IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-24

	BETWEEN	TELEVISION NEW ZEALAND Appellant
	AND	DAVID AND HEATHER GREEN Respondents

Hearing: 15 May 2008

Appearances: Mr Akel for Appellant
Mr Scott-Howman for Respondents

Judgment: 11 July 2008 at 2.30 pm

JUDGMENT OF MALLON J

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Introduction

[1] This appeal from a decision of the Broadcasting Standards Authority ("the BSA") concerns a television item on TVNZ's "Close Up" programme broadcast on its TV One channel. The item was about "drink drivers", who they were and whether naming and thereby shaming them was an effective form of deterrence. In that context the item included footage of two people who had just left the Auckland District Court, each having been convicted on a charge of driving with excess breath or blood alcohol. One of these, a man, was a willing participant in TVNZ's programme. The other, a woman, was not.

[2] When the woman was approached by the reporter as she came out of court the image of her face was pixilated. She made it clear that she did not want to be on television and indicated a concern about her employer knowing about her conviction. She was shown walking hastily down the street and into a shop to get away from the reporter. Her name, age, marital status and salary were mentioned as was the fact that she had just pleaded guilty to her second drink driving charge in eight years. After discussion by the reporter with others, the item returned to the image of the woman as she left the court and the pixilation was removed so that her face was shown for a brief period and her name was stated. All of the details disclosed about the woman had been obtained by the court reporter who had been in court when this information was read out.

[3] The BSA considered that, in respect of this woman, the item breached the broadcasting standard of "fairness". TVNZ appeals contending that the BSA failed to consider the legal principle of open justice and editorial independence in the presentation of a story in the public interest and that its determination was a plainly wrong limit on the right to freedom of expression.

The television item

[4] It is necessary to put that part of the item considered to breach the fairness standard in the context of the item as a whole.

[5] The item began by discussing that there were thousands of drink drivers convicted each year, 31,266 convicted last year alone. The presenter said that many do not get reported except when they kill themselves or others, and that there had already been 43 deaths from drink driving this year. The presenter said that if you sat in court one morning you would see that those being convicted are "just like you and me". The presenter referred to the practice in the *Dominion Post* and *The Press* newspapers of "naming and shaming" all drink drivers by publishing all convictions.

[6] The item then went to a reporter who had spent a morning in court. The reporter approached the woman in the circumstances discussed above. He then approached the man who considered it was a "fair cop" both as to his conviction and the publicity. He was asked what the greater deterrent was, the expense (of the fine and court costs etc) or his face on television. He laughed and said that he would say it was the expense. He said that he did not care about being named and shamed because he had done the crime, and he had to pay the price for it. He was asked if he felt humiliated to which he said that if someone saw the amount that he had lost and the hassle it had caused him then it might make them think twice.

[7] The reporter also had a discussion with a lawyer who represented some of those appearing in the court on the drink driving charges. There was then a further discussion with the man about why he had offended and whether he was likely to offend again. The item then returned to the image of the woman, the pixilation was removed and her name was stated.

[8] The item then moved to a studio discussion with the *Dominion Post* editor and an Auckland lawyer. The presenter asked them whether it was wrong to show these people. A discussion followed about why the *Dominion Post* and *The Press* made the decision to publish all names, whether it was adding to the punishment that they were already receiving, whether we view drink driving differently today than we did 20 years ago, and whether naming and shaming actually deterred people from drink driving.

The complaint

[9] The complaint which led to the BSA's decision was made not by the woman, but by a Mr and Mrs Green, who are apparently unconnected in any way with the woman. As is the process established under the Broadcasting Act 1989, they first complained to TVNZ. They complained that the item:

a) Was unfair to those who were identified because it could have an additional detrimental effect above the penalties imposed in court;

b) Undermined TV One's reputation for impartiality in its news and current affairs reportings; and

c) Breached the woman's privacy because she was unwilling to appear on the programme.

[10] TVNZ rejected the complaint. Amongst other things, it said:

a) It was a basic principle of democracy that the nation's court rooms are places where justice is done and is seen to be done and the news media's role is to relay the court room to a public which is usually unable to be present;

b) The item concerned a matter of public interest;

c) The Court has the power to impose name suppression where the Judge considers that the disclosure of a person's identity would cause detrimental effects, but name suppression was not imposed in this case;

d) The filming was in a public place and those convicted of drink driving offences are a matter of public record; and

e) It is not unfair to film people convicted of a crime.

