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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  
Doctor of Philosophy  
in Marketing  
at Massey University

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1990

## 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.

## ACKNOWLEDGEMENTS

I would like to thank my Chief Supervisor, Dr Tony Lewis who encouraged me to embark on this project. He persuaded me that some aspects of the law could be fruitfully investigated using research techniques other than those typically adopted by lawyers. He also endeavoured to teach me to write clearly.

I would also like to thank my Second Supervisor, Mr Lindsay Trotman. His expertise in the Fair Trading Act 1986, and techniques of legal research has assisted me enormously. He has also given me moral support and encouragement throughout this project.

The debt that I owe to Dr Ivan Preston, Professor of Advertising and Mass Communications at the University of Wisconsin, will be obvious to anyone who reads this thesis. I wish to thank him both for his encouragement and for the assistance he gave me in gathering the literature on the United States legal decisions.

I wish to thank Dr Warren Pengilley, a solicitor in Sydney and frequent commentator on Trade Practice Law. He kindly kept me informed of legal developments in Australia. He also offered advice at a critical stage of this project.

I wish to thank several people at Massey University who offered technical assistance with aspects of this project. Craig Herd and Craig Harding helped in the production of the video tapes which formed a central element in this research. Matt Blakeley, Chris Goddard and Alan Burton helped me with SPSSPC, Quattro and Microsoft Word computer software.

Finally, I wish to thank Pascale Quester for showing me that, not only was it possible to undertake a project of this type, it was also possible complete it.

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## 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.