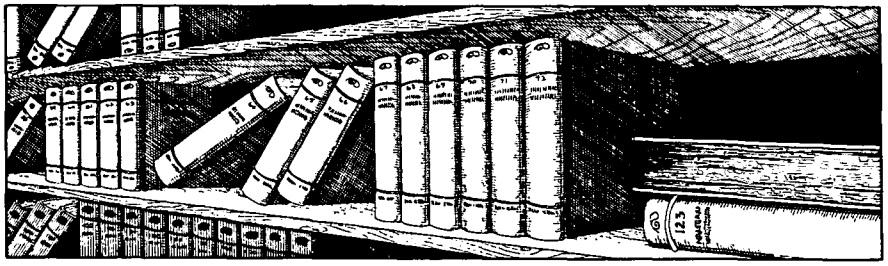
Litigator's Bookshelf



The Death of the Irreparable Injury Rule

What Will the Law Do For Me?
By Douglas Laycock

(Oxford University Press, 1990. 337 pp., $32.50.)

A philosopher imagined himself confronted by a circus strongman. "See my dumbbells," the strongman said. "Your dumbbells are your concern," replied the philosopher. "I desire to see their effect."

We have that kind of conversation with clients all the time. Litigators are hired to get results. When money damages are the only available remedy, the cost-benefit analysis can be relatively straightforward. You are assessing probabilities of spending a certain number of dollars to have an estimated chance of winning or saving a given number of dollars.

The calculus becomes more complex when the client seeks—or opposes—injunctive relief. The value of specific relief may not be quantifiable. Indeed, the conventional wisdom is that equity is more likely to intervene when damages will not make the injured party whole.

We all know, however, that grant or denial of a preliminary injunction can have crucial tactical significance in the early stages of a lawsuit. A permanent injunction—particularly in fields such as intellectual property litigation against alleged infringers—can translate into more real financial benefit than a damages judgment. This is because the damages remedy in such a case may require the jury to speculate about future consequences, leading jurors to recoil from returning a large verdict.

Because of the maxim that equity will not act unless the plaintiff's injury cannot be compensated with damages, we spend a lot of time asking whether there is "an adequate remedy at law," or in other words whether an injury is "irreparable."

Now, along comes an engagingly written yet scholarly book, provocatively titled *The Death of the Irreparable Injury Rule*. One is tempted to dismiss such a work as contrary to the received wisdom—received as recently as last week's advance sheets. Who does this Professor Laycock think he is, anyway? Is this some deconstructionist exegesis? Or a critical legal-studies assault upon the citadel of verity?

Happily not. Professor Laycock has written a book that every litigator should know. He explodes a powerful myth and shows us through analysis of cases from every state and the federal system that "irreparable injury" is a formula invoked to bless results based on other reasons. Were Professor Laycock only to have dispelled a myth, his book would be interesting but not, perhaps, important for practitioners. For those of us who labor in the courts, he performs three distinct services: First, he shows how irreparable injury rhetoric may—in some courts, must—be used to justify or oppose applications for equitable relief. Second, he goes behind the rhetoric and identifies the bases on which courts decide remedies issues. Third, he delivers "a thorough survey of the role of injunctions in contemporary litigation."

Before talking about some theoretical issues, I hasten to describe three distinct ways in which this book is accessible to litigators. First, the table of cases is divided into the Supreme Court, the federal courts of appeals, and the state court decisions by state. You can quickly see if there is authority from your jurisdiction on the precise point that interests you. The book cites and discusses some 1,500 cases. Second, the text marches along uncluttered, with footnotes at the end of each

chapter. The footnotes are not simply numbered blobs of citations. Each one begins by noting, in boldface type, the portion of the text it supports, and each citation is accompanied by a helpful explanatory note. Third, the index contains about 1,200 entries and, with the informative table of contents, will speed you to the discussion you seek.

Now, to the challenging thesis itself—the alleged death of the irreparable injury rule. We should not be surprised that legal formulas sometimes obscure more than they convey. Sir Henry Maine wrote more than a century ago that legal fictions are often the harbingers of change. The common law is sometimes so loath to progress that it must let a new rule grow inside the carapace of old, familiar words.

On the other hand, Laycock is challenging potent and received wisdom. Potent because received from such giants as Charles McCormick himself, who wrote in the very first issue of the *Texas Law Review*—back in 1922—that the special and exceptional character of injunctive relief should be preserved. It takes some courage for Laycock to stand in the selfsame church where McCormick preached and to embrace what McCormick called the "false gods" of disbelief in the irreparable injury rule. But is Laycock right?

