

Ofcom broadcast bulletin

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Introduction

Ofcom's Broadcasting Code took effect on 25 July 2005 (with the exception of Rule 10.17 which came into effect on 1 July 2005). This Code is used to assess the compliance of all programmes broadcast on or after 25 July 2005. The Broadcasting Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

The Rules on the Amount and Distribution of Advertising (RADA) apply to advertising issues within Ofcom's remit from 25 July 2005. The Rules can be found at <http://www.ofcom.org.uk/tv/ifi/codes/advertising/#content>

The Communications Act 2003 allowed for the codes of the legacy regulators to remain in force until such time as Ofcom developed its own Code. While Ofcom has now published its Broadcasting Code, the following legacy Codes apply to content broadcast before 25 July 2005.

- Advertising and Sponsorship Code (Radio Authority)
- News & Current Affairs Code and Programme Code (Radio Authority)
- Code on Standards (Broadcasting Standards Commission)
- Code on Fairness and Privacy (Broadcasting Standards Commission)
- Programme Code (Independent Television Commission)
- Programme Sponsorship Code (Independent Television Commission)
- Rules on the Amount and Distribution of Advertising

From time to time adjudications relating to advertising content may appear in the bulletin in relation to areas of advertising regulation which remain with Ofcom (including the application of statutory sanctions by Ofcom).

Standards cases

In Breach

Sony Ericsson Christmas Calling

Channel 4, 11 December 2005, 14:35

Introduction

This programme, sponsored by Sony Ericsson, featured performances from a variety of artists plus a number of viewer competitions offering prizes apparently chosen by the featured guests.

Throughout the programme, there were numerous visual and verbal references to Sony Ericsson and Sony products. These included:

- sponsor credits at the beginning and end of the programme and also into and out of each commercial break;
- a reference to the full programme title by the programme presenter at the beginning of the programme and into and out of each break;
- six viewer competitions, each offering a Sony Walkman mobile telephone as part of the prize. Of these competitions, two featured additional Sony branded prizes including a television, a PSP (a hand held computer game), a camera, a notebook computer and a DVD recorder. In footage filmed for these two competitions, artists were shown inside Sony stores looking at Sony products with one shot showing the band HARD-Fi holding a Sony branded carrier bag up to the camera;
- a music video, filmed in Japan, featuring the band HARD-Fi, in which they were shown inside a Sony store trying out products. The video also featured scenes in which neon advertisements featuring Sony products appeared prominently; and
- performances by artists signed to the Sony BMG record label.

A viewer complained that the programme appeared to be a “sponsored advert for Sony”.

Response

Channel 4 said that while the programme was sponsored by Sony Ericsson, it was produced by Freedom TV - an independent television production company. At no time did Sony Ericsson have any influence at all over the content of the programme. The editorial responsibility for the programme rested with Freedom TV and the commissioning editors at Channel 4, between whom there was regular and close liaison throughout the commissioning and production process.

The benefits to Sony Ericsson of funding the programme were solely the sponsor credits and the right to use certain content off air. At no point did Sony Ericsson have any involvement in the production of the programme, and certainly not so as to distort it for any commercial purpose or to compromise the independence of editorial control.

With reference to the programme name, Channel 4 said that the Broadcasting Code permits sponsored programmes to incorporate the sponsor's name in the programme title. In such cases, Channel 4 considered it appropriate to bill and promote the programme by the full title. The title sequence and sponsorship credits reflected the

full name of the programme. Channel 4 took the view that a simple 'intro and outro' in each part of the programme was not excessive. While the Code does not specify maximum durations for sponsorship credits, Channel 4 said that the references to the sponsor within the programme credits were limited to the maximum durations set out in earlier Sponsorship Codes enforced by the legacy regulator.

Regarding the viewer competitions, Channel 4 said that an important part of the editorial brief for the programme was to have a significant number of interactive viewer competitions. As the Code does not prevent sponsors from offering prizes in the programmes they are sponsoring, Channel 4 considered it appropriate for Sony products to be given away as prizes. Care was taken to ensure that any reference to the Sony brand were brief and secondary. Although there were a number of competitions, these were spread evenly throughout the 90 minute duration of the programme.

Channel 4 acknowledged that three of the artists featured were signed to the Sony BMG label but pointed out that other artists featured were signed to Warner, Universal and Innocent record labels. The selection of artists featured in the programme was the sole decision of the producers and the commissioning editors at Channel 4 and was entirely reflective of the genre of the programme (mainstream, pop music programme aimed at the 18–34 audience). The decision as to which artists to feature had nothing to do with the record label they were signed to.

Decision

Section 9 of the Broadcasting Code contains the rules that relate to broadcast sponsorship arrangements. These rules include the following requirements:

- A sponsor must not influence the content and/or scheduling of a programme in such a way as to impair the responsibility and editorial independence of the broadcaster.
- Sponsored programmes must be clearly identified as such by reference to the name and/or logo of the sponsor at the beginning and/or end of the programme.
- There should be no promotional reference to the sponsor within the programme. Non-promotional references are permitted only where they are editorially justified and incidental.

These rules help ensure that sponsorship arrangements are transparent and that programmes are not distorted for commercial purposes.

One way broadcasters notify audiences of sponsorship arrangements is by incorporating the sponsor's name into a programme title. Audiences are then aware that there is a relationship between the programme and the sponsor. In the case of this programme, we accept that the references to the sponsor in the credits/opening title helped identify the sponsorship arrangement and were not unduly prominent. We also accept that there was editorial justification for the presenter to refer to the full title of the programme, i.e. *Sony Ericsson Christmas Calling*, during the programme. However, we consider the number of times this was done during the course of the programme was excessive and not editorially justified.

With reference to the Sony branded prizes, the Code does not prevent a sponsor from donating prizes to a programme it is sponsoring. However, it does require that prize descriptions are brief and secondary and that any references to a sponsor in a programme should be editorially justified and incidental. In this case, the number of Sony branded prizes given away within the programme, coupled with the footage of the prizes shot within Sony stores resulted in references that were unduly prominent and not incidental.

We accept that the artists featured were chosen because of their appeal to the target audience, not as a result of their record label. However, we are concerned that the video featuring the band *HARD-Fi*, which appeared to be shot specifically for the programme, featured the band trying out a number of different Sony products in a Sony store as well as prominent shots of neon signs advertising the Sony Bravia television and the Sony Walkman telephone.

Not all the references to Sony in the programme were incidental, nor were they all editorially justified. When taken as a whole, this created the impression that the sponsor had unacceptably influenced the content of the programme.

Breach of Rule 9.6

Farishtay

SET MAX, 5 December 2005, 17:30

Introduction

Farishtay is a Hindi movie about a woman who falls in love with a Police Inspector, only for him to be killed as he attempts to bring peace to a renegade village. A viewer complained that the film included an extended and fairly graphic sequence in which a large group of women were shot by an armed gang. Soon afterwards, there was another bloody sequence in which the lead character attacked members of the gang with a sword. The viewer complained that these scenes of violence had distressed her young niece.

We asked the licensee for its comments under Rules 1.3 (appropriate scheduling to protect children), 1.4 (the watershed must be observed), 1.11 (violence must be appropriately limited before the watershed) and 2.3 (offence must be justified by the context) of the Broadcasting Code.

Response

Sony Entertainment Television Asia Ltd, the licensee, accepted that the film should not have been shown before the watershed. It said that corrective measures had been taken to avoid a recurrence, including the creation of a separate playout for the UK channel, to ensure that material broadcast complied with the Broadcasting Code.

The broadcaster said that now SET MAX had gone through training and technical teething problems, it hoped the channel would replicate the 'great record' of its channel SET ASIA, which had been running for eight years.

Decision

A scene in the film depicted a group of women attacked by a gang of bikers. The women were fired upon, with one character, shown close-up, clearly being shot repeatedly. This was followed by an extended scene in which the lead character took his revenge on the attackers – wielding a sword, he stabbed the majority of gang members before punching their leader repeatedly with an iron chain. The scenes were too violent for the time of broadcast. However we welcome the broadcaster's agreement that it had made a scheduling error.

However, this incident came less than six months after a very similar breach on SET MAX. In August 2005, the channel showed a Hindi film called *Gangaajal*, containing offensive language and graphic violence, at 17:00; we found this in breach of Rule 1.3 (Bulletin 46).

In relation to *Gangaajal*, the licensee said that as the channel was under a test transmission period, it was in the process of training staff and putting compliance procedures in place. We were therefore extremely concerned that, five months later, SET MAX still did not have the proper processes in place. Any future, similar compliance errors may lead to the consideration of further regulatory action.

Breach of Rule 1.3

Resolved

Outtake TV

BBC1, 9 January 2006, 20:30

Introduction

This is an established 'blooper' series. In this programme, a reporter was seen trying to talk to camera but stumbling over his words, having to re-take the item a number of times. Frustration eventually got the better of him and he began to swear. This language was bleeped in the programme.

