

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 108/93
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Dated the 2nd day of September 1993

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaints by

THE SOCIETY FOR THE
PROTECTION OF THE UNBORN
CHILD INC.

and its President

CARMEL ARMSTRONG

and her daughters

CATHERINE ANNE BARKER,
NOREEN ELIZABETH RHODES
and JENNIFER RUTH
ARMSTRONG

Broadcaster
TV3 NETWORK SERVICES
LIMITED

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

DECISION

Introduction

"In my experience with abortion, I've terminated pregnancies of the children of the presidents of SPUC" was a comment made by Dr Richard Fisher, a gynaecologist and obstetrician, on a *60 Minutes* item "The Baby Maker" broadcast by TV3 Network Services Ltd at 7.30pm on Sunday 1 November 1992. The item profiled Dr Fisher and his work as an infertility specialist.



The National President of the Society for the Protection of the Unborn Child Inc. (SPUC), Mrs Carmel Armstrong, complained to TV3 as President of SPUC, on her own behalf and on behalf of her three daughters, that the item breached the broadcasting standards relating to good taste, the maintenance of law, the protection of privacy and dealing fairly with people referred to. A public apology and compensation to each complainant for the breach of privacy were requested.

Denying that the item, first, breached the good taste or the maintenance of law requirements, and secondly, that it had not breached the privacy or had been unfair to a group of national and regional presidents of SPUC (past and present) and their daughters, TV3 declined to uphold the complaint. Dissatisfied with TV3's response, Mrs Armstrong referred the complaint to the Broadcasting Standards Authority under s.8(1)(a) of the Broadcasting Act 1989.

Decision

The members of the Authority have viewed the item complained about and have read the correspondence (summarised in the Appendix). As the issues have been dealt with comprehensively in the correspondence, the Authority has declined Mrs Armstrong's wish for a formal hearing and, following its usual practice, has determined the complaint without a formal hearing.

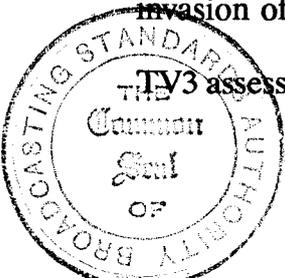
An item on TV3's *60 Minutes* programme broadcast on 1 November 1992 profiled Dr Richard Fisher, an obstetrician, gynaecologist and infertility specialist. During the item, he remarked:

In my experience with abortion, I've terminated pregnancies of the children of the presidents of SPUC.

SPUC is an acronym for the Society for the Protection of the Unborn Child Inc., a lobby group which actively advances a pro-life (anti-abortion) stance. The above comment provided the basis for the claim in the pre-broadcast publicity in the *New Zealand Herald* on 31 October 1992 that the item contained a "startling revelation". SPUC provided the Authority with a copy of the newspaper article.

The President of SPUC (Mrs Carmel Armstrong) complained to TV3 both on the Society's and on her own behalf that the comment was defamatory and breached the broadcasting standards, and that it was a slur on her own children and the daughters of past presidents of the Society. The standards breached, she continued, were those in s.4(1)(a), (b) and (c) of the Broadcasting Act 1989 and standards 4 and 5 of the Television Code of Broadcasting Practice. In a later letter she complained on behalf of her three daughters and alleged a breach of the same standards. On her daughters' behalf, she said TV3's appropriate action would be a public apology to all the children of presidents of SPUC and compensation of \$5,000 under the Broadcasting Act for the invasion of each of her daughter's privacy.

TV3 assessed the complaint under the standards nominated by the complainants. Section



4 of the Broadcasting Act reads:

- 4 (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -
- (a) The observance of good taste and decency; and
 - (b) The maintenance of law and order; and
 - (c) The privacy of the individual;

Standards 4 and 5 (now renumbered) of the Television Code of Broadcasting Practice require broadcasters:

- G4 To deal justly and fairly with any person taking part or referred to in any programme.
- G5 To respect the principles of law which sustain our society.

