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Remedies
Cases and Materials

FIFTH EDITION

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Preface to the Fifth Edition

The publishing of this fifth edition heralds a significant change in the editorial personnel of the casebook. The two founding editors, David Mullan and Stanley Sadinsky, as a result of retiring from active teaching at Queen's University, have decided to leave the editorial board. The remaining editors wish to record their deepest and sincerest gratitude to David and Stanley for both taking the initiative to create a remedies casebook and diligently seeing each of the last four editions through to publication. In addition to David and Stanley leaving the editorial board, Thomas Cromwell has also decided to withdraw from active editorship. Readers will know that Thomas was appointed to the bench of the Nova Scotia Court of Appeal, a task that has left him little time to continue editing his chapters of the book.

Jeff Berryman has assumed the general editorship, and he and Jamie Cassels and Stephen Waddams, two of the original editors, have been joined by Vaughan Black, Michael Pratt, and Kent Roach. We are glad to have such highly respected scholars in remedies join the editorial team. Vaughan has assumed control of chapters 3 and 4, vacated by Thomas Cromwell; Michael has direction over chapters 9 and 11, vacated by David Mullan and Stanley Sadinsky; and Kent takes over control of chapter 12, on Charter remedies. With new blood have come new ideas for the casebook.

David and Stanley envisaged a casebook that would act as a comprehensive resource tool, combining academic commentary, case reports, and detailed notes on the subject of remedies. Their conception was a casebook that could be adapted to the particular focus and interests of individual instructors. Thus, for an instructor who wished to focus only on equitable remedies, the material commencing at part II of the text would provide all that is necessary to ensure complete coverage of the area. The current editors remain true to that original vision. Our experience leads us to believe that most remedies courses taught in Canada combine elements of both common law and equitable remedies, although emphasis may vary as to whether interlocutory injunctions, Charter remedies, or damages for personal injury are covered. The choice is left to individual instructors, who will find in this casebook appropriate material to meet all particular needs.

The fifth edition of the casebook is evolutionary, rather than revolutionary, in its accommodation of new jurisprudence. We have avoided the temptation simply to expand the amount of materials to reflect recent cases, but have, by careful editing, consciously tried to reduce the size of the casebook, while maintaining its topical relevance and comprehensive coverage. In chapter 1, the Supreme Court of Canada's important treatment on punitive damages in *Whitten* has warranted extensive excerpts. In chapter 5, on personal injuries, much of the public policy material on approaches to compensation

been a member of that Court, I adopt this reasoning in principle. I am of the opinion that there is a burden upon the applicant to show to the Court that he has enough of a case—I am adopting Mr. Pepper's word "enough"—that when it comes to trial he will have a reasonable chance of success. Perhaps I am introducing a new term when I use the word reasonable. The cases often refer to a *prima facie* case, a fair *prima facie* case, a strong *prima facie* case, not a frivolous or vexatious case, a chance of success, a probability of success, a serious question to be tried, a substantial issue to be tried. These are only some of the many phrases that have been used in dealing with this matter.

While there are differences in degree in all of these phrases, I do not consider them to be substantially different. Each case must be considered on its own merits and then the discretion of the Court must be exercised. The exercise of a discretion by its nature is not an exact science. Different Judges may come to different conclusions, and provided that they have exercised their discretion within the jurisprudential framework, it is futile to quibble over the semantics of the words they may individually use. The *American Cyanamid* case sets standards that appear in their words to be more lenient than the words "*prima facie* case" or "probability of success." I am of the opinion that there is no serious difference. Surely a serious question to be tried equates to a *prima facie* case. The degree to which a Judge will consider the importance of the nature of the case in coming to his conclusion must be weighed with the knowledge of the other factors which he must consider, such as the question of harm to the parties and damages as an alternative, the balance of convenience to the parties and the need, if any, to maintain the *status quo*.

IRREPARABLE HARM

American Cyanamid places greater attention on the need for the applicant to show "irreparable harm" before being granted an interlocutory injunction. In addition, irreparable harm to the applicant must be weighed against the potential for irreparable harm to the defendant. Only when these are evenly balanced can the court look at the merits.

