

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 19/92

Dated the 14th day of May 1992

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

BRUCE CLEMENTS
of Auckland

Broadcaster
RADIO NEW ZEALAND LIMITED

I.W. Gallaway Chairperson
J.R. Morris
R.A. Barraclough
L.M. Dawson

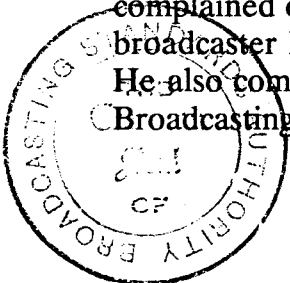
DECISION

Introduction

In September 1991, while driving home from work, Mr Clements had a disagreement with another driver about driving behaviour. He was pursued by the other motorist for some 30 minutes. It involved him driving through a red light and stopping in his neighbour's driveway. Mr Clements described it as a harrowing experience after which he was worried for his family's and own safety for some weeks.

On Monday 18 November, Mr Clements received a phone call from a woman claiming to be the wife of the other driver who said her "husband" was on the way to visit Mr Clements to take revenge. The woman revealed certain information about Mr Clements during the call but she concluded by describing the phone call as a "candid call". A recording of the telephone call was broadcast in Auckland on 89FM at about 7.00am on 19 and 21 November.

Because of the information about him disclosed during the broadcast, Mr Clements complained directly to the Authority under s.8(c) of the Broadcasting Act 1989 that the broadcaster had failed to meet standards consistent with the privacy of the individual. He also complained to the broadcaster alleging several breaches of the Radio Code of Broadcasting Practice.



Decision

The members of the Authority have listened to audio tapes supplied by the complainant and the broadcaster of the item complained about and have read the correspondence (summarised in the Appendix). As is its practice, the Authority has determined the complaint without a formal hearing.

In Decisions Nos: 5/90 and 6/90, the Authority developed its approach to complaints under s.4(1)(c) of the Broadcasting Act 1989 alleging that a broadcaster had failed to maintain standards consistent with the privacy of an individual. The principles established in those decisions have been reaffirmed in subsequent decisions and, most recently, in Decision No: 7/92.

The Authority's detailed reasoning in the development of its approach to the privacy question is set out in each of the above decisions. In this instance, the Authority records, first, the relevant principles that it considers applicable to the issue of personal privacy, and secondly, as the particular facts of each complaint are especially important when privacy is in issue, the relevant facts.

Relevant Principles

Although the right to be left alone is a common sense definition of privacy, as the Authority's decisions may be appealed to the High Court it is necessary for the Authority to follow what it considers to be the appropriate legal precedents. Because of the paucity of reported cases and the lack of a clear legal definition of privacy in New Zealand, the Authority has relied upon precedents from the United States in developing the following five principles which are applied to privacy complaints.

The Authority emphasises that the following five principles are not necessarily the only privacy principles that it will apply and that their application may well require elaboration and refinement. Nevertheless, they are the principles applied so far by the Authority when determining privacy complaints 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 the 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) 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 initiate an action for breach of privacy.

The Factual Situation

Before noting the information disclosed by the broadcast, the Authority comments on the broadcast of the introduction to the item as RNZ initially disputed that it was included. Mr Clements complained that the introduction summarised the incident on the motorway which led to another car following him home and it referred to his use of the neighbour's driveway. In its report to the Authority, RNZ maintained that no details of the car chase, nor the use of a neighbour's driveway, were broadcast. Mr Clements disagreed with RNZ and pointed out the information disclosed was highly embarrassing to him and, furthermore, disclosed information which would help the driver of the other car to identify him.

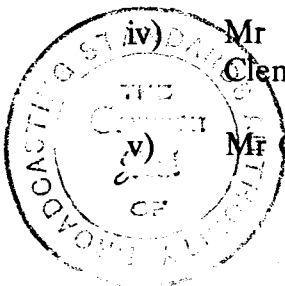
When Mr Clements' allegations were put to RNZ, it acknowledged that its initial response to the Authority was incomplete. It explained that the change of the station's ownership from Triple M Ltd to Radio New Zealand had occurred about the time of the broadcast. The new manager, appointed by RNZ, found that continuity logging was not operative and thus there was no recording of the introductory cue material. RNZ apologised to both Mr Clements and the Authority for, what it described, as an "isolated lapse". The details of the introduction are dealt with in the Appendix. At this point the Authority records that, although it accepts RNZ's explanation and apology, the broadcaster's initial denial reflected significant managerial deficiencies at 89FM.

