

BBC footage of dying journalist Lyra McKee ruled highly intrusive

Ofcom has upheld a privacy complaint against the BBC over the broadcast of footage that showed the dying moments of journalist Lyra McKee. In its decision,¹ Ofcom found that including the footage in BBC Two's *Newsnight* report amounted to an unwarranted infringement of Ms McKee's right to privacy, representing a "very significant intrusion" that had caused her family a great deal of distress. This was not outweighed by the BBC's right to freedom of expression, the audience's right to receive information and ideas without interference, or the public interest in broadcasting the footage. Ms McKee's family had not been informed that the footage was to be included, and so they could not give (or withhold) consent to its inclusion.

Newsnight report

Ms McKee, 29, was shot dead by a New IRA gunman while observing a riot in Londonderry in April 2019. In November 2019, *Newsnight* featured a report about terrorism in Northern Ireland. The 11-minute report described the circumstances that led to her murder, and included three seconds of hazy and blurry mobile phone footage, which showed Ms McKee lying on the ground in the centre of a crowd. The footage showed people apparently huddling over someone on the ground, including a glimpse of the person's trainers. The individual on the ground was largely obscured: there was no close-up detail, and no injuries were shown.

Complaint

Ms McKee's sister, Mrs Corner, complained that Ms McKee's privacy had been unwarrantably infringed in the programme as broadcast because footage of her "final moments" had been shown.

Mrs Corner said that this footage was "previously unseen", and that Ms McKee's family had been unaware that it existed before it was included in the *Newsnight* report. She added that the footage should have been kept private, and that its use in the programme had been extremely distressing to Ms McKee's family.

BBC response

The BBC apologised for the upset that the programme had caused the family and regretted that Mrs Corner had not been aware in advance that the report was going to be broadcast.

The BBC said that, while the central focus of the *Newsnight* report was not the events on the night Ms McKee had died, it had considered that a short sequence which set out the senselessness of her death was editorially important. This was to remind viewers of what had happened as background to inform the rest of the report. The sequence was the starting point for a serious piece of investigative journalism that showed the reality for the community in Londonderry, the attitudes that hold sway within it and the challenges faced by the authorities there.

The BBC said that the programme makers had decided to use the footage to bring home to viewers the full horror of what happened, in the hope that it might encourage witnesses to come forward to bring the killer to justice. It considered this a matter of considerable public interest and referred to the interviews in the programme with a Chief Constable, who spoke about the difficulty of getting evidence from the public, as well as with a contributor who indicated the likely fate of informers.

The BBC noted that some of the footage had been in the public domain online since April 2019. It recognised that the specific footage of Ms McKee on the ground, with a glimpse of her trainers,

¹ https://www.ofcom.org.uk/data/assets/pdf_file/0015/204504/Complaint-by-Mrs-Nichola-Corner-obo-the-Ms-Lyra-McKee-deceased-about-Newsnight-The-Real-Derry-Girls-and-the-Dissidents.pdf

had not been widely used. The footage came from a website and included material filmed on four different mobile phones, as well as from police video cameras. The BBC considered that the footage in the report showed how events unfolded, the large number of people present, and the ease with which the gunman had acted.

The programme makers explained that they had sought to make contact with Mrs Corner and her mother via their lawyer for an interview, but nothing had come of this. They also had little contact with Ms McKee's partner, Sara Canning, as she did not wish to be involved in the programme, although the BBC had understood she would have been kept informed about the development of the programme through her contact with a contributing friend, Ms Quinn, who had been present at the scene of the crime. The BBC said that the immediate participants were told when the broadcast would take place, and the programme makers received assurances that this message was passed on to Ms Canning. The BBC assumed (with hindsight, it accepted, wrongly) that Ms McKee's family would have been aware of the programme and prepared for the footage it was planning to use. The programme makers accepted that this was their responsibility, and that they should have taken further steps to ensure that was the case.

The BBC emphasised that the intention of the film was not to focus on Ms McKee and her family, but rather to examine the fall-out from her murder, as reflected in the words and actions of the tightly-knit group of which Ms McKee and her partner were a part; and to call the "New IRA" and its supporters to account for the murder.

When the BBC received the complaint from Mrs Corner, it apologised and took immediate action. The three-second shot of Ms McKee on the ground was removed from a longer version of the report that was later shown on BBC World and the News Channel. The YouTube version was then replaced by the BBC World version.

Relevant rules

Ofcom noted that an individual's right to privacy has to be balanced against a broadcaster's competing right to freedom of expression, and that neither right has precedence over the other. Where there is a conflict between the two, it is necessary to focus intensely on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account, and any interference or restriction must be proportionate. Ofcom noted that this is reflected in its application of Rule 8.1 of its Broadcasting Code (**Code**), which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

Section 8 of the Code also contains "practices to be followed by broadcasters" when dealing with individuals or organisations taking part in or otherwise directly affected by programmes (or the making of programmes). In considering this complaint, Ofcom had particular regard to:

- practice 8.3 – when people are caught up in events which are covered by the news, they still have a right to privacy, unless it is warranted to infringe it (which applies both to the time when the events are taking place and to later programmes that revisit those events);
- practice 8.4 – broadcasters should ensure that words, images or actions filmed or recorded in, or broadcast from, a public place are not so private that prior consent is required before broadcast from the individual or organisation concerned, unless broadcasting without their consent is warranted;
- practice 8.6 – if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted; and

