The BSA and the Bill of Rights

A Practical Guide

Steven Price, May 2012

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Always begin with an assessment of the value of the speech – and state the corresponding level of justification required

Announce the result early in the decision

The more significant the speech, the more detailed the reasoning and the better reasons required.

Be particularly careful with proportionality analysis when upholding a complaint

Better identify the purposes underlying the standards

Assess how deeply those purposes are engaged in the case at hand

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If upholding a complaint, make the consideration of penalty part of the proportionality analysis

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Overview

Since its enactment in 1990, the NZ Bill of Rights Act 1990 ("the Bill of Rights") has been applied with increasing rigour by the courts. In its early years, much of the focus was upon its effect on the criminal law. More recently, attention has turned to its impact on administrative law.

It is clear that administrative (or quasi-judicial) bodies such as the Broadcasting Standards Authority (BSA) are subject to the Bill of Rights Act. When the BSA upholds complaints, it limits broadcasters' rights to freedom of expression. Under the Bill of Rights, then, those limits must be reasonable and demonstrably justified. This is often expressed as a requirement of "proportionality". But what does it mean? And how should it figure in the BSA's decision making on complaints?

This paper sets out to provide some answers.

The paper begins by introducing the concept of proportionality, describing it in general terms. Then it explains when it comes from and why it is useful. It describes the broad outlines of a recommended method of conducting a proportionality assessment.

In the next section the paper examines the range of High Court cases on appeal from BSA decisions. It extracts principles laid down by the judges relating to the operation of the Bill of Rights.

After that, the paper critiques the Bill of Rights analysis in six BSA decisions. It provides some recommendations about how the BSA's reasoning could better address the requirements of proportionality.

The paper concludes by setting out a framework for integrating proportionality into the BSA's general reasoning. Although this framework is unlikely to be required by the courts – at least in every case – it fits with the principles developed by the courts governing proportionality.

This paper has been peer-reviewed by Claudia Geiringer, a senior lecturer in public law at Victoria University of Wellington's law school and barrister specialising in Bill of Rights law. She agrees with the analysis and conclusions.

The paper draws from an article we wrote together, "Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority" published in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis NZ Limited 2008), 295.

Proportionality: an introduction

What it is

In essence, proportionality is a legal device used to protect rights. It seeks to regulate government encroachments on rights, while still allowing for legitimate government regulation. It does so by requiring that such encroachments can be justified by a process of reasoning, and that they do not do more harm than good.

The idea is that when rights are restricted, society suffers. So to be justified, the restriction should aim to achieve some particular social benefit, there should be good reason to think that the restriction will have some success, the restriction shouldn't be more severe than is necessary to achieve that benefit, and the gain to society of achieving that benefit should be greater than the harm to society by restricting the right. For example, a ban on the distribution of pamphlets to control littering would not be proportionate to the harm it does to free speech. The goal of a clean environment may be laudable, and it may be possible that banning pamphlets may contribute to it, but it clearly harms our rights to express ourselves through pamphlets more than it benefits the environment and there are other ways to control pamphlet littering short of a ban.

Thus, proportionality is a kind of check to ensure that the social benefit of a restrictive rule is commensurate with the social loss caused by the encroachment on rights. The more severe the restriction on the right, the more powerful must be the justification in order to be proportionate.

Where it comes from

The New Zealand Bill of Rights Act 1990 ("the Bill of Rights") sets out a menu of rights and freedoms that are regarded as foundational to democratic society, including freedoms of association, movement, religion and expression, rights to life and to vote, and freedoms from torture, discrimination and unreasonable search.

For the BSA, the most significant is section 14:

> **Freedom of expression – Everyone has the right to freedom of expression, including the right to seek, receive and impart information and opinions of any kind and in any form.**

These rights are not unlimited. Section 5 says:

> **…the rights and freedoms protected in this Bill of Rights shall be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

Thus, to comply with the Bill of Rights, any restriction on rights must be reasonable, prescribed by law, and demonstrably justifiable. This language draws from the Canadian Charter of Rights and Freedoms. In Canada, the courts have held that this requires proportionality between the

encroachment on rights and the harm social sought to be avoided. This has been accepted in New Zealand too. Thus, judges, academics and lawyers have come speak of "proportionality" as a shorthand for this section 5 test. I use it that way throughout this paper.

How it applies to the BSA

The Bill of Rights applies to bodies performing public functions, powers or duties conferred or imposed by law. The BSA fits this description. The Bill of Rights also requires that statutes are, as far as possible, interpreted consistently with the rights and freedoms in the Bill of Rights Act. The Broadcasting Act confers powers on the BSA; those powers must be interpreted and applied consistently with the Bill of Rights Act.

The upshot: when the BSA upholds a complaint and thereby restricts freedom of expression (by punishing that expression and by effectively creating constraints on broadcasters' future speech), it must first satisfy itself that its actions, including the penalty it imposes, are demonstrably justified, that is, proportionate.

The concept of proportionality

At one level, proportionality is a familiar concept. We have an instinctive sense about whether, for example, a particular punishment fits the crime. If a person were sentenced to 10 years in jail for littering, we would find that disproportionate. If we had to unpack that intuition, we might say that the severe restriction on the very important value of this person's liberty vastly outweighs the less pressing benefits to society in ensuring the law is respected and the countryside is clean.

Legal proportionality is not so different. It is about considering people's rights and assessing how far they are affected by a particular decision or rule or policy. It is about weighing that up against the social objectives for that rule or policy. For the BSA it is about assessing, in each case, how important the right to freedom of speech is, whether countervailing social objectives such as accuracy and privacy have been harmed, whether punishment is warranted, and how severe it needs to be.

Why bother with it?

Most importantly, it is required by law. This means that unless the BSA properly factors proportionality into its assessments, its decisions are very likely to be challenged on appeal, as has already occurred.

But there is another reason. Properly understood, proportionality analysis strengthens the quality of decisions. It does so in several ways. First, it puts a thumb on the scales in favour of rights. It puts an obstacle in front of anyone seeking to restrict rights and requires them to reason their way over it. Second, it forces decision-makers to reason in a way that focuses on competing principles. Third, it promotes consistency in decision-making.

Fourth, it may flush out errors in intuitive responses or factors that have been overlooked. A case from 1995 illustrates this possibility.[1] The BSA upheld a complaint against Deborah Coddington, hosting a talkback show on Radio Liberty called Freespeak, which told listeners it was a "programme which attacks bureaucracy, political correctness, fascism from the right or the left and anything else which endangers the freedom of New Zealand citizens." She described NZ on Air as "Nazis on Air", explaining why she was philosophically opposed to the broadcasting fee. She said:

> Don't pay your broadcasting fee. Refuse, like me, on the grounds that in this day and age somebody like "Nazis On Air" has no right to force ... to use force to extract this money from you. They will put the debt collectors onto you, as they have to me, but if enough of us don't pay they'll be stuffed. So let them come and get me. I'm waiting for you, commissars. I may, in future, be broadcasting from a holding cell in Mount Eden but I will still be right and you will be wrong. You may claim you are just doing your job. I remind you of the SS orderly at Auschwitz who, when on trial for injecting 300 inmates with carbolic acid into their hearts, replied, 'I did it on orders, of course'.

There were accuracy issues, which I need not discuss, but the BSA also held that the statement about Auschwitz guards violated the Good Taste and Decency standard.

If the BSA members were required to undertake a proportionality analysis, they would have found themselves asking questions such as: "How important was this type of speech?" And "How much harm was it doing to community morals?" They may well have arrived at the conclusion that the speech was essentially political. It was questioning a law, in a provocative way. It was about ideas and opinions. It invited debate. It was therefore actually the sort of speech that we usually value. What's more, the harm to community morals was likely to be low, given the absence of swearing or abuse, and the plain political focus. The discipline of a proportionality requirement may have altered their thinking, and the result.

How this fits with the BSA's task

I think it is best for the BSA to think of the Broadcasting Act and the Bill of Rights as operating together. The Broadcasting Act sets out a framework of standards, and the Bill of Rights constrains how they are to be applied. They go hand in hand. Proportionality is intended to be infused in the BSA's decision-making process, rather than acting as a check at the end.

How to conduct a proportionality assessment

The courts have not laid down a strict process for assessing proportionality. In fact, they have said that there may be a variety of ways of approaching it, though they have not set out a range of alternatives.

Asher J has concluded that a process of "structured reasoning" as set out in the paper I wrote with Claudia Geiringer would not – at least not always – be required. He suggested that the level of detail,

[1] 1995-140

structure and cogency of the justification required would vary with the type of speech involved. A decision upholding an Accuracy complaint against a serious piece of investigative political journalism would require a more methodical and convincing justification than a decision upholding a Good Taste and Decency complaint against a raunchy scene in a soap opera.