In *RJR-MacDonald*, [1994] 1 SCR 311, at 341 (see also chapter 12, "Charter Remedies"), the Supreme Court gave its approach to irreparable harm in the following terms:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm that cannot be quantified in monetary terms or which either cannot be cured, usually because one party cannot collect damages from the other.

"Irreparable harm" requires the applicant to prove that damages, being the most common civil law remedy, are inadequate. However, we have seen that courts have never retreated from assessing damages, no matter how problematic their quantification. As the following extract suggests, inadequacy or irreparable harm is a question of degree: Owen M. Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978), at 38 (footnotes omitted).

> I begin with the legacy of the property injunction—the view that in our legal system the relationship among remedies is hierarchical and that in this hierarchy the injunction is disfavoured, ranked low. This hierarchical relationship and the subordination of the injunction is, we recall, primarily the handiwork of the irreparable injury requirement. That

requirement makes the issuance of an injunction conditional upon a showing that the plaintiff has no alternative remedy that will adequately repair his injury. Operationally this means that as a general proposition the plaintiff is remitted to some remedy other than an injunction unless he can show that his noninjunctive remedies are inadequate.

There are, to be certain, ambiguities latent in the doctrine. For one thing, inadequacy is not a dichotomous quality, but rather permits of degree, and yet the degree required is never specified. It is not clear how inadequate—whether greatly or slightly—the alternative remedy must be before an entitlement to an injunction is established. Second, there is uncertainty as to which types of inadequacies are to count for the purpose of applying the test. What about the retrospective nature of the damage action, the interposition of the jury, or the future financial unresponsiveness of the defendant? From one standpoint—that of the plaintiff seeking the strongest safeguard of his rights—they are viewed as inadequacies; not so from a more disinterested perspective. Counting the retrospective nature of the damage award as an inadequacy would require a reordering of the hierarchy that would undermine the very doctrine being applied, for that defect is always present. The interposition of the jury also might not count as a defect because the Constitution requires it to be viewed as a virtue. And it might even be argued that the likely financial unresponsiveness of the defendant should not count, because it would strain institutional resources by placing an excessive front load on each individual injunctive lawsuit if an evidentiary inquiry into the present and future financial resources of the defendant were permitted. Third, ambiguities inhere in the irreparable injury requirement because it is not clear which alternative remedies must be shown to be inadequate before the injunction is available. Is it just the damage action or criminal prosecution, or is it also, as the Supreme Court has recently suggested, the criminal defense, *habeas corpus*, removal proceedings, change of venue, disciplinary proceedings, and even appellate review?

These ambiguities permit considerable manipulation of the doctrine. Yet I am concerned with the unmistakable general effect of the doctrine: it creates a remedial hierarchy and relegates the injunction to a subordinate place in that hierarchy. The inadequacy of alternative remedies must be demonstrated before the injunction can be utilized, but there is no reciprocal requirement on those alternative remedies. The plaintiff in a damage action or a criminal prosecution, for example, need not establish the inadequacy of the injunction before those remedies come available.

See also D. Rendleman, "The Inadequate Remedy at Law Prerequisite for an Injunction" (1981), 33 *U Fla. L Rev.* 346; Douglas Laycock, *The Death of the Irreparable Injury Rule* (Cary, NC: Oxford University Press, 1990); and Douglas Litchman, "Uncertainty and the Standard for Preliminary Relief" (2002), 70 *U Chicago L Rev.* 197.

In the following cases, what influence has inadequacy or irreparable harm had on the court's decision to grant or withhold an interlocutory injunction?

Mott-Trille v. Steed
(1996), 27 OR (3d) 486 (Gen. Div.)

DYSON J: This motion was brought by the plaintiff, Frank Mott-Trille, for an injunction to prevent the defendants from proceeding with a hearing to determine Mr. Mott-Trille's status within the religious group known as the Jehovah's Witnesses.

Background Facts

Mr. Mott-Trille has been both a lawyer and a Jehovah's Witness for approximately 40 years. Over the years, many of his clients have been members of the organization. For example, he has represented Jehovah's Witnesses in matrimonial disputes and in estate matters.

