

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 32/91

Dated the 23rd day of July 1991

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

BARBARA HOLT
of Auckland

Broadcaster
TELEVISION NEW ZEALAND
LIMITED

I.W. Gallaway Chairperson
J.B. Fish
J.L. Hardie
J.R. Morris

DECISION

Introduction

On 23 October 1990, and on 126 occasions during a period of 19 months, Television New Zealand Limited broadcast a 15 second advertisement for the Southern Cross Medical Care Society. The advertisement featured a woman in a hospital corridor who made the following statement while walking towards the camera:

Cervical cancer or breast cancer won't wait. So why should you? If you are a Southern Cross member you can get early treatment with your choice of doctor or specialist. Southern Cross - you can't afford to be without it.

On 12 November 1990, Ms Barbara Holt complained to TVNZ Ltd that the advertisement was seriously misleading in three ways. When TVNZ declined to uphold the complaint, Ms Holt referred it to the Broadcasting Standards Authority under s.8(a) of the Broadcasting Act 1989 for investigation and review.



Decision

The Authority has studied the correspondence, including the numerous documents supplied to the Authority by Ms Holt, and has carefully considered her detailed arguments put forward in support of her complaint and by TVNZ in response. (This material is summarised in the appendix.) The members have viewed the advertisement which gave rise to the complaint.

In view of the extensive array of documents supplied by Ms Holt to the Authority, TVNZ submitted that the Authority should decline to determine the complaint on the grounds that its basis was substantially different from the complaint considered by TVNZ's Complaints Committee. The Authority rejects this submission as the voluminous supporting documentation, in its opinion, focuses on to the three points made by Ms Holt in her letter of complaint to TVNZ dated 12 November. The documentation does not introduce new grounds for the complaint.

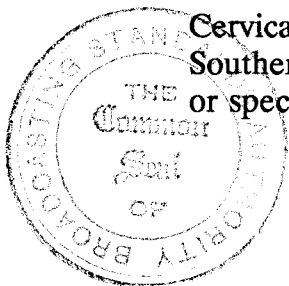
During its deliberations, the Authority considered referring the supporting documentation back to TVNZ's Complaints Committee for comment. The Authority decided not to follow this procedure for two reasons: first, TVNZ dealt with many of the points in its letter to the Authority dated 12 June 1991, and secondly, the complaint focuses on a 15 second commercial containing 39 words which has not been broadcast since the formal complaint was received. Thus is not a current issue. On the other hand, the Authority by that observation does not want to suggest that the complaint is unimportant or trivial. The advertisement was shown 127 times and it refers to cervical cancer and breast cancer - issues of real emotional and practical concern for all women.

Indeed, given this concern the Authority believes that this complaint must be considered in a broader social context. The first such contextual matter is the Cartwright Report into cervical cancer treatment at the Auckland National Women's Hospital published in 1988. That Report gave cervical cancer, and its treatment, a high public profile. Part of the message conveyed to the public was the need for regular cervical smear tests and, if necessary, prompt and competent treatment. Breast cancer already has a reasonably high profile which has focused on the need for self-examination to be followed by professional advice if self-examination discloses any irregularity.

The other important contextual matter is the on-going review of the public health services. Both before and after the publication of the Gibbs Report in 1988, the re-organisation of the public health services has been a matter of continuing public debate. That Report highlighted the public hospital waiting lists as a major problem in the existing public system. These matters form part of the background against which the Authority considered the complaint.

The words spoken by the women in the advertisement were:

Cervical cancer or breast cancer won't wait. So why should you? If you are a Southern Cross member you can get early treatment with your choice of doctor or specialist. Southern Cross - you can't afford to be without it.



The Authority considered that this advertisement reflected both the contextual social matters referred to above in that it refers to both cervical and breast cancers and to the need for prompt treatment.

Ms Holt argued to TVNZ and the Authority that the advertisement made the following three points with regard to cervical and breast cancer:

- i) it implied that there were harmful delays in the public health system;
- ii) it implied that any delay in treatment was harmful; and
- iii) it implied that Southern Cross would pay for private treatment.

The advertisement, she continued, misled the viewer in each of these three points.

TVNZ's Complaints Committee considered the complaint in terms of standard 2 of the Advertising Code of Ethics. The Advertising Code of Ethics is an approved code of broadcasting practice under s.4(1)(e) of the Broadcasting Act 1989 and thus all programmes must maintain standards consistent with it.

Standard 2 reads:

Advertisements must not contain any statement or visual presentation which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, or makes false or misleading representation.

