COMPELLING JOURNALISTS TO IDENTIFY THEIR SOURCES: 'THE NEWSPAPER RULE' AND 'NECESSITY'

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Journalists argue that effective newsgathering is not possible without the assistance of informants who, in some circumstances, will not impart information unless guaranteed that their identity will not be revealed. It is, therefore, part of the journalistic tradition, reflected in journalists' ethical codes, that journalists will respect confidences.[1] Recent Australian cases have raised the question: when will a court order a journalist to reveal the identity of an informant? In one case a journalist, Tony Barrass, was jailed for seven days for refusing to reveal the identity of a news source. In two recent cases - *Cojuangco*[2] and *Guide Dogs*[3] - to ensure that orders for "preliminary discovery" of the identity of sources of information were set aside, media organisations

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1 The Code of Ethics of the Australian Journalists' Association states that members agree that "in all circumstances they shall respect all confidences received in the course of their calling."

2 *Cojuangco v John Fairfax & Sons Ltd (No 2)* (1991) Aust Torts Rep 81-068.

3 *The Herald & Weekly Times Ltd v The Guide Dog Owners' and Friends' Association* (1990) VR 451.

abandoned defences which might otherwise have protected them from liability for defamation.[4]

This article aims to identify and evaluate the legal principles applied in Australia to determine whether a journalist will be ordered to identify his or her informant. It will be shown that Australian courts either are, or should be, guided by a general principle of "necessity". The application of this "necessity" principle means that a journalist will not be required to reveal the identity of an informant unless the court is satisfied, in the circumstances in which the issue of disclosure arose, that such disclosure is necessary for the proper administration of justice; it must be shown that justice cannot be done without this information being revealed.

The factors which will influence a court when determining whether it can be said that justice cannot be done in a particular case unless the identity of a journalist's source is disclosed will depend upon the circumstances in which the issue of disclosure arises. This article will show that the issue of disclosure may arise in three different circumstances and that the application of the "necessity" principle is influenced by different factors in each of those three circumstances.

It will be argued that, properly understood, the "newspaper rule" is the product of the application of the "necessity" principle as that principle operates in the context of one of the occasions when representatives of the media may be required to disclose their sources. One commentator has analysed *Cojuangco* and *Guide Dogs* by reference to the "newspaper rule".[5] In fact, neither *Cojuangco* nor *Guide Dogs* arose in the circumstances in which the "newspaper rule" is relevant. It is suggested that it is not helpful to group together cases falling under the three different headings. It is only by bearing in mind both the principle of "necessity" and the fact that the application of that principle depends upon the circumstances in which the issue of disclosure arises that tests and rules developed by the courts can be understood and evaluated.

I. WHEN DOES THE ISSUE OF DISCLOSURE ARISE?

The identity of a journalist's informant may be of relevance to a court in the following circumstances:

1. when the journalist is giving evidence before a court;
2. as part of the pre-trial, interlocutory and discovery process when defamation proceedings have been instituted against a media organisation; or

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4 The *Cojuangco* and *Guide Dogs* cases are analysed later in this article (*infra* section IV, B (iii) and (iv)). The publishers of *The Age* newspaper adopted a similar strategy in May 1990 in a case in which Mark Alfred Clarkson sought to discover the sources of an article published in *The Age* in January 1985 - see *The Age* May 3, 1990 at p 1.

5 G Hattam "The Newspaper Rule" (1989) 9 *Communications Law Bulletin* 10.

3. under equitable or court rules which establish a procedure for discovering the identity of a wrongdoer.

The principles applied to determine whether a court will require a journalist or media organisation to reveal the name of the source of information will now be analysed under each of these headings.

II. IDENTIFYING A SOURCE WHEN GIVING EVIDENCE

The Barrass case falls into this category. The *Sunday Times* in Western Australia published an article highlighting breaches of security in the Taxation Office. The author of the article, Tony Barrass, was later subpoenaed as a witness in a preliminary hearing in Western Australia. The preliminary hearing concerned a charge against a taxation clerk who was accused of the unauthorised disclosure of information. Barrass refused to answer questions regarding how he obtained confidential tax information. Section 77 of the *Justices Act* 1902 (WA) provides that:

> If on the appearance of a person before justices, ... such person ... refuses to answer such questions concerning the matter as are then put to him, without offering any *just excuse* for such refusal, any justice then present and having there jurisdiction may by warrant commit the person so refusing to gaol, there to remain and be imprisoned for any time not exceeding seven days, unless in the meantime he consents to be examined and to answer concerning the matter. *(emphasis added)*

In 1940 in *McGuinness* the High Court held that a journalist has no "lawful excuse", arising only from his or her professional relationship with an informant, entitling the journalist lawfully to refuse to reveal information when required to do so by a court.[6] Thus, Australian courts have refused to recognise an evidentiary privilege[7] entitling journalists to refuse to disclose evidence on the ground only that this would reveal information imparted to the journalist in confidence or reveal the identity of their source of information. It followed that, under s 77 Barrass had no "*just excuse*" for refusing to say how he obtained the information. He was sentenced to seven days imprisonment.

It is worth noting that, apart from specifying the maximum penalty, s 77 of the Western Australian *Justices Act* incorporates common law principles. At common law, a witness who refuses to answer a question which would provide relevant and admissible evidence may be found guilty of contempt of court.

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6 *McGuinness v The Attorney-General of Victoria* (1940) 63 CLR 73 at 85-6 per Latham CJ, at 87-8 per Rich J, at 92 per Starke J, at 102-4 per Dixon J and at 106 per McTiernan J. This has been confirmed by the High Court in *John Fairfax & Sons Ltd v Cojuangco* (1988) 82 ALR 1 at 6.

7 "Privilege" is the right to refuse to disclose admissible evidence including oral answers and the production of documents.

Accordingly, so far as the contempt finding is concerned, the result would have been the same in the Barrass case even without s 77.

Notwithstanding the absence of an evidentiary privilege, few Australian cases have raised the problem of compulsory disclosure by journalists who are called as witnesses. There are a number of possible explanations for this: journalists' sources may not often be relevant to litigation or investigations; the parties may not press the matter; if a government is involved it may not wish to appear to attack the media.[8] Furthermore, to ensure public confidence in the authenticity of information, journalists generally identify its source; the issue of compulsory disclosure usually arises only in the comparatively rare case where, not only does the informant not want to be identified, but also the information is published notwithstanding that the source is not identified.

