IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-485-002007

UNDER	the Broadcasting Act 1989
IN THE MATTER OF	an appeal against a decision of the Broadcasting Standards Authority
BETWEEN	TELEVISION NEW ZEALAND LIMITED Appellant
AND	BETH WEST Respondent

CIV-2010-485-002008

AND BETWEEN	TVWORKS LIMITED Appellant
AND	GERHARD SUNDBORN Respondent

Hearing: 21 - 29 March 2011

Counsel: J G Miles QC and B Curry for Appellants
S J Mills QC as amicus curiae
A E Scott-Howman for Broadcasting Standards Authority

Judgment: 21 April 2011

JUDGMENT OF ASHER J

This judgment was delivered by me on Thursday, 21 April 2011 at 4pm pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] These are two appeals brought by two television broadcasters, Television New Zealand Ltd ("TVNZ") and TVWorks Ltd ("TVWorks"), who have allied for the purposes of this cause. The two programmes and the scenes in question in each are different, although both contain sexual content. However, there are some common issues in relation to the approach to the appeal, and the role and duties of the Broadcasting Standards Authority ("the Authority") in determining complaints.

[2] Mr Julian Miles QC appears for both appellants. The complainants have not taken any active steps before the Authority or this Court. Mr Stephen Mills QC was appointed as amicus curiae and in that role has presented submissions in support of the Authority's decision and in reply to the submissions of the appellants.

[3] The Authority was represented by Mr Scott-Howman through the hearing and he made submissions on background issues. The Authority abides the decision of the Court. I record that the role that he has taken in providing background material on the Authority's function and practices, and in answering specific questions, has been helpful and appropriate

TVNZ – "Hung"

[4] An episode of the television series "Hung" was broadcast by TVNZ on channel one at 9.50pm on 22 March 2010. The scene in question involved an exchange between the central character in the programme called Ray Drecker and a female character who had appeared in previous episodes named Lenore. The particular scene commenced at approximately 10.10pm and involved Ray Drecker performing oral sex on Lenore.[1] The programme was classified Adults Only 9.30pm – 5am ("AO–9.30pm").

[5] A complaint was lodged concerning the scene alleging that it breached standards of good taste and decency. The complaint was considered by TVNZ in accordance with the initial complaints procedures set out in ss 6 and 7 of the Broadcasting Act 1989 ("the Act"). It was not upheld.

[6] The complainant was dissatisfied with the decision of the broadcaster and referred the complaint to the Authority under s 8(1B)(b)(i) of the Act. The Authority by a majority upheld the complaint determining that the scene was not consistent with the observance of good taste and decency and that it breached Standard 1 of the Free-to-Air Television Code of Broadcasting Practice ("the Code").[2] It decided that upholding the complaint was justified under s 5 of the New Zealand Bill of Rights Act 1990 ("the NZBORA"). It considered the circumstances of the complaint and taking into account the lack of unanimity it concluded that no penalty order was necessary, and that its decision upholding the complaint was sufficient.

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1 The scene is described in more detail at [27].

2 *West v Television New Zealand Ltd* BSA Decision No. 2010-073, 14 September 2010.

TVWorks – "Home and Away"

[7] An episode of the television series "Home and Away" was broadcast by TVWorks on channel three at 5.30pm on 19 March 2010. The scene in question involved two adult characters. During the scene the female character was wearing long pyjama pants, a top and a brassiere. She commenced kissing the male character with obvious passion. She took off her top. The scene culminated in the male character lying back on a kitchen table with the female character straddling him and kissing him. The couple appeared to be moving towards intimate contact when another character walked into the room, whereupon the couple jumped off the table in embarrassment. The programme was classified General ("G").

[8] A complaint was lodged and considered under ss 6 and 7 by TVWorks. It was not upheld. The complainant then referred it to the Authority. The Authority upheld the complaint.[3] It decided that the scene was in breach of Standards 1, 8 and 9 of the Code and in breach of current norms of good taste and decency in the context in which it occurred. As it was the first time that a complaint about sexual content had been upheld in respect of the programme, the Authority considered the publication of the decision was a sufficient penalty in all the circumstances.

Approach to the appeal

[9] These are appeals under s 18 of the Act. Section 18(4) and (5) provide:

> **18 Appeal against decision of Authority**
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> ...
>
> (4) The Court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.
>
> (5) In its determination of any appeal, the Court may—
>
> (a) Confirm, modify, or reverse the decision or order appealed against, or any part of that decision or order:
>
> (b) Exercise any of the powers that could have been exercised by the Authority in the proceedings to which the appeal relates.

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3 *Sundborn v TVWorks Ltd* BSA Decision No. 2010-044, 14 September 2010.

[10] It is clear from s 18(4) that the High Court's jurisdiction is not the same as in a general appeal. The decision in *Austin Nichols & Co Inc v Stichting Lodestar*[4] requiring the appellate Court in such general appeals to come to its own view on the merits does not apply. A now considerable line of cases has followed the approach in relation to an appeal against the exercise of a discretion set out in *May v May*:[5]

> [A]n appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong.

[11] The grounds upon which the appellate Court may interfere with a discretionary decision of this type are not as constrained as those available in judicial review.[6] I am grateful to counsel for not extensively citing judicial review cases, which can only be of limited assistance. There are differences at least in nuance between a Court's appellate jurisdiction and its supervisory judicial review jurisdiction. The concept of Wednesbury unreasonableness is not applicable when an appellate Court is deciding whether to interfere with a decision made by a tribunal in the exercise of a discretion.[7] In determining whether a decision is plainly wrong an appellate Court is not required to consider the contours of Wednesbury unreasonableness and depth of review.

[12] The determination of the High Court on any appeal under s 18 of the Act is final.[8] The responsibility that follows from this provision must be recognised.[9]

The programme standards

[13] Central to the decisions of the Authority were the programme standards notified and published under the Act. Section 4(1)(a) and (e) of the Act provides that every broadcaster is responsible for maintaining in its programmes and their

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4 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

5 *May v May* (1982) 1 NZFLR 165 (CA) at 170. See for example *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at [18] and *Reekie v Television New Zealand Ltd* HC Auckland CIV-2009-404-3728, 8 February 2010 at [21].

6 *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) at 439; *Television New Zealand Ltd v Viewers for Television Excellence Inc* at [19].

7 *G v G* [1985] 2 All ER 225 (HL) at 230 per Lord Fraser, cited in *Shotover Gorge Jet Boats Ltd v Jamieson* at 439 per Cooke J.