But he said that *some* proportionality reasoning would always be required. And it seems that the reasoning should at least address the importance of the speech at issue and weigh it against the harm being done by the breach of the relevant standards.

This comes fairly close to the sort of structured reasoning we advocated. And when the speech is significant, it may be that some sort of structured reasoning is required.[2]

The key point here is that even if this structured reasoning isn't required, or at least isn't always required, I still think it represents best practice. It is consistent with the signals being sent by the courts. If the BSA adopts it, or something like it, a judge on appeal is very likely to be satisfied that the Bill of Rights has been properly applied.

Overview of recommended proportionality test: structured reasoning

This method is not intended to be overly technical or detailed. In fact it can be seen as an unpacking of our intuitions about proportionality. In essence, it treats proportionality as a set of scales, looking first at one side, then at the other, and finally balancing them.[3]

What follows is an outline of that method. I provide more detail it in later sections of this paper.

First side of the scales: freedom of expression

One side of the scales represents freedom of expression. The task is to assess how weighty the free expression interest is in the particular case. How valuable is the speech? The Courts have recognised that not all speech has the same value. A current affairs documentary has more benefit to society than a commercial advertisement. A programme on the science of climate change has more benefit than a reality TV series. A soft-core porn movie with little plot or artistic merit may have little benefit to society.

This is not about elitism or snobbery. Programmes with popular appeal are not necessarily less valuable than "worthy" but stuffy documentaries. What the courts and free speech theorists have sought is some objective way of assessing the value of particular programmes – in order to work out how reluctant we should be to restrict them.

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[2] The term "structured reasoning" in the proportionality context comes from McGrath J in *Brooker v Police* [2007] 3 NZLR 99 at para [132].

[3] In other contexts, the courts have often referred to a test for proportionality developed in the Canadian case of R v Oakes [1986] 1 SCR 103. I don't think this approach is necessary – or indeed easy to apply - in the context of BSA decisions. The method that I'm suggesting is a simpler one.

The values underlying free speech

To evaluate the value of a particular programme, we can look at the *reasons* society benefits from free speech. Three are usually advanced:

1. **Assisting in the search for truth and the advancement of knowledge**. This occurs via what is sometimes called "the marketplace of ideas". The idea is that when competing views of the truth clash together in open debate, we have the best chance of arriving at the truth, or at least the best ideas about what is good or right. If we value speech for this reason, we value programmes that aim to provide factual information, that talk about social issues, that spark debate, that inject unconventional views, that look for experts and evidence, that seek to expose hidden truths or elaborate on less-hidden ones, or that equip audiences to understand and engage in thinking and debates. It particularly values programmes that are *motivated* by a search for truth or good ideas and that have devoted resources to that inquiry. This includes, for example, news, science documentaries, current affairs interviews, talkback about serious issues – and may also include things like children's programmes and drama.
2. **Facilitating democratic self-government**. Speech fosters democracy by acting as a vehicle for information, commentary and debate concerning our leaders and public institutions and their policies. It also includes programmes that provide information that allow us to better understand political issues – a documentary on climate change, for example. At its outer fringes, this rationale includes information, commentary and stories that help shape our critical faculties and political values – for example, literature that questions our attitudes to authority or teaches us about differing viewpoints (though this rationale perhaps applies with less force at these fringes). This rationale can be seen as a subset of the search for truth – it captures programmes seeking the best political truths.
3. **Promoting autonomy.** This rationale values speech that reflects our identities, expresses our culture and nurtures our intellectual, political and artistic growth. It says that speaking out is part of expressing who we are, and helps us develop as people. Free speech respects our liberty as individuals to choose what to say – and to what to hear. In a sense, all speech is expressing the personality of the author, and usually seeks to engage an audience. But this rationale values in particular speech that reflects and develops individuality and creativity – artistic programmes, drama, culture, programmes about personal viewpoints.

The better speech serves those purposes, the more useful it is to society. Note that the rationales overlap. A documentary by Bryan Bruce may sit at the heart of all three rationales, and therefore weighs heavily in the free speech scale. A spiderman cartoon may help teach children about good and evil, but would be unlikely to tip the scales so far.

Note that programmes designed to entertain may still reflect our culture and values, or issues that arise in modern society. For example, Asher J recognised the valuable social and satirical themes underlying the comedy-drama "Hung". But the social importance of a raunchy sexual exchange in a light television programme designed to entertain, for example, is of much lesser importance.

Some rules of thumb may be helpful in assessing the value of a particular programme. The Courts have spoken of a hierarchy of types of speech, with political speech at the core; scientific, religious and educational speech also very important, artistic speech ranking highly, commercial and mass-

entertainment speech having middling importance and things like pornography, privacy invasions without redeeming public interest and perhaps hate speech usually having low value. This "hierarchy of types of speech" maps closely onto the rationales discussed above. The hierarchy can be seen as a shorthand way of identifying programmes that particularly engage those rationales.

Some judges have suggested that asking whether a programme deals with matters of legitimate public concern is one way of assessing its value.

This need not be an elaborate assessment. A sentence or two will usually suffice.

Second side of the scales: The standards

The other side of the scales represents the significance of the relevant broadcasting standard in the particular case. It asks two questions: what is the standard protecting? And then: how important is it in this case? The first simply asks what the purpose underlying the standard is. Why has Parliament chosen to protect it? There is nothing objectionable about this part of the assessment being entirely boilerplate, and in fact, the BSA already often sets out the purpose of each standard as an aid to applying it.

Once the purpose is identified, the task is to assess how severely the particular broadcast damages that purpose. For instance, the controversial issues standards is about providing a range of competing viewpoints sufficient for viewers to make up their minds about important social issues. A programme about a proposed new law to increase the speed limit that only contained views supporting the change might be seen to seriously undermine the value of providing viewers with an informative range of competing viewpoints.[4]

Again, this need not be an elaborate assessment. What's more, it is usually very similar to the usual task of the BSA when it assesses whether a particular programme breaches a standard, and how seriously.

Balancing the scales

The final step is to balance the two sides of the scales. Does the harm to the standard outweigh the harm to the speech? Relevant to this will be the nature of the BSA's findings (free speech suffers less from a requirement that warnings be imposed or balance provided than a finding that something was inaccurate or offensive and should never have been broadcast) and the severity of the proposed punishment (free speech suffers less from a mere uphold than an order to broadcast a statement or an order taking the broadcaster or its advertising off-air).

So proportionality is just a methodology?

Yes and no. It is fair to say that for the BSA, proportionality is very largely about methodology, for two reasons. First, judges on appeal are mostly concerned to ensure that the BSA is taking the Bill of

[4] For a more detailed discussion of the rationales behind some of the different standards, and how to assess the extent to which they are harmed, see Geiringer C and Price S, "Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) Law, Liberty, Legislation (LexisNexis NZ Limited 2008), 326-335.

Rights seriously and to check that when the BSA upholds a complaint it sets out a transparent and robust proportionality justification. If that is so, they will be very unlikely to interfere with the BSA's decision. They often acknowledge the expertise of the BSA and the limited nature of the right of appeal against the BSA's discretion.

Second, if the Bill of Rights reasoning is transparent and robust, the discipline of that reasoning will probably keep the BSA from producing results that a judge would consider disproportionate anyway.

But at the end of the day, proportionality is about the result. If a limitation on speech is disproportionate in the eyes of an appeal judge, no amount of elaborate reasoning by the BSA will save it. It is possible that a judge will say the BSA asked all the right questions, but reached the wrong conclusion. But that is likely to be very rare.

Reference to cases

In the text and footnotes, I occasionally refer to court cases. These are mostly appeals from BSA decision to the High Court. The full references are set out in Appendix 1.

Guidance from High Court decisions

Problems with the High Court's jurisprudence

It is not easy to distil Bill of Rights guidance from the High Court decisions on appeal from BSA rulings. There are several reasons for this. First, as Wild J has put it, "our freedom of expression jurisprudence is still in an embryonic state".[5] For the first decade of BSA appeals, for instance, barely any attention was paid to the Bill of Rights.

Secondly, different judges have taken different approaches. For instance, some have found that the BSA need not apply the Bill of Rights in each individual case; others disagree.

Making matters worse, High Court decisions on BSA appeals are final. They cannot be appealed further. So the appellate courts cannot readily resolve the problems created by contradictory High Court approaches. Furthermore, the general guidance provided by appellate courts to the Bill of Rights has changed over the years. Compare, for example, the old leading case of *Moonen* (Court of Appeal, 2000) with the new leading case *R v Hansen* (Supreme Court, 2007).

