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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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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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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 of 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.

CHAPTER TWO

DECEPTIVE ADVERTISING LAW IN NEW ZEALAND

2.1 Introduction

This chapter addresses the first of the objectives stated in the previous chapter. It uses the standard legal research methods to attempt to identify a class of deceptive advertising litigation in which evidence of consumer tests would be relevant to the issues faced by the court.

The chapter begins by summarising the law relating to deceptive advertising prior to the Fair Trading Act 1986. It then describes the major changes introduced by that Act. Next, two sections of the Act that have particular relevance for television advertisers are examined. These are section 9, which prohibits misleading conduct in trade, and section 41 which gives the Court power to award injunctions. The cases in which these two sections have been considered are discussed. Finally, the types of evidence that have been offered to show that conduct is misleading are described.

2.2 The law prior to the Fair Trading Act 1986

Prior to the Fair Trading Act 1986, the law relating to deceptive advertising was fragmented and ineffective.¹ The legal rules were contained in a number of statutes as well as parts of the common law. Only a very brief outline of these rules is attempted here.

The main piece of legislation concerning deceptive advertising was the Consumer Information Act 1969. The long title of this Act described it as an "Act to make provision for informative labelling and marking of goods and the prevention of deceptive or misleading packaging,

¹ For a very useful summary of the law prior to the Fair Trading Act 1986, see Chapter 10 of Burrows J.F., (1980) News Media Law in New Zealand, 2nd ed., Newspaper Publishers' Association of N.Z. (INC), Wellington, 1980.

labelling, and advertising".² The Act contained a series of very detailed rules about the information to be displayed on packages and labels and about statements contained in advertisements. The most important of these, for present purposes, were contained in section 9 (4) and section 10 (2) of the Act. Section 9 (4) provided that:

No person shall publish or cause to be published any advertisement that contains an express or implied representation relating to the nature, suitability, quantity, quality, strength, composition, origin, age, or effects of any goods if he knows or ought to know that the representation is false or misleading in a material respect.³

Subsection 5 of section 9 contained a very long provision prohibiting certain claims about product endorsements. In part, this subsection provided that :

No person shall publish or cause to be published any advertisement that contains a representation to the effect that any goods have been approved, endorsed or recommended by any person whom, or organisation that, members of the public might reasonably expect to be technically qualified to give an authoritative opinion in respect of the goods, unless the person or organisation is in fact so qualified and has stated that he or it in fact approves, endorses, or recommends the goods.⁴

Section 10 contained rules governing advertisements for goods or services which contained statements about prices.

Subsection 2 provided that :

² By section 2, the term "goods" was extended to include services but did not include land.

³ This provision did not apply to food, drugs or medical devices: section 9(7).

⁴ This provision did not apply to drugs or medical devices: section 9(7).

No person shall publish or cause to be published any advertisement that contains any express or implied representation relating to the price of any goods, if he knows or ought to know that the representation is false or misleading in material respect.

The section then went on to prescribe further rules as to the advertising of discounted prices, price savings due to the size of the package and "below cost" prices.⁵

Before describing the enforcement system contained in the Act, three points are worth noting about the scope of prohibitions found in sections 9 and 10. First, the prohibitions were stated to include both express and implied representations. Second, they only applied to representations that were misleading in a material respect. Third, they only applied where the advertiser knew or ought to have known that the representation was misleading. Each of these three points is discussed below with respect to section 9 of the Fair Trading Act.

The main weakness of the Consumer Information Act 1969 is generally agreed to have been its system of enforcement. Breach of any of the prohibitions gave rise to only criminal liability.⁶ The maximum penalty on conviction was \$500.⁷ Furthermore, any prosecution relating to a package, label or advertisement required the leave of the Examiner. In normal circumstances, the Examiner was required to enter into a process of formal consultation with the party alleged to have contravened the Act and only if such consultations failed to satisfy the Examiner would leave to commence a prosecution be given.⁸ In the eighteen years the Act was in force, no prosecutions were initiated.⁹

⁵ Subsections 3, 4, 5, and 6 of section 10.

⁶ Section 18(1).

⁷ Section 18(2)

⁸ Section 19. However, the Minister could decide that no consultation was required in a particular case: section 20.

⁹ Hill B.M. and Jones M.R., Fair Trading in New Zealand: The Fair Trading Act 1986, Butterworths, Wellington, New Zealand, 1989, p 4.

A wide range of products was expressly excluded from the operation of the Act. These included agricultural chemicals, animal remedies, fertilisers, and stockfoods.¹⁰ This was because similar prohibitions against deceptive advertising existed in legislation governing each of these classes of products.¹¹

Similarly, the exclusion of food, drugs and medical devices from the operation of section 9 of the Consumer Information Act 1969 is explained by the fact that the Food and Drug Act 1969 contains a similar provision in section 8 (2). This provision makes it an offence to publish or cause to be published an advertisement relating to a food, drug or medical device which is:

. . . likely to deceive a purchaser with regard to the nature, quality, strength, purity, composition, origin, age or effects of the food or drug or medical device or of any ingredient thereof.

Burrows concludes that despite the differences in wording, there was "obviously little difference in effect between this and the equivalent provision in the Consumer Information Act 1969."¹²

As with the Consumer Information Act 1969, a process of consultation and negotiation was normally required before a prosecution could be commenced.¹³ However, prosecutions could be taken without consultation in the case of "medical advertisements" that were, to the knowledge of those connected with the publication, false or misleading in a material particular.¹⁴

¹⁰ Section 25.

¹¹ See for example : Animal Remedies Act 1967, Agricultural Chemicals Act 1959, Fertilisers Act 1960, and the Stock Foods Act 1946.

¹² Burrows J.F., (1980) News Media Law in New Zealand, 2nd ed., Newspaper Publishers' Association of N.Z. (INC), Wellington, 1980, at p 352.

¹³ Food and Drug Act 1969, section 34.

¹⁴ Section 10(1)(a). Medical advertisements are defined very broadly in section 2 of the Food and Drug Act 1969.