8 Broadcasting Act 1989, s 19.

9 *Reekie v Television New Zealand Ltd* at [23].

presentation, standards that are consistent with "the observation of good taste and decency" and "any approved code of broadcasting practice applying to the programmes". Section 21(1)(e) to (g) includes the development of codes of broadcasting practice as a function of the Authority:

> **21 Functions of Authority**
>
> (1) The functions of the Authority shall be—
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> ...
>
> (e) To encourage the development and observance by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting undertaken by such broadcasters, in relation to—
>
> (i) The protection of children:
>
> (ii) The portrayal of violence:
>
> (iii) Fair and accurate programmes and procedures for correcting factual errors and redressing unfairness:
>
> (iv) Safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs:
>
> (v) Restrictions on the promotion of liquor:
>
> (vi) Presentation of appropriate warnings in respect of programmes, including programmes that have been classified as suitable only for particular audiences:
>
> (vii) The privacy of the individual:]
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> (f) To develop and issue codes of broadcasting practice of the kinds described in paragraph (e) of this subsection in any case where the Authority considers it appropriate:
>
> (g) To approve, for the purposes of this Act, codes of practice of the kinds described in paragraph (e) of this subsection:

[14] Section 22 of the Act provides for the notification and publication of approved codes of broadcasting practice. Such codes are therefore issued under the authority of statute. They must be interpreted consistently with the NZBORA.[10] A failure to maintain standards that are consistent with approved codes of broadcasting

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[10] *Television New Zealand Ltd v W* HC Auckland CIV-2007-485-1609, 18 December 2008 at [10].

practice can be seen as a failure to meet the statutory obligation imposed on broadcasters by s 4(1)(e).

[15] I note that s 21(1)(e)(i) specifically refers to the development and observance of codes in relation to "the protection of children".

[16] In furtherance of its obligations under the Act the Authority notified and published the Code. It was prepared by the New Zealand Television Broadcasters' Council on behalf of each of the country's free-to-air broadcasters.[11] The relevant edition is July 2009. The Code sets out various standards, followed by guidelines. There are three standards that are relevant to the appeals.

[17] Standard 1 provides that broadcasters should observe standards of good taste and decency.

[18] Standard 8 provides that broadcasters should ensure, amongst other things, that programmes are appropriately classified and adhere to timebands in accordance with Appendix 1. Appendix 1 sets out free-to-air television programme classifications. The relevant classifications are G (general), for programmes which exclude material likely to be unsuitable for children, and AO–9.30pm (adults only between 9.30pm and 5am), for programmes containing stronger material or special elements which fall outside the adults only classification (which is for programmes containing adult themes and directed primarily at mature audiences). The classification provides that these programmes may contain a greater degree of sexual activity, potentially offensive language, realistic violence, sexual violence, or horrific encounters.

[19] Finally, Standard 9 provides that during children's normally accepted viewing times broadcasters should consider the interests of child viewers.

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[11] Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis, Wellington, 2008) 295 at 299.

The application for leave to adduce further evidence

[20] The appellants filed further affidavits. Much of the evidence in those affidavits was not contentious and Mr Mills did not oppose its admission. He did, however, oppose the admission of some of the evidence. This included DVDs of other scenes in programmes of the same classification and screened in the same timeband, said to be comparable. It also included DVDs of scenes said to be comparable which had been subject to favourable rulings of the Authority.

[21] Rule 20.16 of the High Court Rules governs the granting of leave to adduce further evidence on an appeal against a decision of the Authority under s 18 of the Act.[12] Rule 20.16 provides:

> **20.16 Further evidence**
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> (1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal.
>
> (2) In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.
>
> (3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.
>
> (4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[22] In this case leave is required. Leave may only be granted if there are "special reasons". The principles guiding the exercise of the Court's discretion to grant leave have been frequently reviewed by this Court.[13] The discretion is to be exercised sparingly. The presumption is that appeals will be conducted on the record, as it exists. Further evidence should be cogent, relevant and likely to be material. It should not have been available at the earlier hearing by the exercise of reasonable diligence. The appeal should not be turned into a new case. However, every case must be considered in relation to its own circumstances. The test for the admission

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12 Broadcasting Act 1989, s 18(7).

13 See for example *Comalco New Zealand Ltd v Television New Zealand Ltd* [1997] NZAR 97 (HC) at 103-104.

of further evidence should not be put so high as to require the circumstances to be wholly exceptional.

[23] In considering whether to grant leave it must be recognised that the Authority has not conducted a formal hearing with evidence, and is assumed to have background knowledge and expertise. There will be occasions when a party may wish to put before the High Court material that was not formally produced at the hearing although it was referred to by the Authority. Such material will be admissible on appeal.

[24] There was a considerable amount of new material put forward by the appellants. Some of it was not referred to during the appeal and can be ignored. For instance, the new evidence on audience age did no more than show that a great number of children watch television at the relevant time. There was some reference to the pre-broadcast processes of TVWorks and I found that evidence of no assistance. The admission of much background material was not opposed by Mr Mills and it can be considered. I will determine the admissibility of the new material that was relied on where it is necessary to do so to determine the points on appeal.

The "Hung" appeal

The programme and the scene

[25] "Hung" could be described as a comedy drama series. It follows the life of Ray Drecker who is a teacher who had previously been a high school sports star, but has fallen on hard times with a messy divorce and a poor income, amongst other misfortunes. The economic recession functions as part of the backdrop. Ultimately, Ray drifts into a life of providing sex to women for pay. Ginia Bellafante of *The New York Times* described the programme in a review of 6 August 2010 as "the most topical fictional programming on television" and a "finely drawn satire of the Great Recession". The review goes on:[14]

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[14] Ginia Bellafante "Thomas Jane on 'Hung', Symbol of the Recession" *The New York Times* (New York, 6 August 2010) at C1.

> Notionally a sex farce, "Hung" is substantively a continuing commentary on the humiliations of middle-class life during a downturn in which the spending of the still well-to-do strikes many as a kind of aggravated assault.
>
> "Hung" is predicated on a conceptual gag – Ray Drecker, a 40-ish high-school teacher, coach and father of two, supplements his burdened cash flow by providing sexual companionship to women who are bored, lonely, crazy or recovering from frigidity.

[26] The programme is set in the decaying world in and around Detroit. The review goes on to state:

> Collective aspiration and the kind of mercenary will that might move things belong, in the universe of "Hung" to the women in Ray's immediate orbit. As a fantasy of male sexual objectification, "Hung" is a de facto dreamscape of female social authority. Ray is handled by two rivalrous managers, Tanya (Jane Adams), a dishevelled poet, and Lenore (Rebecca Creskoff), a brassy showboat who believes she can turn him into a super brand… .