Arguing that the good taste standard in s.4(1)(a) applied only to language and behaviour and was irrelevant in the present circumstances, TV3 said that it had assessed the complaint under standard 26 of the Code (now renumbered as G13). However, it continued, as the comment was factual, the standard did not apply because of the first exception. The standard requires broadcasters:

- G13 To avoid portraying people in a way which is likely to encourage denigration of or discrimination against any section of the community on account of sex, race, age, disability, occupation status, sexual orientation or the holding of any religious cultural or political belief. This requirement is not intended to prevent the broadcast of material which is:
 - i) factual, or
 - ii) the expression of genuinely-held opinion in a news or current affairs programme, or
 - iii) in the legitimate context of a humorous, satirical or dramatic work.

With regard to the privacy aspect of the complaint, TV3 maintained that as there were a number of past and present national and regional presidents of SPUC, the argument about the invasion of an individual's privacy was not applicable. Moreover, as the defamation laws did not apply to groups, no principles of law had been breached.

Concluding by stating that the item which profiled Dr Fisher gave a candid and factual insight into the complexities of the abortion issue, TV3 declined to uphold the complaint. Consequently, it added, no apology was warranted.

When she referred the complaints to the Authority, Mrs Armstrong argued that TV3 had minimised the defamatory effects of Dr Fisher's comments. Since SPUC had been



established in 1970, she continued, there had been seven National Presidents who had been widely recognised by the public. Even if regional presidents were included, she added, the number with children of an age who might have sought an abortion were few. She concluded:

We suggest that if the remarks of Dr Fisher had referred to the Presidents of the Medical Association, or indeed the Presidents of the groups who oppose us, those individuals would not have taken his statement to be of little consequence. Even those who support abortion would not welcome their privacy being breached in this manner.

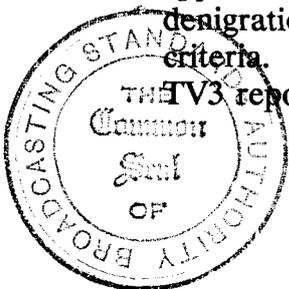
When it responded to the Authority's request for comment on these points, TV3 said that Dr Fisher's comment had arisen during the course of the interview and had been broadcast to illustrate the complexities of the abortion issue. Legal advice had been obtained before the broadcast and, as the comment could refer to any one of 40 or so people, it was considered neither defamatory nor an invasion of privacy. A list of 21 past national and regional presidents was attached and TV3 concluded:

We reiterate that there is no basis for any claim of damages which can only be applied should there have been a breach of privacy. As there has been no such breach, there is no basis for any award of damages. We further reiterate that everyone associated with the production of this segment acted in a responsible manner and that the point made by Dr Fisher was important.

The Authority approached the complaint by referring to the standards allegedly breached. It dealt first with s.4(1)(b) of the Act and standard 5 of the Code which require respectively maintenance of law and order and respect for the principles of law. They are dealt with together as they overlap with regard to the current complaint. As the principle of law in question appeared to be the civil law of defamation (rather than some criminal provision) and as the parties took a diametrically opposite stance on whether the broadcast was defamatory, the Authority decided it did not have the jurisdiction to resolve the dispute and declined to determine that aspect of the complaint.

After examining the wording of each provision, the Authority then decided that s.4(1)(c) of the Act and standard 4 of the Code did not apply to the present complaint. Section 4(1)(c) refers to the "individual" and standard 4 to "any person". Although it did not know the exact number of past and present national and regional presidents of SPUC, the number was such that the Authority considered that Dr Fisher's comment could not be regarded as referring to an identifiable "individual" or "person". His comment referred to one of a reasonably large number who could not be sufficiently identified for the broadcast to be in breach of either provision.

With regard to the complaint that the broadcast breached the requirement for good taste and decency in s.4(1)(a), TV3 replied by suggesting that standard G13 was more applicable. That latter standard prohibits the broadcast of an item which encourages the denigration of or discrimination against a section of the community identified by specific criteria. However, as that standard does not apply to the broadcast of factual material, the TV3 reported that Dr Fisher's broadcast comment was accurate and the standard was



thus inapplicable. The Authority would comment on TV3's approach to the extent that it believed SPUC could be an eligible group to complain under standard G13 as a section of the community holding a political belief. Furthermore, if it accepted the complaint under standard G13, the Authority would be required to determine the veracity of Dr Fisher's comment. That is a matter, however, about which the Authority has not received comment as it was not an aspect of the standards originally nominated by the complainants. Accordingly, as it did not accept TV3's assertion that the good taste complaint which referred to s.4(1)(a) should be subsumed under G13, the Authority does not intend to discuss the matter further.