TVNZ's Complaints Committee, in response to Ms Holt's complaint, did not dispute that urgent treatment was available in the public health system. It said that viewers were encouraged to take out a Southern Cross policy as:

If cancer occurred and non urgent surgery was required, private treatment would take place quickly and in so doing relieve stress and depression often associated with the diagnosis of the disease.

In response to Ms Holt's referral of the complaint to the Authority, TVNZ said that the advertisement did not distinguish between the public and private health sectors, but as medical treatment was expensive, a Southern Cross policy allowed the patient to see a doctor quickly and it enabled all services, whether public or private, to flow.

Neither TVNZ nor the advertiser disputed the evidence provided by Ms Holt that urgent treatment was available in the public health system. Although there was some disagreement about the exact proportion of patients with cervical or breast cancers who required radiation therapy, TVNZ did not disagree with Ms Holt's assertion that a Southern Cross policy did not meet the costs of it nor of chemotherapy.

Whereas the Authority agreed with TVNZ that the advertisement was not "wantonly false", that was not the test when deciding whether an advertisement breached standard



2 of the Advertising Code of Ethics. In the language of standard 2, the test is did the advertisement contain a statement about the availability of early treatment in the private system which, by implication, was misleading?

After examining the advertisement and the evidence from medical sources which Ms Holt provided in support, the Authority had no hesitation in agreeing with her that the advertisement implied that there were harmful delays in the public health system. The advertisement also implied that the delays were physiologically harmful. But in view of the differing medical opinions on the issue of the degree of stress, if not physiological harm, felt by patients during even a short delay, the Authority did not agree with Ms Holt that this implication was misleading. Finally, the Authority agreed that the advertisement implied that Southern Cross would pay for private treatment whereas, in fact, this is true only to a limited extent.

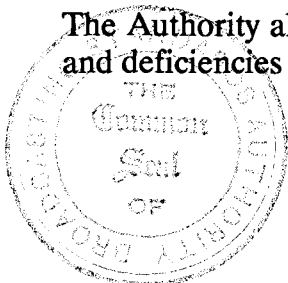
Taking into account that all the parties accepted that urgent treatment was available in the public health system, and that all the necessary treatment was not paid for by Southern Cross, the Authority concluded that two of the implications in the advertisement were misleading.

For the foregoing reasons, the Authority upholds the complaint that the broadcast of the Southern Cross advertisement breached standard 2 of the Advertising Code of Ethics.

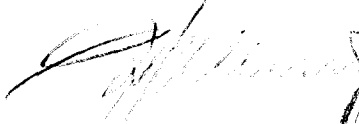
The Authority, having upheld a complaint, may make an order under s.13(1) of the Act. However, as the advertisement was withdrawn following the complaint, the Authority does not intend to make an order in this instance. Even if it decided to make an order, it cannot, as Ms Holt requested, order TVNZ or the advertiser to pay a substantial sum of money to the NZ Cancer Society or to any other organisation.

TVNZ raised the point that no formal complaints were received about the advertisement prior to the one from Ms Holt, despite it having been shown on numerous occasions. Ms Holt replied that this reflected lack of public knowledge about the formal complaints process and she provided material to substantiate her point that the advertisement had been subject to adverse comment in a number of professional arenas. The Authority agrees that there is a need for greater public awareness of the formal complaints process. That is an area for which the Authority is responsible and it is taking steps to ensure improved public knowledge. It also acknowledges Ms Holt's point that until she initiated the formal process, other concerned viewers might have done nothing on the assumption that someone else had complained formally. The Authority records that whatever the reason for, and merits of, a complaint, it is unable to become involved in the complaint process (except in the case of privacy) until a formal complaint has been made to a broadcaster and the broadcaster has responded. Under the Broadcasting Act 1989, the Authority is reactive in this area, not proactive.

The Authority also wishes to record that it found the parties' opinions about the merits and deficiencies of the public and private health systems totally irrelevant to its decision.



Signed for and on behalf of the Authority



I.W. Gallaway
Chairperson

23rd July 1991



APPENDIX

Ms Holt's Complaint to Television New Zealand Limited

In a letter dated 12 November 1990, Ms Holt complained to TVNZ Ltd that the advertisement was seriously misleading in three ways.

