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Permanent Injunctions in Defamation Actions

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Permanent injunctions prohibiting defamatory speech are increasingly sought and ordered following a finding of liability. This may seem unproblematic since a court will have found the particular speech to be unlawful—defamatory and likely false. However, there are good reasons to be cautious in permanently enjoining defamatory speech.

This article shows that courts have recognized a test for permanent injunctions in defamation cases based on a misinterpretation of the case law—a test which is inconsistent with first principles of equitable relief.

It then proposes a number of guidelines and principles for permanent injunctive relief in defamation actions. Most proposals relate to ensuring that an injunction is actually necessary to prevent future reputational harm, while some are more innovative and perhaps controversial, such as creating a serious harm requirement and precluding injunctions where comment rather than fact is at issue. It is also a plea to lawyers and especially judges not to be too quick to seek or impose injunctions simply because defamatory speech is published online.

Les injonctions permanentes interdisant les propos diffamatoires sont de plus en plus souvent demandées et ordonnées à la suite d'un constat de responsabilité. Cela ne semble pas poser de problème puisque le tribunal a estimé que les propos tenus étaient illégaux, diffamatoires et probablement faux. Cependant, il y a de bonnes raisons d'être prudent dans l'interdiction permanente des propos diffamatoires.

Cet article montre que les tribunaux ont reconnu un critère pour les injonctions permanentes dans les affaires de diffamation basé sur une interprétation erronée de la jurisprudence—un critère qui est incompatible avec les premiers principes de la réparation équitable.

Il propose ensuite un certain nombre de lignes directrices et de principes pour les injonctions permanentes dans les actions en diffamation. La plupart des propositions visent à garantir qu'une injonction est réellement nécessaire pour empêcher une atteinte future à la réputation, tandis que d'autres sont plus novatrices et peut-être controversées, comme la création d'une exigence de préjudice grave et l'exclusion des injonctions lorsque ce sont des commentaires plutôt que des faits qui sont en cause. Il s'agit également d'un appel aux avocats et surtout aux juges pour qu'ils ne soient pas trop prompts à demander ou à imposer des injonctions simplement parce que des propos diffamatoires sont publiés en ligne.

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Introduction

Defamation injunctions are meant to be exceptional—even after a finding of liability.¹ Yet in reading hundreds of defamation judgments, I was left with the impression that permanent injunctions were awarded quite often. This observation inspired the empirical and doctrinal study of permanent injunctions in defamation actions below.

It reveals that plaintiffs are increasingly requesting permanent injunctions and they are increasingly being granted, when such orders used to be rare. Between 1973 and 1983 there were 75 reported defamation decisions in which there was a finding of liability. Of these, only two (2.7 per cent) led to permanent injunctions being ordered.² (Though unrelated, both enjoined picketing banks.)

1. *Motoretta v Twist & Go Power Sports*, 2014 ONSC 2469 at para 5 [*Motoretta*]; *Newman et al v Halstead et al*, 2006 BCSC 65 at para 298 [*Newman*]. While quotes about defamation injunctions being exceptional often refer to interlocutory injunctions or are ambiguous as to whether permanent injunctions are included (see e.g. Robert Sharpe, *Injunctions and Specific Performance*, 5th ed (2017, Toronto: Thomson Reuters) [Sharpe, “Injunctions”] at 5.40; *Canada Metal Co Ltd et al v Canadian Broadcasting Corp et al* (1975), 7 OR (2d) 261, 55 DLR (3d) 42 at 261-262 (ONSC)), it is clear that permanent injunctions in defamation were at least historically exceptional. See Section II below.

2. *Canadian Imperial Bank of Commerce v Mitchell*, [1979] BCJ No 315 (BCSC) and *Bank of Montreal v Kamboukas*, [1979] BCJ No 1042 (BCSC). For more on the methodology used to select the cases from 1973–1983, see Hilary Young, “The Canadian Defamation Action: An Empirical Study” (2017) 95:3 Can Bar Rev 591, online: <canlii.ca/t/27t0> [perma.cc/ATP2-QMAP] [Young, “Empirical Study”].

But permanent injunctions in defamation are now fairly common. Of 136 reported cases between 2007–2017 in which there was a finding of liability, 29 (twenty-one per cent) led to permanent injunctive relief. That modest percentage, however, hides a more interesting finding. When it comes to publications involving digital technology (internet and email), permanent injunctive relief was ordered in forty-four per cent of cases in which there was liability. This compares to only six per cent of the time when the impugned publication was offline.³

This led me to examine more recent data with my research assistant, Maggie Washington. We found 74 cases between January 2018 and June 2022 in which permanent injunctions were ordered. 71/74 (ninety-six per cent) of these involved online publications or email. 62/74 involved internet, 24/74 involved email, and nine of these involved both. David Ardia noted a similar trend in the US: “nearly half [of defamation cases in which injunctions were granted] involved speech on the Internet.”⁴ Given that Ardia was writing in 2013, that percentage may well now be higher.

There are several reasons for the increase in defamation injunctions. First, the internet allows defamatory statements to remain publicly available in ways that print or broadcast media do not, such that injunctions are potentially more useful in preventing reputational harm than they used to be. Second, the test for permanent injunctions in defamation has become misstated in a way that makes them easier to obtain. Third—and this is simply an observed generalization based on reading hundreds of cases—judges have little patience when it comes to online libel and may undervalue more abstract and principled reasons not to grant such injunctions.

This has implications for freedom of expression, for the speaker and the audience, and exposes defendants to potential penal sanctions. After all, unlike committing the tort of defamation, disobeying an injunction can constitute either the quasi-criminal offence of civil contempt of court or the criminal offence of contempt of court.⁵ Both “rest on the power

3. These findings were drawn from data I collected for Young, “Empirical Study,” *supra* note 2. While the six per cent number is more than twice the 2.7 per cent figure from the 1973–1983 data, given the small numbers, there is no reason to think that difference is statistically significant. An increase in permanent injunctions has been noted in the US too. While it remains somewhat unclear whether defamation injunctions are ever constitutionally permissible in the United States, according to David Ardia, “a more permissive attitude toward injunctions is clearly emerging.” See David Ardia, “Freedom of Speech, Defamation and Injunctions” (2013) 55 *Wm & Mary L Rev* 1 at 8, online (pdf): <scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3494&context=wmlr> [perma.cc/7BS4-FVB2] [Ardia, “Freedom of Speech”].

4. Ardia, “Freedom of Speech,” *supra* note 3 at 43.

5. *Carey v Laiken*, 2015 SCC 17 at para 42: “civil contempt is always quasi-criminal.”

of the court to uphold its dignity and process.”⁶ Disobeying court orders not to defame can and does lead to jail sentences—although rarely.⁷ And disobeying the injunction is an offence regardless of whether the enjoined speech is otherwise unlawful. Therefore, defamation injunctions raise important free speech considerations.

Yet, despite the potentially very serious consequences of injunctions, they may better protect reputations than a damages award—especially if the words continue to be accessible and to do harm.

Given this increase in permanent injunctions enjoining online defamatory speech, I examine whether the appropriate balance is being struck. At first blush, it may seem unproblematic to order permanent injunctions where there has been a finding of liability in defamation. A court will have found particular speech to be unlawful (defamatory and likely false). It is so-called “low value” speech and few will mourn its absence from public discourse.

And yet there are important reasons to be cautious in enjoining defamatory speech. These are addressed in more detail below but include: the (quasi-) criminal penalties involved; the fact that (at least in principle) they involve state censorship rather than penalizing speech that has occurred; the difficulty of crafting injunctions that are not overbroad (and therefore proscribe lawful speech); and the fact that defamatory speech is not necessarily false or harmful—that is, it is not always and obviously speech that should be enjoined.

I begin by setting out general principles governing judges’ discretion to order permanent injunctions. Then I consider factors relevant to permanent injunctions in defamation actions specifically. Looking to case law, courts have recognized a *de facto* test for permanent injunctions in defamation cases based on a misinterpretation of the case law. That test makes injunctions easier to get. This doctrinal confusion is reason enough to reconsider the modern approach to permanent injunctions in defamation cases, but societal changes are also relevant. New communications technology is an obvious change—one that makes injunctions potentially more useful in preventing additional reputational harm. But society’s view of the importance of speech relative to reputation has changed too. Freedom of expression is now protected by the *Charter* and, in light of *Charter* values, courts and legislators have recently shifted the balance of defamation law away from reputation and toward freedom of expression.⁸

6. *UNA v Alberta (Attorney General)*, [1992] 1 SCR 901 at para 50, 89 DLR (4th) 609.

7. See *infra* note 107.

8. See *infra* note 120.

This modern context must also be considered when assessing when permanent injunctions should be ordered in defamation cases. Given all this, I propose a number of guidelines and principles for permanent injunctive relief in defamation. Most relate to ensuring that an injunction is actually necessary to prevent future reputational harm. This amounts to a return to first principles. But some proposals are more innovative and perhaps controversial, such as requiring likely *serious* harm and not enjoining comment, as opposed to statements of fact.

I. *Permanent injunctions generally*

An injunction is an equitable remedy and consists of an order to do or not to do something.⁹ Permanent injunctions are so-called because their effect tends to persist indefinitely, unlike interlocutory injunctions, which are generally only effective until the merits of a case have been decided. The more relevant distinction between permanent and interlocutory injunctions, however, is that the former generally enjoin conduct which has been found to be unlawful, while the latter enjoin conduct that has not yet been determined to be unlawful.

A finding of liability has not historically been enough to justify permanent injunctive relief, unlike damages, to which there is often an entitlement once liability is established.¹⁰

When a defendant is found liable for battery because she failed to obtain informed consent before operating on a patient, the court does not, as a matter of course, issue an injunction restraining the defendant from future batteries. When an employer is found liable for wrongful dismissal, the court does not, as a matter of course, issue an injunction restraining future wrongful dismissals by that employer. No less, where a court finds a defendant liable for defamation, the court does not, as a matter of course, issue an injunction to restrain future defamatory words.¹¹

So when *should* a permanent injunction be ordered? According to Berryman, for any injunction, “[t]he court must be satisfied, first, that there is a substantive cause of action or violation of the plaintiff’s rights; second, that substitutionary relief would not adequately vindicate those rights;

9. Jamie Cassels, “An Inconvenient Balance: The Injunction as a Charter Remedy” in Jeffrey Berryman, ed, *Remedies: Issues and Perspectives* (Scarborough: Thomson Professional Publishing, 1991) 271 at 273: “The injunction is an order of the court, backed by the contempt power, designed to preserve or restore the status quo in the face of a real or threatened wrong.”

10. There are, however, a number of judges who seem to think an injunction *should* simply follow from liability. See e.g. *Henderson v Pearlman*, [2009] OJ No 3444 at para 49, 179 ACWS (3d) 976 [*Henderson*]: “Having found that the language contained in the postings is defamatory, it follows then, and I order, that a permanent injunction should issue...”

11. *Motoretta*, *supra* note 1 at para 74.

and finally, that no discretionary factors incline against specific relief.”¹² According to the Court of Appeal of Newfoundland and Labrador (NLCA), in addition to liability (Berryman’s “violation of the plaintiff’s rights”), courts should consider: whether the wrongdoing is intended to recur; the existence of alternative remedies; discretionary equitable considerations (e.g. laches, clean hands, and acquiescence); whether terms should be imposed as a condition of obtaining an injunction; and what the scope of the order should be.¹³ The Supreme Court of Canada stated in *Equustek v Google*: “To obtain a permanent injunction, a party is required to establish: (1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court’s discretion to grant an injunction.”¹⁴ Further, “[i]t is axiomatic that injunctions will not lie where damages are an adequate remedy.”¹⁵

All three articulations invoke the concepts of unlawfulness, necessity, and discretionary factors. The NLCA’s reference to scope relates to the terms of the order, not whether one should be granted. I address it only briefly in this article as it was the subject of another article: “The Scope of Canadian Defamation Injunctions,” which showed that defamation injunctions are often unjustifiably broad.¹⁶ Terms as a condition of obtaining an injunction relate to undertakings or other steps that must be taken for an injunction to be ordered. These are unproblematic and are not discussed further. Unlawfulness, necessity, and discretionary factors require elaboration.