[11] Having had their complaint rejected by TVNZ, Mr and Mrs Green were entitled to refer the matter to BSA. They did so. In their complaint Mr and Mrs Green accepted the topic was one of public interest, and that justice must be done and be seen to be done, but focussed on the issue of fairness. They said:

> Is it fair of the National Broadcaster to pursue a convicted drink driver outside of court, someone who was clearly ashamed of their actions and had no desire to appear on television? Was it fair to her that she was named at the end of the programme? Was she even consulted and advised that this was going to take place? This kind of coverage devalues decent investigative journalism and serves only one purpose – to appeal to the base interest of viewers. We do not see how this coverage shed any light on the issue or added to the debate.

[12] They contrasted TVNZ's item with what they viewed as an excellent item on the same topic on Prime News (a news programme by another broadcaster). They said it was for the Courts to punish offenders and that the way TVNZ's reporter harried this woman was more befitting a tabloid journalist than of the standard to be expected from the national broadcaster.

[13] The BSA upheld the complaint. It considered the relevant standard of the Free-to-Air Television Code of Broadcasting Practice against which the complaint was to be assessed was Standard 6 Fairness. That standard says that:

> In the preparation and presentation of programmes, broadcasters are required to deal justly and fairly with any person or organisation taking part or referred to.

[14] The guidelines intended to assist in the interpretation of the standard cover various kinds of unfairness in how a person is dealt with, covering issues of honesty, sensitivity, social responsibility and the proportionality of an individual's exposure. Relevant for present purposes is the guideline that:

> Broadcasters should recognise the rights of individuals, and particularly children and young people, not to be exploited, humiliated or unnecessarily identified.

[15] In reaching the view that this standard was breached the BSA said:

> The Authority acknowledge TVNZ's point that the woman's conviction was a matter of public record. However, there is a fundamental difference between a conviction being on the public record, and identifying a person on

national television as having been convicted of an offence. The public record of a conviction does not include a person's image, and the Authority is of the view that the woman shown in *Close Up* would have been identifiable to a group of people who would not otherwise have identified her.

Looking at whether the broadcaster treated the woman fairly, the Authority has considered guideline 6f to the fairness standard which states that broadcasters should recognise the rights of individuals not to be humiliated or unnecessarily identified. The Concise Oxford Dictionary defines the verb "humiliate" as to "injure the dignity or self respect of" a person. In the Authority's view, broadcasting footage of the woman running away and being chased by the reporter was humiliating, and the fact that she was singled out and identified against her will would have added to that humiliation.

The Authority is also of the view that "unmasking" the woman at the end of the item was sensational and gratuitous. The item could have been presented effectively without singling out one woman and showing her face simply because she was in the wrong place at the wrong time. The Authority notes that when newspapers publish the names of those who have been convicted of driving with excess breath or blood alcohol, everyone who has been convicted receives the same treatment. Their public "shaming" does not include having their faces shown, or their individual cases singled out and highlighted.

The Authority wishes to make it clear that broadcasting footage such as the footage of this woman will not always amount to a breach of the fairness standard. For example, where the person being filmed is a public figure and the very essence of the story relates to that person's conviction, it may be in the public interest to broadcast the footage in those circumstances. In this case, however, the story was not about this woman; she was simply used as an example to illustrate the practice of naming and shaming drunk drivers. In the Authority's view, there was nothing exceptional about the woman's case that justified broadcasting the humiliating footage of her.

The Authority acknowledges that there are occasions when the public humiliation of an individual is a regrettable but necessary consequence of the pursuit of a story in the public interest, but, in its view, this was not one of those occasions.

Accordingly, the Authority finds that the woman was humiliated and treated unfairly by TVNZ in the presentation of the item. It upholds the Standard 6 complaint.

Bill of Rights

For the avoidance of doubt, the Authority records that it has given full weight to the provisions of the New Zealand Bill of Rights Act 1990 and taken into account all the circumstances of the complaint in reaching this determination. For the reasons given above, the Authority considers that its exercise of powers on this occasion is consistent with the New Zealand Bill of Rights Act.

[16] As can be seen from this, the matters that led the BSA to the conclusion that the standard had been breached were:

a) The public conviction of a record does not include a person's image;

b) The woman was singled out as against all other drink drivers who do not have their face shown;

c) This was against her will;

d) She was shown running away and being chased by the reporter, which the BSA viewed as contributing to the humiliation to her of being singled out;

e) She was "unmasked" at the end of the item, which was sensational and gratuitous; and

f) There was no reason why the woman should have been singled out in the context of the issue being discussed.

Approach on appeal

[17] Under s 18(4) of the Broadcasting Act 1989 the Court determines the appeal as if the BSA's decision had been made in the exercise of a discretion. This means that TVNZ must show that the BSA acted on a wrong principle, or failed to take into account some relevant matter or took account of some irrelevant matter, or was plainly wrong: *May v May* (1982) 1 NZFLR 165, applied for example in *Television New Zealand Limited v BA* HC WN CIV 2004-485-1299 13 December 2004 at [29] and [32]; *TVNZ v Viewers for Television Excellence Inc* [2005] NZAR 1 at [18] (*VOTE* case); and *Browne v Canwest TV Works Ltd* [2008] 1 NZLR 654 at [20].