- 1) There was no evidence that there were harmful delays for cancer treatment in the public hospital system.
- 2) As most women with breast cancer would have had this disease for one or more years at the time of diagnosis, a delay of a few weeks between diagnosis and treatment did not affect the outcome. It could have a positive effect in giving the woman time to examine the available options. The advertisement played on the fear of women that delays would be harmful.
- 3) Much of the treatment for breast cancer, for example radiotherapy or chemotherapy, was available only at public hospitals. Chemotherapy for example, the treatment for up to a quarter of women with breast cancer, was available in only two private hospitals in New Zealand and Southern Cross would not pay for it.

TVNZ's Response to the Formal Complaint

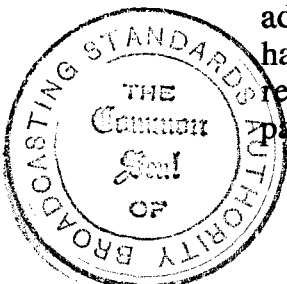
In a letter dated 7 December 1990, TVNZ advised Ms Holt of the decision of its Complaints Committee. The complaint had been considered in terms of standard 2 of the Advertising Code of Ethics approved by the Committee of Advertising Practice which reads:

Advertisements must not contain any statement or visual presentation which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, or makes false or misleading representation.

TVNZ noted that Ms Holt's complaint was the first received by it, by the advertiser or by the advertising agency after nineteen months of the advertisement's screening. TVNZ noted that the complaint had been featured in an article written by Sandra Coney which had subsequently appeared in The Dominion and the Auckland Star.

TVNZ dealt with the three points made by the complainant in support of her complaint.

- 1) TVNZ's Complaints Committee accepted the advertiser's point that the advertisement had not implied that the public hospital system involved harmful delays. The advertisement stated that a general practitioner, when referring a patient to a specialist, would have a choice in directing the patient in the way best suited to the patient.



2) The Complaints Committee agreed with the advertiser:

... that there is much substance in the belief that delay in treatment is harmful. Early detection and treatment of cancer has always been universally recommended by the medical profession.

Although a few weeks delay might make no difference, and the advertisement did not suggest otherwise, early treatment reduced anguish and stress. "This aspect", the letter continued, "was believed to be very important and a significant part of the advertising message".

3) Concerning the availability of treatment, TVNZ repeated that the type of treatment depended on the cancer but in many cases involved surgery and on-going specialist consultations - treatment covered by Southern Cross. Thus the Complaints Committee concluded, it was wrong to suggest that the advertisement was misleading.

TVNZ referred to a recent article in the New Zealand Medical Journal which reported that two thirds of the patients, although they might require pre-operative radiation carried out in public hospitals, required surgical intervention using procedures available in the private sector and one third required radiation therapy only. The article stated that 11 per cent of the patients did not receive radiation therapy prior to their operations which contradicted Ms Holt's statement that cervical cancer always involved radiation.

TVNZ noted that despite the frequency with which the advertisement had been shown, the claim in the newspaper article that some specialists decried it was not borne out by complaints from the medical or nursing professions.

The letter concluded:

Neither the Southern Cross Medical Society nor the Committee disputed the fact that urgent cancer surgery is immediately available from public hospitals. The advertisement had been produced to encourage people to take out a Southern Cross policy. If cancer occurred and non urgent surgery was required, private treatment would take place quickly and in so doing relieve stress and depression often associated with diagnosis of the disease.

The Committee felt a wrong impression would have been given if the advertisement implied that cancer can wait. It would be quite contrary to public and medical belief. It was agreed that while the presentation of the advertisement was certainly strong and thought provoking, it was not misleading.

The complaint was not upheld.

Ms Holt's Complaint to the Broadcasting Standards Authority

As Ms Holt was dissatisfied with TVNZ's decision, on 18 December 1990 she referred



the complaint to the Broadcasting Standards Authority under s.8(a) of the Broadcasting Act 1989. She later expanded on her complaint and forwarded various supporting documents. She recalled the three points she had made in her formal complaint to TVNZ. In regard to the first, she agreed with the advertisement's opening point that women now understood that early treatment for cervical and breast cancer was necessary. With regard to the necessary speed for treatment she continued:

But the advertisement goes on to ask: "So why should you?", suggesting that somebody is forcing women to wait for cancer treatment and that this delay is harmful to them. This is where the deception begins, since there is no evidence that such delays as exist in the public hospital system are harmful to women.

She added that the small delay of up to one month was not physiologically harmful and that the advertisement by not acknowledging that, was misleading.

