IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 527/91

UNDER	the Broadcasting Act 1989
IN THE MATTER	of an Application for Review under Part 1 of the Judicature Amendment Act 1972
BETWEEN	TV3 NETWORK SERVICES LIMITED (In Receivership) Applicant
AND	BROADCASTING STANDARDS AUTHORITY First Respondent
AND	EVEREADY NEW ZEALAND LIMITED Second Respondent
AND	HOME & SAFETY NZ LIMITED Third Respondent

Date of Hearing: 4 October 1991
Date of Decision: 31 10 91

Counsel:

J G Miles QC with T Allan for Applicant
C T Young for First Respondent
J E Hodder with R J Latton for Second and Third Respondents

RESERVED JUDGMENT OF McGECHAN J

The Proceeding

This is an application by the applicant (termed "TV3") for review under the Judicature Amendment Act 1972. It relates to a decision by the first respondent Broadcasting Standards Authority (termed the "Authority") to proceed against objection by TV3 to determine a complaint by the second respondent (termed "Eveready") and third respondent (termed "Home & Safety") as to issues of overall bias and unfairness and distortion in the editing process allegedly involved in a television programme broadcast on 7 October 1990 concerning ionization smoke detectors. The concern of TV3 stems from also facing a substantial injurious falsehood/defamation proceeding in the High Court resulting from the same programme. TV3 fears prejudice from prior public determination of common issues by the Authority. There is concern also at the practicability of determining such issues of bias/unfairness/editorial distortion separately from a third issue of alleged false statements and visual effects. The Authority has decided to determine such third issue only after conclusion of the Court proceedings concerned.

The Authority appeared and abided outcome. Its decision was supported actively by Eveready and Home & Safety. While the approach to be adopted where common factual questions fall for determination both by the Authority and by a Court has been the subject of previous ruling by the Authority, counsel advised the question has not previously been before this Court.

Legislation and Broadcasting Standards

The Broadcasting Act 1989, s4 places responsibility on broadcasters (such as TV3) for the maintenance of standards consistent with various stated criteria, including in relation to controversial issues of public importance a requirement for reasonable effort to present significant points of view within the period of current interest, and also an approved code of broadcasting practice. Section 20 constitutes the Authority. It is to be chaired by a suitably experienced lawyer. It is designed to be expert, balanced, and independent. It has power to co-opt (without voting power). Section 21 specifies the Authority's functions to include the development and issue

of codes of broadcasting practice relating, inter alia, to "fair and accurate programmes". Functions also include the receipt and determination of complaints. Principles and procedures relating to complaints are covered by Part II. Initial responsibility is with the broadcaster. Formal complaints must be received and considered by the broadcaster itself. If such are rejected, the complainant may refer the complaint to the Authority. Strict time limits are imposed. The procedure before the Authority is regulated by ss10 and 11, best quoted verbatim.

> "10. Consideration and determination of complaints by Authority - (1) The Authority may, if it thinks fit, consider and determine any complaint referred to it under section 8 of this Act without a formal hearing, but, in that case, -
>
> (a) Shall give the complainant and the broadcaster a reasonable opportunity to make submissions to it in writing in relation to the complaint; and
>
> (b) Shall have regard to all relevant submissions made to it in writing in relation to the complaint.
>
> 2) In considering every complaint referred to it under section 8 of this Act, the Authority shall provide for as little formality and technicality as is permitted by -
>
> (a) The requirements of this Act; and
>
> (b) A proper consideration of the complaint; and
>
> (c) The principles of natural justice.
>
> 11 Power of Authority to decline to determine complaint - The Authority may decline to determine a complaint referred to it under section 8 of this Act if it considers -
>
> (a) That the complaint is frivolous, vexatious, or trivial; or
>
> (b) That, in all the circumstances of the complaint, it should not be determined by the Authority."

Section 13 grants corrective and punitive powers, including directed and published retraction. By s15, decisions (including reasons given) must be publicly notified, with copies available for that purpose. There is a right of appeal to the High Court, specifically stated to be as if the Authority decision had been made in the exercise

of discretion: s18. Section 19A, added by the Broadcasting Amendment Act (No 2) 1990 provides:

"Evidence

19A Except in any proceedings for perjury within the meaning of the Crimes Act 1961 in respect of sworn testimony given before the Authority or in any proceedings for the enforcement of an order made under this Part of this Act, -

(a) No response made by a broadcaster to any complaint made under this Part of this Act; and

(b) No statement made or answer given by any person-

(i) In the course of the consideration of any complaint made under this Part of this Act; and

(ii) In the course of any proceedings before the Authority in relation to any complaint made under this Part of this Act; and

(c) No decision of the Authority on any complaint made under this Part of this Act; and

(d) No determination of the High Court on any appeal made under section 18 of this Act, -

shall be admissible in evidence against any person in any Court or in any inquiry or other proceedings."

The Act contains no other provisions relating directly to the question of concurrent Authority and Court proceedings.

The Authority has promulgated TV programme standards in a Code of Broadcasting Practice. Those presently relevant are:

"General

In the preparation and presentation of programmes, broadcasters are required :

1 To be truthful and accurate on points of fact.

2 ...

3 To acknowledge the right of individuals to express their own opinions.

4 To deal justly and fairly with any person taking part or referred to in any programme.

5 ...

6 To show balance, impartiality and fairness in dealing with political matters, current affairs and all questions of a controversial nature.

...

News and Current Affairs

A television news and current affairs service should take account of the following points :

12 News must be presented accurately, objectively and impartially.

13 ...

14 ...

15 Care must be taken in the editing of programme material to ensure that the extracts used are a true reflection and not a distortion of the original event or the overall views expressed.

16 No set formula can be advanced for the allocation of time to interested parties on controversial public issues. Broadcasters should aim to present all significant sides in as fair a way as possible, and this can be done by judging every case on its merits.

17 Significant errors of fact should be corrected at the earliest opportunity."

Facts

Regrettably, there is no single identifiable document representing or recording the decision of the Authority now in question. Nor indeed is there an affidavit stating the decision, and the reasons on which it is based. The Court is left in the rather unsatisfactory position of sifting through background and available records to ascertain by inference, and as best it can, the components of and reasoning behind the decision concerned. The process is reminiscent of that the subject of comment by the Court of Appeal in *Fiordland Venison Limited v Minister of Agriculture and*

Fisheries (1978) 2 NZLR 341, and subsequent authorities. It is one which should not be necessary.

As at 7 October 1990 Eveready and Home & Safety were established importers and distributors of ionization smoke detectors which contained as an essential component minute quantities of a radioactive substance Americium 241. Both products appear to have been selling reasonably well to the general public through retail outlets, including some supermarkets.

On 7 October 1990 as part of a regular current affairs programme titled "60 Minutes" TV3 broadcast a 16 minute documentary style programme on ionization smoke detectors in New Zealand. I have seen by arrangement a tape of the programme, and read a transcript. I do not need to attempt a full commentary for present purposes. Broadly speaking, the programme was directed at safety, disposal, and labelling aspects of Eveready and Home & Safety detector products and, less directly, Eveready and Home & Safety accordingly.

Eveready and Home & Safety responded promptly by issuing proceedings in the High Court at Auckland on 16 October 1990 claiming substantial damages against TV3, and three other named persons interviews with whom were broadcast as part of the programme, and who are said to be affiliated to Greenpeace.

A first cause of action is based on injurious falsehood (disparagement of goods). It alleges the Eveready and Home & Safety product, the broadcast, identification of the product and company, the interviews, and then 14 false statements disparaging the product. In brief summary, the 14 allegedly false statements were:

(i) the product was so dangerous as to be potentially lethal, or at least raised a serious issue to that effect;

(ii) the component Americium 241 was 50 times more deadly than Plutonium involving a level of emission which could be described as deadly.

