

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-2137  
[2019] NZHC 351**

UNDER the Broadcasting Standards Act 1989  
BETWEEN BRENDAN LOWRY  
Applicant  
AND TELEVISION NEW ZEALAND LIMITED  
Respondent

Hearing: 7 February 2019  
Counsel: CD Herbert for respondent  
Appearances: B Lowry, applicant in person  
Judgment: 6 March 2019

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**JUDGMENT OF FITZGERALD J**

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This judgment was delivered by me on 6 March 2019 at 12-noon,  
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Hudson Gavin Martin, Auckland (T Mahood)  
To: B Lowry, Christchurch

## Background

[1] Many will recall the infamous incident of Steven Joyce (when a Minister of the Crown) being hit in the face with a sex toy<sup>1</sup> thrown by a protestor. The moment was captured on camera and received significant media coverage. Mr Joyce also referred to the incident in a light-hearted and humorous way in his valedictory speech when leaving Parliament.

[2] The applicant, Mr Lowry, takes issue with Television New Zealand Ltd's (TVNZ) coverage of Mr Joyce's valedictory speech, which was broadcast during the 6pm ONE News on 27 March 2018. In particular, Mr Lowry objects to the coverage showing the sex toy being thrown and hitting Mr Joyce in the face in slow motion, and then being repeated a number of times. Mr Lowry describes the coverage as "vulgar and crass" and of a "school-boy mindset". He says the coverage breached a number of broadcasting standards, including, relevantly for the present application, that which requires a broadcaster to observe standards of good taste and decency.<sup>2</sup>

[3] Mr Lowry complained about the coverage to TVNZ, which rejected his complaint. He then submitted his complaint to the Broadcasting Standards Authority (BSA) for review. The BSA also rejected his complaint. Mr Lowry had a statutory right to appeal the BSA's decision to this Court within one month of the date of being notified of its decision, or "within such further time as the High Court may allow".<sup>3</sup> Mr Lowry's right to appeal expired on 10 September 2018 but he did not file it within time. He has therefore filed an application to extend the time for the filing of his appeal.

[4] TVNZ opposes Mr Lowry being granted an extension. This judgment accordingly determines whether Mr Lowry ought to be granted an extension of time so he can then progress his appeal.

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<sup>1</sup> More particularly, a dildo.

<sup>2</sup> Mr Lowry confirmed that only that concerning good taste and decency would be pursued on appeal

<sup>3</sup> Broadcasting Act 1989, s 18(3).

## Relevant standards and background facts

[5] Section 4 of the Broadcasting Act 1989 (Act) provides as follows:

- (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards that are consistent with-
  - (a) the observance of good taste and decency; and
  - (b) the maintenance of law and order; and
  - (c) the privacy of the individual; and
  - (d) the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
  - (e) any approved code of broadcasting practice applying to the programmes.

[6] The relevant approved code is the Free to Air Television Code of Broadcasting Practice. It provides:<sup>4</sup>

### Standard 1 – Good Taste and Decency

**Current norms of good taste and decency should be maintained, consistent with the context of the programme and the wider context of the broadcast.**

#### *Guidelines*

- (1a) The context in which content occurs and the wider context of the broadcast are relevant to assessing whether a broadcast has breached this standard, including:
  - the nature of the programme and the channel
  - the programme's classification and scheduling
  - whether the broadcast was live or pre-recorded
  - the use of audience advisories, if any
  - the target and likely audience
  - audience expectations of the channel and the programme
  - the availability of filtering technology

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<sup>4</sup> Broadcasting Standards Authority Broadcasting Standards in New Zealand Codebook (1 April 2016) at 35.

- the level of the broadcaster's editorial control over the content
  - the public interest in the broadcast
- (1b) Where broadcasters take effective steps to inform their audience of the nature of their programmes, and enable viewers to regulate their own and their children's viewing behaviour, they are less likely to breach this standard
- (1c) If content is likely to offend or disturb a significant section of the audience, an appropriate audience advisory should be broadcast prior to the content.

[7] Mr Lowry's complaint arises out of the broadcast by ONE News of Mr Joyce's valedictory speech on 27 March 2018, and in particular, its coverage of the sex toy throwing incident described above. Mr Lowry confirmed at the hearing before me that if the coverage simply showed the incident once and at normal speed, he would not have any complaint about it. But Mr Lowry takes issue with the repeated, slow-motion coverage of Mr Joyce being hit in the face with the sex toy. As noted, he considers it breached Standard 1 – Good Taste and Decency, the text of which is set out at [6] above.

