IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY 26/5 AP 29/94

BETWEEN TV3 NETWORK SERVICES LIMITED

S22

Appellant

AND THE BROADCASTING STANDARDS AUTHORITY

First Respondent

AND S

Second Respondent

[redacted]

15/5/95

JUDGMENT OF EICHELBAUM CJ

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BETWEEN	TV3 NETWORK SERVICES LIMITED Appellant
AND	THE BROADCASTING STANDARDS AUTHORITY First Respondent
AND	S Second Respondent

Hearing	7 December 1994
Counsel	TJG Allan for appellant First respondent abides decision of Court Second respondent - no appearance Ailsa Duffy as amicus curiae
Judgment	15 MAY 1995

JUDGMENT OF EICHELBAUM CJ

On 11 July 1993, an item entitled "Hear No Evil - Speak No Evil" was screened on TV3 as part of that network's *20/20* programme. The item dealt with incest, and focused particularly on the case of a man who had recently been convicted of sexual offences committed on his five daughters. The particularly horrific nature of the abuse had made it the subject of some previous publicity,

including a number of newspaper reports, and an article published in a weekly magazine in April 1993.

The programme showed interviews with three daughters who had suffered the abuse, although in accordance with the provisions of s.139(1) of the Criminal Justice Act 1985 their identities were disguised; that is, their faces were concealed and their true names withheld. Also included was a brief interview with the girls' mother, Mrs S, whose identity was disguised likewise. This interview was filmed and taped surreptitiously, without Mrs S's knowledge or permission, by a camera crew stationed on a landfill adjoining Mrs S's property. During the interview it was revealed, partly by means of a voice-over comment, that Mrs S herself had been an incest victim. As the interview progressed the reporter suggested Mrs S had been aware of the abuse inflicted upon her daughters by her husband. Mrs S became angry, and ordered the reporter from the property.

Mrs S complained directly to the Broadcasting Standards Authority, claiming that the broadcast contravened privacy standards, both in filming without her permission, and in revealing that she herself had been subjected to sexual abuse. The Authority having upheld the complaint TV3 now appeals to this Court.

Statutory Provisions

It is necessary to refer to a number of provisions in the Broadcasting Act 1989. Section 4(1) provides:

> "4. Responsibility of broadcasters for programme standards -
>
> 1. 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."

Part II of the Act deals with complaints. Section 5 sets out a series of principles on which this part of the Act is based. Broadly the legislation has established a two tier system under which complaints are generally directed in the first instances to the broadcaster in question, but in addition an independent body, the Broadcasting Standards Authority ("the Authority") is available to ensure that broadcasters discharge their responsibilities in relation to programme standards. The functions of the Authority, established under s.20, are wide ranging. Because they are of significance in considering some of the issues arising I set them out in full:

"(a) To receive and determine complaints from persons who are dissatisfied with the outcome of complainants made to broadcasters under section 6(1)(a) of this Act; and

(b) To receive and determine complaints from persons where the complaint constitutes an allegation that a broadcaster has failed to comply with s.4(1)(c) of this Act, and the complainant has elected to refer the complaint to the Authority in the first instance; and

(c) To publicise its procedures in relation to complaints; and

(d) To issue to any or all broadcasters, advisory opinions relating to broadcasting standards and ethical conduct in broadcasting; and

(e) To encourage the development and observance by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting undertaken by such broadcasters, in relation to -

(i) The protection of children:

(ii) The portrayal of violence:

(iii) Fair and accurate programmes and procedures for correcting factual errors and redressing unfairness:

(iv) Safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs:

(v) Restrictions on the promotion of liquor:

(vi) Presentation of appropriate warnings in respect of programmes, including programmes that have been classified as suitable only for particular audiences:

(f) To develop and issue codes of broadcasting practice of the kinds described in paragraph (e) of this subsection in any case where the Authority considers it appropriate:

(g) To approve, for the purposes of this Act, codes of practice of the kinds described in paragraph (e) of this subsection:

(h) To conduct research and publish findings on matters relating to standards in broadcasting."

