

Complaint by Mrs Nichola Corner¹ on behalf of the Ms Lyra McKee (deceased) about *Newsnight: The ‘Real’ Derry Girls and the Dissidents*

Type of case Fairness and Privacy

Outcome Upheld

Service BBC 2

Date & time 05 November 2019, 22:45

Category Privacy

Summary Ofcom has upheld this complaint about unwarranted infringement of privacy in the programme as broadcast.

Case summary

The programme featured a report about terrorism in Northern Ireland, with a particular focus on Derry, or Londonderry. The report described the circumstances which led to the murder of Ms Lyra McKee, who was a journalist covering a story when she was hit by a bullet after a gunman opened fire on the police. The programme included a brief piece of footage that appeared to show Ms McKee lying in the street in her dying moments after being shot. The footage, filmed on a mobile phone, included around three seconds which focused on Ms McKee as she lay on the ground with people crowding around her. Whilst the footage was brief, of low quality and Ms McKee was largely obscured, it included a glimpse of her footwear. Mrs Corner, Ms McKee’s sister, complained that Ms McKee’s privacy was unwarrantably infringed in the programme as broadcast by the inclusion of this footage.

Ofcom found that Ms McKee had a legitimate expectation of privacy in relation to the broadcast of the footage of her and that this outweighed the broadcaster’s right to freedom of expression and the audience’s right to receive information and ideas without interference, and the public interest in

¹ Section 111(2) of the Broadcasting Act 1996 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)”.

broadcasting the footage in this particular case. Therefore, Ofcom found that Ms McKee's legitimate expectation of privacy was unwarrantably infringed in the programme as broadcast.

Programme summary

On 5 November 2019, the BBC broadcast an edition of *Newsnight* which included a report entitled: *The 'Real' Derry Girls and the Dissidents*. The report looked at terrorism in Northern Ireland and why the threat of a terrorist attack was considered "severe" or "highly likely", while the threat on the UK mainland remained relatively low. The reporter, Mr Peter Taylor, explained that the threat came from various dissident republican groups such as the "New IRA", which he said was the "most prominent and dangerous". He went on to say that the New IRA was responsible for the shooting of Ms McKee, a journalist, during a riot in the city of Derry, or Londonderry, in April 2019. Mr Taylor was shown in the report meeting Ms McKee's friends and discussing their friendship with Ms McKee and what her murder meant to them and the community.

During the report, images of the Creggan Estate part of the city were shown. The reporter described the estate as "one of the most deprived areas in the United Kingdom, [which] has become the stronghold of the New IRA and its alleged political wing, Saoradh". Interview footage was then included of Mr Paddy Gallagher who the reporter described as "part of Saoradh's leadership in Derry". Mr Gallagher explained his view that many people in republican areas like the Creggan Estate were opposed to "British Crown forces" (i.e. the Police Service of Northern Ireland, PSNI) and that they did not trust them. The reporter then said in commentary, which was accompanied by footage of the riot:

"Just over six months ago, police searched a house on that same Creggan Estate for explosives. None was found. A riot broke out. Lyra was standing by a police Land Rover covering the scene as a journalist [a still image in which Ms McKee was encircled standing at the rear of a PSNI Land Rover was shown]. A gunman opened fire at the police, but the bullet hit Lyra".

Ms Sinead Quinn, a friend of Ms McKee interviewed for the programme, then said: "I was there...I saw her fallen, and land on the ground, and I didn't believe, even...". At this point, what appeared to be mobile phone footage was included (for approximately 12 seconds) that showed a group of people shouting, moving about and huddling around the rear nearside wheel of a PSNI Land Rover. The footage was hazy and blurry. Approximately three seconds of 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, and there was no close-up detail, and no sight of any injuries. As this footage was shown, Ms Quinn continued: "...right up until arriving at the hospital, that she'd been shot. I could not believe that it happened on the Creggan".

