

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 5/90

Dated the 3rd day of May 1990

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

FAY McALLISTER
of Christchurch

Broadcaster
TELEVISION NEW ZEALAND
LIMITED

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

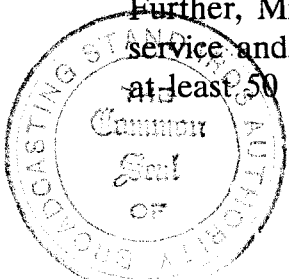
DECISION

Mrs McAllister's Complaint to the Broadcasting Standards Authority

On 15 October 1989 Mrs McAllister wrote to the Authority complaining about the conduct of a Television New Zealand Limited film crew on 6 October, the day of her son's funeral. First she mentioned that the crew had filmed the graveside service from a street outside the cemetery, despite a request from the family of the deceased that the funeral not be filmed. Mrs McAllister stated, however, that she had been told that such conduct by the crew was legal.

Presumably as a result of that advice, Mrs McAllister's complaint was directed at the film crew's conduct after the funeral service, when it entered the cemetery and filmed a group of "skinheads" gathered around the grave holding a swastika flag. The complainant stated that the television crew's presence denied family members of the deceased the opportunity to mourn in private: "We were so on guard trying to get out of the way of the cameras."

Further, Mrs McAllister complained that the skinheads' conduct was not part of the service and, in her view, should not have been filmed. From her comment "We had at least 50 friends there [at the funeral] and most were Christians" it seems that this



aspect of Mrs McAllister's complaint amounts to an allegation that the subsequent broadcast of that film would give viewers the false impression that her son had not received a Christian burial.

At the Authority's request, the complainant elaborated her complaint on a Broadcasting Complaint Referral Form which was returned to the Authority on November 8 1989. In supplying the information requested by the Form, Mrs McAllister listed several TVNZ news programmes broadcast on Channel One early in October 1989 as giving rise to her complaint. She also indicated that the complaint was on a matter concerning the privacy of the individual which she wished the Authority to deal with in the first instance.

On the Form, no mention was made of the filming of the skinheads after the funeral service or of the impression which the broadcast of that film might have on viewers. Instead, Mrs McAllister complained of the film crew's conduct in filming the funeral from the street outside the cemetery. As part of the elaboration of that complaint, the complainant stated: "We were prevented from grieving in a natural way as we had to line up with our backs to the Television crew and could not stand round the grave."

TVNZ's Comments

In response to a request for its comments upon Mrs McAllister's complaint, TVNZ wrote to the Authority on 15 December 1989. A copy of the letter was sent to the complainant for comment but none was received.

The letter begins by stating:

The alleged breach of privacy clearly attaches to the handling of one news item - the coverage at the time of the burial rites even though news coverage on other days are identified on the complaints form. ... In the circumstances it must be assumed, on the basis of [Mrs McAllister's] comments under section 3 [of the Form], that most of her concerns centre on the coverage of her son's funeral. This relates to the item broadcast on Network News on Friday 6 October.

The Authority agrees with that point made by TVNZ. Authority members have viewed videotapes of the other news programmes listed by the complainant on the Complaint Form and none contained coverage of the funeral. The Network News item of 6 October, a videotape of which has also been viewed by the Authority, was the only item containing such coverage.

TVNZ's letter then elaborates upon the conduct of the film crew at the funeral in these terms:

On arrival at the cemetery the reporter was approached by Mrs McAllister and was asked not to film the graveside ceremonies.



The reporter used her radio-telephone to consult the duty editor. She was advised to leave the cemetery but to seek some discreet position on public land from which an indication of the form of the proceedings might be obtained. Accordingly the reporter and the camera crew moved onto a public roadway adjacent to the cemetery and set up their camera a considerable distance from the grave.

It should be emphasised that at no time during the ceremony did the crew or the reporter interfere physically or intrude in what was proceeding or occurring in the cemetery.