A. THE "NECESSITY" PRINCIPLE AS IT APPLIES WHEN A JOURNALIST IS GIVING EVIDENCE BEFORE A COURT

A witness who refuses to answer a question will not be guilty of contempt of court unless the information that is required is relevant to the proceedings.[9] In 1963, in *Attorney-General v Mulholland*, members of the English Court of Appeal suggested that, where a journalist is required to answer a question revealing information conveyed to the journalist in confidence or revealing the source of information, there is an additional requirement. Lord Denning MR said that journalists will not be directed to answer unless the question is "necessary";[10] Donovan LJ stated that the question must be one the answer to which will serve a "useful purpose".[11] The third member of the Court of Appeal, Danckwerts LJ, appears to have agreed with both Lord Denning and Donovan LJ.[12] The two tests do, however, set different standards: much information is "useful", less can be said to be "necessary"; if information is not useful, it could never be said to be "necessary",[13] but information might be "useful" even though not "necessary". Thus, it would be easier to establish that a question is one the answer to which would serve a "useful purpose" than to establish that an answer to a question is "necessary". In the New South Wales

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8 WA, The Law Reform Commission, *Working Paper on Privilege for Journalists* (1977) para 4.8 and WA, the Law Reform Commission, *Report on Privilege for Journalists* (1980) paras 3.5-3.6.

9 *Attorney-General v Clough* [1963] 1 QB 773 at 785-6; *Attorney-General v Mulholland* [1963] 2 QB 477 at 487 per Denning MR and at 492 per Donovan LJ (Danckwerts LJ agreed).

10 *Attorney-General v Mulholland ibid* at 489-90. See also *Senior v Holdsworth* [1976] QB 23 at 34-5 per Lord Denning MR.

11 *Attorney-General v Mulholland ibid* at 492. In *Senior v Holdsworth ibid* at 37 Orr LJ agreed with Donovan LJ's statement in the earlier case.

12 *Attorney-General v Mulholland* note 9 *supra* at 493.

13 *Attorney-General v Lundin* (1982) 75 Cr App R 90 at 99.

case of *Buchanan* both tests were referred to,[14] but the "useful purpose" requirement was subsequently applied in the Victorian case of *Hancock*.[15] In *Cojuangco* the High Court endorsed a "necessity" test, suggesting (obiter) that:

> In effect, the courts have acted according to the principle that disclosure of the source will not be required unless it is *necessary* in the interests of justice. ... *even at the trial* the court will not compel disclosure unless it is *necessary* to do justice between the parties.[16] *(emphasis added)*

If this test is applied, a journalist who refuses to answer a question when called as a witness will be found guilty of contempt of court only if it can be said, not only that the question is relevant to the proceedings, but also that the answer is "necessary" for the proper administration of justice. If justice can be properly administered without the information, the journalist will not be required to answer the question.

The English case of *Maxwell v Pressdram Ltd* illustrates how a necessity test may result in a court not requiring a journalist to reveal the identity of his or her informant. The plaintiff sued *Private Eye* for defamation. When the matter came to trial, the defendant's employees refused to answer questions which would identify the source of the allegedly defamatory material. The plaintiff argued that the identity of the informants was relevant to his claim for exemplary damages. The Court of Appeal upheld the trial judge's refusal to make an order to compel disclosure of the sources. Lord Justice Kerr said:

> it is essential first to identify and define the issue in the legal proceedings which is said to require the disclosure of sources, and then to decide whether, having regard to the nature of the issue and the circumstances of the case, it is in fact 'necessary' to make such a far reaching order.[17]

While it was acknowledged that it was *relevant* to the issue of exemplary damages to know whether the source was reliable, it was held that the trial judge was right to have concluded that he could deal with this by giving an adequate direction to the jury concerning how they might view the journalists' statements of belief in the source; it was not *necessary* in the interests of justice to require the journalists to disclose their sources.[18]

It is desirable that Australian courts should adopt the High Court's suggestion in *Cojuangco*[19] that a "necessity" test be applied to determine whether a journalist should be required to reveal the identity of a source when he or she is giving evidence before a court. Two reasons are:

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14 *Re Buchanan* (1964) 65 SR (NSW) 9 at 10-11.

15 *Hancock v Lynch* [1988] VR 173 at 176-8.

16 *John Fairfax & Sons Ltd v Cojuangco* note 6 *supra*.

17 *Maxwell v Pressdram Ltd* [1987] 1 WLR 298 at 309 per Kerr LJ.

18 *Ibid* at 310 per Kerr LJ and 311 per Parker LJ. In this case s 10 of the *Contempt of Court Act* 1981 (UK) required the Court to apply a 'necessity' test.

19 *John Fairfax & Sons Ltd v Cojuangco* note 6 *supra*.

(a) at common law it is a contempt of court to fail to answer a question when required to do so by a court. The power to convict for contempt is directed at ensuring the effective administration of justice; it is generally understood that the contempt power is exercised only where an act or omission interferes with the administration of justice.[20] Thus, it reflects the true nature of the contempt power to require a witness to answer a question only where the answer is necessary for the proper administration of justice.

(b) a "necessity" test has the advantage of bringing the law regarding witnesses into conformity with other aspects of the law regarding the conduct of judicial proceedings. For example, it is only where it is necessary, in the sense that justice cannot otherwise be administered, that a court will conduct its proceedings *in camera* or conceal information from those present in the courtroom.[21]

Furthermore, a "necessity" test provides a justifiable balance between the public interest in the proper administration of justice and the public interest in the free flow of information which may be facilitated by respecting the confidentiality of journalists' sources.

III. IDENTIFYING A SOURCE DURING THE PRE-TRIAL, INTERLOCUTORY AND DISCOVERY PROCESS OF A DEFAMATION ACTION

Malice, lack of good faith or unreasonableness may defeat certain defamation defences in some jurisdictions. In a defamation action brought against a media organisation, the plaintiff may therefore want to identify the source of allegedly defamatory material to show that, as the source could not reasonably have been believed, the defendant must have been actuated by malice or lack of good faith or the defendant acted unreasonably in publishing the material. The "newspaper rule" has the effect that, except in special circumstances,[22] a defendant in a defamation action who is a newspaper publisher, proprietor or editor will not be compelled in interlocutory proceedings to disclose the name of the writer of the relevant article or the sources of information on which the article was based. This immunity was recognised by the High Court in *McGuinness*[23] and

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20 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 370 per Dixon CJ, Fullagar, Kitto and Taylor JJ; *Hancock v Lynch* note 15 *supra* at 178.

21 *R v Hamilton* (1930) 30 SR (NSW) 277 at 278; *R v Tait* (1979) 24 ALR 473 at 489 and 491-2; *David Syme and Co Ltd v General Motors Holden's Ltd* [1984] 2 NSWLR 294 at 300 per Street CJ and at 307 per Hutley AP.

22 See the discussion regarding "special circumstances" *infra* section III A (ii).

23 *McGuinness v The Attorney-General of Victoria* note 6 *supra* at 85 per Latham CJ, at 87 per Rich J, at 92 per Starke J, at 104 per Dixon J and at 106-7 per McTiernan J.