(iii) Americium involved grave risk of poisoning, escaping from the detector, death from ingesting or inhalation, and appreciable risk of radioactive contamination;

(iv) Americium is a byproduct of the nuclear weapons industry;

(v) it might be dangerous for people, particularly children, to go near the product;

(vi) the product is not labelled adequately to inform consumers of risks;

(vii) the detectors are unsafe consumer products because of use of radioactive material;

(viii) failure by the National Radiation Laboratory ("NRL") and Health Department through permitting marketing, or marketing without adequate labels, and a safety issue;

(ix) diagnostic x-rays would kill 16,000 people in USA that year:

(x) even extremely low levels of radiation are extremely damaging;

(xi) (see (iv));

(xii) (see (x));

(xiii) Amounts of Americium significantly smaller than contained in the product demand heavy lead containers, and involve significant alpha particle emissions;

(xiv) labelling might not comply with regulations.

Eveready and Home & Safety add a cognate allegation of disparagement by visual effects calculated to associate the product in viewers' minds with nuclear weapons or dangerous radiation levels. The effects comprised pedestrians glowing red, a mushroom cloud, and hand wiping. Such false statements (and visual effects) are said to have been made maliciously. TV3 is said to have known such were false, or to have broadcast recklessly. Amended particulars of malice filed on 8 August 1991 referred to specified publications held, omission to broadcast the associations with Greenpeace of some appearing; deliberate broadcasting of specified statements out of context or incompletely, when the impact and implications were contrary to

specified statements made to TV3 crew; and improper motive to improve ratings and to assist Greenpeace. There are the usual pleas of disparagement of product, damage through lost sales of product and related products, and to market reputation. Particulars of special damages remain extant. There is an allegation of calculation to cause pecuniary loss through knowledge of likely effect.

The second cause of action is for defamation. After pro forma repetition of all allegations made in the preceding injurious falsehood cause of action, Eveready and Home & Safety plead identification by the programme as distributors of the product; two specific passages within the programme; and that false statements and visual effects, together with the two passages concerned, were defamatory portrayals of Eveready and Home & Safety as knowing distributors of dangerous products marketed without adequate warning labels. Disparagement of reputation, and similar heads of loss, are pleaded.

A statement of defence was filed on 26 November 1990 by TV3. It admits the programme. It denies reference to the plaintiffs and some of the defamatory meanings alleged. More importantly for present purposes, it pleads justification in relation to alleged false statements (i)-(xiii) (excluding only allegations labelling may not comply with the regulations), and to the alleged false visual effects. It pleads fair comment on a matter of public interest, namely the safety of ionization smoke detectors and the adequacy of their labelling. I am informed an amendment is proposed to cover a defence of common law privilege.

Having issued Court proceedings, before even defence was due Eveready and Home & Safety also made a complaint to TV3. The complaint was by solicitor's letter dated 1 November 1990. The basis of complaint was s4(e) Broadcasting Act 1989 (Codes of Practice), and breaches of TV programme standards 1, 4, 6, 12, 15, 16 and 17. (3 was to be added later). Breaches were treated by Eveready and Home & Safety as falling into three classifications namely

(i) false statements and visual effects.

(ii) Overall bias and unfairness.

(iii) Distortion in the editing process.

The first category was detailed by express cross-reference to the "false statements" and "visual effects" paragraphs in the High Court statement of claim. The second and third categories were more detailed. The letter did not seek specific redress.

TV3 responded on 14 January 1990. The letter bears the hoofprint of legal advice and tactics. Allegations are not answered on their merits. The view is taken that false statements, bias, and editorial distortion were raised "in one form or another" in the statement of claim filed. Eveready and Home & Safety having made a choice to sue in the High Court should stay there: they could not "have it both ways". Having elected their forum, they could not continue with the complaint. TV3 also denied all allegations "flatly", for whatever benefit that adverb may confer.

Undeterred by assertions of election, Eveready and Home & Safety took the next prescribed step. On 15 February 1991 they complained to the Authority. A standard form was used, with expanded reasons. The allegation of breach was expanded, legitimately or otherwise, to cover s4(d) of the Broadcasting Act 1989, and also standard 3 of the Code of Broadcasting Practice. The same threefold classification was adopted. (1) False statements and visual effects were again exemplified by cross-reference to paragraphs of the statement of claim. (2) Overall bias and unfairness were put generally as "an inaccurate and distorted picture of the risk of danger" from the product with clear bias "in favour of the Greenpeace lobby". Examples ("some illustrations") were

(i) omission to state association of several persons appearing with a Greenpeace campaign against ionization smoke detectors, knowledge of which would have added perspective;

(ii) entire focus upon harmful effects, with minimum reference to saving of life;

(iii) New Zealand Fire Service views, strongly supportive of ionization smoke detectors, were not conveyed;

(iv) visual effects (glowing red and mushroom cloud) were calculated to impress viewers with a connection between such things and smoke detectors;

(v) the views of Dr McEwan, director of the NRL, were not accurately reflected.

(3) Editorial distortion in at least one interview, ie editing out of the demonstration by Dr McEwan and inaccurate reflection of views he expressed. There was cross-reference to portions of affidavits filed by Dr McEwan and Mr Clench in interlocutory (preservation) steps in the High Court proceeding describing their actions and overall statements.

The Authority passed a copy of the letter of complaint to TV3 for response. The result was a solicitor's letter dated 29 April 1991. It followed the earlier pattern. TV3 contended "the complaint lodged deals with substantially the same issues as will be dealt with in the litigation". The complaint could not be defended without producing all evidence which TV3 proposed to produce at the hearing in the High Court proceedings, including matters of justification, fair comment, and honesty of view. Evidence would be lengthy, technical, and costly. Concern was expressed that all the complainants need do was make the complaint, leaving TV3 to explain and justify, giving the complainants the advantage of a preliminary assessment of defences to be presented in the High Court. Such, it was said, would be in breach of natural justice and unfair. The Authority was obliged to observe natural justice. Section 11 permitted the Authority to decline to determine the complaint. The letter suggested the Authority should so decline.

Eveready and Home & Safety responded further by solicitor's letter of 15 May 1991. There was a degree of modification, insofar as the two companies accepted in the light of certain recent decisions of the Authority (nos. 16, 17 and 18/91) the latter "might consider it appropriate" to defer consideration of the complaint in respect of the first category, false statements and visual effects, involving as that category did duplication of findings of disputed fact. The companies nevertheless sought determination, as before, in relation to the second and third categories.

As to the second category, overall bias and unfairness complaints made on 2 February 1991 were said to be separate and distinct from the High Court proceeding. Specifics put forward in the complaints concerned failure to meet standards of balance and unfairness required in public broadcasting, an issue said to be distinct from whether the programme contained defamatory material. It was said the alleged failures adequately to present alternative viewpoints, or to explain personal background, could be considered without concern with the issue whether

the programme was false or defamatory. Decision whether editing was fair and reasonable could be made without fact finding by the High Court. Moreover, it was said, "nor will the Authority need to concern itself with the High Court issue of whether the editing evidences malice on the part of TV3 - the authority's sole concern will be to apply the relevant broadcasting standard and determine whether or not it has been breached". Allegations of bias, it was said, did not for complaint purposes

> "touch the question of whether or not the views expressed by the various witnesses were expressed accurately or honestly by them".

Allegations concerned, rather, TV3's accurate and honest portrayal of views expressed; regardless of whether such were honestly held.

