

1. 'If I hold my breath and close my eyes the world everything will stay as it is'. Some fallacies regarding interim injunctions.

Things are not always what they seem to be. For instance, a lot of the processes of growth and decay are more subtle than the human can perceive directly: thus one may have the impression that when one sits in a quiet garden that it is completely motionless and invariable. Yet, if one would look at the same garden at a faster pace (with so-called 'time-lapse photography'¹) the earlier impression of immobility would turn out to be false, for one would suddenly perceive rotting fruits, moving clouds, growing clouds and flowers opening and closing. Moreover, even when one is not a victim of the myth of stability, one may have the childish inclination to think that everything will stay as it is as long as you hold your breath, close your eyes and abstain from any action.

When parties litigate their life outside the courtroom does neither pause nor freeze during the trial. As long as a court has not taken a final decision, the amount of harm infringed on the claimant's rights may continue to grow. However, the question *if* the claimant has a right that has been harmed during the period of litigation can only be decisively answered in retrospect – *after* the final judgement has been given. This is no problem as long as the consequences of the potential violation of the claimant's rights during the trial can be unequivocally established and repaired afterwards: for in the end justice can be done. Things become more complicated when there is no clear way to compensate afterwards for the potential infringement of rights. What is the worth of a judgement that the nationwide emission of a certain documentary violates the claimant's right of privacy if the documentary has already been emitted during the trial? What use is it when a court concludes that the claimant had a right to an expensive medical treatment which was denied to him by his insurance, if the illness of the claimant has become terminal by the time the final verdict is given? Why would a company bother to litigate if the infringement of its patent during the period of trial leads a harm that is not easy to quantify, such as a permanent loss of its market share or its bankruptcy? What is the purpose of civil procedure when both parties are impecunious and could not make up for any harm suffered by the other party during the trial? Conversely, if the court grants an interim remedy to the claimant it may run the risk of causing harm that cannot be compensated for to the defendant. This implies that the court will

¹ See about 'time-lapse photography': <http://en.wikipedia.org/wiki/Time-lapse>.

always run a risk of causing harm that cannot be unambiguously compensated for whatever course of action the court may choose:

When irreparable harm to legal rights on both sides is possible, any interlocutory decision may lead to some loss².

Does this lead to the conclusion that the court is posed for an irresolvable Catch-22? It is clear that an interlocutory decision is not straightforward if both *granting* as well as *denying* an interim remedy could cause potential harm to either defendant or claimant. In such a situation it is very luring to abstain from any decision in the hope to maintain the '*status quo*'. Yet, such hope is probably quite childish – just like it is to think that everything will stay the same as long as you hold your breath, close your eyes and abstain from any action. But isn't the claimant the one who interfered the *status quo* with his claim? Couldn't one argue – seemingly analogous to the idea behind the Latin saying "*affirmanti accumbit probatio*"³ ("he who alleges something must prove that allegation") – that it is unfair to cause potential harm to a defendant who did not ask to be involved in litigation? On a closer look this way of reasoning leads to an unwarranted procedural advantage for defendants:

The fact that it is largely a matter of chance whether a person will be plaintiff or a defendant in any future litigation does not make discrimination between plaintiffs and defendants acceptable⁴.

Moreover, although a court cannot escape the risk of causing harm *completely*, it can make a "try and minimise as much as possible the harmful consequences likely to follow from the court's decision"⁵. This could be done by a comparison of the *risk* of causing irreparable harm (i.e., both the *likeliness* and *amount* of the harm) to the claimant with the *risk* of causing such harm to the defendant.

However, in order to make such a comparison of risks two important issues have to be clarified. The first issue concerns how a the probabilities of causing harm and an estimate of the amount of harm could be made in practice. The second issue is how an interlocutory decision – an interference with due process! – based on such a risk assessment could be justified in terms of *procedural impartiality*. In order to formulate an answer to these two

² J Leubsdorf, 'The Standard for Preliminary Injunctions' 91 *Harvard Law Review* 541

³ Codex Justinianus 4, 19, 23.

⁴ A Zuckerman, 'Interlocutory Remedies in Quest of Procedural Fairness' 56 *The Modern Law Review* 3 325

⁵ A Zuckerman *Civil Procedure* (LexisNexis UK Edinburgh 2003) 272. See also: J Leubsdorf, 'The Standard for Preliminary Injunctions' 91 *Harvard Law Review* 540-541: "[...], the preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decisions".

issues I have to clarify the two rather ambiguous notions involved in them: ‘probability’ on the one hand, and ‘procedural impartiality’ on the other. I will discuss the notion of ‘probability’ in the following section, and the notion of ‘procedural impartiality’ in the section three.