Where a complainant is dissatisfied with the decision or action taken by a broadcaster on a complaint the complainant may refer the matter to the Authority. Another route by which a complaint may go to the Authority is where it constitutes an allegation that the broadcaster has failed to comply with the provisions of s.4(1)(c) of the Act (set out previously) relating to consistency with the privacy of the individual. Under this latter provision, the present complaint went direct to the Authority. It should be mentioned that for purposes of dealing with complaints the Authority is vested with the principal powers of a commission of enquiry under the Commissions of Enquiry Act 1908.

The Authority's decision

No issue has been taken with the Authority's description of the programme, which was in the following terms:

> "Before the broadcast on 11 July of an item on incest containing interviews with three daughters, victims of their father who had been sentenced to 12 years imprisonment, TV 3 had sought to have the name suppression order

uplifted. The application was unsuccessful. The *20/20* item began by recounting that fact. It continued by explaining that, because of the story's importance, it intended to broadcast the item although names had been changed, identities hidden and voices altered. The item recorded in some detail that despite the complaints from one or more of the daughters, the Police and the Social Welfare Department declined to take action against the father during the late 1960's and 1970's.

During the interviews with the daughters, they expressed the belief that their mother, who it was stated had been an incest victim herself, had been aware of her husband's actions but had made no effort to intervene or to stop him. Comments from the daughters who were interviewed and from neighbours who had known the family suggested that the mother had been a victim to some extent herself in that she was abused by her husband but, nevertheless, had also connived in her husband's sexual abuse and had herself been physically violent towards the daughters.

The item reported that the mother had left her husband in 1976 and was now living in a North Island town. Her house was shown and she was seen standing near the back door speaking to the reporter. The Authority agreed with TV3 that the shot of the house was such as not to be clearly identifiable. Similarly, the mother's face had been partly hidden to prevent easy recognition. The Authority was unable to determine whether her voice was disguised. While maintaining that her appearance and house were not recognisable, TV3 did not argue that her voice was altered."

In the reasons for its decision the Authority referred to an Advisory Opinion issued in June 1992 outlining five relevant privacy principles it intended to apply. (As to the power to issue such opinions see s.21(1)(d), quoted above). The decision set out the relevant portion of the opinion as follows:

"By way of introduction to the Advisory Opinion, the Authority wants to stress that, although it records five relevant privacy principles:

- These principles are not necessarily the only privacy principles that the Authority will apply;

- The principles may well require elaboration and refinement when applied to a complaint;

- The specific facts of each complaint are especially important when privacy is an issue.

The following five "relevant Privacy Principles" were enunciated:

Although the right to be left alone is a common sense definition of privacy, as its decisions may be appealed to the High Court it is necessary for the Authority to follow what it considers to be appropriate legal precedents. Because of the paucity of reported cases and the lack of a clear definition of privacy in New Zealand, the Authority has relied upon precedents from the United States in developing the following five principles which have been applied to privacy complaints so far by the Authority when determining them under the Broadcasting Act 1989.

(i) The protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

(ii) The protection of privacy also protects against the public disclosure of some kinds of public facts. The "public" facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to the reasonable person.

(iii) There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.

(iv) Discussing the matter in the "public interest", defined as a legitimate concern to the public, is a defence to an individual's claim for privacy.

(v) An individual who consents to the invasion of his or her privacy cannot later succeed in a claim for breach of privacy."

In applying the privacy principles to the facts of the case the Authority did not accept that the report of the conversation in itself invaded Mrs S's privacy, since she knew she was speaking to a reporter. The Authority also took into account the

newspaper reports of the father's trial in February 1993 and an interview given by the eldest daughter, published in the weekly magazine article in April of the same year referred to earlier. These publications had given the father's name when reporting that he had been sentenced to imprisonment for offences concerning which the eldest daughter had first complained in 1969. The magazine article had given the eldest daughter's married name and the first names of some of her sisters. It had included a photograph of Mrs S and her husband (not dated, but unlikely to be recent) as well as reporting that Mrs S had been an incest victim herself and the daughter's belief that her mother had protected her husband during police enquiries in the 1970's. Neither the newspaper reports nor the magazine article referred to Mrs S by her present name. The *20/20* item covered much of the ground already traversed by the magazine.