One viewer complained that the word "fuck" was audible at least once.

Response

The BBC said that although the word was not audible, it was concerned that in one or two instances it was possible to work out what had been said, as the bleeping was not complete. In one sense, this contributed to the comic effect of the presenter's mild irritation turning to anger. However the broadcaster recognised that this wasn't what people expected at that time of the evening.

In the event of any pre-watershed repeat showing, the programme would be re-edited to make the disguising of the strong language fully effective.

Decision

An attempt had been made to obscure the strongest swearing in the programme. However, the editing was not sufficient to fully obscure the word. We welcome the BBC's decision to re-edit the programme to ensure that the disguising of the strong language is fully effective if this programme is repeated pre-watershed. As a result, we consider the matter resolved.

Resolved

Babe Aerobics

You TV, 15 March 2006, 07:00

Introduction

A fitness instructor was concerned that the programme did not show correct training procedures. She felt that the lack of any warm-up, and the techniques displayed during the exercises, could result in serious injury to viewers using this as a training video.

Response

Following receipt of the complaint, the broadcaster removed the programme from its schedules while it carried out a full investigation. You TV said that each programme was supervised by a trained sports instructor. However, subsequent episodes would be preceded by advice that the programme was for entertainment only, and that viewers should seek professional advice from a qualified fitness instructor and medical advice before trying any of the exercises shown.

Decision

We welcome the broadcaster's decision to include advice to viewers in future broadcasts. We consider the matter resolved

Resolved

Ali Malik Drivetime

Awaz FM, 28 March 2006, 16:00

Introduction

This programme included a television review which discussed *EastEnders* and the storyline of Phil Mitchell's son, who had been living in the Square for a month without his father's knowledge.

A listener complained about a racist comment when the presenter surmised, "It's a shame if you don't know who your son is", to which his colleague responded, "That's true, but then that's white people".

Response

The station apologised for the incident, which it said did not reflect its policy of 'One Voice' regardless of colour, creed or religion.

The station explained that the comment was an off-the cuff remark by a volunteer, which was picked up immediately afterwards by the presenter off-air. The volunteer was suspended for one week and reminded of the station's programme policy. The volunteer had broadcast an apology to listeners when she returned the following week.

Decision

Rule 2.3 of the Broadcasting Code requires that material which may cause offence, including discriminatory treatment on grounds of race, is justified by the context. We agree with the broadcaster that the comment was unacceptable. We welcome the swift action that was taken to guide the volunteer, and the subsequent on-air apology she gave to listeners. We, therefore, consider the matter resolved.

Resolved

Fireman Sam

CBeebies, 10 February 2006, 12.45

Introduction

This episode of the long-running children's television series told the story of an old and carelessly stored electric blanket which caught fire. When Fireman Sam arrived at the fire, before he entered the building, he asked his colleague Elvis to ensure the electrical power source had been disconnected. After Elvis had disconnected the source, Fireman Sam went into the bedroom where the electric blanket was on fire and extinguished the blaze with water.

A complainant felt that extinguishing an electrical fire with water sent out an incorrect safety message to young children watching.

Response

The BBC said it had reviewed the episode and felt confident that Fireman Sam and his team followed the correct procedure by isolating the power source first before tackling the fire. As the sequence was short, there was little chance of viewers seeing the fire fighting without hearing of the precaution first.

Even so the programme makers were concerned that a small number of viewers seemed not to have picked up the safety precaution. This had been discussed with senior editors and another episode, which dealt in more detail with electrical fires, had now been edited to reinforce the safety message further. The BBC confirmed that next time the episode complained of was repeated, the additional episode reinforcing how to deal with electrical fires safely would be the next scheduled.

Decision

Although the storyline had followed the correct procedure, we welcome the BBC's action to reinforce the safety message for young viewers.

Resolved

Brody and Louise in the Morning

Star 107.5 (Cheltenham), 20 March 2006, 06:00

Introduction

In this radio breakfast show, a discussion took place concerning Brody's unusual choice of jacket. His co-presenter remarked: "It's one of those moments – it's borderline insanity. I think, you know, your bipolar disorder is lookin' a little – you know, it's come to the surface this morning." Brody then made repetitive noises and both presenters laughed before they moved on to discuss serious news items.

A listener who had bipolar disorder was offended by the presenters' comments concerning the condition, which he claimed included mimicry. He said that he had spoken to the broadcaster but had found the apology he received to be dismissive.

Response

Star 107.5 said that there had been serious technical issues with its playout system that morning. As the computer continually failed, the frustration the presenters suffered had led them to make light-hearted fun on air of the predicament they were in. This had resulted in a clearly flippant, though ill-judged, comment by Louise.

The broadcaster said that both presenters had offered a full apology to the complainant. They had not intended to ridicule people who had a bipolar disorder or to cause offence. The presenters had intended their conversation to be light-hearted banter and the comment had unfortunately occurred as a reaction to the stressful technical situation they were encountering.

The broadcaster told us that it had spoken to both presenters and assured us that such comments would not recur.

Decision

It was clear that the presenters were encountering ongoing technical problems, which prevented the broadcast of much of the pre-recorded output. They frequently had to extend conversations and occasionally shared their frustration with the audience.

The exchange, which involved equating a serious medical condition with an ill-judged choice of clothing and the mimicry of what the presenter considered to be behavioural symptoms of that condition, was insensitive. However the comments did not appear to have been made with the intention of offending.

Given the predicament in which the presenters found themselves, and the broadcaster's subsequent action, apology and assurance, we consider the matter resolved.

Resolved

Not Upheld

Dispatches - The New Fundamentalists

Channel 4, 6 March 2006, 22:00

Introduction

This edition of the Channel 4 current affairs strand was a personal view programme authored by journalist Rod Liddle. He profiled what he termed “Evangelical Christianity”, examining the growth in Britain of what he described as a movement. He looked at how some Evangelical Christians view issues such as freedom of speech, education (including the sex education of young people) and homosexuality. He suggested that the movement’s certainty of beliefs is leading to a growing intransigence which should be a cause for concern.

123 complaints were received. Issues raised included:

- allegations that the programme was not duly impartial;
- that it was offensive to Christians and their beliefs.

A number of complainants also said that the pre-broadcast trailers were inaccurate.

Decision

Current affairs programmes like *Dispatches* may air provocative journalism and viewers have a right to receive this as long as the requirements of the Broadcasting Code are met.

Our consideration of this programme focussed on three areas, as required by the Broadcasting Code:

- whether the programme, when dealing with matters of political or industrial controversy and matters relating to current public policy, was duly impartial;
- whether the programme was offensive so that it breached generally accepted standards; and
- as the content concerned religious belief, whether the programme approached the subject with a proper degree of responsibility and whether they subjected religious views or beliefs to abusive treatment.

With regard to the trails, we focussed on one area, as required by the Broadcasting Code:

- whether the trails materially misled the audience.

Due Impartiality

The rules on due impartiality apply to ‘*matters of political or industrial controversy and matters relating to current public policy*’. Where this programme dwelt on education issues in particular, these rules applied.

The fact that this was a personal view or authored programme was clearly signalled

to the audience at the outset as required by Rule 5.10. This means that the viewer was aware that what was being presented was the personal view of Rod Liddle with which the viewer was free to agree or disagree.

Rule 5.9 allows presenters of personal view programmes to express their own views on matters of political controversy or matters relating to current public policy. It goes on to explain that due impartiality will be achieved in such programmes when alternative viewpoints are adequately represented either in the programme, or in a series of programmes taken as a whole. An examination of the various discussions within this programme demonstrated that throughout alternative views were adequately represented, meaning that the rules on due impartiality were satisfied.

When, for example the spokesperson, Katy Jones, for 'The Silver Ring Thing' (a group promoting celibacy amongst teenagers which has been criticised by family planning groups for not informing young people of the available methods of contraception) was introduced, the presenter stated:

"..That's what Katy Jones believes – and she's entitled to her beliefs of course."

In the subsequent interview, whilst Rod Liddle described the Silver Ring Thing methods as *'deeply counterproductive to preventing teen pregnancies and preventing the transmission of sexually transmitted diseases'*, Katy Jones also offers her view that *"at the end of the day, the only 100% foolproof way of not getting pregnant and not getting an STD is abstinence"*

The latter half of the programme concentrated on three City Academies run by Sir Peter Vardy, a prominent Christian businessman. These state schools have been the subject of intense debate because of their overtly Christian ethos. Ofsted has investigated the weight given by teachers at the school to Creationist beliefs which critics say inform the entire curriculum at the school.

Liddle interviewed the director of the three schools and Sir Peter Vardy, who explained *"my own Christian faith made me look at how could I help others"*. Whilst Liddle certainly challenged the appropriateness of the schools – which under the Code he is entitled to do – Vardy was also permitted to mount a strong defence of his initiative. He denied that the schools are indoctrination centres and explained that *"what I have done is built a building, equipped it to the highest standard and recruited the best possible teachers that we can find to provide the education for their children"*.

