

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 27/93

Decision No: 28/93

Dated the 18th day of March 1993

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of complaints by

THE KYRKE-SMITH FAMILY  
of Wellington

Broadcaster  
TELEVISION NEW ZEALAND  
LIMITED

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

DECISION

Introduction

The death of Mrs Rosemary Kyrke-Smith was dealt with on *One Network News* and *Tonight* on 14 October 1992. The item reported that Mrs Kyrke-Smith, after being certified dead, was found alive in the hospital morgue but she had later died. The item included visuals of the funeral.

On behalf of the family, Mr N. Kyrke-Smith (a son of the deceased) complained to Television New Zealand Ltd under s.6(1)(a) of the Broadcasting Act 1989 that the item sensationalised and trivialised the event and breached a number of broadcasting standards. He also complained directly to the Broadcasting Standards Authority under s.8(c) of the Act that the item invaded the family's privacy.

While accepting that the broadcast amounted to an unwarranted invasion of the family's privacy, TVNZ declined to uphold any other aspect of the complaint. Dissatisfied with that aspect of TVNZ's decision, Mr Kyrke-Smith referred it to the Authority under s.8(a)

of the Act.



## 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 complaints without a formal hearing.

## **The Procedure**

This decision incorporates two complaints. The Broadcasting Act 1989 requires complaints, other than on the grounds of an invasion of individual's privacy, to be made initially to the broadcaster. If dissatisfied with the broadcaster's decision, a complainant may refer a complaint to the Authority for investigation and review. A complaint alleging an invasion of privacy is the only exception to the rule. When that is the basis of the complaint, the complainant has a choice of either complaining to the broadcaster - as with all other complaints - or directly to the Authority.

The Authority's usual practice is similar with both types of complaint. Acting under s.10(1)(a) of the Act, it seeks the broadcaster's response to the issue which is raised by the complainant. This procedure has been outlined as it is relevant to the present decision.

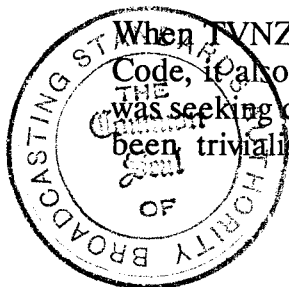
## **The Item Complained About**

The broadcast of a news item on TVNZ's *One Network News* and *Tonight* on 14 October 1992 dealt with the death and funeral of Mrs Rosemary Kyrke-Smith. The item stated that after a heart attack and being certified dead and placed in the morgue, the deceased, named as Mrs Rosemary Kyrke-Smith, was found to be breathing but subsequently died after a further 17 hours in the intensive care unit. The item included shots of the death notice in the press, the funeral service and the coffin being loaded into the hearse. The visual of the service carried the caption "Amateur Video" and the funeral, it was reported, had taken place half an hour after the Police announced the circumstances of Mrs Kyrke-Smith's death.

On behalf of the family, Mr Nick Kyrke-Smith complained both to TVNZ and the Broadcasting Standards Authority. He complained to TVNZ that the broadcast breached standards 2, 4, 6, 7, 14 and 15 of the Television Code of Broadcasting Practice and to the Authority that it breached s.4(1)(c) of the Broadcasting Act 1989. Section 4(1)(c) requires broadcasters to maintain standards consistent with the privacy of the individual.

## **TVNZ's Consideration of the Complaint**

When TVNZ considered the complaint alleging breaches of the above standards in the Code, it also had before it the privacy aspect of the complaint on which the Authority was seeking comment. Maintaining that the item was newsworthy and the event had not been trivialised or sensationalised as claimed by the complainant, TVNZ decided



nevertheless that there had been no good reason for including Mrs Kyrke-Smith's name in the material which was broadcast and that the broadcast of the name amounted to an unwarranted invasion of the family's privacy. TVNZ extended sympathy to the family and said that some errors of judgment had occurred while reporting the extraordinary events surrounding Mrs Kyrke-Smith's death. On the basis that the breaches which occurred were all privacy matters, TVNZ declined to uphold any of the broadcasting standards complaints.

### **The Referral of the Complaint to the Authority**

Upon being advised of TVNZ's decision, Mr Kyrke-Smith on behalf of the family referred some specific matters to the Broadcasting Standards Authority. Rather than cite all the standards listed in the complaint to TVNZ, in the referral Mr Kyrke-Smith alleged that the item breached standards 4, 7 and 14 of the Television Code of Broadcasting Practice. Standards 4 and 7 require broadcasters:

4. To deal justly and fairly with any person taking part or referred to in any programme.
7. To avoid the use of any deceptive programme practice which takes advantage of the confidence viewers have in the integrity of broadcasting.