As to the third category, editorial distortion, failure to accurately and fairly broadcast an original interview was

> "an entirely separate issue from that whether the statements actually made in the programme were defamatory of any product or person"

It involved only comparison of materials supplied with material shown.

Finally, in their solicitors letter, Eveready and Home & Safety added supplementary general points involving the public interest aspects of complaints to the Authority; dilution of the effect of the Authority's role if delays through Court proceedings were allowed; and absence of other complaints to serve as a vehicle. Procedural advantages to complainants were dismissed as "neither here nor there" given s19A, and the limited issues involved.

On 17 May 1991 the Advisory Officer to the Authority, legally qualified, reported to the Authority. His view was that the TV3 letter of 29 April 1991 pointed out common ground covered by the two proceedings, and made a good case for declining to proceed or deferring procedure. He expressed himself unconvinced by the complainants' 15 May 1991 arguments, as findings on bias, unfairness and editorial distortion "have some impact into malice", which would play a "substantial role" in the High Court proceedings, but outside legal opinion was suggested. This report drew a different view from a member of the Authority, also legally qualified, in a memorandum dated 21 May 1991. It best is quoted verbatim, with excision of

some material not presently relevant. (References to "std" are to Broadcasting Standards).

> "2. As I see it, at its most basic we can say the High Ct has to determine:
> Re the first cause of action (a) whether false statements were broadcast and (b) if so whether they were broadcast maliciously (ie with intent to broadcast false statements or with reckless disregard for whether or not what was broadcast was true or false).
>
> Re the 2nd cause of action (defamation) the Ct has to determine: whether what was broadcast seriously injured the plaintiffs reputation.
>
> 3 The substantive issues the complainants are asking us to determine involve:
>
> (a) truth and accuracy of statements made and effects used (std 1 mainly);
> (b) not giving the pro-smoke detector arguments sufficient weight, ie not giving a balance coverage (eg by giving Fire Service views and the views in the Journal article supplied to TV3), and not representing Dr McEwan's views accurately (stds 6 & 4 mainly);
> (c) an elaboration of the latter part of (b), ie distorting Dr McEwan's views by editing out (std 15 mainly).
>
> 4 The procedural issue the parties want us to determine first is whether we will proceed to hear the complaint/any part of it pre the High Ct actions. TV3 says that if we intend to proceed there should be a preliminary hearing on the point; Eveready says that if we don't intend to proceed there should be a preliminary hearing on the point. (Eveready does concede, however, that we might defer determining the truth and accuracy complaints until after the High Ct actions. I believe this is what we should do with the truth and accuracy complaints: whether the statements etc were false is exactly what the Court has to determine first in the injurious falsehood action.)
>
> ...
>
> 6 As we said in the Prebble Decision quoted by Eveready, whether or not we proceed with any of the complaints depends on how much overlap there is between them and the Ct proceedings: we wouldn't proceed if we thought that doing so would jeopardise the ct proceedings. Both parties have given us written arguments as to why we should/should not proceed. All a prelim hearing could do would be give them the chance to elaborate those arguments. But we'll be in no better position to assess the arguments at a hearing than we are now unless we get some legal advice we trust.

> 7 For what it's worth, my view, having read the documents etc, is not the same as [Advisory Officer's]. At point 11 of his covering note he says the balance, fairness stds issues relate to the issue of malice (before the Ct) which will affect the success of the plaintiffs' actions. I'd argue that balance etc don't directly relate to m alice - we've never yet imputed bad intention etc to broadcasters when we've found broadcasts to be unbalanced - and anyway, what's the point of s.19A if not to cover a situation such as this?? Ie the Act clearly anticipates us going ahead while court actions are pending/proceeding and makes our decisions and everything leading up to them inadmissible in court, so, to me, we should not be taking an excessively cautious approach: as long as we are satisfied that the issues in the stds complaints are not directly relevant in court, we should carry on. Ie I'm persuaded by Eveready's arguments in the Chapman Tripp letter of 15 may, re the 2nd and 3rd areas of complaint.
>
> I think we should take independent legal advice on the preliminary point so that we are better equipped to make the preliminary decision, whether or not we hold a hearing on the point."

It appears the Authority decided on or prior to 24 May 1991 to determine on 7 June 1991 whether to proceed or defer. That day it called for any additional submissions on the point.

On 4 June 1991 TV3 solicitors responded. It was contended the Eveready and Home & Safety concession in relation to false statements and visual effects was "more apparent than real". Matters of bias, overall unfairness and distortion did not solely relate to broadcasting standards. The specifics went directly to defences of justification ("primarily a defence based on accuracy of reporting"). Allegations made were crucial to malice, and with that the defences of fair comment and qualified privilege.

At its meeting on 11 and 12 June 1991 the Authority decided to take outside legal advice, and so advised the complainants. Opinion was sought specifically as to the extent issues raised by the complaint and Court proceedings overlapped; whether separation into factual/balance and fairness issues was a workable compromise; if such did not eliminate the overlap, whether there was another way of minimising such overlap; and (regardless) whether the Authority should nevertheless proceed in view of s19A. There were some ancillary questions.

Opinion was received on 26 June 1991. The opinion backgrounds the programme, complaint and High Court proceedings briefly but accurately enough. It notes the differing contentions as to whether the complaint should proceed ahead of the High

Court trial. There is then something of an excursion into a supposed natural justice basis for TV3's claim the Authority should not proceed, regarded as insufficient to warrant a s11 decision to that effect. The opinion then concentrates more directly upon possible contempt through published pre-judgment. It reviews the classic authorities, including recent New Zealand Commission of Inquiry cases (see infra). It notes "the facts and the propositions of law while they tend to prove may be in issue before the Authority and the High Court", but then concludes:

> "In respect of the other matters which are the subject of complaint to the Authority it seems to me that the Authority and the High Court will be dealing with separate issues. To a large extent the same facts will be the subject of consideration but the matters to be determined in each case will depend on whether those facts will support the findings that will ultimately be made. For example, in support of the complaint before the Authority of overall bias and unfairness it is alleged that the views of Dr McEwan were not accurately reflected in the programme. This is a reference to the failure to screen the demonstration of measuring the radio activity of ionisation smoke detectors as compared to that from a luminous watch. The omission of this piece of film is also cited as a particular of malice. But this is not to say that the Authority and the High Court are considering the same issue here - the Authority has to decide whether than (sic) omission breaches standards 4, 6 12 or 16 of the Codes of Broadcasting Practice, which relate to dealing fairly with individuals, showing balance, objectivity and presenting all significant sides in as fair a way as possible. That same omission is cited as an example of distortion in the editing process in breach of standards 3, 4 and 15. The High Court however has to decide whether the omission provides evidence of malice in the legal sense and what must be shown is that "the desire to injure must be the dominant motive for the defamatory publication" (Horrocks v Lowe [1975] AC 135).
>
> Overall, the only issues that I see overlap are whether the statements made in the programme are true and it perhaps illustrates that proposition if I word it in terms that this is perhaps the one area where the Authority might be assisted by awaiting the outcome of the High Court proceedings. In this context, I note that the Authority has successfully negotiated its way around concurrent defamation proceedings in its consideration of complaints about the "Frontline" programme "In the Public Good" which linked the Labour party with major business interests. I see no reason why it should not so proceed in this case.
>
> ... I should perhaps mention s.19A in a little more detail. Really I think the effect of that section is to minimise the risk that the Authority might be in contempt of court by providing that proceedings before the decision of the Authority shall not be evidence in any court proceedings. It also illustrates I think that the legislature contemplates that there might be court proceedings arising out of the same broadcast which is the subject of complaint to the

> Authority. In other words, that of itself is not necessarily going to entail that the Authority ought to defer its consideration pending the outcome of proceedings before the High Court. I do not think s.19A goes so far however as to of itself give the Authority a mandate to proceed."