[27] In the scene itself the female character named Lenore, referred to in a review as one of the two women vying for management of Ray and who has herself used his professional services, meets him after hours in an upmarket department store. Ray does not like Lenore who has previously stolen some of his personal effects in an effort to gain control over him. They talk to each other, with Lenore's theme being how he could improve his life as a purveyor of sexual favours. The two characters begin kissing. Ray lifts up Lenore's skirt and removes her underwear. There is a brief shot of Lenore's pubic hair, but Lenore's genitals are not shown. Lenore pays Ray a significant amount of extra money and obliquely asks for oral sex, while talking to him about his abilities and business opportunities. Ray then performs oral sex on Lenore. The sex act cannot be seen on camera, but there is no doubt as to what is happening. Lenore remains fully clothed in terms of what the camera shows and her upper clothing is not removed. All that can be seen are her legs around Ray's shoulders and his head between her legs. Lenore talks to him at times through the exercise, while at the same time deriving unmistakable pleasure from his attentions. There are no shots of genitals or breasts.

The decision

[28] The Authority considered the scene in terms of Standard 1 requiring that broadcasters observe standards of good taste and decency. The majority noted that

the programme was screened at 9.50pm on Monday during the school term, and the scene itself screened at 10.10pm. The programme was classified AO–9.30pm and was preceded by a verbal and written warning of language and sex scenes that may offend. It noted the adult target audience and the expectations of viewers, influenced by the pre-publicity and the programme's title.

[29] In the critical paragraph of its decision, the majority stated:

> [21] A majority of the Authority ... considers that *although the context went some way* to alerting viewers to the challenging nature of the programme, the content complained about nevertheless went well beyond the level of sexual material that viewers would expect to see on free-to-air television. *In the majority's view, the scene complained about was prolonged, explicit and gratuitous, leaving nothing to the imagination and designed solely for the purpose of shocking and titillating the audience.* In these circumstances factors such as the programme's AO classification and the use of a written and verbal warning were not sufficient to prevent the broadcast breaching standards of good taste and decency.
>
> (Emphasis added.)

[30] The majority acknowledged that upholding the complaint would place a limit on TVNZ's right to freedom of expression protected by s 14 of the NZBORA but found that to uphold the complaint placed a "justified and reasonable" limit on that right. It considered that upholding the complaint would clearly promote the objective in Standard 1 of the Code, to protect against the broadcast of, amongst other things, sexual content that exceeds current norms of good taste and decency.

[31] The Authority's Chairperson, however, dissented from the majority's decision. The decision states:

> [26] A minority of the Authority ... considers that the scene complained about was acceptable in the context in which it appeared: in an AO-classified programme targeted at an informed adult audience. The minority would therefore decline to uphold a breach of Standard 1.

The consideration of the context in which the scene occurred

[32] Mr Miles for TVNZ submits the majority failed to adequately consider the context in which the scene occurred. He submits the determination of the majority that the scene was gratuitous and designed solely for the purpose of shocking and

titillating the audience was plainly wrong. Rather, he submits, the scene was meaningful in the context of the storyline of the episode and the broader themes of the series. It was played late at night, was appropriately classified and preceded by the appropriate warnings.

[33] Mr Mills submitted in response that contextual factors alone will not be enough to prevent a broadcast from breaching the standards. Some material, irrespective of the context in which it occurs, may go too far. The Authority, he submitted, was best placed to assess the degree to which material might deviate from current community standards of good taste and decency. He urged the Court not to undertake an investigation into the gratuity or otherwise of the scene, or the artistic intention behind it. These, he submitted, are the proper functions of the Authority and not those of the Court.

[34] In approaching this ground of appeal I recognise that I should not substitute my own judgment on the merits for that of the Authority. The Authority has the relevant expertise and the appellate role is limited by s 18(4) of the Act. Rather I approach this ground on the narrower basis set out in *May v May*.[15] I determine whether the context in which the scene occurred is a relevant factor which the Authority failed to take into account and/or whether the conclusion of the Authority in light of the contextual factors was plainly wrong.

[35] I accept, of course, Mr Mills' submission that some content, irrespective of the context in which it occurs, may go too far. Explicit pornographic sex will not be acceptable on free-to-air television regardless of its narrative context, classification, screening time and accompanying warnings.

[36] As a matter of general principle, however, the context in which content occurs will be of considerable importance in determining whether that content breaches standards of good taste and decency. Indeed the Code makes specific reference to context in the guidelines to Standard 1. These include:

> 1a Broadcasters will take into account current norms of good taste and decency bearing in mind *the context in which any content occurs and*

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15 *May v May*, above n 5, at 170.

> *the wider context of the broadcast* e.g. programme classifications, target audience, type of programme and use of warnings etc.

(Emphasis added.)

[37] Context is used in two broad senses. The first is described as the "context in which any content occurs". I refer to this as the narrative context. It will be necessary to consider what leads up to and what follows the scene in the particular episode, as well as the broader storyline and the themes of the episode and the series.

[38] The second is described as the "wider context of the broadcast". I refer to this as the external context. It includes the programme classification, the target audience, the type of programme and the accompanying warnings.

[39] As to warnings, the guidelines to the relevant standard continue:

> 1b The use of visual and verbal warnings should be considered when the content is likely to disturb or offend a significant number of viewers except in the case of news and current affairs, where verbal warnings only will be considered. Warnings should be specific in nature, while avoiding detail which may itself distress of offend viewers.

[40] In the critical paragraph of the majority's decision it concluded that "the scene complained about was prolonged, explicit and gratuitous, leaving nothing to the imagination and designed solely for the purpose of shocking and titillating the audience".

[41] Mr Miles' essential submission is that the determination of the majority that the scene was gratuitous and designed solely for the purpose of shocking and titillating the audience was plainly wrong. I accept this submission.

[42] The programme was screened at 9.50pm and the scene was screened at 10.10pm. Its programme classification, AO–9.30pm, is the highest of the classifications. The Code states that programmes so classified "may contain a greater degree of sexual activity". The episode in question was preceded by the following verbal and visual onscreen warning accompanying the classification:

> This programme is rated adults only. It contains frequent use of language and sex scenes that may offend some people.

