

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV 2011-485-840**

UNDER the Broadcasting Act 1989

BETWEEN TELEVISION NEW ZEALAND  
LIMITED  
Appellant

AND P FREEMAN  
Respondent

Hearing: 20 October 2011

Counsel: J Miles QC and B J Curry for Appellant  
No Appearance for Respondent  
A Scott-Howman for Broadcasting Standards Authority  
M McClelland, Amicus Curiae

Judgment: 26 October 2011

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**JUDGMENT OF SIMON FRANCE J**

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**Introduction**

[1] TVNZ appeals against a decision of the Broadcasting Standards Authority which held that it breached two of the standards contained in the Free-to-Air Television Code of Broadcasting Practice.

**Facts**

[2] On Sunday 14 November 2010, in its current affairs show *Sunday*, TVNZ broadcast an item on the events that had occurred 20 years earlier in Aramoana. A resident of the town, Mr David Gray, had embarked upon a shooting spree. He killed 13 members of the public. He was then confronted by the local police officer, Sergeant Stewart Guthrie. Shots were exchanged, and Sergeant Guthrie was killed.

[3] Mr Gray then went into hiding in the town. Armed Police Officers searched the town, and eventually officers located him. Shots were exchanged, after which Mr Gray emerged from the house. There was a further exchange and Mr Gray was fatally shot.

[4] The programme aired on the 20<sup>th</sup> anniversary of these events. The freshness that this programme brought to the topic were interviews with two people – Sergeant Guthrie’s son, and one of the officers, Tim Ashton, who confronted and ultimately killed Mr Gray. The interview with Mr Guthrie was interspersed throughout the 20 minute programme, but primarily occupied the first portion. The interview with the police officer primarily aired in the second segment, the segments being divided by a break.

[5] In his interview the police officer recounted the events of the day. He described first arriving, and being unaware of the exact scale of what had happened. As the day progressed, and the search continued, the bodies of those killed, including Sergeant Guthrie, were located. The house by house search lasted 12 hours until contact was made.

[6] It is relevant to the appeal to set out a transcript of the officer’s description of what occurred, recognising that it cannot capture the manner of presentation, the emphasis and pauses of the interviewee, or the general atmosphere generated by this passage:

(Tim Ashton – the officer) There was a fusillade of shots which came out of the window. He fired straight out of the window. These shots impacted about a metre to our right hand side. And then Mike and I returned that fire in the direction of those shots and then further shots came from round the corner of the house.

GRAY HIT AND WOUNDED ANOTHER POLICEMAN, SHOT HIM THROUGH THE ANKLE. NOW, IT WAS ALL DOWN TO THE OFFICERS’ TRAINING AND ADRENALIN.

(Block capitals indicate voice over.)

(Tim Ashton) I yelled out to him.

What did you say?

(Tim Ashton) Well I never told anybody this. And I don't know if it should be recorded for history or not, but I said to him "You're fucking good with women and kids. Come out here and have a go at us".

Did he reply?

(Tim Ashton) Pete yelled at him "Come outside! Police, come out, come out".

THEN, THERE HE WAS.

(Tim Ashton) The door just opened. Not quickly, it was quite slow and he just quietly appeared at the door with the weapon deliberately hidden. The weapon was hidden at his side like this. Because the firearm wasn't visible we weren't legally in a position then to shoot him on appearance at the door. I totally believe his intention was to murder us and then go on till he was stopped.

Was there any expression on his face that you can remember?

(Tim Ashton) My focus, my only memory, is a sight picture of his chest. So, from that point I didn't register any expression on his face.

You weren't looking at his eyes?

(Tim Ashton) No. Remember all this happens in a matter of a nano second you know. It's very, very quick.

NO COVER AND JUST SEVEN METRES BETWEEN THEM. GRAY WENT FOR HIS GUN.