Overall, while Rod Liddle was able to take a position in the programme, his opinions and views were adequately challenged by others so that due impartiality was achieved.

Offence

Rule 2.3 of the Code requires material which may cause offence to be justified by the context. Context includes, but is not limited to, the editorial content of the programme, the service on which the material is broadcast, the likely expectation of the audience, the information given to any potential viewer.

Any programme that takes a controversial approach to such matters as religious beliefs has the potential to cause offence. However, Ofcom must assess whether any such offence caused is justified by the context. We considered that, in view of the editorial content of the programme (a programme examining the validity of certain held religious beliefs and the consequences of those beliefs), the nature of the programme (a serious documentary focusing on an important issue of the day), Channel 4's distinctive remit, the expectations of any given audience to a *Dispatches* edition and the clear statement at the start that this was to be a personal view

programme, any potential offence was justified by its context.

Religious Programmes

As the programme dealt with matters related to religion, we also assessed its content with respect to the Code's Rules on Religion; in particular Rules 4.1 (proper degree of responsibility with respect to such programmes) and 4.2 (prevention of abusive treatment).

In our view the programme did not subject religious views and beliefs to abusive treatment. Rod Liddle did undoubtedly make his case robustly – but he allowed his challenges to be debated by his interviewees and also included positive comments. For example, when examining the Christian-run "Teen Challenge" initiative aimed at helping people overcome drug addiction, Liddle stated "*there is not the slightest doubt that evangelical Christians do an awful lot of selfless and valuable work in the community. And they do it as a result of their faith*". Overall, in Ofcom's view, the programme did not seek to abuse religious beliefs but sought to critically analyse them.

Trails

The commentary in trails for the programme described people holding certain views as 'The Evangelicals' which might be taken to imply all Evangelicals. It also included the expression Evangelism (general Christian outreach practiced by all denominations) instead of Evangelicalism (a particular approach to Christianity).

There are sensitivities surrounding the use of particular terms when used to describe certain religious groups. Broadcasters should be careful when they use such terms to ensure that they are not used out of context and therefore could cause offence. It is important to be clear what specifically is meant when using terms such as 'fundamentalism', 'evangelical', 'evangelism' and 'evangelicalism'.

However, the use of these terms was not so misleading as to be a breach of the Code.

Not in breach

Fairness and Privacy Cases

Upheld in part

Complaint by Mrs Alyson Evans

Crime Secrets, ITV1 (Wales), 21 September 2005

Summary: Ofcom has upheld part of this complaint of unwarranted infringement of privacy. Mrs Alyson Evans complained that her privacy, and that of other family members, was unwarrantably infringed in the making and the broadcast of the programme. The programme examined the murder of Mrs Evans' sister, Mrs Susan Watts, in 1997 and the subsequent police investigation. Mrs Evans complained, on her own behalf and on behalf of other members of Mrs Watt's family, that the programme was made and broadcast without the family's knowledge or consent, and the programme unwarrantably infringed the privacy of Mrs Watts' sons by including footage showing the family home.

Ofcom concluded that the broadcast of the programme unwarrantably infringed the privacy of Mrs Evans and her family because the programme makers did not take sufficient steps to confirm that the family had been informed about the programme prior to broadcast.

However, Ofcom concluded that because Mrs Evans, and the other family members who brought the complaint, did not themselves feature in the programme, no infringement of privacy resulted from the making of the programme without their knowledge, nor from the making and broadcast of the programme without their consent. Further, Ofcom concluded that since the address of the family home was not identified, no infringement of privacy resulted from the footage shown.

Introduction

This item, part of a programme which re-examined past crimes, looked at the murder of Susan Watts in 1997 and the subsequent police investigation. The programme included a reconstruction of Mrs Watts' murder and interviews with police officers who investigated the murder.

Mrs Watts' sister, Mrs Alyson Evans, complained on behalf of Mr Adam Watts and Mr Christopher Watts (Mrs Susan Watts' sons), Mrs Jean Price (Susan Watts' mother), Mr Stephen Price and Mr Maldwyn Price (Mrs Susan Watts' brothers), and Mrs Clare Sage, Mrs Sian Ronan and herself (Susan Watts' sisters), that their privacy was unwarrantably infringed in the making and broadcast of the programme. Although those members of Mrs Susan Watts' family who brought this complaint did not appear in the programme, in Ofcom's view, by virtue of their relationship with the deceased, they each satisfied the statutory definition of "the person affected" by the programme as defined by the Broadcasting Act 1996 (as amended).

The Complaint

Mrs Evans case

In summary, Mrs Evans complained that the family's privacy was unwarrantably infringed in the making and the broadcast of the programme in that:

- a) the programme was made and broadcast without their knowledge; and,
- b) the programme was made and broadcast without their consent.

In summary, Mrs Evans also complained that Mr Adam Watts' and Mr Christopher Watts' privacy was unwarrantably infringed in the making and the broadcast of the programme in that:

- c) the family home was shown in the programme, in which they were resident at the time of the broadcast.

ITV's case

In summary, the broadcaster responded to the privacy complaint by Mrs Evans on behalf of the family that:

- a) *Crime Secrets* reviews police investigations of some of the most notorious murders in Wales' history. The programme is in its fifth series and enjoys a collaborative relationship with the Welsh police. The programme makers are acutely aware of the distress that families of innocent victims can suffer when these matters are revisited and have never shied away from their responsibilities to those families.

Mindful of duties on broadcasters under the Broadcasting Code, the family should have been contacted about the programme. ITV apologised for the distress caused to the family by their not being contacted but believed they had been. Because the subject matter of the programmes is often so sensitive, and because the producers often (as in this case) do not have full details of the victim's family, in order to protect the privacy of the family members they are contacted through the police's family liaison units. Families can then contact the producers if they choose to.

Regrettably, and for the very first time because of an internal misunderstanding at South Wales Police, contact was not made with the family. The producer spoke to Mrs Evans to explain and apologise as soon as she was made aware of this. South Wales police took full responsibility and a senior officer visited the family to apologise. The programme makers did try to reduce distress to the family by arranging for the police family liaison officer to contact them and through no fault of the producers a mistake led to a one-off failure after five series of the programme. It is highly regrettable that the family were not aware of the programme prior to its broadcast but the producers acted reasonably and responsibly throughout and were entitled to rely on the police liaison officer.

- b) The Broadcasting Code did not require the consent of Mrs Watt's family to make the programme. However ITV hoped that the family accepted that this was an unsensationalised account of the police investigation into an extraordinary case in the public interest. The programme referred to Mrs Watts being the mother of two teenaged boys at the time of her death but no members of her family were identified in the programme nor was her address given nor any member of the family named.

In summary, the broadcaster responded to the privacy complaint by Mrs Evans on behalf of Adam and Christopher Watts that:

- c) The broadcasters did not know the address of the family home and ITV did not believe that it featured in the programme, at least not in a prominent way. If it did appear it was not identified as being the family home. There was one short piece of news archive of a bouquet at the end of a footpath, with, for a fleeting moment, what appeared to be the bottom of a breeze block at the back of the shot. If this was the family home it was impossible to identify it from this archive, or know that it is or was the family home.

The programme makers hoped that the family would derive some comfort at least from the content of the programme which portrayed Mrs Watts in an exemplary light and was not a sensationalist exploitation of her murder.

Mrs Evans' comments on ITV's response

In summary, Mrs Evans commented on ITV's statement regarding the complaint on behalf of the family that:

- a) Her family were not informed about the making and broadcasting of the programme. The fact that this is the first case where this has happened is of no consolation. South Wales police did contact the family and it was agreed that the family would receive a letter of apology taking responsibility and assuring the family that this would not happen again. This had not been forthcoming.
- b) Regarding consent, the family would have to consult the legal profession.

In summary, Mrs Evans commented on ITV's statement regarding the complaint on behalf of Adam and Christopher Watts that:

- c) The family disagreed over what seemed prominent. The bouquet of flowers mentioned was at the bottom of the garden of the family home.

ITV's second statement in response

In summary, ITV responded regarding the complaint on behalf of the family that:

- a) ITV had no doubt that it was of no consolation to Mrs Evans and her family to learn that this was the first time such an unfortunate event had occurred but had hoped that she would appreciate knowing that her feelings had not been disregarded. The programme makers, who always sought to minimise distress to the families of victims, were very surprised and upset to learn that the family had not been informed about the programme but had acted in accordance with the Broadcasting Code in relying on this procedure with the police which had never before failed. ITV was sorry that Mrs Evans had not received the letter from the police but hoped she appreciated this was beyond ITV's control.
- b) No further comment was made regarding the issue of consent.

In summary, ITV responded regarding the complaint on behalf of Adam and Christopher Watts that:

- c) ITV was grateful to Mrs Evans for identifying the precise picture of which she complained but did not accept that this picture breached her, or her family's privacy. ITV did not believe there was anything in the picture identifying the family home.