Following this footage, Mr Gallagher told the reporter that on the night of the riot, people in the area had come out to resist "British Crown forces" and that had led to Ms McKee's death. Mr Gallagher said that he did not know who the gunman was and that it was unlikely that anyone from the area would inform the police as to who may be responsible. He said:

“People have called for members of this community to inform but the people of this community know the life of an informer They think, judging by history, they know exactly what would happen to informers”.

The report then moved on to discuss the aftermath and legacy of Ms McKee’s murder on the local community, and Northern Ireland more widely.

Interview footage from members of republican groups and the Chief Constable of the PSNI, Mr Simon Byrne, was also included, in which they talked about Ms McKee’s murder and why the threat from dissident groups remained severe in Northern Ireland. Describing the challenges faced by the PSNI in solving Ms McKee’s murder, Mr Byrne said:

“There’s an undertone of threats and intimidation that you can understand, even if you were the person overlooking where that gunman was standing and pulling the trigger, how frightened you would be about putting your name to a statement and giving evidence in court”.

The footage of Ms McKee next to the PSNI Land Rover, which is subject to this complaint, was not shown again in the programme.

Summary of the complaint and broadcaster’s response

Complaint

Mrs Corner complained that Ms McKee’s privacy was unwarrantably infringed in the programme as broadcast because footage of Ms McKee’s “final moments” after being shot by an unknown gunman was shown in the programme².

Mrs Corner said that this footage was “previously unseen footage” and that Ms McKee’s family had been unaware that it existed before its broadcast in the programme. She added that this footage should have been kept private and that its use in the programme had been extremely distressing to Ms McKee’s family.

Broadcaster’s response

The BBC apologised for the upset the programme had caused the family and regretted that Mrs Corner had not been informed about the programme in advance of its broadcast.

Background

The BBC said that at the time when the report was broadcast, Northern Ireland’s devolved political institutions had been suspended for almost three years, with little prospect of it being restored, and political violence appeared to be worsening. It said that it considered the report was in the “best

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tradition of public service broadcasting”, in that it investigated some of the most sensitive and difficult issues that continue to be faced in Northern Ireland.

The BBC said that the murder of Ms McKee made headlines around the world – it was senseless and shocking. It said that Ms McKee had made a name for herself as a journalist who was able to reflect the “voice of a generation for whom the troubles should be in the past but who saw the peace process had yet to fully deliver”. The BBC said that her death hit a collective nerve because it seemed to underline the extreme fragility of the political settlement and the growing confidence of dissidents seeking to exploit it. The BBC referred to the leading political figures who had attended her funeral, noting that the entire congregation had given the priest a standing ovation when he asked why it had taken Ms McKee’s murder to unite politicians. It also referred to the fact that more than six months later, despite this “passionate appeal”, the Northern Ireland Executive was still not in operation and no one had been charged with Ms McKee’s murder. The BBC explained that *Newsnight*, which it said is known for its in-depth and forensic investigations, commissioned the report with this in mind.

The BBC referred to the reporter’s experience of covering the conflict in Northern Ireland.

The BBC said that the murder of Ms McKee had dramatically changed the context and the perception of Saoradh (widely regarded as the political wing of the “New IRA” which had claimed responsibility for Ms McKee’s murder). It said one of the main aims of the report was to carry out robust interviews with leading members of this group, and to examine why it had proved so difficult for the PSNI to gather evidence to convict Ms McKee’s murderer. The report also focused on how Ms McKee’s friends had chosen to break the silence over her murder by the “New IRA” by painting red hands on the walls of the office of Saoradh to reflect their anger and disgust.

The BBC said that the murder of Ms McKee was a terrible event for her close family and for all those who knew her. It added that tragically, it also gave her a prominence in the public mind. The BBC said that it did not intend to breach Ms McKee’s privacy. It said that her death was the starting point for a serious piece of investigative journalism that showed the reality for this community, the attitudes that hold sway within it and the challenges the authorities face.

Response to the complaint

The BBC said that while the central focus of the report was not the events on the night Ms McKee died, it had considered that a short sequence which set out the senselessness of her death was editorially important, to remind viewers of what had happened as background to inform the rest of the report.

