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Equitable Protection by Injunction for Business Reputation

EQUITABLE PROTECTION BY INJUNCTION FOR BUSINESS REPUTATION

Where individuals are harmed as the result of libelous publications the resort to a court of law for damages may be sufficient redress. However, in the case of the libel of a business, damages may not be adequate and restraining the publication by an injunction in equity may provide the only complete relief available.[1]

In the recent case of *Mayfair Farms, Inc. v. Socony Mobile Oil.*,[2] two plaintiffs, both restaurant operators, sought to enjoin the publication of defendant's motoring guidebook, a small part of which rated restaurants upon certain standards not set forth in the publication itself.[3] The basis of plaintiffs' complaint was that while the rating experts employed by defendant had information which warranted placing their restaurants in the highest category, the restaurants were nevertheless given inferior ratings.[4] The Superior Court of New Jersey denied a temporary injunction pending the hearing of the issues at law for three reasons: (1) the plaintiffs' rights to equitable relief were not clear as a matter of law,[5] (2) the ultimate error com-

[1]In most cases it is impossible to determine the extent of the damages arising from a business libel, therefore the remedy at law is speculative if not inadequate. See Toledo Computing Scale Co. v. Computing Scale Co., 142 Fed. 919, 922 (6th Cir. 1906) (dictum); Dehydro, Inc. v. Tretolite Co., 53 F.2d 273 (N.D. Okla. 1931); Kwass v. Kersey, 139 W. Va. 497, 81 S.E.2d 237 (1954) (dissenting opinion).

[2]172 A.2d 26 (N.J. Super. 1961). In the principal case the plaintiff cannot establish the cause of a falling off of its trade or the failure of its business to increase, except in cases where some tangible situation exists which is obviously the cause of business decline. On the other hand, the business volume of the plaintiffs' may increase, but how much greater the increase would have been had it not been for defendant's dissuasion is a matter of conjecture.

[3]Id. at 27. "The basis for the rating given to a particular restaurant is not explained in the guide...."

[4]The symbols used in the guide book are as follows:

"†—an unusually good value, relatively inexpensive
*—better than average
**—good
***—very good
****—excellent, worth a special effort to reach
*****—outstanding—one of the best in the country

Plaintiffs' restaurants, Mayfair Farms and Pal's Cabin, were given a good and better than average rating respectively." Id. at 27

[5]172 A.2d at 29. "New Jersey has for many years subscribed to the principle that an interlocutory injunction should not issue if a plaintiff's asserted rights are not clear as a matter of law." Citizens Coach Co. v. Camden Horse R.R., 29 N.J. Eq. 299 (Ct. Err. & App. 1878); General Elec. Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 115 A.2d 626 (App. Div. 1955); Noble Co. v. D. Van Nostrand Co., 63 N.J. Super. 534, 164 A.2d 834 (Ch. Div. 1960). Contra, Note, 40 Marq. L. Rev. 191 (1956) and cases cited therein.

plained of was that of ratings, a matter of judgment and opinion, and therefore not a justiciable issue,[6] and (3) the result of the injunction would be to deprive the public of the extensive material contained in the guidebook. Under New Jersey procedure the plaintiffs' allegations are taken as admitted for purposes of ruling on a motion to dismiss. Since certain allegations were sufficient to state a cause of action, the court overruled the defendant's motion to dismiss. This left the plaintiffs with only a remedy at law for damages for injury incurred by the publication.

Until recently, the use of an injunction to enjoin a business libel has been exercised only in exceptional cases.[7] However, the familiar language of an equity court that "equity has no jurisdiction to enjoin a libel"[8] is becoming "the power does exist and can be used in proper circumstances."[9] Where the power is recognized, the matter seems to be clearly one of discretion.

As a guide in the exercise of this discretion the Supreme Judicial Court of Massachusetts and one writer[10] have recognized and arrived at a triangular balance that recognizes the interests of the publisher of the alleged libel, the public, and the party seeking relief. In *Krebiozen Research Foundation v. Beacon Press, Inc.*,[11] the plaintiff was denied injunctive relief against publication of a book which criticized the effectiveness of plaintiff's drug as a cancer cure. The case is distinguishable from the principal case in that the objective appraisal of medicinals by the doctors based upon independent research is not akin to opinion ratings of restaurants. Furthermore, considera-

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[6]See Restatement, Torts § 627 (1938). The caveat to this section is noteworthy: "The Institute expresses no opinion as to whether one who holds himself out as able to give to intending purchasers ... information in regard to ... the quality of lands, chattels, or intangible things may be subject to liability for publishing to an intending purchaser ... an inaccurate opinion disparaging the other's property ... if he fails to exercise reasonable care ... or reasonable competence in forming his opinion ...."