Next the Authority referred to privacy principles (i) and (ii), as set out in the Advisory Opinion, dealing with the disclosure of "highly offensive" facts. It considered that Mrs S's experience as an incest victim fell under this heading. Earlier the Authority had recorded its belief that notwithstanding the steps taken to disguise Mrs S's face she could well have been identified by friends and acquaintances. Noting this factor and emphasising the highly personal nature of the material revealed, a majority of the Authority considered that in view of the suppression order, the prior disclosure in the media was irrelevant. The facts should have remained private. In the opinion of the majority, the suppression order meant that the information it protected was "private" within the terms of the privacy principle (i). Alternatively the majority was of the view that if the print media's prior disclosure had made any of that information "public", the continuation of the suppression order caused it to become private again, within the terms of principle (ii). The minority view was that there was no breach of principles (i) and (ii).

As to principle (iii), the Authority had little hesitation in deciding that the surreptitious filming of the discussion, in which Mrs S believed she was being asked only to take part in an interview, was offensive to the ordinary person under (iii). The Authority did not accept TV3's argument that because the filming was made from a place to which the public had access principle (iii) did not apply, taking the view that the exception at the conclusion of (iii) applied only when the person being photographed was in a public place.

In considering the applicability of the public interest defence contained in para (iv), the Authority noted a previous decision where it had accepted that the surreptitious recording of a conversation was excusable in the public interest as there it had been the only way to obtain an admission of behaviour of a kind widely regarded as anti-social. However, in the present case the Authority came to the conclusion that the public interest defence did not prevail. The theme of the programme, the Authority said, was the official inaction in response to the earlier complaints, and according to the daughters interviewed one reason for such failure was Mrs S's conduct. The Authority while accepting that the attempted interview was at least to some extent in the public interest, held it did not justify the methods employed. The item did not move beyond the human interest level to a point where it became of legitimate concern to the public. Finally the Authority rejected the submission that TV3 had to approach Mrs S in order to comply with the obligation for balance. In order to achieve that, the Authority thought, there was no need to engage in covert activities. Accordingly it upheld the complaint and pursuant to the powers contained in s.13 of the Act made an order for payment of compensation of $750 to Mrs S.

Under s.18 of the Act there is a right of appeal to this Court. The section provides that the Court is to deal with the appeal as if the decision appealed against

had been made in the exercise of a discretion. This means the appellant needs to show the Authority based its conclusion on some error of principle (including an error of law, for example an error in the interpretation of the statute), that it took irrelevant considerations into account or failed to consider appropriate ones, or was plainly wrong. What the Court is not allowed to do is simply substitute its own view for the Authority's.

I now turn to the arguments on the appeal.

"Privacy"

Essentially the first branch of the appellant's argument was an attack on the Authority's adoption of USA caselaw. As noted the Authority went to this source because of the perceived paucity of reported cases and absence of a clear definition of privacy in New Zealand. At the time of issue of the Advisory Opinion, so far as I am aware the only New Zealand reported cases on the topic were the judgments of McGechan J in *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 and Neazor J in *Bradley v Wingnut Films Ltd* (1992) 24 IPR 205. I am sure the Authority's reference to the absence of clear definition was not intended as criticism of the terms of those judgments, the point being rather that by contrast with North America, in New Zealand this field of law was still in its infancy and the scope of any tort of privacy and the principles applicable had not yet been fully developed. As indicated by the citations before me the subject has been before the Court of Appeal only when the interim injunction granted to Mr Tucker was taken on appeal (see *News Media Ownership Ltd v Tucker* CA 172/86, 23 October 1986) on which occasion, without expressing any view on the ultimate legal issues, the Court of Appeal stated the law was far from clearly settled in New Zealand. That remained the position at the date when the Advisory Opinion was issued, and indeed is so today.