2. An equivocal notion: Probability.

2a. A double role of *probability* in interlocutory decisions.

A judge who has to decide if a interim injunction should be granted has to deal with uncertainty in two respects: *first* there is the uncertainty about the question which party will have success on the merits that should be restated in terms of probabilities, and *secondly* there is the uncertainty about the amount of harm. In both cases the way wherein the judge should make his estimate is not obvious. At first glance it seems as if the estimation of the success on the merits is more dependent on probabilistic notions than the estimation of the amount of harm. Probably it was this idea, combined with the idea that the notion of ‘probability’ is something which should be avoided in making interlocutory decisions, that made Lord Diplock say in the classical case of *American Cyanamid*:

The use of such expressions as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief.⁶

Because Lord Diplock apparently believed that the magnitude of the harm – or what he called “that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried”⁷ – could be estimated without taking recourse to probabilistic notions, the *American Cyanamid* case resulted in the doctrine⁸ that only the amount of harm is relevant is a relevant consideration in interlocutory decisions, whereas the probability of success on the merits should be banned from it.

⁶ *American Cyanamid Co v Ethicon* [1975] 1 All ER 504 (HL) at 510.

⁷ *American Cyanamid Co v Ethicon* [1975] 1 All ER 504 (HL) at 510.

⁸ In practice, however, judges continued to be influenced by the probability of success on the merits: A Zuckerman, *Civil Procedure* (LexisNexis UK, Edinburgh 2003) 278; A Keay, 'Whither American Cyanamid? Interim injunctions in the 21st century' 23 *Civil Justice Quarterly* 133-151.

One may wonder however if it is right to conclude that probability has no role to play in the estimation of harms. Lichtman argues convincingly that in decisions about interim injunctions the uncertainty about the magnitudes of harms has to be taken in account as well as the uncertainty about the proper outcome on the merits⁹.

However, although I agree with Lichtman that the uncertainty involved in the estimation of the magnitude of harms should not be ignored, I do only partly agree with the probabilistic approach he proposes. In order to explain the reasons for my disagreement I will have to expand a little bit more on the notion of 'probability'.

2b. What is *probability*? About subjective beliefs and frequencies.

Was Lord Diplock right in *American Cyanamid* to be suspicious of the notion of 'probability'? I think he partly is, in as far as so-called 'subjective' or *Bayesian* probability is involved – a notion of probability that is not only used by Lichtman in his article¹⁰, but also by “the virtual personification of law and economics himself”¹¹, Judge Richard Posner¹². Besides *Bayesian* probability there is also a completely different notion of probability, the so-called 'frequentist' approach. These two approaches to probability have caused fierce debates among probabilists. When famous philosopher Popper – who adhered to the frequentist notion of probability – heard that his colleague Carnap had to a certain extent turned into a 'subjective' probabilist he wrote:

I felt as a father must feel whose son has joined the Moonies; though, of course, they did not yet exist in those days.¹³

This makes one wonder what the difference between these two approaches to probability is.

The *frequentist* approach is the generally scientific method of drawing conclusions out of empirical data. It says that probability is the frequency of certain events ('data') in the long run *given a certain hypothesis*. Frequentist probability is 'objective' in the sense that it does not depend on *the amount of subjective belief somebody would attach to a certain hypothesis*. So one could for instance do empirical research and conclude that, given the hypothesis that the production of surgical sutures by company X does not affect the sales of surgical sutures

⁹ DG Lichtman, 'Uncertainty and the standard for preliminary relief' 70 *University of Chicago Law Review* 1 210. Cf. A Zuckerman, *Civil Procedure* (LexisNexis UK, Edinburgh 2003) 285.

¹⁰ DG Lichtman, 'Uncertainty and the standard for preliminary relief' 70 *University of Chicago Law Review* 1 213.

¹¹ RD Friedman, 'A Presumption of Innocence, Not of Even Odds' 52 *Stanford Law Review* 4 873.

¹² R Posner, 'An Economic Approach to the Law of Evidence' 51 *Stanford Law Review* 6 1477-1546

¹³ K Popper, *A world of propensities* (Thoemmes, Bristol 1990) 5.

by company Y, the decline in the amount of sutures sold by company Y is very *improbable* - which leads to the conclusion that the hypothesis has to be rejected.

Crucial in *Bayesian* probabilistic inference is that a *hypothesis* has a probability and that the probability of this hypothesis can be adjusted on the base of new empirical evidence: e.g. every time a physician is confronted with the symptoms fever, rash and red bumps that turn out to be caused by measles the probability of his hypothesis might go up.

