REVIEW OF ACCURACY DECISIONS

Media freedom and accuracy

The essentiality of freedom of expression in our news media is a given. It is often assumed that the principal benefit of media freedom is that it enables the Government to be held to account. So it does; indeed that is more important now than ever in a time when politicians and other leaders can bypass the traditional media by connecting directly with their audience via Facebook and other social media.

But Government accountability is not by any means the only benefit of media freedom. It also serves to bring others to account: the banking and finance sectors, for example, or traders who deceive their customers. It makes us better citizens by providing us with essential information. It enables us to cast our votes knowledgably at election time; to contribute to public affairs by making submissions to select committees or engaging effectively as members of boards or committees; and also simply by helping us to understand our fellow citizens, who are now from many different cultures. Finally it provides us with information which improves our own lives: information relevant to our health, or the housing market, for instance. So media freedom is essential to our civil well-being.

However these interests are not properly served if the media cannot be relied on to give us *accurate i*nformation. Accuracy is one of the most fundamental requirements of good journalism. New Zealand's Broadcasting legislation has long recognised this by expressly requiring it. For example in the Broadcasting Act 1976 the need for the "accurate and impartial presentation of news" appeared in section 3 as one of the purposes of the Act. Section 24(1) of the same Act placed on the Broadcasting Corporation the responsibility for maintaining a number of listed standards. They included such as good taste and decency, individual privacy, balance in the discussion of controversial subjects, and the maintenance of law and order. Included in this list was "the accurate and impartial gathering and presentation of news, according to the recognised standards of objective journalism".

Interestingly, in the 1976 Act's successor, the present Broadcasting Act 1989, the accuracy requirement was dropped from the list of statutory standards in what is now section 4. However it has not disappeared. The legislature has

decided to move it to the BSA's function of encouraging and developing codes. Section 21(1)(e)(iii) provides that one of the matters to be addressed in the codes is "fair and accurate programmes and procedures for correcting factual errors and redressing unfairness". This move probably has something to do with the fact that so different are different types of broadcast programme these days that some may need special treatment; one size may not always fit all. (For example in the Radio Code and the Pay TV Code, talkback radio and items on foreign pass-through channels respectively receive an indulgence.)

Allowing for this possibility of flexibility, however, accuracy remains a statutorily recognised requirement of news broadcasting. It is provided for in all three broadcasting codes: the Radio Code, the Free to Air Television Code and the Pay Television Code. However it has changed over the years. Up until 2008 the code provision in the Free to Air Television Code read as follows:

> News, current affairs and other factual programmes must be truthful and accurate on points of fact, and be impartial and objective at all times.

The Radio Code was substantially similar.

This commendably brief statement underwent significant change in 2008 and 2009. It now reads, in all three Codes:

> Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:
>
> - is accurate in relation to all material points of fact
> - does not mislead.

Of the several changes in the current version the most significant is that the accuracy standard is no longer absolute. The broadcaster will escape an adverse finding if it can show that it made reasonable efforts to avoid inaccuracy or a misleading impression.

The reason for this change is clear enough. It has always been difficult for the media to attain complete accuracy. Journalists do not have the powers of a court to obtain information. They cannot require that interviewees produce documents or supply them with information; indeed they cannot require that anyone talks to them at all. Public relations personnel rigorously control and massage the information released by their agencies. Journalists sometimes have to rely on leaks and unnamed sources. It has become even more difficult

in the digital age, where there is a plethora of often conflicting "information" circulating; where there is increasing pressure to beat the opposition to a breaking story; where dwindling finances mean less reporters to properly research stories; and where the appetite for brief soundbites can lead to inaccurate summaries. The new accuracy standard in the New Zealand codes acknowledges these pressures. It is also a reasonable and justifiable limitation on freedom of expression for the purposes of the New Zealand Bill of Rights Act, whereas a requirement of absolute accuracy might possibly be argued not to be.

However there have been concerns that the current New Zealand "reasonable efforts" standard has downgraded the importance of accuracy, particularly when many codes in other jurisdictions, and the New Zealand Media Council statement of principles, still retain an unqualified accuracy requirement. However it is not quite like that. In two High Court cases, *Radio New Zealand v Bolton*[1] and *Attorney General for Western Samoa v TVWorks*[2] Justice Joseph Williams held that the "reasonable efforts" requirement only becomes relevant if it is first shown that the story is inaccurate or misleading. His Honour said that he detected no intention that accuracy could be treated as irrelevant for the purpose of complaints. "Frankly it would make no sense to apply the standard in that way." [3]

So there is a two-stage test: first, is the item inaccurate or misleading, and secondly, if it is, did the broadcaster make reasonable efforts to ensure it was not. The BSA now acknowledges that expressly in all its decisions on the accuracy standard. It inserts a paragraph in a fairly standard form of words at the beginning of its consideration of the accuracy complaint. That is good practice in that it removes any possibility that the standard might be misunderstood by either complainants or broadcasters.