The appellant argued that "privacy" in s.4(1)(c) should be read as a reference to the principles of the New Zealand law of privacy. I reject that submission, for three reasons. First, given the state of the law in 1989, when the present legislation was enacted (let alone in 1976, when reference was made to privacy in a similar context in the previous Act, see the Broadcasting Act 1976 s.24(1)(g)) it was not a situation where the word had an established meaning at law. The presumption that the legislature uses a technical legal term in its ordinary common law meaning cannot apply. Secondly, having regard to the scheme of the Act, especially sections 5, 6 and 21 (particularly, paragraphs (d) and(e) of s.21(1)), and the terms of the appeal provision (s.18), on my reading of the Act the Authority is intended to have a central role in establishing and maintaining broadcasting standards. Broadcasting, especially by television, is a potentially intrusive process. The protection afforded to the individual under s.4(1)(c) is an important one. It would downgrade the role of the Authority in establishing and maintaining that protection if the meaning of "privacy" were to be interpreted in the way the appellant argues.

The third point is an extension of the second. In the development of the law of torts one would not necessarily expect a new-found cause of action to cover ground adequately protected by existing law in other fields. To take examples of some relevance to the present case, if an aggrieved person has adequate recourse to remedies under the law of trespass, or confidentiality, in an ordinary civil action the Courts would not need to consider, and might well not consider, whether the same facts gave rise to a case in privacy law. Thus if the complainant is restricted to a complaint regarding privacy in the narrow setting of the tort of that name, the protection intended to be afforded by s.4(1)(c) is likely to remain limited. That

would not be in accord with my impression of the purpose of this part of the legislation.

In regard to the individual principles, Mr Allan accepted that (i) had been recognised in New Zealand first instance decisions (principally *Tucker v News Media Ownership Ltd*) and did not challenge the Authority's reliance on it. He attacked (ii) which he said did not appear to be derived from USA principles, and was uncertain in its scope, in that one could not tell when a previously public fact had become private. The point about difficulty of definition is made by Professor J F Burrows in *News Media Law in New Zealand* (3rd Ed) at p 189.

As it happens *Tucker's* case was an instance of the threatened revelation of facts which at one stage had been in the public domain. Mr Tucker required heart transplant surgery unavailable in New Zealand and a fund raising campaign was mounted to enable him to undergo the operation in Australia. The proceedings were taken to endeavour to prevent a weekly newspaper, the Broadcasting Corporation, and a daily paper from publishing details of criminal offending of which Mr Tucker had been convicted years previously. There was evidence that the stress resulting from publication was likely to cause Mr Tucker grievous physical or emotional harm. At the stage when the proceedings came before McGechan J the plaintiff's convictions had been revealed to the public by media organisations other than the defendants. Efforts by the Courts to bar the defendants from publishing the information would be seen as an exercise in futility; consequently the interim injunctions were discharged.

In the circumstances Jeffries J who granted the interim injunction and the Court of Appeal in affirming his judgment were concerned only with whether there was a serious question to be decided. Both held there was. McGechan J, who dealt

with the application for discharge of the injunction, as part of his process of reasoning affirmed that finding. In each instance therefore the judgment of the Court is of persuasive value only in deciding whether a cause of action for breach of privacy exists in New Zealand, and its scope. To the extent however that each of the Judges who considered the case at its various stages was of the opinion that the plaintiff had a tenable case based on a tort of breach of privacy, they must have regarded it as not necessarily fatal to such a cause of action that the "private" facts concerned (the plaintiff's convictions) had originally been in the public domain.