Standard 14 reads:

14. News should not be presented in such a way as to cause unnecessary panic, alarm or distress.

Standard 4 was breached, Mr Kyrke-Smith wrote, when the item omitted to include any information about the issue which was central to the family - whether or not the delay in getting treatment for his mother affected her chance of recovery. He continued:

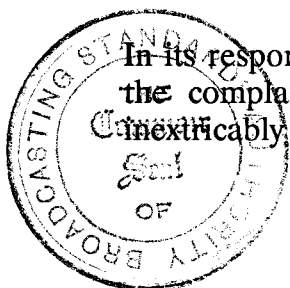
It was not just or fair to my mother to create an open question about this matter.

In addition, as unnecessary distress had been caused to the family, relatives and friends, the item had breached standard 14.

The standard 7 aspect of the complaint related to the caption "amateur video" which was broadcast during shots of the funeral service. Mr Kyrke-Smith complained:

It is, in our opinion, inherently misleading to describe footage which has been commissioned by a broadcaster as "Amateur Video". The description "amateur" relates to the matter of payment, not to the standard of equipment used. Accordingly, we believe that the practice is in breach of standard 7.

In its response, TVNZ explained that, having acknowledged that the privacy aspect of the complaint had merit, the standards 4 and 14 aspects of the broadcast were inextricably linked to that conclusion. It had not, it pointed out, included any comment



about Mrs Kyrke-Smith's medical condition as that matter was being investigated by the Coroner and as the item focused on hospital procedures. It maintained that standard 14 applied to viewers generally, not to family who might, nevertheless, be a consideration under the requirements of standard 4.

In regard to the standard 7 complaint about the caption "Amateur Video", TVNZ said that it paid for virtually all material used and thus questions of payment did not arise. Internationally, the term "amateur video" referred to the quality of the equipment although TVNZ now acknowledged the "unfortunate suggestion of snooping" which was never intended. TVNZ concluded:

Quite simply, normal procedures were being followed and the "editorial" impact was not realised until the programme was broadcast. It was accepted by [TVNZ's] Complaints Committee that the use of the term further heightened the impression of breaching the privacy of the bereaved family.

### **The Privacy Complaint**

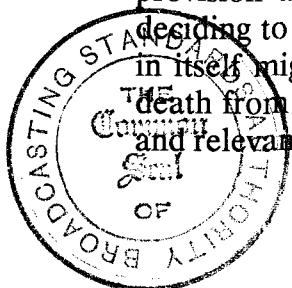
The Authority acknowledges that TVNZ believed that two aspects of the privacy complaint should be upheld. They were the portrayal of the funeral service and the broadcast of the deceased's name. However, as the complaint alleging a breach of privacy had been made directly to it, the Authority began its examination of the complaint by assessing whether the item breached any of the privacy principles set out in Decision No: 19/92 and which are applied by the Authority to broadcasters when assessing complaints under s.4(1)(c) of the Act alleging a breach of the privacy provision.

Privacy principle (iii) states that a ground for complaint is the intentional interference (in the nature of prying) with an individual's interest in solitude and seclusion. It continues:

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.

As the portrayal of the funeral service showed the mourners in the chapel and had been filmed without the family's permission, the Authority had no hesitation in deciding that its broadcast was a blatant breach of privacy principle (iii) and, furthermore, that this aspect of the broadcast would not only be offensive to the ordinary person but was insensitive as well.

TVNZ accepted that the broadcast of the deceased's name breached the privacy provision and the Authority decided not to contest TVNZ's view of the matter. In deciding to follow that course, the Authority noted that while the broadcast of the name in itself might not amount to a breach of s.4(1)(c), showing the announcement of the death from a newspaper's death column was in the circumstances of questionable taste and relevant when assessing penalty. It was particularly insensitive, the Authority added,



in view of the clear invasion of privacy occasioned by the broadcast of the funeral service.