Courts in other jurisdictions are grappling with similar issues, and reaching similarly disparate conclusions (see, for example, the recent *Denbigh High* case in the UK, where the Court of Appeal held that proportionality was essentially a matter of getting the methodology right; the House of Lords said it was about getting the result right).

Thirdly, the issues themselves are complicated. "Proportionality" is an unfamiliar concept in common law countries. Judges are still coming to terms with it themselves. They do not seem to be thinking hard about how to translate the concept in ways that are easy for decision-makers like the BSA to apply. The waters are further muddied by another complication: a High Court judge on appeal isn't necessarily asking how the Bill of Rights should be applied by the BSA. He or she is asking whether the BSA has botched the Bill of Rights reasoning so badly that an appeal should be upheld. So any guidance offered on appeal is often rather indirect.

In sum, the High Court decisions, taken together, are often inconsistent, opaque and unhelpful.

Some better news

However, the picture is not completely gloomy. In recent years, High Court judges have been grappling with Bill of Rights issues more regularly, and at greater length. Some relatively clear guidance is beginning to emerge. Even if it is not entirely clear precisely what approach is required, we are getting some idea of what not to do, and the broad outlines of a Bill of Rights methodology that is likely to withstand High Court scrutiny.

What follows is a set of principles that seem relatively firmly established by the cases, with particular emphasis on more recent decisions, decisions that have commanded the support of more than one

[5] *Browne*,para [28].

judge, and decisions that accord with the general Bill of Rights jurisprudence of the Supreme Court and foreign courts applying proportionality reasoning.

JUSTIFICATION IS REQUIRED

A decision to uphold a complaint is a restriction on free expression and needs to be demonstrably justified.[6]

It is now clear that the BSA may not uphold a complaint if it harms the broadcaster's speech more than is demonstrably justifiable (or proportionate) in Bill of Rights terms. The BSA has long acknowledged this in its decisions, its statements to courts, and even in a policy circular.

There is no one correct approach to proportionality[7]

There may be many roads that lead to proportionality. There is no one rigid methodology that must be followed. But whichever path is chosen, it must feature the key characteristics discussed here.

IS PROPORTIONALITY ABOUT THE REASONING PROCESS OR THE OUTCOME?

Proportionality is mostly about reasoning…

As Asher J put it, the proportionality analysis "should be articulated in the Authority's decision."[8] Boilerplate assurances that the Bill of Rights has been considered or bare references to generic statements in other decisions will not be enough. But if the proportionality analysis is done adequately, it seems that will usually be all that is required. Judges frequently indicate that they want to defer to the expertise of an expert tribunal.[9] They see their job as supervisory, and will usually be satisfied if they can see that the BSA has properly addressed the issue of proportionality.

…but in rare cases, proportionality is about the result.

That is, sometimes upholding a complaint will not be proportionate, no matter how comprehensive the BSA's reasoning, and the High Court will reverse the BSA's decision. This happened in *Freeman*.[10]

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[6] *West*, paras [90], [95], *KW* para [11], *Green* para [39], *Bolton* para [53], *Browne*, para [42], *BA* para [34], *VOTE* para [56], but see *MAF* at para [34] and *Holt* at [37]-[41].
[7] *R v Hansen* para [61], *West*, para [93], *VOTE* para [37]
[8] *West*, para [86], [95]; see also *BA* para [35]
[9] Eg *Browne*, para [52]
[10] See also *West*, para [97] quoting the House of Lords in *Denbigh High*: "…what matters in any case is the practical outcome, not the quality of the reasoning".

THE TWO SIDES OF THE SCALES

Proportionality is about balancing two things[11]

Proportionality is about weighing the value to society of the particular speech against the importance to society of upholding the standard. That is, a complaint may only be upheld if, in the particular circumstances, the social benefit of promoting the values underlying the standards outweighs the social harm of penalising and perhaps chilling the broadcaster's speech.

HOW DETAILED DOES THE JUSTIFICATION HAVE TO BE?

The detail of the Bill of Rights reasoning and the strength of the justification required depends on the significance of the speech in the particular case[12]

In most cases, the proportionality reasoning need not be lengthy and detailed. In run-of-the-mill cases about Good Taste and Decency in a soap opera, or minor inaccuracies in a news programme, or name-calling on sports talkback, a succinct summary of reasons - without breaking the reasoning down into a series of steps - will be sufficient. But if the decision may penalise more important speech, a stronger and more elaborate justification is needed.

THE FIRST SIDE OF SCALES: THE VALUE OF THE SPEECH

When assessing the importance of speech, consider the type of speech

What counts as more important speech? The courts distinguish different types of speech, which are of differing values to society. Most important is a significant political programme.[13] Intellectual or educational speech that contributes to our development as citizens is also important.[14] Serious investigative reports into pressing social issues will count as important speech. The courts have suggested that "public interest" or matters of "legitimate public concern" are indications that speech is socially important.[15] Artistic speech is also significant. [16]

Another way of looking at this is to "assess the extent to which the values underlying free speech are implicated by a particular exercise of the free speech right", as Mallon J acknowledged in *Green*.[17]

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[11] See eg, *Green* para [39], *Bolton* para [53], *VOTE* para [52]
[12] *West* paras [[97]-[109]
[13] *West*, para [108]
[14] *West*, para[99]
[15] See, for example, Tipping J in *Hosking v Runting*, cited below.
[16] *West*, paras [99], [100]
[17] Para [60]

The assessment of importance is not about truth or falsity[18]

The question is whether it's the type of speech that contributes to society, not whether it's right. If it's inaccurate, that may well be a good reason to restrict it. But that's part of the other side of the equation.

The severity and likely effect of the penalty may increase or decrease the severity of the impact on free speech[19]

Merely upholding a complaint without further penalty restricts speech less than requiring a statement to be broadcast.[20] It is relevant that many of the BSA's penalties do not greatly impinge on speech. On the other hand, ordering a broadcaster off-air requires an extremely strong justification.

The BSA should also look to the impact on broadcasters of the precedent it is setting. (Technically, BSA decisions do not create legal precedents, but courts and commentators have emphasised the value of consistency in decision-making, so broadcasters can expect similar cases to be decided the same way in future, and amend their behaviour accordingly). For example, if the BSA were to require a balancing view for every criticism expressed, it would be placing a great constraint on broadcasters – a constraint that has potential to chill news and current affairs reporting. That requires particularly robust justification. It is not just the effect on the individual broadcaster that needs to be considered. It is the effect of the rule the BSA is effectively creating.

THE OTHER SIDE OF THE SCALES: THE HARM CAUSED BY THE SPEECH

A strong justification is one that identifies the social purpose of the relevant standard, and explains why it is particularly important in the current case

This is clear from the way the judges analyse decisions on appeal. For example, in *West*, Asher J praises the BSA for following this process, albeit in a rather truncated way.[21] Courtney J in *KW* identifies "the public's interest in being able to have confidence in the reliability of factual media reporting" as the purpose of the Accuracy standard.[22] Mallon J in *Green* closely examines the degree of unfairness in naming and shaming a convicted drunk driver, in assessing whether it is sufficient to outweigh the powerful free speech interests in reporting on courts.[23]

Another way of looking at this is to ask what harm is being done to society by the breach of the standard. Sometimes, the harm to the interests that underpin the standard will be quite low. This is what Simon France J concluded in *Freeman*, as discussed below.

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[18] *KW*, para [9]; *Bolton* para [50]
[19] *West*, [101], *KW* para [12]
[20] See *VOTE* para [57]
[21] Para [107]
[22] *KW* para [16]
[23] *Green* paras [61] and [62].

THE BALANCING PROCESS

It may not be enough simply to list factors on each side of the balance. It may be necessary to explain how those factors contribute to the conclusion.[24]

At least, where there are some apparently powerful factors on one side of the balance and the decision goes the other way, it may be necessary to explain why those factors were outweighed.

[24] *Freeman*, para [24], albeit in the context of relevant considerations.

Critique of selected decisions

Swearing police officer in Aramoana item

Freeman v TVNZ 2011-001

This complaint was upheld by a majority of the BSA and overturned on appeal. It concerned a police officer who was interviewed about his involvement in the shooting of David Gray after the massacre at Aramoana, 20 years previously. Recounting the events, the officer twice used the word "fucking" in the course of quoting what he and Gray had said. The item was part of a current affairs programme, broadcast at 7:30pm. The majority held that it breached standards of Good Taste and Decency and Children's Interests. I focus on the majority's reasoning.

Simon France J upheld the appeal[25] largely because the majority had failed to properly consider the context of the use of the swear words, fettering its discretion by applying a rule against the use of this swear-word as if it were an absolute requirement.