- practice 8.16– broadcasters should not take or broadcast footage of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

Decision

Expectation of privacy

Ofcom took into account that the murder of Ms McKee had happened in a public place, in full view of any members of the public who may have been in the area at the time. It considered that, in the shot of her lying on the ground, she was mostly obscured by the people standing around her, there was no close-up detail of her, nor any sight of any injuries, and only her trainers could be seen. The footage was only shown briefly (for approximately three seconds). Yet Ofcom also took into account that the footage showed Ms McKee in her dying moments, which clearly attracted a high degree of privacy, despite being in public. So Ofcom considered that the footage showed her in a highly sensitive situation, and that she had a legitimate expectation of privacy in the material as broadcast, which was heightened in the circumstances.

Ofcom noted that, although the footage of Ms McKee had been in the public domain since April 2019, the BBC had acknowledged that “the specific shot of Ms McKee on the ground, with a glimpse of her footwear” had not been widely used. Taking into account the particular circumstances, and noting that there was nothing to suggest that her family had chosen to place this footage in the public domain themselves, or that they had consented to it being in the public domain, Ofcom did not consider that the availability of the footage in the public domain deprived Ms McKee of her right to privacy in connection with the broadcast of the footage in the programme.

Taking all of that into account, Ofcom considered that she had a legitimate expectation of privacy in relation to the broadcast of the footage in issue, even though she was largely obscured and there was no close-up detail of her shown, and that the broadcast represented a very significant intrusion into her privacy.

Consideration of defences

Ofcom went on to consider whether the infringement of privacy had been made with the consent of Ms McKee’s family, as her next of kin. Ofcom noted that no attempt had been made before broadcast to obtain consent from her family to broadcast the footage. Further, in its view, even if her family had been aware of the intended broadcast of the programme, given the highly sensitive nature of the specific footage in issue and the potential distress that would be caused to the family by its inclusion, the BBC should have ensured that it had obtained the family’s informed consent (as her next of kin) to include the footage, unless it was warranted not to do so.

Ofcom then considered whether the intrusion had been warranted. In doing so, it balanced Ms McKee’s right to privacy with the BBC’s right to freedom of expression and the audience’s right to receive the information broadcast without unnecessary interference. It took into account the BBC’s response that there was a public interest justification for the inclusion of the footage. Ofcom agreed that there was a genuine public interest in making programmes about the threat posed by dissident groups in Northern Ireland and showing the realities for the affected community, and accepted that broadcasters have editorial discretion to include challenging material in exploring these issues, as long as that does not breach the Code.

While Ofcom recognised the public interest in exploring what happened on the night and the impact on the community, as well as the BBC’s right to freedom of expression and the audience’s right to receive information, it considered that the footage included in the programme depicted a matter of

extreme sensitivity for both Ms McKee and her family. So it took the view that the interference with her legitimate expectation of privacy was significant. On balance, Ofcom concluded that the infringement of her right to privacy in the broadcast of the footage without her family's consent was unwarranted, and that the competing rights of the broadcaster and the audience, on the one hand, did not outweigh the very significant intrusion into her right to privacy, on the other.

Rights on behalf of deceased persons

Complaints to Ofcom

It is noteworthy that the complaint was made on behalf of a deceased individual, rather than on behalf of her surviving next of kin. Fairness and privacy complaints may be made to Ofcom on behalf of a deceased individual, under section 111(2) of the Broadcasting Act 1996, which provides that "where the person affected is an individual who has died, a fairness complaint may be made by his personal representative or by a member of the family of the person affected, or by some other person or body closely connected with him (whether as his employer, or as a body of which he was at his death a member, or in any other way)".

Such complaints are, however, few and far between. This is most likely because broadcasters are generally careful to abide by practice 8.19 of the Code, which states that:

"Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes. In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past."

In this instance, although the programme makers reached out to the next of kin through their lawyer to seek an interview, it does not appear that they made any further attempts (e.g. during editing/ post-production) to inform them of the plans for the programme and its intended broadcast. Had they done so, it might have been possible to address the family's concerns before broadcast.

Privacy

The issue of whether or not a privacy claim may be made in the courts on behalf of a deceased individual remains untested. It has been suggested (e.g. by Toulson and Phipps, the authors of Confidentiality, and by Tugendhat and Christie, the authors of The Law of Privacy and the Media) that post-death publication of confidential or private information could give rise to a limited cause of action. It might well be, however, that a privacy claim on behalf of a deceased individual would fail if its only aim were to vindicate personal rights related to individual dignity and hurt feelings.

Comment

It is noteworthy that Ofcom found that the programme makers were required to provide a clear explanation to Ms McKee's family of the footage that they were planning to include in the programme. It is unusual for Ofcom to be so specific, but, in this instance, it was clearly reflective of the highly sensitive and private nature of the footage showing her dying moments, for which the consent of her next of kin was required for broadcast.

There is no doubt that the BBC's public-interest argument was compelling, that the decision to include the footage was finely balanced and not taken lightly, and that the intention behind the broadcast was creditable. As Ofcom's finding makes clear, though – and as the BBC accepted in a statement following

publication of Ofcom's finding – it should not have used the footage without obtaining the informed consent of Ms McKee's family.

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