At the conclusion of the ceremony Craig McAllister, the brother of the deceased, came onto the roadway to talk both to the TVNZ reporter and to representatives of other media.

It was he who explained the significance of the Nazi symbols and invited the crew and the photographer from the Christchurch Star to approach the grave where he and his colleagues were displaying Nazi paraphernalia.

The brother and a companion took this opportunity to tell the TVNZ reporter of their sadness that friends of the dead man had not been released from prison to act as pall-bearers.

It should be said that the reporter was under the impression, throughout the proceedings, that she was complying with the wishes of the family. She had removed herself and the crew when asked, and her subsequent return to the gravesite after the ceremony was at the invitation, and in the company of, the deceased's brother.

Next, TVNZ's letter offers three reasons for the Network News' coverage of Glen McAllister's funeral: it was in the public interest; Nazi symbolism was in the background; and there was a political involvement. By way of introduction to TVNZ's elaboration of those reasons, it needs to be noted that Glen McAllister's death was the result of suicide, committed immediately after he had shot dead a Christchurch City Council worker.

TVNZ's reasons for the funeral coverage were elaborated in these terms:

"The killing of Wayne Motz had shocked the country. ...he was the son of a former prominent New Zealand test cricketer and thus he was a person that the public could relate to.

The killing was apparently motiveless - the victim completely innocent and chosen at random.



The public, it is submitted, were entitled to know what manner of person it was who could carry out such a horrifying and senseless murder in the heart of Christchurch, and what might have motivated him.

Little information about Glen McAllister was readily available and it was not until television was able to show the skinheads around the grave, the tattoos and the Nazi symbols that it was possible to provide some indication of not only the sort of person McAllister was but also the company he kept.

... It is not only the company feeling, but also its perceived duty, to bring to public attention that there are those in their midst who openly flaunt symbols, such as the swastika, which are associated with hatred and ruthlessness in the minds of so many, especially an older generation who may have dread recollections of Hitler and what he stood for. ...

The story of the funeral gained an added dimension of more than fleeting interest when the Opposition Police spokesman, Mr John Banks, successfully lobbied to have imprisoned companions of McAllister denied special leave to attend the funeral.

... As it turned out this became a significant part of the funeral coverage itself, with Craig McAllister and a companion criticising the decision to deny leave."

Privacy Complaints under the Broadcasting Act 1989

Section 4(1)(c) of the Broadcasting Act 1989 imposes an obligation upon broadcasters in these terms:

4(1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -

...
(c) The privacy of the individual.

There is some similarity between s4(1)(c) of the 1989 Act and ss24(1)(g) and 95(1)(g) of the Broadcasting Act 1976, which were repealed, respectively in 1988 and 1989. They applied to the Broadcasting Corporation of New Zealand (s24(1)(g)) and each private broadcaster (s95(1)(g)). Each provision made the relevant broadcaster responsible:

... for maintaining, in its programmes and their presentation, standards which will be generally acceptable in the community, and in particular it shall have regard to -

...
The privacy of the individual.



Of greater interest, however, is s95o(1)(b)(ii) of the Broadcasting Act 1976, added in 1982 and repealed by the Broadcasting Act 1989. That provision empowered the Broadcasting Complaints Committee to receive and consider formal complaints of:

Unwarranted infringement of privacy in, *or in connection with the obtaining of material included in*, programmes broadcast by any broadcasting body.
(Emphasis added.)

A notable difference between that provision of the 1976 Act and s4(1)(c) of the 1989 Act is the lack of mention in the current Act of privacy being infringed by the *obtaining of material* included in programmes: the opening words of s4(1)(c) merely require *programmes and their presentation* to conform to a standard consistent with the privacy of the individual. A deduction which might be drawn from that difference in statutory wording is that the 1989 Act recognises fewer grounds for privacy complaints than were recognised by the 1976 Act. Thus, it may be that only when a *programme or its presentation* is alleged to infringe an individual's privacy (as opposed to the obtaining of material for a programme) that a complaint can be established under the 1989 Act.

