

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 177/93

Dated the 21st day of December 1993

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaints by

Ms H
of Auckland

Broadcaster
TELEVISION NEW ZEALAND
LIMITED

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

DECISION

Summary

Every Widow's Dream was the title of a documentary screened on TV1 at 8.30pm on 31 August. It followed the fortunes of a woman who invested her late husband's insurance policy in an all-male strip revue. The programme included extracts from some of the troupe's performances which included its interactions with members of the audience.

Ms H complained to Television New Zealand Ltd that, as a member of an audience, she was shown on stage at a nightclub during part of a performance screened during the item. She had been embarrassed and humiliated by the portrayal and, as she had not been aware of the filming, she had not been treated fairly and her privacy had been invaded.

On the basis that the audience was advised before the performance that filming was occurring and that the cameras were obvious in the small venue, TVNZ denied that Ms H had been treated unfairly or that her privacy had been invaded. Dissatisfied with TVNZ's response, Ms H referred her complaint to the Broadcasting Standards Authority under s.8(1)(a) of the Broadcasting Act 1989.

For the reasons given below, the Authority declined to uphold the complaint.



Decision

The members of the Authority have viewed the programme 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.

Ms H complained to TVNZ about the broadcast of *Every Widow's Dream* at 8.35pm on 31 August. As an alleged breach of privacy seemed to be the central issue, TVNZ advised Ms H that she might wish to complain directly to the Broadcasting Standards Authority, although it said it would also consider the complaint under standard G4 of the Television Code of Broadcasting Practice.

Ms H followed TVNZ's suggestion but, unfortunately, was given the wrong address and the privacy complaint, although posted on 24 September (17 working days after the broadcast), did not reach the Authority until 26 October (38 working days after the broadcast). Under the Broadcasting Act 1989 (s.9(3)), the Authority may not accept privacy complaints referred to it:-

... after the expiry of 20 working days beginning with the first working day after the day on which the programme to which the complaint relates was broadcast.

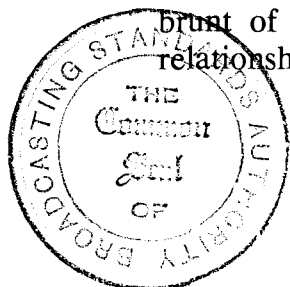
Because an argument could be advanced that the 20 working day period ended when the complaint was posted and not when it was received, the Authority decided that it could avoid the possibility of a legal challenge by asking TVNZ to act on the original letter of complaint it had received (clearly within the statutory time limit) from Ms H and to investigate the privacy aspect of the complaint as well as the standard G4 requirement to deal with people referred to justly and fairly. TVNZ accepted that suggestion.

The Complaint

In her complaint, Ms H wrote that she had been seen during the documentary *Every Widow's Dream* which included scenes from a performance of an all-male strip revue at a Parnell nightclub which she had attended. She added:

I had no prior knowledge that any form of recording was taking place during the event until my fiancée and I were aghast to see and recognise myself on nationwide television.

The broadcast, she continued, had had an impact on her employment and personal relationships. Because of the inferences drawn by others, her career had suffered and she had felt humiliated and embarrassed. She had been to the nightclub with some women friends to what she believed was a private function and she argued that her consent should have been sought before filming and then screening the ten second shot of her which included a close-up of her face. Furthermore, her fiancée had "been the brunt of many harmful and defaming comments" which had caused a rift in their relationship.



TVNZ dealt with the complaint as an alleged breach of standard G4 of the Television Code and of s.4(1)(c) of the Broadcasting Act 1989. The former requires broadcasters:

G4 To deal justly and fairly with any person taking part or referred to in any programme.

Section 4(1)(c) requires broadcasters to maintain standards consistent with the privacy of the individual.

In regard to the standard G4 aspect of the complaint, TVNZ said it sought an explanation from the makers of the programme. It continued:

It received from the director an assurance that before the performance began an announcement was made informing the audience that the show was being filmed for a television documentary.

The director also pointed out to the [Complaints] Committee that the venue was so small that it is inconceivable that a member of the audience would be unaware of the presence of the television cameras.

Expressing sympathy for Ms H, TVNZ maintained nevertheless that she had not been treated unfairly as her attendance at a public performance of the New Zealand Male Export Strip Revue had been screened as part of the performance without editorial comment and that she had elected to stay during a performance which was being filmed.

In responding to the privacy aspect of the complaint which it described as very similar to the concerns raised under standard G4, TVNZ began by repeating the above points. It then assessed the complaint against the privacy principles enunciated by the Authority and, on the basis that a public event had been filmed, it declined to uphold that aspect of the complaint. Had a breach of privacy occurred nevertheless, it added, then by staying after the announcement that filming would occur, Ms H had accepted any breach of her privacy that might have taken place.