Cojuangco,[24] but in *Cojuangco* it was said that the newspaper rule is one of practice, not of evidence. According to the High Court in *Cojuangco*, the rule "guides or informs the exercise of the judicial discretion".[25]

A. THE "NECESSITY" PRINCIPLE AS IT APPLIES TO THE PRE-TRIAL, INTERLOCUTORY AND DISCOVERY PROCESS

(i) The rationale for the newspaper rule

There are a number of uncertainties about the newspaper rule. For example, it is not clear to what publications and actions the rule applies: does it apply to some or all radio and television programs;[26] is it confined to defamation proceedings;[27] what relationship must the defendant have to the publication to take advantage of the rule? These issues are not easily solved because the rationale for the rule is uncertain.

In one case, the English Court of Appeal decided not to require answers to interrogatories regarding the source of a letter and information published by a defendant where the object was to show that the defendant acted with malice. This decision was based on two grounds; first, that the answers to the interrogatories were not material and, secondly, that the purpose of the interrogatories was to enable the plaintiff to find a case of which he knew nothing, and therefore the rule against "fishing" interrogatories operated.[28] So far as it is based on the first of these grounds, the Court's reasoning is open to doubt; in determining whether a publisher was actuated by malice, important factors are whether an inquiry was made into the truth of the statement and to whom the inquiry was addressed.[29] Subsequently, the rule has been said to be based on the grounds, first, that the object of obtaining the informant's name is

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24 *John Fairfax & Sons Ltd v Cojuangco* note 6 *supra* at 4-8.

25 *Ibid* at 7.

26 In *Wran v Australian Broadcasting Commission* [1984] 3 NSWLR 241 at 251 Hunt J accepted that the rule applied to a current affairs program. In New Zealand it has been held that the rule applies to television and radio as well as to newspapers *(Isbey v New Zealand Broadcasting Corporation (No 2)* [1975] 2 NZLR 237; *Brill v Television Service One* [1976] 1 NZLR 683) and that it does not apply only to news items *(Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163 at 166 per Woodhouse J and at 177-8 per McMullin J).

27 The newspaper rule has been applied in respect of a claim based on slander of goods *(Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd ibid* at 166-7 per Woodhouse J, at 173-4 per Richardson J and at 179 per McMullin J) and in *Cojuangco* the High Court suggested (obiter) that the rule applies to "interlocutory proceedings in defamation and, perhaps, other analogous actions" *(John Fairfax & Sons Ltd v Cojuangco* (1988) 82 ALR 1 at 7).

28 *Hennessy v Wright (No 2)* (1890) 24 QBD 445n at 447-8 per Lord Esher MR (with whom Lindley and Lopes LJJ agreed).

29 *White and Co v Credit Reform Association and Credit Index, Limited* [1905] 1 KB 653.

to sue her or him and this is an improper use of the discovery process and, secondly, that a newspaper stands in such a position that it is not desirable that the name of its informant be disclosed.[30] This analysis is also open to criticism. If the rule were based on the first ground it would not apply if the plaintiff undertook not to sue the informant; nonetheless, it has been held that, despite such an undertaking, the rule applied.[31] Moreover, this ground is no more applicable to a newspaper than to any other defendant.[32] If the rule were based on the second ground alone it would apply not only to interlocutory proceedings, but also to the trial.[33]

Some cases suggest that the newspaper rule is based on the public interest in the dissemination of information.[34] Certainly the rule may promote greater freedom of speech by encouraging people to provide journalists with information and by encouraging journalists to publish that information. Nonetheless, a test which called on the courts to determine whether the public interest served by the publication of the information in question outweighed the public interest in the proper administration of justice in any particular case would be unworkable.

Members of the High Court have made a number of suggestions regarding the rationale of the rule.[35] Dixon J's analysis in *McGuinness* was quoted with approval by the High Court in *Cojuangco*.[36] In *McGuinness*, Dixon J said that the newspaper rule is founded on:

> the special position of those publishing and conducting newspapers, who accept responsibility for and are liable in respect of the matter contained in their journals, and the desirability of protecting those who contribute to their columns from the consequences of *unnecessary* disclosure of their identity.[37] (emphasis added)

This suggested rationale for the newspaper rule is based on three considerations: first, that media defendants accept responsibility for what they publish; secondly, the references to the "special position" of media organisations and the "desirability" of protecting their sources indicates that regard was had also to the public interest in the dissemination of information by the media; finally, reference is made to the fact that disclosure is "unnecessary". If the newspaper rule applies only in circumstances referable to all three considerations, it is not

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30 *Adam v Fisher* [1914] 30 TLR 288.

31 *Lyle-Samuel v Odhams, Limited* [1920] 1 KB 135.

32 *Ibid* at 141 and 146.

33 *Attorney-General v Clough* note 9 *supra* at 789-90.

34 *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* note 26 *supra* at 166 per Woodhouse J, at 172 per Richardson J and at 180 per McMullin J.

35 *McGuinness v The Attorney-General of Victoria* note 6 *supra* at 87 per Rich J (special considerations affecting liability for defamation and the discretionary nature of discovery) and at 92 per Starke J (convenience and limits fishing and oppressive inquiries).

36 Note 6 *supra* at 7.

37 Note 6 *supra* at 104.

open to the criticism made of some of the other suggested grounds for the rule. In particular, the second consideration indicates that it cannot be said that the reasoning is applicable to defendants other than media defendants. This explains why it has been held that the newspaper rule does not apply to enable a defendant who has written a letter published in a newspaper to refuse to disclose his or her sources.[38]

The approval by the High Court in *Cojuangco*[39] of Dixon J's analysis in *McGuinness*[40] makes it clear that it is not enough that the publisher is a media organisation; the organisation must also take responsibility for what it has published so that it is unnecessary to identify the source. The reference to "unnecessary" disclosure explains why the newspaper rule is, itself, directed only to interlocutory proceedings: when the matter comes to trial, disclosure may be necessary to show malice or lack of good faith so as to defeat a defence pleaded by the media organisation, but, as Hunt J said in *Cojuangco*, the newspaper is liable for what it publishes so that it is *unnecessary*, at the interlocutory stage of proceedings, for the plaintiff to "delve around for other targets".[41]

(ii) Limits to the application of the newspaper rule

The High Court's endorsement in *Cojuangco*[42] of the "necessity" rationale for the newspaper rule was, of course, by way of obiter dicta: *Cojuangco* did not involve interlocutory proceedings. Nonetheless, the High Court did make two comments regarding the newspaper rule which would limit its operation. First, the High Court left open the possibility that the newspaper rule may not always apply:

> It may be that ... all that the applicant has to show is that the making of the order [to compel disclosure in the pre-trial interlocutory and discovery process] is *necessary* in the interests of justice.[43] *(emphasis added)*

This limitation on the operation of the newspaper rule is justifiable. It is difficult to imagine circumstances where justice requires that the identity of the source be revealed at the interlocutory stage. Nonetheless, it is consistent with the rationale for the newspaper rule that it should not operate in the unusual case where the plaintiff can establish that disclosure is, in fact, necessary at this point.

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38 *South Suburban Co-operative Society Limited v Orum* [1937] 2 KB 690.

