

The law of equity is famous for its maxims. They include such classics as: “One who comes to equity must come with clean hands”: “One who seeks equity must do equity”; and a particular one that has come in to my mind in recent days: “Equity does not act in vain.”

The law of equity is a marvelous creature of the common law system. One of its most distinctive features is that it is entirely judge made. At its most general it might be thought of in terms of principles of fairness that balance out the harshness that could arise from a strict application of technical legal rules. Injunctions were developed in the courts of equity and these have now evolved into some of the most sophisticated remedies available in our legal system. They were not planned by legislators but were innovations of judges in response to real practical needs.

The ancestral home of the courts of equity and the great powerhouses of its development are the senior courts of England and Wales. While the Irish courts have their own distinguished and honorable jurisprudence, many of the landmark cases in the development of equitable principles have, even since independence, come from the UK. But in the matter of injunctions you have to wonder if the home of equity has not lost its way of late.

The most recent development in the law of equity in England has been dubbed the ‘superinjunction’. The most fertile breeding ground for injunctions is the lifestyles of the rich and famous. A feature of injunctions is that you generally have to be pretty loaded to consider getting one and you’d better be damned loaded if you hope to have any chance of defending one.

So suppose you are a wealthy celebrity and you discover that some beastly little hack in the media is about to print a story about some indiscretion that you never had. The story is likely to be utterly scurrilous and ruinous of your good name. But once it is published you won’t be able to put the sauce back in the bottle and damages will be no good to you. Just the job for an injunction. But, of course, those nasty media types know that there is nothing better than a good old courtroom drama to get the story that you tried to prevent printing into the public eye. Therefore, the application for the injunction itself will be newsworthy and will get all the salacious details onto the front page in quotation marks from learned counsel. No smoke without fire...enter the superinjunction.

With a superinjunction on the case, not only is an order granted restraining the paper from printing the story itself, but so too is the fact that an injunction was applied for in the first place. Everything takes place under a veil of incredible secrecy. The rationale behind a superinjunction is the prevention of an unjustifiable invasion of privacy.

But this protection of privacy has to be weighed against another great principle of the common law system, i.e. that justice should be administered in public. Granting draconian injunctions to the super wealthy in absolute secrecy is an extreme derogation from this principle. It needs a good justification to say the least.

The problem for the equity judges is that the omnipotence of the superinjunction may just have run in to a serious obstacle: Twitter. You see, injunctions are only as good as your ability to enforce them. And whatever you might think about some elements of the news media, the courts have always been quite comfortable with their ability to impose their will on these organizations. If a newspaper breaches an injunction it will be held in contempt of court, its editor or the journalist responsible, or both, can be hauled in and faced with all manner of unpleasantness, including jail. Its owner can be penalized where it really hurts: in the pocket by eye-watering fines. Some elements of the news media can try to play ducks and drakes with the judicial systems but at the end of the day if they're present in the jurisdiction of the court where the order is made, the judge has power to compel compliance with his or her order.

However, when it comes to the new media such as Twitter things become a lot less clear. All you need is an e-mail address to set up a Twitter account and it can easily be done anonymously and at no cost. One example at the time of writing is the Twitter account @InjunctionSuper which lists the name of "Billy Jones". It displays one of the default Twitter avatars of an egg in its profile and is otherwise blank. It follows a mere 3 other users and has a paltry 6 tweets.

But at time of writing this user has 110,288 followers and is one of the most cited usernames under the search term #superinjunction on Twitter. The account came to my attention when I saw it being replied to by a celebrity stating in the strongest possible terms that she did not have a superinjunction. No newspaper in the UK will touch what's in the Twitter account's stream but, on the other hand, in reality no court can effectively control what is published via social media sites like Twitter. The people behind them are phantoms incapable of being traced. The hosts can be targeted to take down accounts but as soon as one account is closed another can mushroom elsewhere instantaneously. It will often only be recognized when it develops a huge following by which time it will be too late - the message will have been disseminated.

Superinjunctions have not developed as a feature of the law in Ireland. The constitutional requirement in this jurisdiction that justice must be administered in public would be a high hurdle for an applicant to overcome; though maybe we just don't have the right celebrities! Despite the fact that superinjunctions granted in the UK do not have legal effect in Ireland, Irish newspapers and media outlets are rightly careful about publishing anything that might offend against such injunctions. Many tend to have a presence in the UK and most will have some

element of circulation in a jurisdiction with whom we share a land border. Certain Twitter users have no such concerns and Twitter knows no international boundaries.

Superinjunctions are the subject of a lot of debate in the UK right now and the whole question of privacy in this context is currently being considered by one of the most senior judges there. The UK does not have a written constitution but it is subject to the European Convention on Human Rights which is at the centre of that debate. Any jurisprudence of the European Court of Human Rights (ECHR) in this area will certainly have an impact in this jurisdiction.

The old legal maxims are unlikely to count for much in the ECHR, but in the meantime you have to wonder whether, in the age of social media, in trying to keep a lid on invasive exposés with superinjunctions, equity really is acting in vain.