In regard to the question of privacy, the broadcast disclosed the following facts:

- i) Following a disagreement between two drivers on the motorway, the driver of one car had followed the driver of the other car home.
- ii) The car being followed was a Mitsubishi space wagon and its registration number was given.
- iii) The name of the driver of the Mitsubishi was Bruce Clements.

iv) Mr Clements' neighbour's address was disclosed which, unlike Mr Clement's home, had a spa pool.

v) Mr Clements' employer's name was stated.



Candid Call

In its letter to the Authority, RNZ explained that a candid call, which was similar to the television concept of candid camera, was a brief but credible dramatised scenario involving a temporary practical joke which had to be resolved by the end of the call. RNZ continued:

The artificial scenario must, of course, be a possibility relative to the circumstances of the "victim", but is usually a development from those circumstances, not of them. The audience, of course, from its viewpoint of superior knowledge, enjoys in the traditional way the discomforting of another enhanced by its own omniscient security.

The information on which the call to Mr Clements had been based, RNZ added, came from one of Mr Clements' co-workers. RNZ acknowledged that the call to Mr Clements did not comply with the usual scenario in that the situation was not resolved by the end of the call. Instead, it could have given the driver of the car doing the chasing information which otherwise he might not have.

Public Interest Defence

RNZ stated that there was no public interest in the information disclosed and that, therefore, the "public interest" defence was not applicable.

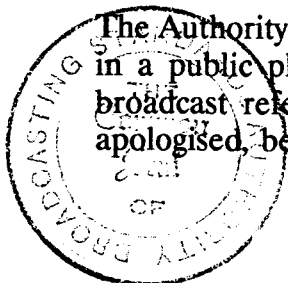
Consent to Broadcast

As privacy principle (v) above, the Authority recorded that consent to broadcast defeats a privacy claim. RNZ pointed out to the Authority that Mr Clements described himself on air as a listener to 89FM. Accordingly, it continued, it could be assumed that he was familiar with the candid call concept and would have been aware that recorded, rather than live, material was always used, and that a particular call would not have been used if an objection to the broadcast was received. In summary, RNZ argued, Mr Clements' response included an "element" of consent to the broadcast.

In reply, Mr Clements said his sons, rather than himself, listened to 89FM, that he did not know of "Candid Calls" and that he assumed that the telephone call was a "live" broadcast. The call was made from 89FM to him on Monday morning and he later discovered that it was broadcast on Tuesday and Thursday mornings. After being advised of the second broadcast, he had telephoned 89FM late on the afternoon of the Thursday and the Station Manager had returned his call on Friday morning. He had not, he stressed, consented to the broadcast.

Public or Private Facts

The Authority noted above that the privacy principles do not apply to events which occur in a public place. Although highly displeased by RNZ's initial disclaimer that the broadcast referred to the car chase and its conclusion, a mistake for which it later apologised, because those events occurred on the roads the Authority considered that



they are public facts their disclosure did not breach the privacy principle. Similarly, the registration number of a car is public information and the owner's name can be readily obtained from the public records. In this instance, Mr Clements explained that the car he was driving was a company car and, thus, a search of the official records would disclose only the company's name. Furthermore, on the morning after the incident he had arranged with his employer that his name would not be disclosed to anyone who asked for the name of the person driving the previous evening. Accordingly, his employer's name, which was disclosed during the broadcast, was a public fact.

Although the broadcast disclosed mainly public facts, in addition it revealed Mr Clements' name, a fact which was not available from other sources and one which he had taken precautions to keep private. Following the broadcast of his name, Mr Clements' address was then easily obtained from the telephone directory which would disclose that, in fact, he lived next door to the address given on the broadcast. The Authority stresses that it was the disclosure of Mr Clements' name by the broadcast, not the other material which were public facts, which resulted in a breach of the privacy principles. Mr Clements, by keeping his name secret, had attempted to avoid the possibility of further aggression.