The broadcaster said that some of the footage used in the report had been in the public domain online since April 2019 and was still available on media websites at the time the BBC provided its statement (the BBC provided Ofcom with a link to this material). However, it said that the specific footage of Ms McKee on the ground, with a glimpse of her footwear, had not been widely used. It said that this footage came from a website (the BBC provided Ofcom with a link to this website) and included material filmed on four different mobile phones as well as from PSNI video cameras.

The BBC said the footage used in the report showed: how events unfolded; the large number of people present; and, the ease with which the gunman acted.

It said that the footage, which is the subject of this complaint, showed a camera spin round on the street and move towards a PSNI vehicle where people were gathering around a person lying on the ground. It said that in total it is 12 seconds long and, of this, approximately three seconds focus on Ms McKee, who is largely obscured by others apart from a glimpse of her footwear. It said that the shot is hand-held and unfocussed in parts and it showed the confusion of the night and how people rushed to help Ms McKee in the moments after she was shot. It also said that the footage was not explicit in terms of what it showed of Ms McKee or of the injuries she received.

The BBC said that at the time of broadcast, no one had been charged with Ms McKee's murder, and the programme makers had decided to use the footage of Ms McKee on the ground to bring home to viewers the full horror of what happened, in the hope that it might encourage members of the public to come forward to assist the PSNI in their endeavours to bring the killer to justice. It referred to the interview included in the programme with the PSNI's Chief Constable who spoke about the difficulty of getting evidence from the public, as well as the interview with Saoradh's Derry spokesman, Mr Gallagher, who indicated what was likely to be the fate of informers. It said there was considerable public interest in encouraging witnesses to come forward.

The broadcaster said it was never the programme's intention to cause the family further distress and that when they received the complaint from Mrs Corner, they 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.

The BBC said it regretted that Mrs Corner was not aware that the report was going to be broadcast, and provided some context to help explain why she had not been informed. It said that in May 2019 the programme makers had initially approached Mrs Corner and her mother through their lawyer for an interview either immediately or at some point in the future, but nothing had come of this. The reporter made contact with Ms Sinead Quinn and Ms Kathleen Bradley, who were part of a friendship group which included Ms McKee and her partner. While the rest of the group agreed to participate in the programme, Ms McKee's partner did not wish to be interviewed. The BBC said that Ms Quinn communicated with the group, including with Ms McKee's partner, throughout the making of the programme. The broadcaster said, from the beginning, Ms McKee's partner was a member of the group and knew about the making of the programme, so it assumed that at some stage she would inform Ms McKee's family, of which, through her engagement to Ms McKee, she had been about to become a part. The BBC said the programme team was conscious that the family was still grieving and did not wish to add to their grief by going into details at such an early stage. It also said that the programme makers had little contact with Ms McKee's partner as she did not wish to be involved in the programme, although the BBC said it had understood she would have been kept informed about the development of the programme through her contact with Ms Quinn. It said that the immediate participants were told when the broadcast would take place and the programme makers received assurances that this message had been passed on to Ms McKee's partner.

The broadcaster emphasised that the intention of the film was not to focus on Ms McKee and her family, but rather to examine the fallout 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. It said with hindsight, it accepted that it was wrong to assume 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 this was their responsibility and that they should have taken further steps to ensure this was the case.

The BBC said the programme raised awareness about a sensitive and painful subject and exposed the methods used by dissident Republican groups to ensure the silence of witnesses to Ms McKee's murder. As such, it said it was in the public interest and it also shone a light on the enduring impact of her death on her closest friends.

Preliminary View

Ofcom prepared a Preliminary View that the complaint should be upheld. Both parties were given the opportunity to make representations on the Preliminary View, but neither chose to do so.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unwarranted infringement of privacy in programmes in such services. These standards are set out in the [Ofcom Broadcasting Code](#) (the Code), which must be complied with by all broadcasters under the terms of their Ofcom licence.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed.

In reaching this decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme and transcript of it, and both parties' written submissions.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and, where there is a conflict between the two, it is necessary to intensely focus 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.

This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

In addition to this rule, Section Eight (Privacy) of the Code contains "practices to be followed" by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by, programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 8.1 and failure to follow these practices will only constitute a breach where it results in an unwarranted infringement of privacy.

