

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 176/93

Dated the 21st day of December 1993

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

COMPLAINANT R

Broadcaster

TELEVISION NEW ZEALAND
LIMITED

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

DECISION

Summary

The sentencing of a Mongrel Mob member who had intimidated one of the victims in a recent rape trial was covered on *One Network News* broadcast by Television New Zealand Ltd between 6.00 - 6.30pm on 10 September 1993.

Complainant R, one of the two rape victims at the trial at which nine Mob members were found guilty of sexual offences, complained directly to the Broadcasting Standards Authority that the broadcast breached her privacy. She said that she had not been the victim intimidated but the shot of her entering the court clearly identified her both to the general public and to Mob members who had not previously known what she looked like.

Maintaining that the fleeting glimpse of the complainant in silhouette was insufficient to reveal the complainant's identity, TVNZ declined to uphold the complaint.

For the reasons given below, the Authority upheld the complaint and ordered compensation



Decision

The members of the Authority have viewed the item complained about and have read the correspondence (summarised in the Appendix). As is its practice, the Authority has determined the complaint without a formal hearing.

Following a recent rape trial, nine Mongrel Mob members were convicted of various sexual offences. In addition, one member was convicted of intimidating Complainant B, one of the two victims. The item which reported the conviction for intimidation included an interview with a police officer who outlined the type of intimidation used and reported the steps that had been taken to protect the victims. It also showed the two victims entering a building (apparently the court) while accompanied by police officers.

Complainant R complained that she was clearly identifiable from the shot of her entering the building and that the item consequently had breached her privacy. As she alleged a breach of privacy, she complained directly to the Broadcasting Standards Authority. She explained that she had not been the victim intimidated and that she had taken steps to keep herself safe during and since the trial. However, following the broadcast of the item, Mob members who had not known what she looked like, would now know and, furthermore, might think that she was responsible for the imprisonment of the convicted intimidator. She concluded:

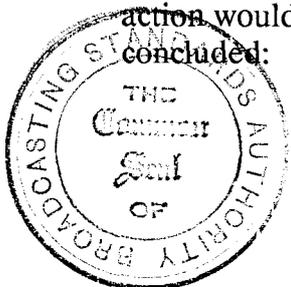
I have taken many precautions to keep myself in hiding and I feel that this item was a total breach of my privacy.

TVNZ emphasised the importance of the story in that it showed that action was taken against people who attempted to intimidate witnesses. It agreed that the item showed two women getting out of a car in the presence of police officers and walking through a door into a building. It continued:

The sequence, originally shot legitimately in a public place outside a courtroom during the rape trial, was used to emphasise to the viewing audience the bravery of both complainants "R" and "B" who had given evidence in the original trial despite receiving anonymous threats and intimidation as outlined in the report by Detective Inspector John Dewar. The contrast between the images of the two, slight yet determined women, and the swaggering macho figures from the gang brought the human dimension in the story to the fore.

Reporting that the material was included only after considerable discussion among senior news staff, TVNZ stressed that the sequence was shown because staff believed that the women's identities were not revealed. Indeed, TVNZ maintained that neither woman would have been recognised other than by their "closest acquaintances".

In addition, TVNZ noted, "Complainant R" had lodged her complaint through two police officers and if a breach of the suppression order of either victim's identity had occurred, action would have been taken against TVNZ. That, it noted, had not occurred. TVNZ concluded:



We are deeply sorry that "Complainant R" believes her identity has been revealed - and holds us to blame - and for the fears she holds as a consequence. We believe, however, that her fears are unfounded and that the fleeting glimpse of the complainant in silhouette was insufficient to inform viewers at large of her identity.

At the outset, the Authority wants to make it clear that its task is to determine whether or not the item breached s.4(1)(c) of the Broadcasting Act. That provision requires broadcasters to maintain standards which are consistent with the privacy of the individual. It is not its task to determine whether a breach of the legislatively imposed suppression order occurred.

Privacy Principles

The Authority would note that although privacy has been the primary concern in only 3% of its decisions, it has been necessary for it to develop a number of principles to apply when a complaint is made that a broadcast has invaded an individual's privacy. It issued an Advisory Opinion in June 1992 to all broadcasters outlining five relevant privacy principles it intended to apply. The Authority would add that these principles have been sufficient to deal with all complaints alleging a breach of privacy received since then. The introduction to the Advisory Opinion provides:

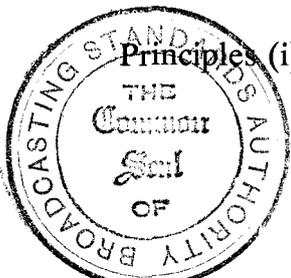
By way of introduction to the Advisory Opinion, the Authority wants to stress that, although it records five relevant privacy principles:

- These principles are not necessarily the only privacy principles that the Authority will apply;
- The principles may well require elaboration and refinement when applied to a complaint;
- The specific facts of each complaint are especially important when privacy is an issue.