Ms H objected to what she believed to be TVNZ's trivialising of the complaint and turning the blame on to her and, she stressed, there had been no announcement made before the show that the performance would be filmed. She also maintained that she had not seen any camera filming the show, that the event was a private function and that it was one which she had not left because there was no reason to expect that her obvious reluctance to participate on stage would be screened by TVNZ.

There is an extensive overlap in this instance between the obligation to deal with people fairly in standard G4 and the privacy requirement in s.4(1)(c) of the Broadcasting Act and the Authority decided to deal first with the privacy requirement.

Privacy Principles



The Authority would note that although privacy has been the major 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.

The principles 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.
- iii) There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or



seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.

- iv) Discussing the matter in the "public interest", defined as a legitimate concern to the public, is a defence to an individual's claim for privacy.
- v) An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for breach of privacy.

The Application of the Principles to this Complaint

The fact that the filming occurred and, as a result, Ms H was shown on TVNZ's broadcast of the documentary *Every Widow's Dream* is not disputed. Ms H advised the Authority which member of the audience she was and she was clearly identifiable as dancing, reluctantly, with one of the male members of the troupe who was dressed only in a G string. The Authority accepted that the performance was open to any member of the public who paid the appropriate admission fee and was, in that sense, a public performance.

The matters in dispute are, first, whether or not the nightclub management made an announcement before the performance that the show was being filmed for the purposes of a television documentary, and secondly, whether or not the cameras were apparent in a small venue. TVNZ stated that the programme makers maintained that an announcement was made and that, in view of the size of the venue, the cameras would have been obvious. Ms H disputed both points and provided the Authority with the name of some friends who accompanied her on the visit and who would corroborate her statement.

The Authority did not believe that any further information was necessary in determining the complaint under either privacy principles (i) or (ii). They apply only when the broadcast discloses private facts which are "highly offensive and objectionable". Attendance at the nightclub, the Authority decided, was not a private fact and there was nothing shown of Ms H in the broadcast which could be considered as offensive apart, possibly, from the attendance itself. Ms H's obvious reluctance to participate in the troupe's gambols was plain. Accordingly, the Authority decided, the broadcast had not breached principles (i) or (ii).

Privacy principle (iii) prohibits the intentional interference (in the nature of prying) with an individual's interest in seclusion. Before considering whether the complaint amounted to a breach of this principle, the Authority points out that the defences in principles (iv) and (v) do not apply. The documentary did not deal with a matter in the "public interest", defined as a legitimate concern to the public, and Ms H did not consent to the invasion of her privacy if one occurred.

In view of the possible application of privacy principle (iii), the Authority wrote to each of the people nominated by Ms H for corroboration about the events of the evening.



One letter to the four listed by Ms H was returned "Gone No Address". The second corroborated the claim that there had been no announcement that the performance was being filmed for the purposes of a documentary. Further, the writer said, a cameraman had been present and, in the absence of logos on the equipment, she assumed that the performance was being filmed "for private purposes to monitor the performers' acts". The third also agreed that there had been no announcement and added:

I was also not aware of any television camera in the club, there was certainly no lighting.

The fourth confirmed the absence of an announcement and the absence of obvious television equipment.

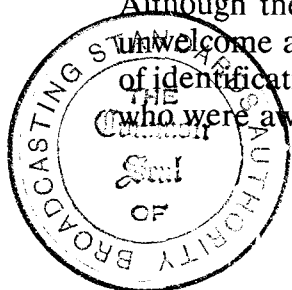
In view of the information received, the Authority dealt with principle (iii) on the following basis. First, any announcement made that the performance would be filmed for the use in a documentary was not heard by Ms H or it had occurred before Ms H and her friends arrived. Secondly, it was apparent to some patrons that parts of the performance were being filmed although there was no indication of why the filming was taking place or who was responsible for it. Furthermore, those who were aware apparently did not enquire about the reasons for it.

These conclusions do not allow a straight-forward answer as to whether or not principle (iii) was breached. The principle is aimed to deal with the situation where filming is undertaken surreptitiously with the intention to deceive the person being filmed. Filming did not take place in that manner on this occasion and there is no evidence that the film makers intended to deceive the people who were filmed. Nevertheless, the Authority acknowledges that the use of video cameras for private purposes (eg weddings and funerals) is increasing steadily. The appearance of cameras at many occasions is assumed to be for private purposes. However, although the use of filming equipment by a television company might be accompanied by a number of people and the use of logos for advertising purposes, the presence of a film crew or the display of logos is not necessary and, indeed, might not be acceptable or practical in some locations.