(Tim Ashton) It was an Ak47. A Norinco which is a Japanese lookalike. Exactly the same as an Ak47. Then he brought it up and started shooting directly at us. At that stage Pete and I brought our firearms up and shot him, shot him till he fell down. I have a recall of him in my sights and then – um – I don't have a recall of how many times I pulled the trigger.

BUT EVEN THEN IT WASN'T OVER.

(Tim Ashton) He screamed out when he was on the ground: kill me, fucking kill me! He repeated that quite a few times. I did think for a second of shooting him. I pointed the firearm at him directly as he was on the ground. For a brief second it crossed my mind because of the horrendous things he'd done, but I'd like to think I didn't shoot him for two reasons: one, our training and professionalism and another one – just the code of human decency that we not lower ourselves to the standard of a murderer.

## **Complaint and decision**

[7] Complaint was made about the use of the expletive “fucking”<sup>1</sup> on the two occasions it appears. The Authority determined the matter on the basis of the written material filed by the parties. In a 3–1 decision, the programme was held to breach two standards:

- (a) Children’s interests;
- (b) Good taste and decency.

[8] The structure of the Code is that the varying standards are described in general terms, and then guidelines are provided under each. At this point I set out only the standard. Standard 1 is Good Taste and Decency, and provides:

Broadcasters should observe standards of good taste and decency.

[9] Standard 9 is Children’s Interests, and provides:

During children’s normally accepted viewing times (see Appendix 1), broadcasters should consider the interests of child viewers.

[10] Appendix 1 states that a child means a boy or girl under the age of 14 years. Two items are relevant:

### **PGR – Parental Guidance Recommended**

Programmes containing material more suited for mature audiences but not necessarily unsuitable for child viewers when subject to the guidance of a parent or an adult.

*PGR programmes may be screened between 9am and 4pm, and after 7pm until 6am.*

### **Unclassified Programming**

1. News and Current Affairs programmes, which may be scheduled at any time and may, on occasion, pre-empt other scheduled broadcasts, are not, because of their distinct nature, subject to censorship or to the strictures of the classification system:

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<sup>1</sup> Rather than continually repeat this, the judgment refers to all derivatives of “f...” as “the word”.

- producers should be mindful that young people may be among viewers of news and current affairs programmes during morning, daytime and early evening hours and should give consideration to including warnings where appropriate.

[11] The primary focus on the majority decision was on the children's interests standard. The decision begins by acknowledging s 14 (freedom of expression) of the New Zealand Bill of Rights Act 1990. In terms of whether upholding a complaint would amount to a reasonable and proportionate limit on s 14, it was noted in the broadcaster's favour that:

- (a) *Sunday* was an unclassified programme;
- (b) the programme contained two warnings for content, including one for language that may offend;
- (c) the programme had an adult target audience;
- (d) there was public interest in the item, and the item as a whole could be considered as high value speech.

[12] However, the objective of the children's standard is to protect them from content which is unsuitable. A passage from the Authority's publication "Freedoms and Fetters" was cited where the Authority emphasises:<sup>2</sup>

its strong expectation that material likely to be heard or seen by children should recognise their innocence and vulnerability. The television classification and watershed systems underpin this special protection.

[13] Hence it was concluded that the standard in issue was equally one of high value.

[14] The members next referred to an earlier decision which concerned a documentary about a man exploring the Amazon.<sup>3</sup> It was aired in the 7.30 p.m. slot. During activity the man was using a pick-axe, and accidentally hit a support beam.

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<sup>2</sup> *Freedoms and Fetters: Broadcasting Standards in New Zealand* (Broadcasting Standards Authority 2006), at pages 95–98.

<sup>3</sup> *Lord and Sky Television Network Ltd* Decision No 2009–137, 21 December 2009 (BA 25).

He exclaimed “F...”. This was held to be in breach of the children’s interest standard. The majority then referred to specific research conducted by the Authority and published in 2010.<sup>4</sup> The research concerned the acceptability of swear words. Seventy-one per cent of survey respondents considered the use of the word in interviews was either fairly or totally unacceptable, regardless of the time of broadcast.