The Authority considered matters at its meeting on 2 and 3 July 1991. There is no direct evidence before me as to its conclusions and reasoning beyond an opaque minute which reads:

> g) Eveready - TV3 - 60 Minutes
>
> The Authority, having received the (specified) Opinion asked the Advisory Officer to send a summary of the substantive issues on which the Authority intends to proceed, to the complainant and to TV3. It was also agreed that a courtesy copy be sent to TVNZ.
>
> It was also agreed that TV3 be asked to provide before the end of July, all the material edited out of the programme."

Clearly, the decision was made to proceed on the second and third categories of overall bias and unfairness, and editorial distortion.

With that decided, the Authority wrote a letter to the parties which is undated, but was accepted at this hearing to have been 4 July 1991:

> "Further to its fax of 13 June, the Authority has now obtained a legal opinion about the appropriate procedure to be followed with regard to the complaint by Eveready Ltd and Home and Safety Ltd. A summary of the opinion from (specified) is appended to this letter.
>
> The matter was discussed by the Authority at its meeting on 2-3 July and it has decided to proceed, without a hearing, on the allegations in the complaints about the item's overall bias and unfairness, and distortion in the editing process. You will note that this covers paragraphs 5, 6, 7, 8 and 9 of the formal complaint dated 15 February 1991. These complaints allege breaches of standards 3, 4, 6, 12, 15 and 16 of the Television Code of Broadcasting Practice and s.4(1)(d) of the Broadcasting Act 1989.
>
> In view of both the legal advice received and the complainants' solicitors' letter dated 15 May 1991, the Authority had deferred further action on the allegations about false statements and visual effects (paragraphs 2 and 3 of the formal complaint and alleged breaches of standards 1, 12 and 17.)
>
> The Authority notes that TV3 has not made a substantive response at any stage to the complaint. For example, TV3's letter of 14 January 1990

(should be 1991) to the complainants' solicitors addressed procedural issues rather than the complaint. Your letter to the Authority dated 29 April 1991 adopted a similar stance.

Under s.10(2)(a), the Authority is required to give both the broadcaster and the complainant a reasonable opportunity to make written submissions. The Authority would appreciate TV3's response to the substantive issues raised under the headings of bias, unfairness and distortion in the editing process.

In view of the complainants' dissatisfaction with the editing of the item, the Authority also requests that TV3 supply the material edited out of the item.

The legal advice was of the opinion that a formal hearing to decide procedural matters was not necessary given the Act's requirement for little formality and its emphasis upon natural justice.

The Authority asks for your reply and the edited out pieces of the videotape by Friday 27 July.

A copy of this letter is being sent to the complainants' solicitors."

These proceedings followed, issued 24 July 1991. The Authority, on advice, declined an undertaking not to proceed pending decision. This Court ordered a stay pro tem.

There has been no delay attributable to either side in the disposal of this present proceeding for review. The same perhaps may not be said of the High Court injurious falsehood/defamation proceeding. I do not have that (Auckland) file before me. It appears particulars of malice were delivered by Eveready and Home & Safety in August 1991. I was informed during argument that TV3, some 12 months on since issue, regards itself as owed particulars of claim; sees the possibility of some interlocutories arising out of discovery; and intended to file an amended statement of defence including an additional plea of common law qualified privilege. I rather suspect matters are marking time pending the outcome of the complaint to the Authority; and as an incident of that, this present application for review. There is no sign of any early setting down for hearing, let alone hearing date. Counsel for TV3 was emphatic that jury trial would be sought, as indeed is usual enough in defamation proceedings. No doubt popular disquiet over matters radioactive plays some role in that stance. Counsel for respondents flags the possibility of an application under s19A Judicature Act 1908 for Judge alone trial, given scientific aspects involved in the justification defence relating to allegations as to radioactivity. I will not pre-judge that issue. I am confident defamation

proceedings even if pursued energetically would not be heard inside the next six months, and I rather suspect the period could be measured in years. It will be a long trial.

Authority's Decision to Proceed: Terms and Reasons.

From this long history I distil the following.

The Authority on 2 and 3 July 1991 decided to proceed to determine the Eveready and Home & Safety complaints on their defined overall bias and unfairness/editorial distortion aspects. When I say "defined", I am conscious the particulars given by Eveready and Home & Safety in their letter of complaint were expressed to be illustrative only, but it must be probable those particulars were in the forefront of the Authority's consideration and decision. The Authority decided to defer consideration of the complaint so far as it related to false statements and visual effects, the latter as specified by cross-reference to the statement of claim in the High Court proceedings. That deferral was not for a specified period. I have no doubt the thinking was to await disposition of the High Court proceedings. I have little doubt the Authority, given legal expertise available to it, appreciated such disposition could take a considerable time. Beyond that, no inferences safely can be drawn as to the attitude the Authority intended to take if disposition of the High Court proceedings became unduly protracted. The Authority determined to proceed "without a hearing" on those overall bias and unfairness/editorial distortion issues. It requested substantive response to the complaints from TV3, plus production of material edited out.

The authority's unexpressed reasons are a matter of inference from materials and circumstances. Clearly the Authority accepted the basic premise it should not decide disputed questions of fact also in issue in the pending High Court proceeding, but should await and use findings in the latter. However, it appears the Authority, starting from that position, nevertheless reached a view it could decide the asserted specifics of non-conformance with particular bias, unfairness and editorial distortion broadcasting standards. Some initial concern was felt by the Advisory Officer as to possible overlap between conduct alleged as going to breach of broadcasting standards, and as going to malice. In the end the two were seen as severable. The Member's memorandum of 21 May 199 noted the "balance and fairness standards issues ... don't directly relate to malice", basing that view on past Authority practice ("we've never yet imputed bad intention to broadcasters when

we've found broadcasts to be unbalanced"). I have no doubt that view was influential. The matter, however, probably was concluded by counsel's opinion received 26 June 1991. A statutory body does not usually take counsel's opinion, and then not act upon it. Counsel took the view that "to a large extent the same facts will be the subject of consideration ..." but considered "the Authority and the High Court will be dealing with separate issues". Different "findings" would be involved. The perceived difference was exemplified by the alleged omission to broadcast the demonstration of relevant radioactivity as between a detector and a watch with a luminous dial, cited both as breach of broadcasting standards requiring balance, objectivity, and fair editing, and as malice, involving desire to injure as a dominant motive. In short, in counsel's view, while the act or the omission might be the same, the findings which flowed from it differed so as to allow separate consideration. There were other influences on the Authority. Section 19A was noted, although counsel's advice ultimately was that it did not "of itself give the Authority a mandate to proceed". I have no doubt there would have been consciousness of the Authority's separate statutory function; its importance; and the desirability of avoiding frustration through delay. There may have been other matters which an opaque record does not reveal. However, on the evidence, I am satisfied the key element in the decision reached was a perception, along the lines of advice, that despite a degree of common factual basis findings in relation to particular allegations of bias, unfairness, and editorial distortion could be made by the Authority without entering into the issue of malice later to be determined in the High Court.

Pleadings

The statement of claim pleads the programme, the defamation proceedings, the complaint to the Authority, the requirement by TV3 to decline to deal with or alternatively to defer dealing with the complaint, and the Authority's election to continue with bias/unfairness and editorial distortion issues (but not false statement/visual effects issues). It pleads such decision was the exercise of a statutory power. Under a marginal heading "basis for review" TV3 then alleges:

> "5.2 The decision by the Authority to determine the complaint relating to overall bias and unfairness and distortion in the editing process is in breach of:
>
> (a) The principles of natural justice:
>
> (b) Procedural unfairness.