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 unfair treatment in programmes included in such services.

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, consistent and targeted only at cases in which action is needed.

In the circumstances of this case Ofcom found the following:

- a) In its consideration of Mrs Evans' complaint that the programme was made and broadcast without the knowledge of the family, Ofcom first considered whether the programme examined past events that involved trauma to individuals, including crime, and if so whether the making or broadcasting of the programme was therefore capable of causing distress to the individual's relatives. The programme did not feature the relatives of Mrs Watts, whose murder was the subject of the programme, and accordingly Ofcom found that the production of the programme itself was not capable of causing distress to the family. However Ofcom considered that the broadcasting of the programme was capable of causing such distress.

Ofcom therefore next considered whether the broadcaster had complied with the Broadcasting Code by, so far as was reasonably practicable, informing Mrs Watts' immediate family of the plans for the programme and its intended broadcast.

Ofcom noted that in their statement ITV had apologised for the distress caused to the family by their not being contacted prior to the broadcast of the programme, and had stated that the programme makers had tried to reduce distress to the family by arranging for the police family liaison officer to contact them. Ofcom further noted that ITV stated that because of an internal misunderstanding at South Wales Police contact was not made with the family, and that, through no fault of the producers, a mistake led to a one-off failure after five series of the programme.

Ofcom recognises that it is certainly good practice for the family to be contacted by the police in such circumstances, rather than directly by the programme makers. However responsibility for informing the family still lay with the broadcaster even after assistance from the police was requested. Ofcom considered that it would have been reasonably practicable and appropriate for the programme makers to have obtained confirmation from the police that the family had been informed, or that sufficient steps had been taken in attempting to inform them, prior to broadcast. Ofcom noted that the programme had been broadcast without the programme makers obtaining such confirmation.

Ofcom noted that there are cases where it may not be reasonably practicable for contact to be made with the relatives of a victim, for example in the case of a breaking news story or where the relatives have moved from their last known address. However Ofcom considered that this was not such a case.

Ofcom therefore found that the programme as broadcast resulted in the

infringement of the privacy of the family, and that this was unwarranted. Accordingly, Ofcom found the broadcaster in breach of Rule 8.1 of the Broadcasting Code.

- b) In considering Mrs Evans' complaint that the programme was made and broadcast without the family's consent, Ofcom considered whether the programme featured any material which would have required the consent of the family during its making or broadcast. Although Ofcom noted that such sensitive subject matter was capable of causing distress to the family, as discussed above at head a), the programme did not feature any of the family members who bring this complaint and the programme's making and broadcast did not require their consent.

Accordingly, Ofcom found that the issue of consent did not result in the unwarranted infringement of the family's privacy, either in the making or broadcast of the programme.

- c) In its consideration of whether the family home had been shown in the programme, thereby causing an unwarranted infringement of the family's privacy, Ofcom first considered the material complained of, namely footage of a bouquet of flowers at the bottom of the garden of the family home. Ofcom noted that the footage was a close up shot of a bouquet of flowers which pulled back to reveal a path, fence, grass and the lower part of a brick wall.

Ofcom is sensitive to the concerns of those living in small communities where there may be detailed local knowledge of a location featured in a programme. However, Ofcom considered that only those who already knew the family home could recognise the location from the material shown. Ofcom found that the footage broadcast did not identify the address of the family home.

Accordingly, Ofcom found that the footage shown did not result in the unwarranted infringement of the family's privacy, either in the making or broadcast of the programme.

Accordingly part of the complaint of unwarranted infringement of privacy was upheld.

Complaint by Dr Paul Davis

Today, BBC Radio 4 and Breakfast, BBC Radio Five Live, 13 January 2004

Summary: Ofcom has upheld almost all of a complaint of unfair treatment from Dr Paul Davis. It has not upheld his complaint that his privacy had been unwarrantably infringed.

BBC Radio 4 and Radio Five Live reported on a child protection case in which Dr Davis gave evidence as an expert witness. The items reported on a case where a mother believed that her child had been taken away from her and placed into care after an allegation of Munchausen Syndrome by Proxy (“MSbP”). Dr Davis did not participate in the programmes but he was named. Extracts from his court report were read out in the *Today* programme and other contributors commented critically on his findings in both programmes. He complained that the full content of the programmes was not disclosed to him; that his role in the court proceedings was exaggerated and misrepresented; that the programmes contained factually inaccurate information that harmed his professional standing; that he was identified as an expert witness in the case; and, that his privacy was unwarrantably infringed in the programmes by being identified by name.

Ofcom found as follows:

- a) Ofcom found that the programme makers did not make it sufficiently clear what the programme’s focus was to be and what its parameters would be. It was noted that the BBC itself had acknowledged that the programme makers could have been clearer in their communication with Dr Davis and that more effort should have been made on their part.

However, on the evidence available, Ofcom was unable to conclude that acting more fairly in these respects, would on its own have avoided unfairness to Dr Davis in the programmes as broadcast. Therefore there was no finding of unfairness to Dr Davis in this respect.

- b) Ofcom found that Dr Davis was not presented accurately in the programmes as being one of three paediatricians that had given their expert opinion in the case. Instead he was singled out. Also, the tone and emphasis of both reports was unfair since it implied that Dr Davis was the motivating force in removing the child from his mother, which was inaccurate. It was noted that the BBC had now acknowledged that the connection between Dr Davis’ report and the taking into foster care of the child, was not “direct and immediate” as had been suggested by the programmes and that the programmes had given “a very different impression of [his] involvement” in the case. Ofcom found that these inaccuracies and false impressions had resulted in unfairness to Dr Davis in the programmes as broadcast.
- c) Ofcom noted that Dr Davis had complained that both programmes had implied that Dr Davis was the treating paediatrician in the case rather than an independent expert. In Ofcom’s view, the reports had clearly suggested that Dr Davis had made a diagnosis of MSbP, as the treating paediatrician, without having ever met the mother and challenged whether this was “best practice”. This not only misrepresented his role but was also unfair in that it implied professional incompetence on his part.

Ofcom considered that the reports had contained information that was

factually incorrect and which had suggested that Dr Davis' medical evidence was flawed. The reports had also unfairly criticised Dr Davis in a way which was likely to have led those listening to an unfair impression of him and his professional competence.

- d) Ofcom found that although it is not necessarily unfair to identify an expert by name, the naming of Dr Davis and him alone in what was a sensitive case and in circumstances likely to lead to adverse audience reaction given the context of these broadcasts had resulted in unfairness to him.
- e) Ofcom considered that the programme makers did not make it sufficiently clear to Dr Davis what the focus and tone of the broadcasts was to be. Furthermore, Ofcom noted that at the time they were seeking a response from Dr Davis, it was known that legal proceedings were still active yet this was not made clear in either of the programmes. This was a case being conducted in private under the Children Act 1989 with particular sensitivities and the programme makers were intending to be highly critical of Dr Davis. In these exceptional circumstances, Ofcom found that there was an onus on the programme makers to have made more effort/taken further steps to ascertain, either from Dr Davis or the court itself why he had not responded to the emails and to verify the facts before broadcast.

Had the broadcaster made more efforts to verify the position, it is likely that it would have been able to reflect Dr Davis's position more fairly by stating that Dr Davis was unable to comment on the case. However, the *Today* programme had simply stated that "Dr Davis had declined to comment" and Five Live made no reference to Dr Davis' absence from the programme. Ofcom took the view that in both of these circumstances, this was unfair to Dr Davis.

- f) Ofcom noted that the legal proceedings in this case were under the Children Act 1989 and were held in private in order to protect the identity of the child concerned. In such circumstances, Dr Davis, as an expert in the case, might have expected a degree of anonymity - (a court order prohibiting the disclosure of Dr Davis's name was made shortly after the broadcasts) – but this was not the same as a right to privacy, in human rights terms, which was concerned with the right to a private (home and family) life. Ofcom, therefore, did not find that the BBC, in identifying Dr Davis in the reports, had infringed a right of privacy, as claimed by Dr Davis.

Introduction

On 13 January 2004, the BBC broadcast two reports, one on Radio 4's *Today* programme the other on Radio Five Live's *Breakfast* programme, about a child protection case in which Dr Paul Davis had given evidence as an expert witness. The items reported on a case where a mother believed that her child had been taken away from her and placed into care after an allegation of Munchausen Syndrome by Proxy ("MSbP"). Dr Davis did not participate in the programmes but he was named. The programmes stated that the child had suffered a number of seizures in the first few months of its life and that Dr Davis' report to the court had concluded that the child's mother had been the "perpetrator" and had tried to smother the child. The mother claimed in both programmes that she was a victim of a miscarriage of justice and that Dr Davis had written his report without actually meeting her or physically examining the child; had not taken into account the history in the father's and mother's family of sudden infant death; and had not taken into consideration that the

seizures suffered by the child may have been caused by rotavirus, a natural cause of infantile infection.