The final legislative provision covering deceptive advertising which is of relatively broad scope is that contained in section 35 of the Credit Contracts Act 1981. This provision is as follows:

No credit advertisement shall contain any information, sound, image, or other matter, that is likely to deceive or mislead a reasonable person with regard to any particular that is material to the provision of credit.¹⁵

Contravention of this section renders a range of people liable to a fine not exceeding \$5,000.¹⁶ It is noteworthy that section 35 does not require that the advertiser knew or ought to have known that the advertisement was likely to mislead or deceive.¹⁷

In summary, a number of Acts prohibited deceptive advertisements relating to a variety of products. Proof that the advertiser knew or ought to have known that the advertisement was deceptive was usually required. Only advertisements that were misleading in a material particular were prohibited. The words "deceptive or misleading" were left undefined in the statutes. More importantly, the only consequence of breaching the prohibitions was the risk of prosecution. This was rendered extremely unlikely by the requirement for consultation and negotiation before proceedings could be initiated. The maximum penalties on conviction ranged from a few hundred dollars to a few thousand dollars. Any advertiser who was spending hundreds of thousands of dollars in a television advertising campaign, was unlikely to consider this as a serious deterrent.

As noted above, the legislation prior to the Fair Trading Act did not provide for civil remedies where either a customer or a competitor suffered loss as the result of a deceptive advertisement. This is not to suggest that such remedies were never available. However, as with the legislation discussed above, the rules governing the circumstances

¹⁵ The term "credit advertisement" is very broadly defined in section 2 of the Act.

¹⁶ Section 38.

¹⁷ However, section 38 provides a defence where the advertiser did not know of the advertisement or took all reasonable steps to stop publication of the advertisement.

in which deceptive advertising gave rise to civil remedies were fragmented and often ineffective. The precise application of these rules is beyond the scope of this thesis. All that is attempted here is a brief summary of the set of rules that needed to be considered when the question of civil liability for deceptive advertisements arose. Two types of situation need to be considered: first, where a customer sought redress, and second, where a competitor sought redress.

The starting point for any discussion of the circumstances in which a customer could obtain a remedy for deceptive advertising is the general rule of contract law that, in most circumstances, an advertisement does not form part of the contract entered into when a customer purchases goods or services. Instead, it is viewed as a pre-contractual statement. In legal terminology, an advertisement is not an *offer* but merely an *invitation to treat*. This means that the advertiser is not guaranteeing that the information conveyed by the advertisement is accurate. Consequently, purchasers have, in general, no legal right to recover damages from the advertiser for any loss they might suffer as a result of false or misleading claims in an advertisement.¹⁸

However, the common law recognised some situations where purchasers had a right to claim damages for false or misleading statements made by a seller prior to the formation of the contract.¹⁹ These rules are now contained in the Contractual Remedies Act 1979. This Act specifies the circumstances in which a purchaser can recover damages from a seller for pre-contractual statements.²⁰ Very briefly, these circumstances are where:

- (i) the statement was made by the seller

¹⁸ The usual authority cited for this general principle is *Carlill v Carbolic Smoke Ball Co.* (1892) 2 Q.B. 484, (1893) 1 Q.B. 296.

¹⁹ In this context, the term "common law" refers to the rules developed by judges in the process of deciding individual cases without regard to any statute.

²⁰ For a detailed comparison between the remedies available under the Contractual Remedies Act 1979 and those now available under the Fair Trading Act 1986, see Trotman L.G.S. (1988) Misrepresentation and the Fair Trading Act, Dunmore Press, Palmerston North, New Zealand, 1988.

- (ii) the statement had induced the buyer to enter the contract.
- (iii) the buyer had suffered a quantifiable loss as a result of entering the contract.

In certain limited circumstances, the buyer can cancel the contract and demand the return of the price of the goods or services.

In general, no distinction is drawn in the Act between misrepresentations that are innocent and those that are fraudulent. Thus, it does not matter whether the false or misleading statement is made knowingly or accidentally. However, it is essential to show that the statement induced the contract. That is, that the statement formed at least one of the important reasons for entering the contract. Thus, the Act is of limited assistance in the case of claims in television advertising or other forms of mass media advertising where it was extremely difficult for a buyer to prove the necessary link between the statement of the seller and the loss suffered as a result. More importantly, the Act could only be invoked where the false or misleading statement had been made by the person from whom the customer had bought the goods. In the typical case, where manufactured goods are sold through wholesalers and retailers, a consumer has no remedy under the Act for misrepresentations contained in the manufacturer's television advertisements. This is because the only contract the consumer had entered into was with the retailer who was not responsible for the television advertisement. This is known as the doctrine of privity of contract. Its application meant that the Contractual Remedies Act offered no solution in the vast majority of cases where a consumer suffered loss due to false or misleading claims contained in a manufacturer's television advertisement.

For similar reasons, the Sale of Goods Act 1908 is rarely applicable. This Act provides that certain conditions are implied in contracts for the sale of goods. These conditions include one to the effect that where goods are sold by description, there is an implied term in the contract that the goods correspond with the description. This implied condition is of no assistance to a consumer who buys goods from a retailer as a result of false or misleading claims in a manufacturer's television

advertisement. The doctrine of privity of contract prevents any claim against the manufacturer based on the Sale of Goods Act.

In summary, the general principles of contract law do not provide a remedy to a consumer who purchases goods from a retailer on the faith of deceptive claims contained in a manufacturer's advertising campaign. This is partly because advertisements are viewed as pre-contractual statements rather than statements forming part of the contract. More importantly, the consumer has no contractual relationship with the manufacturer. His or her contract is usually with a retailer who is not responsible for the claims made in the advertisement.

Therefore, a purchaser seeking damages for loss sustained as a result of false or misleading claims in a manufacturer's advertisement would usually have to rely on the law of torts. Under tort law, a manufacturer may in certain cases be liable to consumers of its goods for loss or harm occasioned by the use of these goods.²¹ The main restriction on the circumstances in which a consumer could do this, is the need to prove that the loss was due to negligence on the part of the manufacturer. In the case of deceptive television advertisements, this would require an investigation of the degree of care exhibited by the manufacturer in vetting the content of television advertisements and checking the accuracy of the claims made.²²

Thus, neither contract nor tort law provides an automatic remedy to a consumer who suffers loss as a result of deceptive advertising claims made by a manufacturer. Of perhaps greater practical importance is the fact that manufacturers could usually rely on the costs of litigation as an effective barrier to the risk of incurring liability for deceptive advertising. Very often the loss occasioned by any single consumer is small; often no more than a few dollars. The cost of taking legal action for this loss rendered the action irrational in purely economic terms. The result was that, although the aggregate harm suffered by all consumers of a product

²¹ *Donoghue v Stevenson* [1932] A C 85, PC.