Is accuracy still important in the modern world?

The past decade or so has seen huge changes in the way people – particularly young people - access news. Most of them get it from their digital devices. They may find a reference to a story on social media. They may follow it up on other

[1] CIV-2010-485-225, HC Wellington 19 July 2010
[2] [2012] NZHC 131
[3] *Bolton* at [48]

social media, and, via Google, on other websites. They may discuss it online with "friends". In their researches they may find inconsistent versions, and must make up their own minds on which is right. This, quite recently, led to a view that the "old" news media are becoming increasingly irrelevant. The view holds that these "old" media operate on an outmoded "vertical" model whereby, as a kind of gatekeeper, they select the news they think we need, and hand it down to us at times which they pre-ordain (the morning newspapers, the evening television news, and the periodic radio news bulletins). But now news is available on our devices at any time, is constantly updated, and is spread "horizontally" from a vast array of sources of which the "old" media are only one. The latter have no exalted position.

It is difficult, this view holds, to sustain the theory that the "old" media exercise a special public trust and are a constitutional "fourth estate". They are just part of a huge collection of purveyors of news.[4]

Unfortunately some argue that this reduces the importance of accuracy in the media. This is akin to one of the original justifications for freedom of speech, "the marketplace of ideas". The argument is that if one is exposed to a melee of inconsistent information, the truth will rise to the top and prevail. A falsehood in one of the media, even a long-standing and traditionally respected media organ, will be corrected by other sources, and therefore does not matter as much as it once did.

Recent experience has shown that this is simply not correct. If people are exposed to conflicting versions of the same matter the truth will often not emerge. Many consumers will end up confused. Some will elect to believe the version propounded by the most powerful person (for example a President or a Government Minister). Others of more suspicious bent will go the other way and settle on a version which is not that of the person in power. Others will simply not know what to believe and will decide by hunch or intuition rather than fact-based argument. Some, of philosophical inclination, even argue that there is no such thing as absolute truth and that we are living in a post-truth age. (In 2016 the Oxford Dictionary named "post-truth" its word of the year.)

[4] See Peters and Broersma "Rethinking Journalism", Routledge 2013, particularly the Introduction. For a rather happier prognosis see Johnson, Tiso, Illingworth and Bennett, "Don't Dream it's Over: Reimagining Journalism in Aotearoa New Zealand" Freerange Press 2016.

That may be so of some very few things; mostly, though, there is a right and a wrong answer. It is nonsense to argue otherwise.

The fact is that in this digital age accuracy is more important than it ever was. We increasingly need, among all this mass of information, news sources which we can rely on to give us the right information. People need to know what media they can trust. The importance of this is increased by the fact that if a media outlet publishes an incorrect story which causes public excitement it is likely to "go viral" and cause harm worldwide. These days sensational inaccuracy cannot easily be contained and cannot easily be eradicated.

The Broadcasting Standards Authority, along with the New Zealand Media Council, provide some assurance that the media who are subject to them are reliable. Accuracy is an important component of their codes. If these media transgress they can be held to account by the complaints systems administered by those two bodies. One might say, then, that broadcasters subject to the BSA, and newspapers and other publishers subject to the Media Council, have a "quality mark" which distinguishes them from all the unregulated providers of information that exist on the internet. I am not saying, of course, that any members of the mainstream media are perfect, or ever can be, considering the pressures they presently face, financial and otherwise[5]. But their oversight by the regulatory bodies means that members of the public have some assurance that they are trustworthy. In a confusion of information it is these media which are more likely to have got it right.

The importance of this is recognised in the Criminal Procedure Act 2011. It has long been the rule that members of the news media may remain in court even though the public are excluded. The answer to the question "who are the news media for this purpose?" is provided in section 198. It says that a "member of the media" is

> A person who is either subject to, or employed by an organisation that is subject to:
>
> (i) a code of ethics, and
>
> (ii) the complaints procedure of either the Broadcasting Standards Authority or the Press Council [now the Media Council]

[5] The current financial situation of the mainstream media in New Zealand is a matter of extreme concern

There is a similar provision in the Privacy Bill which is currently before Parliament, set to replace the Privacy Act 1993.

It will be clear that in my view the accuracy standard is one of the most important and fundamental in the Broadcasting Codes. It goes to the heart of good journalism. The New Zealand Bill of Rights Act, of course, codifies freedom of expression as a fundamental right, and that does include the freedom to speak falsely. But *in the case of the media* I think it will seldom be an unreasonable and unjustified limitation on that freedom to uphold a complaint about *material* inaccuracy in a *news or current affairs* programme where proper care has not been taken.

The decisions

I have been asked to review five decisions of the BSA on the accuracy standard. They are all recent decisions – two from 2019 and three from 2020. Three of them involve radio, and two television (one pay TV and one free-to-air). So there are three codes involved, although in all material respects they are the same on the accuracy standard. For purposes of comparison I shall divide the decisions into categories.

