



New York State Broadcasters Association, Inc.

Memorandum in Opposition to

A.420(A) & S.1693(A)

Imposing Liability for Broadcasting of Medical Treatment without Prior Consent

The New York State Broadcasters Association, Inc., representing television and radio stations throughout New York State, opposes A-420(A) and S.1693(A). Like previous bills that did not pass, the most recent versions suffer from the same constitutional and practical problems.

There is No Need for Legislation or a New Private Right of Action

The legislation seeks to remedy a particular situation that occurred several years ago in a NY City Hospital. Litigation was initiated against the hospital, doctors and ABC. A number of claims were filed against ABC, but were dismissed. Courts correctly found that the hospital violated the patient's right to privacy. The decision was upheld by the NY Court of Appeals. See *Chanko v. Am. Broad. Cos. Inc.*, 2016 NY Slip Op 02478, 27 N.Y.3d 46, 29 N.Y.S.3d 879, 49 N.E.3d 1171 (2016). The hospital in question was subject to a \$2.2 million fine.

The stated purpose for the legislation is to protect a patient's privacy. The courts have already held the hospital responsible and it is unlikely that this situation will arise again in New York. Letters from New York City Hospitals to the New York City Council demonstrate that this situation will not be repeated. The current process is sufficient to protect a patient's privacy rights without infringing on the First Amendment. There is no need to create a private right of action against the media to correct this situation. Moreover, the breadth and scope of the legislation goes well beyond the facts presented in the *Chanko* case.

Provisions Seeking to Create Liability for Treatment by Ambulance Companies Effectively Prevents On-the Scene Reporting, Chills News Coverage of Important Events and Violates the First Amendment

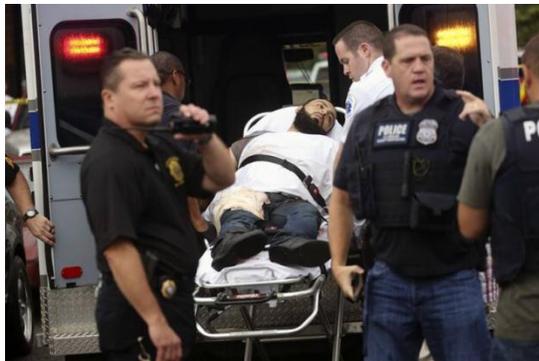
Broadcasting truthful information from a public street is protected speech under the First amendment. Moreover there is no reasonable expectation of privacy for activities occurring in public places.

Unfortunately, A.420-A & S.1693-A would place significant limitations on news coverage when an ambulance is involved. First, the legislation would exempt only “incidental” photographs or film footage from liability.

Provided however, that broadcasting shall not include incidental transmission of the image or speech of an individual being treated, transported or otherwise cared for or attended to by an ambulance service as defined in subdivision two of section three thousand one of this chapter or by a voluntary ambulance service as defined in subdivision three of section three thousand one of this chapter, at an ambulance response scene, public area or during delivery or admission to a health care facility, that is captured by news media, bystanders or others who do not have the written consent of such ambulance service or voluntary ambulance service. (A. 420 page 2 lines 21-31 emphasis supplied)

News crews, and bystanders, will be liable, unless it is determined that the video or photograph is “incidental.” This unworkable construct, and the threat of litigation, will prevent news coverage in public places.

News Coverage: What does incidental mean? Presumably, if it’s a crowd shot then there would be no liability. How long would a video camera have to remain on a person or persons



before it moves from incidental to coverage that will trigger liability? One second? Thirty seconds? With respect to photojournalists, any still picture of an individual would not be “incidental.” As now drafted, the picture (on the left) of the arrest in 2016 of an alleged bomber could trigger liability under the statute for the news photographer. The video that was broadcast from the scene would also trigger liability. See

<http://abcnews.go.com/US/suspect-york-jersey-bombings-custody/story?id=42190095>

The legislation does limit liability to treatment given “within the confines” of an ambulance. What does this mean in the real world? Do news crews have to stop filming when the person is half way in the ambulance? Could the terrorist in the picture above sue the media because he was within the ambulance? As a practical matter, if there is uncertainty about liability, it will not be filmed or broadcast. There is no need for this uncertainty. We suggested that liability be applicable in cases of filming “within an ambulance with all doors shut.” As presently drafted, the bill injects unnecessary uncertainty, and will result in stations not providing any coverage when an EMT or ambulance arrives.

Most newscasts provide live on the scene coverage of these events. When providing on the spot live coverage, broadcast reporters do not have the ability to instantly block out images of people receiving treatment. Video reports from 9/11, AMTRAK derailments, auto accidents and

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terrorist attacks demonstrate that this is impossible. Indeed it is precisely these images that are newsworthy. Facing potential liability, stations will cut back on live reports. The potential chilling effect on the First Amendment and news reporting is inconsistent with the public interest.

News and Public Affairs Programs Should be Exempt

The problem sought to be addressed by the legislation is the failure to obtain written permission for a show that was essentially a weekly “reality” program. The program in question focused on the weekly drama associated with a New York Hospital.

Conceptually, this type of program is vastly different from nightly news, which focuses in important events in the lives of all New Yorkers. Many events involve breaking news necessitating live on the scene reports. Unfortunately the legislation contains no exemptions for news. It does allow reporters to take pictures and communicate with each other or their editors. Liability applies, however, once the material is published or broadcast. It is impossible to provide nightly news coverage with such a threat of litigation.

Legislation Inhibits Investigative Journalism of Medical Facilities

News reports of health care facilities including nursing homes, VA Hospitals and mental health facilities are important to the American public. The legislation would effectively preclude a substantial amount of all medical reporting. Stories about abuse and unlivable conditions in medical facilities may never be broadcast because under the legislation the medical facility must obtain express written consent of all patients that appear in a photograph or film. The horrors of the Willowbrook State School would never have come to light if this bill has passed in 1972.

Creating a New Private Right of Action Against Broadcast Stations is Misdirected and Raises Significant First Amendment Concerns

Fundamentally, the legislation seeks to protect the privacy of patients while under medical care. The obligation to protect the privacy of any patient rests on the relationship between the patient, medical personnel and the medical facilities providing such care. The legislation seeks to extend this duty to the media for broadcasting truthful information. Imposing civil liability on broadcasters for the publication of truthful information raises serious First Amendment concerns. Ironically the bill, which purports to protect patient’s privacy, has an exemption for medical facilities.

Summary

NYSBA opposes this legislation. The newly revised versions do not resolve the fundamental problems. The current system has already sanctioned the hospitals involved. There is no reason to create a new private right of action. Moreover, attempting to extend liability to the media covering events in public places infringe on basic First Amendment principles and the public's right to know.

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