Particulars

i) The factual and legal issues to be determined by the Authority are the same or similar to those to be determined in the High court in the proceedings issued by the Second and Third Respondents under CP 1701/90.

ii) To enable the Applicant to respond properly to the complaint by the Second and Third Respondents it will be necessary for the Application to disclose all or a significant proportion of its evidence relating to its defences including its defence to malice.

iii) The tactical advantages to the Second and Third Respondents in being able to see and assess the evidence of the Applicant and the reasons and justifications for the many editorial decisions made by the maker of the documentary would be very significant to the Second and Third Respondents.

iv) The prejudice to the Applicant outweighs any public interest factor.

v) Any decision made by the Authority is likely to be broadcast or disclosed to the public either by the express order of the Authority or because such decisions are required to be made public.

vi) There is a substantial risk that such publicity would be known to the Judge or jury which would ultimately try the issues in the defamation litigation.

vii) ..

(c) The decision by the Authority to determine the complaint relating to overall bias and unfairness and distortion in the editing process is likely to interfere with the due course of justice, namely the right of the Applicants to have their defences heard in the High Court free from prejudice or bias."

I note (b)(vii) was not pressed as a serious issue at hearing. I note also that (c) was added by amendment as late as 27 August 1991.

Relief sought is:

(A) An order setting aside the decision of the Authority to proceed and determine the complaint filed by the Second and Third Respondents dated the 15th February 1991.

(B) An order that the determination of the complaint be stayed until such time as the Proceedings in the High Court at Auckland under CP No. 1701/90 shall have been determined or settled by the parties whichever is the sooner; alternatively

(C) A declaration that the complaint be determined on such basis as this Honourable Court deems just.

(D) The cost of this application."

The statement of defence by the Authority is pro forma. The statement of defence by Eveready and Home & Safety denies the essentials of para 5.2; denies particulars (b) (i)-(vii) would constitute breaches of natural justice or procedural unfairness; and raises certain discretionary factors, including asserted absence of injustice in determination by the Authority, and a public interest in prompt disposal by the Authority.

The statement of claim is perhaps oblique. It alleges (a) breach of natural justice; (b) procedural unfairness (in specified particulars); (c) likely interference with the due course of justice in the High Court.

Breach of natural justice and procedural unfairness more usually are invoked against the process undertaken in the achievement of the decision under attack. I doubt whether such is the thrust in this case. Those pleas are not so much aimed at contention the Authority in reaching its decision to proceed did not itself give TV3 a hearing on the question, or was itself biased, or reached its decision in some unfair manner. The thrust of the first two pleas is less process than consequence. It is said the decision actually reached on the deferral question will, through resulting disposition of the complaint lead on to future breach of natural justice or procedural unfairness in the pending High Court proceeding. The real essence of TV3's complaint is encapsulated in belatedly added ground (c): the decision made is likely to interfere with the course of justice in the High Court, and Prayer (B) seeking stay of determination of the complaint meantime. I rather doubt whether it was even necessary to commence by judicial review. A more direct route might have been an ordinary proceeding for an injunction against the Authority based on the Court's inherent contempt jurisidiction to protect its own proceedings. In view of plea (c), Prayer (B), and that reality I will approach the matter broadly. I do not think this

Court should dwell on niceties of administrative law characterisation, or upon forms of action, when the protection of its own process is the essential issue. It should act.

Submissions : Applicant TV3

TV3 put the intended determination of the complaint as breach of natural justice and procedural unfairness, and also as pre-judgment of issues which may amount to contempt. The Authority was under a duty to decline to hear the complaint if through its doing so TV3 would be treated unfairly. Submissions referred to recent decisions of the Authority itself (notably "the Frontline" decisions) which accept the Authority will not decide disputed questions of fact likely to be in issue in defamation proceedings in the High Court, but instead will defer standards matters depending upon such questions. The Authority in this case, it was said, had followed that approach in relation to the false statements/visual effects category, but had not done so in the second and third categories of bias, unfairness and editorial distortion. It had proceeded instead upon the basis of counsel's opinion. Without quite dismissing that opinion as being itself influential ("it was taken into account and was wrong") TV3's submission then focused rather more on the Member's memorandum of 21 May 1991. It was castigated as simplistic and erroneous in its separation between breach of broadcasting standards and malice. No such separation was possible. Factual issues for determination would be substantially the same in both the High Court and Authority. In this respect the submission focused particularly upon

(a) knowledge of falsity through articles previously supplied;

(b) deliberate broadcasting out of context or incomplete;

(c) statements edited if contrary to overall input;

(d) failure to disclose Greenpeace associations;

(e) improper motives.

As additional matters TV3 referred to the inevitability of publication, likelihood jurors would be influenced, and disclosure of evidence and arguments well before trial with tactical disadvantage following.

As to the aspect of pre-judgment amounting to contempt TV3 cited the usual authorities as to interference with access to the Courts, starting with the classic *Attorney-General v Times Newspapers Limited* (1974) AC 273, 309-310, and in a more immediate context *Thompson v Commission of Inquiry* (1983) NZLR 98, 107-113. Prejudice could arise through publicity, or requirement for prior disclosure of defences. An Authority hearing would be a usurpation by the Authority of the function of the jury; and even in a Judge alone trial would carry the prior disclosure difficulties. The case was analogous to *Thompson* supra in common issue, publication, jury influence, and defence disclosure aspects. It also carried floodgates risks, with the anticipated first pre-trial step in all television defamation actions perhaps becoming an exploratory complaint to the Authority. Section 19A, with its inadmissibility provisions, was irrelevant accordingly. It had not been treated as decisive in the earlier Authority decisions.

Submissions : Respondents Eveready and Home & Safety

Respondents opened with observations as to importance of broadcasting; the Authority's functions; the denial of legislative intentions by delay; recognition in the legislation of the possibility of concurrent proceedings; the "robust" character of High Court process; and the conflict between TV3's claim to "keep its powder dry" and the open approach to litigation reflected in the new High Court Rules. Focusing on the decision in question, respondents submitted a distinction deliberately had been drawn between "findings of fact relating to the dangers or otherwise of the smoke detectors" and the "process and the approach taken in preparing and presenting". False statements/visual effects could be left to the High Court. However bias and overall fairness and editorial distortion issues related to broadcasting standards, and should proceed. There were acknowledged differences between the parties as to the width of such standards. There would be some overlap. However the question was whether it would be material and prejudicial. Respondents submitted that the degree involved would not be in that category. The Authority would not be concerned with malice. The issues were not prohibitively similar. Further, as to concurrent aspects, emphasis was laid on s19A as directed to the "very issue" now involved (avoidance of injustice to the broadcaster), and upon the principles in *Fitzgerald v Commission of Inquiry* (1980) 2 NZLR 368, 376 and *Thompson v Commission of Inquiry* supra. Disclosure of defence was of reduced significance in a civil case: *Re Winneke* (1982) 56 ALJR 506, 536. There may be publicity. However, the time factor - months for the Authority, with years for the

defamation action - was pertinent, as was the prospect of a Judge alone trial. The floodgates, if anything, were inevitable. If concurrent proceedings were not permitted, applications to the Authority would be made first, with defamation actions following. On discretionary aspects, reference was made to waiver through awaiting counsel's opinion; the need for speed in public administration; the need for the Authority to act effectively, and certain other factors.