Bayesian statistical inference is a rarely used method a scientific method, because there are not many situations wherein the *a priori* degree of belief (i.e., *before* it is adjusted by further experience) can be established in an unequivocal way, which makes the whole enterprise a very subjective matter. The ‘solutions’ proposed to avoid this ambivalence in the *a priori* degree of belief have been manifold. The statistician I.J. Good once counted, a bit tongue in cheek, up to 46,656 possible different Bayesian views.¹⁴

The danger of Bayesianism is that it can be easily abused to give a scientific air to purely subjective and arbitrary beliefs. Bayesianism is for instance often abused by Christian who want to prove that the hypothesis that God exists is very probable. Dawkins says about the attempt of such a writer who is called Unwin:

For what it is worth (nothing, in my opinion), at the end of a ding-dong Bayesian race in which God surges ahead in the betting, then drops way back, then claws his way up to 50 per cent mark from which he started, he finally ends up enjoying, in Unwin’s estimation, a 67 per cent likelihood of existing. Unwin then decides that his Bayesian verdict of 67 per cent isn’t high enough, so he takes the bizarre step of boosting it to 95 per cent by an emergency injection of ‘faith’.¹⁵

So I think there is a good side to Bayesianism – namely that it will force judges to make their train of reasoning very transparent to scrutiny – but also that there is a very bad side to it, namely that it invites to dress up judicial discretion with a pseudo-scientific cloak. Another suggestion in Lichtman – although I think that it is unnecessary to tie this up to the Bayes’ rule – is his implicit proposal¹⁶ to give judges negative feedback about how well they ‘predicted’ in their interlocutory decision the amount of harm suffered by the litigants. “Unfortunately”,

¹⁴ G Gigerenzer, *Adaptive Thinking. Rationality in the real world.* (Evolution and cognition, Oxford University Press, Oxford 2000) 16.

¹⁵ R Dawkins, *The God Delusion* (Transworld Publishers, London 2006) 107.

¹⁶ DG Lichtman, 'Uncertainty and the standard for preliminary relief' 70 *University of Chicago Law Review* 1 211.

as Cranston remarks, until this day “social research and monitoring have not been prominent features of the civil justice system”¹⁷.

2c. How should judges use probability in making interlocutory decisions?

In as far as the judicial expression of subjective beliefs on both the *probability* of success on the merits as well as on the *probabilistic* estimates of potential harms helps to make interlocutory decisions more transparent, I support such quantification. However, such quantification must not be pertained *ad absurdum* – especially not with *Bayesian* statistics which suffer already by themselves from a certain inherent arbitrariness. If, for instance, the magnitude of harm is going to be something like Unwin’s estimation of the probability of God’s existence it is better to be frank about one’s ignorance:

...admit that the consequences are unknowable and cannot therefore be easily accommodated within the balance of justice. The safest course to take where there is such irresolvable uncertainty is to base the interim decision on the substantive merits.¹⁸

Bayesian probability itself provides *no standards* or *reasons* for the degree of belief a judge attaches to a certain account, only transparency of judicial thought. Nevertheless, I think it would be possible to imagine certain cases wherein *frequentist* statistics could help provide some reasons to support judicial beliefs, by providing information about the scientific expectations in certain matters.

Moreover, I would like to argue in the next section that there is still another reason why one should be cautious with the use of Bayesian statistics – namely that it is prone to mix up with a particular idea of “procedural impartiality”.

3. An equivocal notion: Procedural Impartiality.

3a. What is *procedural impartiality*? The Bayesian fallacy that impartiality is a matter of even odds.

¹⁷ R Cranston, *How Law Works. The Machinery and Impact of Civil Justice*. (Oxford University Press, Oxford 2006) 177.

¹⁸ A Zuckerman, *Civil Procedure* (LexisNexis UK, Edinburgh 2003) 285.

It is remarkable to notice that Lady Justice until the 16th century is never depicted blindfolded¹⁹. Moreover, the blindfold in first depiction of a blindfolded Lady made by Dürer in 1494 (figure I) does not bear the modern favourable meaning of procedural impartiality, but tries to depict how Justice is deceived and blinded. The woodcut by Dürer was actually a *criticism* of the justice system²⁰.



figure I. The Blindfolding of Justice, from Brant, *Stultifera navis*, Basel, 1497 woodcut.