²² See the discussion and the cases cited in Trotman L.G.S. (1988) Misrepresentation and the Fair Trading Act, Dunmore Press, Palmerston North, New Zealand, 1988, at pp 65-66.

due to a deceptive television advertisement might be very great, an action for damages was unlikely to eventuate in most cases.²³

The position of a rival trader is different. A trader may suffer a substantial loss as a result of false or misleading claims in a competitor's television commercial. This loss could justify the investment required to initiate legal proceedings. However, prior to the Fair Trading Act 1986, the situations in which a trader could take action against a rival's advertising claims were ill-defined. A common situation was where a business "passes off" its goods as those of its competitor. Such behaviour was described as harming both customers and the competitor concerned. Customers were deceived as to the source of the goods and perhaps their quality, while the reputation of the competitor was being appropriated without its consent. The requirements to succeed in a passing off action are well established. In summary, they are as follows:

- (1) a misrepresentation
- (2) made by a trader in the course of trade
- (3) to prospective customers of his or ultimate consumers of goods or services supplied by him
- (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence)
- (5) which causes actual damage to a business or goodwill of the trader by whom action is brought or (in a *quia timet* action) which will probably do so.²⁴

The remedies available to a successful plaintiff include damages for lost sales and a permanent injunction against continuation of the passing off. In view of the difficulty of quantifying loss suffered by a successful

²³ There was no provision for class actions to be brought on behalf of all consumers. Neither could consumer watchdog groups commence proceedings.

²⁴ This summary, which is taken from the judgment of Lord Diplock in *Warnink (Erven) v Townend & Sons (Hull) Ltd* [1979] AC 732, was adopted by Franki J. in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at p 188. A *quia timet* action is one in which the conduct complained of has not yet occurred.

plaintiff, interim injunctions are commonly granted where the plaintiff can show a *prima facie* case.

Passing off cases typically involve allegations that the defendant's product is too similar to that of the plaintiff by reason of the brand name or company name or the configuration of the product or packaging or other factors usually called the 'get-up' of the product. Advertising claims may form the basis of a passing off action only where the advertisement falsely suggests that a business connection exists between the plaintiff and the defendant.

Similarly, some advertisements can give rise to an action for infringement of trademark. This is where the advertisement makes use of a trademark that is deceptively similar to that of the legitimate owner of the mark. Both permanent and interim injunctions, as well as damages are available as remedies in such cases.

In summary, prior to the introduction of the Fair Trading Act 1986, a manufacturer or other trader had no general right to take legal action against deceptive claims contained in a competitor's advertising. An advertisement could render a manufacturer or other trader liable to a competitor in some instances. These were mostly where the advertisement deceived customers or ultimate consumers into believing that the products of each party had the same source. The obvious difficulties involved in quantifying the loss occasioned by such deception encouraged the courts to grant interim injunctions in such cases. However, it was vital to the success of the action that the plaintiff could show some loss was likely to result from the conduct of the defendant.

In this section, a very brief summary of the variety of rules relating to deceptive advertising prior to the commencement of the Fair Trading Act 1986 has been attempted. These rules were seen to be fragmented and unlikely to be effective in providing real incentives for manufacturers to avoid deceptive claims in their television advertisements.

Several statutes expressly prohibited deceptive advertisements and created offences for non-compliance with the prohibitions. Prosecutions were generally available only where negotiations had failed to produce a

satisfactory result and the maximum penalties prescribed were unlikely to deter many television advertisers.

Similarly, the rules providing for civil liability for deceptive advertising were fragmented and ineffective in most cases. Consumers who suffered loss as a result of deceptive advertising by the retailer from whom the goods had been purchased could, in some instances, rely on the Contractual Remedies Act 1979 or the Sale of Goods Act 1908 to recover damages. Attempts to recover loss due to deceptive advertising claims by a manufacturer had to be based in tort. This required proof of lack of reasonable care on the part of the advertiser. Even without these difficulties, consumers were often in a position where the cost of commencing legal proceeding could not be justified in economic terms.

Such costs could often be justified for a rival trader. However, the only types of deceptive advertising where such a plaintiff could succeed were where the advertisement deceived customers or final consumers into believing the goods of the defendant were those of the plaintiff. In such cases, an interim injunction could usually be obtained.

The conclusion arrived at is that many advertising claims enjoyed an unusual immunity from legal standards of truthfulness. The immunity was due to the fragmentation of the law and the absence of a comprehensive and workable system of enforcement.

The Fair Trading Act 1986 was intended to cure many of these deficiencies. The way in which it attempted to do so is the subject of the next section.

2.3 The Fair Trading Act 1986

The Fair Trading Act 1986 came into force on the first day of March 1987. The Act is based on Part V of the Australian Trade Practices Act 1974. An indication of the scope of the Act is provided by its long title which is as follows:

An Act to prohibit certain conduct and practices in trade, to provide for the disclosure of consumer information relating to the supply of goods and services and to promote product safety and also to repeal the Consumer Information Act 1969 and certain other enactments.

The Act, which repealed the Consumer Information Act is divided into several parts. Part I declares certain types of practices to be prohibited. Some of these practices are very specific. Others are defined very broadly. The broadest of the prohibited practices is contained in section 9 which is discussed below.²⁵ Parts II, III and IV of the Act empower the Minister of Consumer Affairs to set various types of information and safety standards.²⁶ Part V of the Act specifies the remedies that are available for a breach of the prohibitions. Contravention of most of the prohibitions in Part I of the Act gives rise to both criminal prosecutions and a range of civil remedies.

The criminal remedies differ in three important respects from those that existed under the Consumer Information Act 1969. First, no process of consultation is required before prosecutions can be initiated. Second, the maximum penalties provided are substantial, amounting to \$30,000 for an individual and \$100,000 for a corporate body. Third, proof that the advertiser knew or ought to have known that the advertisement was misleading is not normally required.²⁷ However this factor is relevant to the issue of penalties.²⁸

²⁵ Section 2.5 of this chapter.

²⁶ These standards are beyond the scope of this thesis but are usefully discussed in Hill B.M. and Jones M.R., Fair Trading in New Zealand: The Fair Trading Act 1986, Butterworths, Wellington New Zealand, 1989, p 4.

²⁷ However, section 44 provides for three limited defences to prosecutions.