Before recording five "relevant Privacy Principles", the Authority stated:

Although the right to be left alone is a common sense definition of privacy, as the Authority's decisions may be appealed to the High Court it is necessary for the Authority to follow what it considers to be appropriate legal precedents. Because of the paucity of reported cases and the lack of a clear definition of privacy in New Zealand, the Authority has relied upon precedents from the United States in developing the following five principles which have been applied to privacy complaints so far by the Authority when determining them under the Broadcasting Act 1989.

Principles (i) and (ii) appear relevant to the current complaint and they provide:



- i) The protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.
- ii) The protection of privacy also protects against the public disclosure of some kinds of public facts. The "public" facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to the reasonable person.

The Application of these Principles to this Decision

There is no dispute about any of the facts other than the issue of whether or not Complainant R's identity was revealed. Because of the camera angle of the shot, the Authority accepted, for the most part, TVNZ's submission that viewers generally would not have been able to identify her. At no time was Complainant R's entire face portrayed but her profile was clear during the broadcast and her walk, hairstyle and general deportment would have made her identifiable to acquaintances.

TVNZ acknowledged that Complainant R would have been recognised, "perhaps", by her "closest" acquaintances. On the basis of viewing the nine second sequence of the event at normal speed during which both women were seen, the Authority concluded that this summary was unduly restrictive. It considered that Complainant R would have been recognised by people - close to her or not - who had had a considerable amount of interaction with her. That would apply not only to family and close friends, but acquaintances at work or in the community or participants in the same leisure interests.

The Authority then returned to the privacy principles. It was clearly of the view that automatic name suppression ensured that a rape victim's name is a private fact to the general public.

However, a rape victim who gives evidence in open court is disclosing her identity - if not her name - unless evidence is given behind a screen on a television monitor. In view of those possibilities, the Authority asked the police to explain the circumstances under which Complainant R had given evidence. It was told that she gave evidence from the witness box but to a closed court from which most members of the public - but not the defendants - were excluded. She was also known as "Complainant R".

In other words, although they might not have been aware of Complainant R's name, the defendants would have been aware of her physical appearance and could well have gleaned from her evidence some information about her personal circumstances. That information could then have been passed to their associates.

Taking account of the flexibility included in the introduction to the principles, the Authority then applied privacy principle (i) to this specific factual situation.



It noted that in view of the public awareness of the trauma experienced by rape victims in coming forward to give evidence, the legislation now accepts that one way of minimising that impact is to grant automatic name suppression to victims. Because of that requirement, the Authority decided that should a broadcast disclose the identity of a rape victim, it would, in the words of principle (i), "be highly offensive and objectionable to a reasonable person of ordinary sensibilities".

The question remained, however, did the broadcast involve the public disclosure of what the Authority accepted as a private fact, Complainant R's identity?

The Authority has recorded above TVNZ's acknowledgement that the women would perhaps have been identifiable to their closest acquaintances. The Authority has decided that TVNZ unduly restricted this acknowledgement and concluded that the women would have been identifiable to acquaintances from a considerably wider circle of acquaintances.

Consequently, as the broadcast involved the public disclosure of highly sensitive private facts, the Authority concluded that the broadcast breached principle (i).

For the reasons set forth above, the Authority upholds the complaint that Television New Zealand Ltd's broadcast of an item on *One Network News* on 10 September 1993 breached s.4(1)(c) of the Broadcasting Act 1989 which requires broadcasters to maintain standards consistent with the privacy of the individual.

Having upheld a privacy complaint, the Authority may make an order for compensation under s.13(1)(d) of the Act.

In her complaint, Complainant R referred to the efforts she had made to keep her identity hidden from members of the Mongrel Mob. She was concerned that they would mistakenly believe her to be Complainant B whose evidence about intimidation resulted in another gang member being sentenced to three years jail. That comment would suggest that Complainant R was not so intensely concerned should she be identified by viewers at large, but was very apprehensive at being identified by Mob members. Taking note of the fact that both Complainants R's and B's physical appearances, having given evidence in court, were known to some gang members, the Authority acknowledged that whereas the broadcast breached the privacy principles, the broadcast did not disclose any additional information which the gang members would not have otherwise known.