[7]Factors bringing some cases within the exception are continuousness of the act, malice and inadequacy of the remedy at law. Cf., Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943) (display of plaintiff's car as a "White Elephant" enjoined); accord, Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937).

[8]See, e.g., Francis v. Flinn, 118 U.S. 385 (1886); Kidd v. Horry, 28 Fed. 773 (C.C.E.D. Pa. 1886); Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); Wolf v. Harris, 267 Mo. 405, 184 S.W. 1139 (1916); Marlin Fire Arms Co., v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902); Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931).

[9]172 A.2d at 30.

[10]See, Comment, 36 B.U.L. Rev. 644, 647 (1956). It is suggestetd that the principal case might well be the exceptional case that the writer depicted as "but a matter of conjecture."

[11]334 Mass. 86, 134 N.E.2d 1 (1956).

tions of health and safety were involved in the *Krebiozen* case so that the public interest in the discussion of cancer cures outweighed the plaintiff's interest in protection against an alleged libel.[12] This decision shows that a petitioner seeking to enjoin a libel must satisfy the court that his interest in being protected from irreparable injury outweighs the public interest in the publication.[13]

The exercise of discretion in deciding whether to enjoin a business libel presents a more difficult problem since the public interest in publication is not so strong. Therefore, an additional factor may be necessary to overcome the lack of precedent, and at the same time supplement the triangular balance as a guide in the exercise of this discretion.

It is submitted that a consideration of the gravity of the unfairness resulting if temporary injunctive relief is denied may be the additional factor necessary to prompt courts of equity to extend their jurisdiction to enjoin a business libel.

An analogy is to be found in the use of injunctions to enjoin unfair competition.[14] The development of this action to protect the business assets of reputation and good will shows that equity does enjoin business libels under a different equitable theory.[15] Because of the reluctance of equity to enjoin a libel as such, it has expanded the action of unfair competition.[16]

Originally equity would enjoin the passing off by the defendant

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[12]134 N.E.2d at 6. "In this case it is clear that the public interest in the discussion of the subject of cancer... [is] paramount." Accord, Willis v. O'Connell, 231 Fed. 1004 (S.D. Ala. 1916); Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376 (D.D.C. 1957).

[13]See note 10 supra.

[14]"The law relating to unfair competition has a threefold object: First, to protect the honest trader in the business which fairly belongs to him; second, to punish the dishonest trader who is taking his competitor's business away by unfair means; and third, to protect the public from deception." Mitchell H. Mark Realty Corp. v. Major Amusement Co., 180 App. Div. 549, 168 N.Y.S. 244, 247 (1st Dep't 1917).

[15]Cf., Old Investors' & Traders Corp. v. Jenkins, 133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928). See, Defuniak, Handbook of Modern Equity 116 (2d ed. 1956) where the author points out, "Some courts... have termed the wrong a "disparagement of property," or "disparagement of a business" and thus, by avoiding the terms "libel," "slander" or "defamation," have neatly evaded many difficulties presented by precedent as represented in the older cases." See Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640 (1916).

[16]Old Investors' & Traders Corp. v. Jenkins, 133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928) (disparaging statement by competitor and publishers—both enjoined); Cf., Paramount Pictures, Inc. v. Leader Press, 106 F.2d 229 (10th Cir. 1939); Wolff, Unfair Competition by Truthful Disparagement, 47 Yale L.J. 1304, 1305 (1938).

of his goods as those of the plaintiff. This element of passing off was required.[17] This protection was subsequently extended to cases where the defendant did not appropriate plaintiff's good will for himself, but his action had the purpose or effect of aiding others in such appropriation.[18] In *Old Investors' & Trading Corp. v. Jenkins*,[19] the alleged disparagement, contained in a circular sent to plaintiff's customers, was enjoined despite the fact that the publisher was not a competitor. The court said: "While ... the court could not enjoin the mere publication of a libel, it could, provided the facts of the case warranted, issue an injunction against the defendant from mailing or otherwise sending to customers of the plaintiff false and misleading circulars of reading matter which would take away plaintiff's business by unfair means and deceive the public."[20]