If that is the case, s4(1)(c) of the Broadcasting Act 1989 would not provide any basis for a complaint that a broadcaster infringed an individual's privacy by obtaining material for broadcast. One aspect of Mrs McAllister's complaint, namely, that the behaviour of TVNZ's film crew, during and after the funeral, prevented the family of the deceased from mourning naturally, amounts to a complaint of that nature. Despite the possibility that it may not be the type of complaint envisaged by s4(1)(c), the Authority will later consider that aspect of Mrs McAllister's complaint.

Another aspect of the present complaint, as TVNZ acknowledged in its letter of 15 December 1989, is directed at a specific programme - the Network News of 6 October. Section 4(1)(c) of the Broadcasting Act clearly envisages a privacy complaint being so directed and s8(c) of the Act empowers the Authority to deal with it without the complainant first making a complaint to the broadcaster concerned.

With respect to this aspect of the present complaint, there is one "technical" matter that should be noted, although it was not raised by TVNZ. Section 9(3) of the Broadcasting Act 1989 prohibits the Authority from accepting a privacy complaint when it is made more than twenty working days after the broadcast of the programme to which it relates. Mrs McAllister's original letter to the Authority was received on 17 October 1989, well within that time limit. However, that letter did not expressly mention the Network News programme of 6 October: it was first mentioned in the Form which the complainant completed at the Authority's request and which was returned to the Authority on 8 November 1989. Despite the intervention of Labour Day, on 23 October 1989, that Form was received by the Authority twenty two working days after the broadcast of the 6 October Network News.

The Authority is of the view that it should not regard Mrs McAllister's complaint



against the Network News of 6 October as being made on 8 November 1989 when her first correspondence was received within time and when that correspondence raised, with regard to the general circumstances which inspired her complaint, those aspects which she, being unfamiliar with the provisions of the Broadcasting Act 1989, believed were relevant. Thus, while the Form's requests for information prompted the complainant to name the programme at which her complaint was directed, it is the Authority's view that, for the purposes of s9(3) of the Act, Mrs McAllister's complaint was received by it on 17 October 1989. Accordingly, the Authority is empowered to deal with it.

There is a third aspect to Mrs McAllister's complaint, namely, that the broadcast of the film of the skinheads standing around the grave might have given a false impression of the nature of the funeral that had been conducted for her son. The Authority considers that this aspect of the complaint does not comprise an allegation that the complainant's privacy was infringed. Rather, it amounts to an allegation that the Television Programme Standards, contained in the Codes of Broadcasting Practice, were breached by the Network News of 6 October 1989. (Those Standards require television broadcasters to, for example, be truthful and accurate on points of fact, and, in news programmes, to take care in the editing of programme material to ensure that the extracts used are a true reflection and not a distortion of the original event or the overall views expressed.)

Under s8 of the Broadcasting Act, privacy complaints are the only type of complaints that the Authority can deal with directly. Other complaints, including those alleging a breach of the Codes of Broadcasting Practice, must first be made to the broadcaster concerned (ss6, 7 and 8 of the Broadcasting Act 1989). As a result, the Authority believes it is unable to deal with the third aspect of the present complaint. Accordingly, no further mention is made of it.

The 6 October Network News' Coverage of Glen McAllister's Funeral

The item on the Network News of 6 October commenced with the newsreader stating:

"The skinhead who killed a street cleaner and then himself in Christchurch on Wednesday has been laid to rest amid controversy and anger. Glen McAllister's family are disgusted that two of his friends were refused prison leave to be pallbearers at his funeral. The men had initially been granted leave but this was revoked after protests from the murder victim's family and from Opposition M.P. John Banks."

To the accompaniment of film of two skinheads holding a swastika flag above a grave, the reporter then commenced her report with the words:

"The Nazi swastika dominated the funeral of 24 year old Glen McAllister."