We considered the complaint that Ms McKee's privacy was unwarrantably infringed in the programme as broadcast because footage of her final moments after being shot was included in the programme without consent. The complainant also said Ms McKee's family had been unaware that the footage existed before its broadcast in the programme and that its use in the programme had been extremely distressing. In considering the complaint, we had particular regard to the following Practices of the Code:

- Practice 8.3 which states that when people are caught up in events which are covered by the news they still have a right to privacy in both the making and the broadcast of a programme, unless it is warranted to infringe it. This applies both to the time when these events are taking place and to later programmes that revisit those events.
- Practice 8.4 which states that 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 which states that 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.
- Practice 8.16 which states that broadcasters should not take or broadcast footage or audio 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.

We assessed the extent to which Ms McKee had a legitimate expectation of privacy in relation to footage of her included in the programme.

The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact sensitive and must always be judged in light of the circumstances in which the individual concerned finds themselves.

In considering the complaint, we took into account that the incident happened in a public place and in full view of any members of the public who may have been in the area at the time. We considered that in the shot of Ms McKee lying on the ground, she was mostly obscured by the people standing around her, there was no close-up detail of her, no sight of any injuries and only her trainers could be seen. The footage was only shown briefly (for approximately three seconds). However, we also took into account that the footage showed Ms McKee in her dying moments, a matter which clearly attracted a high degree of privacy despite it happening in public. We also considered that the comments by Ms Quinn, who described seeing Ms McKee falling and landing on the ground immediately before and during the relevant footage, made it clear that the images were of Ms McKee. We therefore considered that the footage showed Ms McKee 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.

We recognised that the broadcaster said that the footage of Ms McKee had been in the public domain since April 2019. However, the broadcaster also acknowledged that “the specific shot of Ms McKee on the ground, with a glimpse of her footwear, has not been widely used”. In our view, people are not necessarily deprived of their right to privacy if information, in respect of which they claim that right, has been put in the public domain in the past. Each case must be considered on its own facts.

Taking into account the particular circumstances of this case, we considered that there was nothing to suggest that Ms McKee’s family had chosen to place this footage of Ms McKee in the public domain themselves, or that they had consented to it being put there. Ofcom therefore did not consider that the availability of the footage in the public domain meant that Ms McKee would have been deprived of her right to privacy in connection with the broadcast of the footage in this programme.

We took into account that the footage was very brief and that the broadcaster said the footage was not explicit in terms of what it showed of Ms McKee or of the injuries she received. Ms McKee was largely obscured by people standing around her and only a brief glimpse of her trainers was visible. However, Ofcom considered that although no explicit detail of injuries was shown, the footage was still of a highly sensitive nature because it showed the final moments of someone who was dying. The broadcast of this footage therefore represented a very significant intrusion into Ms McKee’s privacy.

Therefore, taking all of the above in account, it was our view that Ms McKee had a legitimate expectation of privacy in relation to the broadcast of the footage of her in her dying moments, 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.

We then considered whether the infringement of privacy identified in this case was made with the consent of Ms McKee’s family, as her next of kin. Measures which are likely to result in informed consent are described in Practice 7.3 of the Code³. Ms McKee’s family said that they were unaware that the footage existed before it appeared in the programme and were unaware of the programme before it was broadcast. The broadcaster said that it had assumed that the family would be informed of the programme by Ms McKee’s partner, who the broadcaster said it understood was aware of the production of the report and its intended broadcast. Ofcom considered that no attempt was made to obtain consent from Ms McKee’s family to broadcast the footage of her before the relevant material was broadcast. Further, in our view, even if Ms McKee’s family had been aware of the intended broadcast of the programme itself, given the highly sensitive nature of the relevant footage and the potential distress which would be caused to the family by its inclusion, the broadcaster should have ensured that it had obtained the family’s informed consent (as next of kin of Ms McKee) to include the footage (unless it was warranted not to do so, which we go on to consider below). In line with Practice 7.3 of the Code, we would expect such consent to have been based on a clear explanation of the nature and purpose of the programme (including the relevant footage of Ms McKee to be included), and when and where it was likely to be first broadcast. We noted that the BBC accepted that it was wrong to assume Ms McKee’s family would have been aware of the programme and prepared for the

³ See page 39 of the [Ofcom Broadcasting Code](#).

footage it was planning to use, and that the programme makers accepted that they should have taken further steps to ensure this was the case.