39 Note 6 *supra* at 7.

40 Note 6 *supra* at 104.

41 *Re Application of Cojuangco* (1986) 4 NSWLR 513 at 519.

42 Note 6 *supra* at 7.

43 *Ibid* at 9. A similar point was made by Glass JA (with whom Kirby P agreed) in the New South Wales Court of Appeal *(John Fairfax & Sons Ltd v Cojuangco* (1987) 8 NSWLR 145 at 149.)

The second comment made by the High Court in *Cojuangco* restricted the operation of the newspaper rule in "special circumstances". The newspaper rule has generally been expressed to apply "except in special circumstances".[44] There is, however, no reported decision in which disclosure has been compelled on the basis that special circumstances were shown to exist. Indeed, in 1980, in the New Zealand Court of Appeal, Woodhouse J suggested that the proviso should be abandoned.[45] Notwithstanding this, in *Cojuangco* the High Court reasserted, and emphasized, that the rule does not operate "in special circumstances";[46] the High Court suggested that the newspaper rule might not have applied in *Cojuangco* had that case arisen in the context of an interlocutory application in a defamation action in which malice was an issue:

> The striking feature of the case is that the publication complained of consists essentially of defamatory imputations attributed to 'a senior American bank official and prominent local businessmen' and 'one of the leading local US banks'. The thrust of the publication is that the imputations have a solid basis of support ... . It may be that the rule has no application when the newspaper identifies its source in a general way and relies on that source to point up the authenticity of the imputations. But this is by the way. In the context which we have supposed, the circumstances would be special so as to justify a departure from the rule. Apart from the striking feature already mentioned, the defamation is of a very serious kind. The respondent is a prominent personality in the Philippines. His reputation might well be gravely compromised by imputations attributed to the sources mentioned in the publication. He should be given the opportunity of discovering the precise identity of the sources and deciding upon such action as he then considers appropriate.[47]

This aspect of the High Court's judgement in *Cojuangco* is open to criticism. First, the High Court's statement is in no way connected with the rationale for the newspaper rule. Secondly, no reason is given for suggesting that the newspaper rule should not apply where the publication in question identifies a source in a general way and relies on that source to point up the authenticity of the imputations. Thirdly, if a defamatory imputation is of a serious kind the plaintiff can expect more by way of damages from the media organisation which published the material. This part of the High Court's decision appears to confuse the question whether the newspaper rule should operate to allow a journalist to refuse to identify his or her sources in interlocutory proceedings with the question whether an order should be made to force the disclosure of the

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44 *Hope v Brash* [1897] 2 QB 188 at 191 per Lord Esher MR and at 192-3 per Smith LJ; *Plymouth Mutual Co-operative and Industrial Society, Limited v Traders' Publishing Association, Limited* [1906] 1 KB 403 at 415-6 per Vaughan Williams LJ and at 418 per Stirling LJ; *Lyle-Samuel v Odhams, Limited* note 31 *supra* at 141-3 per Bankes LJ and at 146-7 per Scrutton LJ.

45 *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* note 26 *supra* at 168-9.

46 Note 6 *supra* at 7.

47 *Ibid* at 8-9.

identity of a wrongdoer. The latter issue, and the test to be applied, will now be considered.

IV. EQUITABLE OR COURT RULES WHICH ESTABLISH A PROCEDURE FOR DISCOVERING THE IDENTITY OF A WRONGDOER

In 1973 in *Norwich Pharmacal* the House of Lords revitalised and extended an equitable procedure for discovery to ascertain the identity of a wrongdoer. It was held that a person who is "involved" or "mixed up" in the tortious acts of others must give full information by way of discovery and disclosure of the wrongdoer's identity.[48] In some Australian jurisdictions rules of court make provision for discovery which is similar, although not identical to the equitable procedure. For example, in New South Wales the *Supreme Court Rules* 1970, Pt 3, r 1 state:

> (1) Where, on application by any person, it appears to the Court that -
> (a) the applicant, having made reasonable inquiries, is unable to ascertain the identity of a person for the purpose of commencing proceedings against that person ...; and
> (b) some person has or may have knowledge of facts ... tending to assist in the ascertainment of the identity ... of the person concerned,
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> the Court may order that person -
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> (c) to attend before the Court or an officer of the Court and be orally examined on any matter relating to the identity ... of the person concerned ... .[49]

The application for preliminary discovery pursuant to these rules is a similar, but not identical, procedure to a bill of discovery in equity.[50] It is helpful to deal with each procedure separately.

A. THE "NECESSITY" PRINCIPLE AS IT APPLIES TO THE EQUITABLE PROCEDURE FOR DISCOVERING THE IDENTITY OF A WRONGDOER

Granada illustrates the application of the *Norwich Pharmacal* equitable procedure to the media. Granada Television Ltd (Granada) broadcast a program which showed on the screen, and quoted from, confidential documents which were the property of British Steel Corporation (BSC). The documents had been

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48 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 at 175 per Lord Reid, at 178-82 per Lord Morris, at 188 per Viscount Dilhorne, at 195-7 per Lord Cross and at 203-4 per Lord Kilbrandon.

49 See also *Federal Court Rules* O 4 r 17; *The General Rules of Procedure in Civil Proceedings* 1986 (Vic) rule 32.03 (see NJ Williams, *Supreme Court Civil Procedure* paras 3.04-3.08).

50 Some differences were identified by Hunt J in *Re Application of Cojuangco*, note 41 *supra* at 521.

delivered to Granada by a person who must have been an employee of BSC. Granada promised that it would not reveal the identity of the person who gave it the documents. Abandoning all claims against Granada, BSC brought an action for discovery seeking disclosure of the name of the person who supplied the documents to Granada. The House of Lords held that an order for discovery could be made against the media organisation.[51] Being equitable, the remedy is discretionary. The majority held that a court should not compel disclosure unless this is *necessary* in the interests of justice.[52] In this case it was held that, in the interests of justice, disclosure should be ordered as disclosure was necessary to enable BSC to obtain an effective remedy.[53]

There were some suggestions in both *Norwich Pharmacal* and *Granada* that an order for discovery would be made if the applicant showed that it could bring legal proceedings against the source, even though the applicant did not, in fact, intend to exercise its right to commence proceedings.[54] The applicant might intend merely to take disciplinary action against the source of the information or to take some other steps to ensure that no further breaches of security occur. Nonetheless, until the recent decision of the House of Lord in *Goodwin*,[55] it was possible to point to a line of authorities all deciding that it is not sufficient that an action *could* be brought against a wrongdoer. In *Secretary of State for Defence v Guardian Newspapers Ltd* Lord Diplock (with whom Lord Roskill agreed) said that, where the applicant must show that an order is necessary in the interests of justice, " 'justice' .. is not used in a general sense as the antonym of 'injustice' but in the technical sense of the administration of justice in the course of legal proceedings in a court of law".[56] He said that "justice" refers to: "the administration of justice in particular legal proceedings already in existence

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51 *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 at 1169-70 per Lord Wilberforce, at 1178-82 per Viscount Dilhorne and at 1196 per Lord Fraser. Lord Russell agreed (1203-4).