[8] Mr Lowry submitted his complaint to TNNZ on 23 April 2018. In the context of Standard 1 – Good Taste and Decency, Mr Lowry said:

Showing the incident at normal speed and once, could be argued as being the news, but to show it four times and at slow speed, at 6.30 in the evening, as families watch the news, breaks all bounds of normal decency and good taste. This was also shown right in front of a woman, Wendy Petrie as well. Again the showing of it once could be argued that that is part of her job, but not four times and in slow motion. I am sure this must break some rules about decency in the work place. If I had a bunch of giddy men showing this sort of thing repeatedly to a woman in the work place, I would put a stop to it immediately and have more than a stern word with them. It is very awkward and difficult for a woman to speak up in this sort of situation. Basic common manners should not require a rule or law in order to exist.

[9] On 22 May 2018, TVNZ rejected Mr Lowry's complaint. In terms of the stated breach of Standard 1 – Good Taste and Decency, TVNZ:

- (a) Stated that ONE News is aimed at an adult audience;
- (b) Referred to an earlier BSA decision which had noted that "children of a vulnerable age are unlikely to watch the news unattended";

- (c) Referred to the fact that ONE News includes content such as serious crimes and natural disasters where persons are killed and an expectation that such footage will be shown in broadcasts such as ONE News;
- (d) Observed that the incident garnered much humour, as was shown by the reaction of Members of Parliament (MPs) to Mr Joyce's retelling of it in his valedictory speech; and
- (e) Concluded that in context, the coverage was not offensive as suggested by Mr Lowry.

[10] By letter dated 18 June 2018, Mr Lowry submitted his complaint to the BSA for review. By way of summary, Mr Lowry said that:

- (a) The fact ONE News is aimed at an adult audience does not make it so, and thousands of families with children of all ages are likely to view the coverage;
- (b) Parents should have an expectation that some discretion will be shown by the broadcaster concerned, particularly in the earlier news slot rather than the later 9pm slot;
- (c) The fact that Mr Joyce himself and other MPs listening to his speech found the incident funny was irrelevant to his complaint; and
- (d) TVNZ had not responded to the issue raised concerning Ms Petrie, with the coverage representing "blokes' behaviour".

[11] On 10 August 2018, the BSA sent a letter by email informing Mr Lowry that his complaint had not been upheld. Again, by way of summary only, and in relation to the alleged breach of Standard 1 – Good Taste and Decency, the BSA said:

- (a) The incident was newsworthy and received widespread media coverage at the time it occurred;

- (b) Context is important when considering a complaint of a breach of Standard 1 – Good Taste and Decency;
- (c) ONE News is an unclassified news programme targeted at an adult audience, which frequently contains strong or adult material, such that the BSA recognises that children are unlikely to be watching unsupervised; and
- (d) The coverage was a light-hearted news segment reflecting the comedic nature of Mr Joyce’s retelling of the incident during his valedictory speech, and was not likely to have caused widespread or undue offence or distress.

[12] The BSA’s letter drew Mr Lowry’s attention to section 18 of the Act and the right of appeal, stating that “any appeal must be lodged within one month of the date on which you were notified of the decision.”

[13] As already noted, Mr Lowry’s statutory right of appeal to this Court expired on 10 September 2018. On 3 October 2018, Mr Lowry submitted a request for an extension of time, followed by a Notice of Appeal dated 14 November 2018.

**Why Mr Lowry says he should be granted an extension**

[14] Mr Lowry’s submissions on the substance of the complaint can be summarised as follows:

- (a) The usage of slow-motion and freeze-frame techniques was excessive and usage of that technique on this footage is outside the reasonable expectations of viewers;
- (b) Mr Joyce’s feelings about the broadcast are irrelevant to his complaint;
- (c) It is not appropriate that concepts of parental supervision are used to allow content which may otherwise be inappropriate; and

- (d) The BSA's standards of what is tasteful and decent are "out of kilter with society".

[15] His reasons for asking for an extension of time are that:

- (a) He did not initially consider an appeal to the High Court as possible without a lawyer;
- (b) He was acting under the misapprehension that the timeframe for appeal was measured in working days rather than days; and
- (c) He was asked by the High Court on two different occasions to submit further documentation or to adjust his formatting.

