IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-2060

IN THE MATTER OF	an Appeal from a decision of the Broadcasting Standards Authority
BETWEEN	TVWORKS LIMITED Appellant
AND	STEPHANIE DU FRESNE Respondent

Hearing: 7 February 2008

Counsel: C Bradley for Appellant
A Stevens for Respondent
A Scott-Howman for Broadcasting Standards Authority

Judgment: 13 March 2008

JUDGMENT OF SIMON FRANCE J

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1. Introduction

[1] Dr du Fresne is the medical director of a Dunedin clinic that cares for the mentally unwell. Early last year she lodged a complaint with the Broadcasting Standards Authority about a news item on TV3. The item featured an interview with a patient of Dr du Fresne's.

[2] The interview was arranged by the patient, Ms X. It took place without the clinic's knowledge. Ms X, who wished to complain about her treatment, was a committed patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992, but was authorised to go out to Evening Service on a Sunday. It was during such an outing that the interview was filmed. The intention was to show it on the 6 o'clock news the following night. The interview concerned compulsory

electroconvulsive therapy (ECT) that was being administered to Ms X. During the interview Ms X's name was disclosed, as was the fact that she was bi-polar and a committed patient. Ms X admitted to two suicide attempts, which she attributed to fear of ECT.

[3] Between filming on the Sunday night, and airing on the Monday night, the Clinic became aware of the interview and the intention to screen it. There were discussions between the clinic and the broadcaster, culminating in Dr du Fresne writing to TV3 and advising them that, in the opinion of Ms X's clinical team, Ms X was incapable of giving informed consent to such an interview. TV3 ran the item anyway, but included in it an extract from Dr du Fresne's letter setting out her view as to Ms X's incapacity.

[4] Dr du Fresne's complaint was not about herself, or the clinic. Rather she alleged that TV3 had breached Ms X's privacy by filming an interview which disclosed her mental health details. TV3 (formally through the appellant, TVWorks Ltd) disagreed. Amongst various submissions, it said that the personal information about Ms X had been disclosed with Ms X's consent.

[5] At this point it is necessary to briefly digress to explain there is a "Free-to-Air Television Code of Broadcasting Practice", to which TV3 is a party. Complaints about breaches of the Code are ultimately determined by the Broadcasting Standards Authority (the *Authority*), which is set up under the Broadcasting Act 1989 (the *Act*) for that purpose. The Code identifies various standards such as good taste and decency, and balance. Standard 3 concerns "Privacy", and in relation to that standard the Authority has issued a set of guiding principles. Principle 5 protects an otherwise improper disclosure of personal details if the person to whom the details relate has given their "informed consent" to the disclosure.

[6] This was the primary battlefield for the complaint before the Authority, and in this Court on appeal. The Authority accepted Dr du Fresne's unelaborated opinion that Ms X was incapable of giving informed consent. Therefore Ms X cannot have consented, and TV3 could not avail itself of that defence. TV3 appeals

that finding. I will address that submission later, but reflection on the case has caused me more fundamental concerns.

2. Issue one - Ms X is not a party

[7] It was common ground before me that the Act and Code allow a 3rd party complaint, even in relation to someone else's privacy. For a period I regarded it as just a quirk of the case that the "someone else", Ms X, apparently consented to the disclosure. Further, there was evidence before the Authority, albeit in a very unsatisfactory form, that Ms X, having now been released, remained satisfied with her disclosures, and the programme.

[8] However, upon reflection I am of the view that this quirk engages rather more fundamental issues. Late in the piece, indeed after an interim judgment had been released by the Authority, TV3 submitted to the Authority that the failure to involve Ms X was a breach of natural justice. I have come to the view that not only is that correct, but in the circumstances of this case real issues arise as to whether it was appropriate for the Authority to entertain the complaint.

[9] Assume that the facts are as suggested, namely that Ms X was, in her mind, consenting to the disclosures. I have watched the interview, as did the Authority. From my lay perspective Ms X appears lucid, and indeed demonstrably in control. Her husband was present with her; his objections to what was occurring were over-ridden by her. She explained on camera that she was not, as her husband suggested, being harassed by TV3, but in fact wanted her story to be told.

[10] This assessment of apparent consent that one takes from viewing the interview is reinforced by the later information that Ms X subsequently, following release, confirmed her contentment with what occurred. As noted, I am troubled by the form of that evidence, but the Authority in its ruling treated the information it received as conveying that message.

[11] What then is the privacy complaint about, and, more importantly, by what route can it succeed? What it is about is undoubtedly a genuine concern about what

the circumstances might mean for the well being of mental health patients. That is understandable, but it is necessary to consider what is being asked of the Authority, a body established to consider broadcasting standards. The complaint requests the Authority to find that Ms X, despite an appearance of consent, did not do so. Further, the means by which the complaint is to be resolved is an assessment of Ms X's mental health at the time. This assessment is required even though Ms X is not herself putting it in issue.