52 *Ibid* at 1173-4 per Lord Wilberforce, at 1184 per Viscount Dilhorne and at 1200 per Lord Fraser. Lord Russell agreed (1203-4).

53 *Ibid* at 1174-5 per Lord Wilberforce, at 1184 per Viscount Dilhorne and at 1199-1202 per Lord Fraser. Lord Russell agreed with the majority (1203-4). Lord Salmon dissented holding that "the newspaper rule" was not confined to defamation cases, but that in any action against the media for discovery a plaintiff cannot obtain from the defendant the name of the source of information (1188).

54 *Norwich Pharmacal Co v Customs and Excise Commissioners* note 48 *supra* at 188 per Viscount Dilhorne ("If he could be sued, *even though there be no intention of suing him,* he is not a mere witness." [*emphasis added*]); *British Steel Corporation v Granada Television Ltd* note 51 *supra* at 1174 per Lord Wilberforce ("given a cause of action, an intention to seek redress - by court action *or otherwise* - would be enough" [*emphasis added*]).

55 *X Ltd v Morgan - Grampian (Publishers) Ltd* [1990] 2 WLR 1000.

56 *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 at 350 per Lord Diplock (Lord Roskill agreed at 369).

or, ... a particular civil action which it is proposed to bring against a wrongdoer whose identity has not yet been ascertained."[57]

Following *Secretary of State for Defence v Guardian Newspapers Ltd*, in other cases it was held that the applicant must contemplate legal proceedings against the source, not merely disciplinary action.[58] For example, in *Handmade Films (Productions) Limited v Express Newspapers Plc* it was decided that disclosure was not "necessary in the interests of justice" since the applicant had failed to persuade the judge that disclosure was "primarily sought for the purpose of suing the unknown wrongdoer."[59] It was held that it was not sufficient "that the purpose is merely to identify the wrongdoer against whom an action might be brought"; disclosure is necessary in the interests of justice only if the applicant "needs the name of the unknown wrongdoer in another action".[60]

The lower courts in *Goodwin* endorsed the principle that discovery will not be ordered unless it is made for the purpose of commencing legal proceedings against the source,[61] but members of the House of Lords suggested that "justice" is not confined to the administration of justice by the courts. In *Goodwin*, Lord Bridge disagreed with Lord Diplock's view in *Secretary of State for Defence v Guardian Newspapers Ltd*;[62] Lord Bridge said that to confine 'justice' to the administration of justice in a court of law is too narrow and that "persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court will be necessary to attain those objectives."[63] Lords Templeman and Oliver expressed similar views.[64] Other members of the House of Lords agreed with Lord Bridge.[65]

It is suggested that Australian courts applying the equitable procedure for discovery should not adopt the dicta of the House of Lords in *Goodwin*. An order for discovery is made only where the court is satisfied that the journalist is involved in the wrongful, that is, tortious, act of another. The procedure is based on the assumption that it is necessary to make the order so that legal proceedings can be instituted against the tortfeasor. It would be strange indeed

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57 *Id.*

58 *Maxwell v Pressdram Ltd* note 17 *supra* at 300 per Kerr LJ; *X v Y* [1988] 2 All ER 648 at 661-2.

59 *Handmade Films (Productions) Limited v Express Newspapers Plc* [1986] FSR 463 at 470.

60 *Id.*

61 *Re Goodwin* [1990] 1 All ER 608 at 614 per Hoffmann J; *X Ltd v Morgan-Grampian (Publishers) Plc* [1990] 2 WLR 421 at 439 per Lord Donaldson MR and at 441-2 per McCowan LJ.

62 [1985] AC 339 at 350.

63 *X Ltd v Morgan - Grampian (Publishers) Ltd* note 55 *supra* at 1009.

64 *Ibid* at 1014-15 per Lord Templeman and at 1018-19 per Lord Oliver.

65 *Ibid* at 1015 per Lord Griffiths and at 1019 per Lord Lowry.

if judicial resources were devoted to facilitating action outside the judicial system. For these reasons the applicant should be required to satisfy the court that it intends to exercise a legal right to bring a civil action against the source. This brings the principles applied to determine whether discovery should be ordered pursuant to the *Norwich Pharmacal* equitable procedure into conformity with the court rules which operate in some Australian jurisdictions. Under these court rules, an application for discovery must be made "for the purpose of commencing proceedings" against the person who is identified.[66]

B. THE "NECESSITY" PRINCIPLE AS IT APPLIES TO COURT RULES WHICH ESTABLISH A PROCEDURE FOR DISCOVERING THE IDENTITY OF A WRONGDOER

Cojuangco concerned material published in the *Sydney Morning Herald.* An article on the features' page said that "one of the leading US banks" maintained that the then President Marcos of the Philippines and his "cronies" had squandered up to $US 9 billion and that Eduardo Cojuangco was one of those cronies. A news story published in the same edition drew attention to the feature article and referred to the sources of the article as "a senior American bank official and prominent local businessmen." Cojuangco applied for preliminary discovery under Part 3, r 1(1) of the New South Wales *Supreme Court Rules* 1970[67] seeking from the publisher of the newspaper and the author of the article and news story the names of the sources of the information upon which the publications were based so as to institute defamation proceedings against those sources. The case has had a long history. It was heard first in the Supreme Court of New South Wales by Hunt J who ordered the journalist to attend before the Court to be examined in relation to the identity of the sources referred to in this article.[68] Appeals were dismissed by the New South Wales Court of Appeal[69] and the High Court.[70] Subsequently, when the newspaper undertook not to call the journalist to give evidence at the trial of any defamation action which might be brought against it, Hunt J set aside the order for preliminary discovery.[71] Cojuangco appealed to the New South Wales Court of Appeal against this decision arguing that, despite the undertaking, an order should be made; by a majority, the appeal was dismissed after the

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66 *Supreme Court Rules* 1970 (NSW) Pt 3, r 1; *Federal Court Rules* O 4 r 17; *The General Rules of Procedure in Civil Proceedings* 1986 (Vic) rule 32.03. See also the discussion in *Cojuangco v John Fairfax Sons Ltd (No 2)* note 2 *supra* at 68,519 per Kirby P.

67 *Supra* section IV.

68 *Re Application of Cojuangco*, note 41 *supra.*

69 *John Fairfax & Sons Ltd v Cojuangco* note 43 *supra* at 149 per Glass JA (with whom Kirby P agreed) and at 157 per Mahoney JA.

70 *John Fairfax & Sons Ltd v Cojuangco* note 6 *supra* at 7.