[15] The majority concluded that the appearance of the word in the Sunday programme would have been unexpected, and unacceptable to a majority of New Zealanders. Even with a programme that was not of interest to children, the word would still be noticed by children in the room.

[16] The majority concluded it was not an unreasonable limit to require TVNZ not to broadcast the word because either the word could be muted, or the programme shown later. Concerning the good taste and decency standard, and referring again to the research, the majority considered the same reasoning applied. No penalty was imposed.

[17] The dissenter considered the majority view did not give sufficient weight to the context. The essence of his reasoning is captured in these passages:

[47] The policeman, in a measured and considered way and with some hesitation, described what happened and what was said when he saw and challenged the gunman. The policeman’s words, used on the programme, “You’re fucking good with women and kids, come out here and have a go at us” and the gunman’s later response after he had been shot, “Kill me, fucking kill me” were repetitions by the policeman of the words actually used.

...

[51] The word “fucking” used by the policeman when he called out to the gunman was the expressive and natural use of language in an extreme and dire situation. The response of the gunman was his expressive and emphatic use of language when he was *in extremis*. This was, in my opinion, a part of the English language being used by two men each of whom was in a situation of uttermost crisis.

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<sup>4</sup> *What Not to Swear : The Acceptability of Words in Broadcasting* (Broadcasting Standards Authority, 2010).

[52] In his expression in the broadcast interview of the words used 20 years before, the policeman was considered and sober in his delivery. He had weighed whether or not to use the words and had decided to do so in the interests of completeness and accuracy. His first use of the word as he spoke it was powerful and direct and his second use of the word as spoken by the gunman was quiet and subdued. The overall effect was to remind viewers of the awful events of Aramoana, of the bravery of some involved and of the lasting efforts of these events including those on the policeman and those on the family of Sergeant Guthrie.

[53] In my opinion it was not a breach of broadcasting standards for the words to have been broadcast as they were spoken. I consider that to have bleeped or otherwise obscured the words would have been purposeless, inappropriate and demeaning of the policeman and the care which he had taken. The bleeping of the words would have obscured direct aural transmission of the meaning but the presence of the bleep would have triggered a mental message in most people that the policeman had, behind the bleep, said “fucking”. I believe that most adults would have felt the power of the interview and ought not to have been upset by the use of the words complained about. There were two clear warnings about content and language.

[18] Concerning children’s interests, the dissenting view noted:

- (a) that the warnings gave parents some opportunity to regulate the viewing of the programme by their children;
- (b) it was hard to support a view that the subject matter of the programme as a whole did not breach the standard, but the use of this word in the context of accurately recording what had been said at the time, tipped the balance;
- (c) the word would not have disturbed or alarmed children, and, given the context, would not have been harmful.

### **The appeal**

[19] TVNZ appeals. The original complainant did not participate. Mr McClelland presented submissions as an *amicus* and Mr Scott-Howman presented brief submissions on behalf of the Authority.

[20] Section 18(4) of the Broadcasting Act 1989 provides that the appeal is to be determined as if it were an appeal from the exercise of a discretion. It is common ground that this engages the well known formula from *May v May* that it must be shown the decision maker acted on a wrong principle, took into account the irrelevant, failed to consider the relevant, or reached a decision that is plainly wrong.<sup>5</sup>

[21] The appellant focuses its submissions on areas where it is said that the decision maker considered the irrelevant or omitted to look at the relevant. It is fair to say that whilst these are advanced as separate identifiable errors, they also inform a contention that the decision of the majority is plainly wrong, essentially for the reasons given by the majority.