It is most interesting to examine Laycock's theory—and its practical applications—with preliminary injunctions. When we seek a preliminary injunction, we recite the traditional four-part test: probability of success on the merits, threat of irreparable injury to the plaintiff, balance of hardships between the parties, and the public interest. Both the plaintiff's injury and the balance of hardships deal with interests that arguably cannot be redressed by simply awarding or adjusting damages at the end of the case. So it appears that the irreparable injury rule has something relevant to say at the front end of the lawsuit.

Not so, says Laycock. And after reading his analysis, I agree with him. Irreparability at the preliminary injunction stage has nothing to do with whether or not a harm is adequately redressed by a damages remedy, which is what traditional irreparable injury doctrine is all about. Rather, the applicant for preliminary relief must show that she cannot wait until the lawsuit is settled because by that time any remedy will be too late. The strength of that showing must then be viewed in light of the unreliability of preliminary decision making on a partial record with no jury and the prospect of harm to the defendant from having her conduct forcibly altered pending a final disposition of the case. Once again, in assessing potential harm to the defendant, talk of legal versus equitable remedies has no place; all potential harms must be considered, whether reparable by money or not.

Here is the clincher argument that preliminary injunction law tells us nothing about irreparable injury in the law versus equity sense: Courts can unquestionably grant preliminary injunctive relief, but can almost never give preliminary damages relief.

Putting aside the preliminary injunction cases, a majority of those with the talismanic irreparable injury language, what help can Laycock be? Let us put a test case: The plaintiff seeks an injunction against violence. It could be family violence or violence against a place of business. If the threatened harm comes to pass, it will involve property damage, personal injury, or both. Courts and juries assess money damages every day for such events, so it cannot be said that either form of damage is irreparable. Yet injunctions against threatened violence are routinely granted, and many statutes provide expressly for them in a variety of circumstances.

Laycock patiently and ably catalogs the circumstances in which specific relief is granted and for each one shows us that irreparable injury is not the court's concern. Indeed, Professor Laycock's first four chapters are a kind of litany of challenges to the trial lawyer. You name a kind of harm and he has most likely found several cases holding that a victorious plaintiff will be entitled to injunctive relief, damages, or a combination of the two. Given the range of his research, this organized taxonomy of remedies decisions provides the central, empirical support for his contention that the irreparable injury rule is dead. His analysis also provides the litigator with valuable research tools. The cases he analyzes offer the means to fashion or resist a claim for specific relief, using either the language that courts actually employ in ruling on such requests or the true determinants of decision.

Professor Laycock concludes with a restatement of the rules about injunctive relief as they appear in actual practice. He does this in the helpful form of black-letter propositions, followed by commentary and analysis. His most general proposition is that a victorious plaintiff "is presumptively entitled to choose either a substitutionary or specific remedy." This choice should be denied "only when countervailing interests outweigh plaintiff's interest in the remedy he prefers." As you can see, he has turned the traditional rule on its head, a trick he is entitled to perform based on the cases he has discussed.

What are these "countervailing interests"? They are based on identifiable legal principles that courts invoke to deny injunctive relief. A partial list includes hardship to third parties from an injunction, the rule against prior restraint of speech, the right to jury trial, the prohibition against injunctive enforcement of personal service contracts, ripeness, mootness, and interference with other lawful authorities.

In sum, Professor Laycock urges litigators to think of injunctive relief in a way that more nearly tracks the way we build, bring, and defend lawsuits. For the plaintiff, we make a list of the remedies that will make our client most nearly whole. At this early stage, we are looking at facts and at merits theories. Having identified our preferred remedies, we turn to Professor Laycock's book and find case-law support for the injunctive or equitable part of what we seek. We are not, and should not be, hung up on irreparable injury language. The cases we find may use such language, but for us their significance is that they hold that we are entitled to what we want—if we can prove our case. Here the guiding principle will be "what is best for the client." Presumably, one could argue for an injunction against a demonstrably negligent and underqualified surgeon who botched an operation on the plaintiff. But why take the trouble, when this plaintiff wants only damages for past harm—leaving future enforcement to other agencies?

The plaintiff's lawyer will then look over the list of circumstances that cut against equitable relief. Some of these, such as the prohibition on compelling personal service or against prior restraint of speech, are near absolute and will make us turn to different remedies.

Other limitations, such as the judicial reluctance to deprive parties of a jury trial, can be overcome by demanding a jury determination of the facts before permanent—as opposed to interlocutory—injunctive relief is sought.

For the defendant, the road is the same, but the lawyer is looking for different scenery. The defense lawyer, looking for case law that cuts against injunctive relief, would do well to focus on the list of countervailing factors in Laycock's last chapter.

I like this book because Laycock goes the circus strongman one better: He, too, shows his dumbbells, but he also shows what they can do for you.

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