[43] "Hung's" protagonist is a down and out former teacher who turns to providing sexual companionship to women for pay. Sex plays an inevitable part of the narrative. No viewer could be surprised at a scene with some strong sexual content. The scene formed a natural part of the storyline both of the episode and the series. In its immediate context the scene shows a reversal of the traditional role where sexual exploitation is by men of women, and in a mildly humourous way. In terms of the initiation of sexual contact and payment traditional gender expectations are turned on their head. The themes of role reversal and the exploitation of a male for sexual purposes are reflected in the scene. It is the only sex scene in the particular episode. It demonstrates a modest victory for Lenore in her battle with Tanya for control of Ray. For Ray, it is another dollar. He performs a sexual service for a woman he does not like. It fits naturally into the episode's storyline. It was not the case, as the majority decided, that the scene was designed "solely to titillate".

[44] When both the external and narrative context of the scene are considered I am forced to the conclusion that this aspect of the Authority's decision was plainly wrong. Naturally I have hesitated before reaching such a conclusion given the deference I must show to the Authority. I bear in mind, however, that the Chairperson dissented and that the majority erred in failing to take into account the narrative context of the scene in their determination.

Conclusion

[45] I conclude that the majority were plainly wrong in concluding the scene was gratuitous and designed solely for the purpose of shocking and titillating the audience.

[46] Given this conclusion it is unnecessary to consider the other grounds of appeal raised by TVNZ. It is not therefore necessary for me to refer to in particular the submissions that the majority failed to take its own research into account, or failed to take into account previous determinations, or failed to give adequate reasons. Nor do I deal with the NZBORA submissions, although these were much the same in relation to both programmes. I will be referring to these issues when I consider the "Home and Away" appeal.

The "Home and Away" appeal

The programme and the scene

[47] "Home and Away" is a soap opera series focussing on the life of the residents of "Summer Bay" offering general family entertainment. The scene in question involved a female character named Martha removing her pyjama top or bathrobe revealing her brassiere. She is passionately kissing the male character. She proceeds to take off her top and makes him lie down on the kitchen table, and then straddles him continuing to kiss him. There is an unmistakable sexual intent, but there is no actual sex because the parties are humourously interrupted by a much older person visiting them who was taken aback at their passionate engagement.

The decision

[48] The Authority concluded that the scene contained more sexual activity than should have been included in a G-rated programme. It stated:

> [18] In determining whether this episode of *Home and Away* was appropriately given a G rating, we have considered the nature of the scene complained about. In our view, the scene was raunchy and sexually charged. The removal of Martha's bathrobe, revealing her bra, and her straddling of Liam on the kitchen table as they continued to kiss passionately went well beyond the level of sexual activity that should be included in a G-rated programme.
>
> [19] G-rated programmes should be suitable for children to view unaccompanied. In our opinion, the material in this programme would only have been suitable for children to view when accompanied by a parent or guardian. We consider it likely that the scene would have been alarming and distressing to young children when not subject to guidance.
>
> [20] For this reason, we conclude that this episode of *Home and Away* should have been rated PGR rather than G. Having reached this conclusion, the Authority must decide whether to uphold the complaint as a breach of Standard 8.

[49] The Authority held that the programme breached Standard 1 (good taste and decency). It also went on to hold that it breached Standard 8 (responsible programming) and Standard 9 (children's interests). It specifically rejected an

argument put by TVWorks that 5.30pm was not "predominantly children's viewing time".

[50] It was submitted by TVWorks that the Authority failed to take into account the content of the scene, the lack of any explicit sexual touching or talk, the consensual and loving nature of the actions and the humourous interruption. It was also submitted that it failed to take into account the usual content of G-rated programmes and that there was reference to other sexual material in other programmes shown in the same time slot. It was argued that the Authority failed to take into account its previous decisions where similar scenes had been treated as acceptable, and that the Authority failed to take into account its own research on the likely effect of the scene on children. It was submitted that the Authority failed to take relevant contextual factors into account. Finally, TVWorks argued that the Authority's consideration of NZBORA issues was "boilerplate", that it failed to take relevant matters into account and was plainly wrong. It will be necessary to consider these various submissions.

The consideration of the context in which the scene occurred

[51] As TVWorks has submitted, the scene shows a consensual and loving exchange between two attractive characters which is interrupted in a humourous way. The female has a clear sexual intention, and her straddling of the male character has an unmistakable sexual purpose. The Authority accurately described it as "raunchy and sexually charged".

[52] The narrative context, while still relevant, does not have the relevance that it had in relation to the "Hung" scene. This is because the scene was shown during children's normal viewing times. The threshold of acceptability in relation to sex scenes is far lower at 5.30pm than later in the evening.

[53] Needless to say, programmes classified G must be suitable for children. It cannot be expected that in this time slot there will be programmes such as "Hung" which have sex as a central theme. Particularly, the programmes in this timeband will not be expected to involve a storyline that requires relatively explicit sexual

scenes. The Code indicates that broadcasters should not create a programme context in which such scenes are required.

[54] Further, the Authority did indeed consider context, referring to it specifically in the course of the decision. It clearly understood TVWorks' arguments in relation to the content, but made the judgment that it was likely that the scene would have been "alarming and distressing to young children when not subject to guidance". While this is strong language, it is not so obviously in error that it can be said to be plainly wrong. This is a matter clearly within the Authority's expertise and no error in reasoning or failure to take into account a relevant factor has been shown. It can be seen why such a scene could appear to an expert tribunal to be unsuitable for children.

Failure to take into account the usual content of G-rated programmes

[55] TVWorks identifies various scenes from the television programmes "Friends", "The Simpsons" and "Everybody Loves Raymond", all of which are classified G. TVWorks says that these contain sexual material or references that were similar and shown within the time slot. TVWorks has sought to produce as evidence in this appeal DVDs containing the relevant extracts from these programmes.

[56] Mr Mills opposed the admission of these DVDs. Leave is required to adduce further evidence on appeal under r 20.16 of the High Court Rules. Mr Mills argued that leave should not be given if for no other reason than the content of other programmes is irrelevant.

[57] I would hesitate to conclude that material from other programmes could never be relevant in an appeal. I accept the submission of Mr Miles that there may be occasions when broadcasters opposing a complaint before the Authority will assume knowledge of programming on the part of the Authority and not adduce evidence before the Authority, but on appeal may legitimately seek to do so because that same knowledge cannot be assumed of a High Court Judge.

[58] However, any such occasions will be rare. I have no hesitation in refusing leave to TVWorks to produce this sort of material in this appeal. If it had been necessary to do so for the purposes of my decision in relation to "Hung" I would have refused the similar application of TVNZ. A High Court Judge is singularly ill-equipped to trawl through other programmes selected only by one party to try and form a conclusion as to norms of acceptability. The only way that such an exercise could be conducted fairly would be for the amicus, or some other party not aligned with the broadcasters, to be given the opportunity to access the material and comment on it so that there was a balanced presentation. However, even if this was done the Judge would be left in the position of making a value judgment on all the material before it. This goes beyond the limited nature of the High Court's appellate function.