The second reason for her complaint that the advertisement was misleading was that it promoted, falsely, the impression that immediate treatment was essential and that the private hospital system provided the best treatment. From her own experience as a breast cancer patient and as a past secretary of the Auckland Breast Cancer Support Society, she believed a short delay was beneficial for most patients. She supplied a publication from the British Medical Journal which advocated a short delay to enable patients to choose sensibly from the treatment options available. In her experience, she added, the public system provided a wider choice of treatment.

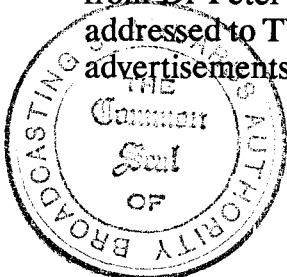
She concluded:

It is grossly misleading of the advertisement to imply that harmful delay is caused by the public hospital system when women's own behaviour is often notable for delay which can be harmful and which is on average three times as great, and in many instances much greater than any delay caused by the public hospital system.

The third basis of her complaint about the misleading aspect of the advertisement was the suggested value of having Southern Cross membership. Most women who had breast or cervical cancer were required to have some of their treatment in a public hospital.

She replied in detail to some of the points made by TVNZ in response to her complaint.

The fact that her complaint was the first official complaint reflected the lack of knowledge about the complaints procedures as she, as well as a number of others, had complained informally. Further, a Workshop on Breast Cancer organised by the Fertility Action Trust in May 1990 had concluded that the advertisement was objectionable and inaccurate. She attached a letter from the Trust which supported her complaint. She also attached a letter from the Auckland Women's Health Council which, at a meeting on 16 December 1990, had supported her complaint. Another attachment was a letter from Dr Peter Dady, the Medical Director of the New Zealand Cancer Society. It was addressed to TVNZ, dated 25 December 1990, and complained about the Southern Cross advertisements about melanoma and cervical and breast cancer.



In regard to TVNZ's statement that the advertisement did not criticise the public health system, she wrote:

I say that the advertisement is cleverly aimed at publicising all the aspects of treatment that Southern Cross will pay for, including hospital care, and that the public sector is therefore subtly implied as having harmful waiting lists in the field of cancer treatment which is completely false.

She stated that Dr Dady had drawn a similar implication as had Dr Alan Gray in a letter to her dated 5 February. Dr Gray is a surgeon with the Oncology Unit at Wellington Hospital and she attached a copy of his letter.

Regarding TVNZ's statement that the advertisement did not claim that a few week's delay did not effect the outcome of treatment, she said that advertisement gave too little information and added to mental anguish. She quoted an editorial from the "NZ Nursing Forum" in November 1990 which said the advertisement in suggesting that "every minute counts" gave a false impression about breast and cervical cancer.

In reply to TVNZ's statement that a "vast amount" of the appropriate treatment was available in private hospitals, she maintained that most patients needed radiotherapy or chemotherapy.

TVNZ stated that it would have expected that the medical or nursing professions would have raised their concerns about the advertisement. Ms Holt remarked that she, as had Dr Dady, had expected someone else to express concern. She attached a comment by Dr Baird from the August 1990 "NZ General Practitioner" strongly criticising the advertisement, along with a number of other Southern Cross advertisements, which, in his opinion, conveyed the false message "that hospital medical care in the public sector is so run down that it may as well be non-existent".

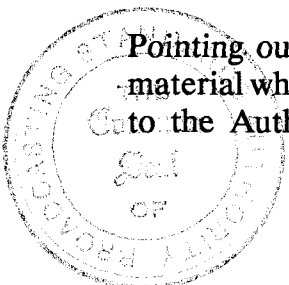
She also objected to TVNZ maintaining that patients in receipt of Southern Cross funding would be aware of the limits of their claims prior to requiring cancer treatment.

In conclusion, she stated that she was not suggesting that Southern Cross advertisements should argue that "cancer can wait". She wanted the company "to stop using fear of cancer to promote its services to the public". As a penalty, she proposed that Southern Cross and TVNZ should have to pay a large sum of money to the NZ Cancer Society and the NZ Federation Women's Health Councils.

TVNZ's Response to the Authority

TVNZ was asked to respond to this complaint on 14 February 1991. Its detailed reply is dated 12 June.

Pointing out that its Complaints Committee did not have available to it the extensive material which the complainant had supplied to the Authority, it questioned its relevance to the Authority's investigation of the complaint. The complainant's submissions, it



wrote, were "of dubious significance or relevance given the nature of the advertisement". Further, given the popular conception that cancer required prompt action, it asked seriously:

Should the message, be it in advertising or otherwise, convey a scenario which would attempt to change this overall view?

It then dealt with a number of specific issues raised by the complainant.