71 *Application of Eduardo Murphy Cojuangco (No 2)* (unreported, Supreme Court of New South Wales, Hunt J, January 6, 1989).

publisher had made another undertaking, this time, that it would not rely on a defence based on section 22 of the *Defamation Act* 1974 (NSW)[72] if Cojuangco instituted defamation proceedings against it.[73]

The most important point to emerge from the *Cojuangco* litigation is that, for an application for preliminary discovery to succeed, the applicant must show that it is "necessary" in the interests of "justice" to order the respondent to disclose the information. So far as "justice" is concerned, the court rules refer to identifying the wrongdoer "for the purpose of commencing proceedings" against that person.[74] This makes applicable Lord Diplock's approach in *Secretary of State for Defence v Guardian Newspapers Ltd*,[75] confining "justice" to the administration of justice in a court of law; the broader view of "justice" taken by the House of Lords in *Goodwin* is not relevant.[76]

Whether disclosure is "necessary" depends upon whether the applicant has an "effective remedy" without knowing who was the source. Thus, in these circumstances, the necessity test will be satisfied if the applicant establishes that, unless disclosure is made, he or she will be unable to obtain the relief to which he or she is, or may be, entitled. If an applicant has an effective remedy against a media organisation, an order will not be made for preliminary discovery of the name of the source.[77]

It was made clear in *Cojuangco* that the "newspaper rule" does not operate directly to provide a sufficient basis for the exercise of a court's discretion to refuse an order for preliminary discovery.[78] Nonetheless, it is important to emphasize two matters. First, defamation proceedings had not been commenced against the media organisation in this case; the case therefore did not arise in the circumstances in which the newspaper rule operates. Secondly, the policy reasons for the newspaper rule were factors taken into account by the High Court in formulating the "effective remedy" test which governs the exercise of judicial discretion in this context.[79] These factors must be emphasized so that it is not concluded that, because the newspaper rule was not applied, the courts were giving less protection to journalists and their sources.

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72 Section 22 of the *Defamation Act* 1974 (NSW) is set out *infra* in section IV B (iii).

73 *Cojuangco v John Fairfax & Sons Ltd (No 2)* note 2 *supra* at 68,541 per Mahoney JA (not deciding whether Justice Hunt's decision was correct) and 68,543-5 per Handley JA; Kirby P dissented at 68,524-8.

74 *Supreme Court Rules* 1970 (NSW) Pt 3, r 1; *Federal Court Rules* O 4 r 17; *The General Rules of Procedure in Civil Proceedings* 1986 (Vic) rule 32.03.

75 *Secretary of State for Defence v Guardian Newspapers Ltd* note 56 *supra*; see the analysis in section IV A *supra*.

76 *X Ltd v Morgan - Grampian (Publishers) Ltd* note 55 *supra*.

77 *Re Application of Cojuangco* note 41 *supra* at 523; *John Fairfax & Sons Ltd v Cojuangco* (1988) note 6 *supra* at 8.

78 *Re Application of Cojuangco ibid* at 522-3; *John Fairfax & Sons Ltd v Cojuangco ibid* at 7.

79 *John Fairfax & Sons Ltd v Cojuangco ibid* at 8.

Both the newspaper rule and the effective remedy test are based on the same principle, that is, that journalists will not be required to identify their sources unless this is necessary for the proper administration of justice.

The "effective remedy" test draws attention to the nature of the remedy sought and the defences which might protect the media organisation from liability.

(i) The nature of the remedy sought

In determining whether the applicant has an effective remedy against the media organisation so that it is not "necessary" to order that the identity of the source be revealed, the question to be addressed is whether the applicant is likely to obtain the relief to which he or she is entitled if restricted to suing the media organisation; the issue is not whether the applicant is likely to succeed against the media organisation.[80] In most actions, whether the applicant has an "effective remedy" against the media organisation will involve an assessment of whether the liability of the media organisation is the same as, that is "co-extensive" with, that of its source.

The dissenting judgment of Kirby P in the last of the *Cojuangco* decisions was based on his view that, where the identity of an informant is sought in order to sue for defamation, considerations other than liability to pay monetary compensation are relevant. His Honour noted that the purpose of a defamation action is not only to compensate the plaintiff, but in some cases also publicly to vindicate the plaintiff's good name and reputation. His Honour held that it was for Cojuangco to decide against whom he wished to bring proceedings to achieve this vindication.[81] He said that:

> For the purpose of vindicating his name and reputation, ... [Cojuangco] wishes to secure the identity of the informants in order to consider whether he will commence proceedings against them. No undertaking which the opponent has, or may, offer him meets that desire on his part. At least in the circumstances of this case it is a legitimate and justifiable desire.[82]

If this view were adopted, it would appear to follow that in the case of the publication of defamatory material based on information supplied by an unidentified source, a media organisation could never successfully argue that a verdict against it would provide the person defamed with an effective remedy.

Although the views of Kirby P were not embraced by the majority of the New South Wales Court of Appeal in the last *Cojuangco* decision, it is difficult to identify their reasons. Mahoney JA (with whom Handley JA agreed) said:

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80 *Re Application of Cojuangco* note 41 *supra* at 525; *Cojuangco v John Fairfax & Sons Ltd (No 2)* note 2 *supra* at 68,542 per Mahoney JA and 68,543 per Handley JA.

81 *Cojuangco v John Fairfax & Sons Ltd (No 2) ibid* at 68,524-5 per Kirby P.

82 *Ibid* at 68,528.

> It is, I think, not necessary here to decide, as a matter of principle, whether such a desire [to sue the source] is relevant in considering whether a particular plaintiff's right to sue a particular newspaper is for this purpose an 'effective remedy'.[83]

Without explaining his reasoning he held that:

> Even if in the present case that factor may be taken into account, my conclusion would be that the remedy against the defendant company is, within the principle referred to by the High Court, an effective remedy.[84]

It is suggested that the reasoning adopted by Kirby P is flawed. While an action for defamation should provide a means for a person to vindicate his or her reputation, this vindication does not require that the courts place the person who alleges that he or she has been defamed in a position to sue the source of the information. If the liability of the source and the media publisher are co-existensive, a plaintiff's reputation can be vindicated, to the extent that a defamation action does vindicate a plaintiff's reputation, by successfully suing the media organisation; to suggest that "vindication" implies that the defamed person must be able to decide against whom he or she brings proceedings is to confuse "vindication" with "vindictive" conduct.

(ii) Defences

If a defence "might well succeed" in protecting the media organisation, but not the source, the applicant does not have an effective remedy against the media organisation.[85] A defence "might well succeed":

> if it is likely or probable that it will succeed, in the sense that there is a substantial or real or good chance that it will succeed, regardless of whether that chance is less or more than fifty per cent.[86]

This is best illustrated by analysing *Cojuangco* and *Guide Dogs*.