The programmes' reporter, John Sweeney, sent Dr Davis two emails, one on 8 January 2004 and the second on 12 January 2004, in which he asked a number of questions surrounding issues relating to the court case and offered him an interview. Dr Davis did not reply to the emails or participate in the programmes in any way. However, extracts from his court report were read out by an actor in the *Today* programme and other contributors commented critically on his findings in both programmes. He was also referred to by name in both programmes.

Dr Davis complained to Ofcom that both programmes treated him unfairly and unwarrantably infringed his privacy in the broadcast of them.

Ofcom's Fairness Committee (its most senior decision-making body with regard to fairness and privacy complaints) met to consider Dr Davis' complaint of unfair treatment and infringement of privacy in the two programmes.

The complaint

Dr Davis' case

In summary, Dr Davis complained that:

- (a) The full content of the programmes was not disclosed to him in the two emails sent by the reporter, John Sweeney. Although he was not able to respond for legal reasons, Dr Davis said that had he known the full content he might have sought further advice from the court or legal advisers.
- (b) The programmes exaggerated and misrepresented his role in the court proceedings. Dr Davis said that he was not the treating paediatrician, as had been implied in the broadcasts, but had been asked by the mother's solicitors to prepare an independent report for the court on a "jointly instructed" basis. The child was already in foster care when he was first contacted. The child was not taken into care as a result of the report to the court, as suggested in the programmes. Dr Davis said that he was one of three paediatric expert witnesses who gave evidence, all of whom came to the same conclusion about the case. The fact that the programmes focused almost entirely on his evidence and "did not put [it] into context" portrayed him in a bad light. Also, there was an unnecessary use and repetition of his name throughout the programmes.
- (c) The programmes contained some factually incorrect information that also portrayed him in a bad light. For example, Dr Davis said that he had not ignored significant medical evidence as was suggested in the broadcasts nor did he diagnose MSbP in the child's mother. He also complained that the programmes harmed his professional standing among patients, colleagues and the courts. Listeners might have concluded that he had failed to do a good job or had been excessively dogmatic or evangelical in his approach to the protection of children from abuse. This was not the case.
- (d) The programmes reported on an active court case under the Children Act 1989 that concerned the welfare of a child and which was held in private to protect the child's interests. Dr Davis said that whilst false names were attributed to the family members involved in the case, he was identified by name as the expert witness in the case. Extracts from his report were also read out in the

programmes. Dr Davis said that he had felt intimidated.

- (e) He was denied a right to reply to criticisms of him as the court proceedings, which were being held in private, were still active at the time of the broadcasts. The judge in those proceedings had requested that Dr Davis make no public comment on the case. To have commented would have placed him in contempt of court.
- (f) His privacy was unwarrantably infringed in the broadcast of the programmes in that he was identified by name as an expert witness in a case held in private.

The BBC's case

In summary, the BBC responded that:

- (a) See response under (e) below.
- (b) The BBC said that Dr Davis was not strictly correct in stating that the child in question was already in foster care when he was first contacted. In fact, the child was in the care of its maternal grandmother, with its own mother in residence for some, but not all of the time. It was correct that the conclusions of Dr Davis and the other medical experts which guided the outcome of the first court hearing did not directly and immediately lead to the child being taken into care, but it was also true that without those conclusions and their consequences, the incidents under consideration would have given no occasion to take it into care.

The BBC said that on the basis of the material to which John Sweeney was given access, including the text of Dr Davis' court report, and of his own knowledge of the field (he was aware that Dr Davis was the co-author of a paper about MSbP with Professor Sir Roy Meadow), John Sweeney formed the view that Dr Davis had taken the lead in drawing the court to the conclusion that the child's mother had deliberately harmed her child. The *Today* report and the comments on *Breakfast* reflected this view. However, in the light of further information the BBC accepted, in its letter of 6 September 2004 to Dr Davis, that "this assigned a more salient role to Dr Davis than he in fact played, and that he shared any responsibility for the court's decision with the two other medical experts who provided reports". The BBC said that this was a far cry from saying that the broadcast criticism of the approach adopted by Dr Davis was unfair or unwarranted.

- (c) The first factual inaccuracy specified by Dr Davis was that the broadcasts attributed to him a diagnosis of MSbP. In the *Today* item, John Sweeney said that:

"Dr Davis cited MSbP 31 times in his reports [on the mother]. He concluded that though 'This is not a classical Munchausen syndrome by proxy', [the child] had suffered imposed upper airway obstruction."

The BBC said this was not a statement that Dr Davis had diagnosed MSbP in the mother. Essentially, the same was said in the *Breakfast* programme, and both programmes quoted Birmingham Social Services Department, who had gained an Order from the court to place the child into foster care, as saying that the mother had not been diagnosed as having MSbP. There was certainly a strong suggestion that Dr Davis' thinking on MSbP had played an important part in his assessment of the mother, but such a suggestion was a fair reflection of Dr

Davis' report.

The second alleged inaccuracy was that Dr Davis ignored significant medical evidence. The BBC said this complaint appeared to relate to three criticisms of Dr Davis made by the mother, which were: that he had reached his conclusions without having met her; that he had not investigated her family history, which included a large number of sudden infant deaths; and, that he had not given sufficient consideration to the possibility that one or more of the incidents were in fact due to rotavirus infection. The BBC believed that the mother's criticism, as reported in the programmes, was no more than fair comment on a matter which the medical experts might have assessed differently. In the circumstances of this particular case, although it was not fair to make Dr Davis the sole focus of the mother's criticisms, it was entirely legitimate to report their substance.

In response to Dr Davis' complaint that the reports harmed his professional standing, the BBC said this was not an issue of unfair treatment, but rather a statement about the consequences of unfair treatment. Any damage to Dr Davis' standing which resulted from unfairness in any BBC broadcast was regretted.

- (d) Although the court proceedings were held in private, the privacy of such proceedings in the family court was for the protection of the minors involved and to ensure that they are not identified. The BBC did not accept that this extended to expert witnesses.
- (e) The refusal or inability of an interested party to contribute to a broadcast did not put discussion of the topic out of bounds. It was not accepted that proceeding with the items in the absence of a contribution from Dr Davis was, of itself, unfair to him.

However, in a letter of 6 September 2005 to Dr Davis, the BBC accepted that he should have been given a fuller account of the *Today* programme than was given to him by John Sweeney. The BBC made two observations on the extent to which this may have resulted in material unfairness. Firstly, Dr Davis believed himself to be legally inhibited from making any public comment. This would presumably have been the case whatever the terms in which the two reports had been described to him. Secondly, he could have told the programme makers that he was legally inhibited from commenting. If he had done so, the reports would have said as much.

- (f) Regarding privacy, Dr Davis complained that, as a witness in proceedings held in private, he had a right to privacy which was infringed by identifying him in the programmes. The BBC repeated that the privacy of such proceedings in the family court was for the protection of the minors involved. The BBC did not accept that it extended to expert witnesses.

Dr Davis' comments

In summary, Dr Davis commented that:

- (a) No further comments were made regarding this point.
- (b) The salient issue was that child protection procedures had already been initiated before he was instructed to prepare a report for the court. He had played no part in the decision to remove the child from its parents and, later, its grandmother. Dr Davis said that it was unfair of the BBC to suggest that his report to the court was

somehow pivotal in the child being removed from its parents.

- (c) Anyone listening to the programmes would have believed that Dr Davis had diagnosed MSbP in the mother, a “patently ridiculous proposition” for a paediatrician to make. Such a suggestion had brought him into disrepute. Dr Davis said that his report was on the child and diagnosed child abuse. Dr Davis said that his report did not cite MSbP 31 times nor did it conclude that MSbP was the diagnosis. He did, however, provide the court with a review of the relevant literature that discussed MSbP. The programmes’ criticisms of his evidence were unjustified and unfair.
- (d) See response under (f) below.
- (e) Had John Sweeney disclosed the content of the programmes, he would have been in a position to ask the judge presiding over the court proceedings for advice about being approached by the BBC. Dr Davis said that he had been instructed by the court not to make a response about the case.
- (f) The BBC’s understanding of the position of expert witnesses and their privacy appeared to be in conflict with the Family Proceedings Rules. The court in this particular case made an Order that experts should not be publicly identified.

BBC’s comments

In summary, the BBC responded that:

- (a) No further comments were made regarding this point.
- (b) The BBC refuted that it was misleading to suggest that there was a connection between the reports by Dr Davis and his expert colleagues and the taking of the child into care. The BBC acknowledged that the connection was not direct and immediate, but made the point that, without those reports and their consequences, the incidents under consideration would have given no occasion to take the child into care. In that sense, these reports had certainly been “pivotal”.