1. *Unlawfulness*

There is some uncertainty as to whether a permanent injunction may only enjoin unlawful conduct, though recent case law suggests that is the case. While “[t]he powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited”¹⁷ and are often framed in terms of courts having jurisdiction to order injunctions

12. Jeffrey Berryman, *Remedies: Cases and Materials*, 8th ed (Toronto: Emond Montgomery, 2020) at 554 [Berryman, “Remedies”].

13. Sharpe, “Injunctions,” *supra* note 1 at 1.45, citing *Nalcor Energy v NunatuKavut Community Council Inc*, 2014 NLCA 46 at para 72 [Nalcor].

14. *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 66 [Equustek].

15. *Motoretta*, *supra* note 1 at para 79. See also Lindley LJ in *London & Blackwall Railway Company v Cross*, (1886) 31 Ch D 354 at 369, 55 LJ Ch 313 [London & Blackwall]: “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.”

16. Hilary Young, “The Scope of Canadian Defamation Injunctions” (2021) 44:1 Dal LJ 285, online (pdf): <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2168&context=dlj> [perma.cc/YU8Q-3ZB7] [Young, “Scope”].

17. Ian Spry, *The Principles of Equitable Remedies*, 9th ed (Australia: Lawbook Company, 2014) at 333, as cited in *Equustek*, *supra* note 14 at para 23.

where “just and convenient,” that “does not constitute a mandate to award injunctions in the absence of a substantive right, however appealing the plaintiff’s case may seem or however ‘just and convenient’ an injunction may be.”¹⁸

The issue isn’t *liability* but rather whether the conduct is unlawful. Quia timet (because he fears) injunctions don’t require actual liability, since the harm hasn’t yet crystalized, but an injunction can be ordered as “an illustration of the rule that prevention is better than cure.”¹⁹ And that order may well be permanent. The issue is whether “the relevant factors which bear upon the granting of injunctive relief have crystallized.”²⁰

That said, some sources suggest even aside from the issue of harm not yet having been suffered, there is no rule that only unlawful conduct may be enjoined: “An injunction may govern a defendant’s conduct that the civil law does not.”²¹ According to the US 7th Circuit: “[t]he district court may even enjoin certain otherwise lawful conduct when the defendant’s conduct has demonstrated that prohibiting only unlawful conduct would not effectively protect the plaintiff’s rights against future encroachment.”²² While this is a US source, I think few would doubt that a court could order a broad injunction if a narrower one were not sufficient to protect a plaintiff’s rights, but the broader one prohibited what would otherwise be lawful conduct. It seems that a permanent injunction must be necessary to protect a party from unlawful conduct, but this does not mean that only unlawful conduct may be enjoined. Note also that the conduct of non-parties can be permanently enjoined.²³

18. *Nalcor*, *supra* note 13 at para 47, citing Robert J Sharpe, *Injunctions and Specific Performance*, (Toronto: Canada Law Book, 1992) (loose-leaf updated 2013, release 22) at 1–57 and *Day v Brownrigg* (1878), 10 Ch D 294, per James LJ at 307. See also *Henderson*, *supra* note 10 and *Rainy River (Town) v Olsen*, 2017 ONCA 605 at para 6 [*Rainy River*]: “Such injunctions are not at large... but are invariably linked to a finding that defamation has occurred.”

19. *Anderson-Berry, In Re, Harris v Griffith*, [1928] Ch 290 (CA) at 307 per Sargant LJ [*Anderson-Berry*].

20. Sharpe, “Injunctions,” *supra* note 1 at 1.750.

21. Doug Rendleman, “The Defamation Injunction Meets the Prior Restraint Doctrine” (2019) 56 San Diego L Rev 615 at 672, online (pdf): <scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1582&context=wlufac> [perma.cc/NE3M-YV2U] [Rendleman, “Prior Restraint”]. Rendleman cites the example of “a buffer-zone injunction around an abortion clinic that forbids defendants picketing... In the absence of the injunction, the defendants’ picketing would be protected free expression.”

22. *Russian Media Grp, LLC v Cable Am, Inc*, 598 F(3d) 302 at 307 (7th Cir 2010). See also *1711811 Ontario Ltd v Buckley Insurance Brokers Ltd*, 2014 ONCA 125 at para 101, where the court refers to the need for a particular proceeding as “a matter of substance” rather than form, which creates a framework for adjudication of the injunction issue.

23. See e.g. *Equustek*, *supra* note 14 at para 31.

This is relevant to the discussion below of whether liability is necessary for permanent injunctions in defamation and to whether the speech to be enjoined must itself be unlawful.

2. *Necessity*

“Those countries which derive their law from the common law tradition have a marked preference for money awards. Equity remedies rank second.”²⁴ Damages are the preferred remedy. This is the hierarchical approach to remedies.

Thus, judges must “determine the adequacy of a remedy in law [that is, damages] before resorting to equitable relief.”²⁵ So long as damages are an adequate remedy, an injunction should not be ordered. In this sense, an injunction must be necessary.

The primacy of damages is related to the concept of irreparable harm.²⁶ Irreparable harm is “harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.”²⁷ If damages are an adequate remedy, harm is not irreparable.

Irreparable harm is notoriously difficult to define.²⁸ It relates to the nature rather than the extent of harm.²⁹ But the value of any harm, including death,³⁰ can be quantified, if imperfectly, so this definition is not very helpful.³¹

24. Grant Hammond, “Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies” in Jeffrey Berryman, ed, *Remedies: Issues and Perspectives* (Scarborough: Carswell, 1991) 87 at 93-94. See also *London & Blackwall*, *supra* note 15 at 369, per Lindley LJ: “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.”

25. Ardia, “Freedom of Speech,” *supra* note 3 at 15, citing *Franklin v Gwinnett County Pub Sch*, 503 US 60 at 75-76 (1992).

26. Berryman, “Remedies,” *supra* note 12 at 554: “[T]he plaintiff must demonstrate that irreparable harm would be suffered if specific relief were not granted.”

27. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at para 59, [1994] SCJ No 17 [RJR].

28. See e.g. Douglas Laycock’s critique in Douglas Laycock, “The Death of the Irreparable Injury Rule” (1990) 103:3 Harv L Rev 687; David Crerar, “The Death of the Irreparable Injury Rule in Canada,” (1998) 36 Alta L Rev 957, DOI: <doi.org/10.29173/alr1484>; PM Perell, “The Interlocutory Injunction and Irreparable Harm” (1989) 68 Can Bar Rev 538, online (pdf): <cbr.cba.org/index.php/cbr/article/view/3452/3445> [perma.cc/Z7UF-7D99].

29. *RJR*, *supra* note 27 at para 79. Although *RJR* deals with interlocutory injunctions, all injunctions require that damages be an inadequate remedy.

30. See Perell, *supra* note 28 at 559: “in tort claims for wrongful death, damages are awarded for truly irreparable harm or injury.”

31. Crerar, *supra* note 28 at para 43: “the phrase ‘irreparable injury’ suffers from an ambiguous myriad of meanings, rendering its utility negligible.” Further, courts in different jurisdictions appear to address the issue differently. BC courts more readily consider harm to be irreparable while the Federal Court is much less inclined to make that determination. See Edward Babin, Cynthia Spry & Clifford Jackman, “Injunctions in Misleading Advertising Cases” (2011) 24:1 Can Competition L Rev 69 at 72.

Another issue with irreparable harm is whether the defendant's inability (or unwillingness) to pay renders an injury irreparable. The quote above suggests it does: "...or which cannot be cured, usually because one party cannot collect damages from the other."³² That is, even assuming damages were an adequate remedy, where it is clear that no damages will be paid, a prospective injury may be considered irreparable. Yet, as discussed below, this is controversial.

And while the preference for damages over injunctions is well-established, there is a contradictory preference for preventing harm rather than providing compensation; *quia timet* injunctions are justified on the basis that "prevention is better than cure."³³

In any event, the hierarchical approach has been persuasively criticized by remedies scholars:

a "non-hierarchical" scheme governing the selection of remedies, dependent on the relative advantages and disadvantages of each in the given substantive law context, with no presumptions favouring one remedy over the other, is to be preferred.³⁴

Grant Hammond has argued that "the remedial hierarchy is still the greatest constraint on a more responsive system of judicial remedies."³⁵ The hierarchy is a hangover from before the merger of law and equity and now seems hard to justify. This matters because if remedies are hierarchical, all things being equal it is harder to get injunctions. If they are not hierarchical and there is no reason *a priori* to prefer damages over an injunction, injunctions would be relatively more available. This is sensible in principle and largely avoids unproductive debates about when damages are an adequate remedy.

The discussion of irreparable harm sometimes disguises the fact that we are dealing with two different issues: one relates to the best remedy for a loss that has already occurred (generally damages, since the harm is done and injunction would not change that). The other relates to whether and how to use the courts' equitable jurisdiction to prevent future harm. Some future harms are economic and damages are as good as an injunction. In such cases there isn't much justification for restricting a defendant's freedom. For example, if a company wants to breach a contract, for reasons of efficiency, and pay damages, there is no reason for a court to

32. *RJR*, *supra* note 27 at para 59.

33. *Anderson-Berry*, *supra* note 19 at 307, Sargent LJ.

34. Sharpe, "Injunctions," *supra* note 1 at 1.90.

35. Hammond, *supra* note 24 at 93.

enjoin efficient breach. But where personal injury, for example, could be prevented by injunction, this may be warranted.

There are other aspects of necessity that are less problematic. The Newfoundland Court of Appeal's reference to whether the wrong is likely to recur relates to necessity. If it isn't likely, ordering the defendant not to commit that wrong does not prevent *any* injury, let alone an irreparable one. (Though in the defamation context a publication can be ongoing, causing further harm if nothing is done.) Courts should not restrict people's liberties for no good reason.

Also implicit in the idea of necessity is that an injunction would be effective. If it can't be effective, the restriction of liberties serves no purpose. Courts have held that the fact that an injunction would be ineffective is a reason for not ordering it: "A court of equity will not do a useless thing."³⁶

For example, the Ontario Court of Appeal noted in *Barrick Gold v Lopehandia* that:

Equity...acts in personam and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction...³⁷

But this is discretionary: there is no bar on ineffective injunctions. In *Barrick Gold* itself, the judges were not convinced by the ineffectiveness argument—they were not willing to simply “throw up their collective hands in despair”—and ordered a permanent injunction.³⁸

Thus, while the inadequacy of damages is regularly cited as a precondition for equitable relief, that preference for damages has been questioned and the concept of inadequacy has proved difficult to apply. More certain is that there must be some realistic prospect that the harm sought to be avoided will occur, and perhaps also that an injunction would be effective in preventing it.

36. *NY Times Co v United States*, 403 US 713 at 744 (1971) per Marshall J. See also *Equustek*, *supra* note 14 at para 77 (per Côté and Rowe JJ, dissenting): “A court may decline to grant an injunction on the basis that it would be futile or ineffective in achieving the purpose for which it is sought...” See also Hammond, *supra* note 24 at 93: “The court will not get into a position where its dignity might be seen to be impaired by trying to enforce a (suggested) impossibility.”

37. *Barrick Gold Corp v Lopehandia*, 71 OR (3d) 416, [2004] OJ No 2329 (ONCA) at para 73 [*Barrick Gold*] citing Robert Sharpe, *Injunctions and Specific Performance*, loose-leaf edition (Toronto: Canada Law Book, 2012), at 1-54 to 1-55.

38. *Barrick Gold*, *supra* note 37 at para 75.