[12] During the hearing I queried with counsel for the broadcaster why, if it disputed Dr du Fresne's assessment, it had not provided contrary evidence. But, of course, such a question highlights the inherent problem with the whole thing. Why is it that Ms X and her mental health should be the subject of a dispute to which she is not even a party? It cannot be that a 3rd party complaint can impose some sort of de facto obligation on Ms X to open up her mental health to scrutiny.

[13] Likewise, during the hearing I noted to Dr du Fresne's counsel the absence of any elaboration by Dr du Fresne of her assertion of incapacity. There is no explanation as to the medical reasons, nor indeed as to what the clinical team believed informed consent in a broadcasting context involved. Concerning the medical reasons, Ms Stevens in her careful submissions pointed out the confidentiality limits on Dr du Fresne. That is so. What the clinician revealed in making the complaint must be the furthest one could go without the express consent of the patient, albeit that the patient put the matter in the public arena. What this means, however, is that the complaint cannot be made in this form. It is not correct for a 3rd party to allege a breach of Ms X's privacy where such complaint necessitates this sort of inquiry into Ms X's mental health status. (It is important to note that this is not a situation of a person, in the sense of a guardian, applying on behalf of an incapable person.)

[14] The Authority's finding involves a fundamental statement about Ms X's place in the world, and her capacity at that time to exercise her rights of citizenship. Ms X's rights were of course already circumscribed by her status as a committed patient but there has been no submission advanced that there existed some form of legal incapacity to consent due to that status.

[15] In the circumstances of this case, formal notice of the complaint, and the intention of the Authority in inquire into it, had to be given to Ms X. More fundamentally, however, the inquiry should not have been undertaken. Whilst 3rd party complaints about privacy may be properly resolved in some situations, this was not one of them. It necessitated an inquiry into the mental health of a person who was not a party to the proceedings, and who was not herself alleging a breach of her privacy. Accordingly for this reason alone, and conscious Ms X is still not a party and has not been heard from, I would quash the decision.

3. Issue two – informed consent?

[16] Because there was considerable focus on it, it is appropriate to make some comment on the submission that the Authority erred in relation to informed consent. I consider there is merit in the broadcaster's concern that there is no articulation either by the person asserting incapacity, or by the Authority in accepting that evidence, of what is involved in "informed consent". Without an understanding of what the clinical team thought informed consent required, I do not consider it was open to the Authority to reach the view it did. In using that terminology of "open", I am acknowledging that s18(4) of the Broadcasting Act 1989 says that any appeal is to be treated as one from the exercise of a discretion.

[17] The suspicion, and that is all it can be in the absence of evidence, is that the concern in relation to Ms X is that she was not capable of appreciating the ramifications of what she was doing, both generally in terms of the publicity it might generate, and personally in terms of what impacts it might have on her health and progress. If that is so, it raises the issue of whether an appreciation of the consequences of giving an interview is a component of "informed consent".

[18] As a general proposition I doubt that it is. It must be common place for people to agree to publicity, only to later have regrets because they had not understood what the consequences would be. In my view, "informed consent" in a Broadcasting Code more obviously relates to an awareness of being interviewed, of knowing the true context of the interview, and of being aware of the purposes to which the interview is to be put. In other words, what use is planned for it. Thus

Ms X would need to have known that she was being interviewed, that it was going to involve disclosing her name, medical status and history, and that it was going to be shown on national television as part of the news.

[19] More might be required in a specific case, and this may indeed be such a case, but as a general proposition I consider informed consent in a broadcasting context embraces only those sorts of issues. To the extent that such an interpretation may seem limited, it is consistent with the obvious freedom of expression context that applies to this discussion. The Privacy Principles, for example, are authorised by the Broadcasting Act, and there is no suggestion that the Act is authorising anything other than a New Zealand Bill of Rights Act consistent document.

[20] There is little written on "informed consent" in this context. The Court's researches led to the BBC Website, which contains the following extract:

> **BBC Editorial Guidelines**
> The model of informed consent comes from a medical practice based on freewill, capacity and knowledge. The knowledge needs to be sufficient for the person to come to a decision to refuse or agree.
>
> The term "contributor" covers a wide range of people taking part in programmes under very different circumstances and with very different needs. Therefore varying levels and types of knowledge will be required for an informed decision to be possible.
>
> Our commitment to fairness is normally achieved by ensuring contributors know:
> - why they are being asked to contribute to BBC output
> - the context of the programme or website
> - the nature of their involvement.
>
> However, the more significant their contribution, the more detail we should provide.

[21] That extract seems consistent with the views just expressed. It is also to be noted that the Guidelines recognise that some circumstances will require a higher level of awareness, and information.