[59] The assessment of what is usual in programmes within specific classifications is a matter best left to the expertise of the Authority. I therefore do not make any finding on the usual content of programmes classified G. The Authority explicitly considered what should be included in such programmes and no error of approach or reasoning has been shown.

[60] I also recognise the force of the point made in *TV3 Network Services Ltd v ECPAT New Zealand Inc* where Chambers J observed in relation to new evidence: [16]

> I declined to view the videotape. It was clear that it could not come in as evidence. The fact that television was – to use Mr Allan's terminology – a "visual medium" did not support looking at something simply because it was itself "visual". The videotape apparently contained excerpts from other documentaries which, so Mr Allan contended, would have fallen foul of broadcasting standards were the Authority's decision in this case correct. Even if that is so, where does it get us? It is no defence to a speeding ticket to show that others have sped but not been ticketed.

[61] The complaint process is subject to the vagary of whether a potential complainant is viewing a programme at a particular time. The fact that there has been no complaint and therefore no decision on a programme has limited probative value.

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16 *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501(HC) at [53].

The importance of previous decisions

[62] I now consider the submission that the Authority failed to take into account two of its previous decisions, and the consequences of this failure. The two decisions relied on are *Simpson v TVWorks Ltd*[17] and *Marshall v Television New Zealand Ltd.*[18] TVWorks sought the leave of the Court to adduce further evidence including the two decisions and a DVD of the scenes subject to complaint in *Simpson.*

[63] Mr Miles referred to the following observation of Professor J F Burrows in an assessment entitled "Assessment of Broadcasting Standards Authority decisions – a legal perspective":[19]

> Consistency of decision is one of the law's strongest requirements. It is fundamental to the nature of law. It wins the confidence of the public. Few things bring the law into greater disrepute than two complainants getting opposite results on similar facts. Moreover, consistency provides guidelines for broadcasters.

[64] I note that Professor Burrows continued:

> Maintaining consistency is probably more difficult for the Authority than it is for some other judicial bodies. This is so for two reasons. Firstly, its membership changes relatively frequently. Secondly, it would require a significant effort on the part of anyone to maintain a knowledge of all the Authority's decisions going back to its inception.

[65] I agree. I note the Authority considered over 200 complaints last year. While the authority may consider earlier decisions, particularly where referred to and relied on by a party to the complaint, its workload is such that it will not be required to in every case.

[66] I would add two further points. First, "good taste and decency" is a necessarily somewhat fluid concept. This is acknowledged in the guidelines to Standard 1 which require broadcasters to "take into account *current* norms of good

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17 *Simpson v TVWorks Ltd* BSA Decision No.2009-120, 25 November 2009.
18 *Marshall v Television New Zealand Ltd* BSA Decision No.2000-201, 20 December 2000.
19 Professor J F Burrows "Assessment of Broadcasting Standards Authority decisions – a legal perspective" (April 2006) at 10.

taste and decency".[20] Secondly, there are no absolutes in the assessment of compliance with standards in artistic works. Competent and properly informed decision makers can form legitimately different views as to the compliance of a particular scene. As was observed by this Court in the context of challenges to immigration decisions in *Singh v Minister of Immigration*:[21]

> The problem with a principle of equality or of consistency in decision-making in a discretionary area is that there are many borderline cases which will have similar or superficially similar facts which different people acting perfectly honestly will decide in different ways.

[67] As Professor Burrows observes, consistency is attained in law by following precedents.[22] Consistency of decision is an object of considerable importance and one towards which the Authority should strive. But for the reasons above consistency in Authority decisions is not a wholly realisable aim. The doctrine of precedent as it is applied by Courts has no rigid application. It must follow both that an apparent inconsistency will not of itself amount to an error of law and that a failure to take into account any particular decision will not of itself amount to an error of law.

[68] Where, as here, an appellate relies on previous decisions not, it seems, referred to in submissions to the Authority, practical considerations also arise. To resolve an allegation as to inconsistency the appellate Court would have to traverse decisions said to be comparable in what could become a burdensome and, for the reasons above, ultimately barren exercise. If this Court engages too readily in assessments of comparative footage it embarks on an evaluative exercise for which it has no skill or training. In contrast, this assessment is within the Authority's expertise, and the assessment of community standards, and any evolution in those standards, uniquely so.

[69] Subject to these considerations there should be no bar to an appellate authority considering previous decisions, even those that are not referred to. The earlier decisions are not evidence as such and there is no need for leave under r 20.16. However, an appellate Court will be cautious for the reasons already given in

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20 At [1a] (emphasis added).
21 *Singh v Minister of Immigration* [2000] NZAR 223 (HC) at [40].
22 At 10.

accepting references to previous decisions such as the *Marshall* and *Simpson* decisions which have not been referred to the Authority and which are not referred to in the decisions. With some reluctance I have decided that I will consider these two decisions as they do relate to somewhat analogous sexual scenes in the same time slot as "Home and Away" and are recent.

[70] Mr Mills, while he accepted that I could consider the previous decisions, had reservations about whether it was appropriate for the appellate Court to consider DVDs containing the scenes that were the subject of the earlier decisions. Providing it is a relevant and useful exercise, I do not believe that there is any difficulty in an appellate Court considering DVDs of the scenes that are the subject of earlier relevant decisions of the Authority. It may be impossible to fully understand what the scene displays and how it compares, and therefore the relevance of the previous decision, without such an examination. Again, the contents are not evidence of fact. They can be seen as akin to an appendix to a decision.

The previous decisions relied on

[71] In the *Simpson* decision there were two scenes in question. In the first a teenage couple meet in a bedroom and then in a very brief scene lie on the bed with the female on top. There is no disrobing shown in this scene. Unbeknown to the female character, the encounter was being covertly recorded by the male. The couple are then shown lying in a bed under the covers, apparently naked. At the end of the episode another character discovers footage which is blurred and difficult to see but appears to be a brief shot of a couple kneeling on a bed kissing and the female removing the male's shirt. The Authority held that the visual depiction of the storyline and its theme were acceptable within the G-rated programme.

[72] While acknowledging the limitations of this Court in comparison to the Authority in terms of its ability to evaluate, assess and compare such footage, I have no hesitation in concluding that the scenes that were the subject of the *Simpson* decision were milder in terms of sexual impact than the subject scene in "Home and Away". The *Simpson* scenes are perhaps not quite so explicit, but the important distinguishing factor is that they are of much shorter duration. A child watching

them is less likely to be embarrassed or confused, simply because the scenes are so brief that they hardly engage the viewer. This is in contrast to the scene the subject of this appeal, which is far longer, and its sexual content therefore more likely to have impact. It is also significant in considering its weight, that *Simpson* was a split decision with the Chairperson's vote being determinative.