Submissions

[18] For the BSA[1] it is submitted that the public interest in the story and the principle of open justice are accepted. It says that what is in issue in this case is the "way" the broadcaster exercised its rights. In this case the broadcast was unfair to the woman and disproportionate to the social objective the item attempted to achieve. The submissions as to unfairness refer to the matters discussed by the BSA in its decision. The submissions also refer to some additional matters going to the unfairness of the item, in particular:

a) In addition to the disclosure of the woman's name, age, marital status and salary, the item also disclosed that the woman had consumed four wines and a beer, alongside a comment from a lawyer that she could not understand why woman think they can drink three glasses of wine and drive a car;

b) The programme was about the practice of naming and shaming generally, yet only two people were named and shamed in this item and the degree of personal information disclosed about the woman went beyond that of the man who was a willing participant; and

c) The woman had said she feared she might lose her job and the item specifically acknowledged the embarrassment the item caused to her and raised the question of whether TVNZ were wrong to name her.

[19] In respect of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"), the submissions made are:

> 62. The Authority accepts that, in hearing complaints, it is performing a public function which is subject to the application of the Bill of Rights legislation. Further, it also accepts that, in developing the Code of Broadcasting Practice in consultation with broadcasters, it is required to adhere to the general principles of the Bill of Rights.

[1] With the consent of TVNZ the BSA made full submissions at the appeal, Mr and Mrs Green deciding not to take active part.

…

64. It is accepted that the Bill of Rights legislation [presumably this is a typographical error and is meant to refer to the Broadcasting Act] places a *pro tanto* restriction upon the freedom of expression. Further, the Authority expressly recorded in its decision that it had given particular regard to the principles of the Bill of Rights in reaching its views (paragraph [25]).

65. The Authority's task in this regard is to assess the extent to which the values underlying free speech are implicated by a particular exercise of expression. In this case, that is a recognition of the broadcaster's right – and the general public interest – to report on a matter of legitimate public concern. The next task is for the Authority to identify the contrary objective sought to be achieved by way of a restriction upon this freedom of expression – and the extent to which a decision to uphold the particular complaint would promote the objective sought to be preserved by the broadcasting legislation. In this case, that objective was the valid goal of ensuring fairness in broadcasting – and, in particular, ensuring against the unnecessary identification of an individual (when weighed against the legitimate social objective sought to be pursued by the programme).

66. The Authority weighed those competing considerations in the way in which it reached its views. It acknowledged the broadcaster's legitimate right to report on a matter of public interest. Equally, it reflected upon the individual woman's right not to be unnecessarily identified.

67. In short, therefore, the Authority performed the type of exercise sought to be achieved by way of the Bill of Rights legislation.

68. On this basis, the Authority says that it performed the exercise required of it by the Bill of Rights legislation. The matters recorded at paragraph [25] of its decision are evidence of its express acknowledgement of this fact.

[20] For TVNZ it is submitted that the BSA failed to consider and apply the legal principles relating to open justice; that it failed to consider editorial independence in the presentation of a story in the public interest, and as it relates to contextualising public interest issues; and that the BSA's decision was plainly wrong and it acted on a wrong principle in:

a) Finding that the public record of a conviction does not include a person's image nor extend to identifying a person on national television as having been convicted of an offence;

b) Finding that to justify the identity of a drink driver on national television, the offender had to be a public figure and the very essence of the story related to the conviction; and

c) Applying the fairness standard as a restriction on the principle of open justice, freedom of expression and editorial independence.

[21] Key aspects of Mr Akel's submissions for TVNZ are as follows:

a) Visual images are now a well-accepted part of court reporting and any feelings of fairness, embarrassment or even humiliation are not a sufficient basis to refuse in-court camera coverage.

b) Footage of people entering and exiting the court is a common feature of news and current affairs reporting and "the open justice principle in the vast majority of cases is represented by identity issues of a particular accused".

c) Humiliation or embarrassment outside the courtroom from what took place inside the courtroom is an accepted consequence of an open criminal justice system.

d) It was for this woman to seek name suppression. The BSA's decision has imposed a de facto suppression order and in doing so has imposed a potentially far-reaching fetter and restriction on court reporting and has dictated to TVNZ what court proceedings it may report on.

