



779

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.147-01

BETWEEN TV3 NETWORK SERVICES LIMITED

Appellant

AND REBEKAH HOLT

Respondent

Hearing: 11 and 24 April 2002

Counsel: TJG Allan for the Appellant
 No appearance for the Respondent
 A Scott-Howman for Broadcasting Standards Authority

Judgment: 26 July 2002

JUDGMENT OF RODNEY HANSEN J

*Solicitors: Grove Darlow & Partners, P O Box 2882, Auckland for the Appellant
 Bell Gully, P O Box 1291, Wellington for the Respondent*

Introduction

[1] On 5 August 2001, the respondent was watching the 6.00 p.m. news on TV3 with her 3-year-old son. The third news item was about the attempted robbery of a liquor store. The broadcast included footage from an in-store security video which showed the proprietor being stabbed twice by the would-be robber. It was shown a second time in the course of the news item as part of an appeal to the public for help in identifying the attacker. A transcript of the broadcast is attached. The shaded areas of the transcript show when the security video footage was being played.

[2] The respondent complained to TV3 about the broadcasting of the actual stabbing. She said it should have been edited out as it added nothing informative or pertinent to the story. She claimed the attacker could be identified from the footage which immediately preceded and followed the stabbing itself.

[3] TV3 considered the complaint, as it is required to do, under the Broadcasting Act 1989 ("the Act"). It rejected the complaint. Its Standards Committee found that the footage was not graphically violent or distressing nor, as the complainant had alleged, gratuitous or sensationalist. The Committee pointed out that the video footage was of poor quality. As a result, neither the actual stabbing nor any injuries could be seen. The Committee relied also on the fact that the victim was obviously not seriously injured; he was shown walking through the store after the attacker had fled.

[4] As she was entitled to do under the Act, the respondent referred the complaint to the Broadcasting Standards Authority ("the Authority"). It upheld the complaint. It concluded the footage was graphic and distressing, its repetition gratuitous and that the broadcast should have been preceded by a warning.

[5] TV3, dissatisfied with the Authority's decision, appeals to this Court under s 18 of the Act. TV3 claims that the Authority failed to correctly apply the relevant standard and that the decision was contrary to the New Zealand Bill of Rights Act 1990.

Programme standards

[6] The responsibility of broadcasters for programme standards is set out in s 4 of the Act. Section 4(1) provides:

“Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with –

- [a] The observance of good taste and decency; and
- [b] The maintenance of law and order; and
- [c] The privacy of the individual; and
- [d] The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
- [e] Any approved code of broadcasting practice applying to the programmes.”

[7] Codes of broadcasting practice for radio and television have been developed by representatives of television and radio broadcasters and issued by the Authority pursuant to its statutory functions under s 21(e), (f) and (g) of the Act. Section 21 requires the Authority to encourage the development and observance by broadcasters of codes of broadcasting practice and to itself develop, approve and issue codes of broadcasting practice. Section 21(e)(ii) specifically refers to the portrayal of violence.

[8] The current Code of Practice (“the Code”) for television was issued in May 1996. That part of the Code which deals with the portrayal of violence was first approved in July 1989 and subsequently amended several times. The current version was approved to take effect on 1 January 1996. It comprises an introductory narrative in which the values and principles which inform the standards are explained. The section concludes by saying that the principles covered in the introduction should assist in interpreting the standards which follow but that any formal complaint must be based on a specific standard.

[9] Eighteen specific standards are then set out, numbered V1-18. Standards V1-V11 apply to all programmes. The remainder have special application to news, current affairs and documentaries, sports programmes and the protection of children.

[10] Both TV3 and the Authority considered the complaint under Standard V12 which applies specifically to news, current affairs and documentaries. It reads as follows:

“The treatment in news, current affairs and documentary programmes of violent and distressing material calls for careful editorial discernment as to the extent of graphic detail carried. Should the use of violent and distressing material be considered relevant and essential to the proper understanding of the incident or event being portrayed, an appropriate prior warning must be considered.

Particular care must be taken with graphic material which portrays especially disturbing images, such as:

- ill-treatment of people or animals
- close-ups of dead and mutilated bodies of people or animals
- views of people in extreme pain or distress, or at the moment of death
- violence directed at children or children in distress

Material shown in late evening may be more graphic than that shown during general viewing times.”

Decision of the Authority

[11] The essential reasoning of the Authority and its conclusion are set out in paras 16 to 19 of its decision which reads as follows:

“[16] TV3 suggested that the impact of the security camera footage was reduced because of its technical quality. The Authority agrees with the observation about the quality, but is of the view that this does not reduce the visual impact of the footage. Nevertheless, TV3 also contended that the footage would assist with viewers’ understanding of the event and could assist with identifying the offender. The Authority accepts that the footage could assist with identifying the offender, but notes that screening the entire segment was not necessary for that purpose.