(iii) Cojuangco

Applying the necessity test to the case, at first instance, Hunt J held that the applicant did not have an "effective remedy" against the media respondents. This conclusion was based on his Honour's view that a defence of qualified privilege was available to the media organisation and journalist, but not to their informants. He took the view that the media respondents might succeed in a defence under section 22 of the *Defamation Act* 1974 (NSW). Section 22(1) provides that:

> Where, in respect of matter published to any person -
> (a) the recipient has an interest or apparent interest in having information on some subject;

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83 *Ibid* at 68,542 per Mahoney JA.

84 *Id.*

85 *John Fairfax & Sons Ltd v Cojuangco* note 6 *supra* at 8.

86 *Application of Eduardo Murphy Cojuangco (No 2)* note 71 *supra* at 14.

(b) the matter is published to the recipient in the course of giving to him information on that subject; and
(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,

there is a defence of qualified privilege for that publication.

It is apparent that this defence could operate so that the liability of a media publisher and its informant are not co-extensive.

Justice Hunt took the view that the newspaper's conduct in publishing the article was "likely" to be held to be reasonable in the circumstances and that it would have available to it the defence of statutory qualified privilege. It followed that Hunt J was not satisfied that the applicant was "likely" to obtain the relief to which he was or might be entitled in an action against the newspaper.[87] Thus, it was necessary in the interests of justice that the respondents disclose the identity of their sources against whom the applicant was likely to obtain such relief.[88]

After appeals were dismissed by the New South Wales Court of Appeal[89] and the High Court,[90] the publisher and journalist sought to have set aside the order for preliminary discovery. An undertaking was given that the newspaper publisher would not call the journalist to give evidence at the trial of any defamation action which might be brought against it in respect of the article. Justice Hunt noted that, although it is not always necessary to call the author of defamatory material to succeed in a defence under section 22, the circumstances in which a defendant could rely on the defence without calling the author of the matter complained of are very narrow. He said:

> a newspaper is very unlikely to succeed upon a defence of statutory qualified privilege unless it calls its journalist to reveal both the nature of the information which he possessed at the time of the publication and its source and (in most cases) to assert his belief in the truth of what he published.[91]

His Honour concluded that this was not one of the unusual cases where the defence of statutory qualified privilege might well succeed despite the absence of the journalist from the witness box. Thus, the applicant could not satisfy Hunt J that the section 22 defence "might well succeed" in protecting the newspaper ; Cojuangco had not shown that he did not have an "effective remedy" against the newspaper.[92] Accordingly, Hunt J set aside the order for preliminary discovery on the ground that it was not necessary. On appeal to the New South Wales Court of Appeal in the final *Cojuangco* decision, Kirby P and Handley JA took a different view of the operation of section 22 of the

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87 *Re Application of Cojuangco* note 41 *supra* at 529-30.

88 *Ibid* at 534.

89 *John Fairfax & Sons Ltd v Cojuangco* (1987) 8 NSWLR 145 at 149 per Glass JA (with whom Kirby P agreed) and at 157 per Mahoney JA.

90 *John Fairfax & Sons Ltd v Cojuangco* note 6 *supra* at 7.

91 *Application of Eduardo Murphy Cojuangco (No 2)* note 71 *supra* at 18-24.

92 *Ibid* at 24-5.

Defamation Act 1974 (NSW). They held that section 22 might protect the media organisation from liability even though the media organisation did not call the journalist as a witness. Accordingly, in their view, the undertaking not to call the journalist was not sufficient to establish that the cause of action against the media organisation was co-extensive with that against the source.[93]

Notwithstanding the different approach of Hunt J and the New South Wales Court of Appeal to the possible operation of section 22 when a media defendant does not call the journalist concerned as a witness, in the final *Cojuangco* decision, the appeal against Justice Hunt's decision to set aside the order for discovery was dismissed. At this stage, the media organisation undertook not to rely on the section 22 defence. By a majority, the New South Wales Court of Appeal held that, because of this undertaking, Cojuangco had an effective remedy against the media organisation without the necessity for an order for discovery.[94]

(iv) Guide Dogs

The *Guide Dogs* case arose out of an article published by the Melbourne *Herald*. The article claimed that an investigation was taking place into the activities of The Guide Dog Owners' and Friends Association as part of an investigation into charitable organisations. Passages in the article indicated that it was based on information supplied by unidentified informants. At the same time that defamation proceedings were commenced against the newspaper and various reporters, an application was made pursuant to rule 32.03 of the Victorian *General Rules of Procedure in Civil Proceedings* 1986 to compel disclosure of the names of those from whom the information in the article was obtained.

The application for discovery was heard first by Gobbo J. His Honour asserted that the defamation case against the informants might be different in character from that against the newspaper. He noted that, in the defamation action brought against them, the newspaper defendants had pleaded qualified privilege and fair comment; he drew attention also to the possibility that exemplary damages might be claimed against the informants.[95] On this basis, Gobbo J made an order in favour of the applicant.

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93 *Cojuangco v John Fairfax & Sons Ltd (No 2)* note 2 *supra* at 68,527 per Kirby P and 68,543-5 per Handley JA. Mahoney JA did not find it necessary to address this issue.

94 *Ibid* at 68,541 per Mahoney JA (with whom Handley JA agreed). Kirby P dissented on the ground that the informants might be seen to be malicious and therefore liable to pay greater damages than the newspaper (68,528).

95 *The Guide Dog Owners' & Friends' Association and Gration v The Herald and Weekly Times Limited* (unreported, Supreme Court of Victoria, Gobbo J, 20 September 1988, at p 9).

The order made by Gobbo J was set aside by the Full Court of the Supreme Court of Victoria.[96] Members of the Full Court noted that the judge at first instance did not offer reasons why the defences of qualified privilege and fair comment "might well succeed" against the newspaper defendants.[97] Marks J gave detailed attention to this issue. He concluded that, if the chance of success of the qualified privilege defence operating to protect the newspaper had been considered, the trial Judge might have concluded that it was slim.[98] So far as the fair comment defence was concerned, Marks J noted that the newspaper could not succeed in this defence unless the facts on which the comments were made were true; if the newspaper established the truth of the facts, the plaintiff would also fail against any informant who could rely on a plea of justification, there being nothing to suggest that the comments, as opposed to the statements of fact, were made by the informants.[99]

The second reason why the order for discovery made by Gobbo J was set aside was that, before the Full Court, the newspaper undertook to amend its defence to remove the defences of qualified privilege and fair comment. This concession was made to produce a situation in which the liability of the newspaper defendants was without doubt the same as that of the informants. It followed that the applicants had an effective remedy against the media organisation, co-extensive with a cause of action against the informants, and it was not necessary to make an order for discovery.[100]

In exercising his discretion to order discovery, Gobbo J was influenced by the applicant's assertion that exemplary damages would be claimed against the informants were they to be identified.[101] In all Australian jurisdictions, except New South Wales, [102] exemplary, or as they are sometimes known, punitive, damages may be awarded to "punish and deter" the defendant in a defamation action.[103] Unlike compensatory and aggravated damages, exemplary damages do not depend upon the harm suffered by the plaintiff, they relate only to the defendant's conduct and are awarded where the publication of the defamatory material was "wanton conduct" or made in "contumelious disregard of the

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96 *The Herald & Weekly Times Ltd v The Guide Dog Owners' and Friends' Association* note 3 *supra.*

97 *Ibid* at 458-9 per O'Bryan J and at 462-4 per Marks J; Murphy J agreed (453).