3. *Discretionary Factors*

Discretionary factors help determine whether an injunction should be ordered. Berryman phrased it as “no discretionary factors incline against specific relief,” the Supreme Court of Canada referred to there being “no impediment to the court’s discretion to grant an injunction,” while the NLCA referred to “equitable discretionary considerations.”

Equitable remedies such as injunctions are always discretionary; they are not available as of right, as damages are.³⁹ In practice this means that a wide range of factors can be considered. Some, like clean hands and laches (delay) are conventional. But anything relevant may be considered. This includes whether an injunction would prevent the finality of the action or require the court’s ongoing supervision; efficiency; benefits and burdens for both parties; and the public interest.⁴⁰ The NLCA’s reference to preconditions can be added here: to achieve equity, courts may, as a matter of discretion, impose conditions on injunctive relief.

Thus, a wide range of factors, including the public interest, can and should shape the approach to defamation injunctions.

II. *Considerations specific to defamation actions*

As with defamation law generally, deciding whether to order defamation injunctions requires balancing interests in freedom of expression and reputation, including public interests in both. Because defamation injunctions aim to prevent future reputational harm, unlike damages awards that compensate for harm already done, it raises censorship concerns that damages awards do not. A court will either order already published words to be removed from further view, as where a billboard is ordered taken down or a website ordered removed from the internet, or will prohibit the future publication of words. This censorship, while perhaps justified in order to protect reputation, raises special freedom of expression concerns: “It is one thing for the law to impose consequences, civil or criminal, in the case of an abuse of the right of free speech. It is another matter for a court to interfere with the right of free speech by prior restraint.”⁴¹

In this section I first describe four different kinds of defamation injunctions, explaining issues specific to each. I raise freedom of expression reasons why courts should be cautious in enjoining defamatory speech. Some relate to concerns about prior restraint of speech generally, while others are specific to the law of defamation. I then consider the reputational

39. Berryman, “Remedies,” *supra* note 12 at 555.

40. See e.g. Berryman, “Remedies,” *supra* note 12.

41. *Australian Broadcasting Corporation v O’Neill*, (2006) 227 CLR 57, (2006) 229 ALR 457 (HCA) at para 32.

interest that is balanced against freedom of expression interests when deciding whether an injunction is appropriate.

The first kind of defamation injunction involves making words, which have already been published and found to be defamatory, inaccessible. This could require either the defendant or a third party to take steps.⁴² Though these do not always involve the internet (as with the billboard example above), for simplicity I refer to these as “takedown” orders. For example, a court may order a defendant to remove a defamatory product review from a website.

The second type enjoins the repetition of words or imputations that were published in the past and found to be defamatory. I call these “do-not-repeat” orders. For example, an employer who wrongly accused her employee of stealing from the company might be enjoined from repeating any words suggesting the plaintiff did, in fact, steal from the company.

The third type enjoins saying things in the future that have not previously been found to be defamatory. These can enjoin specific words that weren’t the subject of adjudication on the merits or can simply be orders not to further defame the plaintiff. I call these “do-not-defame” orders. For example, in the situation with an employer’s allegations of theft above, if the employer instead alleged a wide range of criminal conduct, it might not be effective only to enjoin the repetition of specific accusations made in the past. Instead, a broader injunction may be appropriate, enjoining any allegation of criminality or any further defamation of the plaintiff.

The fourth type of order is de-indexing, which involves de-linking URLs from search engine results of a person’s name. For example, where a foreign website is unwilling to remove defamatory content, a judge could order Google to alter its search engine results so that the offending URL is not included in search results for the plaintiff’s name on google.ca. However, since the site itself is not taken down, it can be found through other means, including a Google search using different search terms.

Other kinds of injunctions may be available. For example, site blocking has been ordered in intellectual property cases.⁴³ A site blocking order requires internet service providers to make URLs inaccessible to their customers. Because, to my knowledge, one has never been ordered in a defamation case, and because site blocking orders raise some of the same concerns as other kinds of orders, I don’t discuss them further.

42. For example, the England and Wales *Defamation Act 2013* (UK), c 26, s 13 [*UK Defamation Act*] provides specifically for operators of websites to remove content.

43. See e.g. *Teksavvy Solutions Inc v Bell Media Inc*, 2021 FCA 100.

All things being equal, takedown orders are less speech-infringing than do-not-repeat orders or do-not-defame orders. The former relate to a wrong that has already occurred and will continue absent intervention, and whose wrongfulness and effect can be reasonably well determined at the time the injunction is ordered. The latter involve prior restraint: “restricting speech in advance of its dissemination on the basis of content.”⁴⁴

Prior restraint is problematic for several reasons. Most importantly, a government with the power of prior restraint can immunize itself against criticism and stamp out opposition. Libel injunctions were once impermissible in large part because they involve “attempting to exercise a power of preventive justice which... cannot safely be entrusted to any tribunal consistently with the principles of a free government.”⁴⁵

What’s more, the potential for getting it wrong and enjoining lawful speech is greater with prior restraint. Do-not-repeat and do-not-defame injunctions require courts to censor despite uncertainty as to whether the defendant will defame again, what words will be used, their context and their audience. There is therefore a danger of either an unnecessary or an overly broad injunction that enjoins lawful as well as unlawful speech.

Even do-not-repeat orders, where the words have already been found to be unlawful, amount to prior restraint and should be approached with caution. After all, the context of publication is not known. The nature of the publication or its audience matter to whether a repetition of even the same words is defamatory and to the degree of reputational injury. As Professor Volokh notes, “[u]ntrue statements may later become true; unprivileged statements may later become privileged’... [A] statement may be libelous in one context but hyperbole in another. Yet an injunction simply barring repeating a statement will prohibit the statement regardless of context.”⁴⁶

Thus, according to the Quebec Court of Appeal, “[a]pplications for orders involving prior restraint of future comments or publications, the content of which are unknown, must obviously be viewed with the greatest of caution.”⁴⁷ Here the uncertainty is at its greatest, both for the court,

44. Nisha Chandran, “Crossing the Line: When Cyberbullying Prevention Operates as a Prior Restraint on Student Speech” (2016) U Illinois JL Technology & Policy 277 at 291, citing *Taylor v Roswell Indep Sch Dist*, 713 F (3d) 25 at 42 (10th Cir 2013).

45. *Brandreth v Lance*, 8 Paige Ch 24 (1839 NY) at 26, as cited in Ardia, “Freedom of Speech,” *supra* note 3 at 19.

46. Eugene Volokh, “Anti-Libel Injunctions” (2019) 168 U Pa L Rev 72 at 98-99, online: <www2.law.ucla.edu/volokh/libelinj.pdf> [perma.cc/6EVC-7GP7], citing *Kinney v Barnes*, 443 SW(3d) 87 at 98 (TX Sup Ct 2014).

47. *Chapagne c Collège d’enseignement général at professionnel de Jonquière*, [1997] RJQ 2395, [1997] JQ No 2863 (QC CA), Rothman JA. Rothman cited English cases in support, including Lord Denning in *Woodward v Hutchins* [1977] 2 All ER (EN CA) at 754-755.

which cannot anticipate the relevant words or context and therefore the harm that risks being done, and for the speaker, whose speech may be overly chilled by uncertainty surrounding what is, in fact, proscribed by the injunction.

That said, do-not-repeat orders are easier to justify—again, all things being equal—than do-not-defame orders, which are effectively *quia timet*. *Quia timet* (because one fears) injunctions are ones ordered before anticipated harm is suffered. The threshold for getting them is high because of “problems of prediction.” Courts have taken a “cautious approach” to *quia timet* injunctions: “there must be a high degree of probability that the harm will in fact occur.”⁴⁸ Do-not-defame orders are *quia timet* because the relevant harm has not yet occurred. Thus, the Supreme Court of California noted that: “[p]rohibiting a person from making a statement or publishing a writing before that statement is spoken or the writing is published is far different from prohibiting a defendant from repeating a statement or republishing a writing that has been determined at trial to be defamatory and, thus, unlawful.”⁴⁹

While I have given reasons why prior restraint should be avoided unless necessary, some have criticized the idea that enjoining speech is fundamentally different from holding people accountable for their speech after the fact. In both cases the penalty is likely to be monetary, since few people are jailed for contempt of court, and nothing will happen unless and until the unlawful words are published.⁵⁰

Yet to my mind the distinction is real and important. Not only is there a lengthy history of governments abusing the power of state censorship, but with prior restraint the enjoined speech is not susceptible to public scrutiny or debate. The words being proscribed will tend to be much broader than actual words already spoken, which are then subject to liability for damages.⁵¹ Finally, while it may be true that penal sanctions for contempt are relatively rare, they are sometimes ordered. What’s more, the offence is having violated the injunction, *not* having said something otherwise illegal. So in principle it is possible to be held in contempt of court for saying something that would be perfectly legal but for the

48. Sharpe, “Injunctions,” *supra* note 1 at 1.660–1.815.

49. *Balboa Island Village Inn v Lemen*, 156 P (3d) 339 at 344-345 (CA Sup Ct 2007), cited by Ardia, “Freedom of Speech,” *supra* note 3 at 49.

50. See Ardia, “Freedom of Speech,” *supra* note 3 at 34-38. See also John Golden, “Injunctions as More (or Less) than ‘Off Switches’: Patent-Infringement Injunctions Scope” (2012) 90 Texas L Rev 1399 at 1471, online (pdf): <texaslawreview.org/wp-content/uploads/2015/08/Golden-90-TLR-1399.pdf> [perma.cc/C59L-WCF5].

51. See Young, “Scope,” *supra* note 16, which discusses the tendency of defamation injunctions to be overbroad.

injunction. None of this is to say that prior restraint, by way of enjoining defamatory speech, should never be permissible. However, the threshold of justification should be high.

The fourth type of injunction, de-indexing, involves words that have already been published and so the prior restraint concerns don't arise. Nor do they involve censorship per se, since the publication is not being taken down. While it should not be undertaken lightly, manipulating search engine results can be justified.⁵² Where defamatory words have spread on the internet and it is impossible or impractical to have the source content taken down, de-indexing can minimize reputational harm.

From a free speech perspective, de-indexing requires enjoining the speech of non-parties—the search engines themselves—who have not been proven to have done anything wrong. However, search engines maintain that the speech in question is not theirs—that they are simply intermediaries or facilitators.⁵³ So long as the de-indexed sites contain unlawful speech, search engines like Google have been willing to de-index—often without the need for an injunction.⁵⁴

One problem with de-indexing is that it applies to URLs rather than to specific words. There is therefore a risk that de-indexing orders are overbroad because they hinder access to entire web pages rather than being narrowly targeted to the specific words at issue. On the other hand, they can be less speech-infringing than takedown orders or orders not to repeat because they do not make the URLs completely inaccessible; they only de-link them from searches of the plaintiff's name.

The discussion above relates to concerns about prior restraint and different kinds of freedom of expression concerns associated with different kinds of defamation injunctions. My next point addresses a distinct freedom of expression concern about defamation injunctions. Some argue

52. See e.g. Eric Posner “We All Have a Right to Be Forgotten,” *Slate* (14 May 2014), online: <slate.com/news-and-politics/2014/05/the-european-right-to-be-forgotten-is-just-what-the-internet-needs.html> [perma.cc/6KK8-M26S]. Also note that new non-consensual disclosure of intimate images laws explicitly provide for de-indexing as a remedy. See *Intimate Images Unlawful Distribution Act*, SNB 2022, c 1, ss 5(2)(iii), 6(2)(iii); *Intimate Images Protection Act*, RSPEI 1988, c I-9.1, ss 5.1(3)(b)(iii), 5.1(3)(c), 5.2(3)(b)(iii), 5.2(3)(c).

53. See *Niemela v Malamas*, 2015 BCSC 1024 at para 107 [*Niemela*], where Google argued that it was not a publisher of its algorithm-generated snippets, and the Supreme Court of British Columbia agreed. See also *Metropolitan International Schools Ltd v Designtecnica Corpn*, [2009] EWHC 1765, [2011] 1 WLR 1743 (QB).