[73] In the *Marshall* scene the complaint was about a music video for U2's song "Beautiful Day" which was broadcast between a religious programme and a children's television programme in the G timeband on a Sunday morning. The complaint alleged that an image of a couple kissing could not take into consideration the current norms of good taste and decency. In the circumstances, the Authority did not consider that the scene was licentious or lurid and declined to uphold the complaint. The content as described in the decision was milder than the subject scene.

[74] I conclude that in fact there was no inconsistency between those two decisions and the present decision. However, I emphasise that even if there had been some inconsistency this may well not have been conclusive.

[75] It has not been shown that the Authority made an error or failed to consider a relevant matter when it did not refer to these earlier decisions. When those decisions relied on are considered, there was no palpable inconsistency warranting further consideration. This ground of appeal cannot succeed.

Previous research

[76] It is necessary to consider whether the Authority should have taken into account its own research on the likely effect of the scene on children. TVWorks referred, without objection, to earlier research carried out by the Authority on the reactions of children to what they see on television. TVNZ had referred to other research in relation to "Hung". It was argued by TVWorks that the results of the study supported the submission that the scene would not have been alarming or distressing for children. On the basis of the contents of that research it was

submitted that children would not have had the chance to feel much emotion before the scene ended and would simply have moved on.

[77] It is proper and indeed desirable that the Authority commission research and this is one of its functions under s 21(1)(h) of the Act. The Authority can be assumed to be familiar with that research and informed by it. The consideration of such research is not a mandatory relevant consideration and the Authority's lack of reference to its research cannot be regarded as an error of law. That the Authority has commissioned a piece of research does not mean that the findings in that research are correct, and it certainly does not mean that the conclusions will represent the Authority's policy.

[78] Here TVWorks was essentially asking this Court to draw conclusions as to what children regard as alarming or distressing from the research material, and to find that the Authority should have applied such conclusions. If I was to enter into an exercise where I sought to interpret the research results and apply them to this case I would be engaging in the type of subjective exercise that goes beyond the limited consideration dictated by s 18(4). I would be substituting my judgment for that of the Authority as to whether the research was reliable and what the research meant in relation to the particular scene.

[79] Mr Mills did not oppose the reference to this research. He carefully analysed the studies and submitted that the conclusions that TVWorks seeks to draw from them are wrong. I do not propose going into the detail of this submission. It demonstrates that the application of the results of the study is an exercise of judgment best left to the Authority. What can be taken from the results and applied in the determination of a specific decision is a matter that Parliament has asked the Authority to decide. It is part of the Authority's discretionary exercise of its decision-making power and this Court should not substitute its own judgment. The research might be relevant if it helped establish a clear error by the Authority. It does not do so. It shows that children are affected by sexual material. Its contents are consistent with a decision that children may be adversely affected by sexual issues such as the scene in question.

[80] It has not been shown that the lack of reference to the previous research was a failure to take into account a material relevant consideration and the research relied on by the appellants does not show the Authority to be plainly wrong.

Failure to give reasons

[81] Mr Miles is very critical of the Authority for giving insufficient reasons in both the decisions. It is only necessary to consider that submission in relation to the "Home and Away" programme. I will consider the reasons given exclusive of those relating to the NZBORA, which are examined later.[23]

[82] There is no doubt that it is good practice for tribunals to provide reasoned decisions.[24] The discipline involved requires the tribunal to analyse the relevant facts and law. It enables the litigants to see that their arguments have been considered and evaluated. It ensures that the party who has lost can discern whether there is a proper basis to pursue an appeal. It enables an appellate body to discern the law and facts that have been applied, and to consider the correctness of the decision made. Transparency of thought is a vital protection against capricious or arbitrary decisions.[25] However, the depth of the reasoning process can be expected to vary in accordance with the role of the tribunal and the nature of the hearing. A District Court might give very short reasons for a bail decision during a busy court day. Appellate Court decisions are generally detailed and closely reasoned.

[83] I discern in TVWorks' submissions a wish that as well as giving conclusory reasons (such as the statement that the scene is alarming and distressing to young children) there should be further explanation and elaboration, explaining why, for instance, such a scene is alarming and distressing. This might have been helpful, but these sorts of conclusory reasons are not always well suited to elaboration. The Authority considers a very large number of appeals each year, and on the papers. The Act only requires one lawyer to sit on the panel, and the rest may not be lawyers. The Authority must ultimately make discretionary judgments of a type that may not

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23 See [85]–[106].

24 *R v Awatere* [1982] 1 NZLR 644 (CA) at 648. See also *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [75]–[84].

25 See *Lewis v Wilson & Horton Ltd* at [82].

be easily illuminated by long explanations. They come down to questions of judgment, rather than the logical progression of thought.

[84] In this case it would have been preferable for the Authority to have elaborated somewhat further than it did, but it cannot be said that there was a failure to give reasons. I am satisfied that the reasoning process displayed in the "Home and Away" decision was sufficiently transparent. The reasons given, while concise, explained to the reader the standards and facts and findings relied on by the Authority in reaching its decision. They were sufficiently discernable to be susceptible to analysis and criticism. I am not able to conclude that there was any failure to give adequate reasons which amounted to an error by the Authority.

NZBORA considerations

Introduction

[85] Mr Miles for TVNZ and TVWorks presented detailed written and oral submissions on the application of the NZBORA. He criticised both of the Authority's decisions for not properly taking into account NZBORA considerations. I have not considered those submissions in relation to the TVNZ appeal as that appeal has succeeded on other grounds. It is now necessary to consider the submissions in determining the "Home and Away" appeal.

[86] The application of the provisions of the NZBORA is a mandatory relevant consideration, and must be taken into account by the Authority if it is considering upholding a complaint.[26] While the Courts in earlier decisions were prepared to accept that the consideration was implicit,[27] it is now clear that the consideration, and in particular the s 5 NZBORA analysis, should be articulated in the Authority's decision.[28]

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26 *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at [52]; *Television New Zealand Ltd v W* HC Auckland CIV-2007-485-1609, 18 December 2008 at [14]; *Television New Zealand v Green* (2008) 8 HRNZ 715 (HC) at [39]; and *Television New Zealand Ltd v Broadcasting Standards Authority* HC Wellington CIV-2004-485-1299, 13 December 2004 at [35].