But he also upheld the appeal on Bill of Rights grounds, saying:

> In terms of the New Zealand Bill of Rights Act 1990, I consider that requiring the deletion of this word from the programme is an unjustified limit. Whilst the children's interest standard was rightly accorded high value, so too was the programme. Within that programme the word occurred as part of an accurate narration of past events, it was used in context, and had no stand alone emphasis. The slot was within the period that might mean some children were watching or present, but the programme was not itself likely to be of interest to children. The words occurred halfway through it and were preceded by a general language warning that would have alerted parents. Balancing these factors, and the general context earlier discussed, in my view a prohibition is not a reasonable limit.

I refer to this decision as an example of a case where the judge found that the proportionality assessment was wrong. He also went further and found that the result was itself disproportionate.

Before I consider what went wrong in that case, I think it is right to focus on the considerable amount that the majority BSA members got right:

- They referred to the Bill of Rights at the beginning;
- They rated to the speech as "high value" and provided reasons for this;
- They recognised the significant public interest in the programme;
- They made some mention of "underlying values" of free speech;
- They identified contextual factors favouring the expression;
- They identified the objectives underlying the relevant standards, then evaluated their significance;

[25] *Freeman*

- They provided reasons and evidence relating to these objectives;
- They assessed the significance of the proposed limit and found it slight;
- They talked of "weighing" the various factors;
- They imposed no penalty beyond upholding the decision.

This is very close to all the elements of a proper proportionality analysis.

Failure to evaluate the harm to the standard in this case

The majority's fundamental error is revealed in the judge's reasoning, and it is one that I think is fairly common throughout the BSA's jurisprudence. It concerns the second side of the scales. Certainly, the majority did assess how important the relevant standards were. But as I discuss below (in the pages dealing with the *SP* case), Parliament has already told us that all the standards are important. What the majority never really asked was "how important is the harm to the rationales underlying the Good Taste and Decency and Children's Interests standards *in this case*?".

Had they asked that question, they may have concluded: "not very important", for the reasons the judge discusses. The swear word wasn't emphasised, it was broadcast in context, it came halfway through the show, it wouldn't be of any interest to children, and there was a warning that minimised the dangers.

Failure to refer to relevant factors

The second problem is that the majority didn't even list several significant factors that suggested that the harm to the standards in this case was low – such as the diffidence and thoughtfulness of the police officer's account, the extreme emotionality of the moment he was describing, and the fact that the word was not used gratuitously – even though these were dealt with at some length in the dissenting decision.

I would add that social science research suggests that fleeting swear-words that are not used in a sexual or aggressive way are not harmful to the development of children.[26]

Inadequate identification of underlying purpose of standard

Related to this, I suggest, is another problem with the majority's reasoning. It's hard to assess harm to a particular standard without closely identifying what it's for. The majority identified the purpose of the Children's Interest standard as being "to protect children from content which is unsuitable for them". But this hardly helps. What is "unsuitable"? What is being guarded against here? If the purpose of this standard were unpacked further, I suggest that it would be about protecting children from material that may disturb them or harm their moral or intellectual development. Looked at that way, it is more difficult to identify the harms that the broadcast does to the interests of children.

These points, admittedly, do not apply with the same force to the Good Taste and Decency standard.

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[26] Timothy Jay "Do Offensive Words Harm People?" Psychology, Public Policy, and Law 2009, Vol. 15, No. 2, 81–101

Over-emphasising evidence of only partial relevance

To assess suitability, the majority turns to a survey of what most adults regard as unsuitable for broadcast. I am not saying this material is completely irrelevant. But I think it should be recognised that it's not quite on point. The issue is really what's necessary to protect children from identified harms, not what some adults might regard as suitable.

Failure to specify the high threshold for justification

This problem relates to the first side of the scales: the assessment of the value of the speech. The majority generally does this well. It concludes, for all the right reasons, that the speech is high-value. But it does not take the logical next step: expressly requiring a greater-than-usual justification for restricting it.

Failure to balance

The judge criticises the majority for failing to put it all together: to explain why it is that the harmfulness of the swear words isn't outweighed by the context of their use and the importance of the underlying speech.

Conclusion

This has been a detailed critique – probably an overly detailed one. But it mostly boils down to the need for a more searching evaluation of the real harm, particularly where, as here, the speech was high-value.

My suspicion is that if the majority members conducted a more detailed proportionality assessment as suggested, they would find it hard to convincingly flesh out their reasoning, which is a signal that the decision isn't proportionate.

But it is possible that the majority members may still have reached the same conclusion. Reasonable people can disagree. The judge may still have reached a different conclusion. But it would have been much harder for him, since he couldn't simply say that the majority omitted a discussion of context and didn't explain why the harms outweighed the importance of the speech that they had identified.

"Jesus the Cold Case"

Axford, Bate and Oldham v TVNZ 2011-115

In this case, the BSA rejected complaints that Bryan Bruce's authorial documentary (suggesting that early Christians rewrote history to blame Jesus's death on the Jews) was inaccurate, unfair, unbalanced and discriminatory.

This decision represents a refinement of the BSA's usual approach to Bill of Rights issues. It seems to be influenced by the High Court's jurisprudence, and by my article with Claudia Geiringer,[27] which is cited. Perhaps it will come as no surprise, then, that I find much to admire in it:

- The decision establishes the centrality of the Bill of Rights at the outset. The BSA signals that it recognises that its work raises free speech issues and that the Bill of Rights constrains its powers. It uses the Bill of Rights as a framework for its decision, rather than a postscript.

- The decision commences with a sophisticated assessment of the speech at issue. It recognises that the importance of the speech depends on the underlying values, the type of speech, and the public significance of the topic. It explicitly identifies the values (self-expression and advancement of knowledge) and the type of speech ("intellectual opinion on an historical and religious topic"). It rightly concludes that this speech ranks highly in terms of free speech values. (Indeed this reasoning could have been bolstered by reference to the plainly serious spirit and intent of the programme-maker and the significant resources devoted to his inquiry). The decision may be read as suggesting that the programme doesn't touch the upper echelons of political or scientific speech, which seems right too.

- The BSA then succinctly identifies the upshot of this characterisation: "a strong justification is required" before the complaint could be upheld. In exemplary fashion, it has described the parameters of its task.

- The BSA makes a powerful and perceptive point (at para [17]) that the novel viewpoint that Mr Bruce is injecting into the debate is particularly valuable in free speech terms.

- This approach also reflects the degree of detail and justification Asher J in *West* suggested is required for more significant programmes.

- The BSA then turns to the standards. In each case, it identifies the purpose for the standard. This readily facilitates its discussion of how deeply those purposes are engaged in the case, which is in any event often very similar to the sort of reasoning the BSA usually uses when applying the standards.

- In reaching its conclusion on Accuracy, the BSA also refers to the balance between the harm to the standard alleged and the importance of the right to free speech.

[27] Geiringer C and Price S, "Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis NZ Limited 2008), 295

- In its overall conclusion it draws attention to the free-speech value of unorthodox viewpoints that stimulate thought and discussion on significant matters, and explicitly weighs this against the alleged harms to the values underlying the standards, finding that upholding the complaints would be an unjustified restriction on the speech involved. This conclusion is consistent with and explained by the whole thrust of the decision.

- The BSA utilises this approach even though it does not uphold the complaint, so it is ultimately not limiting speech in a way that requires a proportionality justification. But this makes sense: the BSA is required to exercise its powers consistently with the Bill of Rights and this also ensures consistency in decision-making. In addition, it would be odd for a different framework to be applied to non-upheld decisions. Further, the framework can make it easier to explain the decision not to uphold, as here. Finally, robust proportionality reasoning will make the decision easier to defend on appeal from a disappointed complainant.

Any criticisms seem minor by comparison.

- I am not sure that the BSA conducts that second stage of the proportionality inquiry as well as it might. This assessment is about how important the standard *is in the circumstances*. Since the BSA characterised the programme's speech as significant, it might be thought to follow that the values underlying the relevant standards are also important here. That is, isn't it also important that viewers be given balanced and accurate information about this important topic? If the subject is important to society, then society can be more greatly harmed by inaccurate and one-sided accounts. But the BSA reaches no such conclusion, and in fact doesn't even make the assessment.

  If the BSA had decided that Balance was particularly important for this programme, the BSA should then be reluctant to find that the standard doesn't apply. Instead, the BSA reads down the Balance requirement. It concedes, with some understatement, that the matters discussed "could be considered controversial". It then reads the Balance standard to require "topical currency", and says this programme involves only "issues of historical interest".

  There are two problems here. First, given the number of Christians for whom religion is very important in their daily lives, there seems a strong argument that this debate *is* topical.