Highly Offensive and Objectionable Disclosure

Having established that the broadcast disclosed the complainant's name, a fact which was not otherwise in the public arena, the Authority then considered whether its disclosure was both highly offensive and objectionable to a reasonable person of ordinary sensibilities.

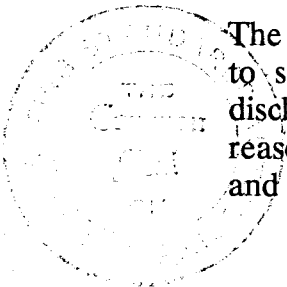
The answer to this question is always largely dependent on the facts of each complaint. In this case, taking into account the events which were broadcast and the shock and fear evident in Mr Clements' voice when he answered the candid call, the Authority concluded that the "practical joke" on this occasion involved more than having fun at someone's unwitting expense. Having disclosed otherwise private information, i.e. the scenario and having referred, to use Mr Clements' word, to "unfinished business" which, because of his concerns, he had sought strenuously to keep private, the Authority decided that the facts disclosed were both highly offensive and objectionable.

Summary

Applying the relevant privacy principles to the facts disclosed by the broadcaster, the Authority concluded that the candid call, when it disclosed Mr Clements' name, breached s.4(1)(c) of the Broadcasting Act. RNZ accepted that the "public interest" defence was inapplicable and, applying common sense and acknowledging that RNZ's defence was tentative, the Authority accepts Mr Clements did not consent to the broadcast.

Indeed, RNZ acknowledged that a breach of privacy had probably occurred when, in its letter to the Authority dated 9 March 1992, it wrote:

The Company inclines to the view that, despite the factors which might support to some degree a contrary view, the broadcast referred to some facts the disclosure of which might be considered "highly offensive and objectionable to a reasonable person of ordinary sensibilities", especially in view of the incomplete and unresolved nature of the incidents which formed the basis of the "Candid



Call" and the continuing worry which the complainant claims the broadcast caused him and his family.

For the reasons set forth above, the Authority decided that the broadcast of a candid call by 89FM in Auckland on 19 November 1991 breached s.4(1)(c) of the Broadcasting Act 1989.

When the Authority upholds a complaint that the broadcaster failed to comply with standards consistent with the privacy of the individual, the Authority may direct under s.13(1)(d) of the Broadcasting Act 1989 that the broadcaster pay compensation to the individual up to a maximum of \$5,000. In Decision No: 6/90 referred to above, it ordered compensation in the amount of \$500. Taking into account the difference in the circumstances referred to, the Authority believed that a larger amount of compensation was appropriate on this occasion. They are, first, the acknowledged lack of public interest in the information disclosed, secondly, Mr Clements' concern that his name remain a private fact, thirdly, that Mr Clements found the broadcast to be harrowing and distressful in that it revived a frightening experience, fourthly, that the broadcast may have aroused the other driver's interest in the incident, fifthly, that the tape of the candid call was broadcast twice, and sixthly, that Mr Clements, was not in any way responsible for the broadcaster's irresponsible behaviour.

For the reasons set forth above, the Authority orders Radio New Zealand Ltd to pay compensation to Mr Clements in the amount of \$1,000.

One matter arose when RNZ advised the Authority (23 March):

the female broadcaster had left the station suddenly, and the male broadcaster also left (the latter for parts unknown).

Mr Clements responded by stating that the male broadcaster (Mr Kevin Black) was in fact employed by another RNZ station in Auckland. RNZ explained the matter (9 April) by stating that there were three broadcasters - two on-air announcers and a producer. The female's announcer's present employment was unknown. The male announcer, as Mr Clements had correctly explained, was employed by another RNZ station. The producer had left RNZ and was now understood to be working for another broadcaster in another capacity.

Now that RNZ has explained the remark, the Authority accepts its account. However, in view of the omission concerning the introduction to the broadcast of the Candid Call and the way in which the matter of the broadcasters' subsequent movements was first expressed, the Authority understands Mr Clements' comments which questioned RNZ's competence and integrity on these matters.

Signed for and on behalf of the Authority

Iain Gallaway

Iain Gallaway
Chairperson
14 May 1992



Appendix

Mr Clements' Complaint to the Broadcasting Standards Authority

In a letter dated 2 December 1991, Mr Clements complained to the Broadcasting Standards Authority under s.8(c) of the Broadcasting Act 1989. Broadcasts of the same item at about 7.00am on 19 and 21 November 1991 in Auckland on 89FM, he said, breached the provision requiring broadcasters to maintain standards consistent with the privacy of the individual.