Open justice

[22] In light of these submissions I start with setting out the principles relating to open justice. The rights affirmed and protected under the Bill of Rights Act include the right to "a fair and public hearing" (s 24(a)). The right to a public hearing applies to all criminal proceedings: *Television New Zealand Ltd v R* [1996] 3 NZLR 393 at 397. There are many statements in the cases about the importance of this

right. For present purposes it is enough to say that the right to a public hearing provides transparency crucial to the fulfilment of the right to a fair hearing, helps to preserve public confidence in the legal system, and assists in fostering the sound and principled exercise of judicial power: see, for example, *Rogers v TVNZ* [2007] NZSC 91 at [118] to [121].

[23] Although a defendant has the right to a public hearing, many would prefer to avoid the embarrassment or shame which those who come before our courts on charges may feel. However, the importance of an open criminal justice system is such that they, and others involved in the process, cannot avoid a public hearing except in limited circumstances. The exceptions (provided for in the Criminal Justice Act 1985) arise because "the requirement of a public hearing is not pressed to the point of publicity that causes unfairness" (Rishworth & Ors *New Zealand Bill of Rights* (2003) at 670). But outside these limited exceptions, the principle is one of openness.

[24] As is said in *Rogers v TVNZ* at [121] this means:

> In general the public, including the media, have full access to court proceedings as and when they take place. In reporting on the processes of the courts, the media are restricted in what they may say only to the extent that rules permit exclusion of the public or suppression of publication of any matters for specified reasons. Such access enables full reporting by the media in traditional ways of what takes place in court. This degree of access usually fulfils the values of open justice and the right to freedom of expression on which the media are entitled to rely in reporting court proceedings.

[25] The same point is made in *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450 (cited in *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 at 127-128 and *R v Mahanga* [2001] 1 NZLR 641 at [21]) where Lord Diplock said:

> The application of this principle of open justice has two aspects: as respects proceedings in this court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

[26] The reporting about matters that have taken place in the courts can extend beyond what was "open" in the course of the proceeding. Accordingly, the Courts have permitted the media to access and report on evidence ruled inadmissible in the criminal proceeding even where the disclosure involves the prospect of further wounding of a family's dignity (see, for example, *Television New Zealand v R* at 395 to 397) or where the evidence was obtained in breach of a person's rights (see, for example, *Rogers v TVNZ* at [47] and [49]).

[27] The public nature of the courtroom means that the public are entitled to be present and to see who appears in our courts. The media act as "the eyes and ears" (as it has been said) of those who cannot be present but who have an interest in what has occurred. In this day and age that can include visual coverage of what has occurred and, as the Court of Appeal said in *R v Thompson* [2005] 3 NZLR 577 at [39], "[t]elevision in the courtroom is now a regular feature of the judicial landscape". While television "does amplify the public gaze to an altogether greater order" (as was said in *R v Crutchley* HC HAM CRI 2007-068-000083 16 May 2008 at [8], see [36] below), a visual image can be "a very powerful mechanism for conveying information about events" (*Mafart v Television New Zealand Ltd* [2006] 3 NZLR 534 at [69]; see also *TVNZ v Rogers* [2007] 1 NZLR 157 (CA) at [128]) and so potentially can well serve the values that underpin the open justice principle.

[28] Open justice and freedom of expression are not, however, the only considerations. Just as information may be suppressed, fairness requires that there are limits, appropriate to the particular proceedings, as to what is photographed or filmed. Media wanting to record a visual image by photograph or film must seek permission from the Judge who has the responsibility of ensuring that the photographs or filming do not interfere with the rights of an accused to a fair trial or that it does not in some other way conflict with the demands of justice in a particular case.

[29] In recent years, Judges considering whether to grant permission in any particular case have been assisted by guidelines, the most recent form of which are the In-Court Media Coverage Guidelines 2003. While a Judge has a discretion not to permit cameras (for still photographs or television coverage) in the particular case,

and will not grant permission where there is a risk of interference with the fair trial of an accused (and nothing in the Guidelines could or was intended to override this requirement – see, for example, *R v Mahanga* [2001] 1 NZLR 641 at [7] and [11] discussing this in respect of an earlier version of the guidelines), the guidelines envisage that in the ordinary course, where there are no special or particular concerns, an accused may be filmed or photographed in court subject to restrictions about when and for what period and the like.

[30] These guidelines, and the media's ability to take images of those who appear in our courts, have been the subject of discussion in two recent High Court decisions. The first of those decisions is *R v Sila* HC CHCH CRI 2007-009-006120 6 May 2008. In this case the Judge was of the view that the Guidelines presumed that a trial Judge would allow filming or photographing of an accused and that this was contrary to the common law. This was because he considered that the filming or photographing of an accused in the course of a trial was often a public humiliation. As such he viewed it as a form of punishment of a person who is innocent until proven guilty and accordingly prohibited by the common law.