Fact and opinion

The BSA Guidelines to the accuracy standard say that "The requirement for accuracy does not apply to statements which are clearly distinguishable as analysis, comment or opinion, rather than statements of fact". Two of the cases I have been asked to review involve this perennially problematic question.

Other branches of the law require the same distinction to be drawn, and there are numerous judicial and academic complaints about how difficult it is to draw it. A Canadian author writing on defamation said despairingly that "sorting out fact from opinion is a difficult and, occasionally, an impossible thing to do. They are not readily distinguishable."[6]

That is overstating it a bit, because the basic concept is simple enough. A statement of fact is one which can be proved or disproved. It is either true or it

[6] Raymond E Brown "The Law of Defamation in Canada" (2nd 1994) Carswell at 964

is not. A statement of opinion is contestable; two people may hold different opinions about the matter, and agree to disagree on it. A statement of fact can be downright wrong; a statement of opinion cannot.[7]

But it can sometimes be a hard distinction to draw. Everything depends on the impact the statement makes on the viewer or listener. Much depends on how assertively it is presented, and on the type of programme it is. The BSA Codebook contains a page or so of guidance on factors which may help in making the decision. None of them is conclusive.

The first of the decisions is ***Wilson and NZME Radio Ltd 2019-067*** which involved a statement made by Mike Hosking in a "Mike's Minute" segment of *Mike Hosking Breakfast*. Mr Hosking, in discussing New Zealand's weakening economy, said that the country has a surplus "that's basically vanished". A listener complained that this was a statement of fact and was inaccurate.

Whether it was a statement of fact or one of analysis, comment or opinion, was a line call. The majority of the three-member BSA found it was the latter, and was thus outside the accuracy standard. In reaching this decision they relied on the factors listed in the Guidance notes provided in the BSA Codebook, and found that the majority of them suggested that this was not a statement of fact. The subject matter of the segment – the economy – was controversial, and audiences would expect Mr Hosking to approach it from his own perspective. Mr Hosking's programme had a reputation for robust presentation of opinion pieces. Listeners would thus not treat his statement as one of fact.

The chair dissented. He found that Mr Hosking's statement was one of fact. He emphasised that it was "definitive and authoritative in its language and tone", and had little connection to the statements which surrounded it in "Mike's Minute". He noted that *Mike Hosking Breakfast* was a programme that listeners tuned into for news updates and not just Mr Hosking's opinion. He commented on a trend of presenters to put forward their views as fact, creating a potential for harm. Having thus classified the statement as one of fact the chairman found it was demonstrably false. He relied on publicly available and widely reported financial statements from Treasury.

[7] In the famous decision of the US Supreme Court in *Gertz v Robert Walsh* (1994) it was said that "there is no such thing as a false idea".

The chair then considered whether the broadcaster had made reasonable efforts to ensure the accuracy of the statement, and found they had not. It is, of course, very difficult to say what they could have done. It can hardly be suggested that NZME should have vetted Mr Hosking's text – if there was one – before he went to air. A continuous monitoring system during the course of the programme was equally unrealistic. Probably all the chair meant was that Mr Hosking himself should have checked his facts before speaking as he did.

This decision really could have gone either way. The views of both the majority and the minority are cogently and logically argued, and both justify the decision they reach. For myself I am inclined to prefer the dissenting view. Mr Hosking's statement about the surplus was stated as if there was no doubt about it. As the BSA Guidance makes clear[8], the fact it appeared in an opinion piece is something to take into account, but does not itself prevent the statement being one of fact. Statements of fact can be buried in an opinion piece. The critical question is how listeners would perceive it, and I think they would see it as an assertion that the surplus was virtually gone, and that that was unarguable. Before then finding the statement was inaccurate one would of course need to have clear evidence of its falsity.

The chair does not refer to the Bill of Rights Act by name, but his analysis does balance the benefits of freedom of expression against the potential harm of misinformation caused by hosts presenting opinion as fact. "Minimising the risk of such harm is an important aspect of promoting valuable public discourse, particularly in the lead up to an election."

However, as I say, the majority view is arguable, and it is argued persuasively.

This case raises an interesting question of whether a broadcaster is entitled to expect that its audience is a discerning one who can be expected to check for themselves and verify from other sources things they hear on the radio. Such a view is mentioned in the decision[9]. There is some support for it. One can find quotes in the literature to the effect that "in an age of plenty the consumer has a greater role to play and responsibility for what they consume", and that news

[8] *The BSA Codebook, Complaints process and other guidance.*
[9] At [9]

purveyors are entitled to "assume a certain level of sophistication and scepticism in their readers".[10] But I don't think one can make such a sweeping assertion. While some listeners might well Google and check out the accuracy of Mr Hosking's assertion, we can assume that others who are less well-informed or of less inquiring mind will not, and will be misled by what they have heard. Broadcasters and other news publishers should take responsibility for what they publish. The accuracy standard requires it.

