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THE EFFECT OF MARKET RESEARCH EVIDENCE IN
DECEPTIVE ADVERTISING LITIGATION

A thesis presented in partial fulfilment
of the the requirements
for the degree of
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ABSTRACT

A review of court cases decided under the New Zealand Fair Trading Act 1986 shows that a television advertisement would be found to contravene the Act where it could be shown to convey an implied claim that is false.

A review of the literature reveals that a variety of empirical tests have been proposed to determine whether an advertisement conveys an implied claim.

A review of legal decisions in the United States, Australia and New Zealand, suggests that the most probative evidence as to whether an advertisement conveys an implied claim is an empirical test using artificial viewing conditions and forced-choice questions.

A survey of expert lawyers in New Zealand shows that evidence of such tests is likely to be given substantial weight in litigation under the Fair Trading Act 1986.

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TABLE OF CONTENTS

	Page
ABSTRACT	ii
ACKNOWLEDGEMENTS	iii
TABLE OF CONTENTS	iv
LIST OF APPENDICES	vii
LIST OF FIGURES	viii
LIST OF TABLES	viii
1 INTRODUCTION	1
1.1 Background	1
1.2 Objectives of the thesis	2
1.3 Outline of chapters	3
1.4 Summary	5
2 DECEPTIVE ADVERTISING LAW IN NEW ZEALAND	6
2.1 Introduction	6
2.2 The law prior to the Fair Trading Act 1986	6
2.3 The Fair Trading Act 1986	16
2.4 Section 41: Injunctions	18
2.4.1 Permanent Injunctions	19
2.4.2 Interim Injunctions	21
2.5 Section 9 : Misleading or deceptive conduct	24
2.5.1 Australian cases	26
2.5.2 New Zealand cases	33
2.6 Evidence in section 9 cases	40
2.7 Summary	45

3	DECEPTIVE ADVERTISING RESEARCH	47
3.1	Introduction	47
3.2	The FTC's regulation of deceptive advertising	47
3.2.1	Definitions of deceptive advertising	50
3.2.2	Use of Consumer Research	56
3.2.3	The FTC's attitude to puffery	58
3.2.4	The FTC's focus on verbal claims	60
3.2.5	The effect of the 1983 policy statement	61
3.3	Empirical studies of deceptive advertising	65
3.3.1	Comprehension studies	72
3.3.2	Belief studies	87
3.3.3	Studies of purchase intention	95
3.4	Summary	100
4	CONSUMER RESEARCH EVIDENCE	103
4.1	Introduction	103
4.2	FTC decisions	103
4.3	Lanham Act cases	125
4.4	Australian cases	136
4.5	New Zealand cases	145
4.6	Summary	156
5	CONCLUSIONS FROM THE LITERATURE	157
5.1	Introduction	157
5.2	Summary of the literature	157
5.3	Conclusions	160
5.4	Restatement of final objective	162

6	METHODOLOGY	164
6.1	Introduction	156
6.2	The weight of a piece of evidence	164
6.3	The type of case	166
6.4	The type of evidence	167
6.4.1	Sample size	168
6.4.2	Choice of test subjects	168
6.4.3	Viewing conditions	170
6.4.4	Question format	171
6.4.5	Response options	171
6.4.6	Results of audience reaction tests	172
6.5	Selection of subjects	173
6.6	Selection of television commercials	174
6.7	The survey instrument	175
6.8	Rationale for the survey instrument	180
6.9	Description of experimental design	184
6.10	Rationale for the experimental design	184
6.11	Summary	186
7	RESULTS AND ANALYSIS	188
7.1	Introduction	188
7.2	The survey's ability to obtain lawyers' predictions	188
7.3	Predicting of the outcome of hypothetical cases	189
7.4	Evidence of audience reaction tests	197
7.5	The relative importance of ART scores	203
7.6	Relationship between ART scores and predicted outcomes	204
7.7	Changes to audience reaction tests	206
7.8	Summary	209