[22] The specific areas where challenges are identified include:

- (a) a failure to take into account several aspects of the internal context of the programme. In particular, where and how the words were said, their consequent limited impact, and the fact that the language followed on from a clear “language” warning which preceded the beginning of Part II of the programme. It is also emphasised that the word was not, in any sense, used gratuitously;
- (b) a failure to take account of the external context surrounding the programme. In particular, that it was played not in “children’s time” but in the area covered by the PGR label; the show itself, being current affairs, is unclassified and needs assessing on its own terms albeit having regard to when it is shown; the target audience was adults and children were unlikely to be watching; and there were two warnings. It is also noted that there is no reference to several other decisions of the Authority which have allowed the use of the word in a similarly graded time slots.

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<sup>5</sup> *May v May* [1982] 1 NZFLR 165 at 170 (CA).



[23] In general terms Mr Miles QC submitted the views of the minority were plainly right. That decision differed from the majority view in that it correctly focussed on the context in which the words were used. The majority decision, by contrast, did not in substance go beyond the use of the word itself the time slot. Mr Miles reiterated the broadcaster's original and continued assessment that to mute the word or "bleep" over it would be to do a grave disservice to Mr Ashton's narrative, and would obscure an accurate record of what transpired.

[24] Mr McClelland helpfully advanced arguments in support of the decision. His primary focus was to identify within the judgment references to the various topics it was alleged that the majority had not considered. In my view he established that most issues were adverted to. The real debate is whether, having been noted, they were taken into account in reaching the conclusion.

[25] Mr McClelland emphasised in particular two aspects of the majority decision. Paragraph [30] of the Ruling reads:

Against that background, we conclude that the broadcast of the word "fucking" in a current affairs interview during children's viewing times would be unexpected, notwithstanding the warnings for language, and unacceptable to a majority of New Zealanders. Even if the subject matter of the programme is not of interest to children or the subject matter too complicated, an expletive such as "fucking" will be obvious and noticed by children who are in the room.

[26] This he submitted was the key finding. The use of the word was unexpected, and remained so despite the warning. As a result, parents would not be on notice. Second children who were present would notice the word, and thereby be affected. These justified a conclusion the children's interests standard was breached.

[27] The other aspect was the majority's consideration of Bill of Rights issues. Emphasising that the Authority's decisions are not to be overly dissected in a jurisdiction designed to give prompt response from a panel with diverse backgrounds, it is noted that the Authority:

- (a) Identified that upholding a complaint would limit the broadcaster's freedom of expression under section 14 of NZBORA (paragraph [33] of the decision);

- (b) Identified the objective of the relevant standard (paragraphs [34]);
- (c) Evaluated the importance of the objective of the standard and assessed it as an important objective (paragraph [35]);
- (d) Assessed the extent to which upholding a complaint would impact on the broadcaster's freedom of expression (paragraph [36] and [37]); and
- (e) Concluded that upholding the complaint would be a reasonable and proportional limit on the appellant's freedom of expression (paragraph [38]).

[28] Finally, on the issue of plainly wrong, Mr McClelland reminded the Court of the Authority's expertise, and the limited nature of the appeal right. It was not a situation where the Court should just substitute its view, but had to be satisfied to the higher standard that the decision under appeal was plainly wrong.

### **Decision**

[29] I am grateful for the submissions which all assisted to clarify the matters. There was considerable reference during them to a decision of Asher J in *TVNZ v West*.<sup>6</sup> I am content to adopt His Honour's reasoning on the equivalent matters that arise here. In particular, I accept that failure to refer to past decisions, or to available research of the Authority, is not generally to be seen as an error of law. Likewise, I consider that inconsistent past decisions may give support to a claim that the present decision is plainly wrong, although one would want a significant degree of contextual overlap before prior decisions were thought to be of much assistance.

[30] I have a clear view on the outcome of the appeal, and do not therefore intend to address all the matters raised by counsel. In my view the dissenting judgment is plainly right and the majority plainly wrong. I recognise that the issue is whether the particular programme should be regarded as an exception to the generally accepted rule. As such, it is inherently an issue on which views can differ, and therefore less susceptible to being over-ruled as plainly wrong. However, I still feel obliged to make that assessment.