### **The Broadcasting Standards Complaint (other than privacy)**

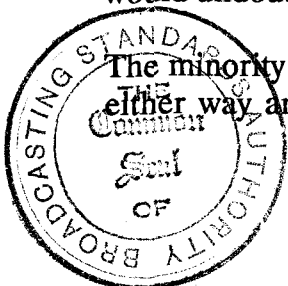
Turning to the broadcasting standards complaints referred to it, the Authority noted that TVNZ said that causing distress and alarm to the family in the item was not a standard 14 matter. Standard 14, it said, is mainly designed to deal with incidents when a broadcaster, totally without justification, announces an imminent disaster such as a hurricane or a tidal wave. While accepting that standard 14 may also be relevant when announcing the injury or death of a named person before the family has been informed, the Authority agreed that the announcement of the death to the general public and the name of the deceased did not contravene standard 14 in the situation complained about - ie where the funeral had been held and those closest to the deceased would have been aware of the circumstances surrounding the death.

In regard to the standard 4 complaint about unfairness to the mother, the Authority had some sympathy for the complainant's family as they had not been responsible for the news item which featured them. However, the Authority decided that the element of unfairness in the item was in the circumstances subsumed into the privacy aspect of the complaint. It could also be relevant when penalty was considered.

The use of the caption "Amateur Video", Mr Kyrke-Smith alleged, amounted to a deceptive programme practice. While understanding how the Kyrke-Smith family came to that conclusion, TVNZ argued that "amateur" in television circles referred to the equipment and not to the operator. The Authority concluded that the general viewer upon seeing the caption "Amateur Video" would assume that the broadcaster had not commissioned the operator to make the film but that it had been supplied by a family member or a bystander. Although TVNZ acknowledged that it had commissioned the operator, the Authority accepted that TVNZ had not intended to deceive the public by the use of the caption and that it may well have been using a description used by broadcasters internationally. However, the Authority believed that TVNZ should have used more care as there was the unfortunate suggestion, to use TVNZ's words, "of snooping".

A breach of standard 7 does not require a finding that the broadcaster intended to use a deceptive programme device - the use of such a practice is sufficient. Furthermore, upon having the practice drawn to its attention, TVNZ acknowledged the error. Nevertheless, a majority of the Authority decided that although TVNZ did not intend to mislead, the use of the caption would have misled viewers to the extent that it amounted to a deceptive programme practice in contravention of standard 7. "Amateur" may refer to the equipment rather than to the operator in television circles but the Authority is concerned with the interpretation in viewing circles where, it concluded, it would undoubtedly be taken to refer to the operator and, possibly, his or her equipment.

The minority considered that the "Amateur Video" tag was capable of being interpreted either way and that while, to the Kyrke-Smiths, the label seemed like the practice of



deceit, its fleeting appearance would have had little impact on the majority of the viewing audience.

**For the reasons set forth above, the Authority upholds the complaint that the broadcast by Television New Zealand Ltd of an item about the death of Mrs Rosemary Kyrke-Smith on *One Network News* on 14 October 1992 breached s.4(1)(c) of the Broadcasting Act 1989 and a majority upholds the complaint that the broadcast breached standard 7 of the Television Code of Broadcasting Practice**

**The Authority unanimously declines to uphold any other aspect of the complaint.**

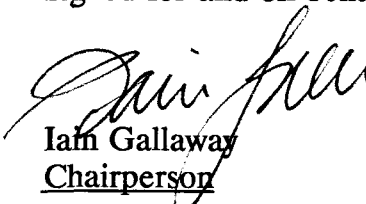
When it upholds a complaint that the broadcaster failed to comply with standards consistent with the privacy of the individual, the Authority may direct under s.13(1)(d) of the Broadcasting Act 1989 that the broadcaster pay compensation to the individual up to a maximum of \$5,000. Taking into account that the circumstances in this complaint were the most insensitive that it has encountered in about four years, the Authority believed that a significant amount of compensation was appropriate. The circumstances are, first, the blatant intrusion of privacy involved in filming the funeral service; secondly, the unnecessary broadcast, both verbally and visually, of the deceased's name and the unfair intrusion thus occasioned for both the family and the deceased; and thirdly, that the broadcast of a statement of correction could only, on this occasion, exacerbate the family's grief.

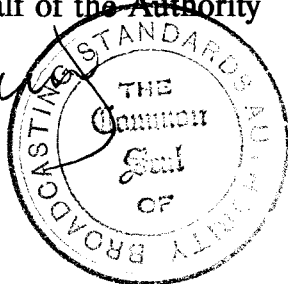
#### **ORDER**

**For the reasons set forth above, the Authority orders Television New Zealand Ltd to pay compensation to Mr N. Kyrke-Smith on behalf of the Kyrke-Smith family in the amount of \$2,500.**

Having upheld the complaint under standard 7 of the Television Code, the Authority may make an order under s.13(1)(a), (b) or (c) of the Act. In view of the order it has imposed under s.13(1)(d) as a result of its determination of the privacy complaint, the Authority does not intend to impose a further order. It merely notes that broadcasters, to avoid confusion, should refrain from using the caption "Amateur Video" to describe a film that it has commissioned.