98 *Ibid* at 462-6 per Marks J.

99 *Ibid* at 466 per Marks J.

100 *Ibid* at 459-60 per O'Bryan J and at 467 per Marks J; Murphy J agreed (453).

101 *The Guide Dog Owners' & Friends' Association and Gration v The Herald and Weekly Times Limited* note 95 *supra.*

102 *Defamation Act* 1974 (NSW) s 46.

103 *Uren v John Fairfax & Sons Pty Limited* (1966) 117 CLR 118 at 130 per Taylor J and at 149 per Windeyer J.

plaintiff's right to his good name."[104] As an award of exemplary damages depends on the defendant's conduct, the same award is unlikely to be made against a media organisation and its informants. The Full Court's application of the "effective remedy" test to this aspect of *Guide Dogs* is not satisfactory. Justices O'Bryan and Marks held that evidentiary material was needed pointing to a basis upon which the respondents might recover greater damages against the newspaper's informants than would be recovered against the newspaper.[105] As there was no such evidentiary material regarding exemplary damages, there was no material on which the trial judge could have concluded that the respondents had a better chance of success against the informants than against the newspaper.[106] The problem with this reasoning is that it would be virtually impossible for an applicant to produce material justifying a claim for exemplary damages until the applicant knew the identity of the informant. There is, however, a valid policy reason for refusing to make an order for discovery on the basis only that the applicant asserts that it will seek exemplary damages against the informant. This is that the object of an order for discovery under equitable or statutory rules is to ensure that the applicant can bring a civil action to obtain compensation. Exemplary damages are not awarded to compensate, but to punish. The anomalous nature of this form of damages is such that its availability should not persuade a judge to exercise his or her discretion in favour of making an order for discovery.

(v) Conclusion regarding Cojuangco and Guide Dogs

Concern has been expressed that the procedure for preliminary discovery may be used to render worthless the newspaper rule; it has been suggested that no source can be certain that the disclosure of his or her identity would not be compelled under these court rules.[107] It is possible that the application of the necessity test when an interlocutory application is made in a defamation action may produce a result different from that produced when the necessity test is applied to an application for preliminary discovery. The reason why the journalist is not required to reveal the identity of his or her source in the interlocutory application is that it is assumed that the media organisation which is being sued takes responsibility for what is has published. Where an application is made for preliminary discovery, the media organisation can protect its sources from discovery on the same basis, that is, by taking

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104 *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474 at 496; *Uren v John Fairfax & Sons Pty Limited ibid* at 123 per McTiernan J, at 129 per Taylor J, at 143 per Menzies J, at 154 per Windeyer J and at 160-1 per Owen J. Compare *Rookes v Barnard* [1964] AC 1129 at 1226-8.

105 *The Herald & Weekly Times Ltd v The Guide Dog Owners' and Friends' Association* note 3 *supra* at 460 per O'Bryan J and at 462 per Marks J.

106 *Ibid* at 460-1 per O'Bryan J and at 467 per Marks J.

107 Editorial, (1989) 10 *Gazette of Law and Journalism* 8.

responsibility for what it has published. *Cojuangco* and *Guide Dogs* illustrate the fact that, at this point, taking responsibility for what has been published may require the media organisation to undertake not to rely on defences which might otherwise have protected it, but not its sources, from liability for defamation.

V. CONCLUSION REGARDING THE NECESSITY PRINCIPLE

This article has shown that a journalist will be required to reveal the identity of a source of information only where this is necessary for the proper administration of justice. The principle of necessity is the true basis of the "newspaper rule" which is applied where the issue of the disclosure of a journalist's sources arises as part of the pre-trial, interlocutory and discovery process when defamation proceedings have been instituted against a media organisation. The "effective remedy" test is another manifestation of the necessity principle, in this case where the issue of disclosure arises under court rules which establish a procedure for discovering the identity of a wrongdoer. The necessity test has been evaluated under three headings which coincide with the circumstances in which the identity of a source may be in issue. It remains to make some general points supporting the necessity test.

Certain criticisms of the law can be answered once it is understood that the newspaper rule is simply the product of the application of a more general principle of "necessity". For example, this reveals that the suggestion which is often made that the newspaper rule should be extended to the actual trial of the action itself as well as to the pre-trial process[108] is fallacious. In *Guide Dogs*, Murphy J said he was unable to follow the logic of the "newspaper rule": "what happens at trial time to gainsay the application of the rule is not made clear to me."[109] In fact a necessity test is applied both at the interlocutory stage, when it is described as the "newspaper rule", and at the time of the trial.

Understanding that the "newspaper rule" is based on the application of a principle of necessity will enable the courts to resolve some uncertainties about the application of the rule: it should apply to any action brought against a media organisation in respect of its publication of material where the media organisation accepts responsibility for what it has published.

Whether disclosure of the identity of an informant is necessary in the interests of justice is one of the criteria adopted in English legislation dealing with sources of information. Section 10 of the *Contempt of Court Act* 1981 (UK) provides:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication

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108 See, for example, G Hattam, "The Newspaper Rule" note 5 *supra* at p 11.

109 *The Herald & Weekly Times Ltd v The Guide Dog Owners' and Friends' Association* note 3 *supra* at 452.

> for which he is responsible, unless it be established to the satisfaction of the court that disclosure is *necessary in the interests of justice* or national security or for the prevention of disorder or crime. *(emphasis added)*

It has been held that necessity is a higher standard than expediency,[110] desirability,[111] relevancy[112] or usefulness;[113] "necessary" means "really needed".[114] These English decisions illuminating the meaning of "necessity" may provide guidance to Australian courts.

The fact that the various tests examined in this article are all based on a principle of necessity indicates that the courts adopt a consistent approach to the question of disclosure of journalists' sources. The necessity principle also indicates that the courts are aware of the desirability of protecting journalists' sources from unnecessary disclosure; tests based on this principle establish an appropriate balance between the public interest in the free flow of information and the public interest in the proper administration of justice.

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110 *Secretary of State for Defence v Guardian Newspapers Ltd* note 56 *supra* at 350 per Lord Diplock.

111 *Handmade Films (Productions) Limited v Express Newspapers Plc* note 59 *supra* at 468.

112 *Maxwell v Pressdram Ltd* note 17 *supra* at 309 per Kerr LJ and at 310 per Parker LJ.

113 *Re Goodwin* note 61 *supra* at 610 per Hoffmann J.

114 *Re an inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 All ER 203 at 208-9 per Lord Griffiths.