The decision invites comment on one other point. In weighing up the factors listed in the BSA Guidance on distinguishing fact from opinion, it is not a numbers game. One or two of the factors may be so strong in a particular case that they alone carry the day.

The second decision is ***O'Neill and Radio New Zealand Ltd 2019-086.*** National MP Chris Penk had tweeted in relation to amendments recently made to the Abortion Legislation Bill. The tweet said some amendments had been expected, "but nothing so extreme (cruel?) as liberalising abortion right up to birth". The leader of the National Party, Mr Simon Bridges, was interviewed by Ms Susie Ferguson on *Morning Report.* Ms Ferguson described Mr Penk's tweet as 'misinformation', 'wrong', and 'fake news'. A complaint was made that Ms Ferguson's comments were inaccurate.

The BSA did not uphold the complaint on the accuracy ground. They found that Ms Ferguson's statements were comments she was making as part of a devil's advocate style of questioning in which an interviewer takes a position on an issue in order to engage the interviewee. They were comment rather than assertions of fact.

I agree with the decision. It seems to me that Mr Penk and Ms Ferguson simply had different interpretations of the Bill as amended. Differences in the interpretation of legislation are classically differences of analysis and opinion. They occur in the courts of New Zealand every day.

The reasoning of the BSA is brief on this point, and it contains the occasional awkwardness of expression – for example in its assertion that while Ms

[10] Quoted by K Riordan in "Accuracy Independence and Impartiality", Reuters Institute Fellowship, University of Oxford (2014) at page 10.

Ferguson was not presenting 'a factual position' she was nonetheless 'putting forward a position'. But I am not quibbling about that. I could see what was meant, and I agree with the outcome and with the spirit of the decision that interviewers must be allowed some latitude in engaging their interviewees. Devil's advocate questioning is a time-honoured technique.

Misleading by omission

The accuracy standard now has two parts: reasonable efforts must be made to ensure that the programme

- is accurate in relation to all material points of fact
- does not mislead

This is a recognition that a programme may be completely accurate in every fact it states, yet still give a misleading impression overall. Usually this will be because certain critical facts are omitted, as in the example of an advertisement saying that a house had stunning harbour views but conveniently omitting to disclose that resource consent had been granted to build a clubhouse which would obscure those views. On a number of occasions, however, the BSA has gone a step further and found that a programme is misleading because it leaves out one side of a story. The following two decisions are examples.

In ***Horowhenua District Council and Mediaworks Radio Ltd 2018-105*** a Horowhenua District Councillor was interviewed by Wendyl Nissen on a radio programme called "The Long Lunch". The councillor alleged that he had experienced bullying from others in the Council and had resorted to wearing a body camera to provide evidence. The interview gave the impression that this was indicative of a significant culture of bullying within HDC. Ms Nissen certainly thought so. She made statements such as "Where is the leadership? Surely someone, the CEO or someone should stand up and say 'Guys. Stop behaving like idiots'." This question of culture was not verified by the broadcaster, and HDC's perspective was not sought. The BSA upheld the accuracy complaint on the ground that the programme as a whole was misleading, and the broadcaster had not made reasonable efforts to ensure otherwise.

I do not disagree with this decision, and the reasons for it are clearly explained. But I do have some comments on it.

The core of the ***Horowhenua*** case was failure of natural justice. The Council was not given a fair hearing. The presentation was one-sided. It seems to me that this is squarely a matter for the balance standard. Indeed it was dealt with under that standard as well, with the same result. That was upheld as well.

When we say that the programme was misleading under the *accuracy* standard what do we mean? We cannot say that the *content* of the programme was shown to be misleading. Its falsity was not demonstrated. There may indeed have been a culture of bullying at the Council – we are just not sure. What was misleading is that the existence of a culture of bullying was presented *as if there was no other possible conclusion*; the broadcaster was effectively saying "there is no doubt about this". Yet this takes us back to the balance standard. It is simply that all sides of the argument were not considered.

I am not saying that the decision on the accuracy standard is wrong. The programme certainly did give a misleading impression. There are decisions like it in other branches of the law: misrepresentation in contract, for example. It is also useful to be able to use the accuracy standard in this way, because on some rare occasions the balance standard may not be available because the matter under discussion is not a controversial issue of public interest.