8 DISCUSSION AND CONCLUSIONS	210
8.1 Introduction	210
8.2 The class of deceptive advertising litigation	210
8.3 The type of consumer research evidence	213
8.4 The weight of the evidence	214
8.5 Implications of research findings	216
8.6 Summary	217
LIST OF APPENDICES	218
Appendix A Covering letter	219
Appendix B Questionnaires	220
Appendix C First reminder fax	221
Appendix D Second reminder fax	222
Appendix E Respondents' experience in Fair Trading Act litigation	223
Appendix F Description and results of each case	224
Appendix G ANOVA tables	225

LIST OF FIGURES

Figure 6.9	Order of presentation of advertisements	184
Figure 7.3.1	Distribution of total responses	190
Figure 7.3.2	Total predictions broken down by tape viewed	192
Figure 7.3.3	Predictions for the first three cases	194
Figure 7.3.4	Predictions for the second three cases	195
Figure 7.3.5	Predictions for the last three cases	196
Figure 7.4.1	Total predictions broken down by the number of assumptions	198
Figure 7.4.2	Changes broken down by the ART score provided in the second scenario	200
Figure 7.4.3	Predictions for four cases broken down by ART score	202
Figure 7.6.1	Relationship between the ART score and the ad being found deceptive	204
Figure 7.6.2	Change in prediction due to value of the ART score	205
Figure 7.7.1	Effect of doubling the sample size	206
Figure 7.7.2	Effect of showing the ad twice	207
Figure 7.7.3	Effect of using open-ended questions	207
Figure 7.7.4	The best group to sample	208

LIST OF TABLES

Table 7.2	Reminders and responses	189
Table 7.3.6	Mean of predictions for each of the nine cases	197
Table 7.5.1	Effect of the ART score and the ad on predictions	203

CHAPTER ONE

INTRODUCTION

1.1 Background

Television advertising began in New Zealand with the advent of television in 1960. Since then, it has been subject to a number of criticisms. One of the most common criticisms is that television commercials are misleading.

Misleading television advertising has been prohibited in New Zealand at least since 1969. However, until 1987, the legal rules were of limited significance to television advertisers. They applied only in situations where the advertiser knew or ought to have known that the advertisement was misleading. The only possible consequence of breaching the prohibition was the imposition of a small fine.

The Fair Trading Act 1986 radically changed the law relating to deceptive advertising. First, it substantially increased the maximum penalties available on conviction for deceptive advertising. Second, it introduced a range of civil remedies for deceptive advertising including interim and permanent injunctions, damages and orders for corrective advertising. Third, it included a very broad prohibition relating to misleading advertising. This is contained in section 9 of the Act which states:

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Contravention of section 9 gives rise to civil penalties only. However, in many instances, commercials that contravene section 9 will also contravene one or more of the specific prohibitions in the Act that give rise to criminal proceedings.

Few of the cases decided under section 9 have concerned advertisements. None has concerned television commercials.

However, most television commercials are clearly within the scope of section 9. Thus, the broadcast of a misleading television commercial exposes the advertiser to the risk of civil liability.

It has often been suggested that the best way to determine whether a television advertisement is misleading is to undertake an empirical test of the advertisement. Researchers in the fields of mass communications and psychology have developed a variety of empirical tests for determining whether a television advertisement is misleading. These tests typically involve showing the advertisement to a sample of consumers and then asking them some questions.

It is difficult to predict the weight that a New Zealand court would place on the results of such tests. This is partly because evidence of this type has been introduced in legal proceedings infrequently in New Zealand. In addition, the courts have yet to decide a case involving the allegation that a television commercial contravenes section 9 of the Fair Trading Act.

This thesis is concerned with the problem of determining whether survey evidence would be useful in determining whether a television advertisement is misleading in the context of legal proceedings under section 9 of the Fair Trading Act 1986.

1.2 Objectives of the Thesis

The broad aim of this thesis is to determine the weight that New Zealand courts would give to evidence of empirical tests in deciding whether a television advertisement contravenes section 9 of the Fair Trading Act. It is obvious that the weight placed on the evidence would depend both on the type of case in which it was introduced and on the particular type of test that had been conducted. Therefore, this aim is broken down into three more specific objectives as follows:

1. The first specific objective is to identify a class of deceptive advertising litigation in which the court might give some weight to evidence of empirical tests. This objective is

addressed by analysing the relevant legislative provisions and associated court cases.