I do not need to emphasise that what is presently under consideration is not whether publication of such facts can constitute a tort, but whether it is one fit basis for the imposition of a standard by the Authority, charged as it is with maintaining standards consistent with the privacy of the individual. The Authority can properly take the view that privacy in this setting should include relief from individuals being harassed with disclosure of past events having no sufficient connection with anything of present public interest. True that precise definition may be difficult if not impossible but the introductory remarks made by the Authority in its Advisory Opinion recognised that the principles were not set in stone and would require consideration in the light of particular sets of facts. Reflecting the arguments advanced, I have spent a little time on considerations arising out of *Tucker's* case but they do not go to the heart of the issues in this appeal.

In regard to principle (iii) Mr Allan accepted it was supported by USA precedents, see *Prosser, Law of Torts* (4th Ed, 1974) pp 807-809. There the text refers to a particular form of invasion of privacy consisting of intrusion upon the plaintiff's physical solitude or seclusion, as by invading the plaintiff's home. The text recognises limitations on this branch of the right of privacy, principally that the disclosure must be a public and not a private one; that the facts disclosed must be

private facts, and that the matter made public must be one which would be offensive and objectionable to an ordinary, reasonable person. Mr Allan argued that the common law dealt with "prying" situations under the heading of trespass rather than as part of any tort of privacy, and that this catered adequately for grievances of that kind. I do not see this as a reason for excluding such situations from those where complaints regarding breach of privacy may be brought under s.4(1)(c). Complainants may have a choice of remedies. Again, I see no error of principle in the Authority's decision to regard prying as one potential form of breach of privacy, nor in its adoption of the approach gleaned from USA caselaw as a foundation for its own guidelines on the topic.

The Authority's findings challenged

In relation to the Authority's finding, by a majority, that there had been a breach of principle (i), it was not contested that Mrs S's own experience as an incest victim fell within the category of a disclosure highly offensive and objectionable to a reasonable person of ordinary sensibilities. What was challenged however was the finding, critical to the Authority's conclusion of a breach, that Mrs S could well have been recognised by acquaintances and friends by her voice and deportment.

Essentially this finding depended upon the inferences to be drawn from the visual and aural content of the programme. It showed Mrs S in her back yard, speaking to the reporter and walking about. TV3 did not claim that the voice, which I thought was capable of being regarded as distinctive, had been disguised. At the invitation of counsel, during the hearing I viewed the tape of the item and I have seen it again since. Not everyone would agree with the finding on the potential for identification, but it was an issue of fact for the Authority and I am unable to accept the submission that there was no evidence on which it could base an affirmative conclusion.

The next point taken is that the information was already in the public domain. A contemporary report of the proceedings, inferentially from a newspaper circulating locally, and evidently giving an account of Mrs S's own testimony, said she had been an incest victim. The magazine article published in April 1993, some two months after the trial, which consisted largely of an interview with the eldest of Mrs S's daughters, reported the same information. On the other hand several other publications, although covering ground relating to the abuse of the daughters, and the prosecution, in terms similar to those of the two reports mentioned, did not refer to the mother's own experiences.

In deciding that the prior disclosures were irrelevant the Authority placed reliance on the fact that the suppression order, as the Authority called it, remained in force. So far as I can tell from the record, during the trial the accused's name was suppressed, but that order was lifted upon delivery of the verdicts. However, s.139 of the Criminal Justice Act 1985 prohibited the publication of the name of any person upon or with whom the offences had been committed, or any name or particulars likely to lead to the identification of that person, unless the Court permitted publication. As noted in the item itself, TV3 had tried, unsuccessfully, to obtain leave. It is apparent that the Authority was aware what had happened, and its description of the result of the earlier proceedings as a suppression order was a mere semantical inaccuracy.