  Secondly, the requirement of topicality is not apparent on the face of the Controversial Issues/Balance standard. While the BSA seems justified in noting that topicality will usually be a central feature of most "controversial issues of public importance", I think that this may be one of the rare subject-matters that, even if not "topical", still falls within the purposes of the standard. In short, if Balance matters here, why was the BSA taking such a miserly approach to it? (Bear in mind that upholding a Balance complaint also does less harm to free speech values that upholding many other complaints, because it requires *more speech* and perspectives to be added to a debate, and thereby promotes the values underlying free speech.

None of this is to question the powerful cogency of the BSA's other reasoning on Balance: that the programme was clearly authorial, the traditional view of Christianity widely known and acknowledged in the programme, and the programme as a whole advanced free speech values by adding a fresh perspective to the debate. These matters seem to amply justify the BSA's conclusion.

- A similar point can be made about the reasoning on Accuracy. As discussed above, it seems that if the BSA had assessed the importance of the Accuracy standard in this case, it would have concluded that it was particularly important for the public not to be misled about material matters in a broadcast about something this important. That would suggest the BSA ought to have taken care not to be dismissive of these values.

  But again, the BSA applied the standard narrowly by categorising the whole programme as analysis comment or opinion. I haven't seen the programme, the alleged errors, or the evidence about them, but I do wonder whether all the statements that were challenged were really plainly expressions of opinion. A programme that is clearly largely personal opinion can still contain some assertions of fact – assertions that may be very central to the reasoning, very compelling and very wrong. The standard surely applies with particular force to such statements. The BSA seems to reason that viewers will not be misled if most of the programme is opinion. I'm not sure this follows, and I wonder whether this approach sells short the values on this side of the equation.

  Still, this is not to question the BSA's conclusion that the particular matters were incapable of proof, or that in general statements that fall on the borderline between assertions and commentary should be treated as opinion in a context like this. These parts of the reasoning seem unassailable.

In making these criticisms, perhaps I am not sufficiently acknowledging the central thread of the BSA's reasoning: that because the documentary was plainly authorial, the audience knows that the account advances an argument and lacks other perspectives, the values of viewpoint-diversity and factual integrity are less engaged.

A final point. The decision makes several references to the audience's right to receive information. This is certainly part of s 14 of the Bill of Rights Act. But it is not unproblematic. What information does the audience have a right to receive? And who then has a duty to provide it to them? What if TVNZ decided not to broadcast the documentary, or wanted to edit it against Mr Bruce's wishes? Do viewers have a right to receive that? If they have a right to receive it in any form, as s 14 suggests, can viewers ask for a copy to be emailed to them? If the documentary was – without advance billing – full of nudity and swear words, would we say the audience had a right to receive it? I raise these questions merely to alert the BSA to the vexed nature of this "right to receive", not to criticise the way it is used in the decision, which does not seem objectionable.

Conclusion

With perhaps one exception, the framework used by the BSA in this decision seems thorough, principled and robust. If this approach were used consistently, I expect it will be very rare for a court to overturn the decision on Bill of Rights grounds.

Labour's "kiss your assets goodbye" election ad

Radley and Angus v TVNZ 2011-142

This was one of a series of complaints alleging the inaccuracy of election advertisements. None were upheld. This ad said:

> If you think power prices are high now, wait until we don't own a damn thing. You have a choice: vote National and kiss your assets goodbye, or vote to own your own future.

The complainants noted that National policy was only to sell 49% of selected assets; ownership would be retained.

The decision begins by noting the effect of the Bill of Rights and emphasising the very high importance of political speech and the corresponding need (reflected in the code itself) to provide leeway for debate and advocacy. As a result, the BSA says "a correspondingly high threshold must be reached before the Authority would intervene and uphold a complaint as a breach of the accuracy standard."

This opening strikes me as very good, though it could have been strengthened by a sentence about the particular speech. This ad was evaluating a policy that was central to the election campaign, that would have a large effect on New Zealand's fiscal position, and that was attracting much debate. It wasn't just political speech. It was political speech that falls right at the very core of the reasons we value political speech.

The BSA goes on to identify the relevant standard, but does not outline its underlying purpose. This may be a counsel of perfection: the underlying purpose is pretty clear in an Accuracy complaint.

More significantly, the decision does not go on to ask: how important is that purpose in this case? That is, what harms might inaccuracy do in these circumstances? I suspect the BSA ought to have acknowledged that inaccurate political claims made on television in order to influence people to vote a particular way could cause great harm indeed. In fact, that harm might be exacerbated by the fact that these ads are designed to appeal to swing voters who may not be very informed about the issues. And the error identified by the complainants is a significant one: National was not going to sell the assets outright, and was not proposing to divest the country of the "ownership" of anything. Nor is there much ambiguity in this advertisement. It is factually wrong, and at the very least misleading. It is hard to see that as being other than deliberate.

A proportionality methodology calls on the BSA to confront the strength of the countervailing arguments, and I don't think that was done here. It didn't help that the complainants themselves did not present the arguments in their most compelling form.

Once again, however, this is not to say the BSA got this decision wrong. The BSA was within its rights to conclude that the ads would be understood as political rhetoric, were different from commercial claims, and were broadcast in a context of extensive coverage of the facts about the assets sales. It was fair to say that these factors significantly reduce the harm done by the ad to values of broadcasting probity.

The BSA could even have added that political speech is often caustic and even reductivist, that the claim had a broad element of truth, and that a governmental agency ought to be particularly wary of exercising its power as an arbiter of political truth. It was open to the BSA to find that upholding the complaint would have placed an unjustified limit on free speech.

But even in reaching this result, if the BSA had addressed the concerns about the social importance of accurate political information, it might have been more inclined to gently chide Labour for the ad's excesses rather than saying the ad was "well within the limits of acceptability in the context of a robust election campaign".

Even though the complaint was not upheld, the reasoning ends up strengthening the decision by infusing it with principle, without adding unduly to its length or complexity.

Conclusion

This case displays strong proportionality reasoning on the free speech side, but perhaps less so on the contrary-objectives side.

Noise control show

SP v TVWorks 2010-112

Here, the BSA upheld a complaint against a reality TV show for treating a woman unfairly after she was filmed being spoken to by a noise control officer who had asked her to come outside and had provided, at best, minimal warning to her that she was becoming part of a reality TV show.

This case raises some Bill of Rights issues that are common to many upheld complaints.

Assessing the importance of the speech

The decision does not commence with an evaluation of the importance of the particular speech. As it happens, this creates some problems. In para [54] the BSA characterises the programme as an "entertainment show", perhaps implying that it is low value speech. This raises the broadcaster's hackles, as they point to earlier case law they say treats reality TV as "news".

I haven't seen *Noise Control*, but I suspect the better assessment lies between these poles. Here is what Allan J had to say about a similar reality TV series, Fire Fighters, in the context of deciding whether there was public interest in the programme: [28]

> [91] … I would have upheld [TVNZ's] defence of legitimate public concern. The television series, while providing a certain level of entertainment, nevertheless had a serious underlying purpose. The entertainment aspect is not to be taken as somehow cancelling out that purpose.
>
> [92] The programme was not primarily about road safety. Its focus was on the lives of fire fighters and their work, but there is an undoubted public cost to road accidents, and the impact of such accidents attracts a significant level of public concern. …

Allan J was not assessing free speech values. But he was pointing out, I think, that there can be a degree of educative value in watching the lives and stresses of officials charged with carrying out public duties in connection with issues that affect us all, and learning about the rules they are enforcing. That value might well be lower in a programme about noise control than one about fire fighters, but it hardly reduces the programme to the level of mere entertainment.

I rather think it would have been better to acknowledge that value at the outset, and record that this means any uphold will need to be adequately justified, but not to the compelling level of, say, a complaint against a serious political documentary.

The two-step approach to the Bill of Rights

The case adopts what seems to be the current BSA's standard approach to the Bill of Rights when a complaint is upheld. That is, it first analyses the facts and reaches a preliminary conclusion about whether the relevant standard has been breached. If it thinks there is a breach, it conducts a separate analysis of whether the decision just reached would impose a justified restriction on

[28] *Andrews v TVNZ* (15 December 2006, HC Auckland) CIV 2004-404-3536, paras [91]-[93]

speech. In this second stage, it identifies the purpose of the standard, then summarises its earlier arguments as a proportionality analysis.

There are some benefits to this approach. It shows that serious consideration has been given to the Bill of Rights. It is no mere boilerplate. The discussion is focused around the purpose of the standard. (Sometimes the BSA also discusses at this point why the uphold decision does not seriously threaten speech). No doubt judges would approve of all this.

