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CASE NUMBER: 27/2010

DATE OF HEARING: 11 NOVEMBER 2010

S DAVIES

COMPLAINANT

vs

e-tv

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 PROF HENNING VILJOEN (DEPUTY CHAIRPERSON)
 MR BRIAN MAKEKETA
 MS ZALI MBOMBO
 PROF GERRIT OLIVIER

FOR THE COMPLAINANT: The Complainant was invited but was unable to attend.

FOR THE RESPONDENT: Dan Rosengarten and David Feinberg attorneys from Rosin Wright Rosengarten accompanied by Olefile Bop Tshweu: Regulatory Affairs Executive of e-tv and Ben Said, e-news.

News – alleged health scare in news item - held to have been part of the duty of the broadcaster to inform – item saved by inclusion that Government had only advised the manufacturers of bottles not to include BPA in their bottles. Davies vs e-tv, Case No: 27/2010 (BCTSA).

SUMMARY

The issue before the Tribunal was whether e-tv news had not contravened the Broadcasting Code by having caused a health scare based on BPA in baby bottles, which was not justified in the light of the debate on the matter.

Held, by the majority, that the news item made it clear that (1) the warning was that of the Cancer Association of South Africa; (2) Government had not “yet” banned the use of BPA in baby bottles; (3) Government had *advised* manufactures to adopt a BPA-free policy; (4) bottles which do contain BPA have a sign on them indicating this, which

means that the manufacturers are fully aware of the BPA, yet nevertheless continue to distribute such bottles; (5) the advice from the NUK representative which based his opinion clearly on probabilities as to which bottles contain BPA (transparent = probably containing BPA; milky, probably not containing BPA). He then also refers to the signs on the bottle which indicate whether the bottle does contain BPA or not. *Accordingly:* In essence the news insert cautioned against baby bottles with BPA, but also clearly conveyed that Government has only *advised* manufacturers to follow a BPA-free policy. The Respondent also has, as part of its duties, the duty to caution. Ultimately the effect of the item as a whole was not to scare, but to inform and caution. If e-tv news had not referred to what government had said about BPA, the broadcast of the item would, however, have amounted to a contravention of clause 34.2(b).

Accordingly the Complaint was not upheld by the majority of the Commissioners.

JUDGMENT

JCW VAN ROOYEN SC

[1] A complaint was received by the Registrar concerning an e-tv news item on the danger of the chemical bisphenol A (BPA) in baby bottles. The Registrar decided to entertain the complaint and then I referred the matter to a Tribunal.

[2] The complaint reads as follows:

“Programme name: Newsnight

Time: several repeats of the offending insert between 6pm and 9pm

Date: 12 August 2010

News I would like to complain about e-tv for their sensationalist insert this evening on BPA in baby bottles. It was a classic and appalling example of "bad-science media" where a very limited and inconclusive body of scientific evidence is mashed by journalists into a widespread panic. Enough of this nonsense! The real damage is not just in the needless anxiety such stories cause but in the harm done to the public understanding of science, that it's all about what 'experts' say and not about a careful and thorough process of research. When a media scare is debunked by the research process - as with MMR vaccine and silicon implants - do the journalists who scared the public with their false information ever retract or apologise for the harm they've done? They do not!

Environmental toxins are a gift to lazy journalists because all they have to do is wheel out an "expert" (in this case a representative of CANSA, not even a scientist one suspects?!) and then announce to the viewers that the alleged toxin - without specifying a dose or referencing standing health regulations – will cause [insert dread disease].

Combine that with pictures of tiny helpless babies and it's all you need for a major scare amongst parents and big sales of the new - and more expensive - "BPA-free" products whilst the old products go to the landfill even if, as is probably the case, they pose no real "danger" at all.

Less than a minute's search on the Net will turn up well referenced articles that present the true and full picture, which is that we still don't know what levels of BPA are dangerous or in what way, that conclusive research on toxic effects in humans has not yet been done, and that BPA is already present in thousands of everyday products including heat-sensitive papers used to print receipts, and the plastic used to protect young children's teeth from decay, as well as foods sold in plastic packaging or in tins. An American study found it in the urine of 95% of the people that were tested!

Moreover, manufacturers use it for a reason which is that it helps to stop plastic from cracking or breaking which in itself is hazardous especially if bottles are being sterilised at high temperature or filled with hot fluids. So there are risks involved in telling people to avoid BPA when as yet the evidence for that is insufficient to justify those risks.