It was submitted however that the Authority took a wrong view of the effect of the statutory prohibition. By way of background it should be mentioned that Mrs S evidently parted from the accused many years ago and now went under a different surname. At first sight it may appear that the Authority mistakenly believed that the prohibition under s.139 covered her position directly as a person

with or on whom an offence had been committed. Clearly these provisions related only to the daughters. However, although the s.139 prohibition was not directly for Mrs S's benefit, her name could not be published (and in the event, the print media did not publish it) because revealing her name and the fact that the complainants were her daughters would have been likely to lead to identification of the daughters. So although the passage in the Authority's reasoning may be a little cryptic, subject to consideration of two further factors I agree with the majority conclusion on the first of the two alternative bases advanced: effectively, that by reason of the s.139 prohibition Mrs S should not have been identified, and therefore the information that she had been an incest victim would not have become known.

There have of course been well-known instances where because information which should not have been published in the first place has in fact obtained widespread notoriety, it would be an exercise in futility by the Courts to prevent other people from publishing the same information. *Tucker* was an instance, as already noted. On TV3's application on the name publication issue (see *TV3 Network Services Ltd v R* [1993] 3 NZLR 421) the Court of Appeal did not regard this as such a case. On the evidence, publication relating to the abuse suffered by Mrs S had been limited. It was open to the Authority to take the view, analogous to that followed by the Court of Appeal, that although to a limited extent the facts had become public identification of Mrs S with them had been slender (mainly, the publication of an old photograph) and afforded no reason why other members of the media should be allowed to exacerbate any damage by following suit.

The second aspect requiring consideration is that Mrs S's evidence that she had been an incest victim was given in open Court. In written submissions filed after the hearing at my request Mr Allan argued it followed that such information necessarily became public property. He relied on the fundamental principle,

exemplified by such decisions as *Scott v Scott* [1913] AC 417, that the administration of justice in the Courts must be done in public. Miss Duffy on the other hand submitted that whether information disclosed by way of evidence given in open Court may still be regarded as private is a question of degree turning on the facts of the case. She referred to an unreported judgment of the English Court of Appeal, *R v Broadcasting Complaints Commission, ex parte Granada Television Limited* delivered on 14 December 1994. Although the Broadcasting Complaints Commission is the equivalent of the Broadcasting Standards Authority, as Mr Allan has pointed out there are significant differences in the statutory provisions establishing the respective bodies. As here, the English statute does not contain a definition of "privacy". Neither of the two complaints before the Commission appeared to involve a question of publication of material which had been the subject of previous evidence in Court, although the information in question had at one stage been in the public domain. Further, the findings made against the broadcaster by the Commission, which the broadcaster unsuccessfully attacked in judicial review proceedings, were restricted to failure to warn the complainants that a programme making reference to their deceased child was to be transmitted. While therefore the decision is of limited precedent value it lends some support to the Authority's case in that in referring to how the tort of privacy had developed in the USA the Court said it was by no means clear that the fact that the matter was already in the public domain precluded a finding of an invasion of privacy. Referring to an article by Dean Prosser (Privacy, 48 Californian Law Review 383, 1960) the Court quoted a passage which cited the "leading case" of *Melvin v Reid* 297 Pacific Reporter 91 (1931) where a cause of action based on the tort of privacy survived a striking out application notwithstanding that the facts had all been made public during a trial. However, since the case had been seven years previously this does not really take the matter further than *Tucker*.

Subject to limited exceptions, such as the evidence of complainants in sexual offending cases, evidence in our Courts is given in public. With, again, specific exceptions such proceedings may be reported by the media. In the present case the print media, as it was entitled to do, reported the evidence given in open Court that the mother of the complainants was herself an incest victim. Had it been a situation where no inhibitions on name publication were applicable, the media could have reported the evidence in question while at the same time publishing Mrs S's name. While this would be distressing to a witness, in the absence of a specific order the media would have been restrained only by its sense of propriety.

However, in the present case there is the additional factor of s.139. Theoretically it may be said there are no shades of "public"; that once evidence is given in open Court the information is public property no matter that the witness may have been appearing in a remote courtroom devoid of spectators or media representatives. Whether considerations of that kind may make a difference is not the issue in this case. Whatever the theory, there is a vast practical difference between the situation where evidence receives media publicity and where it does not. That has long been recognised by the legislature (see, currently, sections 139, 139A and 140 of the Criminal Justice Act) in providing for the non-publication of details of identity relating to complainants, witnesses and parties notwithstanding that anyone who had been in Court at the time the case was heard would have become aware of such information. Only in exceptional situations are names totally suppressed.