²⁸ See *Lane's Appliance Centres Ltd v Commerce Commission* (Unreported) High Court Christchurch, AP 57/89, 8 June 89, where guilty pleas were entered to charges under section 13(g) relating to misleading price advertisements. See also *Farmers Trading Co. v Commerce Commission* (Unreported) High Court Auckland, AP 167/88, 7 October 88, where garments made in China were sold with a label including the words "Made in New Zealand". See also *Connell v L D Nathan* (Unreported) High Court Wellington, AP 129/88, 18 August 88; and *Connell v*

Contravention of section 9 is not an offence under the Act, and consequently no prosecution can be brought on this basis.²⁹ However, conduct that contravenes section 9 will often also breach one of the more specific provisions contained in sections 10 to 13 of the Act.³⁰ Contravention of any of these provisions is an offence.³¹

For present purposes, the main importance of the Fair Trading Act 1986 is that it introduced, for the first time in New Zealand, a comprehensive range of civil remedies for deceptive advertising. These include injunctions,³² corrective advertising orders,³³ and damages.³⁴ Each of these remedies could be awarded against an advertiser whose television commercial is found to have contravened section 9.

The great majority of cases litigated under the Fair Trading Act have been applications by a rival trader for an injunction under section 41 based on the alleged contravention of section 9 of the Act. The remainder of this chapter is limited to consideration of such cases. In the next section, the courts' approach to such applications is discussed. In the following section, the courts' approach to determining whether conduct contravenes section 9 is examined.

2.4 Section 41: Injunctions

Section 41 gives the High Court power to grant both interim and permanent injunctions. Applications for a permanent injunction are discussed first.

Farmers Trading Co. (Unreported) High Court Wellington, AP 142/88, 18 August 88.

²⁹ Section 40.

³⁰ Trotman L.G.S. (1988) Misrepresentation and the Fair Trading Act, Dunmore Press, Palmerston North, New Zealand, 1988.

³¹ Section 40.

³² Section 41.

³³ Corrective advertising orders are only available on the application of the Commerce Commission: section 42.

³⁴ Section 43.

2.4.1 Permanent injunctions

Under section 41(1), the High Court may, on the application of the Commerce Commission or any other person, grant a permanent injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of any of the provisions of Parts I to IV of the Act. As section 9 is in Part I of the Act, the Court may grant an injunction where it is satisfied that a person has engaged in conduct contravening section 9. It is no bar to the granting of relief that the person does not intend to engage again or to continue to engage in the conduct.³⁵ The Court also has power to grant an injunction where the person has not yet contravened section 9, but it appears to the Court that, in the absence of an injunction, it is likely that the person will engage in conduct which contravenes the section. In such a case, it is no bar to relief that there is no imminent danger of substantial damage to any person as a result of the conduct.³⁶

One of the first issues that arose in the interpretation of this section was whether the section extended to include applications by rival traders. This question had been answered affirmatively in Australia.

The rationale for this position is that although the Act was primarily a piece of consumer protection legislation, it was also intended to operate for the benefit of the ethical trader. Allowing traders to apply to the Court for an injunction, enabled them to prevent rivals who contravened the Act from obtaining a competitive advantage. In taking action to prevent breaches of the Act, traders were also indirectly protecting consumers. In this sense, the Act was said to be self-enforcing.

This position was adopted in New Zealand in the first case to reach the Court of Appeal. In *Taylor Bros. Ltd v Taylors Textiles Services*

³⁵ Section 41(3).

³⁶ Section 41(4).

*Auckland Ltd.*³⁷ Cooke P., in delivering the judgment of the Court, stated:

Certain points well settled in Australia may be said with confidence to be equally applicable in New Zealand. For instance, it is clear that, although the Act is primarily consumer-protection legislation, a rival trader may enforce s.9 and is indeed the usual applicant. In this way, the Act operates partly for the benefit of the ethical trader.³⁸

The second issue that arose with respect to section 41, was whether a rival trader had to show any loss as a result of the defendant's conduct. As noted above,³⁹ under the common law of passing off, the plaintiff was required to show that damage to his business or goodwill would be caused by the defendant's conduct in order to be awarded an interim or permanent injunction.

In Australia, the Courts had emphasised that this requirement did not apply to applications under the corresponding provisions of the Trade Practices Act 1974. A similar approach was taken by the New Zealand Court of Appeal. In the *Taylors* case, Cooke P. stated:

Certainly the degree of impact or likely impact on consumers is important. It goes both to whether there is a real likelihood that persons will be misled or deceived and to whether the Court in its discretion should grant an injunction (or other remedy) under the Act. The case has to be sufficiently serious to warrant a remedy. But

³⁷ *Taylors Textiles Services Auckland Ltd v Taylor Bros. Ltd* (1988) 2 NZBLC 103,032.

³⁸ This passage was cited with approval by Williamson J. in *Wilson's Army and Navy Western Ltd v Recycled Recreation Ltd* (Unreported) High Court Dunedin, CP 99/89, 19 May 88; and also by Bisson J. in *Prudential Building and Investment Society of Canterbury v Prudential Assurance Company* (1988) 2 NZBLC 103,351.

³⁹ Section 2.2 of this chapter.

section 9 and the remedy sections of the Act are not limited to cases of identifiable economic loss.⁴⁰

A third issue was whether the Court could award a mandatory injunction requiring the defendant to undertake corrective advertising to rectify the false impression created by the original advertisement. This power had been expressly conferred by an amendment in Australia in 1983.

In *E R Squibb and Sons (NZ) Ltd. v ICI New Zealand Ltd*, McGechan J. doubted whether the Court's powers under section 41 included the power to grant mandatory injunctions in the form of corrective advertising orders. His Honour felt that the failure of the New Zealand legislature to copy the amended section indicated that such extended powers were not intended.⁴¹

2.4.2 Interim Injunctions

Most of the cases decided under the Fair Trading Act have been applications for interim injunctions to restrain conduct alleged to contravene section 9 of the Act, pending determination of the substantive issues. Section 41 provides that the Court may grant an interim injunction "if in the opinion of the Court, it is desirable to do so".⁴²

In deciding applications for interim injunctions, the New Zealand and Australian courts have traditionally adopted an approach where the court asks itself two questions. The first is whether there is a "serious question to be tried". The second is whether the "balance of convenience" favours the granting of an interim injunction. In *Klissers*

⁴⁰ *Taylors Textiles Services Auckland Ltd v Taylor Bros. Ltd* (1988) 2 NZBLC 103,032. This passage was cited with approval by Bisson J. in *Prudential Building and Investment Society of Canterbury v Prudential Assurance Company* (1988) 2 NZBLC 103,351.

⁴¹ *E R Squibb and Sons (NZ) Ltd v ICI New Zealand Ltd* (1988) 2 NZBLC 103,382.

⁴² Section 41(3) and (4).