He stated that several months previously while driving home from work, and after a disagreement with another motorist about road rules, he was pursued for some 30 minutes. The experience had been harrowing, it had involved him using his neighbour's driveway in desperation and, for some weeks, he had been worried that the other driver would return to "complete any unfinished business".

On 18 November he had received a phone call from a woman who claimed to be the other motorist's wife who said that her "husband" was on the way to visit him to take revenge. The phone call, he added, revealed his name, his employer, his address, the make and registration number of his car, and details of the car chase. It also included some incorrect information. The call concluded when the woman said it was a "candid call".

He stated that the call had caused stress to his wife and himself and it had referred to an act of violence to his neighbour's property at his expense.

In addition to the complaint to the Authority under s.8(c), he stated that he had also complained to the broadcaster alleging a number of breaches of the Radio Code of Broadcasting Practice.

Radio New Zealand's Response to the Authority

In early December 1991, the Authority sought 89FM's response to the complaint. In early February 1992, it was advised by Radio New Zealand Ltd that it owned 89FM. After some correspondence about the possibility of Mr Clements taking other action, in a letter dated 9 March 1992 RNZ responded to Mr Clements' privacy complaint made directly to the Authority. It also provided the Authority with a transcript of the item.

Candid call programmes, it said, were similar to candid camera items on television. It continued:

The essence of all such programmes is a brief but credible scenario involving a temporary "practical joke", which is, however, rapidly resolved at the end of the episode. The artificial scenario must, of course, be a possibility relative to



the circumstances of the "victim", but is usually a development from those circumstances, not of them. The audience, of course, from its viewpoint of superior knowledge, enjoys in the traditional way the discomforting of another enhanced by its own omniscient security.

After giving two examples of the usual format used, RNZ said the context for the call to Mr Clements differed in that it could not be comically resolved in one brief programme.

The protection given to an individual's privacy by the Act, RNZ noted referring to an earlier decision from the Authority, either was the public disclosure of private facts or the public disclosure of public facts which, in both cases, were "highly offensive and objectionable to a reasonable person of ordinary sensibilities". In addition, RNZ argued that the provision in the Act was confined to the privacy of the material broadcast, not to any questions of privacy involved in obtaining the material.

Referring to the broadcast, RNZ acknowledged that some facts were disclosed but emphasised, contrary to Mr Clements' letter:

no details of the car chase, and no details of his taking "revenge" in a neighbour's property had been given on air at all.

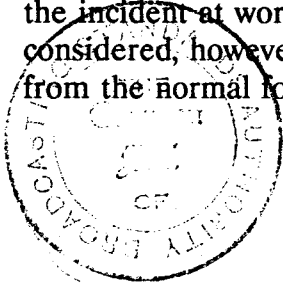
Further, his address was not revealed.

As Mr Clements admitted on air after the nature of the call was explained to him that he listened to 89FM, RNZ stated that it could be assumed he was aware of the nature of a candid call. RNZ continued:

It is to be noted that "Candid Call" is never broadcast "live", but always pre-recorded; is subject to a station rule that an objection prior to broadcast will mean that a particular candid call recording will not be used; that no call has ever been not broadcast because of such an objection [sic]; and that no complaints have hitherto been received concerning "Candid Calls".

In this particular case, the station reports that, neither at the time of the call itself, nor in the period after recording and before broadcast (approximately 24 hours) was an objection received from Mr Clements. It may also be noted that Mr Peter Hawkins (see below - a workmate of Clements's) is also an 89FM listener, and the initiator of this particular Candid Call, and was well aware of the call's having been made and the fact that it would have been intended for broadcast. Overall, it is difficult to accept that Mr Clements would have been ignorant of the nature of the call, or its intended purpose.