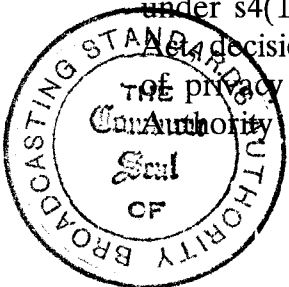
The two themes thus introduced were developed in the news item in the following manner. Scenes from the interview with Craig McAllister and a companion were shown - with the two men explaining the significance to Glen and themselves of the flag and the Nazi salute - followed by a scene of a small group of skinheads standing around the grave giving the Nazi salute over the coffin. An older man in ordinary civilian attire, not saluting, was standing at the head of the coffin. Next, a group of people was shown gathered near a van, presumably in the cemetery grounds. The group contained both skinheads and others. Further shots followed of people gathered at the graveside, with skinheads in the foreground - one making a gesture with his finger towards the camera. One long distance shot of the people gathered near the grave and another closer shot of the grave with the Nazi flag held over it by skinheads preceded another segment from the interview with Craig McAllister and his companion.

To this point in the item, the reporter's commentary had explained that prison authorities had changed their minds about releasing two of the deceased's friends from jail to act as pallbearers, that protests by the murder victim's parents and from John Banks M.P. had caused the change, and that the skinheads at the funeral were angry at the decision. Craig McAllister's companion then confirmed that anger by his comments. While another scene screened of the graveside with skinheads gathered around, the reporter summarised the Justice Department's explanation for not releasing the prisoners: it did not want the prisoners exposed to the media. A Justice Department spokesperson was then shown giving that explanation.

Another scene, with skinheads and others throwing soil into the grave and departing, accompanied the reporter's summary of the comments of the next interviewee, Mr John Banks M.P. He was then shown asking why "two thoroughly bad criminals" should be released from prison "for a day's holiday to partake in such insulting exhibitionism", followed by another scene of people departing the graveside as a couple of skinheads gave the Nazi salute. Craig McAllister was then seen unfurling the Nazi flag and holding it up, followed by the closing scene of the item which was, again, taken from the interview with Craig McAllister and his companion. There, the companion stated, with respect to the imprisoned friends of the deceased, "We only wanted them as pallbearers."

The Concept of Privacy

In everyday language, the question whether an individual's "privacy" has been infringed may be determined by "taste, ethics and regard for the feelings of others" (Professor J F Burrows, "Developments in Media Law" p35, in Media Law, Legal Research Foundation Inc. 1988). However, the Broadcasting Standards Authority believes that it is unable to rely solely upon everyday notions of privacy to determine complaints made under s4(1)(c) of the Broadcasting Act 1989. This is because, pursuant to s18 of the Act, decisions of the Authority are appealable to the High Court. Since legal notions of privacy can be expected to dominate the High Court's approach on appeal, the Authority is of the view that it must endeavour to take a similar approach when



determining the extent of the protection afforded against broadcasters' actions by s4(1)(c). Unfortunately, a precise legal view of the matter is not readily ascertained: the development of a clear legal concept of privacy is in its early stages in New Zealand, as it is in many other countries.

Despite the lack of authoritative statements as to the precise meaning of the protection afforded to individual privacy by a provision such as s4(1)(c) of the Broadcasting Act 1989, there is no shortage of general information about privacy, written from a legal perspective. The Authority has been assisted in its comprehension of the limits of s4(1)(c) by such materials as official Reports on privacy, legal text books, and by commentaries upon the International Covenant on Civil and Political Rights (Article 17 of which provides, amongst other things, for the right of every person to be protected against arbitrary or unlawful interferences with privacy).

This is the first privacy complaint to be determined by the Authority and accordingly it believes that it should deal with it in considerable detail. It fully appreciates that some of the material may be difficult to assimilate, but it is a most important issue and the Authority makes no apology for this detailed approach.

