

Reference No. HRRT 026/2012

UNDER SECTION 50 OF THE HEALTH AND  
DISABILITY COMMISSIONER ACT 1994

IN THE MATTER OF AN APPLICATION FOR IN-COURT MEDIA  
COVERAGE

BETWEEN DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND RUTH NELSON

DEFENDANT

TRIBUNAL: Mr RPG Haines QC, Chairperson

**REPRESENTATION:**

Mr A Martin, Director and Ms Cook  
Mr A Beck for defendant  
Ms B Torrie for Fairfax Ltd

DATE OF DECISION: 19 April 2013

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**DECISION OF CHAIRPERSON  
ON APPLICATION FOR IN-COURT MEDIA COVERAGE**

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**Background**

[1] By application dated 27 February 2013 Fairfax Ltd on behalf of *The Dominion Post* sought permission to take still photographs during the hearing which will commence on Monday 26 August 2013 at the Tribunals Unit, Wellington.

[2] By *Minute* dated 7 March 2013 the Director of Proceedings and Ms Nelson were asked to advise whether the application was opposed and if so, the reasons for the opposition. The Chairperson would then decide whether to grant or decline the application on the papers or convene a formal hearing or telephone conference.

[3] The responses filed by the parties have provided no grounds for the convening of a formal hearing or of a telephone conference. The application is therefore to be dealt with on the papers.

#### **Position of the Director**

[4] By memorandum dated 22 March 2013 the Director advised that he does not oppose the application and submits that media coverage will not cause undue stress to any of the plaintiff's witnesses nor would it result in any witness becoming unwilling to give evidence. He added:

This is particularly the case given the previous television interviews with Ms Maine (the consumer), Ms Taylor (the consumer's daughter) and Ms Nelson (the defendant) in relation to this matter.

[5] However, the Director reserved his position in relation to any application he might wish to make for an order suppressing the name and identifying details of other witnesses not already named in media coverage to date.

[6] The Director has since filed his briefs of evidence. They are four in number. One is for Ms Taylor.

#### **Position of Ms Nelson**

[7] In a notice of opposition dated 3 April 2013 enlarged upon by submissions from Mr Beck of the same date, Ms Nelson opposes the application. She has subsequently filed an affidavit sworn on 12 April 2013 in support of her position.

[8] In brief, Ms Nelson deposes that for 28 years she has lived in Otaki on the Kapiti Coast. Otaki is a very small town with a population of approximately 6,000. Following from the TV interviews and newspaper coverage of this case during the investigation by the Health and Disability Commissioner, she faced harassment and hostility on many occasions when out in public. This harassment included verbal abuse and on one occasion a physical assault in the carpark of a local supermarket. She has received threatening and abusive phone calls and what she describes as constant harassment by various media organisations. She has two daughters who also live and work in the same community and they too have been approached by people about the case. Both daughters may have to give evidence at the hearing. Ms Nelson does not wish them to suffer further harassment. One daughter in particular is currently experiencing serious health issues requiring surgery and further treatment in the near future. Her doctor has advised that she must avoid stress as much as possible. The prospect of her photograph appearing in the media is, in Ms Nelson's opinion, likely to cause significant stress not only to her daughter but also to the daughter's children.

[9] In 2008 Ms Nelson suffered a serious injury to her leg and hip. She is now 71 years of age and still experiences problems with her leg. Her general health has declined, particularly following the stress caused by the investigation by the Commissioner.

[10] Mr Beck accepts that the public interest requires in general that court and tribunal proceedings be held in public, that any member of the public be free to attend and that the media be able to provide reports of the proceedings for the benefit of those unable to attend in person. However, citing *Chief Social Worker v "Nikki"* (2002) 16 PRNZ 801 at [26] (Heath J), the taking of photographs of participants in the hearing is not a necessary concomitant of holding a hearing in public. Any photograph taken during the hearing will

not contribute to justice being seen to be done. It is likely to achieve little other than to satisfy prurient interests. In addition the presence of a photographer in the hearing is likely to prove a distraction and to contribute to the anxiety of Ms Nelson and her witnesses who will already be in a very stressful situation.