But ultimately, this approach seems flawed to me. I say this for five reasons. First, and most importantly, are we expected to believe that there will ever be a case in which the BSA finds a breach then concludes, after a proportionality analysis, that upholding the complaint cannot be justified? I'm not aware that there has ever been one. Once again, it looks like an exercise in self-justification. This impression is exacerbated by the BSA's tendency to use exactly the same reasoning. It reads like a rubber stamp, confirming a decision already reached.

Second, there is a strong argument that the step-one reasoning about breach itself must be conducted consistently with the Bill of Rights. How can the BSA reach a conclusion about breach (which in itself would amount to a censure of sorts) without ensuring it is proportionate? This first-step also seems to lock in the BSA's thinking before it gets to the proportionality analysis.

Third, it makes the BSA engage in much the same reasoning twice.

Fourth, the reasoning does not (or doesn't much) address the question of the value of the speech, as discussed above.

Fifth, the reasoning doesn't deal with penalty. The punishment is a significant component of the harm being done to speech. Ideally it should be part of the overall balancing.

I think these problems are easily dealt with. The solution is for the BSA to set out the result and the penalty immediately after describing the background to the case, assessing the value of the speech and recording its conclusion about how compelling the justification needs to be. Then the rest of the decision can be devoted to an integrated analysis explaining the justification for the upheld complaint and the penalty. (If separate submissions are to be invited on penalty, they can be integrated in the final draft). The discussion can commence with the purpose of the standard, then much the same reasoning about whether it has been breached and how badly. The BSA often sets out the purpose at this point anyway: it helps in the assessment of whether the standard has been breached. (This approach is further explained below).

I don't see this as a big change. I am inclined to think the BSA is making a serious and ever-improving attempt to grapple with proportionality issues in its general reasoning anyway. This would avoid the awkward two-step approach.

Another unnecessary piece of Bill of Rights reasoning

In this case, as in many others, the BSA begins its assessment of the Bill of Rights by asserting that the particular standard in issue is itself prescribed by law and is (in general) a demonstrably justified restriction on free speech. The BSA cross-references its discussion in an earlier case (here *Commerce*

Commission v TVWorks 2008-014). Sometimes (though not in this case) the BSA will then assess the importance of the standard in general.

I don't think any of this is necessary. I don't know that the BSA needs to constantly repeat that the standards are prescribed by law. Nobody has ever questioned it. All the High Court decisions can be taken to proceed on that assumption. *TV3 v BSA* approved the legality of Privacy Principles, which probably raise the most difficult "prescribed by law" questions.

The same goes for whether the standards themselves are reasonable or demonstrably justified. Again, no one has raised this issue. It's hard to see how they could: the standards track closely with (and sometimes explicitly mirror) the Broadcasting Act provisions, and the codes were developed with the broadcasters, as Wild J points out in *VOTE*.[29] They are expressed at a level of generality that makes them difficult to challenge.

What's more, the decisions the BSA continually cross-references don't contain any particularly convincing justification, and sometimes barely address the question at all.

Finally, there is no reason to assess the general importance of each standard. They are all based on principles identified by Parliament as significant enough to include in the broadcasting standards regime. The BSA can take it for granted that, in general, they represent important social values. (Privacy is arguably of particular importance in that, as the BSA notes occasionally, Parliament has singled it out for the remedy of damages. But this is probably because privacy violations are especially capable of harming individuals, whereas breaches of standards such as Controversial Issues/Balance harm society as a whole. It doesn't make the Balance standard less important). The question will always be: *how important are those values in the particular case?*

For the BSA, proportionality is about particular contexts.

I would recommend deleting paragraphs of this sort.

Conclusion

This critique applies to almost all recent upheld complaints. It suggests axing the two-step approach and adopting a framework that integrates the Bill of Rights analysis and the general reasoning, making the decision simpler and more coherent.

Would this approach have changed the outcome in this case? Probably not. An explicit assessment of the value of the programme may have put a little more weight in the free speech scales for the BSA. But the harm to the woman's dignity and reputation and the values of just treatment of participants was arguably strong. And the BSA's care in constraining the scope of the ruling (and the penalty) meant that the restrictive (and punitive) effect of the decision was minimised in a way that a High Court judge would be likely to find proportionate.

[29] Para [36]

***Criminal Minds* torture scene**

King v TVNZ 2011-030

In this decision, the BSA upheld a complaint that an episode of *Criminal Minds* breached standards of Violence, Good Taste and Decency and responsible programming because of a graphic torture scene.

Many of my comments will by now be familiar. The BSA does well to acknowledge the Bill of Rights issue at the outset and to identify the key issue of demonstrable justification. Its two-step approach seems awkward, but at least sets out a principled justification.

Discussion of the values underlying the speech

The BSA also does well to explicitly recognise at the outset the relevance of "the values underlying the right to freedom of expression". It is odd then, that those values are nowhere discussed. Again, I'm not familiar with *Criminal Minds*, but it would have been helpful for the BSA to say something like:

> Criminal Minds is a serious drama broadcast primarily for the entertainment of mature audiences, but it also provides information and explores issues about the workings of a criminal justice system similar to ours, the pathology of criminals, the content of the law, values of good and evil, and the techniques and challenges of criminal investigation. The values underlying freedom of expression are therefore engaged to a moderate degree.
>
> Thus any restriction on its broadcast by upholding a complaint requires adequate justification under the Bill of Rights, but not to the compelling level of, say, a serious political documentary.

Discussion of the values underlying the standards

The BSA goes on to analyse the application of the standards, and rightly focuses on context. But in this general part of its reasoning, it does not set out the purposes of the standards, as it sometimes does in other decisions. This is a pity. Explicitly setting out the purposes underlying the standards up front has three strong benefits:

1. It helps to construe and apply them – making it easier to determine whether and how badly they have been breached;
2. It promotes consistency of decision-making;
3. It channels reasoning into the discussion of the values and principles that proportionality requires.

The contextual factors favouring TVNZ relied on by the BSA in this case fit neatly into this framework. If we say that the purpose of the Good Taste and Decency standard, for example, is to reflect and preserve community norms of decorum and civility and to protect viewers from material that may disturb or offend them, then the contextual factors all demonstrate that these goals are not greatly undermined by *Criminal Minds*. Equally, the other factors discussed (the horrific nature

of the violence, the vagueness of the warning, the likelihood that audiences would not have expected this level of violence) show that the broadcast is indeed causing serious harm to the values protected by the standard.

Again, these changes in approach are unlikely to have affected the result.

I note that in the second stage of the decision, when it turns to the Bill of Rights, the BSA does identify the purpose of the standards. But again, it feels like a postscript. The BSA also engages in an unnecessary consideration of whether these purposes are important in the abstract. Then it reprises its reasoning for finding that the standards have been breached. This would of course be unnecessary if the integrated approach discussed above were adopted.

Assertions about the minimal effect on free speech

The BSA does add one extra element to its second-step analysis. It considers the extent to which the upholding the complaint would limit speech (not much, it says, since TVNZ merely needed to screen the programme later.) This is sensible, and is certainly an aspect of proportionality analysis. Of course, if there were any other penalty (such as an order to broadcast a statement), that would need to be factored in too.

However, there is a danger that a narrow focus on the minimal effect on the speech in the particular case might overlook the potential wider consequences of a BSA decision. For example, if the decision on what level of violence is acceptable creates confusion among broadcasters because of its vagueness, or is very far-reaching, it may cause broadcasters to have to devote extra resources to vetting the programmes they screen, or they may become overcautious and screen programmes later that do not need to be shifted, which may limit their audiences.

Another example may make this point better. If a BSA decision held that a particular interview was unfair because it was overly confrontational and set the bar for a complaint low, it may not seem like much of an imposition on speech in the individual case: “the broadcaster needed only have been more polite and not interrupted as much: there was nothing to stop it conducting the interview”, the BSA might reasonably claim. But this may understate the effect of such a decision. If the limits of the decision are not clearly stated, or if they are and they go too far, broadcasters may become wary of conducting challenging interviews, may soft-pedal their questioning, and may conduct fewer and less useful interviews. Thus, the BSA’s ruling may chill broadcasters’ speech, even in connection with later programmes that the BSA may not have upheld any complaint against.

This points up two things. First is the need for the BSA to consider the likely general impact of its decision as well as its particular impact on speech in the case before it. Second, it highlights the need for the BSA to carefully define the restrictions it is imposing so they do not sweep more widely than the BSA may have intended. In the *Criminal Minds* case, it seems to me that this was done well, because the BSA clearly explained what it was about the programme that breached the standard.

But broadcasters may have been left in some doubt about whether a more specific warning would cure it. The finding that the programme should have been screened in a later timeslot suggests not. But the earlier reasoning can be read to suggest that the lack of an adequate warning was a pivotal part of the decision, implying that had the warning been adequate, the programme could have been

screened at that time. This second interpretation is less restrictive; if it is the one the BSA intended, it would perhaps have been wiser to have been clearer about it.

