

ANTI-LIBEL INJUNCTIONS

Sometimes Equity Will Enjoin a Libel After All

by Daniel L. Schmutter



A client walks into your office and tells you that she has been sued by her neighbor for libel, and a court has entered an injunction.

As it turns out, New Jersey state and federal courts are not 100% clear on how such anti-libel injunctions should be treated, under the First Amendment or otherwise. Much of how such a case will turn out can depend on the type of injunction—how broad it is and whether it is preliminary or permanent—but the law is not nearly as settled as one might like.

I was recently presented with just such a case by a client. A court entered a temporary restraining order (TRO) directing the defendant to take down an entire website critical of the plaintiff. Importantly, in that case, there was neither any allegation nor any finding of libel, and as such, it is difficult to see how such an order would pass constitutional muster under any standard. And, in fact, the order was eventually vacated.

But I Thought “Equity Will Not Enjoin a Libel”

Historically, the traditional view was thought to be that equitable relief was not available in libel cases. The Delaware Court of Chancery explained the historical basis for the rule in *Organovo Holdings, Inc. v. Dimitrov*:¹

The no-injunction rule originated in England during the eighteenth century, when one of Parliament’s major victories in the battles for freedom of the press was ‘to give jurors, rather than judges, the power to determine whether publications were in fact defamatory.’ By the end of the eighteenth century, it was settled law in England that a court of equity had no jurisdiction to adjudicate a



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defamation claim. American courts adopted the English approach. In his influential treatise on equity, Justice Story explained that ‘matters of this sort [*i.e.*, defamation] do not properly fall within the jurisdiction of Courts of Equity to redress; but are cognizable, in a civil or criminal suit, at law.’

If this was ever actually a correct statement of the law, it is no longer universally held.² However, some jurisdictions still retain the view that injunctions are not available in libel cases.³ And still other jurisdictions take an intermediate view that equitable relief is available in certain types of libel cases only, such as if essential to preserve a property right, if the publication is in violation of a trust or contract, or if the defamation is published in aid of another tort or unlawful act.⁴

Breadth and Scope

The question of the breadth and scope of an anti-libel injunction has several components to it. In the case referenced above, there was no finding of libel prior to the entry of restraints. Hornbook law tells us that such a broad restraint on speech would not satisfy constitutional requirements.

But suppose there *had* been a finding of libel by the court. Note that the order described above directed the takedown of an entire website. Just as a statute restricting speech must not be overly broad, so must an order restricting speech not be overly broad.⁵ To the extent a website contains both libelous and non-libelous statements, an order directing the entire website be taken down would likely exceed the bounds of constitutionality on that ground alone.

However, suppose at the time an injunction is entered by a court a website contains *only* libelous statements. On its face, such a takedown order would seem narrow in scope. Yet, an order directing an entire website to come down would also prospectively preclude non-libelous statements from being published. Thus,

an injunction directing that “Defendant shall take down the website Fredisthedevel.com” or “Defendant shall not publish statements about Fred on the internet” will preclude any speech about Fred even if the particular website at issue in the case only contained libelous statements at the time the injunction was entered. Accordingly, an injunction directing the takedown of a website containing only libelous statements A, B, and C is arguably broader than an injunction directly prohibiting the publication of statements A, B, and C.

Preliminary vs. Permanent Injunctions

Does the fact that the order in my case was a TRO matter? It should. Under both New Jersey and federal law, a court need only find a reasonable probability of success on the merits in order to enter a TRO or preliminary injunction.⁶ Thus, such an injunction would be entered without any actual finding of libel.

But even a permanent injunction, after a trial on the merits, can present a thorny issue of constitutional law. Eugene Volokh has argued that even a *narrow* permanent injunction enjoining *specific* speech after a full trial on the merits is insufficiently protective of First Amendment rights.⁷ Take, for example, an injunction that prohibits Mary from saying that Don robbed a bank. Presumably, such an injunction would be entered after a trial on the merits in which it was proven that Don did not rob a bank, that is, that the statement made by Mary was false.

Volokh argues that such an injunction fails to sufficiently protect speech for several reasons.

First, the initial trial would have been a civil trial in which the libelous nature of Mary’s statement was found by a preponderance of the evidence. But if Mary then violates the injunction she is subject to criminal contempt penalties in a trial in which the only issue to be proven beyond a reasonable doubt is

whether she made the statement, not whether the statement was libelous. Thus, Mary would be subject to criminal penalties for speech in which the alleged libelous nature of her speech was not subject to the usual standard of proof for criminal liability.⁸

Second, the libelous nature of the statement would have been found by a judge, not a jury. Thus, Mary would be subject to criminal penalties for speech in which the alleged libelous nature of her speech was not subject to a jury trial.⁹

Third, if she were indigent, Mary would have had no right to appointed counsel at trial to determine whether her speech was libelous, since that initial trial would have been a civil trial.¹⁰

Finally, an injunction prohibiting Mary from stating that Don robbed a bank would prevent her from making true, non-libelous statements in the case of changing facts. If, after trial, the court were to find that Don did not rob a bank, it might enter an injunction against Mary prohibiting her from stating that Don robbed a bank. But if Don then does, in fact, go out and rob a bank, Mary is still prevented from making the *now true* statement that Don robbed a bank. Thus, even an injunction entered after a trial on the merits can end up prohibiting true, non-libelous speech.¹¹ In prohibiting anti-libel injunctions entirely, the Supreme Court of Texas echoed this very concern:

Given the inherently contextual nature of defamatory speech, even the most narrowly crafted of injunctions risks enjoining protected speech because the same statement made at a different time and in a different context may no longer be actionable. Untrue statements may later become true; unprivileged statements may later become privileged.¹²

The court further explained that in addition to posing the risk of this type of over-breadth, anti-libel injunctions are also unlikely to be effective:

The narrowest of injunctions in a defamation case would enjoin the defamer from repeating the exact statement adjudicated defamatory. Such an order would only invite the defamer to engage in wordplay, tampering with the statement just enough to deliver the offensive message while nonetheless adhering to the letter of the injunction.¹³

Thus, while preliminary anti-libel injunctions present the more obvious problem that no proper record can be made prior to entry of the injunction, permanent anti-libel injunctions present, perhaps, less obvious but equally problematic concerns.

Anti-Libel Injunctions in New Jersey

New Jersey state and federal court decisions fall somewhere in the middle of this spectrum and, unfortunately, lack the consistency and clarity that would provide clear guidance to practitioners.

In the 1951 case *Voltube Corp. v. B. & C. Insulation Products*, the Chancery Division adopted the intermediate approach, holding that an anti-libel injunction is only available where breach of trust or breach of contract is involved.¹⁴

Twenty-three years later, in *Barres v. Holt, Rinehart & Winston, Inc.*,¹⁵ the Law Division discussed the historical and traditional approach of prohibiting anti-libel injunctions entirely. The court explained that this was done to “avoid interference with free speech and the right of defendants to have juries pass on the question of whether the material is libelous or slanderous.” However, the court then went on to note that a “plaintiff might be entitled to an injunction against further circulation of the same material in order to avoid a multiplicity of suits for damages.”

In 2013, in *Chambers v. Scutieri*,¹⁶ the Appellate Division took up the issue in an unreported decision. Noting that neither the Supreme Court of New Jersey nor the Appellate Division had previous-

ly addressed the issue, the court took an especially broad approach, squarely rejecting the historical and traditional prohibition on injunctive relief and holding that such relief is appropriate after a full trial on the merits. The court specifically distinguished such relief from preliminary injunctive relief where a court could not “determine the full extent of the defamatory conduct.”¹⁷

In *ThermoLife Intern. LLC v. Connors*,¹⁸ the United States District Court for the District of New Jersey sought to apply New Jersey law and looked to *Chambers* for the rejection of the traditional prohibition on anti-libel injunctions, noting that in providing relief it must be such that it is “not overbroad and does not unduly burden First Amendment rights.” In entering permanent injunctive relief, the court relied on four concepts:

1. The court noted that the purpose of the libel was not personal but made to injure the plaintiff’s business.
2. The court explained that because the defendant defaulted, there was no danger of subverting the right to a jury trial.
3. Because the defendant did not defend he appeared ready to continue his defamatory speech.
4. The court imposed a narrow injunction limited to the specific defamatory statements alleged in the complaint.¹⁹

Accordingly, there is no clear controlling case law in New Jersey. The trend in New Jersey appears to be the broad approach employed in *O’Brien*, *Balboa*, *Hill*, *Turner*, and *Lothschuetz*. The court in *Chambers* cited and relied upon both *O’Brien* and *Balboa*, while the court in *Thermolife* cited and relied upon *Lothschuetz*. Until the Supreme Court of New Jersey addresses the issue, or the Appellate Division does so in a reported decision, the foregoing suggests a roadmap for navigating anti-libel injunctions in New Jersey. ☞

Endnotes

1. 2017 WL 2417917, *11 (Del.Ch. 2017).
2. See, e.g., *O’Brien v. University Community Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Oh. 1975); *Balboa Village Island Inn, Inc. v. Lemen*, 156 P.3d 339, 350 (Cal. 2007); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 311 (Ky. 2010); *In re Conservatorship of Turner*, 2014 WL 1901115, *20 (Tenn.Ct.App. 2014); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990).
3. See, e.g., *Kinney v. Barnes*, 443 S.W.3d 87, 96-97 (Tex. 2014) (injunctions against defamation are impermissible because they are necessarily ineffective, overbroad, or both); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087 (C.D.Cal. 2012) (same).
4. See, e.g., *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 559 N.W.2d 740, 747 (Neb. 1997).
5. See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010); *Carroll v. President and Com’rs of Princess Anne*, 393 U.S. 175, 183-84 (1968).
6. See *Crowe v. De Gioia*, 90 N.J. 126 (1982); *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017).
7. See Eugene Volokh, *Anti-Libel Injunctions*, 168 Univ. of Penn. L. Rev. 73 (2019).
8. *Id.* at 99-100.
9. *Id.* at 100-02.
10. *Id.* at 103-04.
11. *Id.* at 104-05.
12. *Kinney*, 443 S.W.3d at 98.
13. *Id.* at 97.
14. 20 N.J.Super. 250, 258 (Ch.Div. 1951). See also *Devine v. Devine*, 20 N.J.Super. 522, 528 (Ch.Div. 1952).
15. 131 N.J.Super. 371, 391-92 (Law Div. 1974),
16. 2013 WL 1337935 (N.J.Super.Ct., App.Div., dec. Apr 4, 2013).
17. *Id.* at 13-14.
18. 2014 WL 1050789, *6-7 (D.N.J., dec. Mar. 17, 2014).
19. *Id.*