Privacy principle (iii) is breached when the broadcast involves the disclosure of public or private facts by the intentional interference (in the nature of prying) with a person's interest in seclusion. Ms H, undoubtedly, did not wish to be shown in the documentary *Every Widow's Dream* screened by TVNZ. However, taking into account the factual conclusions it had reached about the circumstances relating to the filming, the Authority was hesitant to conclude that the interference had been in the nature of prying. That hesitancy was confirmed when the Authority considered the next part of the principle. It begins:

The intrusion must be offensive to the ordinary person

Although the intrusion which occurred at the Parnell nightclub might well have been unwelcome and, because the fact and purpose of the filming was not plain, the absence of identification of the cameraperson allowed incorrect assumptions to be drawn by those who were aware of the filming, the Authority was not prepared to conclude that filming



a person's attendance at a nightclub without an explicit announcement of the purpose for which filming was taking place, amounted to intentional interference with a person's privacy.

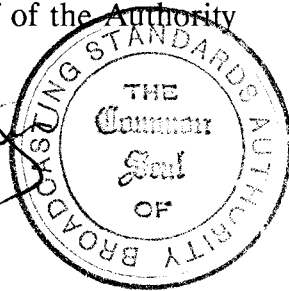
To deal justly and fairly - standard G4

The Authority agreed with TVNZ that, on this occasion, the concerns raised by the complainant were encompassed by its conclusions about the privacy aspect of the complaint.

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

Signed for and on behalf of the Authority


Iain Gallaway
Chairperson



21 December 1993

Appendix

Ms H's Complaint to Television New Zealand Limited

In a letter dated 13 September 1993, Ms H of Auckland complained to Television New Zealand Ltd about her appearance in the documentary *Every Widow's Dream* screened on TV1 at 8.30pm on 31 August 1993.

With a group of close friends, she said, she had gone to a private function at a nightclub and had been seen on the documentary about the all-male strip revue which had performed that evening. She had been portrayed for at least 10 seconds which included a close-up of her face. She had had no knowledge that the troupe's performance in the nightclub was being filmed but her appearance had affected her life in a number of ways.

First, at a time of beginning her professional career, she had been embarrassed, humiliated and frustrated. Secondly, as she had been at a private function for which she had paid to enter, she believed her privacy had been invaded by her portrayal. She noted:

A lot of women were shown during the documentary in similar circumstances to mine, but I believe mine differs as they seem, at various intervals, to be acknowledging the cameras presence.

Thirdly, her fiancée who was also starting out on his career had been "the brunt of many harmful and defaming comments" which had caused a rift in their relationship.

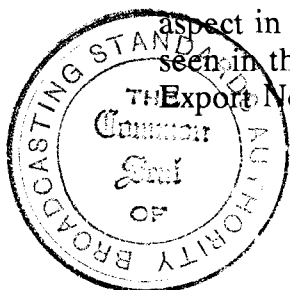
TVNZ's Response to the Formal Complaint

TVNZ advised Ms H to refer the privacy aspect of her complaint directly to the Broadcasting Standards Authority but, because of a mistaken address, that aspect of the complaint did not reach the Authority until the time limit for privacy complaints made directly to the Authority had expired. Eventually, TVNZ considered complaints both under standard G4 of the Television Code of Broadcasting Practice and s.4(1)(c) of the Broadcasting Act. Standard G4 requires broadcasters:

G4 To deal justly and fairly with any person taking part or referred to in any programme.

Section 4(1)(c) requires broadcasters to maintain standards consistent with the privacy of the individual.

TVNZ advised Ms H of its Complaints Committee's decision on the standard G4 aspect in a letter dated 6 October 1993 in which it pointed out that she had been seen in the audience and possibly on the stage during a performance of the Male Export New Zealand Strip Revue. The operation of the revue, TVNZ added, was the



reason for the documentary.

Pointing out that the documentary makers had assured it that the performance was preceded by an announcement that filming for a television documentary would occur, TVNZ said that the smallness of the venue meant that it was inconceivable that cameras would not have been noticed. Moreover, the performance had been a public one and the audience's presence and participation was broadcast without comment.

Expressing sympathy for Ms H, TVNZ continued:

However, [the Complaints Committee] did not believe that the blame for your predicament can properly be placed at the feet of the producers of "Every Widow's Dream". As a member of the audience you were told the performance was being filmed, yet elected to stay. You were conscious that television cameras were present yet apparently made no effort to distance yourself from them, or to ask the programme makers not to use pictures of you.

The Committee could not conclude that a breach of G4 had occurred.

TVNZ advised Ms H about its decision on the privacy aspect of the complaint in a letter dated 29 October 1993.

It began by expressing the opinion that the privacy issue on this occasion was virtually the same as the standard G4 issue. Repeating the points that an announcement was made, that the presence of the cameras was obvious and that the club was open to all paying members of the public, TVNZ said that the issue seemed to be one of defamation rather than privacy.