Conclusion

I have made some criticisms about this decision. But I doubt that a High Court judge would overturn it on appeal. The justification is clear; the Bill of Rights is considered. My suggestions then are largely about fleshing out the proportionality analysis and better integrating it into the decision.

Reformed solvent abuser case

MQ v TVNZ 2011-033

In this case, the BSA upheld Privacy and Fairness complaints brought by a man identifiable in embarrassing 10-year-old footage as a solvent abuser. The programme was a re-run of an episode of reality-TV series *Police*, first screened in 1999, and the man had been rehabilitated and moved on with his life.

This decision raises many of the same issues already discussed about the absence of an assessment of the value of the speech, for example, and the awkward two-stage analysis.

I have chosen it to illustrate two points which have more general application: the way the purposes of the standards are defined, and the evaluation of penalty.

Before that, however, I turn to a brief point about the BSA's assessment of the public interest defence to a claim of invasion of privacy (paras [32] to [34]). In *Hosking v Runting*, the Court said that the public interest defence was a manifestation of proportionality:

> The importance of the value of the freedom of expression therefore will be related to the extent of legitimate public concern in the information publicised. Phillipson refers to proportionality which captures the interrelationship between the competing values. (Gault P and Blanchard J, (para [132])

Tipping J elaborated further, at para [235]:

> What I am suggesting is that the nature of the information imparted may well have a bearing on the reasonableness and justifiability of the limitation in issue. This is a manifestation of proportionality. The more value to society the information imparted or the type of expression in question may possess, the heavier will be the task of showing that the limitation is reasonable and justified. As already noted, the proposed tort of invasion of privacy recognises this through the defence of legitimate public concern. There may well be a greater potential for legitimate public concern about information imparted as part of the marketplace of ideas or in support of the democratic process than there is with information, the imparting of which is supported only by the abstract theory of liberty.

Thus, the defence of legitimate public concern reflects the value of the speech. The more significant the speech, the better the justification must be in order to limit or punish it – that is, the worse the invasiveness of the privacy violation must be.

In *MQ*, the BSA has applied this proportionality nexus between privacy and public interest in exemplary fashion, noting that "the more substantial the breach of privacy, the greater the degree of legitimate public interest necessary to justify the breach", and balancing the invasiveness of the broadcast against the limited public interest in the particular footage. This is the stuff of proportionality.

Identification of the purposes of the standards

In some of the case critiques above, I discussed concerns that the identification of the underlying purposes comes rather late in the day (that is, in an awkward second-stage) in decisions like this one. Here, I focus on the definition of those purposes. These need to be identified carefully. The BSA needs to have a good sense of what interests Parliament was trying to protect, in order to assess whether and to what extent they are engaged in each case. I made a similar comment about the Children's Interests standard in the *Freeman* case.

The first standard under consideration in this case is Privacy. The BSA says the purpose of this standard is "to protect individuals' right to privacy". I am afraid this is rather circular and unhelpful. Admittedly, privacy is a notoriously slippery concept, and Parliament has provided no guidance in the Broadcasting Act. But there is a body of theory about what privacy is all about.[30] In order to give more substance to this rationale, I wonder whether the BSA might develop something more elaborate, along the following lines:

> In our view, the privacy standard exists to protect individuals from undesired informational and observational access to themselves and their affairs, in order to maintain their dignity, choice, mental wellbeing and reputation, and their ability to develop relationships, opinions and creativity away from the glare of publicity.

There is no magic in this particular formulation. Others may serve just as well. But it indicates the richness of the interests underlying the right to privacy, and is likely to prove useful (to the BSA as well as to broadcasters and complainants) in evaluating the seriousness of any particular alleged invasion – and weighing that seriousness against the harm to free speech in upholding a complaint.

The BSA offers a more detailed account of the values underlying the Fairness standard in this case:

> One of the purposes of the fairness standard is to protect individuals and organisations from broadcasts that provide an unfairly negative representation of their character or conduct. Programme participants and people referred to in broadcasts have the right to expect that broadcasters will deal with them justly and fairly, so that unwarranted harm is caused to their reputation and dignity.

This rationale provides clear guidance about the values concerned. It also recognises that in other contexts (allegations that a reporter broke a promise for example), other values may be involved.

Evaluation of penalty

The BSA imposes a penalty of $1000 damages and $1000 in costs to the Crown. But there is no separate Bill of Rights consideration of penalty. There is not even a bare assertion that the penalty is demonstrably justified. Worse, the Bill of Rights analysis seems to be addressed only to justifying the decision to uphold the complaint. There is no indication that the BSA realises that the penalty is relevant to the proportionality assessment.

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[30] See, for example, Ruth Gavison "Privacy and the Limits of the Law" (1979) Yale LJ 421; Nicole Moreham, "Privacy in the Common Law" (2005) 121 LQR 628; Daniel Solove *Understanding Privacy* (Harvard University Press, 2008)

As discussed, judges have recognised that penalty is relevant to proportionality. The BSA will often add a sentence to the section on penalty referring to the Bill of Rights, and this is an improvement, but still tends to look like boilerplate. A recitation of some of the reasoning would further strengthen the proportionality analysis, but this approach is open to the same criticisms as the two-stage approach discussed above.

Again, this problem can be solved if the outcome (including the penalty) is announced high in the decision so that the general reasoning doubles as a proportionality analysis for both the decision and the penalty.

I am not questioning the level of the penalty in this case, which I consider could be readily justified as proportionate.

Conclusion

I have suggested that some standards could be more readily applied (and assessed for proportionality) if the purposes were more closely defined. I have also suggested that the penalty imposed should be part of the proportionality analysis.

Once again, I doubt these would make any difference to the result (though it may in other cases) but they would make the decision challengeable on appeal.

If I were conducting an exacting proportionality analysis, I might seek more evidence:

1. (from the complainant) about which friends and family members in fact recognised him from the programme – to assess how much harm was in fact done;
2. (from the broadcaster) about how often, in rebroadcasting similar programmes, this sort of issue is likely to arise and how difficult it would be to identify and fix them – to assess how much of a burden this decision would place on the speech of broadcasters.

However, I doubt that a judge would find the proportionality assessment inadequate on these grounds.

Strategies

This part of the paper brings together some of the recommendations detailed above and provides some additional advice about the BSA's approach to proportionality.

It must be acknowledged that the BSA can probably get away with not following all of it to the letter. As the courts have said, a range of approaches is open, proportionality reasoning need not always be detailed, and deference is due to the expertise of the BSA members.

However, if the BSA wants to err on the safe side, following the advice below should give it maximum confidence that its proportionality analysis is sound.

Always begin with an assessment of the value of the speech – and state the corresponding level of justification required

This is what the BSA did in the *Jesus: the Cold Case* decision discussed above. This approach signals that the BSA is aware of the Bill of Rights requirements. It focuses on the underlying values as the courts have suggested. It provides a principled measuring stick for assessing the harms alleged in the complaint. It seems a logical way to begin. Hopefully, it will also strike BSA members as intuitively sensible.

Depending on the significance of the speech, the level of justification required could range from "compelling" or "particularly strong" (for a serious, well-researched political expose for example, or a political advertisement), to "careful" or "strong" (for a current affairs show exploring a matter of public interest, for example), to "adequate, but not to the level required by a significant political programme" (for a soap, for example), to a statement such as: "because free speech values are not engaged to any significant extent in this programme, the level of justification required is relatively low" (for a soft-porn movie, for example).

Announce the result early in the decision

Once these parameters have been established, it makes sense for the BSA to state immediately whether those parameters have been exceeded and what order it is imposing (if the complaint is upheld). Then the rest of the decision can used to show why upholding the complaint is or is not justified, and if it is, which standards were breached and why the chosen penalty reflects the seriousness of the breach. This avoids the disadvantages of the two-step approach criticised above. It prevents a failure to consider the proportionality of the penalty. It provides a framework that is cohesive, consistent, and easy to follow for the BSA and its various audiences alike.

Of course, this is about *presentation* of the decision. In reality, the BSA will no doubt work its way through the arguments about the merits of the complaint and the penalty rather than deciding up front whether to uphold it!

The more significant the speech, the more detailed the reasoning and the better reasons required.

This is what Asher J requires in *West* (the *Hung* and *Home and Away* case). In general, the BSA should be giving deeper consideration to complaints that would affect significant programmes, and taking greater care before doing so. This ought to be recorded in the body of the decisions.

Be particularly careful with proportionality analysis when upholding a complaint

Realistically speaking, it is more likely that upheld complaints will be challenged on appeal. That has been the pattern in most High Court appeals. It is therefore worth taking particular care with these.