As stated earlier, while the benefit of the s.139 prohibition did not relate directly to Mrs S, in the circumstances it had the effect of preventing publication of her name. In the result, although her statement regarding the abuse she had suffered was made public, her identity remained protected from media publication.

In other words, although her identity and history became known to any persons in Court, the information retained a significant degree of privacy. The 20/20 programme did not merely report the evidence previously given - a "highly offensive disclosure, objectionable to a reasonable person of ordinary sensibilities" - but linked it with pictures and sound in a form, as the Authority found, rendering Mrs S identifiable, albeit in a limited way.

It will be apparent that in my view, for purposes of this legislation "privacy" is not an absolute concept. The term should receive a fair, large and liberal interpretation; and although in the first instance this is a matter for the Authority it would certainly not be wrong to adopt a similar approach to its definition of private facts. On any sensible construction the meaning of that expression cannot be restricted to facts known to the individual alone. Although information has been made known to others a degree of privacy, entitled to protection, may remain. In determining whether information has lost its "private" character it would be appropriate to look realistically at the nature, scale and timing of previous publications.

I conclude the Authority was justified in holding that principle (i) had been breached and did not commit any error allowing or requiring interference by this Court. In the circumstances I do not need to make any finding about the majority's alternative proposition based on principle (ii) save to say that to my mind situations such as the present are difficult to equate to cases like *Melvin v Reid*, or *Tucker V News Media Ownership*, where a lapse of years had occurred since the facts had been before the public.

Turning to the finding relating to the surreptitious filming, on the authorities it is clear that no tort is committed by photographing another person's private

property without consent. There is a range of authorities but I cite only *Bathurst City Council v Saban* (1985) 2 NSWLR 704 and *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. In the latter Latham CJ said:

> "... Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence. ... The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he saw anywhere if he does not make defamatory statements, infringe the law to offensive language, etc, break a contract, or wrongfully reveal confidential information." (494)

In *Bathurst City Council v Saban* Young J relied on this authority, among others, to reach the conclusion that no tortious conduct was involved in taking a photograph of another's private property without consent.

Regarding the TV3 reporter, Mr Allan submitted that in accordance with the principles in *Robson & another v Hallett* [1967] 2 QB 939 (a precedent followed in a series of New Zealand cases) she was not a trespasser. The reporter was entitled, he said, to go on to the complainant's property to ascertain if she was prepared to be interviewed. The Authority's findings of fact were that Mrs S knew she was a reporter, but did not know the conversation was being recorded and filmed from a secret location.

My view is that the reporter's position did not fall within the principles in *Robson v Hallett*. In that case it was held that in general the occupier of a dwelling gave an implied licence to any member of the public on lawful business to come through the gate and knock on the door of the house. While media reporters have no greater rights than the general public they do not have any less and usually a

reporter would be entitled to go to the door to ascertain whether the occupier was willing to be interviewed. Reference may be made to *Marris v TV3 Network Ltd* CP 754/91 Wellington registry, 14 October 1991 at page 14. However, the concept of an implied licence raises the question of the purposes for which a licence may be implied. See, for example, *Lincoln Hunt Australia Pty Ltd v Willesee & Ors* (1986) 4 NSWLR 457, 460. Such a licence has been expressed as limited to lawful purposes, but it does not follow that only an entry for unlawful purposes will be outside the terms of the licence. Purposes for which it is known or understood that the occupier would not give consent will be outside the ambit of implication.

Here no doubt the purpose of the visit was to obtain an interview if that could be achieved; but if it could not TV3 was ready to film whatever encounter ensued and record such statements as the occupier might make, without her being aware of it. The occupier would not have agreed to the reporter coming on to the premises for that purpose, and the inference is open that TV3 was aware of that. In the circumstances the reporter's entry did not fall within the terms of the normal implied licence, and for purposes of action in tort was a trespass from the outset.