The whole insert gave the impression of a shameless promotion for companies such as NUK - whose products were prominently featured!! - whilst other reputable baby bottle companies such as Avent who have decided to continue using BPA and defended the safety of their products were not represented or given a say.

As a standard for reporting on matters of science, this is unacceptable and irresponsible. South African parents deserve better. Amongst others, the following article online refers. <http://www.sciencebasedmedicine.org/?p=209>"

[3] e-tv responded as follows:

"This letter is in response to a complaint by Sally Davies who accuses eNews of "bad-science media" where a very limited and inconclusive body of scientific evidence is mashed by journalists into a widespread panic.

CANSA is a South African institution that deals with all cancer related matters. It has a research team including leading academics some specializing in oncology, nursing science, medicine and primary health and oncotherapy. Ms Sue Janse van Rensburg who was interviewed in the news item is the CEO of CANSA and has an Advanced Nursing Diploma and started her career as a registered nurse at Helen Joseph Hospital. eNews had no reason to doubt CANSA's expertise on the issue of BPA in baby bottles. eNews did not manufacture the story, we merely reported on it.

The complainant has the right to hold a different opinion on the issue of BPA in baby bottles, however, it does not necessarily follow that our report was incorrect. We had every right to rely on the opinion of CANSA as one of the leading organizations in cancer research.

We submit that the suggestion that we practice "bad-science media" is without basis and accordingly the complaint must be dismissed."

[4] The Transcript of the news item reads as follows:

The Cancer Association of South Africa has thrown its weight behind a range of baby bottles, which it says are completely free of the chemical BPA. BPA is commonly found in baby bottles, and is widely believed to cause cancer. While many manufacturers are already producing BPA-free products, CANSA is hoping the move will encourage all companies to test their products with them, for a similar endorsement. (PAUSE)

INCUE: Mothers be warned

SERUSHA GOVENDER; REPORTING;

Mothers be warned...using the wrong kind of baby bottle could endanger your child's health. Experts say some bottles contain a dangerous chemical called Bisphenol A. In high doses it could cause cancer, diabetes and heart problems.

BPA is found almost everywhere, from bottles to credit cards - but it's most dangerous when ingested.

Babies and children are particularly at risk.

SUE JANSE VAN RENSBURG; CANSA CHIEF EXECUTIVE;

"They're not properly developed yet, meaning that their enzyme system is not able to inactivate the BPA in the same way that adults, our bodies can do... if you heat it up if you heat the bottle up that contains the BPA, the polycarbonate bottles, 55 times more of the BPA can be absorbed into the fluid in the bottle for the baby to absorb."

Manufacturers who haven't already made their bottles BPA-free, are promising to phase them out.

Many items are clearly labelled - but there are easy ways to tell if the bottle is safe to use.

WILLIAM WERTHEIM AYMES; NUK SA MANAGING DIRECTOR;

"A general rule of thumb: if the bottle is completely transparent, in other words like glass, most probably it does have Bisphenol A in it. If it is a bit of a milky colour, or coloured completely, most probably it doesn't have."

Plastic products should also have a triangular sign: if there's a PP under the triangle it's BPA-free.

If there is a 7 in the triangle with a PC underneath, it has BPA in it.

PTC

"While government has not yet banned the use of BPA in baby products, it has advised manufacturers to adopt a BPA-free policy. Most baby products in the stores now already have the BPA-free signs, which can be seen on the product packaging, or on the bottle itself. SOQ)).

[5] The Complainant, inter alia, replied as follows:

My complaint was based on the general principle that in my opinion the "evidence" presented was shaky and did not support the conclusions, let alone the implications that parents must stop buying certain products and use other products instead. I am not a scientific expert and cannot comment on the biochemical issues or the status of research into BPA. For this, I suggest that you contact a representative of the baby product company Philips AVENT, whose products are widely distributed in South Africa. They have decided to continue using BPA in their products, and I thought that the eTV insert unfairly represented their rival company NUK as being more safety conscious without specifying the dangers of using bottles that do NOT have BPA in them.

I've little doubt that when there's a market share involved, companies will be more than happy to spare the time to help with a tribunal and unlike me, they are likely have all the relevant facts and updated research to hand.