The defendant Watch Tower Bible and Tract Society of Canada ("Watch Tower Society") is an unincorporated association that runs the Jehovah's Witnesses. The defendants John Didur and André Ramseyer are two of the Watch Tower Society's administrators. The defendants W. Glen How, QC, and John Burns are its in-house counsel. The defendant Daryl Harris is the Circuit Overseer for the Jehovah's Witnesses in the area in which Mr. Mott-Trille resides. The defendants Douglas Fraser, Edward Morrison, and Charles Goodvin are members of the church who have been appointed to the "new Judicial Committee" to hear and consider allegations of theft against Mr. Mott-Trille.

In 1993, the Law Society of Upper Canada ("Law Society") launched an investigation into Mr. Mott-Trille's legal practice based on allegations of his misapplication and misappropriation of clients' funds. It is alleged that some members of the Jehovah's Witnesses and the Watch Tower Society itself were affected by Mr. Mott-Trille's mishandling of funds. During the course of its investigation, the Law Society spoke with and obtained information from a number of Jehovah's Witnesses, including Mr. How and Mr. Burns. In July 1994, Mr. Mott-Trille gave an undertaking to the Law Society not to practise law until the resolution of the disciplinary proceedings. The hearings before the Law Society began in June 1995 and are currently adjourned. It is anticipated that the Law Society hearing will resume and be completed within the next few months.

In 1994, the Watch Tower Society conducted its own investigation into whether Mr. Mott-Trille was in violation of any scriptural principles such as to warrant discipline. In April of that year, a Judicial Committee of the Watch Tower Society comprised of three members held a hearing on charges of "theft" against Mr. Mott-Trille. The church's Judicial Committee decided that Mr. Mott-Trille had committed theft and sentenced him to a reproof, which was subsequently changed to a disfellowship (a "disfellowship" is somewhat analogous to an excommunication in the Roman Catholic Church). Mr. Mott-Trille appealed this decision, according to the Watch Tower Society's procedure, to an Appeal Committee. On April 25, 1994, the Appeal Committee upheld the findings of the first Judicial Committee and the decision to disfellowship Mr. Mott-Trille.

Mr. Mott-Trille had a number of concerns regarding the conduct of the hearings before the Watch Tower Society's first Judicial Committee and the Appeal Committee. He contended that both committees breached the rules of natural justice in that they interviewed witnesses without him being present, limited his right to cross-examination, and prevented him from being represented by legal counsel. Mr. Mott-Trille asserted that the committees applied an incorrect definition of theft in that they had specifically found that he had no intention to steal, yet decided that he had committed theft. He further alleged that Mr. How and Mr. Burns had misrepresented and/or misled all of the tribunals, including the Law Society, with regard to the Jehovah's Witnesses' files carried by Mr. Mott-Trille and their relationship to the Watch Tower Society.

Because of these concerns, Mr. Mott-Trille appealed to the Governing Body of the Jehovah's Witnesses in New York in May 1994. He never heard back directly from the Governing Body. However, in January 1995, the Chair of the first Judicial Committee of the Watch Tower Society phoned Mr. Mott-Trille and informed him that they would be annulling the previous decisions and a new Judicial Committee would be appointed by the church to consider the same charges afresh.

In 1993, the defendant Jeanette Steed sued Mr. Mott-Trille for damages. In 1994, the defendant A.F. Danley also commenced an action against Mr. Mott-Trille. Both Ms. Steed and Mr. Danley were clients of Mr. Mott-Trille and are also Jehovah's Witnesses. These actions were both settled and full and final releases were separately signed on February 7, 1995, by Ms. Steed and August 30, 1995, by Mr. Danley. Both releases included an undertaking of confidentiality by Ms. Steed and Mr. Danley respectively.