In summary, for the reasons stated I consider that while the conduct of the camera crew was not unlawful, the reporter was a trespasser. However, even had my finding regarding the reporter's actions been otherwise, consonant with views expressed elsewhere in this judgment I would not regard such a conclusion as immunising TV3 against a finding of breach of broadcasting standards. The proviso contained in the last sentence of the citation from the *Victoria Park* case is significant. That the conduct referred to is no trespass does not avail if it gives rise to causes of action under other branches of the law.

During the argument there was some discussion whether the Authority's jurisdiction extended to conduct as distinct from broadcasting. The jurisdiction of the Authority to deal with s.4(1)(c) complaints traces back to the reference in s.4(1) to "[standards] in .... *programmes and their presentation*". In cases where the complaint is routed through the broadcaster, s.6 requires broadcasters to receive and consider "complaints about any *programme broadcast*". Having regard to these expressions it seems clear that the broadcasting of a programme is a pre-requisite to any complaint about it. But subject to this qualification I do not see why the references to "programmes" should be construed narrowly; and I would hold that where filmed or taped material has been televised, in adjudicating upon a complaint the Authority is entitled to take into account not only the broadcast material itself but also how it was obtained. To restrict complaints to the content alone would significantly limit the Authority's jurisdiction.

The Authority was of the view that the surreptitious filming of a discussion in what the complainant thought was the privacy of her own property amounted to prying which the ordinary person would regard as offensive. I think this should be read as relating to the showing of a programme obtained in the manner stated. Being satisfied that in reaching that conclusion the Authority did not commit any error reviewable on this appeal and that the finding was open, I uphold the Authority's finding of breach of principle (iii).

Public interest

There may be occasions when the public interest, for example in the exposure of misconduct, justifies tactics of the kind adopted here. The appellant challenged the Authority's finding that in this case the public interest defence did not apply.

As noted the main theme of the programme was the official inaction on the daughter's complaints. According to the daughters Mrs S's own conduct in supporting her husband was part of the reason for the lack of official response. The absence of official action, which if taken would have saved the daughters from further abuse, could be a legitimate subject of public concern; and the mother's part in bringing about this unsatisfactory state of affairs might be sufficiently linked to justify exposing it to public scrutiny. The Authority recognised that. However, the critical events happened more than 20 years ago, in an era of different attitudes towards the reporting and prosecuting of allegations of sexual offending, especially if occurring within the family. In light of changes of attitudes it may be thought that even so far as officialdom was concerned there was little point, and consequently in the proper sense of the term, no public interest, in exposing the failings of a previous generation of police and departmental officers. Much less would there be any in denouncing a mother for whom the Court proceedings must have been a humiliating experience.

Once again it is necessary to draw attention to the distinction between matters properly within the public interest, in the sense of being of legitimate concern to the public, and those which are merely interesting to the public on a human level - between what is interesting to the public and what it is in the public interest to be made known. I find no error of principle in the Authority's conclusion that the defence under (iv) did not apply.

Balance

The appellant argued that it was required to balance the allegations made by the daughters against their mother with a response with the latter. As noted the Authority's view was that while an approach to Mrs S was necessary, the covert activities were not. Again, I see no error in the Authority's approach.

Standard of proof

The appellant did not pursue a submission that the Act required a higher standard than the balance of probabilities. It may be helpful if I express the view, obiter, that the proceedings before the Authority should in this respect be regarded as analogous to professional disciplinary proceedings. In those the standard of proof is the civil standard but it is applied with regard to the gravity of the particular allegation. See *Gurusinghe v Medical Council of NZ* [1989] 1 NZLR 139, 163.

Conclusion

All the grounds argued having failed I dismiss the appeal and confirm the Authority's decision. I make an award of costs against the appellant in favour of the amicus curiae in the sum of $3,000.

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