54. See e.g. *Niemela*, *supra* note 53 at para 8. See also Google Legal Help, “Frequently Asked Questions: Court Orders” (2023), online: <https://support.google.com/legal/answer/3463369?sjid=13112803151753600122-NA> [perma.cc/4CAE-9WX8]; “If a court has ruled that web pages in Google’s search results...is unlawful, you can submit the order through our troubleshooter for our review... We may voluntarily remove the content from our services if provided with specific URLs and if the terms of the court order indicate that the content violates the law.”

that because defamation consists of injurious lies it is low value speech that can unproblematically be enjoined.⁵⁵ But there are several reasons to resist this conclusion.

First, even false and harmful speech has value.⁵⁶ Further, when defamatory speech is enjoined, it is not only the interests of the parties to a defamation action that are affected, but also those of the public as a whole, which has an interest in receiving a range of speech, including false speech.⁵⁷ The low value of defamatory speech may justify requiring the defendant to compensate the plaintiff but censoring is another matter. Yet these are perhaps not strong reasons for refusing injunctions where serious reputational harm would otherwise result from publications found to be defamatory.

More convincing, in my view, is that liability does not necessarily mean the words are false or injurious, and if they are not both false and injurious then they are not wrongful or necessarily of low value. A finding of liability *should* mean that the relevant speech is both false and injurious because the law requires both.⁵⁸ However, both injury and falsity are presumed.

In Canada, injury is irrefutably presumed from the defamatory nature of the publication, unlike in England where *serious* harm must be affirmatively proven.⁵⁹ It is certainly possible, indeed in my view not uncommon, for speech that is found to be defamatory *not* to be

55. Although not discussing injunctions, Cory J had the following to say about defamatory speech in *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC)1130 at para 106 [*Hill*]: “Certainly, defamatory statements are very tenuously related to the core values which underlie s. 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance selfdevelopment. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.”

56. *Grant v Torstar Corp*, 2009 SCC 61 at para 30 [*Grant*], citing *Toogood v Spyring* (1834), 1 CM & R 181, 149 ER 1044 at 1050: “The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.” See also paras 51-52, where the court notes that two of the three rationales for freedom of expression—democratic governance and the pursuit of truth—are advanced by even false statements if they are about matters of public interest.

57. Some argue, for example, that being exposed to falsehoods is necessary to develop critical thinking and to be able to discern truth from lies, or that truth will emerge when lies and truth compete in the marketplace of ideas. See Cass Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (2021, New York: Oxford University Press) at ch 5.

58. *Hill*, *supra* note 55 at para 137: “The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements.” Note that I am assuming a factual statement rather than comment. Where the relevant speech is comment, the issue is “fairness,” in the sense used in the fair comment defence, rather than truth.

59. *UK Defamation Act*, *supra* note 42, s 1.

injurious, particularly given courts' tendency to mistakenly equate what is disparaging with what is defamatory.⁶⁰

Defamation law also presumes the falsity of the impugned publication, though this may be rebutted through the defence of justification, or truth. Nevertheless, there may be liability in relation to true statements because defendants cannot prove the truth of their assertions years later at trial. The Supreme Court of Canada acknowledged this in *Grant v Torstar* and considered this a reason to create a new responsible communication defence.⁶¹ However, that defence is of questionable utility outside the context of journalism.⁶²

There may also be liability in relation to true statements because the onus of proving truth is on the defendant, and rates of default judgment and self-representation are relatively high. In reviewing all reported cases between 2003 and 2013, I found that defendants were self-represented in 50 of 475 cases (10.5 per cent) and didn't appear (default judgment) in an additional 27 cases (5.7 per cent).⁶³ As more cases involve the internet, rather than professional publishers and other insured defendants, and as the cost of access to justice increases, the percentage of self-represented defamation litigants will presumably increase. Supporting this, my research assistant and I found that of 74 cases in which a permanent injunction was granted between 2018 and June 2022, 68 (ninety-two per cent) involved either a self-represented defendant (45/74 = sixty-one per cent) or default

60. For example, calling Paul Bernardo a murderer is not defamatory, in the sense of making an ordinary person think less of him, because people already know he is a murderer. The fact that it is also a *true* statement is a separate issue. See Hilary Young, "But Names Won't Necessarily Hurt Me: Considering the Effect of Disparaging Statements on Reputation" (2011) 37 Queen's LJ 1, online (pdf): <journal.queenslaw.ca/sites/qljwww/files/Issues/Vol%2037/1.%20Young.pdf> [perma.cc/256P-RWJL] [Young, "Names"], where I wrote about the tendency to treat disparaging statements as defamatory, regardless of their tendency to cause reputational harm.

61. See e.g. *Grant*, *supra* note 56 at para 56. The court cites Denis Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997), 22 Queen's LJ 229 at 270:

Those who argue that false and defamatory publications have a weak claim to *Charter* protection omit to mention that it is only at trial, usually several years after publication, that a trier of fact determines whether a defence of justification is well founded. Moreover, it is only then that the defamatory nature of the publication is assessed. *Surely freedom of expression encompasses more than statements which, after the fact, are either proven factually accurate or do not injure someone's reputation.* [Emphasis added by SCC.]

62. See Hilary Young, "'Anyone...in Any Medium?': The Scope of Canada's Responsible Communication Defence," in Andrew Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 17.

63. The methodology for these findings is the same as in Young, "Empirical Study," *supra* note 2. The numbers of cases are different because I subtracted from the total any cases in which it wasn't clear whether the party was represented.

judgment (23/73 = thirty-one per cent). And ninety-six per cent of those 74 cases involved internet or email publication.

All of this means that a finding of liability does not necessarily suggest that the relevant imputation is false. One peer reviewer suggested that it raises *res judicata* issues to question whether a defamatory statement is, in fact, false, when a trier of fact has found it to be. But I am not suggesting the matter could be relitigated. I am simply suggesting that the structure of defamation law, which concerns itself with false and injurious speech, permits liability without affirmative proof of either. If speech is not both false and injurious, it shouldn't be enjoined.⁶⁴

In summary, when contemplating defamation injunctions, protecting freedom of expression is obviously important, with prior restraint being particularly problematic. Different kinds of defamation injunctions raise different free speech issues.

Reputation is also fundamentally important, not only for the individual who possesses it, but for the public, which relies on people's reputations in deciding how to interact with them.⁶⁵ Defamation law, with its plaintiff-friendly presumptions of falsity and of harm, reflects the law's recognition of the importance of reputation. Reputation implicates human dignity and has been granted "quasi-constitutional" status.⁶⁶

Nevertheless, there is debate as to whether reputational harm is irreparable. Of course, the answer depends on the facts of each case, but there are different approaches in principle. On the one hand, damages are the usual remedy for libel. Injunctions are exceptional. Historically, the very high threshold for getting defamation injunctions rested not only on the importance of freedom of expression but also on the belief that reputation could be vindicated through liability and an award of damages.⁶⁷

64. *Bonnard v Perryman*, [1891] 2 Ch 269 at 284: "[U]nless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

65. Ardia has referred to reputation as a "quintessential public good" and notes that "injuries to reputation are not borne exclusively, or even primarily, by the affected individual" in David Ardia, "Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law" (2010) 45 Harv CR-CLL Rev 261 at 262, online (pdf): <harvardcrcl.org/wp-content/uploads/sites/10/2009/06/261-328.pdf> [perma.cc/L3WJ-KCTQ] [Ardia, "Reputation"].

66. *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18 at para 57: "While the constitutional right to the protection of freedom of expression must be upheld in the crafting of the law of defamation, this Court has recognized that one of the primary purposes of the law of defamation is to protect the reputation of the individual, which was elevated to quasi-constitutional status in *Hill v Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130."

67. See e.g. David Rolph, "Vindicating Reputation and Privacy" in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 291

This is in contrast to an invasion of privacy which is more readily enjoined because it is thought that such an injury, once done, cannot be undone.⁶⁸ Canadian courts have therefore sometimes refused to find that harm to reputation is irreparable.⁶⁹

On the other hand, reputational harms are intangible and often relate to dignity. Dignitary harms are more likely to be viewed as irreparable by an award of damages.⁷⁰ Referring to damages and criminal prosecution for libel as “grossly inadequate,” Douglas Laycock states that “damages cannot replace a reputation once lost or erase emotional distress once suffered.”⁷¹ David Ardia views damages as “an especially inadequate remedy for defamation.”⁷² On that basis, “[t]he irreparable injury rule is not a significant barrier to equitable relief [in defamation cases], because the legal remedy is almost never adequate.”⁷³ David Rolph also criticizes the view that reputational injuries are repairable and privacy-related injuries irreparable, therefore justifying very different approaches to injunctions in defamation and privacy cases.⁷⁴

The best approach is not to focus on the question of irreparable harm per se but rather to abandon the strict hierarchical approach that prefers damages over an injunction. Then, as discussed below, the focus would be on whether the injunction is necessary to prevent significant harm to reputation.

III. *How courts approach permanent injunctions in defamation actions*

Given the principles underlying permanent injunctive relief, discussed in Section I, and issues involved in appropriately balancing freedom of expression and protecting reputation, discussed in Section II, it is surprising how Canadian courts approach permanent defamation injunctions.

[Rolph, “Reputation and Privacy”]. See also Halsbury’s Laws of Canada (online), *Defamation*, “Remedies: Injunctions” (IV.3) at HDE-227 “Judicial Reluctance to Grant Defamation Actions” (Cum Supp 2021 Release 25): “the concern for freedom of speech and the press in defamation cases has also led courts to more readily accept that the plaintiff may be adequately compensated in damages if a wrong has been done. A court may take the view that unless the defamation complained of is particularly grave, an award of damages will be an adequate remedy.”

68. See Rolph, “Reputation and Privacy,” *supra* note 67.

69. Crerar, *supra* note 28 at para 46, citing *General Mills Canada Ltd v Maple Leaf Mills Ltd*, [1980] OJ No 1616, 52 CPR (2d) 218 (ON Sup Ct), *Unitel Communications Inc v Bell Canada* (1994), 17 BLR (2d) 63, 29 CPC (3d) 159 (ON Ct J (Gen Div)).

70. Laycock, *supra* note 28 at 707-709. Laycock refers to injunctions being available where intangible rights are at stake.

71. *Ibid* at 744.

72. Ardia, “Freedom of Speech,” *supra* note 3 at 16.

73. Laycock, *supra* note 28 at 768.

74. Rolph, “Reputation and Privacy,” *supra* note 67.

We would expect the approach to be something like the following: a permanent injunction may be ordered only where necessary to prevent further reputational harm, considering the likelihood of such harm and perhaps the extent to which an award of damages would remedy that harm. Whether an order would be effective may be relevant, as are the importance of freedom of expression, the conduct of the parties etc. Permanent injunctive relief in defamation should be exceptional, though not to the extent that interlocutory injunctive relief in defamation is, since in that case the unlawfulness of the speech has not been established.⁷⁵ Do-not-defame orders should be particularly rare while takedown orders may more easily be justified.

Instead, in Canada, broad permanent injunctions, including do-not-defame orders, are effectively available when there is a prospect of further defamation or where the defendant won't pay damages. But before showing how we got there, I set out some historical and comparative context.

As noted above, there was a time, even after the merger of law and equity, when defamatory speech could not be enjoined. Period. "The no-injunction rule has been a fixture of Anglo-American law for more than three centuries."⁷⁶ In England and the US it was impermissible prior restraint on speech.⁷⁷ There were several reasons for this. These included concerns about prior restraint, jurisdiction, and the proper role of the jury.⁷⁸

Until recently, Americans doubted that permanent injunctions in defamation are *ever* constitutionally permissible—at least where the issue is prior restraint as opposed to what I have called takedown orders.⁷⁹ Yet while the US Supreme Court has never held that a defamation injunction is constitutional,⁸⁰ the "modern rule" in the US is that defamatory speech may be enjoined where the particular speech being enjoined has been found to be false and libelous.⁸¹ Whether it *should* be enjoined depends on additional factors.