Precedent

Only limited assistance is gained from precedent, none of which is direct. As to general considerations of natural justice and fairness, I mention merely and in view of citation *Daganayasi v Minister of Immigration* (1980) 2 NZLR 130 and *Webster v Auckland Harbour Board* (1987) 2 NZLR 129. As to general approaches to publications potentially prejudicial to Court process I note *Attorney General v Times Newspapers Limited* (1974) AC 273, 279-310. More helpful for present purposes are the two recent review cases in New Zealand in which the Court has faced the question of potential conflict between the proceedings of a Commission of Inquiry on the one hand, and a criminal jury trial on the other.

In *Fitzgerald v Commission of Inquiry* (1980) 2 NZLR 368, the applicant and his wife obtained a loan from the Marginal Lands Board. Their loan application was supported by a statutory declaration by the applicant. Questions arose as to the propriety of the loan approval. A Commission of Inquiry under the Commissions of Inquiry Act 1908, chaired by Queens Counsel, was set up to examine allegations of impropriety on the part of any person in relation to the reference of the loan application to the Board for consideration, and its consideration. It became known the applicant would be charged with making a false declaration, as indeed later occurred. The Commission took a view that any impropriety before the point of reference to the Board was outside its terms of reference. The falsity of the declaration was in that previous excluded category. Evidence on the point would not be admitted. The Board refused to adjourn its inquiry. It took the view that prejudice to the applicant, particularly evidence bearing on the statutory declaration, could be met by the privilege against self-incrimination; prohibition of publication of prejudicial material; and by evidence heard in private. The applicant commenced judicial review proceedings seeking an order in the nature of prohibition against the Inquiry before completion of investigation and prosecution. An inherent jurisdiction to intervene in the proceedings of a Tribunal to ensure justice was asserted. Nothing must occur which through publicity or otherwise might prejudice the right

to fair and impartial trial by jury. There was concern at likely widespread media reporting, influence an potential jurors, and the prospect of evidence inadmissible before a Court. There was concern that even on the restricted approach taken by the Commission, there would be evidence indirectly relevant to the prosecution issues, which it would be impracticable to separate. The alternative of hearing almost entirely in camera was not sought. Hardie Boys J, 376-378, took the question for consideration as whether continuation of the proceedings by the Commission amounted to "an interference with the course of justice". If it did not, it was not unlawful, and the Court could not interfere. Such legality was to be judged by the law of contempt. Contempts "have in general the characteristic of publication". A newspaper article may amount to contempt. Discussion between two persons, even with a third present do not. A Commission was in the same position. The conduct of its inquiry was not in itself a contempt. The likely publication of news reports changed nothing. The inquiry and such publications were separate matters:

> "If the Commission acts lawfully in conducting the inquiry it is required to conduct this Court cannot stop it. Its otherwise lawful proceedings do not become unlawful because some other person chooses to publish them, even in a manner that itself amounts to contempt". (Emphasis added).

The Court was not entitled to prohibit the Commission proceeding:

> "according to the procedures it has already laid down".

This last, I comment, is significant. Hardie Boys J did not contemplate carte blanche to the Commission to proceed blithely onward on the assumption matters of publication were never its concern. Such an approach would be quire artificial. The protective steps of privilege against self-incrimination, suppression of publication, and in camera hearing were envisaged as in-built protections. There was also an awareness of the control the law of contempt always carries for the media (377):

> "I consider the steps it has indicated it would take to protect the applicants' rights, coupled with the laws of contempt as they apply to the news media, will ensure that the interests of justice are properly served".

In short, the Court could control an inquiry which would result in contempt. The essence of contempt, however, was publication. If the inquiry exercised satisfactory

controls over publication of potentially prejudicial material, the possibility of publication - even contemptuous - by others did not suffice.

In *Thompson v Commission of Inquiry* (1983) NZLR 98, Barker J faced a somewhat similar situation. Certain District Court clerks had been charged indictably with conspiracy to defeat the course of justice by interfering with minor offence notice procedures. Shortly afterwards a Commission of Inquiry was appointed, chaired by Queens Counsel, to inquire whether there had been impropriety on the part of staff or any other person in relation to prosecutions, and whether there had been laxity or irregularity on the part of staff. The Commission had power to sit in camera, and was directed not to publish information received, or its report, otherwise than to the Governor-General. The Commission refused to adjourn its inquiry, for which an early reporting date was set, pending prosecution outcome, noting particularly its power to sit in private. Applications for judicial review followed, seeking orders in the nature of prohibition preventing the inquiry continuing before determination of the prosecutions, anticipated for some three months away. Depositions commenced before the application for review was heard. It was accepted a "large amount" of evidence given at the depositions would be repeated before the inquiry, which would also however involve matters and persons unconnected with the prosecutions. The Court's decision was given at the conclusion of depositions. Barker J joined Hardie Boys J in accepting, as the initial question, whether continuation of the Commission proceedings "in the manner it had indicated ... would amount to an interference with the course of justice". He noted Hardie Boys J's view as to separation between hearing and media publication. However, Barker J (109) distinguished the *Fitzgerald* situation as a relatively simple matter of false declaration, compared with the complexities of the conspiracy charges presently before him. He expressed agreement with the views of Brennan J in *Re Winneke* (1982) 56 ALJR 506, 564 that the real test was whether the matter published, or to be published, had "as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case", while distinguishing the outcome as one related to trial before Judge alone. Barker J (111) considered prejudice based on publicity would be offset by ability to sit in private. There would be no prejudice from material already published through depositions. However, questions of prejudice went further. Cross-examination might reveal matters of defence prematurely. Applicants might be summonsed to give evidence on trial material, and even refusal to answer on grounds of privilege would lead to unfavourable inferences "by the uninformed". Evidence inadmissible at trial might be given. Barker J concluded these matters were more than inconvenience: "They could

undermine the applicants' right to a fair trial", (112), even if the commission sat in private. There was a balancing exercise between the respective public interests. The decision was to allow the Commission to proceed, pending outcome of the prosecutions, upon a limited basis. This comprised procedures and evidence relating to matters other than those involved in the prosecution; evidence-in-chief as given at depositions; but no evidence from the applicants themselves. The right of the applicants to apply for hearing in private even within those restricted areas was preserved. Such overall approach would avoid "substantial risk of serious injustice".

What can be drawn from these two cases for present purposes? Clearly enough, a Court can and will intervene to restrain a statutory inquiry where such will amount to "an interference with the course of justice". (I think it implicit in that test that the approach is one of "practical reality" involving a "substantial risk of serious injustice". The Court will not be bothered with trivia). As to the risk of publicity at the hearing itself, provided reasonable controls are put in place by way of hearing in camera and restriction on publication of prejudicial material, the Court will not necessarily be deterred by a residual risk of media publication, even contemptuous. The Court will, however, look also at any potential prejudice to a defendant inherent in the procedures which will be adopted at the inquiry. It will keep in mind the reactions of the "uninformed". In the end, each case will turn upon its own circumstances. More complex Court proceedings may require greater controls, albeit short of total prohibition. A close examination of the issues which will arise in each of the inquiry and the Court proceeding, and of the realities involved, is required in each case. There must be an ultimate estimation of risk of prejudice, and balancing of the public interests involved.

In a general way, those approaches can be transposed to this present case - but caution is needed. The situations are not identical. First, while I am prepared to assume the Commissions' reports would not be published while the criminal proceedings concerned still were in train, that may well not be so for the Authority. It is under a statutory duty to publish, and indeed to include reasons. I have some doubts whether it could see its way clear to deferring publication for a period perhaps running into years. The Court in the Commission cases did not have that extreme prospect in mind when considering the propriety of allowing continued concurrent inquiry. Second, the present situation involves the unique feature of s19A, directing that statements to and the decision of the Authority are inadmissible in Court proceedings. That attempt at quarantine was not involved in the

Commission cases. Third, the Commission cases involved not merely jury trials, but jury trials in criminal cases. The difference is more than a mere matter of atmosphere, considerable as that is. The criminal law is still the subject of particular procedural and evidential rules, strictly applied. Not least is the accepted right to conceal almost all defences until the last moment, and the undoubted right of silence and to decline to give evidence. The Court in the Commission cases did not consider in any direct fashion the approach properly applicable to a civil jury trial. In the end,the general principles laid down in the Commission cases are helpful, but this case demands its own distinctive treatment.