But in cases where both accuracy and balance standards are available I do wonder if it is necessary to argue both when doing so involves saying almost exactly the same thing twice. I note that the BSA in the ***Horowhenua*** case itself seems to have been initially uncertain whether it needed to address under the accuracy standard matters which were relevant to balance, but decided to do so after reviewing the further submissions of HDC. (paras [38]-[39])

To further demonstrate the overlap between the two standards, it is of some interest to note that in a few decisions based solely on the balance standard the BSA has said that one of the key questions in deciding whether to uphold a balance complaint is whether the one-sided presentation created a *misleading* impression.[11] This is another indication that the two standards are being made to do the same job. In fact some media codes combine the twin requirements

[11] See the review of the BSA's balance decisions (2015) to be found on the BSA website

of accuracy and balance as a single standard (the New Zealand Media Council's Statement of Principles for instance.)

So, while I think dealing with both standards (accuracy and balance) cumulatively cannot confidently be said to be wrong, it seems to me to be often unnecessary**.** It may also be regarded as tidier to keep them in separate compartments.

The second decision is ***Phillips and Racing Transition Agency 2019-044***. Sky Network Television, in two episodes of its racing programme "The Box Seat", presented a discussion of the practice of "blood spinning" whereby blood taken from a horse is spun in a centrifuge to create an extract which is then injected back into the horse to encourage regeneration of damaged tissue. The complainant alleged a number of inaccurate statements of fact. The BSA found that the statements were either immaterial, or not inaccurate, or statements of opinion. It therefore did not uphold the complaint on these grounds.

But the complainant had a more substantial ground – that the programme gave only one side of the story. It would have left viewers with the impression that blood spinning was "an uncontroversial, long-standing, legal and veterinarian-approved practice". However there was another, contrary, view which challenged the safety and propriety of blood spinning. This was not addressed in the programme. Moreover shortly after the programme was broadcast the industry changed the rules on blood spinning, this indicating that the matter must have been under discussion for some time previously. The BSA upheld the accuracy complaint on the ground that the programme was misleading, and the broadcaster had not made reasonable efforts to ensure that that it did not mislead.

Many of the same considerations apply as in ***Horowhenua,*** but ***Phillips*** raises another issue which gives greater pause for thought. What rendered the programme misleading in that case was the omission of the contrary view on blood spinning. But that other view was a matter of opinion, or perhaps more likely a mixture of fact and opinion; the BSA said that what was left out was "other available information and perspectives". Does the second limb of the accuracy standard – the "not misleading" bullet point – extend beyond assertions of fact and extend to opinions in a way that the first limb does not?

In ***Attorney- General of Samoa v TVWorks Ltd*** Justice Joseph Williams defined "misled" as being given "a wrong impression *of the facts*"[12]. An earlier BSA case ***Brooking and TVWorks Ltd*** 2012 – 121 seemed to take that view as well. A programme discussing the Parole Board had put forward the views of one person only, and had omitted contrary views. The BSA found that the complainant's concerns "would have been remedied by the presentation of alternative views which we believe we have adequately addressed under the balance standard."[13] Since what was involved in the case were matters of opinion rather than fact, the accuracy standard did not apply. The complaint under the balance standard was upheld, the complaint under the accuracy standard was not.

Brooking does not sit entirely comfortably with ***Phillips***. It would have been interesting to see them compared. Perhaps they would have been found distinguishable on the ground that ***Phillips*** involved more than just opinion. Or perhaps the BSA would have found that the programme in ***Phillips*** *implied* a fact which was misleading: that is to say, that the programme gave the whole story.

In the end, while I am somewhat ambivalent about ***Phillips,*** it cannot be said that the decision reached by the Authority was not open to it. After all, the programme did give the audience "a misleading impression". The reasonable lay viewer would say so, and would probably agree with the decision. He or she would be impatient with fine distinctions.

Interpreting the statements in the programme

The decision in ***CA and Television New Zealand – 2019 – 042*** contains some good examples of the need for careful scrutiny of statements made in a programme *in their context* to determine what they would convey to the reasonable listener or viewer, and whether that person would be misled by them. The complainant was a voluntary "DIY" sperm donor who had fathered many children by this method. A programme on TVNZ argued the case for regulation of this activity, and pointed out some of the dangers currently

[12] [2012] NZHC 131 at [98]
[13] At [15]

attending it. It noted that some of the children fathered by CA had some health concerns, and that this had not been disclosed to families seeking his services.

CA said, first, that there was no evidence the children's health concerns had been passed on by him. But the BSA found that the programme did not allege that they had. One of the mothers interviewed in fact expressly said she made no such allegation. The point was, rather, that there should have been full disclosure. The BSA accordingly found that there was no inaccuracy on this point.

Secondly, the programme disclosed that some of the children had a heart murmur. CA said he did not have a heart murmur, and produced a cardiologist's letter confirming he had a healthy heart, but stating there was no genetic test that could prove that he did or did not pass on a heart murmur to his children. The BSA again found that the programme had accurately stated these facts and was not misleading.

The case is also a good illustration that errors of fact only breach the standard if they are material. CA said the programme stated he had fathered 21 children by sperm donation whereas the correct number was 19. The BSA reached the only possible conclusion: that such a small discrepancy was immaterial "given that both numbers are significant and above the clinic limits."