2. The second specific objective is to describe the type of empirical test that would be given the most weight in such litigation. This objective is addressed in two steps. The first step is to describe the empirical tests that have been devised by consumer researchers. The second step is to determine the type of test that has been given most weight in court cases.
3. The third specific objective is to estimate the weight that would be given to evidence of the type of test described in the second objective in the type of litigation identified in the first objective. An empirical method incorporating techniques of survey research and laboratory experimentation is used to address the final objective.

1.3 Outline of chapters

Chapter 2 discusses the law relating to deceptive advertising in New Zealand. The chapter begins by summarising the law prior to 1987. It then describes the main changes to the law introduced by the Fair Trading Act 1986. Next, it discusses the leading court cases decided under section 9 of the Act. Finally, it examines the types of evidence that have been introduced in section 9 cases. The purpose of the chapter is to identify a class of litigation in which empirical tests would seem to provide evidence relevant to the courts' decision.

Chapter 3 examines the academic research literature on deceptive advertising. It begins by outlining the regulation of deceptive advertising in the United States. Next, it summarises the criticisms of this regulation that have been made by marketing and consumer researchers. Finally, it reviews the empirical studies of deceptive advertising. The main aim of the chapter is to describe the range of tests to determine whether an advertisement is misleading that have been proposed by consumer researchers.

Chapter 4 considers the extent to which the tests developed by consumer researchers have influenced legal decisions. The chapter begins by reviewing the United States cases in which evidence of such tests has been offered. It then examines the New Zealand and Australian cases in which similar types of evidence have been offered. The chief aim of the chapter is to describe the type of test on which the courts place most weight.

Chapter 5 summarises the main conclusions drawn from the court cases and academic literature reviewed in the previous three chapters. Tentative conclusions are stated about the class of litigation in which the courts would give most weight to empirical tests, and the type of test that would be given the most weight in such litigation. The third objective is clarified and restated in the light of these conclusions. This final objective is addressed in the following two chapters.

Chapter 6 begins by discussing problems that arise in attempts to devise an empirical method to determine the weight that would be placed on a piece of evidence in a court case. It then describes a method of estimating the weight that would be placed on evidence of consumer tests in deceptive advertising litigation. The method involves a survey in which expert lawyers are asked to predict the outcome of hypothetical court cases.

Chapter 7 reports the results of the survey and analyses the effect that evidence of consumer tests has on the predictions of expert lawyers.

Chapter 8 discusses the implications of the research findings. Conclusions are drawn about the probative value of consumer research evidence in deceptive advertising litigation. The usefulness of the survey method devised in this research for evaluating the weight of other types of evidence is also discussed.

1.4 Summary

This thesis investigates the extent to which evidence of consumer tests would be given weight by a New Zealand court in deciding whether a television advertisement contravenes section 9 of the Fair Trading Act 1986.

It incorporates aspects of two separate research traditions. The first is that followed by legal researchers. This tradition involves analysing the wording of statutory provisions and the comments of judges in previous cases as a guide to predicting the outcome of a future case. It seeks to identify the arguments and the evidence that influenced the outcome of previous cases. The aim is to state general principles that provide a basis for predicting or influencing the outcome of future cases.

The second research tradition is that followed by researchers in marketing and other social sciences. This tradition involves formulating hypotheses and then subjecting them to empirical tests. The standard research tools are laboratory experiments and surveys. The aim is generally to develop or refine theories that can be used to predict, explain or influence human behaviour.

The thesis begins by reviewing the leading court cases decided under section 9 of the Fair Trading Act. It then discusses the empirical tests of deceptive advertising proposed by consumer researchers. Following that, it investigates the extent to which the courts in Australia, New Zealand and the United States have placed reliance on the results of such tests. Finally, it uses an empirical method to estimate the probative value that one type of evidence would have in one type of case.