All parties accepted the need for early treatment and TVNZ said that the phrase used in the advertisement, "so should you", did not mean that the public hospital system involved delays. TVNZ added that insurance was about affordability and peace of mind and that the complainant's implication, that the advertisement said that the public health system could not provide them, was not sustainable.

Moreover, Southern Cross had advised TVNZ that the advertisement contained two essential points:

- * prompt treatment reduces worry
- * health insurance improves access to a doctor and reduces the financial barrier which might otherwise cause delay.

It did not, it continued, distinguish between the public and private health sectors. Medical treatment could be expensive, the advertiser said, and:

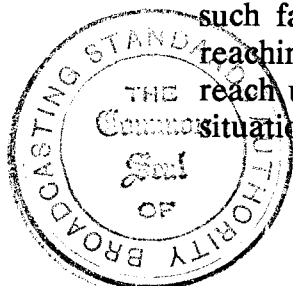
We make no claim other than the general one that to avoid such worry, the patient should get to a doctor quickly, thus enabling all other services to flow, public or private.

While not disputing the complainant's comments about a short delay before treatment, TVNZ denied that the advertisement was intended to deceive or mislead. Indeed, many of the complainant's concerns were peripheral and were based on expectations which were beyond the scope of brief advertising messages.

In regard to her general comments about TVNZ's Complaints Committee, TVNZ expressed the opinion that they were not helpful given the reasoned response from the Committee. In addition, the advertiser had informed TVNZ that it had not received any complaints during the two years the advertisement was shown until Ms Holt began her campaign.

With reference to the complaint from Dr Dady, TVNZ recorded:

While Dr Dady's letter reveals differing viewpoints from those of the complainant, such factors perhaps go some way to illustrating the difficulties there are in reaching finite and sound decisions when knowledgeable people are unable to reach unanimous agreement among themselves with regard to serious medical situations.



More generally, TVNZ wrote:

Motives behind the devising of the advertising were not contemplated by the company's Complaints Committee. It is submitted that the complainant is reading more into the advertisement than what the average viewer might reasonably be expected to do. It is a well-known factor that delays in public hospital treatment exist and that in the private sector such delays can be circumvented. As to cancer treatment there appear to be a number of factors which differ. That is on the basis of the complainant's submissions. The company does not believe, given the material it had before it when considering the complaint, that it could reasonably have reached a conclusion that what was said or implied in the advertisement, could be completely or wantonly false.

TVNZ dealt with the other points raised by the complainant. It was emphasised that the medical profession, which Ms Holt referred to on a number of occasions, would inevitably be more sensitive and more critical about cancer treatment, that the advertisement was brief (15 seconds), that no formal complaint had been received before the complainant's (and many would have been received if it was so seriously flawed as alleged), that the complainant and her supporters (known to be against the private health sector) referred to innuendos and implications, and that the advertisement, which was shown 127 time, was withdrawn as soon as a complaint was received.

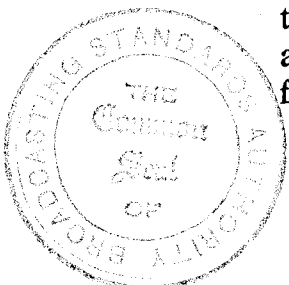
The letter finished:

In conclusion, the company would submit that on the basis of the complainant's voluminous case now being presented, the Authority is being asked to review a complaint substantially different in terms of substance from what was assessed by the company's Complaints Committee. In such circumstances the company would further submit that the Authority would be entitled to exercise powers available to it under section 11 of the Act.

Ms Holt's Final Comment to the Authority

Ms Holt, when asked for her comments on TVNZ's response to the Authority, referred to the three points in the advertisement which she said mislead the viewer.

- (1) It implied that there are harmful delays in the public hospital system for their treatment where there are not.
- (2) It implied that any delay in treatment was harmful whereas some delay can be of benefit to a woman.
- (3) It claimed that you need Southern Cross to pay for private treatment for these conditions whereas much of the treatment needed is not even available in the private sector, and where it is, Southern Cross will not pay for it.



She added that private health insurance competed with the public health system in some sectors, that private health insurance companies should provide accurate information, that Southern Cross did not pay for chemotherapy, that women with a breast lump received prompt treatment within the public health system at no expense to themselves, that reference to fire and theft insurance were irrelevant as there was no comparable public system, that the points raised in the letter of complaint to the Authority were made in response to TVNZ's Complaints Committee's decision but that the basis for the complaint was unaltered from the time of her original complaint.