Better identify the purposes underlying the standards

The importance of a clear understanding of the purposes of the various standards has already been emphasised. There is nothing wrong with standardising this part of the analysis. The BSA has already developed stock passages describing the purposes of various standards, and it often refers to them, either in general reasoning or in Bill of Rights analyses.

Much of this is being done well. However, I suggest developing a practice of referring to those underlying purposes before applying the standards (rather than holding off for a separate Bill of Rights assessment).

I also suggest giving consideration to refining some of the stock passages. Some seem excellent to me, such as the BSA's description of the purposes of the Controversial Issues/Balance standard. The purpose of the Law and Order standard is also usually described well. The purposes of some other standards are fairly obvious, such as the Accuracy standard. But some could stand to be unpacked a little further. I have suggested that the Privacy and the Childrens' Interests standards fall into this category. Once the purposes are clarified, much greater light is shed on the relevant lines of argument, evidence and principle involved. With that focus in mind, the BSA's reasoning, and – at the same time – its proportionality assessment, should be improved.

The same may be said of the standard against violence, for example. The BSA needs a firm handle on what's being protected in order to work out whether there's been a breach and how harmful it is. Is the Violence standard about stopping people from emulating violent behaviour? Is it about preventing viewers' desensitisation to violence? Or is it about protecting viewers' sensibilities? All three? Depending on the answer to this fairly fundamental question, the BSA's reasoning may be quite different.

Assess how deeply those purposes are engaged in the case at hand

This is probably the BSA's biggest failing. Even when it identifies the purposes behind the standards, it often fails to ask the crucial question: how much are those purposes harmed *by this programme*? It is not enough to say "this standard is important". It needs to assess how much damage the

programme complained about is doing to the values of receiving accurate and diverse information, of trust in the integrity of broadcasters, of people's dignity and reputation and ability to feel secure that they can control access to information about them. This is the heart of the proportionality assessment.

Seek information aimed at clarifying harms

A proportionality assessment focuses on competing harms: harms caused by broadcasters to the values protected by standards and harms caused by the BSA in penalising broadcasters' speech. This weighing process may sometimes highlight further information that might be necessary or useful in conducting the balance. The BSA often writes to the parties seeking further information in connection with the complaint. It should not shrink from seeking particular information (such as details of the harm suffered by MQ, the reformed solvent abuser) or even inviting submissions about the proportionality of a particular proposed action.

A proportionality analysis sometimes opens up questions that may be answered by social scientists. The BSA will rarely be required to seek this out, though it must consider any such evidence if it is supplied by the parties and is relevant. But the BSA is within its rights to search for research to help it determine, for example, the sort of harm that is done to children's development when they are exposed to different sorts of swearing. Reputable research of that sort, whether conducted by the BSA itself or not, may be useful for assessing competing harms. If the BSA does seek to rely on such research in a particular case, it would be well advised to give the parties an opportunity to comment on it first.

If upholding a complaint, make the consideration of penalty part of the proportionality analysis

It is the breach *and the penalty* that must be proportionate to the free speech harms involved.

In this part of the proportionality analysis, the BSA is effectively saying, "Here's why the our decision and penalty will in fact support the values and purposes underlying the standard, and here's why effect of our decision and penalty on the values and purposes underlying free speech is acceptable or minimal."

The BSA should bear in mind that the free speech harms include both the effect on the broadcaster of the particular penalty and the effects on broadcasters generally of the rule that is effectively created. In this connection, note that warnings and Balance requirements – which create rules facilitating the provision of more information to audiences – do not harm free speech values as much as, say, Accuracy and Good Taste and Decency upholds, which effectively ban particular speech. The BSA can therefore more readily conclude that warnings and Balance requirements are proportionate.

The BSA should also bear in mind that a penalty that exceeds what is required to adequately address the breach may be found disproportionate. It should certainly impose a penalty that vindicates the standards and appropriately punishes non-compliance, or provides a remedy for breach (damages

for privacy violation or ordering a statement to be broadcast). But it would be disproportionate to impose a very severe penalty when another penalty that hurts speech less would do the trick. That is, the BSA should be wary of overkill.There is obviously much room for the BSA's own evaluation here.

Address the hard arguments, especially if they are raised in dissent

This is the lesson from the *Freeman* case (about the Aramoana documentary). Although the majority followed a fairly rigorous proportionality methodology, the judge felt their views didn't engage with the critique in the dissent. If the BSA (or a majority) addresses and provides reasons for rejecting the most powerful arguments against its position, its decisions are more likely to be accepted as sound. .

Take care with audience expectations

I wonder whether sometimes the BSA puts too much store on audience expectations. Certainly, the expectations of audiences are central to considerations of Good Taste and Decency, and may be relevant to the application of standards such as Controversial Issues/Balance. But there are some dangers with focusing too closely on audience expectations.

First, it will seldom be very clear what those expectations are. Even when there is some research, it may be difficult to apply to particular programmes.

Second, it has a tendency to punish unpopular speech, which may nevertheless be valuable. The BSA's research has uncovered a popular distaste for depictions of homosexuality, for example. But the BSA would have to be very careful before relying on this to uphold a Good Taste and Decency complaint (and to its credit, it has been careful).

Most significantly, it has the potential to shift the focus of inquiry away from the values underlying the standards and the speech. Arguably the BSA fell into this trap in both the *Freeman* and *West* cases. It focused on the audience's expectations of language and nudity to the detriment of its consideration of the value of the underlying speech and the actual harm being done to children's development and community morals.

Overall conclusion

The BSA generally does a very good job justifying its decisions. That is, its (non-Bill of Rights) general reasoning is rigorous and convincing. One effect of this is that its decisions to uphold complaints will seldom be substantively disproportionate, even if some of the Bill of Rights reasoning is somewhat flawed.

I have identified what I would describe as flaws in the BSA's proportionality methodology (some of which have been addressed in more recent BSA decisions). But I have not identified any decisions that I think have been wrongly decided as a result.

A judge on appeal may take issue with the BSA's methodology. He or she may make similar criticisms to those that I have advanced. These may even be treated as errors of principle such that the decision is sent back to the BSA for reconsideration. Some judges have displayed greater willingness than in the past to re-assess the BSA's reasoning. And judges are increasingly inclined to map out correct approaches to proportionality, even though they disclaim the existence of any one "correct" approach.

A judge on appeal may also take issue with the result in a particular case. He or she may find that it is disproportionate restriction on free speech.

In either case, rigorous and principled proportionality reasoning, integrated in the decision, is likely to discourage anyone from challenging BSA decisions.

In my assessment, the BSA's proportionality reasoning is getting better and better. In the 1990s, the Bill of Rights was hardly mentioned at all. For the first years of the new century, the BSA's Bill of Rights analysis was little more than boilerplate. But the BSA has progressed to raising and addressing proportionality issues routinely, and its latest framework, represented in the *Axford* case, is its best attempt yet.

I think, with a little tweaking the BSA 's approach would display a very sound proportionality methodology. It would require routine assessment of the value of the speech and the level of justification required, closer identification of the purposes of some of the standards and closer attention to the way those purposes are undermined by the broadcasts at issue, and the integration of assessment of penalty into the proportionality framework. I suggest that the approach I recommend would actually simplify the decisions, as well as rendering them more consistent and better focused on competing principle.

Appendix 1: Key Court decisions

TVNZ v Freeman (HC Wellington, Simon France J, 28 October 2011, CIV 2011-485-840)

TVNZ v West [2011] 3 NZLR 825

Radio NZ v Bolton (HC Wellington, Joseph Williams J, 19 July 2010, CIV 2010-485-225)

TVNZ v XY [2008] NZAR 1

Browne v CanWest TV Works Ltd [2008] 1 NZLR 654

TVWorks v Du Fresne [2008] NZAR 382

TVNZ v KW (HC Auckland, Courtney J, 18 December 2008, CIV-2007-485-1609)

TVNZ v Green [2009] NZAR 69

TVNZ v Viewers for Television Excellence Inc [2005] NZAR 1

TVNZ v BA (HC Wellington, Miller J, 13 December 2004, CIV 2004-485-1299,1300)

TV3 Network Services Ltd v ECPAT New Zealand Inc [2003] NZAR 501.

TV3 Network Services Ltd v Holt [2002] NZAR 1013

TVNZ v Ministry of Agriculture and Fisheries (High Court, Wellington, AP 89/95, 13 February 1997)

Other cases

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA)

R v Hansen [2007] 3 NZLR 1 (NZSC)

Hosking v Runting [2003] 3 NZLR 385 (CA)

R (SB) v Governors of Denbigh High School [2006] 2 WLR 719 (House of Lords); [2005] 1 WLR 3372 (Court of Appeal)