As for myself, all I did was what anyone with access to the Internet could do - I looked it up. I did so because I'd recently read a book ("Bad Science" by British doctor Ben Goldacre) which raised awareness about poor science reporting in the media. On seeing the e-TV insert, I thought that this was an example of what Goldacre is describing and as such should be challenged. Unlike e-TV, I do not think that the question of BPA in baby bottles is a matter of "opinion" but rather of fact, the problem being that there is evidence both for and against the hypothesis that it causes cancer and is dangerous for babies, and that this evidence was not presented in an objective or even-handed way but in an emotionally loaded and biased way. Like many South Africans, including our own Government for that matter, I'm doubtful of the media's ability to regulate itself and I am not personally enthusiastic about an invitation to confront a media organisation - with all its massive resources and tame "experts" - armed merely with some info from the Internet and a suspicion that proper scientific rigour has not been applied in this case. It seems to me that in such circumstances it is impossible for the media organisation to lose its case and I'm not interested in being part of such a scenario

unless I'm assured that people with specific knowledge of the relevant issues will be present to confront e-TV with a degree of authority that I do not possess.

[6] Clause 34 of the Broadcasting Code provides as follows:

34.1. Licensees shall be obliged to report news truthfully, accurately and fairly.

34.2. News shall be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:-

- (a) Distortion, exaggeration or misrepresentation.
- (b) Material omissions; or
- (c) Summarisation

34.3 Only that which may reasonably be true, having due regard to the source of the news, may be presented as fact, and such fact shall be broadcast fairly with due regard to context and importance. Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it shall be presented in such manner as to indicate clearly that such is the case.

[7] The Commissioners seized with this matter were divided 50:50 on whether the news item had not contravened the Code. I also had considerable problems with the item but, ultimately, decided to give the benefit of doubt to the broadcaster. What brought me to this conclusion were the following aspects of the news item: the news item made it clear that (1) the warning was that of the Cancer Association of South Africa; (2) Government had not “yet’ banned the use of BPA in baby bottles;(3) Government had *advised* manufactures to adopt a BPA-free policy; (4) bottles which do contain BPA have a sign on them indicating this, which means that the manufacturers are fully aware of the BPA, yet nevertheless continue to distribute such bottles; (5) the advice from the NUK representative which based his opinion clearly on probabilities as to which bottles contain BPA (transparent = probably containing BPA; milky, probably not containing BPA). He then also referred to the signs on the bottle which indicate whether the bottle does contain BPA or not.

[8] On the other hand it is the view of Commissioners Makeketa and Mbombo that the insert does create a doubt and that that, in itself, should have led the Respondent to not including the insert. Public health is an all important matter for any Government and

when news deals with a subject as sensitive as this subject, there should be certainty or a contrasting view should be included, as indeed put forward in the complaint.

[9] Ultimately, the conclusion of the majority is that Government has only advised manufactures to adopt a BPA-free policy and has not prohibited the sale of the product, which it most certainly would have done had it reached a different conclusion.

[10] Although I realise that there are, most certainly, conflicting views expressed on the matter, it is of interest to note that Ms Katherine Zenatsky RD LD from the renowned Mayo Clinic in the USA expressed the following opinion on the internet:

“Some research has shown that BPA can seep into food or beverages from containers that are made with BPA or into your body when you handle products made with BPA. BPA remains controversial, and research studies are continuing. The American Chemistry Council, an association that represents plastics manufacturers, contends that BPA poses no risk to human health.

But the National Toxicology Program at the Department of Health and Human Services says it has "some concern" about the possible health effects of BPA on the brain, behaviour and prostate gland of fetuses, infants and children. This level of concern is midway on its five-level scale, which ranges from serious to negligible. The Food and Drug Administration now shares this level of concern and is taking steps to reduce human exposure to BPA in the food supply by finding alternatives to BPA in food containers.”

[11] In essence the news insert does not go further than this comment. It cautions but also conveys that government has only advised manufacturers to follow a BPA-free policy. The Respondent has, as part of its duties, the duty to caution. Ultimately the effect of the item as a whole is not to scare, but to inform. If it had not referred to what government had said about BPA, the broadcast of the item would have amounted to a contravention of clause 34.2(b).

In the result the complaint is not upheld



**JCW VAN ROYEN SC
CHAIRPERSON**

Commissioners Viljoen and Olivier concurred with the judgment, whilst Commissioners Mbombo and Makeketa did not agree.