The Authority would agree with TV3 that the phrase "good taste and decency" in s.4(1)(a) should be interpreted with reference to standard G2 of the Code which refers to language and behaviour in context. Standard G2 requires broadcasters:

- G2 To take into consideration currently accepted norms of decency and taste in language and behaviour, bearing in mind the context in which any language or behaviour occurs.

Accepting the complaint under s.4(1)(a) as expanded upon in standard G2, the Authority then examined whether Dr Fisher's broadcast remark observed the requirement for good taste and decency.

As the item was a profile of an obstetrician and gynaecologist involved with infertility and in vitro fertilisation, the Authority accepted that a reference to his performance of abortions was justified. Having the comment on tape, TV3 took legal advice and being advised that it was neither defamatory nor an invasion of an individual's privacy, included it in the broadcast. Furthermore, a reference to the remark was used in the item's pre-publicity. TV3 was obviously aware that the remark contained an element of sensationalism.

The Authority decided that the remark was provocative. It believed that while the remark's inclusion illustrated the ethical dilemmas which Dr Fisher might confront in his work generally, its broadcast was not necessary in order to illustrate the complexities of the abortion issue. However, in deciding whether it had gone one step further and breached the broadcasting standard requiring good taste and decency, the Authority returned to one of its earliest decisions (No: 2/90) when it had dealt with the requirement of the standard. In that decision, it wrote:

... the concept of good taste and decency in a given situation or context pertains to conformity with such standards of propriety as the Authority considers to be in accord with generally accepted attitudes, values and expectations of New Zealand society.

Applying that standard to the present complaint, a majority of the Authority considered that whereas the broadcast comment could well raise ethical questions, it did not infringe the generally accepted values of New Zealand society and, consequently, did not breach s.4(1)(a) of the Act.



The minority, emphasising that the remark referred to a group of people with a known stance on abortion and that it could reflect on the integrity of the organisation of which they were leaders, decided that the comment, in addition to being ethically questionable, was in clear breach of the accepted standard of decency and taste expected from a member of a profession from which the public is entitled to expect a greater degree of confidentiality.

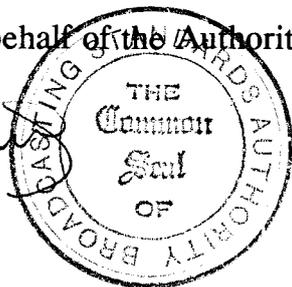
For the reasons set forth above, a majority of the Authority declines to uphold the complaint that the broadcast by TV3 Network Services Ltd of an item on *60 Minutes* on 1 November 1992 breached s.4(1)(a) of the Broadcasting Act 1989.

The Authority declines to uphold the complaint that the same programme breached s.4(1)(c) of the Act or standard 4 of the Television Code of Broadcasting Practice and declines to determine the complaint under s.4(1)(b) of the Act and standard 5 of the Code.

Signed for and on behalf of the Authority



Iain Gallaway
Chairperson



2 September 1993

Appendix

**The Society for the Protection of the Unborn Child Inc.'s and Mrs Armstrong's
Complaint to TV3 Network Services Limited**

In a letter dated 13 November 1992, the President of the Society for the Protection of the Unborn Child (SPUC), Mrs Carmel Armstrong, complained to TV3 Network Services Ltd both as President and on her own behalf about an item broadcast on *60 Minutes* at 7.30pm on Sunday 1 November.

Mrs Armstrong said that the item depicted Dr Richard Fisher, an infertility specialist and an obstetrician/gynaecologist, saying "In my experience with abortion, I've terminated pregnancies of the children of the presidents of SPUC". That statement, she continued, was both defamatory and a breach of the broadcasting standards. She recorded her distress at the effect of the accusation upon her and her three daughters and the effect on the other Society presidents and their children. Even if the statement was true, she added, it had cast a slur on all the Society's presidents and their daughters.

Broadcasting information gained while certifying for or carrying out an abortion, Mrs Armstrong continued, was reprehensible and, irrespective of the truth of the claim, its broadcast detracted from the Society's credibility in its efforts to maintain respect for human life and from her credibility as a spokesperson in particular.