The clearest principle to emerge from the sources, as well as from common sense, is that an individual's privacy cannot be protected by law to such an extent as to override the legitimate interests of other members of society. In the context of the present complaint - against a broadcaster - the complainant's interest in privacy is in competition with the public's "right to know" about events of interest to it. If both interests are to coexist, neither can be given its fullest meaning: if individual privacy is given its largest interpretation, the valued freedom of the media would be severely constrained; if the "public interest" in events is given its widest interpretation - to cover the public's curiosity about all matters reported to it - there would be no room left for individual privacy to be respected.

Although the Broadcasting Act 1989 gives no indication as to how the balance should be struck between the competing interests in individual privacy and the public's "right to know" about events of interest to it, the various materials studied by the Authority provide assistance. The most developed ideas come from the United States, with its tort (civil action) of invasion of privacy. Although American legal doctrine is not as common a source of inspiration for New Zealand law as the doctrines of Commonwealth countries, the Authority notes that, in the area of privacy, the New Zealand High Court recently called in aid United States' law. In Tucker v News Media Ownership Ltd [1986] 2 NZLR 716, at 733, McGechan J invoked American notions of privacy in support of the High Court's earlier decision (which had been upheld by the Court of Appeal) that a serious question to be tried was raised by the argument that a tort of invasion of privacy exists in this country.

The American tort of invasion of privacy has been said to comprise, in fact, four distinct torts. The invasions they protect against are "tied together by the common



name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'. (Prosser and Keeton on Torts, Fifth edition, Hornbook Series, Lawyer's Edition, p851). From that text's discussion of the four American torts of privacy, it emerges that two may cast light upon the limits of the protection afforded to an individual's privacy by s4(1)(c) of the Broadcasting Act 1989.

The first tort is described as protecting against the public disclosure of *private* facts but it is generally agreed that it will also protect against the public disclosure of *public* facts provided, in both cases, that the facts disclosed would be "highly offensive and objectionable to a reasonable person of ordinary sensibilities" (Prosser and Keeton pp856 - 859). Examples of private facts given by the authors include the details of a person's sexual relations or intimate private characteristics and conduct (p857). Public facts are described as facts "that occurred at a public place and in view of the general public, ... or... [that] can be found in a public record" (p859). Logically, it will be more difficult to establish that the disclosure of public facts, rather than private facts, meets the "highly offensive" etc. test. The authors suggest that if a public fact is "of public concern" its disclosure will not meet that test. They then discuss the American law's liberal view of matters which are "of public concern", testifying to the difficulty an American plaintiff would have in succeeding in an action for invasion of privacy by the public disclosure of public facts (pp859 - 862).

In Tucker v News Media Ownership Ltd, McGechan J, relying on another American text by Prosser, expressed his support for the introduction into the New Zealand common law of a tort covering, at least, invasion of personal privacy by the public disclosure of private facts ([1986] 2 NZLR at 733). In its limited sphere of operation, ie affecting broadcasters, it seems reasonable to presume that s4(1)(c) of the Broadcasting Act 1989 may provide the protection afforded in the United States by that tort. Further, in light of comments by McGechan J in Tucker, it may be that s4(1)(c) should be interpreted to provide greater protection against the disclosure of *public* facts than is provided in the United States.

In Tucker, the facts disclosed were of the plaintiff's previous criminal convictions - facts which were a matter of public record. The occasion which prompted the media to disclose those facts was the plaintiff's public appeal for money to fund heart surgery which he was advised he needed and for which he had to travel to Australia. Despite the "public concern" about the plaintiff's criminal record in the circumstances, McGechan J clearly was not convinced that the plaintiff would be debarred from relief in any privacy action that might be recognised in New Zealand. The Judge stated:

It may well be that a person loses a right to privacy by presenting himself to the public eye for evaluation. This concept is well recognised in American privacy law and is not unknown to our own law in the somewhat cognate field of breach of confidence. ... In this case Mr Tucker undoubtedly did put himself and his character forward to the public when appealing for funds through the media. By doing that he invited some degree of examination of his personal background



and "worth" in the eyes of persons considering requests for assistance. However, on the facts of this case I do not place undue weight on this qualification to privacy. Mr Tucker was a reluctant debutante as far as public exposure was concerned. It gave him no pleasure, and was forced upon him by a desperate need for funds for what then was perceived to be a lifesaving operation. There is some element of unfairness in holding that inevitable situation against him. ([1986] 2 NZLR at 735).

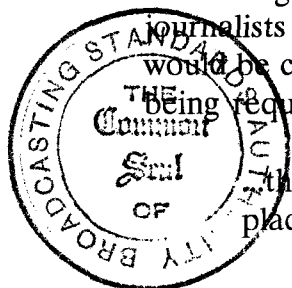
The second American tort of privacy which may be relevant to a determination of the limits of the protection afforded by s4(1)(c) of the Broadcasting Act 1989 is referred to by Prosser and Keeton as unreasonable intrusion. It is described in these terms:

This is said to consist of intentional interference with another's interest in solitude or seclusion, either as to his person or to his private affairs or concerns. One form of invasion consists of intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters, or an illegal search of a shopping bag in a store. The principle has, however, been carried beyond such physical intrusion, and extended to eavesdropping upon private conversations by means of wiretapping and microphones; and there are decisions indicating that it is to be applied to peering into the windows of a home, as well as persistent and unwanted telephone calls. ...

It is clear, however, that there must be something in the nature of prying or intrusion ... It is clear also that the intrusion must be something which would be offensive or objectionable to the reasonable person ... It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private. ... On the public street, or in any other public place, the plaintiff has no legal right to be let alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see. (Prosser and Keeton, pp855 - 856).

Unlike the United States, New Zealand and countries with comparable legal systems - such as Australia and England - do not recognise any general legal right of a citizen to individual privacy. However, the question whether the law of those countries should recognise such a right, or whether it should, instead, protect individual privacy in specific circumstances by specific statutory provisions, has occupied a great deal of official time in recent years. In the course of examining those questions, the Australian Law Reform Commission Report No. 22 on Privacy (1983) includes a section canvassing the existing law's ability to protect individuals against intrusive conduct by journalists and reporters (ALRC 11 Volume I, p126). Having stated that journalists would be committing trespass if they entered private property and remained there after being requested to leave, the Report continues:

the legal position is less clear where the offending activity occurs in a public place, for example, television coverage of funerals, an increasingly common



feature of television news coverage following major accidents. It is argued that actions of this kind are often necessary and justified because of the interest of the general public in receiving news. ... It is said that the abuses of 'investigative journalism' are rare and must be tolerated as the price paid for a free media. Alternatively, it is said that adequate avenues of complaint exist [to the Australian Press Council, the Commonwealth Ombudsman, the Australian Broadcasting Tribunal or the Australian Journalists' Association].

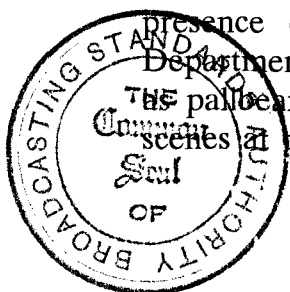
The Report then endorses the Law Commission's proposal, made in its 1979 Report Unfair Publication, for striking a balance "between privacy on the one hand, and freedom of the press, and the need of the public to be informed, on the other". That proposal was for the enactment of a statutory provision giving a cause of action to a person in respect of the publication of "sensitive private facts", ie those relating to health, private behaviour, love life or personal or family relationships in circumstances in which publication is likely to cause distress, annoyance or embarrassment, whether true or false. Importantly, several defences were proposed to be made available to that cause of action, including that the publication in question was relevant to a topic of "public interest", ie "a legitimate concern to the public but not merely published to arouse prurient or morbid curiosity". Also included as proposed defences were the consent of the affected person and the fact that the information complained of was a matter of public record (Unfair Publication: Defamation and Privacy, ALRC 11 (1979) pp236 - 240).