In Australia, "permanent injunctions restraining a repetition of publication of matters found to be defamatory are not usually issued as

75. *Motoretta*, *supra* note 1 at para 5; *Newman*, *supra* note 1 at para 298.

76. Ardia, "Freedom of Speech," *supra* note 3 at 18.

77. Thomas Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumours* (London: W Clarke & Sons, 1813): "[C]ommunications concerning reputation cannot be [] prohibited," as cited in Ardia, "Freedom of Speech," *supra* note 3 at n 66.

78. See Sharpe, "Injunctions," *supra* note 1 at 5.40.

79. See Ardia, "Freedom of Speech," *supra* note 3 at 42.

80. *Ibid* at 39.

81. Ardia, "Reputation," *supra* note 65, citing *Hill v Petrotech Res Corp*, 325 SW (3d) 302 (KY Sup Ct 2010).

a matter of course.”⁸² Rather, “injunctions are issued only when some additional factor is evident, usually, an apprehension that the respondent may, by reason of irrationality, defiance, disrespect of the Court’s judgment or otherwise, publish allegations similar to those found to be defamatory unless restrained from doing so.”⁸³

The approach in England and Wales appears to be more permissive: the House of Lords has stated that: “It is normal for success in a defamation action to be accompanied by an injunction restraining the defendant tortfeasor from repeating the defamatory remarks.”⁸⁴

Canadian courts, like English ones, have long had “little hesitation in granting an injunction” after liability in defamation is established.⁸⁵ Some courts apply general principles of injunctive relief in such cases, while noting the importance of freedom of expression and the risks of prior restraint.⁸⁶ But a special test for permanent defamation injunctions has emerged. As a result, Canadian courts take a unique and problematic approach to permanent injunctions in defamation.

The starting point appears to be *Newman v Halstead* in 2006:

Injunctive relief is an exceptional remedy which will only be imposed by the courts in the clearest of cases. In my view, in a case such as this, where there is a likelihood that the publishing of defamatory statements will continue and where there is a real possibility that the plaintiffs will not actually be compensated by the payment of damages, injunctive relief must be carefully considered as a possible remedy.⁸⁷

The court then cited two cases—one from Saskatchewan and one from Ontario—in which both criteria were present and an injunction was ordered. This is consistent with general principles. The two factors are relevant. The likelihood of repetition relates to necessity to prevent future harm not readily quantifiable in damages. The inability to pay damages is more controversial as discussed below. But its relevance is its relationship to necessity and the sufficiency of damages: damages are not an adequate remedy if they are illusory.

The Supreme Court of British Columbia did not treat these factors as determinative but rather as relevant to its decision.

The approach in *Newman* was then cited in *Hunter Dickinson v Butler* in 2010:

82. *Hockey v Fairfax Media Publications Pty Limited (No 2)*, [2015] FCA 750 at para 15.

83. *Ibid.*

84. *Grobbelaar v News Group Newspapers Ltd*, [2002] UKHL 40 at para 89. Lord Scott of Foscote.

85. Sharpe, “Injunctions,” *supra* note 1 at 5.40.

86. See e.g. *Rainy River*, *supra* note 18 at para 7.

87. *Newman*, *supra* note 1 at para 298.

[75] The plaintiffs submitted that an injunction is warranted because there is a likelihood that the publication of the defamatory statements by the defendant will continue...

[76] The plaintiffs submitted further that an injunction is warranted in this case because there is a real possibility they will not actually receive any compensation given that enforcement against the defendant of any judgment for damages may not be possible...

[77] Courts have granted permanent injunctions where the defendant was judgment proof and there was more than a reasonable apprehension that the defendant would repeat the defamation: *Newman et al v. Halstead et al*, 2006 BCSC 65.⁸⁸

Again, this approach is consistent with principles governing injunctive relief and cites *Newman* accurately, if perhaps in a way that overgeneralizes. While *Newman* simply says that there are cases in which the two criteria were present and an injunction was ordered, *Hunter* implies that courts *regularly* do so, although the language is also consistent with courts *sometimes* doing so.

Like a game of Telephone, things go astray in *Astley v Verdun*. Chapnik J. described the approach as follows.

Permanent injunctions have consistently been ordered after findings of defamation where either (1) there is a likelihood that the defendant will continue to publish defamatory statements despite the finding that he is liable to the plaintiff for defamation; or (2) there is a real possibility that the plaintiff will not receive any compensation, given that enforcement against the defendant of any damage award may not be possible.⁸⁹

This passage is still framed as describing the kinds of cases in which injunctions are ordered, rather than as a test, but the word “consistently” has been added. It may well be true that when those factors are present, courts consistently order permanent injunctions, but there is no evidence of this if the origins of this passage indeed lie with *Newman*.

Much more problematically, the words “either” and “or” have replaced “and,” making the test easier to satisfy. While *Newman* and *Hunter* referred to *both* criteria being present when injunctions were ordered, *Astley* says it’s either/or. Not only is there no basis for this—the case cites *Hunter* and *Newman* for the proposition, as well as *Cragg v Stephens*, which barely mentions injunctions at all—but this is at odds with the general approach

88. *Hunter Dickinson Inc v Butler*, 2010 BCSC 939 at paras 75-77.

89. *Astley v Verdun*, 2011 ONSC 3651 at para 21, citations omitted [*Astley*].

to permanent injunctive relief.⁹⁰ The likelihood of republishing relates to necessity but would alone not establish irreparable harm. Similarly, the lack of an effective damages remedy does not alone establish irreparable harm, let alone negate discretionary aspects of the inquiry.

I'm not the first to notice the mistake in *Astley*.⁹¹ Nevertheless, the Ontario Court of Appeal cited the approach in *Astley v Verdun* with approval, referring to its two “branches”—a likelihood of repetition or damages not likely to be paid.⁹² This has now crystalized into a two-part test rather than simply stating factors relevant to irreparable harm. In *Zall*, for example, the court refers to an injunction being “available in two circumstances in the context of defamation,” namely either of the criteria in *Astley*.⁹³ In *Port Alberni* the court states that the two “requirements are disjunctive.”⁹⁴ What’s more, the test appears to have been applied in several provinces: British Columbia,⁹⁵ Saskatchewan,⁹⁶ Manitoba,⁹⁷ Ontario,⁹⁸ and Nova Scotia.⁹⁹

Finally, consider how “likelihood” and “real possibility” have been interpreted. Recall that the *Astley* “test” requires a likelihood of repetition or a real possibility that damages won’t be recovered. In *Craven v Chmura*, the court addressed the meaning of “a likelihood” for the purposes of the first prong of the test. Broad J. viewed “a likelihood” as meaning less than a probability—in other words, less than the civil standard.¹⁰⁰ I think the plain language of “a likelihood” is ambiguous and could mean “more likely than not.” However, Broad J.’s interpretation is plausible and if his meaning is to apply, it sets the bar for a permanent injunction quite low—just above possibility of repetition. But Broad J. is treating Chapnik J.’s

90. *Cragg v Stephens*, 2010 BCSC 1177.

91. *Motoretta*, *supra* note 1 at para 76.

92. *St Lewis v Rancourt*, 2015 ONCA 513 at paras 13-14, leave to appeal refused, [2015] SCCA No 407 [*St Lewis*].

93. *Zall v Zall*, 2016 BCSC 1730 at para 98 [*Zall*]. See also *Houseman v Harrison*, 2020 SKQB 36 at para 70 [*Houseman*]: “In defamation cases, permanent injunctive relief is appropriate in one or both of two circumstances. The first circumstance arises where it is likely that the defendant will continue to publish defamatory words about the plaintiff. The second circumstance is where there is a reasonable possibility that the plaintiff will not receive any compensation, primarily due to the inability to collect the damage awards from the defendant.”

94. *Port Alberni Shelter Society v Literacy Alberni Society*, 2021 BCSC 1754 at para 170 [*Port Alberni*].

95. *Ibid*; *Zall*, *supra* note 93.

96. *Houseman*, *supra* note 93.

97. *Lord Selkirk School Division v Warnock*, 2015 MBQB 195 [*Lord Selkirk*]; *The College of Pharmacists v Jorgenson*, 2020 MBQB 88 at para 47 [*Jorgenson*].

98. *Astley*, *supra* note 89; *St Lewis*, *supra* note 92; *Soliman v Bordman*, 2021 ONSC 7023 at para 210.

99. *Trout Point Lodge Ltd v Handshoe*, 2012 NSSC 245.

100. *Craven v Chmura*, 2016 ONSC 2406 at para 13.

words like those of a statute when they are, in fact, a loose description of the kinds of cases in which injunctions tend to be ordered.

This low bar is reflected in Broad J.'s application of the test. Despite evidence from the defendant that he would not repeat the libels, Broad J. inferred a likelihood of repetition from the defendant's refusal to apologize and from his having maintained defences such as qualified privilege and justification.¹⁰¹

Broad J. interpreted "a real possibility that the plaintiff will not receive any compensation" as setting an even lower threshold than "likelihood." "A possibility means a chance that something will happen, and a real possibility connotes a possibility that is not speculative or lacking in support."¹⁰² Thus, "real" was interpreted as going to the quality of evidence rather than to increasing the requisite likelihood. Again, I think this is a plausible interpretation if Chapnik J's words are read like a statute, but they should not be.

Returning to first principles, it is problematic to grant an injunction solely because it is unlikely the defendant will pay a damages award in relation to *past* reputational harm. In *Craven v Chmurra*, the Ontario Superior Court addressed a possibility that the defendant would repeat the defamatory statements. Acknowledging that the evidence of this was not especially strong, Broad J. stated that he was "not required to make a determination as to whether this concern has reached a level of likelihood" because the second prong was satisfied: there was a real possibility that the defendant would not pay a damages award to the plaintiffs.¹⁰³ Broad J. ordered an injunction without being satisfied there was a likelihood of future harm that the injunction was to guard against. After stating the *Astley* test, Douglas J. in *Hudson v Myong* granted a permanent injunction, reasoning as follows: "I am satisfied the facts of this case justify a permanent injunction, particularly given that the defendant boasted during the Campaign about being judgement proof, thereby calling into question the likelihood the plaintiffs will be able to enforce this judgment."¹⁰⁴

It is wrong in principle to make defendants subject to criminal or civil contempt charges *solely* because they cannot pay damages.¹⁰⁵ This

101. *Ibid* at paras 13-16.

102. *Ibid* at para 19.

103. *Ibid* at paras 16-19.

104. *Hudson v Myong*, 2020 BCSC 517 at para 213. See also *Zall*, *supra* note 93 at para 99.

105. Erwin Chemerinsky, "Injunctions in Defamation Cases" (2007) 57:2 Syracuse L Rev 157 at 170, online (pdf): <scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2493&context=faculty_scholarship> [perma.cc/XZG7-HAWR]: "[T]he assumption behind the concern is troubling; poor people should have their speech enjoined, while the rich are allowed to speak so long as they pay damages."

is particularly inappropriate if the issue is the ability to satisfy past judgments, as opposed to whether the defendant would be able to satisfy a future damages award if an injunction were not granted and harm resulted (though the two may, of course, be related). The former is irrelevant to injunctions, which are forward-looking and grounded in necessity to prevent harm. Yet this distinction gets lost with the *Astley* test: consider *Hudson* above, which refers to “the likelihood the plaintiffs will be able to enforce *this* judgment” (emphasis added). Even if the hierarchy of remedies is abandoned, it makes no sense to order an injunction not to do something in the future as a remedy for a past instance of defamation. A likelihood of future harm is necessary.¹⁰⁶ Otherwise this would amount to a right to a permanent injunction on proof of liability—but only where the defendant is judgment-proof. Defendants with means would have to pose an ongoing threat to the plaintiff’s reputation for their speech to be enjoined.