The new Judicial Committee of the Watch Tower Society has pressed Mr. Mott-Trille to proceed with the hearing; the last scheduled date was November 9, 1995. In response, Mr. Mott-Trille has issued two statements of claim. The first statement of claim was issued on September 14, 1995 against the same defendants as the within action, except for Ms. Steed and Mr. Danley. As well, the members of the first Judicial Committee were named as defendants. In this action, Mr. Mott-Trille seeks damages and an injunction restraining the hearing of the church's new Judicial Committee until at least the completion of the Law Society disciplinary hearings. The second claim was issued on October 30, 1995. In the second action, Mr. Mott-Trille seeks a declaration that the decisions of the Watch Tower Society's original Judicial Committee and the Appeal Committee and the proceedings of the new Judicial Committee are void and have no legal effect due to breaches of natural justice, lack of jurisdiction and *functus officio*. Mr. Mott-Trille also seeks an injunction restraining the new Judicial Committee of the church from proceeding with any information obtained from Ms. Steed or Mr. Danley, which he claims would be in breach of their confidentiality agreements.

Mr. Mott-Trille subsequently brought this motion for an interim and/or permanent injunction to prevent the new Judicial Committee of the Watch Tower Society from conducting its hearings until the Law Society proceedings and Mr. Mott-Trille's civil actions have concluded. In this motion, Mr. Mott-Trille also requests a declaration that the proceedings of all the ecclesiastical tribunals, including the new Judicial Committee, are void *ab initio* for breaches of the principles of natural justice, bias, errors of law and lack of jurisdiction. Finally, Mr. Mott-Trille seeks an order requiring the production of all documents in the possession and control of the defendants arising

out of the matters dealt with by the church's first Judicial Committee, the Appeal Committee, and the second Judicial Committee.

I only propose to deal with the motion as it relates to the application for an interim injunction to enjoin the new Judicial Committee of the Watch Tower Society from conducting its hearings until the Law Society has concluded its proceedings, without prejudice to the plaintiff to reapply for further relief when such hearings have been completed.

Jurisdiction

Courts are justifiably reluctant to interfere with the internal affairs of domestic tribunals, particularly religious organizations such as the Watch Tower Society. However, courts in this province have intervened in the internal affairs of a church where the circumstances warrant. ...

Interlocutory Injunction

In *Yule Inc. v. Atlantic Pizza Delight Franchise* (1977), 17 OR (2d) 505 (Div. Ct.), the Divisional Court adopted the test for interim injunctions formulated in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396 (HL), and in so doing set down the criteria to be followed in this province. The first issue to be determined on a motion for interlocutory injunction is whether the moving party has presented evidence of a substantial question to be tried. This is a departure from the old rule requiring the moving party to establish a strong *prima facie* case. In *Yule*, Cory J recognized that in cases where there is conflicting affidavit evidence before the court, a determination of the existence of a *prima facie* case is unrealistic. A finding that a serious issue exists is sufficient. Once that determination is made, the court then considers whether the harm may be adequately compensated for by damages and which side the balance of convenience favours. In his review of the law, Cory J quoted from the reasons of the motions judge in the case before him at p. 507:

> The principles which emerge from the cases cited including *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 2 WLR 316, and *Bryanston Finance Ltd. v. de Vries (No. 2)*, [1976] 1 All ER 25, make it evident that on an application for an interlocutory injunction the rights of the parties arising out of their contractual relationship are not to be determined by the Court. It is sufficient if the applicant establishes that there is a substantial issue to be tried; that it has demonstrated a *prima facie* case, in the sense that the applicant has a legal right which it is attempting to protect pending trial; that the failure to grant the relief will result in a threatened harm to the applicant which may not be adequately compensable by way of damages and finally, that the preponderance of convenience must be in favour of the applicant if the application for injunctive relief is to succeed.

Adopting the test in *American Cyanamid*, *supra*, I find that it is clear that there are substantial issues to be tried in this action.

Irreparable Harm

In the case at bar, if the injunction is not granted, the second Judicial Committee of the Watch Tower Society will proceed, likely before the Law Society hearings have completed. Based on the information before the court, and without making a finding as to whether there has been prejudgment by the second Judicial Committee, it is entirely possible that Mr. Mott-Trille will be disfellowshipped by this second Judicial Committee of the church. There was much material put before the court as to the effect of a disfellowship on a member.

The defendants insist that Jehovah's Witnesses are free to interact with a disfellowshipped member in any manner they wish. It is argued that nothing prevents a member from speaking to the disfellowshipped person or giving evidence with respect to that person at a hearing. As a result, the defendants contend that Mr. Mott-Trille will not be impeded in presenting his case before the Law Society and will therefore not suffer any harm that cannot be compensated for by damages.