However, approximately 50 years later the blindfold will be the generally accepted symbol of procedural impartiality, such as it is still today; the blindfolding now shows that justice is fair and not subject to unwarranted biases.

One of the possible explanations for the sudden popularity of this peculiar symbol which probably would have been misunderstood by people from earlier centuries, is its coincidence with the beginning of the modern era: the era of the reformation, of rationalism, the individual, the *ego cogito* and mathematization of the world (the '*mathesis universalis*').

Impartiality and a 'pure', mathematical kind of rationality are closely linked in this view. In

¹⁹ OR Kissel, *Die Justitia. Reflexionen über ein Symbol und seine Darstellung in der bildende Kunst* (Verlag C.H.Beck, München 1984) 82-92.

²⁰ OR Kissel, *Die Justitia. Reflexionen über ein Symbol und seine Darstellung in der bildende Kunst* (Verlag C.H.Beck, München 1984) 88.

accordance with this view Luther writes in 1529 that a judge ‘has to be blind, eyes and ears closed, must not see, not hear’²¹.

I would argue that this notion of impartiality is not the notion we have – or should – have today. Procedural impartiality is today characterized firstly by the fact that a judge has to decide according to pre-existing rules, which exist independent of the dispute and secondly by the fact that the judge is not subject to any apprehended or actual²² bias or preference²³. So, impartiality does *not* mean that the judge has to detach himself from any influence whatsoever and to access the pure, mathematical and metaphysical Reason within himself.

Yet, once again the Bayesian notion of impartiality – the presumption that the a priori judicial belief towards the claims of both litigants has to be mathematically expressed as ‘even odds’²⁴ – falls into the Bayesian fallacy of pseudo-science:

...the oxymoronic-sounding “even odds” of 1:1 – or 50/50 – represent an assessment that the proposition is precisely as likely to be true as to be false. [...] An assumption of even odds would lead to similarly bizarre results in civil cases, in which the usual standard of persuasion is “preponderance of the evidence.” That standard is usually interpreted to mean that the plaintiff must only satisfy the jury that the facts more likely than not favour him – that is, that the probability in his favour is just a shade over 0.5.²⁵

The fact that interlocutory decisions always will imply a certain kind of partiality²⁶ does not mean that this partiality should be hidden behind a pseudo-scientific and rational approach, which is in fact nothing else than judicial discretion.

3b. A pragmatic approach to impartiality?

Granting or denying interim injunctions implies a certain partiality because the court shows itself to be ‘partial’ toward one of the parties. A court which has granted an interim injunction towards the claimant shows that the probability that the claimant will win the case is probably bigger than the probability that the defendant will win the case, unless it is clear that the

²¹ OR Kissel, *Die Justitia. Reflexionen über ein Symbol und seine Darstellung in der bildende Kunst* (Verlag C.H.Beck, München 1984) 85.

²² Because an ‘actual’ bias has to be ‘apprehensible’ to be noticed and because the expression ‘apprehended’ does not mean that the bias is ‘fictional’, it is very hard to draw a distinction between these two notions. Cf. A Zuckerman, *Civil Procedure* (LexisNexis UK, Edinburgh 2003) 72 ff.

²³ Cf. A Zuckerman, *Civil Procedure* (LexisNexis UK, Edinburgh 2003) 71-79.

²⁴ RD Friedman, ‘A Presumption of Innocence, Not of Even Odds’ 52 *Stanford Law Review* 4 873-887.

²⁵ RD Friedman, ‘A Presumption of Innocence, Not of Even Odds’ 52 *Stanford Law Review* 4 874 and 885.

²⁶ A Zuckerman, ‘Interlocutory Remedies in Quest of Procedural Fairness’ 56 *The Modern Law Review* 3 326.

injunction was given not based on the chances of success on the merits but solely based on the amount of expected harm.

One may wonder if such a 'sneak-preview' is objectionable from the view of procedural impartiality. It seems to me that this is not the case as long as a judge the judge is not obviously biased and as long as he decides according to pre-existing rules, which exist independent of the dispute.

Moreover, I would not be surprised if it turns out that such a 'sneak-preview' of the decision on the merits actually may turn out to be highly appreciated by the parties because it gives them the opportunity to make their own risk-assessment about the question if it is worthwhile to continue to litigate if a tribunal has shown a clear 'bias' against them²⁷. In this way the 'sneak-preview' given by an interlocutory decision may in the end turn out to save lots of otherwise – probably – wasted money, energy and time.

²⁷ In the Netherlands interim injunctions are given in summary proceedings. In approximately 95% of the cases the litigants accept the interim injunction and do not proceed to litigate on the merits.