Even relying on the inability to pay a future damages award is problematic. Richer defendants could defame again and be subject to damages and costs (or get away with it entirely if the plaintiff has tired of litigation), while poorer defendants could face fines and potential jail time. And while defamers are rarely sent to jail for contempt of court, it does happen.¹⁰⁷

Nor does it make sense to have an injunction depend *solely* on the likelihood of repetition. Yet when Chapnik J. concluded the defendant would likely continue to defame the plaintiff, she decided it was “unnecessary” to discuss the adequacy of compensation and didn’t discuss irreparable harm more generally.¹⁰⁸ In other cases too, the injunction was based only on the likelihood of repetition.¹⁰⁹

While it is less obvious that likelihood of repetition is insufficient, it is only part of irreparable harm. And there is a particular difficulty in the defamation context. Because what counts as defamatory is complex and context-dependent, a repetition—or even continued accessibility on

106. Golden, *supra* note 50 at 1425. In the patents context, Golden states, “[a]n injunction is only proper to prevent future infringement of a patent, not to remedy past infringement.”

107. Those found in contempt of court for breaching an injunction not to defame are rarely imprisoned, but it does happen. See e.g. *Caplan v Atas*, 2021 ONSC 670 at para 207; *Enverga v Balita Newspaper*, 2017 ONSC 3500 at para 35 [*Balita*].

108. *Astley*, *supra* note 89 at para 26.

109. See e.g. *Jorgenson*, *supra* note 97 at paras 47-50; *Port Alberni*, *supra* note 94 at para 170; *Lord Selkirk*, *supra* note 97 at para 53: “Whether or not there is a real possibility that the plaintiffs will recover their award of damages against the defendant, it is my opinion that 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.” See also *Lork Selkirk*, *supra* note 97 at para 56; *Balita*, *supra* note 107 at paras 51-52.

the internet—is not necessarily defamatory and does not necessarily cause harm. If everyone already believes something, my repeating it doesn't affect reputation. And if I lack credibility, my repetition also fails to affect reputation. Repeating the same words to the same audience is also not defamatory since the repetition presumably does nothing that the first publication didn't do. It doesn't cause people to think less of the plaintiff.¹¹⁰

While the fact that a repetition of a libel might, in context, not be libelous is unequivocally true, it is perhaps too technical a point to militate against injunctions where there is a likelihood of repetition. Nevertheless, the complexity and context-dependence of defamation law are such that we must be especially careful about enjoining repetitions of words found to be defamatory.

The issue is more problematic still if we move away from repetitions of the “sting” of the particular libel at issue to other disparaging statements that were not the basis for a finding of liability.

Given the general discussion of injunctions above, it should be clear that the *Astley* “test” for permanent injunctions in defamation cases should be rejected. It makes issues that are at best *relevant* to irreparable harm *determinative* of the injunction question and ignores discretionary factors. It conflates the ability to pay damages for past injuries with the need to prevent future ones. It is inconsistent with the exceptional nature of interlocutory relief in defamation actions, with general principles for injunctive relief, and it is completely unjustifiable given the free speech issues at stake.

IV. *When should permanent injunctions be ordered in defamation cases?* Recall the starting point: there is a final adjudication on the merits, usually with a finding of liability and a damages award, whether it can be collected or not. When should an injunction be ordered?

This is not simply a question of applying the existing rules and principles of injunctive relief to the facts of defamation cases—which would at least solve much of the problem created by *Astley*. Rather, it is a policy question that allows us to consider anything relevant.¹¹¹

Specifically, we should consider whether changes are needed in light of modern communications technology and the value of freedom of expression. Given modern technology, permanent injunctions should arguably be more readily available than they used to be, but free speech remains crucially important.

110. Young, “Names,” *supra* note 60.

111. See e.g. Berryman, “Remedies,” *supra* note 12 at 555.

In the print and broadcast era, it appears that fewer injunctions were sought and granted in defamation cases than today.¹¹² This makes sense, since yesterday's newspaper is today's fish and chips wrapper. If a libel is published in a newspaper, the harm has occurred by the time of trial. It is impractical to order copies destroyed and often pointless to enjoin republication, since newspapers don't usually run the same or similar stories, especially years later after a trial. And anyone who remembers microfiche knows that while records were kept, they were not easily searchable. Thus, "[p]rint defamation is generally a short, sharp shock, which causes harm that an injunction can't stop."¹¹³ The same is true of broadcast media. There are obviously exceptions. Print books containing libels could be removed from bookstore shelves and libraries. Particularly scandalous allegations could be repeated several times by the same publisher if not enjoined from doing so. But as a general matter, published words tended to become inaccessible, making permanent injunctions less useful.¹¹⁴

The effect of modern communications technology is to make publications persist, spread, and show up in search engine results. Instead of today's speech disappearing into the broadcast ether or the recycling bin, it is easily accessible. The speed of transmission and geographical scope are greater. Technology allows words to be shared more easily too, causing a potentially greater audience for a libel.

In sharing, the original context can be lost. "[A]lmost everything on the Internet is disaggregated: reputation is disaggregated; information is disaggregated; and liability is disaggregated."¹¹⁵

But search engines are the most relevant difference when it comes to *permanent* injunctions. While the internet stores data and allows it to be shared, the effect of online publications, after a trial on the merits years after the original publication, would likely often be similar to the effect of offline publications if not for search engines, which change things in two important ways. First, they connect a libel to an individual's name. "Every time someone Googles a plaintiff's name, the libels pop up again."¹¹⁶ The searcher doesn't have to be researching, or even aware of, the facts to which the libel relates.

112. It is difficult to establish this empirically. However, as noted above in the text to which footnotes 2 and 3 relate, my data shows they are now fairly commonplace following a finding of liability, although they were once rare.

113. Volokh, *supra* note 46 at 75.

114. See Ardia, "Freedom of Speech," *supra* note 3 at 17.

115. Ardia, "Reputation," *supra* note 65 at 313.

116. Volokh, *supra* note 46 at 76.

Second, search engines decontextualize the original publication, both through snippets and by removing the publication from its original time and “place.”¹¹⁷ For example, libelous words may have been published during a fierce public debate. That debate was part of the publication’s original meaning but search engines allow the words to be revived long after the policy debate is forgotten, such that contextual meaning is changed. Another example relates to the speaker’s credibility. While it may have been clear in its initial context that the speaker is untrustworthy or has a particular bias, that context can disappear when new audiences access the words through search engines.

I don’t want to overstate the ability of the internet to destroy reputations. Courts have tended to view the internet as toxic to reputation¹¹⁸ and while it certainly can be, I think courts have overestimated the tendency of things to go viral, to remain accessible indefinitely, and to be believed.¹¹⁹ We must take a more nuanced approach that recognizes the serious reputational consequences of publishing a libel on the internet while not exaggerating them. We should avoid the simplistic approach from *Barrick Gold* that automatically views publication on the internet as weighing in favour of an injunction.

Communications technology is not the only way in which society has changed. Freedom of expression has been entrenched in the *Charter of Rights and Freedoms*. Canada’s commitment to equality and democracy means that the freedom to speak must be carefully protected. Courts and legislators have shown a willingness in recent years to alter defamation law to shift its balance toward relatively greater protection of speech and

117. Google, “Control Your Snippet in Search Results” (20 February 2023), online: *Google Search Central* <developers.google.com/search/docs/advanced/appearance/snippet> [perma.cc/M5MB-R4Q7]: “[a] *snippet* is the description or summary part of search result on Google Search.” Depending on which text is included in the snippet, and given the lack of context, it can have quite a different meaning than the source text. In *Niemela*, *supra* note 53, the plaintiff alleged a Google snippet defamed him.

118. *Barrick Gold*, *supra* note 37 at para 75: “[t]he highly transmissible nature of the tortious misconduct at issue here is a factor to be addressed in considering whether a permanent injunction should be granted.” Courts have interpreted this as meaning that the fact of publication on the internet weighs in favour of a permanent injunction. See e.g. *Port Alberni*, *supra* note 94 at para 169 citing *Barrick Gold*, *supra* note 37 at para 95. (Note, though, that para 75 of *Barrick* should have been cited. Interestingly, para 95 refers to the dissenting judge’s rejection of the relevance of internet publication in that case.) See also Robert Danay, “The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation” (2010) 56:1 McGill LJ 1.

119. For example, the Ontario Court of Appeal in *Barrick Gold*, *supra* note 37 at para 31, took judicial notice of the fact that anonymous statements are more credible than attributed ones. Yet every year when I ask my students which they think is more credible, all things being equal, they say attributed statements.

less protection of reputation.¹²⁰ This too must be considered in assessing the proper approach to defamation injunctions.

Given the above, I propose some guidelines for permanent injunctions in defamation cases. They are not meant to be strict rules, given the discretionary nature of injunctive relief, but I believe they should be departed from only with good reason. Some follow fairly straightforwardly from general principles. Others are more innovative and perhaps controversial.

First, an injunction shouldn't be ordered unless it is necessary to prevent future reputational harm. This means that there must be evidence of a likelihood of such harm. "Where the wrongdoing has ceased and there is no likelihood of its recurring, an injunction will generally be refused... a permanent injunction requires the prospect of *continuing* or *recurring* injury to the claimant."¹²¹

Contrary to Broad J.'s approach in *Craven v Chmura*, the standard of proof for this evidence should, it seems to me, be *at least* a balance of probabilities and perhaps higher for prior restraint than for takedown orders. Historically, for permanent injunctions enjoining future defamation, "a very high likelihood of damage" was required, or that the harm would "necessarily" result.¹²² This is consistent with the quia timet nature of such injunctions: while a publication will have been found to be libelous, the order sought would enjoin a future publication that may or may not happen and may not actually be libelous if repeated. The harm to be prevented is unknown, since we do not know the scope or nature of the anticipated publication. And a new libel action can always be brought should the defendant defame again.¹²³ Thus, something more

120. Robert Diab, "Search Engines and Global Takedown Orders: Google v Equustek and the Future of Free Speech Online" (2019) 56:2 Osgoode Hall LJ 231 at 261-262, online (pdf): <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3481&context=ohlj> [perma.cc/P8CY-EDMK]: "The primary concern in earlier case law on defamation had been protecting an individual's reputation. But in *Hill v Church of Scientology of Toronto*, the Court recognized that defamation also engages 'the public's interest in protecting freedom of expression.' Recent cases have emphasized 'the importance of achieving a proper balance between protecting an individual's reputation and the foundational role of freedom of expression in the development of democratic institutions and values.'" See also *WIC Radio Ltd v Simpson*, 2008 SCC 40 [*WIC Radio*] (broader fair comment defence); *Grant*, *supra* note 56 (new responsible communication defence); *Crookes v Newton*, 2011 SCC 47 [*Crookes*] (hyperlinking not publication); *Courts of Justice Act*, RSO 1990, c C-43, s 137.1 [Justice Act] (Ontario anti-SLAPP laws); *Protection of Public Participation Act*, SBC 2019, c 3 [Protection of Public Act] (BC anti-SLAPP laws).

121. David Bean, *Injunctions*, 10th ed (London: Sweet & Maxwell, 2009) at 2.09, with p 18 citing *Proctor v Bayley* (1889), 42 Ch D 390.

122. Alastair Mullis & Richard Parkes, eds, *Gatley on Libel and Slander*, 12th ed (London: Sweet & Maxwell, 2013) at 379 [*Gatley*], citing *White v Mellin*, [1895] AC 154 at 167, [1895] CCS No 183.

123. While this is cold comfort to the plaintiff seeking an injunction, who would have to pay to initiate another action, injunctions too must be enforced. There is no easy path where someone is determined to continue defaming.

like the *quia timet* standard of a “high degree of probability that the harm will in fact occur” makes sense.¹²⁴ While the online context may justify some changes to the approach to defamation injunctions, it does not, in my view, justify Broad J’s approach to the degree of likelihood of harm required. Censoring speech requires good reason to think such censorship is necessary—whether on the internet or not.