[31] He considered that "justice is secured" by the name of the accused being made public during the trial. After trial he considered that the position might be different, although he went on to say, at [27]:

> Incidentally, I do not think it follows that the media has a right to film and photograph all convicted persons no matter how minor their convictions for in my view broadcasting and publication of such film and photographs is a public humiliation and part of the punishment. It is a matter for judgment. As the charges are very serious here I considered that if proved the subsequent filming and photography would not be unjust.

[32] His Honour does not say how the media could be restricted from doing so, given s 14 of the Bill of Rights Act, nor whether he is referring to a person's image captured on camera (film or a still photograph) inside or outside the courtroom. His concerns in this respect, however, are not unlike those which prompted the Greens to make their complaint and which led to the BSA concluding that the item breached the Fairness Standard in the code.

[33] A contrary view from that taken in *Sila* about the potential for humiliation from the filming of an accused was taken in *R v Crutchley*. In this case the Judge said that inherent in the principle that trials are public is that they are open to public report and that this principle was to departed from only exceptionally. As to the photographing or filming of an accused the Judge said that he did not consider that to be a humiliation akin to pillory. He said (at [8]):

> An accused person in the dock may well feel humiliated. That is not sufficient of itself to exclude the public from the Courtroom. Newspaper and television coverage does amplify the public gaze to an altogether greater order. That is not sufficient to exclude the media either. A principal purpose of the Guidelines is, after all, to enable the trial Judge, the media co-operating, to prevent any possibility of pillory.

[34] Other jurisdictions do not permit cameras in criminal proceedings to the extent envisaged by the Guidelines. As support for his view, the Judge in *Sila* referred to the positions in the United Kingdom, Canada and Australia and said "New Zealand is out of line" in permitting an accused to be filmed and photographed (at [27]). That the position in New Zealand is different from some other jurisdictions does not of course mean the position is wrong. An interesting overview of the position in a number of jurisdictions is found in a paper by Daniel Stepniak in "Court TV – Coming to an Internet Browser Near You" (Paper presented at the AIJA Annual Conference, Wellington, 7-9 October 2005) where he refers to the New Zealand "developments" with "some envy" (at 10).

[35] In any event, for present purposes the point is that, subsequent to an initial pilot and the introduction of guidelines, Judges in New Zealand have regularly granted permission for cameras (TV and still photographers) to film court proceedings. Those Judges who have granted this permission have not viewed the humiliation, embarrassment or shame that may be experienced by an accused as overriding the public importance of open justice – which assists public understanding, scrutiny and informed debate of court proceedings. Current technology is not intrinsically distracting (a point discussed by Stepniak at p 8) and the controls envisaged by the Guidelines serve at least in part to guard against any "punishment" that more intrusive coverage might involve.

[36] An illustration of the view that Judges have taken is found in an oral ruling of *R v Li* DC AK CRI 2004-004-12332 25 September 2006 where the District Court Judge said:

> Obviously of course, if the television cameras are here and there is reporting in the news and so on, that raises markedly the level of embarrassment. But we do have to live with the fact that this is the 21st century and that the nature of reporting has changed and expanded; and, no more than could King Canute stop the tide coming up the beach, can we ignore those changes.
>
> What began as an experiment has become something which is part of the way we do things now, recognised by the fact that initial Guidelines have been revised, the current set is the one as far as I am aware that is in front of me; and another set is a work in progress.
>
> So it really does require something distinctly unusual, different, or extraordinary to look at, it seems to me, making an exception. And nothing here in that kind of category is identified. I appreciate that the accused's mother is a Justice of the Peace apparently, and holds a Queens Award, but such can be the misfortunes of life for any of us.
>
> I see no reason at all why I should not grant the in all respects in standard terms request of Television New Zealand for television coverage of this trial, and it will be granted in terms that in all respects schedule 2 will apply to the letter.

[37] Permitting cameras in court is one way that visual images of those who appear in court can be obtained and become part of the reporting on what has taken place in court. However, even where permission is not sought or granted, absent suppression orders, the law does not prevent the media from taking visual images of those who enter and exit the courts. As Mr Akel submits, that is a common aspect of media reporting on what has taken place in court.

Limitations on reporting of criminal proceedings

[38] If there are no court imposed restrictions, and the reporting of criminal proceedings does not otherwise interfere with the proceedings, then it is not generally for a Judge to assess whether the media interest in a particular matter is inappropriate or undue: see, for example, *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [68] and *Sooalo v New Zealand Police* HC CHCH CRI 2006-409-000151 14 September 2006 at [6]. The media have the right to "impart information

and opinions of any kind in any form" (s 14 of the Bill of Rights Act) and so can select the cases they will cover and the content of that coverage, presumably influenced by such things as viewers' likely interest and available resources. Limitations can, however, arise in other ways. This includes the broadcasting standards code approved by the BSA under the Broadcasting Act.