S19A Broadcasting Act 1989

The prospect of concurrent complaints and legal proceedings stemming out of a single broadcast is obvious. The prospect of legal proceedings taking the form of a defamation claim is equally so. I am prepared to assume the legislature was aware of that reality.

Concurrent proceedings problems were resolved under the previous Broadcasting Act 1976 by a simple prohibition upon complaints authorities dealing with complaints already the subject of Court proceedings, or which might be the subject of Court proceedings. Section 67(4), 95 Q(1)(b), and 95V(3) applied. Indeed, a complainant was required to lodge an undertaking not to take legal proceedings as a preliminary to invoking the complaints procedure.

This solution was abandoned in the 1989 Act. I have no information as to why. The experience and problems arising no doubt underlie the enactment very soon afterwards by the Broadcasting Amendment Act (No 2) 1990 s4 of a new s19A. Significantly, however, the previous total barrier was not reinstated. Evidently it was envisaged the new Authority at least in the usual run of cases would be able to proceed with concurrent complaints disposition, given protection afforded to litigants by the new inadmissibility provisions. Significantly, however, there was no accompanying mandatory direction that the Authority must so proceed in all cases. Such direction would have been a simple matter if inadmissibility was considered a universally sufficient protection. Parliament was silent. Indeed, it left s11 power to decline to consider complaints at all intact. I do not find that silence surprising. I think it likely that Parliament intended the Authority, even with the advantage given by the new s19A, to use commonsense and a feeling for fair play in exceptional situations. Such approach foreseeably might require delayed disposition

by the Authority, not least where published material despite technical inadmissibility might have prejudicial effects upon a jury. I do not view s19A as an intended licence to act in all cases without inhibition, and regardless of injury. I concur with the view of counsel previously advising the Authority : s19A does not go so far "as to of itself give the Authority a mandate to proceed". It is a protection to be weighed in the balance, but in a jury context is not determinative.

Malice

This is no place for some general dissertation upon the meaning of "malice" within the torts of defamation and injurious falsehood. However, in view of the restricted perception adopted in counsel's opinion sourced to *Harrocks v Lowe* (1975) AC 135 (desire to injure must be the dominant motive), I refer to the discussion in *Gatley* Libel & Slander 8th Ed. para 762, 765-7, 771; and recently in *Todd et al* Law of Torts in New Zealand para 16.10.2. I bear in mind also that the question whether malice carries identical requirements in defamation and in injurious falsehood remains open: *Broadcasting Corporation v AHI* (1980) 1 NZLR 163, 173.

Impact of Authority Determination Upon High Court Proceeding

The potential impact falls under two heads

(i) through necessary pre-trial disclosure by TV3 of evidence and arguments it will use later in the High Court.

(ii) Through publicity given to the Authority's determination when publicly released, and the effect of publicity upon potential jurors, and possibly witnesses.

I dismiss outright the possibility of effects upon any future trial Judge. There is no such possibility.

What, in fact, will the Authority do and say? The Authority is entitled to regulate its own procedure. In particular under s10(1) it may "consider and determine" a complaint "without a formal hearing", provided it gives complainant and broadcasters "a reasonable opportunity to make submissions to it in writing in relation to the complaint" and has regard to such submissions. It is not required to hold an open hearing, with appearance by counsel, oral evidence, cross-

examination, and oral submissions, with the media present. Indeed, in "considering" complaints it is enjoined by s8 to provide for "as little formality and technicality" as is permitted by the Act, the proper consideration of the complaint, and principles of natural justice. So long as the Authority permits each side to present a full written case, including response in writing to the case of the other, there need be no public presentations. That is the course which, on the evidence before me, and despite formal requests on both sides, the Authority has decided to adopt. Such is understandable, given logistics. I doubt whether the process will prove completely confidential. Very little in this country these days does. However, there will be no prolonged public spectacle, with selectively reported cross-examination and submissions served up to the public.

Within this particular procedure, the issues (on the Authority's intended approach) will be confined to the applicability of certain broadcasting standards to certain identified matters put forward as showing bias, overall unfairness, and editorial distortion. No forward predictions can be entirely reliable, particularly when there is a careful "illustrative only" reservation. However, the likelihood (from the complainants' letter of 15 February 1991) is such will comprise standards 4, 6, 12 and 16 (fair personal treatment, balance, accuracy/objectivity, all significant sides); as applied to aspects of concealed Greenpeace connection, minimal reference to life saving; omission of New Zealand Fire Service views; the visual effects; and inaccurate reflection of Dr McEwan's views. Likewise, on the editorial distortion side, such will comprise standards 3, 4 and 15 (rights to individual opinion, fair personal treatment, editing not to distort) and the aspects of editing out of the luminous watch dial demonstration and Dr McEwan's additional statements. The Authority will need to consider such factual, or mixed fact/opinion, matters as likely viewer perceptions at the time and in this context of such Greenpeace affiliation; the then views of the New Zealand Fire Service on net benefits; and the actual demonstrations and statements by Dr McEwan to staff at the time. As to the visual effects, it may need to ascertain whether indeed there is some connection between Americium and the nuclear weapons industry. (I do not seriously suggest it need ascertain whether radioactive pedestrians glow red). It will need to assess the information in these areas held or reasonably available to TV3 at the time. It will need to weigh, from material used and un-used, style of programme, and demeanour of participants whether broadcasting standards were met, bearing in mind of course such matters as programme time, cost constraints, and the luxury of hindsight. There will be many other details. At the end of the exercise, it must reach a view as to standards compliance. The implications of such ultimate

conclusions, if adverse to TV3, are not to be overlooked. The upshot could be findings that within particular areas TV3 was biased, produced a programme which overall was unfair, or was guilty of editorial distortion. The decision, with reasons, must be published. It is to be expected publication would not be long delayed.

In these circumstances, quite apart from exposure to penalties imposed by the Authority itself, TV3 cannot be expected to emulate the ostrich, merely awaiting its day in the High Court. Obviously, it must prepare and furnish full written evidence and arguments within the areas raised. In particular, it will need to disclose total resource materials held, the personnel involved in the production process, the reasons for production decisions made, and its arguments for fairness, balance, and accuracy. It may not be necessary for TV3 to establish the truth of the thrust of all of the alleged false statements pleaded at this stage. However, it will be involved in promoting a particular view of some such matters of fact and very much involved in establishing it acted fairly and properly overall.