[11] Mr Beck emphasises that Ms Nelson has already faced harassment from strangers as a result of publicity in this case. Such harassment is likely to be increased as a result of any photographs published in the press.

[12] He emphasises that Ms Nelson is now 71 years of age and in very poor health. The considerable stress she will likely experience as a result of these proceedings will be unnecessarily increased by permitting the taking of photographs. Finally, Mr Beck points out that witnesses whom Ms Nelson wishes to call will be reluctant to expose themselves to being photographed while giving evidence.

[13] The points made by Mr Beck are compelling.

## **Discussion**

[14] Grant of the present application to take still photographs during the hearing is at the discretion of the Tribunal. The starting point (by analogy) must be s 107 of the Human Rights Act 1993 which provides:

### **107 Sittings to be held in public except in special circumstances**

- (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
- (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
- (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
  - (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof;
  - (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof;
  - (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
- (4) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c).

[15] This provision makes it clear that every hearing of the Tribunal must be held in public. However, the Tribunal has power under subs (3), if “satisfied that it is desirable to do so”, to order a hearing in private, to make non-publication orders and to restrict publication of exhibits in the form of books or documents. It is clear that the requirement in subs (1) that hearings of the Tribunal be held in public is not an absolute one.

[16] When determining whether it is “desirable” to exercise one or more of the powers in s 107(3), the Tribunal must have regard to the presumption of open judicial proceedings, freedom of speech (as allowed by s 14 of the New Zealand Bill of Rights Act 1990) and the right of the media to report. The Tribunal must identify and weigh the interests of both the public and of the individual including the need for a fair hearing.

[17] Applying these principles by analogy to the present application, refusing permission to take still photographs during the hearing will not inhibit the public reporting of the claim brought by the Director or of the response made by Ms Nelson. Representatives

of the media will be able to attend, observe and report in the usual way. In that respect the principle of open judicial proceedings and freedom of speech will remain respected. But in the context of the present case it is difficult to see what public interest there is in allowing still photographs to be taken of Ms Nelson and of her daughters during the course of their evidence. On the contrary, there is the practical consideration that permitting cameras during the hearing is likely to deter the daughters from giving evidence and increase the stress on Ms Nelson while giving evidence and distract her without offering any substantial benefits in the public interest. A fair hearing could be compromised. This is a significant factor given the terms of s 105(2)(b) of the Human Rights Act which are incorporated into proceedings under the Health and Disability Commissioner Act 1994 by s 58 of that Act. The Tribunal is required to act in a manner that is fair and reasonable.

**[18]** My conclusion is that given the matters related by Ms Nelson in her affidavit, particularly the prior history of harassment of herself and her daughters, her age and the decline in her health, allowing still photographs to be taken during her evidence and that of her daughters is likely to adversely affect the quality of their evidence. On the facts, a fair hearing will be in jeopardy. The privacy interests of these witnesses clearly outweigh the public interest in having photographs taken of them while they give evidence.

**[19]** The taking of still photographs (but not of Ms Nelson and her daughters) is, however, to be permitted during the balance of the hearing. The restriction (such as it is) on the freedom of Fairfax Ltd to photograph the proceedings is thereby reduced to a minimum. This is, however, subject to any application which may be made by the parties for a non-publication order in relation to any witness.

**[20]** In the result the following orders are made:

**[20.1]** The application to take still photographs during the hearing is declined in relation to Ms Nelson and her daughters.

**[20.2]** The application is otherwise granted subject to any application the parties may make for an order suppressing the name and identifying details of any witness.

**[20.3]** The *In-Court Media Coverage Guidelines 2012*, appropriately adapted, are to apply including Schedule 3 which prescribes the standard conditions for still photographs.

**[20.4]** Leave is reserved to both parties to make further application should the need arise.

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**Mr RPG Haines QC**  
**Chairperson**