Dr Davis’ point that his citations of MSbP were not in his report on the child, conflicted with the clear recollection of John Sweeney, which was of a document consisting of several pages on the case, followed by several pages on MSbP with no evident distinction between them. Even if they had been distinguished, it would be a distinction without a material difference.

- (c) The BBC acknowledged that a listener to the programmes might have drawn a conclusion that Dr Davis had diagnosed MSbP. However, it was doubted whether the distinction between diagnosing the child and diagnosing the mother bore much weight in this instance. To diagnose the child as having been abused was to diagnose the mother as an abuser. The BBC appreciated that identifying the mother as an abuser did not in itself constitute a medical diagnosis, or necessarily imply that there was a pathology which accounted for the abusive behaviour; but in this instance Dr Davis offered the opinion that “This is not a classical Munchausen’s syndrome by proxy”, which was itself a diagnosis of sorts.
- (d) See response regarding privacy below.

- (e) If Dr Davis was legally inhibited from making any public comment on the case in question, it was unclear how further advice from the court or his legal advisers could have altered that fact. The BBC said that the court might have restrained him from commenting on the case, but it had no power to prevent him from disclosing that restraint.
- (f) The BBC said that it would abide by any relevant court order.

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 unfair treatment in programmes included in such services and from unwarranted infringement of privacy in the making and broadcasting of programmes. Where there appears to have been unfairness in the making of a programme, this will only result in a finding of unfairness, if Ofcom finds that it has resulted in unfairness to the complainant in the programme, as broadcast.

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, consistent and targeted only at cases in which action is needed.

This case was referred to Ofcom's Fairness Committee for consideration. The Committee's decision is set out below, by reference to each of the heads of Dr Davis's complaint. It is clear that investigative journalism is important in reporting on matters of public concern. Such matters are quite properly the subject of broadcast programmes (subject to any legal restraints imposed) and broadcasters are entitled to address and debate them fully in television and radio programmes. However, it is essential not only to the parties directly concerned but also to listeners and viewers, that such reports should be accurate in all material respects so as not to cause unfairness. Where a damaging critique is made of an individual or organisation, who does not participate, for whatever reason in the programme, care should be taken to ensure that their views are not misrepresented.

The Committee considered that there was a clear public interest in examining the circumstances surrounding the role played by expert witnesses in the case, and the concerns raised by the mother of the child who was taken into care about the report considered by the court. An appropriate level of freedom of expression should be preserved for both the broadcaster and any person directly affected by the programme, including the complainant. When considering the broadcast in this case, we took into account the unique sensitivities facing investigative journalists when reporting matters relating to challenges from accused parents in child protection cases and the importance of investigative based journalism in assisting the public's understanding of these matters.

- (a) Dr Davis complained that he was not given the full content of the programmes before broadcast by the programme makers. Although he was not able to respond, Dr Davis said that had he known the full content, he might have sought further advice from the court or legal advisers and this might have resulted in a different outcome.

The information that contributors to a programme should be given in order to be dealt with fairly include being told what the programme was about, why they are

being contacted, what kind of contribution they are expected to make and the areas of questioning to be covered.

The Committee considered that although John Sweeney's email of 8 January 2004 to Dr Davies did go some way to inform him about the nature and purpose of the programme and made clear that he was being offered an interview, it did not make sufficiently clear what the parameters of the intended broadcast were and what the programme's focus was to be. The email contained a list of questions. Although serious in nature, they contained no detail about the background to the intended programmes or the context in which the questions were being put to Dr Davis. The Committee considered that the questions appeared to have been intended to elicit information from him rather than being posed in order to make serious allegations against his medical expertise, professional conduct and competence.

The Committee noted that the BBC itself had acknowledged that the programme makers could have been clearer in their communication with Dr Davis and that more effort should have been made on their part.

Taking all this into account, the Committee considered that the programme makers had failed to treat him as fairly as they should have done in the making of these programmes. However, in these circumstances, the Committee was unable to conclude that acting more fairly in these respects, would on its own have avoided unfairness to Dr Davis in the programmes as broadcast, especially since Dr Davis appeared to be unable to respond to any allegations. The Committee found no unfairness to Dr Davis in this respect.

However, the BBC had to ensure that without such a response from Dr Davis the programmes themselves were not unfair to him (see below).

- (b) Dr Davis complained that the broadcasts exaggerated and misrepresented his role in the court proceedings. Contrary to what was implied in the broadcasts, he was not the treating paediatrician but had been asked by the solicitors to the mother of the child at the centre of the case to prepare an independent report for the court. The child was already in foster care when he was first contacted and was not taken into care as a result of the report as suggested in the programmes. Dr Davis said that he was one of three paediatric expert witnesses who gave evidence, all of whom came to the same conclusion about the case. The fact that the programmes focused almost entirely on his evidence and did not put it into context portrayed him in a bad light, and there was an unnecessary use and repetition of his name throughout the programmes.

Where an individual or organisation is mentioned in a programme or discussed in their absence, care should be taken to ensure that their views are not misrepresented. It is also important to ensure wherever possible, that reporting is accurate so that the position of the non-participant is not misrepresented.

The Committee considered that Dr Davis was not presented accurately in the programmes as being one paediatrician of three that had given their expert opinion in this case. Instead he was singled out. *Breakfast* stated that he was "the lead doctor in coming to the conclusion that the mother must have been the perpetrator" (which was not the case). Also, the tone and emphasis of both reports was on Dr Davis as the motivating force in removing the child from its mother.

The *Today* programme stated that it was as a result of Dr Davis' report and the reports of others that the child had been taken into foster care.

Breakfast had reported it was directly as a result of his report - and his alone - that the decision was taken to remove the child from the care of its mother. It was also noted that the programme had stated that "this is in the report by Doctor Paul Davis. [H]e is the problem".

It was noted that the BBC had now acknowledged that the connection between Dr Davis' report and the taking into foster care of the child, was not "direct and immediate" as had been suggested by the programmes but that the programmes had given "a very different impression of [his] involvement" in the case.

The Committee found that these inaccuracies and false impressions had resulted in unfairness to Dr Davis in the programmes as broadcast.

- (c) Dr Davis complained that the broadcasts contained information that was factually incorrect and portrayed him in a bad light. For example, he said that he did not diagnose MSbP in the child's mother. He had not ignored significant medical evidence. It was not necessary in these circumstances to meet the mother. He also complained that the broadcasts harmed his professional standing among patients, colleagues and the courts.

The Committee noted that both *Today* and *Breakfast* had implied that Dr Davis was the treating paediatrician rather than an independent expert in the case. This was inaccurate and unfair in the context of the programmes, for the reasons set out below.

The *Breakfast* programme introduced the report as a case "concerning a mother [who] claims that her baby has been taken away from her after an allegation of Munchausen Syndrome by Proxy" and later stated that Dr Davis had found in his report that the mother had "attempted to smother her child four times." The *Today* programme had introduced Dr Davis as "a leading expert on Munchausen Syndrome by Proxy" and referred to MSbP several times throughout the report. Although Dr Davis was quoted in the programme as saying that the case was "not a classical Munchausen Syndrome by Proxy", the Committee was satisfied that listeners would have been left with the impression that the case concerned a form of MSbP.

Moreover, the Committee noted that Dr Davis referred to himself in his complaint as being misrepresented as the treating paediatrician in the case. The Committee considered that the use of such remarks as describing Dr Davis as "the lead doctor in coming to the conclusion..." in the *Breakfast* programme and "a leading expert on MSbP..." in the *Today* programme, had led to the reports implying that he was the treating paediatrician and that he had made a diagnosis of MSbP without having ever met the mother. The reports then challenged whether this was "best practice". The Committee considered this not only misrepresented his role but was also unfair in that it implied professional incompetence on his part.

As for the allegation in the programme(s) that his medical evidence was flawed in that it had ignored certain factors which should have been taken into account, the Committee noted the Court of Appeal judgment which had been issued shortly after the broadcasts, had found no errors in the medical evidence in the case.

The Committee recognised that it is legitimate for programmes to raise matters of genuine public concern, and fairness can not necessarily be judged with the benefit of hindsight (for instance, in this case, the result of the Court of Appeal). However, in this particular case, undue weight was given to Dr Davis not having met the mother or the child; not having considered the family's medical history which included incidences of sudden infant death; or the possibility that the cause of the child's seizures could be due to natural causes such as a rotavirus infection.

The Committee also considered that listeners might have concluded that he had failed to do a good job or had been excessively dogmatic or evangelical in his approach to the protection of children from abuse. This was unfair.

In view of the above, the Committee considered that the reports had contained information that was factually incorrect and which had suggested that Dr Davis' medical evidence was flawed. The reports had also unfairly criticised Dr Davis in a way which was likely to have led those listening to an unfair impression of him and his professional competence.

- (d) Dr Davis complained that he was identified by name as the expert witness in an active court case under the Children Act 1989 that concerned the welfare of a child and which was held in private to protect the child's interests. Extracts from his report were also read out in the programmes. Dr Davis said that he had felt intimidated by this.