**Why TVNZ says Mr Lowry should not be granted an extension**

[16] Broadly, TVNZ argues that:

- (a) The delay in Mr Lowry filing his appeal was due to indecision;
- (b) The delay in filing the appeal is lengthy;
- (c) TVNZ suffers "general prejudice" from the delay, given there is public interest in the swift appeal of decisions given broadcasters rely on the decisions to determine what to broadcast;
- (d) There is no issue of public importance to be determined; and
- (e) The appeal is meritless in any event.

[17] TVNZ accepts the BSA took into account an irrelevant consideration in dismissing the complaint, namely, Mr Joyce's own feelings towards the incident. I note, however, that Mr Joyce's apparent attitude to the incident was taken into account by the BSA when considering the alleged breach of Standard 11 – Fairness, which requires broadcasters to deal fairly with any person or organisation taking part or

referred to in a programme.<sup>5</sup> As noted, Mr Lowry does not propose to pursue an appeal against the BSA's decision on Standard 11 - Fairness.

### **Legal principles**

[18] In determining whether to grant an extension of time to appeal, the Court must consider what the interests of justice require in the circumstances of the case.<sup>6</sup> In particular, the Supreme Court has said that the following factors will be relevant:<sup>7</sup>

- (a) The length of the delay;
- (b) The reasons for delay;
- (c) Whether the delay has or will cause any prejudice or hardship;
- (d) The conduct of the parties, particularly of the applicant; and
- (e) The merits of the appeal. However, the Supreme Court also cautioned that a court considering whether to grant an extension of time should only form a view about the merits of the proposed appeal where they are obviously very strong or very weak.

[19] In the context of the merits of Mr Lowry's proposed appeal, an appeal from a decision of the BSA must be treated as an appeal from the exercise of discretion.<sup>8</sup> The Court of Appeal in *May v May* articulated the approach to such an appeal as being that:<sup>9</sup>

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<sup>5</sup> When considering the alleged breach of Standard 1, the BSA simply referred to the light-hearted nature of the news segment, reflecting the comedic way in which Mr Joyce had retold the incident. This did not comment specifically on Mr Joyce's personal feelings towards the incident (i.e. rather than the manner in which he retold the incident).

<sup>6</sup> *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 224, (2009) PRNZ 518 19 at [19].

<sup>7</sup> *Almond v Read* [2017] NZSC 80; [2017] 1 NZLR 801 at [38]-[39].

<sup>8</sup> Broadcasting Act 1989 s 18(4).

<sup>9</sup> *May v May* (1982) 1 NZFLR 165 (CA) at 170. The decision has been applied within the BSA context in *Television New Zealand Ltd v Viewers for Television Excellent Inc* [2005] NZAR 1 (HC), *Reekie v Television New Zealand Ltd* HC Auckland CIV-2009-404-3728, 8 February 2010 and *Television New Zealand Ltd v West* [2011] 3 NZLR 825 at 829.



[A]n appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong.

[20] Faced with an application to extend the time to appeal a decision of the BSA, Ronald Young J in *Williamson v TV Works Ltd* remarked:<sup>10</sup>

[14] The merits of an appeal [...] is only one ingredient that goes into the interests of justice. As long as there is a reasonable prospect of success in the appeal, and, as there is here, an excuse for the failure to bring the appeal within time, then leave should be granted. The threshold should not be set too high. It is in the interests of justice that appellants with a reasonable prospect of success should be able to have their day in Court. On the other hand it cannot be in the interests of justice to allow an essentially hopeless case proceed when the required time limits have not been complied with.

[21] I respectfully agree with his Honour's observations.

## **Discussion**

[22] Mr Lowry confirmed at the hearing before me that his primary ground of appeal will be that the BSA was “plainly wrong” in reaching the view it did on whether the coverage in question breached Standard 1 – Good Taste and Decency.<sup>11</sup>

[23] Before considering whether the proposed appeal gives rise to an issue of public importance and its merits, I record that the remaining factors referred to at [18] above would tend to point to an extension being granted. The delay in Mr Lowry filing and serving his appeal is not great, and while I was not particularly persuaded by some of the reasons advanced by Mr Lowry for the delay, I take into account the fact he is self-represented. In *Simpson v Hamilton*, the Court of Appeal considered a delay by a self-represented litigant.<sup>12</sup> The Court regarded the delay as “not trivial but nor is it particularly long”.<sup>13</sup> The Court considered in particular that leniency must be given to the self-represented litigant in assessing his or her ability to understand the Court's processes.<sup>14</sup>

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<sup>10</sup> *Williamson v TV Works Ltd* HC Wellington CIV-2010-485-2120, 21 February 2011.

<sup>11</sup> This is also reflected in Mr Lowry's Notice of Appeal.