Mrs Armstrong maintained that the comment breached the standards in s.4(1)(a), (b) and (c) of the Broadcasting Act 1989 and standards 4 and 5 of the Television Code of Broadcasting Practice. They require broadcasters to observe standards of good taste, to maintain the principles of law, to protect the individual's privacy and to deal fairly with people referred to in a broadcast. Pointing out that it did not matter for the complaint whether Dr Fisher's claim was correct or not, Mrs Armstrong concluded by seeking a public apology to the present and past presidents of the Society and compensation for the breach of privacy.

**Catherine Anne Barker's, Noreen Elizabeth Rhodes' and Jennifer Ruth Armstrong's
Complaint to TV3 Network Services Limited**

In a letter date 23 November 1992, Mrs Carmel Armstrong complained to TV3 Network Services Ltd about the same programme on behalf of each of her three daughters.

Alleging that Dr Fisher's broadcast comment was defamatory, Mrs Armstrong said that none of her daughters had had an abortion and the defamation was increased as her daughters were readily identifiable. She pointed out that the number of daughters of the seven National Presidents since the Society was founded in 1970 was small and that one of her daughters could easily have been thought to be the one Dr Fisher referred to. Her daughters, she added, were deeply distressed.



Mrs Armstrong repeated that the item breached the broadcasting standards listed in her earlier letter and, on her daughters' behalf, sought a public apology to the children of the presidents of the Society and compensation under the Broadcasting Act for \$5,000 for each of her daughters.

TV3's Response to the Formal Complaints

In a letter dated 1 March 1993, TV3 advised Mrs Armstrong of its Complaints Committee's decision on the complaints from the Society, from her and her daughters. It reported that the complaints had been assessed under the provisions cited in the letters of complaint and that the decision was based on legal advice given to the Complaints Committee.

TV3 dismissed the good taste complaint as inapplicable as the standard was concerned with language and behaviour. The complainants' point, TV3 added, seemed to allege a breach of standard 26 of the Television Code but as standard 26 included an exception for factual comment, it was not contravened by the broadcast of the factually accurate programme.

The complaint under the maintenance of law standard in both the Act and the Television Code was declined, TV3 wrote, as the law allegedly breached was the defamation law. However no defamation occurred as Dr Fisher had referred to a grouping of people whereas defamation requires reference to an individual. Similar reasoning applied to the privacy complaint which, TV3 said also referred to a comment about a group rather than an individual. It continued:

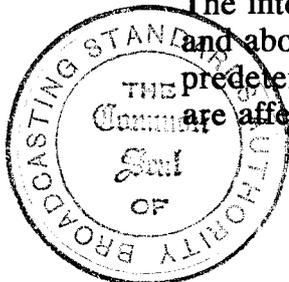
This grouping includes all National Presidents and Regional President, both present and past (plus all their daughters). This is a substantial number; such a size that any invasion of privacy argument is not applicable.

The Complaint about dealing unfairly was also declined as the item had not referred to an individual but to a substantial group.

Describing the issues raised by the programme as ones which dealt with extreme situations, TV3 recorded:

The segment complained of was of documentary style and centred upon the professional life of Dr Fisher and his achievements (and those of Fertility Associates) in the field of infertility. Dr Fisher specialises in cases of below normal fertility. Widely recognised as New Zealand's foremost 'baby doctor', Dr Fisher has also aborted pregnancies. His argument gave the viewer an insight into the complexities of the abortion issue.

The interview was candid and factual. It portrayed the issue of fertility and abortion as one which does not and can not fit neatly between predetermined points of view, that people of all persuasions and beliefs are affected by it. Further, that there are factors of such gravity that



they leave some people with no choice but to partake in a course of action, abhorrent as it may be to them, which is contrary to their stated beliefs.

As the complaints were not upheld, TV3 said that an apology was not warranted and the question of compensation was inappropriate.

The Complainants' Complaints to the Broadcasting Standards Authority

As they were dissatisfied with TV3's decision, in a letter dated 26 March 1993 Mrs Armstrong, on the complainants' behalf, referred the complaints to the Broadcasting Standards Authority under s.8(1)(a) of the Broadcasting Act 1989. The details of the referral were included in the Authority's Complaint Referral Form dated 20 April 1993.