CA also complained that a quoted statement by an expert in medical ethics was inaccurate. He had said that voluntary sperm donation falls into a gap in the law. The BSA found that this was a statement of analysis and not a statement of fact.

The BSA thus did not uphold the accuracy complaint.

I have no issues with any of the BSA's conclusions or its reasoning in ***CA***. One has a feeling with regard to the first two issues above that the audience would have entertained a suspicion that CA might have been responsible for the children's medical issues, but the broadcaster was careful not to say that he was, and I think the BSA was right in its decision. The case shows that the whole of the programme must be looked at to get the statements into proper perspective. Context matters. As to the "gap in the law" statement I myself

would have had no difficulty in finding it was one of fact, but that it was completely accurate. But the BSA's approach works just as well.

The structure and style of the decisions

The BSA has settled into a consistent structure of decision-writing.

- The decision is prefaced by a summary (or "headnote") which summarises the facts and decision. This provides a useful focus and direction-finder for the reader, and a research tool for locating decisions on particular topic.
- Then, under the heading "Introduction" or "The broadcast" there is an outline of the facts.
- The details of the complaint and the broadcaster's response to it are then set out. In the five decisions I have reviewed these are all summarised in bullet points. It is a helpful practice to see argument and counter-argument side by side. I would say, though, that while generally bullet points are helpful in that they isolate the threads of argument, they don't work as well in all situations. They can lead to over-abbreviating a point, and they are not well suited to cases where a coherent argument is better captured in a longer paragraph. For the most part, though, they work well enough.[14]
- Next, the relevant standards are set out.
- Then, under the heading "Our findings" there is, in all the decisions, a paragraph emphasising the importance of freedom of expression, and the "reasonable and justified" test for imposing limitations on it. The Bill of Rights is not referred to by name, but there is no need for it to be. I shall return to this later in a separate consideration of the Bill of Rights.
- The next stage is the application of the accuracy standard to the facts. It is always prefaced by an explanation of the standard itself. Typically it notes the two-step requirement (important, because it is something a lay complainant would probably not have realised); the definition of "misleading"; the fact that statements of opinion are not covered; and the exclusion of non-material inaccuracies. Depending on the facts in issue in the complaint, one or two of those items of explanation may be omitted.

[14] It may be seen as an irony that I have chosen to use bullet points in this paragraph!

- There then follows the reasoned decision of the Authority. The reasoning in the five decisions under review was not hard to follow, and even where I might have differed in my approach, I could always see why the Authority decided as it did. In only in one case would I have reached a different decision from the majority. In two others, as I have said, I might have been inclined to treat the matter as one of balance alone rather than accuracy as well. But the reasoning in these decisions was valid, and the conclusion reached was tenable.
- If more than one standard is engaged there is then a concluding paragraph summarising the overall effect of the decisions on those standards. If it is proposed to make an order there is a discussion of that.

The BSA has an important job, and it is a difficult one. It has a very heavy workload, and limited resources. It has to write decisions which will survive judicial scrutiny should there be an appeal. It has to provide guidance for the future for broadcasters. It also has to communicate effectively with complainants who are neither lawyers nor broadcasters. It is important, therefore, that as far as possible its decisions be not too long, free from jargon and written in plain language. Those are not easy objectives to reconcile, and it is never easy to write for a multiple audience. The Authority has to deal with some very difficult issues. The decisions the subject of this review make that clear. The issues in them have to be confronted; they cannot be glossed over. It is not at all easy to communicate complex decisions in a way that a layperson can immediately understand.

From my point of view the BSA succeeds in its task. Overall I found the decisions were explained adequately. I had no trouble understanding them. However I was trained as a lawyer, and I note that in the complainant satisfaction survey carried out by the BSA in 2019 a number of non-lawyer complainants do express the wish that the decisions could be written in plainer language. I think it is important to continue with such surveys, and if that criticism continues to appear in them, to investigate whether the language of decision writing could be made more accessible.

The Bill of Rights

It is now well established that the BSA must follow the New Zealand Bill of Rights Act in its decision-making. Section 14 protects freedom of expression, and section 5 provides that a limit can only be placed on a freedom if that limit is reasonable and can be demonstrably justified in a free and democratic society. The BSA must, particularly when it is proposing to uphold a complaint, ensure that that test is met.[15]

There has been a great deal of writing on this topic, both in the judgments of our highest courts and in legal literature. Most regrettably these sources contain some of the most difficult conceptual writing in the whole of our law. A tribunal like the BSA (as opposed to a court) cannot be expected to explore its depths. The key concept for the BSA is simply that a limit imposed on freedom of expression must be reasonable and able to be justified. That involves a balancing exercise which weighs the importance of freedom of expression in general and the value of the publication complained about in particular, against the damage that publication might do. It also makes sure that any limit imposed is proportionate: one does not use a sledgehammer to crack a nut. There is a good description of the process involved in the Introduction to the BSA *Codebook***.**