27 See *Television New Zealand Ltd v Viewers for Television Excellence Inc* at [57].

28 See *Television New Zealand Ltd v Broadcasting Standards Authority* at [35].

[87] The Authority acknowledged in three separate places in its decision that upholding the complaint would place a limit on the broadcasters' right to freedom of expression, which is protected by s 14 of the NZBORA. It did so in the context of Standard 8 (responsible programming), Standard 9 (children's interests) and Standard 1 (good taste and decency). Its consideration in relation to each standard was different and it determined in respect of each that the limitation was justified as required by s 5 of the NZBORA.

The NZBORA framework

[88] Section 14 of the NZBORA provides:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[89] The right to freedom of expression includes the right to present offensive material. In *Handyside v United Kingdom* it was observed in the European Court of Human Rights:[29]

> [Freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism tolerance and broadmindedness without which there is no "democratic society".

[90] There is no doubt that a finding of breach of the standards involves an imposition on the right to freedom of expression, even if no direct restraint is involved. The mere upholding of a complaint without penalty can dampen future expression. The question for the Authority in every case if it is considering upholding a complaint, is whether its decision is such a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s 5. Any limit on freedom of expression imposed by the Authority is one prescribed by law. So the issue comes down to whether upholding the complaint can be demonstrably justified in a free and democratic society.

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[29] *Handyside v United Kingdom* (1979-80) 1 EHRR 737 at [49].

[91] Section 5 provides:

> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[92] The Authority carried out the s 5 exercise in relation to each breach of each of the three standards. I consider it would have been preferable to carry out the s 5 weighing as a single exercise. There is a single complaint, and in the end if it is unheld there will be a single order, irrespective of how many standards are breached. The s 5 determination should involve balancing the right to freedom of expression against the limits resulting from upholding the complaint taking into account the breaches of each of the standards but weighing those breaches as a whole, rather than piecemeal. But the approach taken of examining each breach, if anything, favoured TVWorks as each breach of standard individually offered less justification. This was not a material error.

The extent of the s 5 analysis

[93] The Supreme Court considered the correct approach to the s 5 exercise in *R v Hansen.*[30] In applying *Hansen* it must be remembered that the primary issue was how the reverse onus for possession of drugs under s 6(6) of the Misuse of Drugs Act 1975 should be approached under s 6 of the NZBORA. It was necessary to determine the standard against which consistency with the Bill of Rights was to be measured. The application of s 5 was therefore a secondary issue. It was observed in that case that the NZBORA does not mandate any one method or sequence of application for applying and reconciling the NZBORA provisions.[31]

[94] In *Hansen* the majority of the Judges approached the s 5 exercise by applying the decision of the Supreme Court of Canada in *R v Oakes* and the cases that

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30 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
31 At [61].

followed it.[32] Tipping J in *Hansen* provided this adapted summary of the *Oakes* approach:[33]

> This approach can be said to raise the following issues:
>
> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

Here the limiting measure is the Authority's decision.

[95] There has been some judicial difference as to whether the Authority needs to go through a s 5 exercise in relation to its determination of individual complaints as distinct from Standards.[34] I agree with the approach adopted in more recent cases that its decisions must involve a s 5 analysis.[35]

[96] Mr Miles for TVWorks submits that in order to be compliant with the NZBORA the Authority in considering s 5 must follow a process of "structured reasoning". He derives support for this proposition from an article by Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority".[36] In his submissions he sets out a detailed analytical process which he asserts the Authority should have followed but did not. He submits that the Authority failed to carry out such a process, and rather inserted boilerplate paragraphs into its decision. Relying on *The New Zealand Bill of Rights Act: A Commentary*[37] it was submitted that it was

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32 *R v Oakes* [1986] 1 SCR 103. See [120]–[124] per Tipping J, [203]–[205] per McGrath J and [272] per Anderson J following *R v Chaulk* [1993] 3 SCR 1303 which essentially summarised the *Oakes* approach.

33 At [104].

34 For a view that it was not necessary to carry out the exercise in relation to decisions see *TV3 Network Services Ltd v Holt* [2002] NZAR 1013 (HC) at [37]–[41].

35 See n 26.

36 Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (Lexis Nexis, Wellington, 2008) 295.

37 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, Wellington, 2005) at 6.12.2.

necessary in such an enquiry to consider the significance in a particular case of the NZBORA values, the importance of the public interest, the extent of intrusion of the particular right, the limits sought to be placed on the application of the NZBORA provision, and the effectiveness of the intrusion in protecting the interests put forward to justify the limits. He submits the Authority did not carry out a full s 5 analysis involving the exploration and evaluation of free speech values and conflicting legislative objectives, and a process weighing up the strengths of the interests of each side.

[97] The degree of formalism required of a decision-making body will vary according to the nature of that body. As was observed in *R (SB) v Governors of Denbigh High School* in relation to the decision of a school excluding a student for wearing a particular form of clothing and in overturning a Court of Appeal decision:[38]

> I consider that the Court of Appeal's approach would introduce "a new formalism" and be "a recipe for judicialisation on an unprecedented scale". The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.

[98] The Authority consists of four members, one of whom (the Chairperson) must be an experienced lawyer, one of whom is appointed after consultation with representatives of the broadcasting industry and one of whom is appointed after consultation with "representatives of public interest groups in relation to broadcasting".[39] The Authority is a more legally sophisticated body than a school board. However, the only person required to be a lawyer is the Chairperson and the Authority has a large volume of cases each year which it must deal with promptly. There must be caution in imposing too formulaic and detailed analytical requirements on such a body, which may greatly add to the time taken for decisions and their bulk. Although the Authority must always clearly and transparently explain the reasons for its decision, at the moment Authority decisions are commendably

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38 *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [31].

39 Broadcasting Act 1989, s 26.

brief and to the point. I accept Mr Mills' argument that it would be unwise to excessively judicialise the process of the Authority.

[99] In carrying out this s 5 balancing exercise of right breached against justification for the breach, the importance of the particular form of expression that is affected is relevant. Distinctions can be made between different types of speech. In *Campbell v MGN Ltd* Baroness Hale said:[40]

> There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech... . Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.

[100] Political speech may be at the top of the list and any decision by the Authority that has the effect of restraining such expression will need clear justification. A short scene involving a raunchy sexual exchange in a light television programme designed to entertain is, in contrast, towards the bottom. I accept the submission for TVWorks that the programme reflects and explores issues that arise in modern society, including marital problems and sexuality, and in an Australian context which is relevant to New Zealand. But the scene cannot be said to be educative or informative, or the sexual part to reflect a central theme of the programme.