[39] However, if the BSA is to uphold a complaint it must be satisfied that it would be imposing a limit on freedom of expression that is a reasonable and justifiable limit on that freedom (s 5 of the Bill of Rights Act). The BSA's submission accepts this in as much as they refer to the need to balance the extent to which the values underlying free speech are implicated by a particular exercise of expression as against the contrary objective sought to be achieved by way of the restriction upon this freedom. It is said that the BSA did this in this case.

[40] There have been some High Court decisions indicating that the BSA is not required to make this kind of assessment in respect of a particular complaint and other decisions discussing how and why the Bill of Rights Act has application. These are helpfully discussed by Geirenger and Price "Moving from Self-Justification to Demonstrable Justification: The Bill of Rights Act and the Broadcasting Standards Authority" in Todd and Finn (eds) *Law, Liberty and Legislation* (2008, forthcoming) under the heading "The Bill of Rights and administrative action: getting the basics right". As these decisions indicate, there are different ways of analysing this and this may be partly why the BSA's decisions typically include what has been described as its "boiler plate" reference to the Bill of Rights Act, set out at the end of the quotation in [14] above.

[41] For my own part (assisted by Geirenger and Price's analysis) I consider that the Bill of Rights Act applies because (under s 3 of the Bill of Rights Act) the BSA's decision on a complaint is an act done in the performance of a public function or power conferred on the BSA pursuant to the Broadcasting Act (namely the function and power under s 10 of the Broadcasting Act to determine complaints referred to it). The BSA's decision imposes a limit on a broadcaster's right to impart information of any kind in any form. That limit is prescribed by law because of s 4 of the Broadcasting Act (which requires a broadcaster to be responsible for maintaining

standards which are consistent with, amongst other things, approved codes), s 21(1)(g) of the Broadcasting Act (which empowers the BSA to approve codes) and the procedure in the Broadcasting Act whereby complaints may be made in respect of alleged failures to comply with s 4 (s 6 of the Broadcasting Act) in respect of which the BSA makes its determination (s 10 of the Broadcasting Act).

Limit imposed on freedom of expression in this case

Visual image

[42] In this case the BSA considered that TVNZ's right to impart information of any kind in any form was to be limited out of considerations of fairness for the woman unwillingly involved in the item. In reaching this view the BSA accepted that a person's details were a matter of public record, but appears to have considered that the image of a person appearing before the courts was not. In taking this view the BSA has recognised the public nature of the record but not the public nature of the courtroom which includes the potential for a person's image to be captured in court or as they exit and leave the court in a public street. I consider that in failing to take this into account the BSA failed to take into account a relevant consideration when it determined that the item was humiliating.

[43] In the present case Television New Zealand could have sought permission to film a day in court, rather than have a reporter in court and the camera outside the court. Potentially the Judge would have been able to grant permission providing the Judge was satisfied about the practicalities of a camera in a busy list court (ie. where a large number of different matters are being dealt with that day in that court). Had the permission been granted it would then be up to the broadcaster to make what use it wished to make of the permitted footage, subject to limits justifiably imposed via the broadcasting codes. Even if permission were not sought or granted, and if there were no suppression orders, the media are able to take footage or a photograph of people that have been in court when they are on a public street and to make what use of it they wish in their report, again subject to limits justifiably imposed.

[44] The shame and humiliation of being shown on television as a defendant in a courtroom (whether the footage is obtained in or out of the courtroom) could not of itself give rise to a breach of the fairness standard. There would need to be something more because it would mean that, out of considerations of fairness, open justice values are not to be served by visual images of those who appear in the courts. No televised coverage of defendants in court or as they enter or exit court could take place because each defendant could say that it was humiliating and therefore in breach of the fairness standard. Mr Akel suggests that a justified limitation would be not showing coverage of a witness (or defendant) vomiting or soiling themselves. I agree with that. Absent something that takes it beyond the usual embarrassment, shame or humiliation of being a defendant in a court proceeding a defendant's feelings about being shown in the media is not a justified limit on open justice and freedom of expression.

[45] This is relevant because, if regard is had to the potential for the visual image to be obtained from within the court, or that the law does not ordinarily restrict television coverage of those who are leaving the courts, then it must be asked what made the item unfair in this case when the image was taken as the woman walked out of a public hearing in a court, on to a public street, having been convicted of an offence, and the reporter disclosed information from the details that had been read out in the public hearing.