However, Mr. Mott-Trille has provided the court with contradictory and, in my opinion, convincing evidence in respect of how he might be impeded in communicating with and preparing witnesses for trial or the hearing before the Discipline Com-

> Therefore the members of the congregation will not associate with the disfellowshipped one, either in the Kingdom Hall or elsewhere. They will not converse with such one or show him recognition in any way. If the disfellowshipped person attempts to talk to others in the congregation, they should walk away from him. In this way he will feel the full import of his sin. ...
>
> When one ignores the disfellowshipping action and continues his association with the disfellowshipped person, then it shows a bad attitude toward Jehovah's laws. He, in effect, is showing that he upholds the offender and thinks Jehovah's righteous laws are of no account. ... Actually, the one who deliberately does not abide by the congregation's decision puts himself in line to be disfellowshipped for continuing to associate with such one. Since he is classified the same as the one disfellowshipped, "a sharer," then it is reasonable for the same action to be taken against this dissenter. He too can be cut off from Jehovah's favor and from his visible organization.
>
> *(The Watchtower, July 1, 1963)*
>
> The situation is different if the disfellowshipped or disassociated one is a relative living outside the immediate family circle and home. It might be possible to have almost no contact at all with the relative. Even if there were some family matters requiring contact, this certainly would be kept to a minimum, in line with the divine principle: "Quit mixing in company with anyone called brother that is a fornicator or a greedy person [or guilty of another gross sin], not even eating with such a man"—1 Corinthians 5:9-11.
>
> *(The Watchtower, April 15, 1988)*

In my view, it is entirely possible that Mr. Mott-Trille's ability to speak to Jehovah's Witnesses could be severely impaired upon being disfellowshipped and this would

have a significant negative impact on his defence before the Law Society. If a potential witness is a Jehovah's Witness and adheres to the dictates of the excerpts cited from the Watchtower as set out, Mr. Mott-Trille or his counsel might well find it impossible to determine what such witness's evidence might be in order to decide whether to call such witness. A person called to testify under such circumstances would be put in an extremely awkward position. Such a person would be caught between their sense of civic duty to fairly impart the facts that they know of the case and the strong belief in their faith, which dictates that they must separate themselves from the outcast member, or risk being contaminated themselves. Mr. Mott-Trille asserts that one person in particular who will be in such a position will be his daughter Sarah, who is an important witness in this case.

If an interim injunction is not granted, there is a very real possibility that Mr. Mott-Trille will be disfellowshipped before the conclusion of the Law Society hearings. As indicated, this could have a significant impact on Mr. Mott-Trille's ability to answer the charges against him at the Law Society.

Mr. Mott-Trille is fighting for the right to continue practising his profession before the Law Society. As indicated, this is a very important right, which the courts have recognized as worthy of protection: see Lee, *supra*; *Kane v. University of British Columbia*, [1980] 1 SCR 1105. In my opinion, Mr. Mott-Trille risks suffering irreparable harm to his ability to earn a livelihood if he is unable to fully and effectively present his case before the Discipline Committee of the Law Society by reason of being a disfellowed Jehovah's Witness.

Disposition

Accordingly, I grant an interim injunction, restraining the defendants from proceeding with the new Judicial Committee hearing of the Watch Tower Society until the Law Society hearings have concluded. It is my view that this order is the least intrusive to the Watch Tower Society's ability to conduct its own affairs, given the circumstances of the case. I make no decision at this time as to whether the breaches of natural justice and other improprieties alleged by Mr. Mott-Trille warrant more serious and permanent intervention by the courts. Mr. Mott-Trille's ability to protect his livelihood before the Law Society should not be hampered by any decision of the second Judicial Committee prior to the Law Society hearing. Mr. Mott-Trille is not a threat to the Watch Tower Society or to Jehovah's Witnesses in general; he can be disciplined as the organization sees fit after the outcome of the Law Society hearings, subject as I have said to Mr. Mott-Trille convincing a court to intervene further.

Motion granted.