<sup>12</sup> *Simpson v Hamilton* [2018] NZCA 450.

<sup>13</sup> At [15].

<sup>14</sup> At [15].

[24] Further, I do not accept TVNZ's submission that "general prejudice" to it militates against an extension being granted. While there is no doubt the Act envisages a reasonably prompt process for dealing with complaints, any suggested "general prejudice" from an appeal being filed late will exist in every case where an extension of time is sought. For this reason, "general prejudice" in and of itself cannot, in my view, form the basis for refusing to grant an extension. Rather, the Court must still consider whether the delay in any given case has caused any actual prejudice to the respondent. Ms Grenfell, counsel for TVNZ, quite responsibly accepted that TVNZ could not point to any actual prejudice from Mr Lowry's appeal being filed late.

[25] I have reached the clear conclusion, however, that Mr Lowry's application for an extension should nevertheless be declined. This is because the proposed appeal raises no matter of public importance and there are little or no prospects of it being successful.

[26] As to public importance, while the matter is obviously of some importance to Mr Lowry, the BSA's decision and Mr Lowry's proposed appeal do not give rise to any significant points of principle, novel questions of law, interpretation or the like which would make an appeal to this Court desirable despite the statutory timeframes not having been met. Rather, the appeal simply concerns whether the BSA wrongly exercised its discretion in reaching its conclusion on the application of Standard 1 to a particular item of news coverage.

[27] Further, having carefully considered Mr Lowry's submissions on the merits of the complaint, I consider it very unlikely any appeal would succeed. As noted, the appeal would need to be approached on the basis of an appeal against discretion, and in this case, whether the BSA was plainly wrong. And unlike in some applications for an extension of time to appeal, the materials which would be considered on the appeal are very limited and are before the Court on the extension application. The focus of Mr Lowry's submissions at the hearing before me were also why he says the BSA was plainly wrong in rejecting his complaint.

[28] Were the Court to hear Mr Lowry's appeal, it would not substitute its own judgment on the merits for that of the BSA. Importantly, the BSA has the relevant

expertise in assessing current standards of taste and decency in the broadcasting context, which is presumably why the appellate role of this Court is limited by s 18(4) of the Act.<sup>15</sup> While an appellate court is not required to show “deference” to expert bodies whose decisions are under appeal,<sup>16</sup> the BSA’s expertise in the area of good taste and decency in a broadcasting context is nevertheless a factor in any assessment of whether it was “plainly wrong” in reaching the decision it did.<sup>17</sup>

[29] In this context, and having considered the “external” and “narrative” contexts to the coverage,<sup>18</sup> I cannot see any basis for concluding the BSA was “plainly wrong” in reaching the decision it did. It noted the news item was a light-hearted piece, which mirrored the light-hearted manner in which the incident had been addressed in Mr Joyce’s valedictory speech. The original incident had received widespread media coverage before, such there was nothing particularly new in the further coverage complained of by Mr Lowry. Further, the BSA took into account earlier decisions by it to the effect that vulnerable children are unlikely to be viewing ONE News in an unaccompanied setting. There was nothing before me to suggest these earlier decisions were wrong or ought not to have been followed by the BSA in considering Mr Lowry’s complaint.

[30] Further:

- (a) The BSA took into account and adequately addressed Mr Lowry’s concerns about freeze-framing and slow motion;
- (b) The BSA cannot be wrong in treating the news as unclassified, as it is entitled to have regard to the classification of programmes; and
- (c) The BSA did not fail to consider Mr Lowry’s contention that parental supervision is not always possible; rather, as noted, it rejected the submission in line with earlier BSA decisions.

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<sup>15</sup> *Television New Zealand Ltd v West* [2011] 3 NZLR 825 at [34]. See also [44].

<sup>16</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, (2007) 18 PRNZ 768 (SC) at [3], [4] and [5].

<sup>17</sup> At [5], where the Supreme Court recognised a specialist body may have a particular advantage stemming from technical expertise, in which case an appellate court may be hesitant to intervene.

<sup>18</sup> *Television New Zealand Ltd v West* [2011] 3 NZLR 825 at [37]-[38].

[31] Accordingly, absent any relevant error of fact or principle, or conclusion that the BSA was plainly wrong, it would be wrong for this Court to usurp the role of the BSA in an area which calls upon the application of its particular expertise.

**Result**

[32] Mr Lowry's application for an extension of time is dismissed.

[33] Neither party sought or made submissions on costs. I accordingly make no order as to costs.

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Fitzgerald J