Singling out

[46] The BSA referred to the woman being singled out as against others convicted of drink driving offences. Certainly she might be viewed as unlucky (by being in the wrong place at the wrong time). But the BSA has not indicated why that was any different from other television items which decide to cover a particular court proceeding but not others, nor other items which single out unwilling participants because of their actions which have occurred in public places.

[47] The BSA's decision in *Hong and Chung v Television New Zealand* Broadcasting Standards Authority 2002-118-119 19 September 2002 provides an example. In that case, an episode of *Motorway Patrol* (a reality police television

show) covered an investigation into an incident involving a trampoline attached to the roof of a vehicle driven by Mr Hong or Ms Chong becoming dislodged and causing alarm to others on the road. For this offence Mr Hong and/or Ms Chong (presumably whichever one of them was driving) were fined $600 for having an insecure load. The television show followed the patrol car which investigated the matter and spoke to Mr Hong and Ms Chong in the course of that investigation. They were clearly identified in the show.

[48] Mr Hong and Ms Chong complained about the show, contending that the item invaded their privacy, discriminated against them and exposed them to ridicule and contempt. In a sense Mr Hong and Ms Chong were singled out. Not everyone prosecuted for an insecure load or other minor misdemeanour appears on national television. Undoubtedly Mr Hong and Ms Chong were unwilling participants, did not like seeing their actions portrayed on television and were subjected to publicity they did not want. Nevertheless, the BSA rejected their complaints. In doing so the BSA acknowledged that the complainants were entitled to feel humiliated by the broadcast, but it was their actions which gave rise to this feeling. The BSA acknowledged that the complainants were inadvertent participants but the item concerned their actions in a public place and involved a degree of public interest.

[49] The same rationale would seem to apply to the item in this case. If the woman in this case felt humiliated then it was her own actions which gave rise to this feeling. She was an unwilling participant, and her participation was inadvertent in that she happened to be in the wrong place at the wrong time, but the item also involved a degree of public interest.

[50] Apart from situations of offending, there are other examples of items which cover poor or odd behaviour and in respect of which a person would not ordinarily want to appear on national television, and which in a sense involving singling out the person, which the BSA has found not to breach the fairness standard. For example the BSA did not consider that standards were breached in *Young v Canwest TVWorks Ltd* Broadcasting Standards Authority 2006-084 22 February 2007. That decision concerned an item in *Target* (a consumer affairs television programme) which used a

hidden camera to film an airline check-out operator, showing the operator as having poor customer skills. In that decision the BSA said at [24]:

> … in circumstances where an individual is filmed in a public place performing employment duties which involve interaction with the members of the public, and where the footage fairly represents what occurred, the Authority considers that broadcasting the hidden camera footage will generally not be unfair.

[51] Similarly in *Jenkin v Television New Zealand* Broadcasting Standards Authority 2004-134 15 October 2004 a complaint was made about a television item covering a story about a man who had taken to his home a cat that belonged to another family. The item included coverage of the man driving away erratically to avoid the reporter and his apparently abusive reaction when she contacted him by telephone. The man's complaint was assessed under the privacy, accuracy and fairness standards. The BSA found no breach. In respect of the fairness standard the BSA acknowledged there were aspects of the coverage the man found humiliating but considered that the man had brought the situation on himself.

[52] Again, the rationale that the BSA applied in *Young* and *Jenkin* would seem to apply to this case.

[53] The BSA's objection to the singling out in this case is that it views it as unnecessary. It contrasts this item with newspapers who "name and shame". Those newspapers who name and shame treat everyone the same and do not include photographs. While that is true of the list of drink driving convictions published by the *Dominion Post* and the *Press*, that is the decision the editors of those newspapers make, presumably taking into account a number of factors including competing stories for the available space. As TVNZ says, the comparison with these lists that the BSA made fails to take into account the visual medium that television is (where, as Mr Akel says, the story is told as much through images as with words) and that the "naming and shaming" involved in singling out this woman provided the context in which to discuss a matter that was of real public interest. It also seems to assume that all media should give the same kind of coverage to the same issues. Even amongst newspapers that will not be the case. For example, a local newspaper in a small town may give greater coverage to drink driving convictions than the lists that

appear in the *Dominion Post* because the editor views all court news in the town as of interest to the paper's readers.

[54] The same can be said in respect of the BSA's view that the singling out of this woman was unnecessary because the item was not about this particular woman. Again, while that is true, it does not seem to take into account that the item was about drink drivers being ordinary New Zealanders, that the item was discussing whether "naming and shaming" was an effective form of deterrence, and that naming and shaming this particular woman contextualised the issue. These matters were all relevant to the assessment the BSA needed to make – namely, whether the unfairness to this woman in being in the wrong place at the wrong time was of a kind that justified limiting TVNZ's right to impart information of any kind in any form. That right included the right to choose which court proceeding it wished to report on, and therefore the right to select a particular case involving drink driving.