- [17] The Authority was not prepared to accept TV3's argument that the footage was not gratuitous. While it could be argued that the use of the footage once could be justified, the Authority is firmly of the view that the repetition of the footage was gratuitous.
- [18] When determining a complaint as to whether a broadcast contravenes standard V12, the Authority notes that the standard calls for careful 'editorial discernment' about the broadcast of graphic material. The standard accepts there may well be a case for screening violent and distressing material, but requires that consideration in that case then be given to the use of a warning.
- [19] The Authority concludes that the footage of the robbery from the security camera carried on *3 News* was graphic and distressing. The Authority is inclined to the view that a warning would probably have been necessary even if the footage had been shown only once. It is certainly of the view that the gratuitous repetition of the security camera footage called for a prior warning.

[12] Pursuant to s 13(1)(a) of the Act, the Authority ordered TV3 to broadcast, within one month of the date of the decision, a statement explaining why the complaint was upheld.

Appeal - principles

[13] By s 18(4) of the Act an appeal is to be determined as if the decision appealed against had been made in the exercise of a discretion. The principles on which an appeal against the exercise of a discretion must be exercised are well established. In order to succeed, the appellant must show that the Tribunal acted on a wrong principle or that it failed to take into account some relevant consideration or took into account irrelevant considerations or that it was plainly wrong: *May v May* (1982) 1 NZFLR 165 (CA), *Society for the Promotion of Community Standards Inc v Waverley International (1988) Limited* [1993] 2 NZLR 709. This approach is appropriate to appeals against decisions of the Authority: *Comalco New Zealand Limited v The Broadcasting Standards Authority* (1995) 9 PRNZ 153, 161-162 (CA), *TV3 Network Services v Broadcasting Standards Authority* [1995] 2 NZLR 720, 727.

Grounds of appeal

[14] The appeal was advanced by Mr Allan on the basis that:

- [a] The Authority was plainly wrong.
- [b] It took into account an irrelevant consideration.
- [c] It misdirected itself as to the appropriate test.

Additionally, Mr Allan submitted that the decision was contrary to the New Zealand Bill of Rights Act 1990. I will consider this ground of appeal separately.

[15] Mr Allan submitted that the Authority failed to fairly consider the content of the footage itself, gave undue emphasis to its repetition and failed to apply an objective test of whether the material would be distressing to the “ordinary, reasonable viewer of ordinary sensibilities”. He pointed out that the violent incident itself lasted only a few seconds; the film was of poor quality, grainy and lacking clear definition; a viewer would not have been aware that a stabbing was occurring if not told by the voice-over; the victim was plainly not badly injured as he immediately got up and walked around the shop. Mr Allan submitted that what tended to shock about the footage was not the violence as such but the wholly unprovoked and seemingly casual way in which the attack took place. Having viewed the footage, I accept this to be a fair characterisation of what happened.

[16] Mr Allan also emphasised that the purpose of showing the footage was to help enlist public assistance in the hunt for the attacker. The voice-over and comment which accompanied the repeat broadcast confirms this. Viewers were invited to focus on the distinctive clothing worn by the offender. They were also told that the police were still looking for the weapon.

[17] Mr Allan submitted that the Code should be interpreted and applied by reference to the fundamental right to freedom of expression and that any restriction on press freedom should be “proportionate and no more than is necessary to promote

the legitimate object of the restriction”: *McCartan Turkington Breen v Times Newspapers Limited* [2000] 4 All ER 913 at 922. See also *TV3 Network Services Limited v Fahey* [1999] 2 NZLR 129 and *Newspaper Publishers Association (Inc) New Zealand v Family Court* [1999] 2 NZLR 344. Mr Allan referred to the particular value of open reporting for the detection of criminal offending recognised in such cases as *R v Liddell* [1995] 1 NZLR 538 (CA). He suggested that an unduly restrictive approach to the broadcasting of criminal activity may impede the legitimate use of the media in the prevention and detection of crime.

Discussion

[18] The tension between a broadcaster’s right and obligation to report news items honestly and accurately and the need to avoid an unacceptable level of violence is explicitly acknowledged in the Code. The introduction to the section on the portrayal of violence states:

“Violence in news programmes and documentaries often presents particular dilemmas. Broadcasters have a responsibility to present news honestly and without sanitising it but must avoid the temptation to sensationalise or use violence to shock gratuitously.”