Farmhouse Bakeries v Harvest Bakeries Ltd, the Court of Appeal stated:

Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications.⁴³

The appropriateness of the "serious question to be tried" standard has been questioned in the context of section 9 cases. In *Arles Holdings Ltd v Burberry Mortgage Finance and Savings Ltd*, Holland J. suggested that the "extraordinarily wide" terms of the Act may mean that an applicant for an interim injunction must show a "strong prima facie" case.⁴⁴

However, most judges have adopted the traditional "serious question to be tried" test. In *E R Squibb and Sons (NZ) Ltd v ICI New Zealand Ltd*, McGechan J. preferred the normal standard.⁴⁵ However, he emphasised the dangers of interim injunctions being granted too freely when he said:

I believe that the public interest also requires consideration of a more pragmatic factor. It would not be in the public interest for any notion to spread that all a trader need to do to ruin a competitor's launch is find some arguable item in the competitor's promotional material which might be labelled misleading or deceptive, and then apply urgently to the Court for an interim injunction restraining use of those promotional materials. Interim injunctions in this area should not be allowed to become a matter of mere routine, turning the Court into a tool for marketing gamesmanship.

⁴³ *Klissers Farmhouse Bakeries v Harvest Bakeries Ltd* [1985] 2 NZLR 129 at p142.

⁴⁴ *Arles Holdings Ltd v Burberry Mortgage Finance and Savings Ltd* (Unreported) High Court Christchurch, CP 582/88, 14 October 88.

⁴⁵ *E R Squibb and Sons (NZ) Ltd v ICI New Zealand Ltd* (1988) 2 NZBLC 103,382.

One constraint on people who attempt to make use of the interim injunction procedure for purposes of marketing gamesmanship, is the requirement that an applicant must give an undertaking as to damages, before the Court will grant the application.⁴⁶

The "balance of convenience" limb of the test usually favours the applicant.⁴⁷ This is because the most commonly referred to factor under this limb is the difficulty of determining the amount of damages caused to a competitor by a deceptive advertisement.

In summary, contravention of section 9 of the Fair Trading Act does not amount to a criminal offence. However, a wide range of civil remedies are available under the Act. Corrective advertising orders may only be granted on the application of the Commerce Commission. A rival trader may apply for damages and both interim and permanent injunctions. The courts have recognised the difficulties of quantifying the amount of loss sustained by a trader due to a competitor's deceptive advertisement. For this reason, the balance of convenience usually favours the plaintiff in an application for an interim injunction. In practice, the award of an interim injunction often constitutes the final determination of the case.⁴⁸ This fact increases the risk of the procedure being used as part of competitive spoiling strategy by a rival trader, since the applicant need not show any loss on his part in order to obtain an injunction. One possible solution to this risk would be to require a higher standard of proof than the normal "serious question to be tried" test. This solution has not found favour with the New Zealand courts. The current solution appears to be to give some consideration to this factor when considering where the overall justice of the case lies.

⁴⁶ In *Commerce Commission v Megavitamin Laboratories Ltd* (Unreported) High Court Christchurch, M 532/87, 14 December 87, Holland J. held that this requirement extended to applications by the Commerce Commission.

⁴⁷ For a case where the balance of convenience did not favour the granting of an interim injunction see *Mount Cook Group Ltd v Waterwings Airways (Te Anau) Ltd* (Unreported) High Court Christchurch, CP 686/88, 10 February 88.

⁴⁸ Where the defendant fails to adhere to the strict terms of an interim injunction, the Court has power to impose a fine: *Direct Response Campaigns Ltd v Spectrum Mail Order* (Unreported) High Court Auckland , CP 2485/88, 9 December 88.

In the next section, the courts' interpretation of section 9 of the Act is discussed. Throughout this discussion, it needs to be remembered that as far as television advertisements are concerned, a rival trader will not usually have to prove that the advertisement contravenes section 9, but merely that there is "a serious question to be tried" as to whether this is the case. This is because the award of an interim injunction restraining broadcast of the advertisement until trial of the substantive issues would normally dispose of the case.

2.5 Section 9: Misleading or deceptive conduct

This section reviews the leading court cases on section 9 of the Fair Trading Act. The purpose of this review is, first, to determine the class of television advertisements that are prohibited by the section and, second, to identify the factual issues that arise when an advertisement is alleged to contravene the section.

As noted previously, section 9 provides that:

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

A common starting point in any discussion of the scope of section 9 is to note that it contains three elements:

- (i) conduct
- (ii) which is in trade
- (iii) and which is misleading or deceptive or is likely to mislead or deceive.

The first two of these elements would rarely cause difficulty in deciding whether a television advertisement contravenes the section. There is little doubt that the broadcast of a television advertisement promoting the sale of goods or services amounts to "conduct which is in trade". The main difficulty is in the application of the words "misleading or deceptive or likely to mislead or deceive".

In interpreting the phrase "misleading or deceptive", the New Zealand courts have made frequent reference to the principles developed in connection with section 52(1) of the Australian Trade Practices Act 1974. Apart from the limitation that section 52(1) only relates to conduct by a corporation, the wording of the section is identical to section 9 of the Fair Trading Act.

Cases decided under comparable legislation in the United Kingdom, are normally treated as being of persuasive authority in New Zealand. For several reasons, this attitude has not been adopted with respect to cases arising under the Fair Trading Act. First, the corresponding UK provisions⁴⁹ differ from the Fair Trading Act in that they include a definition of misleading advertising which limits the application of the concept to situations in which the economic interests of consumers are affected. Second, the regulations exclude cases concerning television advertisements which are dealt with by the Independent Broadcasting Association. Third, competitors have no right of action under the regulations. Only the Director General of Fair Trading can seek an injunction. In the only case decided under the Regulations, the Director General obtained an injunction against newspaper advertisements for a slimming aid.⁵⁰

The UK regulations were introduced following a European Community directive requiring harmonisation of member countries' laws on deceptive advertising.⁵¹ Most Community members have some provisions governing deceptive advertising. None of these provisions are sufficiently similar to the New Zealand Fair Trading Act to provide any guidance in applying section 9. Thus, the only foreign cases that have been referred to in New Zealand decisions are those decided under section 52(1) of the Australian Trade Practices Act 1974.

⁴⁹ Control of Misleading Advertising Regulations (SI 1988 No. 915)

⁵⁰ *Director General of Fair Trading v Tobyward* which is cited in *Consumer Affairs* No 96, Nov/Dec 1988.

⁵¹ 84/450/EEC

The principles derived by the Australian courts in deciding cases under section 52(1) are discussed below.