Signed for and on behalf of the Authority

  
Iain Gallaway  
Chairperson



18 March 1993

## Appendix

### The Kyrke-Smith Family's Complaints to Television New Zealand Limited and the Broadcasting Standards Authority

In letters dated 22 October 1992, Mr N. Kyrke-Smith on behalf of the Kyrke-Smith family complained to both Television New Zealand Limited and to the Broadcasting Standards Authority about an item which had been broadcast on *One Network News* and *Tonight* on 14 October.

The item dealt with the death of Mrs Rosemary Kyrke-Smith (Mr N. Kyrke-Smith's mother) who died in Masterton hospital some 17 hours after being found alive in the hospital morgue. She had been put in the morgue having been declared dead after suffering a heart attack.

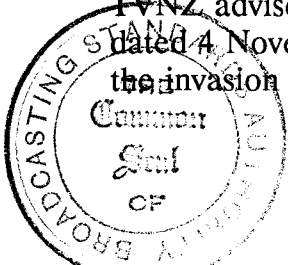
In the complaint to TVNZ, Mr Kyrke-Smith alleged that the item failed to maintain standards of good taste and decency. While accepting that the events surrounding his mother's death were newsworthy, he argued that his mother should not have been identified. Further, citing as an example the phrase "the death that wasn't" with which the item had finished, he maintained that the item's entire presentation was both sensational and trivial and had ignored the rights of the mourners and the dignity of the deceased.

Mr Kyrke-Smith complained about the following specific aspects of the item. First, the footage of the funeral was objectionable and had been taken without the family's permission or knowledge. Secondly, the use of the caption "Amateur Video" on the footage of the funeral was misleading as it implied that it had not been shot for the purposes of broadcasting. Thirdly, the screening of the death notice in the newspapers which identified the deceased served no legitimate purpose and added to the family's distress.

The letter of complaint to the Broadcasting Standards Authority was on the grounds that the broadcast failed to maintain standards consistent with the privacy of the individual. (Section 8(c) of the Broadcasting Act 1989 allows such complaints to be made directly to the Authority.) That letter explained the matters covered above and complained that the deceased should not have been identified and that the family should have been allowed to mourn without the "callous, sensational and pointless battering" by TVNZ. Furthermore, the footage of the funeral, taken without permission and carrying the caption "Amateur Video", was invasive as was the screening of the death notice.

### TVNZ's Response to the Formal Complaints

TVNZ advised Mr Kyrke-Smith of its Complaints Committee's decision in a letter dated 4 November 1992. It recorded that the complaint, other than the allegation of the invasion of privacy, had been assessed under standards 2, 4, 6, 7, 14 and 15 of the



Television Code of Broadcasting Practice.

Although the privacy aspect of the complaint had been made directly to the Broadcasting Standards Authority, TVNZ believed that it was the central issue and indeed that the other aspects of the complaint arose out of the privacy concern.

TVNZ recorded that the item dealt with a chain of events which were newsworthy and then proceeded to assess whether the three incidents referred to - the filming of the funeral, the description of the firm as "Amateur Video", and the naming of the deceased - constituted an invasion of privacy.

TVNZ advised that the details of the events surrounding Mrs Kyrke-Smith's death were revealed in a police statement released only half an hour before the funeral and it had requested a person in Masterton who had previously done work for the company, but equipped only with what was considered to be amateur equipment, to provide some footage. Although there had been insufficient time to seek the family's permission to film, the cameraman obtained the funeral director's permission to shoot the material subsequently included in the item.

TVNZ had some reservations, first, about whether the cameraman had made clear that he was commissioned by TVNZ, and secondly, as the story focused on the hospital and its procedures, whether coverage of the funeral was relevant to the item. TVNZ agreed that the use of caption "Amateur Video" was misleading as it implied that the film was provided by a mourner rather than being as a reference to the quality of the equipment used. Explaining that the deceased's name had been used in the item to draw attention to the fact that the events had happened to a real person, TVNZ now believed that the name should not have been recorded.

Accordingly:

As a consequence of the discussion, the Complaints Committee of Television New Zealand - while not accepting your description of the item as sensationalising or trivialising the matter - concluded that the material did amount to an unwarranted invasion of the your family's privacy.

