowed on appeal to a *Type IV* and, in addition, the geographical scope of the order was narrowed.<sup>76</sup> Other courts go beyond the specific defamatory words and enjoin publishing words with similar imputations to those found defamatory.<sup>77</sup>

Some courts explicitly acknowledge the need for an injunction due to a likelihood of repetition. For example, in *Cragg v Stephens* the court states: “I conclude that there is a reasonable apprehension that Ms. Stephens will continue with her campaign against the plaintiffs and continue to defame them.”<sup>78</sup> Even in such circumstances, however, a court should consider whether a finding of liability, perhaps with aggravated or punitive damages, would be a sufficient deterrent and whether the harm from the anticipated repetition justifies the use of injunctive relief.

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permanent injunctions are often considered those that reflect a decision on the merits, as opposed to interlocutory injunctions that are ordered before the merits are assessed.

72. *St. Lewis*, *supra* note 45 at para 13, citing *Astley v Verdun*, 2011 ONSC 3651 at para 21.

73. According to Chemerinsky: “there is a particular danger in allowing injunctions as a remedy in defamation cases because of the inadequacy of money damages,” *supra* note 1 at 170.

74. *Awan v Levant*, 2014 ONSC 6890 at para 214, *aff’d Awan v Levant*, 2016 ONCA 970.

75. *Nazerali v Mitchell*, 2018 BCCA 104 at para 117.

76. *Ibid* at paras 103-109.

77. *Eg Cragg v Stephens*, 2010 BCSC 1177 at para 40.

78. *Ibid*.

Finally, I wish to note one last reason for concern with regard to the scope of defamation injunctions. Because plaintiffs usually draft orders, there is a risk they will be inappropriately broad or vague unless opposing counsel objects to their scope. Unsurprisingly, then, the broadest orders seem to be made where defendants are self-represented or do not appear. For example, of the ten *Type I* (i.e. do-not-say-anything-about-the-plaintiff) injunctions in the data set, nine were ordered in cases with either a self-represented defendant or where there was default judgment. Almost three quarters (19/26) of *Type II* (do not defame) injunctions were ordered in cases in which the defendant was self-represented or there was default judgment. For *Type IV*, the narrowest and most justifiable injunctions, only about half (9/17) involved a self-represented defendant or default judgment. The numbers are small, and there is no evidence of statistical significance.<sup>79</sup> However, it would be unsurprising to find that injunction orders are more narrowly tailored where defence counsel is involved. To be sure, judges should not grant problematic orders even if there is no defence counsel, but that seems more likely to happen in the absence of an adversarial process. This suggests an even greater need for judges and lawyers to carefully consider the proper scope of injunctions.

### *Conclusion*

*Type I* injunctions, which prohibit saying anything about the plaintiff, are clearly overbroad and should never be ordered. Yet they make up 16 per cent of the injunctions in my study. *Type II*, which prohibit further defamation, raise two issues. The first is that they may prohibit lawful conduct by enjoining speech with defamatory meaning but that may be defensible. These are called *Type IIa* injunctions. There may also be ambiguity as to whether “defamatory” means “has a defamatory meaning” (*Type IIa*) or “satisfies the elements of defamation and no defences are made out” (which I call *Type IIb*). Assuming no ambiguity, *Type IIb* injunctions are less problematic, in that they do not proscribe lawful speech. However, they are vague in that they do not put the defendant on notice as to what counts as defamation. *Type II* injunctions were 26/62 (42 per cent) of the orders in the data set, with at least 7/62 (11 per cent) being *Type IIa* and 19/62 (31 per cent) *Type IIb* (or ambiguous as to whether *Type IIa* or *b*). It is admittedly difficult to craft a narrower and effective order in cases where defendants make a range of allegations. Yet in my view, this problem

79. A standard  $\chi^2$  test of the null hypothesis (that there is no correlation between the type of injunction and whether the defendant was self-represented or there was default judgment) was inconclusive.  $\chi^2(2, 53) = 4.361$ ,  $p = 0.1130$ . This means that there is no statistically significant relationship between type of injunction and type of representation if the 0.05 threshold is used.

only justifies the imposition of a *Type IIb* injunction where, in addition to necessity, there is a real risk of serious reputational harm. Otherwise, the preferable approach is to order damages and if the defendant continues to defame the plaintiff, to bring a new action. Many (47 per cent) of the *Type IIb* orders in the database were not ones in which a wide range of allegations had been made; they were ones in which a narrower injunction could have been crafted with little difficulty.

*Type III* orders, which prohibit saying x when x has not been found to be defamatory, are rarely if ever justifiable. They constituted 15 per cent of the data set. *Type IV* injunctions, which enjoin specific imputations found to be defamatory, are sometimes justifiable. This is particularly so if they are understood to require that the impugned speech be defamatory in the context in which it is repeated. Further, there must be reason to believe the defendant will continue to defame, despite a finding of liability, and this would cause serious and irreparable harm. 27 per cent of the injunctions in the data set were *Type IV*. The main conclusion of this article is that that number should be much closer to 100 per cent.

The apparent correlation between overly broad injunctions and self-representation or default judgment is worth investigating further as, if established, it would suggest that defendants' freedom of expression is impaired to a greater extent when they don't have legal counsel. And if established, it would be problematic, particularly given that some courts have stated that the inability to pay damages is a factor that could, on its own, justify a permanent injunction.