The Code also recognises that balancing and resolving these conflicting aims will often come down to an exercise of judgment. The preface to the section containing standard V12, which deals specifically with news, current affairs and documentaries, states:

“News broadcasts clearly cannot be subject to censorship. The following standards need to be seen not as censorship provisions, but as prudent measures which should be exercised to ensure the observance of statutory requirements, bearing in mind that early evening news programmes are broadcast during family viewing time.”

[19] Standard V12 develops this theme. Unlike the preceding standards V1-V11, it does not lay down principles of general application which are amenable to objective evaluation. Rather, it focuses on the judgments which broadcasters must make in applying the standards to news, current affairs and documentaries. “Careful editorial discernment” is called for. “An appropriate prior warning must be

considered” if the broadcast of violent and distressing material is contemplated. “Particular care must be taken” with graphic material which portrays disturbing images.

[20] Both TV3 and the Authority, nevertheless, attempted to determine the complaint under V12 alone. In this respect I consider both were in error. In my view, standard V12 generally should not be considered or applied in isolation from the other standards of general application. It is exhortatory rather than declaratory. If it is to be relied on for the purpose of complaints, it should be by reference to such of standards V1 to V11 as apply in the particular case.

[21] The Authority’s key findings were:

- The repetition of the security camera footage was “gratuitous” (decision, paras 17 and 19).
- The footage was “graphic and distressing” (para 19).
- The repetition of the footage required a prior warning (para 19).

Although inclining to the view that a warning “would probably have been necessary even if the footage had been shown only once”, the critical default was held to be the failure of TV3 to broadcast a prior warning before repeating the footage.

[22] These findings were based on standards which are not to be found in V12. It does not refer to gratuitous violence. There is no proscription of the transmission of graphic and distressing material. On the contrary, it is implicit that violent and distressing material, and graphic material, may be broadcast, subject to the need for editorial discernment, particular care and consideration of a warning. The standard does not require that a warning must be given in the circumstances referred to. It stipulates that a warning must be considered. TV3 was not in breach of this requirement. The Authority accepted that TV3 staff considered issuing a warning. They decided against a warning because they judged the poor quality of the video

and the minor injuries suffered by the victim to have diminished the level of violence portrayed.

[23] Based on decisions of the Authority referred to in argument, it seems that both broadcasters and the Authority have been prepared to give standard V12 a generous interpretation and to translate the “prudent measures”, referred to in the introductory comments to standards V12 and V13, into immutable obligations. I do not think such an approach can be justified, having regard to the important consequences which flow for the individual broadcaster. The standards which broadcasters are required by statute to observe should be spelt out clearly and unambiguously. Common law principles require an interpretation which involves minimal impairment to freedom of expression: *McCartan Turkington Breen v Times Newspapers Limited* (supra), *TV3 Network Services Limited v Fahey* (supra), *R v Home Secretary ex parte Pierson* [1998] AC 539, 575. Bill of Rights considerations, which I will discuss in more detail later, also dictate a conservative approach.

[24] The standards which apply to all programmes (V1-V11) are generally explicit and unequivocal. Some have direct relevance to the complaint in this case and, in my view, should have been considered. They are:

- “V1 Broadcasters have a responsibility to ensure that any violence shown is justifiable, ie is essential in the context of the programme.
- V2 When obviously designed for gratuitous use to achieve heightened impact, realistic violence – as distinct from farcical violence – must be avoided.
- V3 Warnings should be given, at least at the beginning of a programme, when a programme contains material which is likely to be disturbing to the average viewer or which is unexpectedly violent for that programme genre.”

[25] Standard V1 lays down the guiding principle to which most of the standards which follow respond. Generally they provide specific examples of when violence is not justifiable. Standard V2 deals with the use of gratuitous violence which, as I have already noted, is not mentioned at all in Standard V12. Standard V3 gives clear guidance on the pivotal question of when a prior warning should be issued. It introduces the objective standard of the average viewer. Even if, contrary to the

view I have expressed, V12 creates a duty to warn, it should be interpreted by reference to standard V3 and an objective standard invoked.

[26] I acknowledge that the Authority may be confined to the standards on which the original complaint was based or determined by the broadcaster. In a recent decision, *Hooker v Television New Zealand* (High Court, Auckland Registry, AP.138/01, 13 June 2002) Smellie J held that s 10(1)(a) and (b) of the Act prevented the Authority from considering a complaint by reference to standards which were not the subject of the original complaint. In that case, before the Authority, the complainant sought to expand the original complaint to include alleged breaches of two other standards. Smellie J held at para [10]:

“While section 10(1)(b) requires the Authority to have regard to ‘relevant submissions made’ all submissions are required by subsection (1)(b) to be relevant ‘to the complaint’. The appellant argued that section 10(1) in its entirety enabled him to introduce allegations of breaches in respect of G2 and G12 before the tribunal. I hold, however, that the correct construction of section 10(1)(a) and (b) restricts the Authority’s jurisdiction to a consideration of the original complaint.”