After some uncertainty in the first few years of its existence, I think the BSA handles the Bill of Rights satisfactorily. As I said earlier, it begins its consideration of all complaints with a paragraph setting out the balancing exercise required. It does not use precisely the same form of words in every case, but the import is the same. Then, in all but one of the decisions I reviewed, this is followed by a further paragraph discussing the interests to be balanced in the case at hand. Some of these discussions are very good. For example in ***Horowhenua,*** having noted the importance of the media being able to hold governing bodies and public bodies to account, the BSA continues: [16]

> The criticism and challenging of these institutions promotes free and frank public discourse and discussion, which is an important feature of the right to freedom of expression and our democratic society. However, while the value of this type of expression is high, so is the risk of harm, due to the potential for unfair, unbalanced and inaccurate criticism to mislead the public and unduly damage the reputation of, and public trust in, those

[15] Asher J in *Television New Zealand v West* CIV-2019-485-002007 HC Auckland 21 April 2011, especially at[86]
[16] At [16]

> criticised. Our task is to strike an appropriate balance between these interests.

There has been debate about where in a decision to situate the Bill of Rights Act discussion – the beginning or the end. One can argue a case for both. Having it at the beginning can focus the ensuing discussion. Having it later (during or after the application of the relevant standard to the facts of the case), helps to ensure that the decision complies. There is no reason why in some cases it should not feature in both places. The ***CA*** decision is of interest here. There is an excellent discussion of Bill of Rights issues at the beginning of the Authority's decision, focussing in particular on the degree of public importance of the subject (voluntary sperm donation and its risks). The passage concludes:[17]

> We concluded that the potential harm to CA….did not outweigh the value of the story and the high public interest in raising awareness of a legitimate issue. Therefore any restriction on the right to freedom of expression on this occasion would be unjustified.

This came before any discussion of the application of the standards to the programme complained about. In other words the decision on whether there had been a breach of the standards was effectively pre-empted by the Bill of Rights discussion. This was a case where that discussion, or part of it, might have been better placed later in the decision.

So at what point in the decision-writing process the Bill of Rights consideration takes place may depend on the circumstances of the case. I don't think there need be any hard and fast rule about it.

One other matter deserves mention. The code standards themselves take into account the Bill of Rights Act. They have been framed in such a way that they impose only reasonable constraints on freedom of expression. So, for example, in the accuracy standard immaterial mistakes do not matter; the standard only applies to statements of fact, not opinions or comments; and so on. An argument used to be put that for this reason there was no need for the BSA to again apply the Bill of Rights when it was deciding a case: the standard being applied was already consistent with it. Early High Court authority so held. But

[17] At [15]

that view is no longer held. The BSA does have to apply the Bill in its decision making, and that is particularly so when it proposes to uphold the complaint.[18]

But this can give rise to a minor difficulty. Sometimes, if the BSA proposes an uphold without an order or penalty, and in the process has carefully analysed the relevant standard and its application to the facts of the case, it can then be quite hard to find anything extra to say about the Bill of Rights. So occasionally one feels the reference to the Bill of Rights is rather repetitive. I don't think that matters.

A Bill of Rights analysis is even more important if the Authority proposes to make an order or impose a penalty. That happened in ***Horowhenua*** where the Authority ordered the broadcast of a corrective statement. The decision to do so was preceded by a justification of nearly two pages.

Consistency and precedent

Consistency of decision is important in any tribunal. Complainants and broadcasters have a right to feel aggrieved if they are treated differently from someone else in the same situation.

I did not find any inconsistency in the decisions I reviewed, but they are a very small sample, and the same three Authority members were involved in all of them. It is more difficult to maintain consistency over a longer time. Tribunals like the BSA have a particular problem in that members are appointed for limited terms and institutional memory can be lost.

The best way for consistency to be assured is by the use of precedent. Most of the decisions I reviewed did cite earlier decisions in footnotes, but they were mostly recent ones, only one being earlier than 2016. Perhaps that is understandable, because times change rapidly in the media industry, and decisions from the 1990s and the first decade of this century may not be as relevant today as they used to be. Nevertheless some important points were decided in those earlier years. And as we have already seen the ***Brooking*** case from 2012 could have been usefully referred to in ***Phillips.***

[18] See note 15 above

All the Authority's decisions are on the BSA website in chronological order. Summaries of each are in open view, and the full decisions are accessible via a link. There is a search function, and one can easily bring up all the accuracy decisions together. One can also search by keywords. But there are many hundreds of decisions, and one is bound to miss things. I have often thought, in relation not just to the BSA but to a number of New Zealand tribunals, that it would be helpful to have a full synthesis of their decisions so that one can read a coherent account of the jurisprudence they have created. Steven Price did a splendid one of 145 pages on the BSA decisions in 2007 in his book *Media Minefield.* There are also chapters devoted to the media regulators in the Media Law textbooks by Burrows & Cheer, and Tobin Harvey & Sumpter, but space constraints mean they can only go part of the way.