The goal of preventing future harm also means that the inquiry should be based on likely future reputational *harm*, not just whether the words would be repeated and would be defamatory. Thus, the fact a libel has been published and remains accessible, or will be repeated, should not necessarily satisfy this requirement because a) words can be defamatory without causing harm¹²⁵ and b) there would have to be a prospect that the repetition would be seen and believed by new audiences.¹²⁶ Repeating the same libels to the same people likely doesn’t pose a risk to the plaintiff’s reputation at all, though this will depend on context. Where there is no prospect of *additional* harm, an injunction cannot serve its purpose. It can only punish the defendant by making her speech subject to contempt of court.

What’s more, courts shouldn’t be too quick to assume there will be additional reputational harm just because internet.¹²⁷ While the internet undoubtedly creates the *potential* for ongoing reputational harm, whether that is actually likely will depend on the facts. Where there is little to no evidence that an online publication has the potential to be seen in the

124. Sharpe, “Injunctions,” *supra* note 1 at 1.690. For imminence see 1.750.

125. Strictly speaking, this is only the case where an ordinary person would think less of the plaintiff, but only to a trivial (*de minimis*) degree, or the audience is not ordinary and thinks better of the plaintiff than the ordinary person would. These circumstances are almost not worth considering. However, a much greater issue arises from judges conflating what is disparaging with what is defamatory. See Young, “Names,” *supra* note 60, where I provide several examples of this. When that happens, there is a very real possibility of liability without harm. Disparaging words may not actually be harmful to the plaintiff’s reputation because they fail to convince their audience, because they tell the audience nothing they didn’t already know, or for other reasons. Such publications should not be found defamatory but frequently are. For example, saying an abortion provider kills unborn babies makes no one think less of them (except by revealing their profession, which is true and therefore defensible speech). Those who respect a woman’s right to choose do not consider the plaintiff a killer and those who oppose it do not think any worse of the plaintiff because the words “killing unborn babies” were used. They think poorly of him because of his profession. See *Assad v Cambridge Right to Life*, 69 OR (2d) 598, [1989] OJ No 1276 (SC) as discussed in Young, “Names,” *supra* note 60 at 10-11.

126. For example, courts cannot presume that something published on the internet has been accessed. Evidence is required. See e.g. *Crookes*, *supra* note 120 at para 14; *Zoutman v Graham*, 2020 ONCA 767 at paras 12, 20.

127. Megan Garber, “English Has a New Preposition, Because Internet,” *The Atlantic* (19 November 2013), online: <theatlantic.com/technology/archive/2013/11/english-has-a-new-preposition-because-internet/281601/> [perma.cc/G2NC-T8KF].

future, or there is evidence that it will not be believed if seen, the need for an injunction is not established.

Further, where a declaratory remedy would suffice to prevent the anticipated harm, an injunction is not necessary and therefore not justified. For example, if a declaration of illegality is sufficient to get Facebook to remove a post, according to its terms and services, injunctions against Facebook and the defendant may not be necessary.¹²⁸

Permanent injunctions tend to be associated with a finding of liability but there are several reasons why, in the defamation context, liability for past speech should be neither necessary nor sufficient for an injunction.

It shouldn't be necessary because there may be findings that speech is false and harmful, but is defensible—perhaps because of a limitations defence, privilege, or responsible communication. While such speech should not be subject to liability and a damages award, it may make sense to enjoin it—unless the repetition or continued publication would itself be defensible. While a permanent injunction when there is no finding of liability might seem controversial, we must distinguish the wrongfulness of the speech that is the subject of the action from the wrongfulness of the speech sought to be enjoined.¹²⁹ It is the latter whose wrongfulness is relevant to the injunction question, as with *quia timet* injunctions.

Might false and harmful speech be enjoined even where its repetition, in context, would not be unlawful? I believe the answer is yes, since lawful conduct may be enjoined, though great caution is warranted.¹³⁰ Such examples require considering why the repetition wouldn't be unlawful. Where, for example, someone sought to enjoin a politician from repeating a damaging lie in Parliament despite that repetition otherwise being protected by absolute privilege, a court would be unable to do so (or at least to enforce such an order via contempt of court) because courts cannot intervene in relation to speech during Parliamentary proceedings.¹³¹

128. Rendleman, "Prior Restraint," *supra* note 21 at 665, citing Aaron Morris, "How to Stop Defamation When You Can't Afford an Attorney" (5 July 2016), online (blog): *Internet Defamation Blog* <internetdefamationblog.com/how-to-stop-defamation-when-you-cant-afford-an-attorney/#more-11> [perma.cc/Y325-JMSL]: "Many websites will remove material following a declaratory judgment that it is defamatory."

129. See *Gatley*, *supra* note 122 at 9.42.

130. This is consistent with Ardia, "Reputation," *supra* note 65 at 320: "*The focus should be on ensuring the reliability of reputational information rather than on imposing liability.* This means developing procedures for correcting false information or placing it in a more accurate context" (emphasis in original).

131. See e.g. Sir David Beamish, "Court injunctions and parliamentary privilege: Is there a case for new restrictions" (2 Nov 2018), online (blog): *Hansard Society* <www.hansardsociety.org.uk/blog/court-injunctions-and-parliamentary-privilege-is-there-a-case-for-new> [perma.cc/9HG4-QSWV].

Further, as discussed in Section II, liability shouldn't be sufficient to establish the wrongfulness of particular speech such that the inquiry could move on to necessity and discretionary factors. Liability in defamation has become an unreliable indicator of the wrongfulness of speech. Since defamatory words are presumed to be false and injurious, there is always the risk that liability will be imposed despite the speech not actually being wrongful.

In default judgment proceedings, courts must presume the truth of the pleadings. There are practical reasons for this, but the result is that even where the claims are undefended, and therefore the presumptions are not subject to *any* scrutiny, courts have considered the presumption a sufficient basis not only for damages but for injunctions.¹³² But in my view, the pleadings should not be presumed true for the purposes of an injunction. If the plaintiff wants the court to censor the defendant's speech, there should have to be some evidence not only that the words are defamatory but that they are indefensible. The plaintiff is in a good position to show at least that the words are false and should have to provide evidence to that effect. Requiring the plaintiff to disprove other defences, like responsible communication or qualified privilege, is perhaps asking too much, though Ontario and BC's anti-SLAPP laws impose a similar onus on plaintiffs.¹³³ This helps avoid the risk of an injunction being ordered simply because a claim was undefended.¹³⁴

The next issue is how courts should treat the fact that a damages award won't be paid. As demonstrated above, some courts have treated this as *sufficient* for a permanent injunction. It should be clear why that cannot be right. Instead, if the analysis focuses on whether the anticipated harm can be prevented, the issue of whether the defendant can or would pay damages becomes largely irrelevant. I agree with Laycock, Ardia, and others who say that defamation is a cause of action in which damages are generally inadequate. If wrongful reputational harm can be prevented, it generally should be. And while this involves censorship of a kind, an injunction would only be available in the narrow circumstances I set out here. The speech must be likely to be repeated (or not voluntarily taken down) despite the fact that a court will have found the speech to be not only defamatory but false and harmful.

132. *Henderson*, *supra* note 10 at paras 41, 49, 52.

133. Justice Act, *supra* note 120, ss 137.1(4)(a)(ii); Protection of Public Act, *supra* note 120, s 4(2)(a)(ii).

134. In the interlocutory context, Robert Martin discusses a case in which an injunction was likely ordered because a claim was undefended. See Robert Martin, "Interlocutory Injunctions in Libel Actions" (1982) 20:1 U W Ontario L Rev 129 at 132-133.

Despite the important free speech context, in my view the ability to pay damages should generally be irrelevant. In the words of Branca J.A., “once the appellant has proven the untruth of the allegations...and has in addition shown a probability of a repetition of the untruthful allegations, then the question as to whether or not money can adequately compensate... is of relatively little importance and an injunction must issue.”¹³⁵

An exception may be warranted where a future libel’s anticipated harm is pecuniary in nature and relatively easy to quantify—for example where one contract is likely to be lost. There, it may be appropriate *not* to enjoin the speech but rather to require the plaintiff to sue to recover that loss if the defendant has the ability to satisfy the damages order. This still requires additional litigation, but that may be a justifiable extra step—*not* because of the hierarchy of remedies but given the nature of the interests engaged. In any event, enforcing injunctions also requires litigation.

This is a form of minimal impairment or a version of the necessity requirement—don’t restrict speech rights where it isn’t necessary to do so to prevent serious harm. In other words, I agree that damages are usually an inadequate remedy for most speech that is false and harmful to reputation. Regardless of whether the defendant can pay, an injunction may be appropriate. This is far different than saying the defendant’s inability to pay is *sufficient* for an injunction.

This is principled and avoids creating separate injunction rules for the rich and the poor.

I considered recommending that corporate plaintiffs never be entitled to permanent defamation injunctions, but this seems unnecessary and undesirable if falsity and likely future harm must be proven. However, we should also reject the historical approach that makes it easier for corporations to get defamation injunctions because the interest being protected, corporate goodwill, is a business asset.¹³⁶ At least in earlier decades there was a “disposition to granting an injunction to restrain a defamatory publication that affected the plaintiff’s property or trade.”¹³⁷ Ardia laments: “The incantation ‘property’ seems sufficient to render free speech issues invisible.”¹³⁸ There is no reason to more readily enjoin speech about corporations because their reputation is an asset that is sometimes

135. *Church of Scientology of British Columbia v Radio NW Ltd*, [1974] 4 WWR 173 at paras 25, 46 DLR (3d) 459 (BCCA). I would add to this that it must be shown that the repetition would be harmful as that is not self-evident.

136. Ardia, “Freedom of Speech,” *supra* note 3 at 44-46.

137. David Rolph, “Bonnard v Perryman” in David Rolph, ed, *Landmark Cases in Defamation Law* (Oxford: Hart, 2019) at 37-38, citing *Collard v Marshall*, [1892] 1 Ch 571 at 577-578, 8 TLR 265.

138. Ardia, “Freedom of Speech,” *supra* note 3 at 45.

protected by property law. The right to corporate reputation, free from unfair criticism, is not subject to a property rule in the Calabresi/Melamed sense, enforceable by injunction, the way the right to exclude people from one's property generally is or intellectual property rights are.¹³⁹ Rather, a liability rule applies. Further, given the importance of expression about corporations there is no reason to give them any rights to more readily obtain injunctions. General principles for permanent injunctive relief should apply.

The next issue is the relevance of whether an injunction would be effective. "In our increasingly networked world, defamatory speech may be beyond the power of a court to enjoin,"¹⁴⁰ and as noted above, courts generally don't want to make ineffective injunctions. On the other hand, courts are increasingly reluctant to "throw up their collective hands in despair"¹⁴¹ and do nothing when an injunction would be futile.

While I'm sympathetic to the idea that courts shouldn't simply declare themselves impotent, and while I don't reject imposing ineffective injunctions in all circumstances, my view is that injunctions in restraint of *defamatory* speech should only be ordered where they can be effective. Defamation injunctions are a form of state censorship. They can sometimes be justified, but it is hard to justify an order censoring speech that is unnecessary because it cannot serve its purpose. Necessity is a hallmark of injunctive relief. Its absence, combined with the importance of freedom of expression, militates against ineffective permanent orders enjoining defamatory speech.¹⁴²

The threshold for effectiveness needn't be high: a realistic prospect that the injunction would be effective. Certainly it would be problematic for an individual's prior refusal to obey court orders to ground a court's refusal to make future ones.¹⁴³ But where an injunction truly will not be effective—for jurisdictional reasons, for example—there is no reason to order one.¹⁴⁴ This is controversial. Rendleman thinks it goes too far: "the perfect is the enemy of the good. That the judge cannot prevent all of the

139. Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral in Property Law" (1972) 85 *Harvard L Rev* 1089.