[27] I recognise the force in this reasoning and the difficulties which would arise if complainants were able to change the essential nature of their complaint when it came before the Authority. In this case, however, the complainant did not specify a standard in her complaint. The applicable standard was chosen by TV3. There would have been no injustice if the Authority had determined the complaint by reference to other relevant standards, provided it had given the parties notice of its intention to do so and an opportunity to make further submissions. That would have been consistent with s 10(2) which requires that in considering complaints, the Authority shall provide for as little formality and technicality as is permitted by the requirements of the Act, a proper consideration of the complaint and the principles of natural justice.

[28] However, the Authority confined itself to standard V12 which provides no foundation in law for its conclusion that TV3 was in breach of s 4(1) of the Act. Its decision accordingly cannot stand.

Bill of Rights Act 1990

[29] My conclusion on the application of standard V12 to the broadcast in question makes it strictly unnecessary to consider the arguments addressed in relation to the Bill of Rights. I venture some observations on this issue at the behest of counsel for TV3, as well as Mr Scott-Howman for the Commission, who sought to be heard only on this issue.

[30] The Authority addressed the implications of the Bill of Rights Act 1990 ("Bill of Rights") in para [20] of its decision which reads as follows:

"In reaching this decision, the Authority records that it has considered whether the broadcaster's right to freedom of expression, as contained in s.14 of the New Zealand Bill of Rights Act 1990 is unjustifiably infringed. The Authority is satisfied that its decision to uphold this complaint, and any resultant order, are made under its empowering legislation. The Authority is also satisfied that the exercise of its power on this occasion does not unduly restrict the broadcaster's right to express itself freely. Indeed, it considered that while still giving effect to the intention of the Broadcasting Act, the upholding of this complaint is reasonable and demonstrably justified in particular as the visual footage of the actual stabbing was screened on two occasions. In coming to this conclusion, the Authority has taken into account all the circumstances of this complaint, including the nature of the complaint, and the potential impact of the order."

[31] I was informed that the Authority routinely gives consideration to the Bill of Rights in its decisions. Mr Allan's complaint was that it had failed to give adequate consideration to the provisions of the Bill of Rights and wrongly concluded that the decision did not infringe the right to freedom of expression. He said that para [20] of the Authority's decision closely followed that adopted in other decisions which it had issued this year. Of twenty-one decisions which considered the implications of the Bill of Rights, six adopted the same form of words as the decision in this case, save for a brief reference to the particular facts of the case. The remainder adopted a shorter, though similarly standard, form of words. The short form seems to be adopted when a complaint is not upheld.

Preliminary issue

[32] The Authority sought leave to file an affidavit from its chairman explaining how the Authority carries out its deliberations for the purpose of the Bill of Rights. The Authority was anxious to show that it had given independent consideration to Bill of Rights issues.

[33] There is power under r 718(4) to receive further evidence on questions of fact in any general appeal. I see nothing in the rule to indicate that this extends to evidence from the Tribunal itself as to the conduct of the hearing and the course of its deliberations. Evidence of this nature should be introduced by way of a report under r 715 which the appellate Court can then consider under r 718(5). Had application been made before the hearing, a report could have been ordered. Alternatively, with TV3's agreement, the affidavit could have been received as a report under r 715. In the face of Mr Allan's opposition, however, there is no basis on which I could properly consider the affidavit.

[34] However, nothing of substance is lost as a result. I would not have inferred that the Authority had failed to consider the implications of the Bill of Rights merely from its adoption of a standard form of words to explain its reasoning. The use of the same or a similar form of words in successive decisions conveys only that the same reasoning process has been adopted. It does not imply the process is wrong or has not been consciously followed.

Application of Bill of Rights

[35] It is not in issue that the Bill of Rights applies to acts of the Authority. It is a body performing a public function, power and duty conferred or imposed by law in terms of s 3(b) of the Bill of Rights.

[36] The right to freedom of expression is plainly affected by the Act. The common law right is enshrined in s 14 which reads:

“Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind and any form.”

The obligation on broadcasters to meet the standards set out in s 4 of the Act necessarily derogates from the right to freedom of expression. To use the words of Tipping J in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15-16, there is a pro tanto abrogation of the right to freedom of expression.