The Committee took into account the fact that the correspondence sent to Dr Davis by the BBC before the programmes were broadcast did not indicate, expressly, that Dr Davis would be identified by name in the programmes. He was not therefore made aware in advance of the fact that he was to be named in the broadcasts (see head (a) above). The *Today* programme had also referred to the court proceedings that had resulted in the child being taken into care as being "held in secret and everyone involved cannot be identified".

The Committee found that although it is not necessarily unfair to identify an expert by name, the naming of Dr Davis and him alone, in what was a sensitive case and in circumstances likely to lead to adverse audience reaction given the context of these broadcasts (see above) had resulted in unfairness to him. In particular, he was identified when extracts from his report – sometimes inaccurately – were referred to; his role was exaggerated and misrepresented (he was the only one of three experts in the case who was named); and the proceedings were still active (see (e) below). This had resulted in unfairness to him.

The Committee also noted that the BBC chose to refer to the private nature of family courts as being held in "secret". These words are not synonyms and carry very different emotional weight, not least in relation to legal proceedings.

- (e) Dr Davis complained that he was denied a right to reply to the criticisms of him as the judge in the case, which was still active at the time of the broadcasts, had asked him not to make any public comment. To have commented would have placed him in contempt of court.

Where a programme alleges wrongdoing or incompetence, or contains a damaging critique of an individual or an organisation, those criticised should normally be given an appropriate and timely opportunity to respond to or

comment on the arguments and evidence contained in the programme.

In this case, it was clear that the broadcasts had contained a damaging critique of Dr Davis and the evidence contained in his report and had made allegations regarding the nature and effect of his role in the proceedings. It was also clear that the BBC had written to Dr Davis by email five days before the broadcasts putting a number of questions to him of a serious nature.

Dr Davis' evidence is that he sought the advice of the judge in the case as to whether he could respond to those questions and was told that he should not make any public comment on the proceedings which were still active and being held in private to protect the child concerned. Believing that this meant that he should have no further contact with the BBC, he failed to respond to any of the questions put in the emails to him.

On the question whether Dr Davis had been provided with an appropriate and timely opportunity to respond, the Committee considered that whilst the questions put to Dr Davis by email covered serious issues, they did not make sufficiently clear to him what the focus and tone of the piece was to be (see above).

In addition, the Committee noted that at the time the BBC was seeking a response from Dr Davis, it was known that legal proceedings were still active. However, neither the *Today* nor *Breakfast* programmes made this clear.

In this particular case: where Dr Davis had failed to respond at all to the issues and questions put to him; given the exceptional circumstances and particular sensitivities surrounding the court case; that the proceedings were conducted confidentially under the Children Act 1989; and that the programme makers knew that they were intending to be highly critical of him, the Committee considered that there was an exceptional onus on the programme makers to have made more effort/taken further steps to ascertain, either from Dr Davis or the court itself why he had not responded to the emails and to verify the facts before broadcast. Whilst there could be no guarantee that Dr Davis would have felt able to say more, the fact that further efforts were not made to contact him or find out why he hadn't responded, was coupled with the fact that he was not given as full information as he might have been about the content of the broadcasts.

In circumstances where the subject of a damaging critique is given a right to reply but has not exercised it, broadcasters are expected to reflect this position fairly in the programme. Had the broadcaster made more efforts to verify the position, it is likely that it would have been able to reflect Dr Davis's position more fairly by stating that Dr Davis was unable to comment on the case.

However, the *Today* programme had simply stated that "Dr Davis had declined to comment". The Committee took the view that to attribute a statement in response to Dr Davis that was not entirely correct was manifestly unfair to him.

Breakfast made no reference at all as to whether Dr Davis had been asked to comment or whether or not he had responded to the points raised in the report. Nor, as stated above, did either programme make it clear that the legal proceedings were still ongoing.

- (f) Dr Davis complained that his privacy was unwarrantably infringed in the broadcast of the programmes in that he was identified by name as the expert

witness to a case held in private.

The Committee noted that the legal proceedings in this case were under the Children Act 1989 and were held in private in order to protect the identity of the child concerned. In such circumstances, Dr Davis, as an expert in the case, might have expected a degree of anonymity - (a court order prohibiting the disclosure of Dr Davis' name was made shortly after the broadcasts) – but this was not the same as a right to privacy, in human rights terms which was concerned with the right to a private (home and family) life.

Therefore the Committee did not find that the BBC, in identifying Dr Davis in the reports, had infringed a right of privacy, as claimed by Dr Davis.

Accordingly, Ofcom's Fairness Committee upheld almost all of Dr Davis' complaint of unfair treatment. It did not uphold his complaint of unwarranted infringement of privacy.

Ofcom directed the BBC to broadcast a summary of its findings.

Other programmes not in breach/out of remit

29 March – 11 April 2006

Programme	Date	Channel	Category	No of complaints
4 Music	14/02/2006	Channel 4	Dangerous Behaviour	1
4 Music	20/03/2006	Channel 4	Dangerous Behaviour	1
Adopt a Grandad	28/03/2006	Channel 4	Generally Accepted Standards	1
BBC Breakfast News	26/03/2006	BBC1	Generally Accepted Standards	1
BBC Midlands Today	14/02/2006	BBC1	Generally Accepted Standards	1
BBC News	09/02/2006	BBC1	Subtitles	1
BBC News	28/03/2006	BBC1	Due Impartiality	1
BBC News	30/03/2006	BBC1	Inaccuracy/ Misleading	2
BBC News	28/03/2006	BBC1	Inaccuracy/ Misleading	1
BBC News	31/03/2006	BBC1	Inaccuracy/ Misleading	1
BBC Scotland	12/12/2005	BBC Scotland	Offence	1
BBC Weather	05/04/2006	BBC1	Inaccuracy/ Misleading	1
Brainiac	26/03/2006	Sky Three	Generally Accepted Standards	1
Brainiac	09/04/2006	Sky One	Generally Accepted Standards	1
Brat Camp	08/02/2006	Channel 4	U18s in Programmes	2
Brat Camp	22/02/2006	Channel 4	U18s in Programmes	1
Breakfast	22/03/2006	BBC2	Generally Accepted Standards	1
Celebrity Big Brother	25/01/2006	Channel 4	Misleading	1
Central News	20/03/2006	ITV1	Sex / Nudity	1
Champions League	28/03/2006	ITV1	Generally Accepted Standards	1
Channel 4 News	09/03/2006	Channel 4	Inaccuracy/ Misleading	1
Channel 4 News	22/03/2006	Channel 4	Animal welfare	1
Channel S	19/03/2006	Channel S	Advertising	1
Channel S	28/03/2006	Channel S	Offensive language	1
Channel S	30/03/2006	Channel S	Violence	1
CITV Trailer	03/04/2006	ITV1	Generally Accepted Standards	1
Comedy Unit	12/03/2004	BBC Scotland	Offence	1
Commonwealth Games 2006	22/03/2006	BBC1	Offensive language	1
Commonwealth Games 2006	31/03/2006	BBC1	Due Impartiality	1
Coronation Street	28/03/2006	ITV1	Sponsorship	1
Coronation Street	27/03/2006	ITV1	Other	1
Coronation Street	26/03/2006	ITV1	Generally Accepted Standards	1
Coronation Street	30/03/2006	ITV1	Inaccuracy/ Misleading	1
Coronation Street	31/03/2006	ITV1	Substance abuse	1
Coronation Street	03/04/2006	ITV1	Advertising	1
Countdown	27/03/2006	Channel 4	Generally Accepted Standards	1
Countdown	08/04/2006	Channel 4	Generally Accepted Standards	1
Dancing on Ice	29/03/2006	ITV1	Other	1
Deal Or No Deal	22/03/2006	Channel 4	Competitions	1
Deal Or No Deal	31/03/2006	Channel 4	Competitions	1
Deal Or No Deal	05/04/2006	Channel 4	Competitions	1
Derren Brown: Trick of the Mind	16/04/2006	Channel 4	Religious offence	2
Dismissed	23/03/2006	MTV	Generally Accepted Standards	1