Decision

In the Authority's view, the protection afforded to an individual's privacy by s4(1)(c) of the Broadcasting Act 1989 includes protection against disclosure of private or public facts where, to adopt the phraseology of the American tort, the matter disclosed would be highly offensive and objectionable to the reasonable person of ordinary sensibilities. Whether a disclosure meets that criterion of offensiveness etc will depend on the circumstances of each case: the protection of privacy cannot be absolute. Therefore, in an inquiry into a complaint that s4(1)(c) has been infringed, any competing claim of "public interest" in the facts disclosed, as well as any other relevant matter of defence (eg consent of the individual whose privacy is alleged to have been infringed) will need to be examined.

With regard to the present complaint, the first question to be determined is whether the Network News of 6 October 1989 disclosed any private or public facts about the complainant or the other members of her family on whose behalf she complained.

As has been stated, the programme's coverage of the funeral service dwelt on the presence of the skinheads, their Nazi symbols and their views of the Justice Department's decision not to release two of the deceased's friends from prison to act as pallbearers. Apart from Craig McAllister, who invited the film crew to film the scenes at the graveside at the conclusion of the funeral service and who consented to



be interviewed, no other member of the deceased's family was identified in the programme. No doubt other family members were identifiable to those who know them but, because the only close-up shots were of Craig McAllister and his companion, the presence of other family members, and their grief, were not emphasised or dwelt upon in any way.

In light of the nature of the 6 October Network News' item, Mrs McAllister's complaint that the programme infringed her own and other family members' privacy would appear to be directed at the very fact that TVNZ broadcast film of her son's funeral and its aftermath. Thus the question arises, are such things private or public facts? The answer to this question will affect the ease with which their disclosure, by broadcast, can be established to be highly offensive etc.

In considering whether the funeral of a relative is a private fact for members of the deceased's family, the location of the service would appear to be a relevant factor. When the service is conducted in a private place, the claim that its broadcast is of a private fact would be stronger than when the service is conducted in a public place. The funeral service for Glen McAllister which was filmed by TVNZ was conducted in a public place: a cemetery. Obviously, it was conducted in view of another public place - a street - for it was from that vantage point that the service was filmed.

The aftermath of the funeral - the skinheads behaviour at the graveside - also took place in the cemetery. The Authority believes it is pertinent that the film crew was invited by Craig McAllister to enter the cemetery to film that behaviour. It is also pertinent that Craig McAllister and his companion were prepared to be interviewed about the behaviour as well as about other matters relevant to the funeral.

In light of the above, it is the Authority's view that the funeral for Glen McAllister and, especially, its aftermath were public facts. However, even if the funeral and/or its aftermath were private facts, the question whether Mrs McAllister's and her family's privacy was infringed by their broadcast falls to be determined by the effect which their broadcast would have on "a reasonable person of ordinary sensibilities". That effect can only be judged in light of the context in which the facts were disclosed.

In this regard, the Authority finds compelling TVNZ's reasons for broadcasting coverage of Glen McAllister's funeral and its aftermath. News of (at least recent) crimes and those who commit them, of government policy, and of groups within society whose values contrast sharply with traditional norms are, in the Authority's view, matters of genuine public interest or concern. Glen McAllister's funeral and its aftermath were occasions which brought together those various matters. While it is unfortunate for those members of the deceased's family who did not want publicity given to the funeral, the Authority is of the view that the public interest in the matters

which surrounded Glen McAllister's death makes it impossible to describe the 6 October 1989 Network News item as highly offensive and objectionable to a reasonable person of ordinary sensibilities.