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<sup>6</sup> *TVNZ v West* HC Auckland CIV 2010-485-002007, 21 April 2011.

[31] The majority concluded that TVNZ should either have muted the word, or shown the programme later. These alternatives were thought to show why prohibition on what occurred was not an unreasonable fetter on freedom of expression. The fact that it was these two alternatives that were identified highlights that what underlies the majority decision is a view that the word cannot ever properly be used in this time slot. The majority do not say this expressly but it is the inevitable outcome of their decision.

[32] That proposition is not correct. The guidelines themselves make that clear, and past decisions of the Authority have rejected complaints about the use of the word in similarly rated time slots. Once it is accepted that some exceptions can be contemplated, then in my view the particular programme is plainly an example of an exception.

[33] It is important, first, to identify some limits. There is no dispute from anyone that generally the word is not to be used at times when children might be watching or present. The broadcaster's evidence acknowledges this, and affirms its commitment to the basic principle. Second, there is nothing in this judgment that is intended to be a comment on a growing acceptability, or not, of the use of the word on television. That is a matter for the Authority. Rather, I approach the issue on exactly the same terms as the minority decision:

[49] The general approach followed by broadcasters and this Authority is that the use of the word "fuck" and its derivatives before 8.30pm is not acceptable as its use would be contrary to the expectations of many viewers and strong language of this kind is not considered appropriate during children's viewing times. Research which this Authority has undertaken, but which is of a general nature only, shows that most people would not regard the use of the word "fuck" and its derivatives to be acceptable in a typical news or current affairs interview. There are no rigid rules and nor should there be. There can be exceptions to the general rule and the question is whether this is one of those exceptional situations. The approach of this Authority had consistently been that, when allegedly objectionable material is being considered, context is all important.

[34] I have previously cited extracts from the dissent, and there is little point in trying to rewrite passages that I consider very accurately capture, and resolve, the issue. For the reasons given, in paras [52] and [53] of the dissent (see [17] above), I too consider the programme did not breach broadcasting standards.

[35] Where I differ from the majority is on the emphasis one places on the context, both internal and external. In my view the outcome reached by the majority results from focussing only on the time-slot and the use of the word, with little focus on the context of the programme. It does a disservice to the programme to isolate this word which, when used in context, did not stand out, and on the second occasion was very quietly said.

[36] I consider it is very important to emphasise that what was being done was that the interviewee was recounting exactly what was said between the two protagonists 20 years ago. This was not a record of any crime, but of one of the most serious events in New Zealand history. The officer is explaining what he said in effect to lure or dare or taunt the gunman to come out.<sup>7</sup> It was information not previously known, and the word formed a part (but only that) of what the officer said. The same can be said about the gunman's last words, having been shot.

[37] I agree with Mr Miles that the fact that the use of the word is not gratuitous is of considerable importance. It is why I consider the context in this specific case is quite removed from the situations being posited in the research referred to by the majority. That research informs and confirms the general position that the use of the word is to be closely monitored, but on its face says little about its appropriateness or otherwise on this occasion.

[38] I was referred to four decisions where the use of the word had in similarly classified time slots had been upheld:

- (a) in *Werder and Television New Zealand Ltd*,<sup>8</sup> the programme was called *Police*. It contained footage of youths abusing the Police in terms that included this expletive. The Authority noted that the footage reflected reality, and served a purpose in enlightening viewers to the stresses that Police may face;

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<sup>7</sup> It is, I believe, quite unusual footage for an involved officer to be interviewed in this manner, and not anonymously.

<sup>8</sup> Decision Nos 1998-115, 116, 1 October 1998 (BA 29).