It would be good to have a full updated commentary summarising as many of the main decisions as possible, and discussing the points they make. I don't know if it would be possible in these times of financial stringency to commission such a work. By way of comparison I would draw attention to the regularly updated comprehensive annotations of the Privacy Act by Paul Roth in which he includes analysis and synthesis of the decisions and notes of the Privacy Commissioner.[19]

Code, Guidelines, Commentary and Guidance: some issues

The BSA Codebook is a useful publication. It contains, first, the codes themselves and the guidelines to them. Secondly there is commentary on the codes. Thirdly there is additional guidance on some aspects of the standards: one of these guidance passages is on the difference between fact and opinion for the purpose of the accuracy standard.

Code and Guidelines

I have noted previously that the code provisions are usually broad general statements of principle, whereas some of the guidelines are expressed in quite specific terms, and seem more like rules than "guidelines". In relation to the accuracy standard that is particularly so of the guideline about corrections. It reads[20]

[19] Paul Roth "Privacy Law and Practice". Online and Looseleaf, LexisNexis

[20] Guideline 9(c) in the Free to Air Television and Radio Codes and 9(d) in the Pay Television Code

In the event that a material error of fact has occurred, broadcasters should correct it at the earliest possible opportunity.

This sounds like more than just a "guideline". It states a requirement which is good practice in that it both mitigates harm and increases respect for the media organisation. In most of the other media codes I have seen the correction provision appears as a term of the code itself. I think there would be merit in making it so here. But perhaps there is a reason for not doing so of which I am unaware. At least failure to abide by it can currently be taken into account in assessing the seriousness of the breach when considering whether an order should be made.

The accuracy standard in the Code itself may contain an ambiguity. It says that broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming

- is accurate in relation to all material points of fact
- does not mislead.

The Guideline provides that the accuracy requirement does not apply to statements which are clearly distinguishable as analysis, comment or opinion, rather than statements of fact. This clearly applies to the first bullet point of the code provision, but does it apply equally to the second? Can statements of opinion leave a misleading impression? We have already raised this question above in the discussion of ***Phillips***.

It may be worth considering whether there would be merit in amending the wording of the code to clarify the scope of the second bullet point. I am not advocating this strongly, because I have a feeling that tinkering with the wording might create more problems than it solves. That often happens. Let us leave this by saying that this is one of the Broadcasting Codes' more difficult areas.

Commentary and Guidelines

The **Commentary** is a very helpful discussion of the standards. It contains a number of good explanations of the accuracy standard. Some of its paragraphs are nice summaries which can be, and are, quoted in the Authority's decisions.

They are in clear non-technical language. The commentary is of assistance not just to the Authority itself but also to broadcasters and persons preparing a complaint.

But just as it is possible to say that some things in the Guidelines might be better in the Code, so it is possible to argue that some things in the Commentary might be better in the Guidelines. For instance the Commentary contains the information that determination of a complaint under the accuracy standard involves a two-stage process - first, is the programme inaccurate or misleading, and second, if it is, did the broadcaster make reasonable efforts to ensure it was accurate and did not mislead?[21] I agree that this is of a rather different character to the other Guidelines in that it is more relevant to post-broadcast decision-making. But it is very important nonetheless, because it emphasises to all the continuing importance of accuracy. Being in the Commentary, a separate online document removed from the Code and Guidelines, means that some readers might overlook it. It is worth considering whether it might be moved.

Guidance

The Guidance section gives, in relation to the accuracy standard, guidance on the distinction between fact on the one hand and analysis, comment or opinion on the other.[22] Since I gave advice during its preparation it would be inappropriate for me to comment on its usefulness or otherwise. But I would say one thing. It gives a list of factors to be taken into account in making a decision on "fact or not". They are to help in deciding what the impression made by the statement on the audience would be. They are no more than aids to deciding that question. None of them is decisive. Nor do the numbers matter: sometimes the strength of one or two of them can trump all the others.

Conclusion

This review confirms my impression that the BSA is doing a very important job, and doing it well. Some of its decisions involve questions of considerable conceptual difficulty, and it would be easy to get bogged down in

[21] *BSA Codebook, Commentary on Standard 9, Accuracy.*
[22] See note 8 above

technicalities. But the BSA keeps its feet on the ground and somehow manages, while not shying away from the difficult issues, to reach decisions which are practical and sensible, and which are reasoned logically. In some of the decisions there is room for another view, but is there any area of the law, in any court or tribunal, where that is not the case?

I was not asked to make recommendations, and would not have wanted to in any case. I have simply made a few suggestions, and raised a few questions, which the BSA may wish to consider.

John Burrows
22 May 2020