140. Ardia, "Freedom of Speech," *supra* note 3 at 7.

141. *Barrick Gold*, *supra* note 37 at para 75.

142. See *Hudson Bay Mining & Smelting Co, Limited v Dumas et al*, 2014 *MBCA* 6 at para 48: "At common law, freedom of expression... is presumed to be protected unless curtailment is justified (see *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 *SCC* 8 at para 67)."

143. See Rendleman, "Prior Restraint," *supra* note 21 at 678: "The judge should not hinge an injunction on whether the defendant will obey because that holds the plaintiff's substantive rights hostage to the defendant's potential obduracy."

144. Ardia shares this view. See Ardia, "Freedom of Speech," *supra* note 3 at 78, 80-83.

defendant's violations does not mean that she should not forbid any of them.¹⁴⁵ But Rendleman is not saying that completely ineffective orders should be made—just that they *may* be effective even where it seems the defendant will not obey.¹⁴⁶

The fact is that the law can only do so much to prevent or remedy online libel, and judges shouldn't express their frustration with the law's ineffectiveness by ordering pointless injunctions in restraint of speech.

The next issue is how the approach to do-not-repeat orders, takedown orders, and de-indexing orders might differ.

Do-not-repeat (or further defame) orders are prohibitive injunctions, while takedown and de-indexing orders are mandatory injunctions. Yet I don't think the relative efforts involved, need for supervision or other factors suggest that takedown or de-indexing orders should be harder to get simply because they're mandatory. On the contrary, an injunction to remove or take down speech is often easier to justify than one to prohibit repetition, which involves considerably less certainty and may require the court's supervision. Since a new act of publication is required, a do-not-defame injunction does not prohibit a continuing wrong but rather an anticipated future one. The risk of continued harm posed by speech that has already been published militates in favour of a takedown injunction—assuming that it will continue to be seen by people who might take it to heart.¹⁴⁷ In addition, the precise wording of an existing publication, and its context, are known.

An order not to say something in the future is harder to justify given that: a) it is uncertain whether the speech will occur at all; b) it is uncertain whether, if such speech occurred, it would reach new audiences that are persuaded by it (since otherwise the injunction does not prevent further reputational harm); and c) the precise words and context are not known, so that the speech might not be unlawful but for the injunction.

It is debatable whether permanent do-not-defame orders should ever be permissible. Recall that these are orders not to defame again but go beyond libels already adjudicated. They amount to obey-the-law orders

145. Rendleman, "Prior Restraint," *supra* note 21 at 678.

146. *Ibid.*

147. A new publication, and thus a new libel, arises every time words are accessed and understood. Thus, even takedowns all technically require quia timet injunctions since continued access to those words creates new libels, not the continuation of past ones. Nevertheless, where the words and much of the context are known, the uncertainty and prematurity militating against quia timet injunctions are less of an issue.

and are necessarily vague.¹⁴⁸ As a result, they are likely unconstitutional in the United States.¹⁴⁹

Yet in a recent study published in this journal I showed that forty-two per cent of Canadian defamation injunctions are do-not-defame orders.¹⁵⁰ This is shocking, but reflects the difficulty of crafting appropriately narrow defamation injunctions. Do-not-defame orders seem preferable to overly broad orders (e.g. don't ever speak about the plaintiff again)¹⁵¹ or overly narrow ones (e.g. don't repeat the exact words you used).¹⁵²

In my view do-not-defame injunctions should only be ordered where narrower ones would not be effective, while a do-not-defame order would, and the harm sought to be avoided is very significant.¹⁵³ This will rarely, if ever, be the case. Efficiency arguments should rarely prevail. If a defendant defames again, the plaintiff may always sue again. Injunctions are sometimes said to be justified on efficiency grounds: "administrative celerity may favor equity, for injunctions may serve efficient, economical administration."¹⁵⁴ "When the defendant engages in a continuing course of conduct that requires the plaintiff to bring multiple damage actions, an injunction may also be less burdensome on the parties and the court."¹⁵⁵ But it is not obvious that injunctions deter the behaviour of defendants who are determined to defame, despite already being held liable, any better than future libel actions. Injunctions require enforcement proceedings and contempt of court generally results in a fine, not dissimilar to a damages award. Courts must carefully consider whether an injunction truly is more efficient and, if so, whether this is sufficient reason to censor speech that is already unlawful.

In general, injunctions should be framed as narrowly as reasonably possible. An entire URL shouldn't be taken down or de-indexed just because that site contains a libel. If the libelous part can be excised, it should be. If it cannot, then a judge should consider, in deciding whether to order an injunction, the fact that lawful speech would also have to be

148. See Young, "Scope," *supra* note 16 at 296.

149. *Ibid.*

150. *Ibid.* at 294. Note that this includes interlocutory and permanent injunctions.

151. Such obviously overbroad injunctions are surprisingly common: sixteen per cent of defamation injunctions were orders not to speak about the plaintiff again. See Young, "Scope," *supra* note 16 at 291-292.

152. Chemerinsky, *supra* note 105 at 171: "Any *effective* injunction will be overbroad, and any *limited* injunction will be ineffective" (emphasis in original).

153. Young, "Scope," *supra* note 16 at 298-299.

154. Doug Rendleman, "The Inadequate Remedy at Law Prerequisite for an Injunction" (1981) 33 U Florida L Rev 346 at 357, online (pdf): <scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2004&context=facpubs> [perma.cc/H4TG-RXSQ].

155. Ardia, "Freedom of Speech," *supra* note 3 at 58.

enjoined. Such injunctions should be truly exceptional and the speech at issue should have to be very harmful to justify such an overbroad injunction.

It follows that if the defamatory content on a website can be deleted or edited to remove only defamatory content, there is no need for de-indexing (or site blocking). The problem is solved at the source. This is preferable since de-indexing a URL and site blocking will generally require overbroad orders.

The suggestions above are grounded in existing principles of injunctive relief and should be relatively uncontroversial. They amount to stating that orders enjoining defamatory speech should only be made where the wrongfulness of the enjoined speech is established and such orders are necessary to prevent additional reputational harm that is not adequately compensable in damages.

Here I make two additional suggestions that don't necessarily flow from first principles but are, in my view, justifiable given the interests in reputation and freedom of expression at stake. They are that the harm sought to be prevented should be serious or significant, and that defamatory comment—as opposed to statements of fact—should not be enjoined.

Because Canadian defamation law requires no proof of harm, liability can flow where words are technically libelous but cause no actual injury. As discussed above, this is unlikely where the law is applied correctly but is a problem where “defamatory” is conflated with “disparaging,” as it too often is.¹⁵⁶ Since the focus of an injunction should not simply be liability but the prospect of future *harm to reputation*, injunctions should not be ordered unless harm would otherwise result. I suggest that the prospective harm should have to be significant and should have to be in addition to any harm caused by the libel that was litigated. The importance of freedom of expression is such that courts should not interfere unless there is very good reason to do so.

In my view, there should be no liability in defamation at all unless the speech at issue causes serious harm. The United Kingdom now requires serious harm for liability, and in the case of corporations, that serious harm means “serious financial loss.”¹⁵⁷ For injunctions, where censorship is involved rather than allocating responsibility after the fact, it makes sense to require a heightened threshold.

It may be thought that a serious harm threshold is inherent in the concept of irreparable harm, but given that judges have been ordering

156. See generally *supra* note 125.

157. *UK Defamation Act 2013*, *supra* note 42, s 1.

injunctions based on nothing more than the defendant being judgment-proof or being likely to repeat a libel (regardless of whether additional harm will result), it is worth emphasizing that the harm to be avoided should be serious. Specifically, this means considering whether the words will gain a new audience if not enjoined. If so, the size or nature (etc.) of that audience must justify an injunction. Even if the original libel caused very serious reputational harm, it shouldn't be enjoined if the damage is already done and by the time the trial is over, leaving it on the internet or the defendant repeating it won't do any serious additional harm. I think that courts will resist this approach, but injunctions are not punitive and enjoining speech is censorship. This may be justified, but it cannot be justified where there is no significant harm to prevent.

Another perhaps controversial proposal is that libel in the form of comment—that is, opinion or inferences that are incapable of proof—should not be enjoined. Only false statements of fact should be enjoined in defamation. Comment is generally less harmful to reputation and is especially worthy of free speech protection.

There is no doubt that comment can cause reputational harm.¹⁵⁸ That said, courts have acknowledged the importance of protecting even unfair comment from liability.¹⁵⁹ People's right to state opinions should be widely safeguarded. Further, I am persuaded by LeBel J, concurring in *WIC Radio*, that defamatory comment is less likely to harm reputation than a defamatory statement of fact.¹⁶⁰

I recognize that my proposal means that even where comment is published with malice it could not be enjoined. That is preferable to having courts censor opinions and inferences.

Finally, courts should be considering more creative remedies that new technologies make possible. As noted above, declaratory remedies may often result in takedowns without the need for an injunction. In addition to de-indexing, there have been various proposals for things like flags, warnings, and the use of choice architecture such as down-ranking.¹⁶¹ Down-ranking, like de-indexing, can affect the likelihood that someone will see a particular post or site. There are issues with each of these proposals. For example, it is not clear that labels indicating that words are false will convince readers.¹⁶² While a discussion of these tools is beyond

158. *WIC Radio*, *supra* note 120 at para 72, LeBel J concurring.

159. See e.g. *ibid* at paras 28, 39.

160. *Ibid* at para 70, LeBel J concurring, citing *Davis & Sons v Shepstone* (1886), 11 App Cas 187 (UKPC) at 190, [1886-90] All ER Rep 404.

161. Sunstein, *supra* note 57 at 133.

162. Rebecca H Grady, Peter H Ditto & Elizabeth F Loftus, "Nevertheless, partisanship persisted:

the scope of this article, the importance of avoiding censorship suggests that less drastic means should be used where they could be effective.

Conclusion

After pointing out how courts have erred by creating a two-part test for permanent defamation injunctions, I suggested a better approach. This involved getting into the weeds of defamation injunctions in a way that is of interest to perhaps only the most dedicated scholars of equitable relief or of defamation. More pragmatic readers may consider the suggested approach overly technical. Online abuse is a clear and present danger that some think justifies a more permissive and flexible approach to defamation injunctions. Certainly judges have abandoned the exceptionalism of defamation injunctions, now readily ordering them, ostensibly in order to combat the scourge of online harms.

But more readily enjoining libels—at least in the way suggested in *Astley* and endorsed by the Ontario Court of Appeal—is misguided. It punishes defendants rather than protecting reputation. And it fails to adequately protect freedom of expression. Defamatory speech may, of course, be enjoined, and in the online context it more often makes sense to do so. But we must be careful to ensure that fundamental principles of injunctive relief, like necessity, and the fundamental value of freedom of expression, are not ignored in the quest to address online libel. Permanent defamation injunctions should only be ordered where they are necessary to prevent further reputational harm—arguably significant reputational harm—from false statements.

“Increasingly, courts and academia are recognizing that even the most ostensibly private litigation has public dimensions.”¹⁶³ In *R v Mentuck*, the Supreme Court was alive to the need to guard the public interest in open courts and freedom of expression even where the parties themselves didn’t argue in favour of it.

It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in

fake news warnings help briefly, but bias returns with time” (2021) 6 *Cognitive Research* 52, DOI: <10.1186/s41235-021-00315-z>.

163. Crerar, *supra* note 28 at para 36.

generally unrestricted speech on matters of such public importance as the administration of justice.¹⁶⁴

The same admonition applies in the context of permanent injunctions enjoining defamatory speech. Even if the defendant does not object to the injunction, or if the matter is undefended, there remains an important public interest in freedom of expression that justifies denying such injunctions unless there is good evidence that they are necessary to prevent serious harm.

164. *R v Mentuck*, 2001 SCC 76 at para 39.