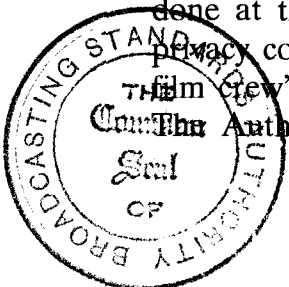
In reaching this conclusion, the Authority is mindful of the possibility that New Zealand law may take a stricter view than is taken in the United States of the circumstances in which public facts may be disclosed. As was noted earlier, in Tucker, McGechan J opined that the privacy of a "reluctant debutante" is entitled to more protection than that of a person who has otherwise presented herself or himself to media attention. With regard to the present complaint, there is no doubt that Mrs McAllister and those members of her family who wished to avoid media attention were, in the Judge's words, "reluctant debutantes". However, it is also the case that none of those people was focused upon in any way by the 6 October Network News item. Therefore, while the Authority is sympathetic to the plight of Mrs McAllister and those members of her family who wished to avoid publicity being given to Glen McAllister's funeral, it is of the view that no infringement of their privacy occurred by TVNZ's broadcast of the Network News of 6 October 1989.

It was stated earlier that it may be that s4(1)(c) of the Broadcasting Act 1989 does not authorise complaints which allege that an individual's privacy was infringed by a broadcaster's conduct in obtaining material for broadcast. In case the provision does authorise such complaints, the Authority has considered the question whether the conduct of TVNZ's film crew in obtaining the film of Glen McAllister's funeral and its aftermath amounts to an infringement of the complainant's privacy. With regard to this aspect of the complaint, the relevant American tort is that known as unreasonable intrusion.

In the United States, the success of a privacy claim on these grounds depends on there being "something in the nature of prying" into something which is, and which is entitled to be, private, where the intrusion would be offensive and objectionable to the reasonable person of ordinary sensibilities (Prosser and Keeton p855). Those authors state that "on the public street or in any other public place, the plaintiff has no legal right to be let alone". Thus, it is not an unreasonable intrusion to photograph a person in a public place "since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see" (at p856).

The Authority has already expressed its view that the funeral service in the cemetery, and the behaviour of the skinheads afterwards, were public facts. On that basis, if the American tort is taken as indicative of the protection conferred by s4(1)(c) against broadcasters' conduct in obtaining material for broadcast, the complainant's privacy complaint would fail. Even if the facts were private, however, it is the Authority's view that, again, the conduct of the film crew was not such as would be offensive and objectionable to the reasonable person of ordinary sensibilities. This is because the filming of the actual funeral service took place from a street some considerable distance from the cemetery and the filming of the skinheads' behaviour afterwards was done at the invitation of the deceased's brother. Therefore, by applying notions of privacy consistent with those prevailing in the United States, the complaint about the film crew's obtaining of material must also fail.

The Authority acknowledges that it is by no means clear that American notions of

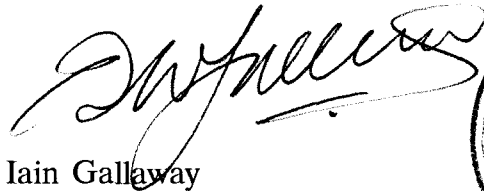


privacy, such as have guided its decision upon the present complaint, will be endorsed in every detail by New Zealand courts when the opportunity arises. However, it believes that the basic principles about successful privacy claims are consistent across jurisdictions comparable to New Zealand. Thus, the Australian Law Reform Commission's views, earlier summarised, about the statutory protection that should be afforded to individual privacy in that country, would, the Authority believes, lead it to the same conclusions about the present complaint.

For the reasons set forth above, the Authority declines to uphold the complaint.

Although the Authority considers that a privacy complaint cannot be upheld on the facts, it appreciates the deep concern of the complainant in circumstances which were for her undoubtedly traumatic and it acknowledges her distress at the publicity attracted by her son's funeral.

Signed for the Authority



Iain Gallaway
Chairperson



3 May 1990