Getting to the source

Kerrie Henderson discusses the Cojuangco case and finds that journalists anxious about their sources identity can draw no solace from the court's findings

Eduardo Cojuangco is a successful Filipino business man, with extensive commercial interests both in the Philippines and in Australia. He has announced his intention to run for the Filipino presidency when Corazon Aquino retires. Reputation is clearly important to such a man.

When, in 1985, the *Sydney Morning Herald* published an article by Peter Hastings which cited 'leading US banks' in Manila as claiming that Cojuangco and others had assisted the Marcoses to 'totally squander $US9 billion', Cojuangco sued. What was surprising, and disturbing in its implications, was the type of action he chose.

Cojuangco commenced proceedings under Part 3 Rule 1 of the Supreme Court Rules, a provision which permits preliminary discovery in aid of proposed litigation. He argued that he was not interested in a trial against the *Herald* or Hastings, but wanted Hastings' sources as defendants.

In a protracted series of hearings, during the course of which Peter Hastings died, the case went to the High Court and twice to the New South Wales Court of Appeal. Initially the judgments went Cojuangco's way, but the most recent decision, handed down by the Court of Appeal on 13 November last year, ruled against disclosure. Despite the outcome, the case raises more questions than it answers and demonstrates all too clearly just how exposed journalists who wish to protect sources really are.

The 'newspaper rule' and preliminary discovery

Traditionally, court practice in defamation matters is to allow newspaper defendants to keep sources secret up to the actual trial. This rule (known as the 'newspaper rule') is however a rule of practice, not a legal right, and its application is a matter for judicial discretion.

In *Cojuangco*, the High Court ruled that the newspaper rule was strictly limited to proceedings already commenced, and was not available to newspaper defendants in actions for preliminary discovery. A defamation plaintiff can therefore greatly improve his chances of getting access to sources, and get around the newspaper rule, simply by commencing a separate preliminary proceeding.

The tactical implications are obvious. Given journalists' well known ethical position, early attempts to access sources could easily be used to force settlements. The proliferation of Part 3 applications could render the newspaper rule a non-event.

The 'interests of justice'

At each stage of the litigation, judges explained that the issue had to be decided on the basis of what was 'in the interests of justice'. Justice Hunt's approach at first instance, which was essentially followed throughout the case, was that to establish that the interests of justice require disclosure a plaintiff must show that, in the absence of disclosure, he will be unable to obtain the relief to which he may be entitled. With the High Court's endorsement, the 'interests of justice' are therefore to be equated with the availability of an 'effective remedy'.

What is an 'effective remedy'?

Justice Hunt thought that an 'effective remedy' would exist if there was no defence plausibly available to the media defendant which would not be available to the source. He found in favour of Cojuangco on the basis that the newspaper might have pleaded a defence of statutory qualified privilege which would have been unavailable to the source.

This analysis rests on an assumption that a plaintiff who can make out a case of defamation is as well compensated by one defendant as another.

This view has been roundly criticised, particularly in Justice Kirby's dissenting judgment in the last appeal.

The Kirby argument is that a remedy is effective only if it also provides the opportunity for vindication of the plaintiff's reputation, and that the ability to select one's target is an important factor in vindication.

On this view it is impossible to equate an action against one defendant with an action against another, and the 'interests of justice' will usually require disclosure.

If the majority view prevails, there remains a difficult question of the degree to which the action against various defendants must be equally likely to succeed, or 'co-extensive', before the courts will find an action against any of the defendants, not necessarily the plaintiff's preferred defendant, is a sufficiently effective remedy. In Cojuangco's case the problem conveniently disappeared when the newspaper agreed not to rely on any defence which would not be available to Hastings' sources.

We are left with the unedifying prospect of the plaintiff, to demonstrate lack of co-extensivity, and the defence, to demonstrate its presence, arguing the demerits of their own cases.

Future implications

All of the courts which have heard the Cojuangco litigation have explicitly rejected any attempt to broaden the newspaper rule's application, and in refusing to apply it in preliminary discovery proceedings, may have severely undermined it.

The judgments have reinforced the role of judicial discretion, for which there are no guidelines or parameters which enable a journalist or source to assess the likelihood of compulsory disclosure.

Cojuangco's case demonstrates the insecurity of media sources and makes is clear that in the absence of legislative clarification (such as American press shield laws, or the English Contempt of Court Act) it is impossible to determine how much or how little protection will be available in any given circumstance.

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HENRY MAYER (1919 - 1991)

Professor Henry Mayer died on 4 May 1991. His influence on Australian communications policy was immeasurable. As an individual he, more than any other, provided contact between people and ideas in all areas of communications. His written contribution included *The Press in Australia* (1968), his popular science readers, *Media Information Australia*, and innumerable scholarly and popular articles. However, his greatest influence was through untiring encouragement of everyone with an idea to offer. This was done with rare objectivity and generosity. He was a university condensed into one person.

Mark Armstrong