2.5.1 Australian cases

Most of the leading cases in which detailed consideration has been given to the interpretation of the phrase "misleading or deceptive" in the context of section 52(1) have been 'similar names' cases. These are cases where the corporate or product names chosen by the applicant and respondent have been very similar. The proceedings have usually arisen as applications for an injunction to prevent further use of a name that it alleged to contravene the section. These applications have often been based on both breach of section 52(1) and the common law tort of passing off.

A concise summary of the principles derived in such cases was provided by Wilcox J. in *Chase Manhattan Overseas Corp. v Chase Corp.*⁵² Wilcox J. stated five principles which he thought summarised "the legal principles relevant to the determination of the question whether the use by a corporation of a particular name amounts to conduct which is actually or potentially misleading or deceptive". These five principles are discussed in turn. The first is that:

- (i) Conduct cannot, for the purposes of sec.52, be categorised as misleading, or deceptive or likely to be misleading or deceptive unless it contains or conveys a misrepresentation: *Taco Company of Australia Inc. v. Taco Bell Pty Limited* (1982) ATPR 40-303 at p.43,751; (1982) 42 ALR 177 at p.202.

Wilcox's first principle is easy to apply to television commercials. The authority Wilcox J. cites for this principle is a passage in the combined judgment of Dean and Fitzgerald JJ. in the *Taco* decision which is as follows:

⁵² *Chase Manhattan Overseas Corp. v Chase Corp.* (1986) ATPR 47,328 at p 47,336.

Irrespective of whether conduct produces or is likely to produce confusion or misconception, it cannot, for the purposes of s.52, be categorised as misleading or deceptive unless it contains or conveys a misrepresentation.⁵³

The concept of a misrepresentation includes not only statements expressly made but also those that are implied. Thus, a statement in a television commercial that is literally true may imply another statement that is untrue. In such a case, the statement may be misleading or deceptive on the basis that it conveys an implied misrepresentation. This is the second principle of the Wilcox summary.

- (ii) A statement that is literally true may nevertheless be misleading or deceptive: see *Hornsby Building Information Centre Pty Limited v. Sydney Building Information Centre Pty Limited* (1978) ATPR 40-067 at p.17, 690; (1978) CLR 216 at p. 227. This will occur, for example where the statement also conveys a second meaning which is untrue: *World Series Cricket Pty Limited v. Parish* (1977) ATPR 40-040 at p.17 436 91977) 16 ALR 181 at p.201.

The first authority cited for this principle is a paragraph from the judgment of Stephen J. in the High Court of Australia which is as follows:

No doubt the meaning of the statutory prohibition which section 52(1) enunciates must be gained from the terms of the subsection itself; but nothing in those terms suggests that a statement made that is literally true, ie that the centre at Hornsby is conducted by the Hornsby Building Information Centre Pty Ltd may not at the same time be misleading or deceptive. It clearly may be so. To

⁵³ *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303 at p 43,751.

announce an opera as one in which a named and famous prima donna will appear and then produce and unknown young lady bearing by chance that name will clearly be to mislead or deceive. The announcement would be literally true but none the less deceptive, and this because it conveyed to others something more than the literal meaning which the words spelled out.⁵⁴

The second authority quoted is an extract from the judgment of Brennan J. in *World Series Cricket*:

Before a statement can be said to be misleading or deceptive or falsely to represent a fact, it must convey a meaning inconsistent with the truth. A statement which conveys no meaning but the truth cannot mislead or deceive or falsely represent; although a statement which is literally true may nevertheless convey another meaning which is untrue, and may be proscribed accordingly.⁵⁵

Following this principle, it seems that an advertisement can be found to be misleading or deceptive where it conveys an implied claim that is false. A problem arises in applying this principle to television advertisements since any implied claim might be conveyed to some members of the audience but not others. In addition, it is not clear whether the implied claim must be conveyed to the majority of viewers. Wilcox J.'s third principle suggests that a television advertisement can be found to be misleading or deceptive where it conveys a false implied claim to a minority of viewers. The principle states that:

- (iii) Conduct is likely to mislead or deceive if this is a real or not remote chance or possibility regardless of whether it

⁵⁴ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) ATPR 40-067 at p 17,690; (1978) CLR 216 at p 227.

⁵⁵ *World Series Cricket Pty Ltd v Parish* (1977) ATPR 40-040 at p 17,436; (1977) 16 ALR 181 at p 201.

is more or less than 50 per cent (sic): *Global Sportsman Limited v. Mirror Newspapers Limited* (1984) ATPR 40-463 at p. 45, 343; (1984) 55 LAR 25 at p.30.

In deciding whether conduct conveys an alleged implied representation, the Courts have often used the "reasonable man" test. This test holds that only representations that would be conveyed to a reasonably intelligent and reasonably informed person are recognised by the law. Wilcox J.'s fourth principle states that the "reasonable man" test is not the appropriate one in section 52(1) cases:

- (iv) The question whether conduct is, or is likely to be misleading is an objective one, to be determined by the Court for itself, in relation to one or more identified sections of the public, the Court considering all who fall within an identified section of the public, including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations: *Taco Company* at ATPR p.43, 752 ALR, p.202. The evidence of the formation in fact of an erroneous conclusion is admissible but not conclusive: *Global Sportsman* at ATPR p.45;342, ALR p.30.

A much more detailed description of the process by which the Court determines whether a particular representation is implied is contained in the passage cited which is from the joint judgment of Dean and Fitzgerald JJ. in the *Taco* case:

The difficulty which will commonly arise in a s.52 case is in determining whether the conduct contains or conveys, in all the circumstances, a misrepresentation and in assessing the significance to that question of evidence that one or more persons were in fact led into error. In extreme, but not necessarily infrequent, cases, it may be correct to hold as a matter of law, conduct said to contravene s.52 is incapable of conveying the untrue meaning alleged or any other false meaning. Such cases

aside, whether or not conduct amounts to a misrepresentation is a question of fact to be decided by considering what is said and done against the background of all the surrounding circumstances. In some cases, such as an express untrue representation made only to identified individuals, the process of deciding that question of fact may be direct and uncomplicated. In other cases, the process will be more complicated and call for the assistance of certain guidelines upon the path to decision. In a case, such as the present, where the suggested misrepresentation has not been expressly made and it is alleged that the relevant deception or misleading (sic) is, or is likely to be, of the public, the following propositions appear to be established as affording guidance.