Dispatches	21/11/2005	Channel 4	Impartiality	1
Dispatches: After School Arms Club	03/04/2006	Channel 4	U18s in Programmes	1
Doctors	24/03/2006	BBC1	Sex/Nudity	1
Doctors	23/03/2006	BBC1	Sex/Nudity	1
Dog Borstal	20/03/2006	BBC3	Animal welfare	1
Don't Blame the Koalas	01/04/2006	Five	Dangerous Behaviour	1
Dream Team	26/03/2006	Sky One	Sex/Nudity	1
EastEnders	28/03/2006	BBC1	Violence	1
EastEnders	29/03/2006	BBC1	Sex/Nudity	1
EastEnders	02/04/2006	BBC1	Crime Incitement/Encouragement	1
EastEnders	23/03/2006	BBC1	Generally Accepted Standards	1
Emmerdale	02/03/2006	ITV1	Inaccuracy/ Misleading	1
Emmerdale	29/03/2006	ITV1	Generally Accepted Standards	1
Emmerdale	05/04/2006	ITV1	Sex/Nudity	1
Everybody Hates Chris	22/03/2006	Five	Offensive language	1
Five News	26/03/2006	Five	Generally Accepted Standards	1
Food Uncut	20/02/2006	UKTV Food	Generally Accepted Standards	1
Footballers' Wives	23/03/2006	ITV1	Substance abuse	1
Footballers' Wives	06/04/2006	ITV1	Violence	2
Friends	03/04/2006	Channel 4	Scheduling	1
Gay Date TV	21/01/2006	Gay Date TV	Other	1
Gay Date TV	27/03/2006	Gay Date TV	U18s in Programmes	1
George Galloway	19/03/2006	Talksport	Inaccuracy/ Misleading	1
GMTV	23/03/2006	ITV1	Due Impartiality	1
GMTV	24/03/2006	ITV1	Offensive language	1
GMTV	06/04/2006	ITV1	Competitions	1
Gordon Ramsay's Christmas F Word	21/12/2005	Channel 4	Offensive language	1
Grab a Grand	15/11/2005	You TV	Offence	1
Granada News	13/03/2006	ITV1	Generally Accepted Standards	1
Grand Designs	05/04/2006	Channel 4	Inaccuracy/ Misleading	1
Grandstand	01/04/2006	BBC1	Sex/Nudity	1
Greatest TV Cock-Up Moments	05/04/2006	Five	Generally Accepted Standards	1
Green Wing	26/03/2006	Channel 4	Animal welfare	2
Green Wing	31/03/2006	Channel 4	Sex/Nudity	3
greyhound racing	03/04/2006	Sky Sports	Animal welfare	1
Gumball 3000	01/02/2006	Channel 4	Danagerous behaviour	1
I Didn't Divorce My Kids	28/02/2006	BBC1	U18s in Programmes	1
Ice Age	01/04/2006	ITV1	Scheduling	2
It's My Life	27/03/2006	ITV1	Due Impartiality	3
ITV News	13/03/2006	ITV1	Generally Accepted Standards	1
ITV News	21/03/2006	ITV1	Generally Accepted Standards	1
ITV News	23/03/2006	ITV1	Inaccuracy/ Misleading	2
ITV News	08/04/2006	ITV1	Generally Accepted Standards	3
James Blunt: Video Exclusive	03/03/2006	Channel 4	Dangerous Behaviour	1
James Whale Show	28/03/2006	Talksport	Generally Accepted Standards	1
Jamie's Great Escape	06/11/2005	More4	Offensive language	1
Jamie's Great Escape	16/11/2005	Channel 4	Offensive language	1

Jetix	01/03/2006	Jetix	Competitions	1
John Turner	03/02/2006	BBC Radio Bristol	Religious offence	1
Johnnie Walker Show	27/03/2006	BBC Radio 2	Offensive language	1
Key103FM	07/02/2006	Key 103	Competitions	1
Key103FM	03/02/2006	Key 103	Competitions	1
Legal TV	02/03/2006	Legal TV	Inaccuracy/ Misleading	1
Let's Talk Sex	22/03/2006	Channel 4	Sex/Nudity	1
Live & European	06/02/2006	Sport XXX Babes	Sex/Nudity	1
LUSU Sabattical Elections 2006	09/03/2006	Bailrigg FM	Offensive language	1
Making the Band	19/03/2006	MTV	Generally Accepted Standards	1
Mourinho's Ultimate +10 Team	01/04/2006	Channel 4	U18 Sexual/ Other offence	1
MTV2	10/12/2005	MTV2	Sex/Nudity	1
Munchies	07/01/2006	Five	Offence	1
My Parents Are Aliens	23/03/2006	ITV1	Offensive language	1
Naughty Week	26/03/2006	Discovery	Sex/Nudity	1
Newsnight	03/04/2006	BBC2	Due Impartiality	1
Pinochet in Suburbia	26/03/2006	BBC2	Offensive language	1
Poirot	19/03/2006	ITV1	Generally Accepted Standards	1
Poirot	03/04/2006	ITV1	Generally Accepted Standards	1
Poor Little Rich Girls	06/04/2006	ITV1	Inaccuracy/ Misleading	2
Popworld	05/03/2006	Channel 4	Danerous behaviour	1
Popworld	02/04/2006	E4	Generally Accepted Standards	1
Pushing the Limits	18/03/2006	Bravo	Generally Accepted Standards	1
Quizmania	14/03/2006	ITV1	Animal welfare	1
Quizmania	01/04/2006	ITV1	Subtitles	1
Radio 1	30/03/2006	BBC Radio 1	Offensive language	1
Radio City	03/02/2006	Radio City 96.7	Competitions	1
Radio Ga Ga	28/03/2006	VH1	Competitions	1
Real Radio Glasgow	03/04/2006	100-101FM Real Radio	Competitions	1
Richard and Judy	28/03/2006	Channel 4	Generally Accepted Standards	1
Richard and Judy	21/03/2006	Channel 4	Generally Accepted Standards	1
Scotland Today News	08/11/2004	STV	Offence	1
Sky News	17/03/2006	Sky News	Due Impartiality	1
Taggart	22/03/2006	ITV1	Inaccuracy/ Misleading	14
Taggart	22/03/2006	ITV1	Generally Accepted Standards	1
Take My Mother-in Law	04/04/2006	ITV1	Religious offence	1
Test Drive My Girlfriend	17/03/2006	ITV2	Generally Accepted Standards	1
The Armstrongs	05/04/2006	BBC2	Offensive language	2
The Bloody Circus	12/01/2006	Channel 4	Other	1
The Chatterley Affair	20/03/2006	BBC4	Sex/Nudity	1
The Chatterley Affair	28/03/2006	BBC4	Sex/Nudity	1
The Commander	27/03/2006	ITV1	Hypnosis/Subliminal	1
The Commander	27/03/2006	ITV1	Generally Accepted Standards	3
The Commander	03/04/2006	ITV1	Violence	1
The Commander	05/04/2006	ITV1	Sponsorship	1
The District	28/03/2006	Hallmark Channel	Inaccuracy/ Misleading	1

The F Word	24/11/2005	Channel 4	Offensive language	2
The F Word	04/12/2005	Channel 4	Offensive language	1
The F Word	15/12/2005	Channel 4	Offensive language	1
The Games	24/03/2006	Channel 4	Sex/Nudity	1
The Games	25/03/2006	Channel 4	Sex/Nudity	1
The Games: Inside Track	17/03/2006	E4	Crime Incitement/Encouragement	1
The Naked Archaeologist	09/03/2006	UKTV History	Inaccuracy/ Misleading	1
The News Quiz	25/03/2006	BBC Radio 4	Generally Accepted Standards	1
The Paul O'Grady Show	27/03/2006	ITV1	Scheduling	1
The Paul O'Grady Show	28/03/2006	ITV1	Inaccuracy/ Misleading	1
The Simpsons	04/04/2006	Channel 4	Violence	1
The Simpsons	06/04/2006	Channel 4	Violence	1
The Today Programme	15/03/2006	BBC Radio 4	Generally Accepted Standards	1
The Trouble With Old People	30/03/2006	Channel 4	Generally Accepted Standards	1
The Wright Stuff	23/03/2006	Five	Inaccuracy/ Misleading	1
The Wright Stuff	05/04/2006	Five	Undue prominence	1
The X Factor	17/12/2005	ITV1	Competitions	1
This Morning	20/10/2005	ITV1	Offence	2
This Morning	05/04/2006	ITV1	Competitions	1
Thought for the Day	26/05/2005	BBC Radio 4	Generally Accepted Standards	1
Tonight with Trevor McDonald	07/11/2005	ITV1	Impartiality	2
Top of the Pops	02/04/2006	BBC2	Offensive language	1
Totally Busted	07/02/2006	Men & Motors	Sex/Nudity	1
Totally Busted	28/03/2006	Men & Motors	Sex/Nudity	1
Touch FM	10/03/2006	Touch FM	Undue prominence	1
Turn on TV	27/03/2006	Satellite & Cable	Sex/Nudity	1
TV Heaven, Telly Hell	20/03/2006	Channel 4	Animal welfare	1
UK Style	04/12/2005	UKTV Style	Other	1
Vanessa Feltz	20/03/2006	BBC Radio London	Generally Accepted Standards	1
Victoria Derbyshire	29/03/2006	BBC Radio 5 Live	Generally Accepted Standards	1
Waterloo Road	23/03/2006	BBC1	Generally Accepted Standards	1
Weakest Link	01/04/2006	BBC1	Generally Accepted Standards	1
What Women Want	04/01/2006	BBC1	Sex/Nudity	3
Yu-Gi-Oh!	28/03/2006	CITV	Exorcism/Occult	1