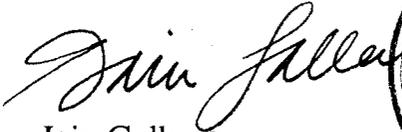
Nevertheless, the Authority gathered from TVNZ's letter that its news staff were aware that broadcasting the item might not have been in the interests of the complainants. On the basis that the societal issues raised by violence generally and rape specifically are of considerable importance and justify a cautious approach on the broadcaster's part, the Authority reiterates its concern that a person who has been a rape victim, but who nevertheless was prepared to give evidence, has been further victimised by the broadcaster. In the circumstances, the Authority considered that compensation of \$2500 was appropriate.



Order

For the reasons set forth above, the Authority orders Television New Zealand Ltd to pay compensation to Complainant R in the amount of \$2500.

Signed for and on behalf of the Authority



Iain Gallaway
Chairperson



21 December 1993

Appendix

Complainant R's Complaint to the Broadcasting Standards Authority

In a letter dated 6 October 1993, Complainant R complained directly through the local police to the Broadcasting Standards Authority under s.8(1)(c) of the Broadcasting Act 1989 that an item on Television New Zealand Ltd's *One Network News* on 10 September breached her privacy.

The item, she wrote, dealt with the sentencing of a Mongrel Mob member who had intimidated one of the two rape victims at a recent trial and the item referred to the conviction of nine Mob members for sexual offences.

Pointing out that she was one of the victims but not the one who had been intimidated, Complainant R said the item showed her entering the Court and that she could be "clearly identified". She added:

In fact, many people have spoken to me, saying they recognised me. It has got back to me that Mongrel Mob members who didn't know me before, now know what I look like.

Reporting that she had been careful to keep herself in hiding, she argued that the item was a breach of her privacy. She concluded:

It makes me angry that after going through the trial and trying to keep myself safe, since the trial, TVNZ did not even try to disguise me on that news. This makes me really angry, and afraid, that everyone will think that I was one who put the Mongrel Mob member away.

TVNZ's Response to the Broadcasting Standards Authority

As is its practice, the Authority sought the broadcaster's response to the complaint. Its letter is dated 8 November and TVNZ's response, 29 November 1993.

TVNZ explained that the item, filmed from a public place, showed Complainants R and B in the presence of police officers getting out of a car and entering a building. The sequence, TVNZ continued, was designed to emphasise the complainants' bravery despite the threats which they had received.

TVNZ said that the news staff, after considerable discussion, used the material because they believed the women's identities were not revealed and because it showed the contrast between two slight yet determined women and the gang members and highlighted the human dimension of the story. TVNZ added:

The story was an important one and the role of the two rape victims was central to it. The sentencing of Gilly Kira Jacobs to prison for intimidation



must be seen in the context of a year in which there have been numerous allegations of attempts to intimidate witnesses in criminal cases.

It referred to privacy principle (i) enunciated by the Authority which states:

- (i) The protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

It argued that as Complainant R's identity was not revealed, no private fact had been disclosed. Noting that the complaint was lodged through the local police station, TVNZ asked why, if it had revealed Complainant R's identity as alleged, it had not been prosecuted for breaching the suppression order.

TVNZ concluded:

We are deeply sorry that "Complainant R" believes her identity has been revealed - and holds us to blame - for the fears she holds as a consequence. We believe, however, that her fears are unfounded and that the fleeting glimpse of the complainant in silhouette was insufficient to inform viewers at large of her identity.

The Complainant's Final Comment

In a letter dated 7 December 1993, Detective Senior Sergeant Frederickson responded on Complainant R's behalf to TVNZ's comment.

He reported that Complainant R gave evidence in a closed court where the accused, their counsel, prosecution staff and immediate family members were allowed to attend. He added:

The associates of the accused were not permitted to attend the court hearing when complainant 'R' gave her evidence. During the remaining trial, she was referred to as complainant 'R'.

As for TVNZ's comment that action had not been taken for breaching the suppression order, he advised that the matter had been referred to the Crown Solicitor and no decision had been taken. He also maintained that viewers would have been able to identify Complainant R from the coverage and he concluded:

The complainant has been recently contacted as recent as the 2.12.93 and is still very much dissatisfied with being exposed on National Television and can categorically state that a lot of people who do know her, but did not know that she was a complainant, now have that knowledge as a result of the viewing.