The complainants referred to a programme preview published in the NZ Herald on 31 October which forewarned of "startling revelations" and argued that TV3 had minimised the defamatory impact of Dr Fisher's comments. They also rejected TV3's remark that the comment was justified in order to give viewers an insight into abortion, noting that the programme was about in vitro fertilisation, not abortion. The complainants also rejected TV3's argument that the comments referred to a grouping and not to individuals. Describing that argument as "spurious", Mrs Armstrong said viewers would be aware that Dr Fisher referred to Presidents who were well-known media spokespeople.

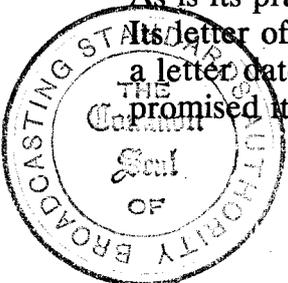
Mrs Armstrong noted that the records showed that Dr Fisher had been carrying out abortions since 1985 and even if he had been referring to Branch Presidents, the number with daughters of child bearing age who might have sought an abortion were few.

On the complainants' behalf and in view of the sensitive nature of the topic, Mrs Armstrong stated that the Authority might find a verbal submission useful and she observed:

We suggest that if the remarks of Dr Fisher had referred to the Presidents of the Medical Association, or indeed the Presidents of the groups who oppose us, those individuals would not have taken his statement to be of little consequence. Even those who support abortion would not welcome their privacy being breached in this manner.

TV3's Response to the Authority

As is its practice, the Authority sought the broadcaster's response to the complaint. Its letter of request enclosing all the papers from SPUC was dated 23 April 1993. In a letter dated 28 May 1993, TV3 sent the Authority a videotape of the item and promised its comment in a few day's time after it had been checked by its lawyer. It



was finally received in a letter dated 12 July and began with the following:

Whilst we recognise you would have wished these comments earlier, we must state our desire to be most thorough in our discussions and subsequent response.

In dealing with the substance of the complaint, TV3 stated:

Dr Fisher's statement was deemed to be pertinent to the programme and was not defamatory nor deliberately provocative and rose naturally out of the discussion. The NZ Herald article was considered general in its nature and the comments therein were made after the recording of the interview. The article can not in any way indicate an intent at the time of the interview.

Before the broadcast, TV3 continued, it was ascertained that there were approximately 40 past or present national or regional presidents of SPUC and legal advice confirmed that, in view of that number, no defamation or invasion of privacy could occur. A list of 21 such presidents was attached.

Describing the programme as a profile of Dr Fisher and not about fertilisation or abortion, TV3 said Dr Fisher stood by his comment and his comment has given viewers an insight into the abortion issue. He had not made the comment in justification of anything other than to demonstrate the complexities of the issues involved.

TV3 accepted that Mrs Armstrong was known and recognised in her role but repeated that there were a number of regional and national presidents of various degrees of public recognition. TV3 concluded:

We reiterate that there is no basis for any claim of damages which can only be applied should there have been a breach of privacy. As there has been no such breach, there is no basis for any award of damages. We further reiterate that everyone associated with the production of this segment acted in a responsible manner and that the point made by Dr Fisher was important.

The Complainants' Final Comment

When asked if she wanted to respond on behalf of all the complainants, in a letter dated 4 August Mrs Carmel Armstrong made a number of points.

First, she asked how TV3 had come up with the number of 40 presidents. She repeated that because of her involvement in SPUC and other community groups, she was well-known in the community.

Next, she disagreed that Dr Fisher's comment contained an insight into the complexities of abortion. Instead, she said it revealed a person who was unable to answer the question of why undertake an activity (abortions) which destroyed life.



She believed that Dr Fisher could have made the point contained in his comment in a number of different ways - for example by stating that he had carried out abortions on women who had previously opposed that procedure:

She also pointed out that TV3, because of the actions taken before the broadcast, was aware that the comment would be controversial and it could have been reworded. She added that as Dr Fisher had been performing abortions only since 1985, the number of relevant "presidents" of SPUC was limited.

Referring to the effect of the statement on people because of the organisation referred to, she said that her daughters had been unable to defend themselves as, by elimination, the daughter of the president to whom the comment applied would have had her confidentiality breached.