First, it is necessary to identify the relevant section (or sections) of the public (which may be the public at large) by reference to whom the question of whether conduct is , or is likely to be, misleading or deceptive falls to be tested. (*Weitmann v Katies Ltd.* (1977) 29 FLR 336 per Franki J. at 339-40, cited with approval by Bowen CJ. and Franki J. in *Brock v Terrace Times Pty. Ltd.* 40 ALR 97 at 99: (1982) ATPR 40-267 at 43,412)

Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, "including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations" *Puxu Pty Ltd. v Parkdale Custom Built Furniture Pty. Ltd.* (1980) 31 ALR 73 per Lockhart J at 93: see also *World Series Cricket v. Parish*, supra per Brennan J (16 ALR at 203).⁵⁶

⁵⁶ *Taco Company of Australia Inc. v Taco Bell Pty Ltd* (1982) ATPR 40-303 at p 43,751; (1982) 42 ALR 177 at p 202.

This passage emphasises that whether conduct is misleading or deceptive is usually a question of fact. The first step in answering this question is to determine the class of person affected by the conduct. In the case of television advertisements, an obvious approach is to identify the people who watched the advertisement. The second step is to consider the impact of the advertisement on each of these people in turn. It is not sufficient to consider the impact on only the average member of such a group.

The second part of Wilcox J.'s fourth principle relates to the significance to be attributed to evidence offered by a member of the group as to the representations inferred from the advertisement. The point is that such evidence is relevant to the question before the Court, but cannot be conclusive. This point is explained further in the *Taco* passage cited below:

Thirdly, evidence that some person has in fact formed an erroneous conclusion is admissible and may be persuasive but it is not essential. Such evidence does not of itself conclusively establish that conduct is misleading or deceptive or likely to mislead or deceive. The court must determine that question for itself. The test is objective.⁵⁷

The application of this statement to television advertisements is not immediately clear. The underlying assumption appears to be that people are likely to infer different messages from the same ad. Thus, evidence that one person interpreted an ad seen by thousands in a particular way cannot be conclusive because it is possible that this person's response was atypical. The statement does not consider the situation where everyone who saw the commercial gave evidence. If they all agreed, then there would appear to be no room left for argument as to whether the ad conveyed a misrepresentation.

⁵⁷ *Taco Company of Australia Inc.v Taco Bell Pty Ltd* (1982) ATPR 40-303 at p 43,751; (1982) 42 ALR 177 at p 202.

However, this would be to overlook the last principle in Wilcox J.'s summary:

- (v) Ordinarily, mere proof of confusion or uncertainty will not suffice to prove misleading or deceptive conduct: *Parkdale Custom Built Furniture Pty Limited v. Puxu Pty Limited* (1982) ATPR 40-307; (1982) 149 CLR 191. However, where confusion is proved, the Court should investigate the cause; so that it may determine whether this is because of misleading or deceptive conduct on the part of the respondent: *Taco* at ATPR p 43,752; ALR p 203.

This last principle recognises that the extraction of meaning from an advertisement is an interactive process that depends partly on the content of the advertisement and partly on the background knowledge of members of the audience. It may be that in some cases the inferences drawn from the advertisement are due to unreasonable assumptions on the part of some members of the audience. In the passage cited from the *Taco* case, this principle was explained as follows:

Finally, it is necessary to inquire why proven misconception has arisen: *Hornsby Building Information Centre v. Sydney Building Information Centre* (18 ALR at 647; 140 CLR at 228). The fundamental importance of this principle is that it is only by this investigation that the evidence of those who are shown to have been led into error can be evaluated and it can be determined whether they are confused because of misleading or deceptive conduct on the part of the respondent.

This principle is commonly referred to as the "erroneous assumption defence". Its status in Australia remains controversial. The only case in which the Court has explicitly based its decision on this principle is the *Big Mac* case.⁵⁸ In that case, it was alleged that McWilliams' use

⁵⁸ *McWilliams Wines Pty Ltd v McDonalds System of Australia Pty Ltd* 33 ALR 394.

of the words "Big Mac" on one of its large size bottles of wine was misleading in that such use would lead members of the public to infer that McDonald's had given their consent to use to the words. Smithers J. held that this inference was based on the mistaken assumption that McDonald's had the exclusive right to use these words on all types of products. He thus refused to find an advertisement picturing the wine to contravene section 52(1). His reasoning was as follows:

It follows from the above that those persons who, by approaching the advertisement with erroneous ideas in their mind and interpreting its contents by reference thereto, and are thereby misled, do not arrive at their erroneous conclusion as a consequence of the terms of the advertisement, but because of the application, to those terms, of reasoning based on erroneous assumptions of their own. A member of the public can hardly complain of being misled by the conduct of another if because of errors made by himself he erroneously interpreted the nature of that conduct. And one would not contemplate that conduct, only misleading to those who misinterpret it because they apply erroneous assumptions in the exercise of interpretation, would be proscribed by the legislature. Such conduct would not be, one would think, truly misleading or deceptive."

2.5.2 New Zealand cases

In interpreting the words "misleading or deceptive or likely to mislead or deceive" in section 9 of the Fair Trading Act 1986, the New Zealand courts have made frequent reference to the Australian decisions under section 52(1) of the Trade Practice Act 1974.

Wilcox J.'s summary of principles has been quoted with approval in two cases involving section 9 of the Fair Trading Act. Although Wilcox J. expressly limited his summary of principles to 'similar names' cases, McGechan J. saw no reason why these principles should not be applied

to deceptive advertising cases.⁵⁹ Similarly, this summary of principles was adopted by Sinclair J. in the context of a case concerning pre-contractual negotiations.⁶⁰

However, the New Zealand Court of Appeal has warned against the tendency to see these principles as superceding the words of section 9. In the *Taylors* case,⁶¹ Cooke P. stated that:

As to when conduct is to be characterised as misleading or deceptive, judicial exegesis probably can do little at a general level to expand upon the ordinary words of the section: and obviously it cannot be allowed to supercede them. In the end, one must always return to them and apply them to the particular facts.⁶²

A similar reluctance to embark on a detailed analysis of the meaning of the words "misleading or deceptive" had been shown earlier by the Court of Appeal in the *Mills* case.⁶³ After referring briefly to the leading Australian decisions, Casey J. stated:

We do not find it necessary to embark on a discussion of the views expressed in those cases. The simple language in the three lines of s.9 is clear and unambiguous and, at least for the resolution of a straightforward case such as this, requires neither interpretation nor qualification beyond observing that the Act is intended to operate in a society which expects that

⁵⁹ *E R Squibb and Sons (NZ) Ltd v ICI New Zealand Ltd* (1988) 2 NZBLC 103,382.

⁶⁰ *Mills v United Building Society* 2 NZLR 392 .