[22] It is in that regard that one cannot be sure about this case. What did Ms X appreciate, and what incapacities did she have in the view of her clinical team? Arguably with the mentally unwell (and her committed patient status at the time

justifies that label), one needs to take particular care to ensure that the person's understanding is real and sufficiently complete. Likewise, it may well be argued that a capacity to appreciate the ramifications is a requirement of informed consent, even if actually taking cognisance of them is not. One can see arguments both ways and resolution must await a case where it matters, and where there has been full argument on the point. I have included this paragraph to emphasise that if the Court is correct as to the elements that generally make up informed consent in this context, those elements need not represent all that is required in a context such as the mentally unwell. Were it, for example, a now well Ms X who was making the complaint, some careful analysis would be required. One would in such circumstances also, of course, have the advantage of knowing what Ms X thought and understood at the time.

[23] For the reasons given, however, I do not consider it was open to the Authority on the information it had to resolve the complaint.

4. Issue three – miscellaneous points

(a) Other appeal grounds

[24] The appellant raised two other grounds. One was subsumed into the consent issue. The other suggested there might be a "public interest" defence (available under Privacy Principle 8) on the facts of this case. The "public interest" defence would arise for consideration only if it were held that the disclosure of Ms X's details was non-consensual. In my view, once that point is reached, any argument for a public interest defence is untenable. Nothing in the item, or the general context, would justify the non-consensual disclosure of Ms X's name and personal health information. I am still unclear as to the basis on which the appellant even suggests it might be an available defence in this case.

(b) The broadcaster's actions

[25] The reason why Dr du Fresne brought the complaint is, I consider, obvious. She is concerned at the implications for mental health patients who may agree to things when they are not really in a position to make a sensible choice. The consequences of publicity may be harmful to their mental health.

[26] My conclusions should not be taken as an endorsement of the appellant's conduct. There was no urgency in the matter at all, and plenty of opportunity to work through the implications of the information that TV3 had received from Ms X's clinician. The focus of the item, as broadcast, suggests at best that Ms X was a vehicle for a broader discussion about the use of compulsory ECT. If so, then even more so can it be said that there was plenty of time to assess whether it was right to disclose her personal details, given what the broadcaster had been told about her mental health. There was time to find out why the clinical team might be concerned about Ms X's condition, and whether any harm might result to Ms X.

(c) The Authority's status on the appeal

[27] Finally, I observe that the Authority was present at the appeal under Rule 717 of the High Court Rules which provides:

> Unless the Court otherwise directs, at the hearing of an appeal the decision-maker, other than a District Court, is entitled to be represented and heard on all matters arising in the appeal.

[28] In this case the appeal was filed on 13 September 2007. On 25 September the Authority, through counsel, filed a notice seeking to be represented and heard on all matters. The Authority was present at the telephone conference on 2 October which timetabled all matters, including a date for the filing of the Authority's submissions. Written submissions were duly filed on behalf of the Authority. The submissions are restrained, but are fairly described as advocating for the correctness of the decision under appeal.

[29] At the hearing I queried the Authority's presence. I took Mr Scott-Howman to indicate it was routine for the Authority to be represented. I admit to surprise at that. It is certainly commonplace for a Tribunal to file a notice of representation, and often to appear at the outset of a hearing to offer assistance if the Court requires. Often at that point counsel will withdraw unless the Court indicates otherwise. Sometimes, if the matter is of interest, counsel might remain and observe.

[30] Any routine practice beyond that seems to me to be a departure from the traditional position as identified in *Portage Licensing Trust* v *Auckland District Licensing Agency* (1997) 10 PRNZ 554. Similar sentiments were expressed by the Court of Appeal in *Attorney-General* v *Maori Land Court* [1999] 1 NZLR 689, 695 in relation to the Court being appealed from being represented on the appeal.

[31] It would not be appropriate for me as an individual member of the Court to purport to indicate any general rule or approach. However, lest silence be thought to be support for the position that may have developed, I indicate my view that appearances, and certainly submissions in support, should be the exception. It is recognised that in certain areas, such as jurisdiction, a Tribunal might make submissions, but rarely should it advocate for the outcome.

(d) Name suppression

[32] Finally, I observe that I have referred to "Ms X" because the Authority imposed name suppression at the respondent's request, and there has been no application by Ms X or anyone else to vary that.

5. Conclusion

[33] The decision of the Authority is quashed, and the complaint dismissed for the reasons given. The parties may file memoranda on costs if agreement cannot be reached.

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Simon France J

In accordance with r540(4) I direct the Registrar to endorse this judgment with the delivery time of 2.30 p.m. on the 13th day of March 2008.

Solicitors:
C Bradley for Appellant
A Stevens for Respondent
A Scott-Howman for Broadcasting Standards Authority