TVNZ's Programme Standards Manager added that there had been no malice and concluded:

The Committee wished me to extend to you and your family the Company's regrets and apologies on this matter - as well as our deepest sympathies on your sad loss.

Upon receipt of the Kyrke-Smith family complaint alleging a breach of privacy, the Authority as is its practice, sought the broadcasters's response to it.

In its reply to the Authority dated 4 November, TVNZ enclosed a copy of its letter to Mr Kyrke-Smith (summarised above) and said that it believed that the privacy complaint (under s.4(1)(c)) should be upheld because:





The central reasoning behind that decision was that neither the funeral of Mrs Kyrke-Smith (filmed without the family's permission), nor her name were centrally relevant to a story which was about a botched procedure at the hospital.

TVNZ asked that its reply to Mr Kyrke-Smith be treated as its response to the Authority's request for comment about the privacy aspect of the complaint.

### **The Kyrke-Smith Family's Referral of Aspects of the Complaint to the Authority**

Dissatisfied with TVNZ's response on some matters, in a letter dated 3 December 1992, Mr N. Kyrke-Smith on the family's behalf referred to the Authority the complaint under standards 4, 7 and 14 of the Television Code of Broadcasting Practice.

Pointing out that the central issue for the family was whether the delay in treatment at the hospital affected their mother's chance of recover, Mr Kyrke-Smith noted that enquiries had disclosed that the delay had not affected her chances. As TVNZ had not addressed that question, the Kyrke-Smith family complained that TVNZ had been unfair to his mother.

The letter continued:

The result of the distorted impression created by the coverage, and the breaches of privacy, was to cause unnecessary distress to us and to relatives and friends. It is not in our view reasonable to dissociate the elements of the coverage from their effects in these circumstances, and we consider the coverage in breach of standard 14.

The final issue we would like to place before the Authority is that of the description of "Amateur Video". It is, in our opinion, inherently misleading to describe footage which has been commissioned by a broadcaster as "Amateur Video". The description "amateur" relates to the matter of payment, not to the standard of equipment used. Accordingly, we believe that the practice is in breach of standard 7.

### **TVNZ's Response to the Authority on these Aspects**

As is its practice, the Authority sought the broadcaster's response to the complaint. Its letter is dated 4 December 1992 and TVNZ's response, 25 January 1993.

TVNZ began:

You will recall that the [Complaints] Committee decided to uphold Mr Kyrke-Smith's complaint as a breach of privacy and made no decision on the other individual codes quoted because it believed that in this case Mr Kyrke-Smith's



reference to them was inextricably linked to the matter of privacy.

The company still holds to that point of view.

Dealing with the standard 4 complaint first and appreciating that the family's central concern was whether the delay had affected Mrs Kyrke-Smith's chances of recovery, TVNZ said that the broadcast contained as much information as time and the Coroner's investigation had allowed and had discussed the wider public issues involved. TVNZ said that it had earlier acknowledged that the family had been treated unfairly insofar as the coverage of the funeral was concerned, but that the unfair treatment involved was a breach of privacy.

As it believed that standard 14 applied to viewers generally, not to the reaction of those involved in the item depicted, TVNZ said that the family's concern under that standard had been dealt with under the standard 4 complaint.

In regard to the standard 7 complaint, TVNZ argued that the use of the caption "Amateur Video" implied either that the camera operator was not a professional or that the equipment was not of professional standard. It continued:

Having said that, the Company acknowledges that on this particular occasion the use of the term carried an unfortunate suggestion of snooping which was never intended.

Quite simply, normal procedures were being followed and the "editorial" impact was not realised until the programme was broadcast. It was accepted by the Complaints Committee that the use of the term further heightened the impression of breaching the privacy of the bereaved family.

#### The Kyrke-Smith Family's Final Comment to the Authority

When asked for a brief comment on TVNZ's reply, Mr N. Kyrke-Smith in a letter dated 5 February 1993 reported that the family's views were unchanged.

In reply to TVNZ's comments about the standard 4 complaint, he said that the family would have preferred less coverage (preferably none) and that the broadcaster had been unfair in identifying his mother. Accepting that standard 14 referred to viewers other than the participants portrayed in the item, Mr Kyrke-Smith argued that they would have been distressed and disturbed by the broadcast.

He also maintained strongly that the caption "Amateur Video" suggested that the material had not been commissioned - not that the equipment was inferior, concluding:

In short, the deception enables the broadcaster to distance itself from obtaining contentious footage through the implication that the material arrived fortuitously.