Ofcom therefore went on to consider whether the infringement of Ms McKee's legitimate expectation of privacy was "warranted".

The Code states that "warranted" has a particular meaning. It means that, where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of broadcasting being in the public interest would include revealing or detecting crime, protecting the public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

We carefully balanced Ms McKee's right to privacy with regard to the inclusion of the relevant footage of her in the programme with the broadcaster's right to freedom of expression and the audience's right to receive the information broadcast without unnecessary interference.

We took into account the BBC's response that there was a public interest justification in the broadcast of the footage of Ms McKee, in that it demonstrated to viewers the full horror of what happened on the night Ms McKee was murdered, including how events unfolded, the large number of people present, and the ease with which the gunman acted. The broadcaster said that part of the intention of the film was to call the "New IRA" and its supporters to account for the murder. In particular, it said that it might encourage witnesses to come forward as, at the time of broadcast, no one had been charged with Ms McKee's murder. We also considered the broadcaster's statement that the film was in the public interest as it "raised awareness about a sensitive and painful subject and exposed the methods used by dissident Republicans to ensure the silence of witnesses to Ms McKee's murder". The BBC also said that there was a public interest in showing the enduring impact of Ms McKee's death on her closest friends.

We recognised that the report explored the threat posed by dissident groups in Northern Ireland and that the footage of Ms McKee was shown in a section of the report which sought to demonstrate the ease with which the gunman operated, the reluctance of witnesses to come forward to the PSNI and the severity of the threat posed by the "New IRA" and other groups across Northern Ireland. Ofcom considered that there was a genuine public interest in making programmes about this topic and showing the realities for the community affected, and accepts that broadcasters have editorial discretion to include challenging material to explore these issues, provided that this does not result in a breach of the Code.

In considering whether the broadcast of the footage of Ms McKee unwarrantably infringed her privacy or whether the public interest in broadcasting the footage outweighed Ms McKee's rights to privacy, we took into account that the focus of the report was not on the murder of Ms McKee, and that the footage of Ms McKee included in the programme was very brief and did not show any explicit detail of her injuries. However, we also took into account all the relevant factors set out above, including that the footage showed Ms McKee in her dying moments. Although the footage was already in the public

domain, we did not consider that this in itself resulted in Ms McKee being deprived of a right to privacy in relation to this footage of her. While we recognised the public interest in exploring what happened on the night Ms McKee was murdered and the impact on the community, as well as the broadcaster's right to freedom of expression and audience's right to receive information, we considered that given the footage included in the programme depicted a matter of extreme sensitivity for both Ms McKee and her family, the interference with Ms McKee's legitimate expectation of privacy in this case was significant.

Having taken all the above factors into account and intensely focused on the comparative weight of Ms McKee's right to privacy and the broadcaster's right to freedom of expression, the audience's right to receive information and ideas about the matters explored by the programme and the public interest in broadcasting the footage of her in the programme, Ofcom considered that the infringement of Ms McKee's right to privacy in the broadcast of the footage without her family's consent was not warranted in the particular circumstances of this case. On balance, we did not consider that the broadcaster's right to freedom of expression and the audience's right to receive information and ideas about the matters explored by the programme outweighed the very significant intrusion into Ms McKee's right to privacy.

Ofcom acknowledged that when the BBC received the complaint from Mrs Corner, they apologised and immediately removed the footage of Ms McKee from a longer version of the report. Despite this, Ofcom found that the programme as broadcast resulted in an unwarranted infringement of Ms McKee's privacy.

Ofcom has upheld Mrs Corner's complaint, made on behalf of her deceased sister, Ms McKee, of unwarranted infringement of privacy in the programme as broadcast.