This indicates that injunctive protection may be granted when the action is labeled unfair trade competition even though the plaintiff and defendant are not competing in the narrow sense. This is manifest in the language of some courts to the effect that "there is no fetish in the word competition. The invocation of equity rests more vitally upon the unfairness."[21]

In *Burke Transit Co. v. Queen City Coach Co.*,[22] the defendant, a transporttation corporation seeking to take over plaintiff's business, was alleged to have circulated false statements to the effect that plaintiff was unreliable, in failing financial condition and intending to go out of business. The defendant contended there was no right to restrain by injunction such slanderous statements affecting the plaintiff's business and that he had a remedy at law. The court disposed of this by saying:

> "But when it appears necessary for the protection of plaintiff's business or property rights, and it is alleged that the systematic circulation of false statements seriously affecting these rights will work irreparable and continuing injury, injunctive

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[17]Queen Mfg. Co. v. Isaac Grinsberg & Bros., 25 F.2d 284 (8th Cir. 1928) (passing off, injunction granted); Pulitzer Publishing Co. v. Houston Printing Co., 11 F.2d 834 (5th Cir. 1926) (no passing off, bill dismissed).

[18]Ralston Purina Co. v. Saniwax Paper Co., 26 F.2d 941 (W.D. Mich. 1928); Old Investors' & Traders Corp. v. Jenkins, 133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928); Cf. Bass, Ratcliff & Gretton Ltd. v. Guggenheimer, 69 Fed. 271 (C.C.D. Md. 1895).

[19]133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928).

[20]Id at 247.

[21]Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509, 512 (6th Cir. 1924); See Golenpaul v. Rosett, 174 Misc. 114, 115, 18 N.Y.S.2d 889, 891 (Sup. Ct. 1940).

[22]228 N.C. 768, 47 S.E.2d 297 (1948).

relief may be granted pending final determination of the action."[23]

In the principal case there was no threat by the defendant seeking to take over the plaintiff's businesses. However, there is little significance in distinguishing between a defendant who induces old customers not to carry out their contractual obligations, as in the *Burke* case, and the defendant who persuades new customers not to enter into contractual relations, as in the principal case. "One practice is as unfair as the other, and in both cases the growth and success of the plaintiff's business are seriously affected."[24]

Another factor to be considered is the purpose and effect of the publication sought to be enjoined. In *Mayfair Farms* the primary reason for denying the temporary injunction was the defendant's interest in immediate distribution of the publication as part of its summer advertising program.[25] Since the public interest involved is not so great as in the *Krebiozen* case, the argument for the granting of the temporary injunction in order to preserve the *status quo* is greater.[26]

In cases where the petitioner seeks to enjoin the publication of an alleged business libel, the exercise of discretion in the denial or issuance of a temporary injunction must be based upon sound principles of equity. As suggested in the *Krebiozen* case, even though the remedy at law is inadequate, the nature of the publication may be such that public interests must prevail over private. However, where the public interest is of less weight, equity may well issue a temporary injunction in order to preserve the *status quo* pending the hearing of the issues.

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[23]47 S.E.2d at 299.

[24]Derenberg, Trade Mark Protection and Unfair Trading 143 (1936).

[25]The court states in the opinion: "It is obvious that a prompt decision as to an injunction is of great importance to the defendants who plan to launch at once, if not enjoined, a widespread campaign of advertising and selling, a campaign which will be timed for the commencement of the summer touring season." Query whether public or in fact private interest has outweighed the plaintiffs' interest in the preservation of the status quo pending the hearing upon the issues. 172 A.2d at 27.

[26]Mytinger & Casselberry, Inc. v. Numanna Laboratories, 215 F.2d 382 (7th Cir. 1954); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); City of Newton v. Levis, 79 Fed. 715, 718 (8th Cir. 1897). An examination of these cases leads to the conclusion that the court in exercising discretion to issue or deny the temporary injunction should not be bound by the number or complexity of untried and unsettled questions of law, but rather the necessity (or lack of necessity) for preserving the status quo. See Milwaukee Elec. Ry. & Light Co. v. Bradley, 108 Wis. 467, 84 N.W. 870, 877 (1901) (temporary injunction granted to preserve status quo) "Not only does the discretionary power exist to protect a party against [irreparable injury]..., but the duty exists... to prevent such injury."