RNZ recorded that it had received details of the incident discussed on the call from one of Mr Clements' co-workers (Mr Hawkins) who, as Mr Clements had discussed the incident at work extensively, thought it would make a "good practical joke". RNZ considered, however, that the use of the item, because it represented a departure from the normal format, displayed a lack of judgment by the station. It could, it was



said, have instigated renewed action on the part of the driver who had pursued Mr Clements. Accordingly, RNZ noted:

On balance, the Company believes that the broadcast in question was capable of being interpreted as an invasion of the complainant's privacy in that it publicised an unresolved real situation (as Mr Clements has put it, "unfinished business") in a manner which might have caused Mr Clements embarrassment and could have prompted further unpleasantness from the driver of the other vehicle concerned in the original incident. Further, the Company does not believe that a valid defence of public interest can be put forward in this particular case.

However, in its defence, RNZ pointed to the limited number of facts disclosed, that Mr Clements had not objected prior to the broadcast of the item, that details of the car chase were not given and that nothing was said about the neighbours other than their address. Further, RNZ said that the information disclosed was public and the original incident had occurred in a public place.

In summary, RNZ wrote:

The company inclines to the view that, despite the factors which might support to some degree a contrary view, the broadcast referred to some facts the disclosure of which might be considered as "highly offensive and objectionable to a reasonable person of ordinary sensibilities", especially in view of the incomplete and unresolved nature of the incidents which formed the basis of the "Candid Call" and the continuing worry which the complainant claims the broadcast caused him and his family.

The Company believes that the Authority may well wish to assess these factors, but notes that matters covered in this comment and raised by Mr Clements's formal complaint to the Company under other standards have been clarified with the station concerned and other producers likely to be involved in such programme exercises, emphasising typical areas of potential danger.

Mr Clements' Final Comment to the Authority

When asked to comment on RNZ's response, in a letter dated 16 March Mr Clements expressed strong disappointment with RNZ as the transcript it had supplied to the Authority was incomplete. The missing segment, he added, spoken by the announcer before telephoning him, referred to the traffic disagreement which gave rise to the car chase and to his use of the neighbour's driveway. Consequently, he wrote, RNZ's comments to the Authority were based on incorrect information and RNZ "has clearly attempted to mislead the BSA".

Mr Clements said that, as he was not a regular listener to 89FM, he thought his call was being broadcast live. He said that he did not realise until after the second broadcaster that it have been recorded.

He also objected to RNZ's statement that he had discussed the incident extensively at work. As the car he was driving was owned by his employer, he had discussed the

incident with the managing director at the time it had occurred when it was decided not to divulge the name of the driver to anyone.

RNZ's Response to the Authority in view of Mr Clements' Comment

In view of the serious nature of Mr Clements' point that RNZ had sought to "mislead" it, the Authority sought RNZ's response.

In a letter dated 23 March, RNZ responded to that point as well as some other issues. RNZ wrote that it had been unaware, until it received the material from Mr Clements, of the introductory section of the broadcast. It recorded that the time of the broadcast and the complaint coincided with RNZ's acquisition of the station. The Station Manager that RNZ put in place had found it necessary to introduce continuity logging and to sort out by the confusion about script filing.

In addition, the female broadcaster involved had left the Station suddenly, and the male broadcaster also left (the latter for parts unknown). It was under these circumstances that the recording which has been supplied to the Authority, and on which assessment of Mr Clements' complaints has been based, was taken in good faith by the Station Manager and in turn by the Corporate office as essentially complete. In some ways it is perhaps unfortunate that Mr Clements' off-air recording was not available earlier.

It concluded:

Radio New Zealand offers its apologies to both the Authority and Mr Clements for the combination of circumstances which led to the omission. The Authority will acknowledge that the Company does not resort to such pointless tactics.

Mr Clements' Response to the Authority

When asked to comment on the above letter, Mr Clements said he left it for the Authority to judge RNZ's actions. He repeated the points that the introductory "cue" revealed important information, that his co-worker who supplied the material for the candid call had apologised to him, and that the male broadcaster involved, rather than being in "parts unknown", was working for 97FM, which was another RNZ station.

RNZ's Response to the Authority

In a letter dated 9 April, RNZ expanded on some of the points made by Mr Clements. With regard to the location of the broadcaster responsible for the broadcast of the candid call, it explained that the term "broadcaster" covered the two on-air announcers and the producer. It stated that the male announcer worked for another RNZ station, the female announcer had moved to parts unknown and the producer worked for another broadcaster (not RNZ) in Auckland.