- (b) in *Crouch and Radio New Zealand Ltd*,<sup>9</sup> in the 9 a.m.– noon radio slot, a poem was discussed which included the word. In the course of the discussion it was used several times. The Authority noted that the source of the word was a well known contemporary poem, the programme was aimed at an adult audience, and the programme was discussing accuracy of translation;
- (c) in *Lord and Television New Zealand Ltd*,<sup>10</sup> the word was used several times by a prisoner being interviewed about psychiatric treatment. The time slot was 7.45 a.m. on Good Friday. The Authority noted the use by the interviewee was not gratuitous, it was not particularly audible, and there had been a warning preceding the programme of “graphic content”. It was noted younger viewers were unlikely to have watched, especially since the words occurred at least 15 minutes into the show;
- (d) in *Campbell and Television New Zealand Ltd*,<sup>11</sup> the word was used by an America’s Cup sailor in the celebrations after winning the Cup. It was a live broadcast at 1.30 p.m.

[39] The Authority is in no way bound by its own decisions, although it no doubt strives for consistency. Nor do I consider it an error to not refer to these decisions.<sup>12</sup> However, in the context of my view that this was an exception, and plainly so, I take comfort from the existence of less compelling (at least in my view) examples of the word being found to not breach standards although used in children’s viewing times. Mr Miles observes, and I agree, that much of the reasoning that found favour with the Authority in those decisions is equally applicable here.

[40] In the Code, news and current affairs shows are kept outside the classification framework. The Practice Note to the good taste and decency standard observes:

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<sup>9</sup> Decision No 1998-155, 26 November 1998 (BA 24).

<sup>10</sup> Decision No 1998-083, 30 July 1998 (BA 26).

<sup>11</sup> Decision No 1995-077, 31 July 1995 (BA 22).

<sup>12</sup> I do note, however, that the decision relied on by the majority does not strike me as involving a comparable situation.

News bulletins, although often broadcast during children's normal viewing times, are unclassified. Broadcasters must still comply with the good taste and decency standard, but there is no expectation that bulletins will be suitable for unsupervised children. The effect of this is that the Authority expects parents to supervise children watching the news.

[41] Whilst generally PGR is limited to, at most, "infrequent low level swearing", there is recognition that a news programme may be different. In saying that, one repeats that it is the exceptional case being considered, not any general relaxation of the basic rules.

[42] In terms of the New Zealand Bill of Rights Act 1990, I consider that requiring the deletion of this word from the programme is an unjustified limit. Whilst the children's interests standard was rightly accorded high value, so too was the programme. Within that programme the word occurred as part of an accurate narration of past events, it was used in context, and had no stand alone emphasis. The slot was within the period that might mean some children were watching or present, but the programme was not itself likely to be of interest to children. The words occurred halfway through it and were preceded by a general language warning that would have alerted parents.<sup>13</sup> Balancing these factors, and the general context earlier discussed, in my view a prohibition is not a reasonable limit.

[43] For completeness I note that I consider the idea of a breach of good taste and decency had less merit than a breach of the children's interests standard. Such a breach could only flow from a view that the use of the word in itself at this time breached. Once the legitimate concern about children is removed, the proposition that this show breached good taste and decency only because of the use of the word is not tenable.

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<sup>13</sup> Given that the host of the show orally communicated the warning, for myself I would urge a less bland formula which might raise the alert somewhat more sharply.

## Conclusion

[44] Essentially for the reasons given by the minority, I allow the appeal. It is an appeal from an exercise of discretion but I consider the test of plainly wrong is made out. The majority judgment refers to, but does not engage with, the context. Rather, the effect of its decision is to find a breach solely in the combination of time slot and word. Whilst that might well be correct in the vast majority of cases, it is not an absolute rule and it is not applicable to this case. The majority judgment does not discuss the minority reasoning, and thereby fails to explain why the context of the show, and the various features that have been discussed, do not properly make it an exception to the general rule.

[45] The decision of the Authority is quashed, and a finding made that the programme did not breach the relevant Code.

[46] My preliminary view is that costs should lie where they fall, with Mr McClelland's costs being borne by the Court. However, if counsel wish to file memoranda they should do so in a timely way.

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Simon France J

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