[37] Mr Allan submitted that the Authority failed to properly consider the provisions of the Bill of Rights and wrongly concluded that the decision did not infringe the right to freedom of expression. His submissions and the Bill of Rights reasoning in the Authority’s decision are phrased in terms of s 5 of the Bill of Rights which provides as follows:

“Justified limitations – Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

In my view, the Bill of Rights does not require the Authority to consider, as a matter of course, whether an unjustifiable limitation is raised by the complaint.

[38] The s 5 enquiry is as to the reasonableness of limits prescribed by law. What has been prescribed by law, for the purpose of complaints to the Authority, are the standards referred to in s 4 of the Act. In cases such as the present, those standards are laid down in the Code. It has been developed, approved and issued under the Act. The standards in the Code are the relevant limits prescribed by law. It is these standards which must be the focus of any enquiry under s 5.

[39] In this case, and other decisions referred to me, the Authority purported to test the decision it had reached against s 5, after applying the relevant standard or standards to the facts. In my view, this goes a step too far. The impact of the Bill of Rights should be considered, if it is necessary to consider it at all, on the standard or standards which are being applied in the particular case.

[40] If the reasonableness of a standard is put in issue, it should be examined in accordance with the general approach indicated in *Moonen* at p 16. That requires a consideration of whether:

- [a] There is reasonable proportionality between the statutory objective and the way it has been achieved;
- [b] There is a rational relationship between the means adopted and the objective of the legislation; and
- [c] The interference with the right to freedom of expression has been kept to a minimum or, at least within reasonable limits – see *Moonen v Film and Literature Board of Review (Moonen 2)* (CA.238/01, 16 April 2002) paras 12-15 and *R v Sharpe* [2001] 1 SCR 45 at paras 96-97.

[41] It seems unlikely that the standards could ever be challenged by reference to the first and second criteria. In accordance with the Act, they were developed by broadcasters (including TV3) to achieve the objectives in s 21(1)(e) of the Act. The Code as a whole is both a proportional and rational response to the legislative objective of maintaining programme standards. A challenge to a standard could, however, be mounted on the basis that it involved an unreasonable degree of interference with the right to freedom of expression. Such a challenge would effectively be to the validity of the standard in question. The empowering provision of the Act must be read down so that it empowers only standards which reasonably limit the right to freedom of expression: *Drew v Attorney-General* [2002] 1 NZLR 58 at para 68. Any standard which imposes an unreasonable limit on the right to freedom of expression will be *ultra vires*.

[42] It was therefore unnecessary for the Authority to consider the Bill of Rights in this case. Where a complaint concerns a code under s 4(1)(e), it will be necessary for it to consider the Bill of Rights only where the reasonableness of a standard is put in issue.

Result

[43] The appeal is allowed. The decision of the Authority is quashed. In the circumstances it is inappropriate to remit the matter back to the Authority for further

consideration. There is no basis on which the complaint could be upheld under Standard V12 and it would not now be just for the Authority to reconsider the complaint by reference to other standards.

[44] There is no order as to costs.

Delivered at 11.45 a.m./p.m. on 26 July 2002.

W. J. J.

HB:	Detectives are describing a stabbing attack on an Auckland liquor store owner last night as one of the most cowardly they have seen. The 37 year old Asian shop keeper needed stitches to several wounds after a masked man stormed into his shop armed with a knife.
SP: (Voiceover)	The shop owner was watching his own security guard stack the shelves when the attacker arrived. Within moments the owner was being tussled to the ground, the guard fled and then the assailant viciously lashed out twice with his knife. Fortunately the Asian shopkeeper only suffered minor cuts that needed stitches but the Police say the stabbing could have easily been much worse.
Det.R G	Cowardly, disgusting, disgraceful attack. No provocation, absolutely unnecessary and really disgraceful.
SP: (Voiceover)	Neighbouring shopkeepers were disturbed by last night's attack...
Neighbour:	Everyone was, you know, just really freaked out. It doesn't happen here. I mean, it's a quiet neighbourhood, it doesn't happen...
SP: (Voiceover)	Police are worried small liquor stores are increasingly the targets of violent attacks. Almost exactly 12 months ago an Indian South Auckland liquor store owner was stabbed to death outside his shop. In this latest attack the assailant was well disguised. The Police are hoping his distinctive clothing will provide vital clues...
Det.R G:	The black jacket in particular is going to be important and we are appealing for people who may recognise that jacket as belonging to a particular person to let us know
SP: (Voiceover)	Despite a demand for money, nothing was taken in the attack. Police are still looking for the weapon described as a sharp paring knife. The incident has traumatised the shop owner so much he is now deciding whether he wants to keep his business or sell it. Stephen Parker – 3 News."