The way the woman was "named and shamed"

[55] The BSA considered that in addition to being identified against her will and singled out, humiliation arose because the footage showed the woman "running away and being chased by the reporter" and that the "unmasking" of the woman (where the pixilation was removed and her name disclosed) was sensational and gratuitous.

[56] It might be said that this was not unlike an ambush interview (approaching unsuspecting people with the cameras rolling) and it is accepted that this can have potential for unfairness. Other decisions of the BSA have indicated that ambush interviews should be used only if other ways of obtaining the information are not available or the person being investigated is given the opportunity to respond. Here, the real point of this part of the item was to see a person's reaction to being "named". There might have been other ways to do this, but the question was whether it was unfair to do it in this way such that it justified limiting TVNZ's right to do so.

[57] If the ambush did involve humiliation then that may justify limiting TVNZ's right to impart the information in this way. But to be a justified limit something more than embarrassment would ordinarily be required. As TVNZ points out, the

BSA in *Young* (at [28] of its decision) was of that view. The relevant guideline (6f) refers to "humiliation" and not embarrassment.

[58] TVNZ submits that humiliation is subjective and therefore the actual response of the person is directly relevant. (In support of this submission Mr Akel refers to *TV Works Ltd v Stephanie Due Fresne* HC WN CIV 2007-485-2060 6 May 2008, but that is dealing with a slightly different point.) TVNZ submits that here there is no evidence that this woman was humiliated. The woman did not complain and, it is submitted, the footage does not indicate humiliation. The woman was approached minutes after being convicted and she was asked for her reaction. As TVNZ points out, this happens every day outside courts all around the country.

[59] It is clear from the footage that the woman was an unwilling participant. She makes that apparent and is shown walking away quickly, with the reporter following her for a short period. Other than the use of pixilation there was nothing about the footage that made it different from coverage of others leaving the courts. The woman's face was initially pixilated, and then later that pixilation was removed. To some degree that was sensational. But her face was shown only briefly and her name mentioned once and the item then moved to the discussion of whether naming should be done and whether it was likely to be effective. To say the use of pixilation and its removal was gratuitous seems not to take into account that it was done in this way to highlight the issue being discussed – ie. would it help if nameless ordinary drink drivers were not nameless?

Balancing of the competing interests

[60] For the reasons discussed above I consider that the BSA failed to take into account the public nature of the courtroom and the right of the media to report on all or any part of what takes place in the courtroom unless there are suppression orders in place. I consider that the BSA failed to take into account that this can include television coverage of defendants appearing in the courts or in public streets and that the media can and do select particular court proceedings to cover. It is also not apparent that the BSA took into account the reasons why this woman was named and shamed in the way that she was. That assessment needed to be made to, as Mr Scott-

Howman's submissions for the BSA put it, assess the extent to which the values underlying free speech are implicated by a particular exercise of the free speech right.

[61] In this case Television New Zealand was seeking to impart information and debate an idea about a type of offending in New Zealand. That idea was whether greater publicity of drink driver offenders would serve as a useful kind of deterrent to others. To demonstrate that point the item did name (and therefore seek to shame) two drink driver offenders. These offenders were selected because they had both been convicted of their second such offence and because they were viewed as ordinary New Zealanders. The topic was one of public interest and importance.

[62] On the other side of the balancing exercise is that the woman did not want to be involved, apparently feared certain consequences if she was involved (although it must be assumed these were insufficient to warrant a suppression order), was unlucky to be selected, made it clear that she did not want to be filmed and was deliberately "named and shamed". It is likely that to some degree she was embarrassed, but did that reach the standard of humiliation intended by the code? Was it any different from the unlucky defendant in court that the media seek permission to film (when other court proceedings are not covered by the media), or who is approached as he or she comes out of court and asked for comment (when this does not happen to everyone who comes out of court), or who receives greater coverage in a newspaper because there are no higher priority stories on that particular day? I do not think so. The position may have been different if there was a greater degree of "shaming" involved, extending beyond the public disclosure of what had been seen and heard in court and devoid of public interest. But that was not the case here.

[63] I am conscious that the BSA is the specialist body that has the experience and expertise to make these assessments. Nevertheless, I am satisfied that the BSA failed to take into account material relevant considerations which led it to a view that limited freedom of expression in a way that was not justified. The unfairness to the woman was not of a kind that breached the fairness standard.

Result

[64] The appeal is allowed. The BSA's decision upholding the complaint is set aside. If there is any issue concerning costs the parties may submit memoranda.

Mallon J

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