Assessing the complaint against the privacy principles applied by the Authority, TVNZ advised:

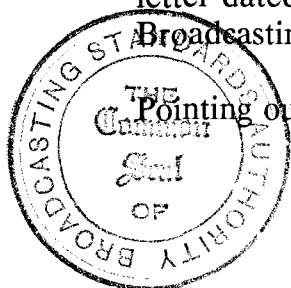
We do not accept that there was a breach of your privacy. However, should it be deemed to have occurred we suggest that by staying at the performance after the announcement that it was being filmed was made and in the presence of television camera equipment you implicitly agreed to the programme acknowledging your presence at the performance.

It concluded by expressing sympathy for Ms H.

Ms H's Complaint to the Broadcasting Standards Authority

Dissatisfied with TVNZ's decision on the standard G4 aspect of the complaint, in a letter dated 15 October 1993 Ms H referred that aspect of her complaint to the Broadcasting Standards Authority under s.8(1)(a) of the Broadcasting Act 1989.

Pointing out that she had arrived at the club early in the evening, Ms H was adamant



that she had not heard any announcement about filming the performance and that she had been unaware of any television cameras. She provided the names of witnesses who could corroborate those claims. She added that it was unjust that TVNZ had consulted the programme makers but not her.

She was also dissatisfied with TVNZ's decision on the privacy aspect of her complaint which she referred to the Authority on 7 November 1993.

She again stressed that no announcement had been made or that the presence of television cameras had been obvious. She also listed the names of some witnesses who would confirm that information. As for TVNZ's comment that no one had asked to be excluded from the final programme, she asked how could anyone make such a request if they did not know they were being filmed. She concluded:

TVNZ still seem to be basing their decisions on biased research. This entire ordeal has become very frustrating for me as I feel that my statements backed up by witnesses are not being heard at all.

TVNZ's Response to the Authority

As is its practice, the Authority sought the broadcaster's response to the complaints. Its requests were dated 5 and 10 November 1993 and TVNZ's Programme Standards Manager (Mr David Edmunds) in his reply of 18 November dealt with both complaints referred to the Authority.

Summarising the complaints, TVNZ stated that Ms H had been seen during the documentary, *Every Widow's Dream*, while attending a performance of the Male Export New Zealand Strip Revue. It continued:

We understand that the performance took place at a night club in Auckland on 6 February, and that Ms H is one of the women shown in the programme joining in the performance with the male strippers.

Ms H says she did not know she was being filmed, would not have stayed in the club had she known, and that her appearance in the programme has caused acute personal embarrassment to her and led to the break-up of her engagement.

Because the issues in both the Section 4(1)(c) complaint and the G4 complaint are identical we request that this letter be applied to both.

Expressing sympathy for Ms H, TVNZ added that nevertheless she was the author of her own misfortune. First, she had not heard the announcement that the performance was being filmed for a documentary.

Secondly, we do not find it credible that Ms H was unaware of the cameras. As she herself says, "a close-up of my face" was shown - indicating that the



camera was not only present but not far removed from the complainant. It is my understanding that the premises in which this performance took place is very small indeed. It is described as being about the size of two average-sized living rooms. In such circumstances the presence of camera equipment could not be missed.

Thirdly, TVNZ wrote, the camera crew was present at the invitation of the club's management, and fourthly, it was a public performance open to any members of the public who paid the admission fee.

Ms H's Final Comment to the Authority

When asked to comment on TVNZ's response, in a letter received on 3 December 1993 Ms H described it as biased and unfair. The party she was with had arrived early, before the show, and there had been no announcement that the performance would be filmed. Moreover, she maintained that she had not seen the camera which had filmed her obvious reluctance to participate in the performance. She argued in addition, that it was a "private" performance and observed:

If this was reversed and a professional man was filmed on stage with a female stripper on nationwide television unbeknown to him I'm sure that he, like me, would consider his attendance at such a function as private.

She considered that she had been embarrassed, humiliated and frustrated by being included in the documentary and objected to TVNZ's attitude which, she said, was to trivialise her concern and turn the fault on to her.

Further Correspondence

The Authority wrote to the four people named by Ms H who, she said, could corroborate the account of events on the night. They were asked to comment on:

- (i) whether or not an announcement was made that the performance was being filmed; and
- (ii) whether or not they were aware of the presence of television cameras

One letter was returned "Gone No Address". The second and third confirmed that there had been no announcement. The third also reported that she was unaware of any television camera in the club and there was no specific lighting for television. The second observed that a cameraman had been behind them at the club, adding:

I saw no logos or such on the left side presented to me and presumed it was for private use to monitor the performers' acts. The cameraman did not move and several times the camera was to his side facing the floor, indicating that he was not filming. I saw only one cameraperson during the time we were there.

The fourth respondent again confirmed the absence, first, of any announcement, and secondly, television camera equipment.