[101] In assessing the justifiable limitations threshold, the content of the Code and the relatively mild remedies available to the Authority for any breach are also relevant. The Authority will generally be considering programmes after they have been shown, and so often will not be restraining any broadcast. The issue will be the penalty for breaching the standards, and there will be no direct prevention of expression. If this is the case in relation to a complaint, it will indicate a lower threshold of justification. While any Authority decision upholding a complaint can

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40 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [148].

have a chilling effect on future expression, the impact is much greater if there is an actual restraint imposed which stops a programme from being broadcast at all.

[102] The decision in relation to the scene in the "Home and Away" programme involved no direct curtailment of expression and is in that category, in contrast to, say, an order to refrain from broadcasting a programme under s 13(1)(b) of the Act.

[103] Therefore the nature of the decision-making body and its workload, and the importance of the type of expression restrained will be relevant to the degree of formalism required in the s 5 consideration. So will the impact of the restraint. More formal reasoning will be required if a limit is placed on a major decision or policy of a government department[41] rather than a limit placed on a short scene in an episode in a television drama.

[104] Given the non-judicial nature of the Authority and the volume of its throughput, the low rating of the importance of the scene in terms of free speech, and the limited public consequences of the Authority's decision, a full step-by-step *Oakes* analysis was not required. Indeed, there have been a considerable number of appellate decisions that have accepted a s 5 proportionality assessment where there has not been any detailed analysis.[42] Nevertheless, I agree with Claudia Geiringer and Steven Price that a true "boilerplate" consideration which only records, without reasons, that the Authority has given weight to the provisions of the NZBORA is unlikely to be adequate.[43] The Authority should, in its own reasoning, show transparently why it has reached the conclusion that the limitation is justified under s 5, and not by reference to generic statements in other earlier decisions.

[105] I am satisfied that it is unnecessary for the Authority to undertake a detailed analysis of the factors relevant to s 5 in its written decision, although on occasions this may be appropriate. Generally a succinct summary of reasons will be sufficient.[44] If the nature of the summary indicates that there has been no proper s 5

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41 See for example *Ministry of Health v Atkinson* (2010) 9 HRNZ 1 (HC).
42 See for example *Television New Zealand Ltd v Broadcasting Standards Authority* at [35]–[36] and *Television New Zealand Ltd v W* at [19].
43 At 306.
44 See above n 42.

exercise carried out, then the Court may well conclude that there has been a failure to take into account a relevant consideration.

[106] I have no hesitation in rejecting the general proposition of the appellants that the Authority in a decision such as this, should articulate and explain a detailed process of structured reasoning along the lines they put forward.

The Authority's s 5 consideration

[107] I turn now to the exercise carried out by the Authority. The right of freedom of expression is important, but as observed, the type of expression here is far from being the most deserving of protection. The Authority explains clearly its justification for the limitation on the right. In relation to its first ground in upholding the complaint, it observes that it does so to "ensure that broadcasters take care to correctly classify programmes so that children are not exposed to unsuitable material".[45] In relation to the complaint that there is a breach of Standard 9, children's interests, it concludes that the material was "unsuitable for broadcast during G time" and that upholding the complaint is justified and reasonable in the circumstances.[46] In relation to Standard 1, the good taste and decency standard, it concludes that upholding the complaint would ensure that television broadcasters "take care to ensure that sexual content which exceeds the G classification is not broadcast during the G timeband when children are likely to be watching television unaccompanied".[47]

[108] There seems to me to have been a proper s 5 balancing process and a sufficient although rather bare explanation. It is not fair to typify the determinations as "boilerplate", although it would have been helpful if they had been less conclusory and contained more reasons. The sentences, although brief, show a proper understanding of the s 5 exercise and the proper conduct of that exercise. I do not accept the description by TVWorks of the explanation as arbitrary. I take into account that shorter reasons can be justified for a s 5 decision relating to a short sex

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45 At [21].
46 At [30].
47 At [35].

scene, than might be expected if a complaint concerning a significant political programme was being upheld.

[109] Further, it was legitimate for the Authority in the course of explaining its process in carrying out the s 5 exercise to refer to other earlier decisions of the Authority, although care must be taken in this exercise as to rely exclusively on an earlier decision could tip the explanation into boilerplate.

[110] I am not prepared to carry out my own s 5 balancing exercise. In the absence of any relevant error of fact or principle, and in the absence of a conclusion which is plainly wrong, the Court will not interfere with the Authority's decision. For this Court to carry out the process would be to usurp the role of the Authority and to apply its own judgment.

[111] In this regard I follow the approach in the majority of recent High Court s 18 appeals.[48] This Court is an inferior position to the Authority when it comes to assessing how the right is affected, and what is a reasonably necessary and justified limit in the circumstances. On the other hand, this is a task in which the Authority is specially qualified.

[112] I conclude that the Authority did consider the provisions of the NZBORA and carried out a proper s 5 exercise. The fact that it did not break that exercise down into a series of steps is not fatal to its decision. The essential balancing exercise has been carried out.

Conclusion in relation to "Home and Away"

[113] In the end, TVWorks has failed to make out any of its grounds of appeal. The conclusion that was reached by the Authority was one that was open to it. There were no demonstrable errors or failures to take into account relevant considerations

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[48] *Browne v Canwest TVWorks Ltd* [2008] 1 NZLR 654 (HC) at [52]; *Radio New Zealand Ltd v Bolton* HC Wellington CIV-2010-485-225, 19 July 2010 at [53]; and *Television New Zealand Ltd v Broadcasting Standards Authority* at [32]. Mr Mills criticised the decision in *Television New Zealand Ltd v Green* as going further in carrying out the NZBORA exercise on the merits.

or the taking into account of irrelevant considerations. The decision was not plainly wrong. TVWorks appeal therefore cannot succeed.

General conclusion

[114] The TVNZ appeal in relation to the "Hung" programme (CIV-2010-485-2007) is allowed, and the Authority's decision is reversed. I am not clear whether any further order will be required and note that submissions on the point varied. Now that the decision on the merits of the appeal has been given, I reserve the question of whether any further specific orders, such as an order for a rehearing, should be made.

[115] If particular orders are sought submissions should be filed within 21 days with submissions in reply within a further 14 days.

[116] The appeal against the decision relating to the "Home and Away" programme (CIV-2010-485-2008) is dismissed, and the decision of the Authority in relation to that programme is confirmed.

Costs

[117] It is unlikely that any costs issues will arise, but cost issues are reserved.

[118] Under s 99A of the Judicature Act 1908 I order that Mr Mills' reasonable fees and his junior's fees be paid out of public funds. I am grateful to Mr Mills for his thorough and helpful submissions.

Asher J