It follows TV3 will be affected to some degree in the first area of impact: pre-trial disclosure of evidence and arguments. Is the degree such as to amount to interference with the course of justice? It is important not to exaggerate. I put to one side the somewhat extravagant assertions of TV3 in early correspondence. If the Authority intended to hold extensive formal sittings, with both oral evidence and cross-examination, I could be persuaded such a risk existed. There is nothing like the opportunity of a "dry run" assessment of witnesses as to demeanour, and the opportunity of advance cross-examination, to assist in shaping a later case, particularly with a jury in prospect. An advantage of that character, very much the form of procedure under consideration in the Commission cases, could require adjustment. However, a procedure under which evidence on both sides is in documentary form only, with no witness appearance, differs in marked degree. Certainly, there is still information disclosure, and of a wide-ranging kind. The equivalent of evidence-in-chief, and perhaps some rebuttal evidence, will be revealed by TV3 in detail. However, that is not so very far from the position in which TV3 is likely to find itself pre-trial under the new High Court Rules. Discovery of documents and interlocutories, even allowing for rules as to journalist's sources, exchange of experts' reports, and quite possibly a requirement for exchange of briefs before trial,total to very much the same ultimate result. As to prior disclosure of arguments, I would be surprised in this case, given the resources and talent deployed, whether either side by trial date would be able much to surprise the other. It is not a secrecy which I would stir myself to facilitate. The

days of trial by ambush are gone. There will be some disadvantage. I accept a requirement to disclose at an earlier stage than otherwise is unwelcome to TV3, but I do not accept such will be prejudicial to a point warranting interference.

I turn to the second area of impact upon High Court proceedings : prejudice by publicity.

I am not particularly concerned at risks arising from minor publicity relating to the Authority's mere consideration of the matter, preparatory to decision. In any event, I am prepared to adopt the approach of Hardie Boys J in *Fitzgerald v Commission of Inquiry* supra that, provided proper controls are imposed on the publication of actual proceedings before the Authority, the prospect of publication by others, even in contempt, need not be a barrier.

The problems arise more from ultimate publication of the Authority's decision itself. I have no doubt that decision will receive wide publicity at the time, particularly if adverse in any respect to TV3. It has a number of tabloid elements : fires, safety, radioactivity, Greenpeace, defective consumer goods, television, Court proceedings, etc ad nauseam which are likely to prove irresistible to the mass media. Television channels in competition with TV3 may not be overly charitable. The impact which such publicity might have should be gauged for present purposes, at least in part, by its possible effects on Barker J's "uninformed". Certainly, with the prospect of a jury trial, it is to be gauged by its possible effects on the general public.

On this point, I regret, I rather part company with the apparent reasoning adopted on advice by the Authority. I consider the matter was not sufficiently worked through to practical consequences. I can accept that as an analytical exercise it may well be possible to segregate many at least of the pleaded false statements and visual effects, not under consideration by the Authority, from the relatively fewer factual matters necessary before it, although some overlap even then seems likely. I can accept that for the trained mind it is possible to take a single factual element and to focus upon it for the purpose of deciding one issue only, ignoring all others for which the fact has implications. To take the example selected by counsel previously advising the Authority, the lawyer or logician can take the failure to show Dr McEwan's reassuring luminous dial demonstration, and focus upon the relevance of that omission only in relation to broadcasting standards 3, 4 and 15 (right to own opinion, fair and just dealing with participants, editing not to distort), avoiding any

focus upon the question of common law malice. The trained mind can accept (if such be shown to be the case) that TV3 did not respect the right of Dr McEwan to express his own opinions, but made adjustments to his opinion; did not deal justly and fairly with him when excising balancing material important to his overall view; and edited material obtained from him in a manner which produced distortion, but still left over for further consideration whether TV3 did so out of ill will or in circumstances such to amount to malice at common law. It can hold open the possibility of negligence, incompetence, or mistake. However, it is quite unreal to expect any such exercise from Barker J's "uninformed" or general public, to whom the Authority report will be published through the media. So far as the citizen and potential juror is concerned, particularly if publication absorbed is of a headline character, the message received may be to the effect TV3 has been found by a reputable statutory body to have been biased, unfair, and to have distorted a programme relating to smoke detectors. That is a stain which could remain. One cannot expect a lawyer's trained awareness that issues of defamation remain distinct and undecided. It will not be at all obvious to the general public that a TV channel can be biased, unfair, and commit distorted editing of a programme, but still not be at least probably liable for defamation. The subtleties of distinctions between statutory broadcasting standards and common law malice if grasped at all, which is not likely, are unlikely to be retained. It may well be - and properly - that the Authority itself would use deliberately guarded language, and state express reservations to the effect it is not pre-judging issues outstanding in litigation. Such refinements, if noticed and understood, tend not to be retained. Nor, I regret to say, do I have much confidence in the curative powers of time, s19A, or directions to a jury by the eventual trial Judge. It is predictable that even some years hence a juror may recall something was said by some authority on the matter, and with the widespread interest in television, and a publicly available document, follow the matter up, whatever seemingly curious directions may be given. Once learned, the effect could be potent. In the end, I am driven to say the Authority's thinking on this matter, while understandable and perhaps workable so far as its own consideration is concerned, in the real world of subsequent jury litigation is unworkable. To follow the course proposed carries an unacceptable risk of interference with justice. With luck, injustice might not occur. TV3 should not be asked to rely upon luck.

However, there is another aspect to justice. It is delay. It is possible Eveready and Home & Safety brought their complaint to the Authority with a view to immediate consideration and product clearance, in part at least, rather than the predictable

delays of a High Court trial and judgment. It should be open to Eveready and Home & Safety, if such is their preferred course, to abandon permanently their High Court proceeding and request immediate disposition of the complaint to the Authority. It is a matter for commercial judgment. In that situation, I would see no barrier to the complaint proceeding immediately, and indeed in relation to the first category of false statements and visual effects also. (For clarity, abandonment does not mean tactical discontinuance with the way open for subsequent resumption). More importantly, TV3 should not be tempted or allowed to apply Fabian tactics. It is a fact of life that with interlocutories, appeals, and the scarcity of judicial and jury time available for long civil matters, a High Court defamation case of the present character can drift for some years before coming to hearing, and even then the prospect of appeals and retrials can protract matters further. It is not unknown for plaintiffs to be worn down by tactical attrition, with proceedings never coming to trial. In their present situation, Eveready and Home & Safety, if further disposition of the complaint is stayed, will be in the unenviable position of having no more than a distant prospect of High Court hearing, and no prospect at all meantime of even partial clearance through the Authority. So far as that situation cannot be avoided, so be it. So far as it can, it should be. If there became good reason to believe TV3 may not be co-operating to the fullest reasonable extent in pressing the High Court litigation to an early hearing, the wider interests of justice could warrant withdrawal of the stay, or at least a sunset clause. That protection should be preserved. No doubt Eveready and Home & Safety can be expected to act as watchdog in that regard, without imposing obligations on the Authority. It might well be appropriate any such application be heard by an Auckland Judge assigned to eventual trial of CP No. 1701/90.

Finally, should there be an order in the High Court proceedings for trial before Judge alone, all difficulties to my mind would disappear. I am not troubled by the pre-trial disclosure concerns expressed by TV3. A stay no longer would be warranted. Any application for order for Judge alone trial should of course be made in the Auckland proceeding concerned, and not as an aspect of this present application.

Orders

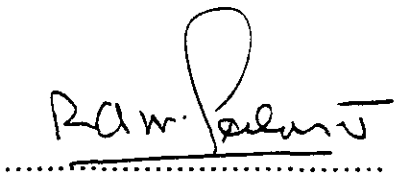
There will be orders:

(A) setting aside the decision of the Broadcasting Standards Authority (notified by undated letter despatched on or about 4 July 1991) to proceed to determine the complaint filed by the second and third respondents dated 15 February 1991;

(B) that the determination of the complaint be stayed until such time as the proceedings in the High Court at Auckland under CP No. 1701/90 shall have been determined, settled, or discontinued permanently, or this Court shall have directed trial therein before Judge alone, whichever may be the soonest;

(C) reserving leave to the respondents or any of the respondents to apply to this Court upon notice to uplift or vary such stay upon grounds the applicant is not co-operating to the fullest reasonable extent in seeking prompt disposition by trial of defamation proceeding CP No. 1701/90 (Auckland Registry);

(D) costs are reserved.



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