⁶¹ *Taylors Textiles Services Auckland Ltd v Taylor Bros. Ltd* (1988) 2 NZBLC 103,032.

⁶² This passage was adopted by Fraser J. in *Griffins & Sons v Regina* (Unreported) High Court Christchurch, CP 72/89, 1 August 89; and also by Bisson J. in *Prudential Building and Investment Society of Canterbury v Prudential Assurance Company* (1988) 2 NZBLC 103,351.

⁶³ *Mills v United Building Society* (1988) 2 NZBLC 103,337(CA).

in general, honest people may buy and sell what they please.

Similarly in *Pitstop Exhausts*, Wylie J stated:

Here, as I see it, the answer lies in a simple issue of fact. Is the conduct in which the defendants are engaging or intending to engage of such a nature that it is likely to be misleading or deceptive?⁶⁴

The New Zealand courts have emphasised that whether particular conduct is within the section is a question of fact. In deciding this factual question, they have generally followed a similar approach to that laid down in Australia. After the passage from the *Mills* case cited above, Casey J. continued:

Whether any particular conduct by a vendor is misleading or deceptive, or is likely to mislead or deceive, is essentially a question of fact. As the High Court of Australia recognised in *Parkdale Custom-built Furniture Pty v. Puxu Pty Ltd* [1982] 149 CLR 141; [1982] 42 ALR 1, the test is objective; that some consumers have been misled is not conclusive. The character of the market reasonably likely to be affected by the conduct must also be taken into account.

It seems safe to conclude that Wilcox J.'s "summary of principles" contains an accurate description of the process the Court would employ in deciding whether a television advertisement contravenes section 9 of the Fair Trading Act. This process begins by the Court asking itself whether the advertisement conveys a misrepresentation. Where the advertisement contains an explicit statement that is false, this is likely to be a simple matter. However where all the explicit statements in the advertisement are true, a further question arises as to whether the advertisement conveys an implied statement that is false. The first step in answering this question is to define the people likely to be

⁶⁴ *Pitstop Exhaust Ltd v Alan Jones Pit Stop* (1988) 2 NZBLC 102,968.

affected by the advertisement. Next the court will consider the characteristics of members of this group. Finally, it will attempt to determine whether the advertisement conveys to a significant proportion of members of this group the implied misrepresentation alleged.

A useful illustration of this process is contained in the judgment of McGechan J. in *E R Squibb and Sons (NZ) Ltd v ICI New Zealand Ltd*.⁶⁵

The case concerned an application for an interim injunction to restrain the defendant from making deceptive statements in certain advertising materials regarding its prescription heart drug, Zestril. These materials included a wall chart, a quick reference guide, a monograph, and two brochures which had been distributed at various times to medical practitioners.

The statement of claim specified ten implied representations that were alleged to be conveyed by these materials. It then set out what it alleged to be the true facts with respect to each of these representations. In its statement of defence, the defendant admitted making two of the ten representations but denied making the other eight. It asserted that none of the ten representations was false.

McGechan J. explicitly relied on the second principle of Wilcox J.'s summary in arriving at the conclusion that:

If a statement contains no meaning but the truth, it cannot mislead or deceive. If, however, it also conveys another meaning, which is untrue, then it may fall within s.9.

In considering the question of whether there was a serious question to be tried, McGegan J started by identifying the relevant section of the public. He concluded that:

⁶⁵ *E R Squibb and Sons (NZ) Ltd v ICI New Zealand Ltd* (1988) 2 NZBLC 103,382.

It comprises doctors operating in a range of situations from the knowledgeable specialist to the pragmatic general practitioner, and in perception from the acute to the hurried.

McGechan then turned to examine each alleged representation in turn. He first stated the explicit statement in the promotional materials. Then, he considered whether this statement implied another statement. In some cases, he had no doubt that this was so:

The statement is that Zestril has more complete plasma ACE inhibition in vitro than Capoten. The implication is clear: Zestril is a more effective in vitro inhibitor than Capoten.

In other cases, he had more doubt:

The statement is that there are peak and trough effects associated with Capoten in heart failure patients. There is a possible implication that Zestril does not produce peaks and troughs and therefore is superior"

The statement is that Capoten is a first generation ACE inhibitor, and Zestril is a third generation. An inference is invited that the third generation will be an improvement upon the first, ie that there will have been an improvement in quality. I think there is a risk that the reader will draw that inference. Modern habits of thought tend to involve assumptions that the new will improve upon its predecessors.

After finding that in each case, the explicit statement seemed to imply another one, McGechan J. went on to consider whether each implied statement was accurate. In doing so, he made many direct references to various clinical studies and published reports. His conclusion was that there was a serious question to be tried as to whether each of the ten statements was misleading or deceptive.

Having arrived at this conclusion, McGechan J. then considered the question of where the balance of convenience lay. In particular, he considered whether damages might adequately compensate the plaintiff. The plaintiff had estimated lost sales as \$370,000 per year. However, His Honour was not inclined to accept this figure or even that a reliable estimate could be made.

Damage to reputation is an imponderable. Damage to goodwill, as in a sense the habit of doctors prescribing can be called, is notoriously difficult to quantify.

In deciding to award an interim injunction, McGechan J. emphasised the role that considerations of the public interest played in his decision. He saw the public health benefit in promoting accuracy in manufacturer's claims about drugs as outweighing the danger of interim injunctions becoming a tool for competitive gamesmanship.

In conclusion, Wilcox J.'s "summary of principles" have been widely cited in decisions under section 9 of the Fair Trading Act. His first principle, that conduct must convey a misrepresentation in order for it to be misleading or deceptive has been almost universally accepted in New Zealand.⁶⁶ His second principle, that an explicit statement which is literally true may be misleading or deceptive where it conveys an implied statement that is false, has been followed in several section 9 cases. His third principle has not been mentioned in New Zealand cases.⁶⁷

⁶⁶ The only apparent exception is a statement of Bisson J. in the Court of Appeal decision in *Prudential Building and Investment Society of Canterbury v Prudential Assurance Company* (1988) 2 NZBC 103,351: "While the tort of passing off involves proof of a misrepresentation . . . the provisions of s.9 of the Fair Trading Act require no more than conduct, in trade, which is "misleading or deceptive or is likely to mislead or deceive". The distinction is a clear one."

⁶⁷ This principle, which states that conduct is likely to mislead if this is a real not remote possibility regardless of whether it is more or less than 50%, seems to be an explanation of the term "likely" as it occurs in section 52(1) and section 9.

His fourth principle has been followed in several cases. The first part of this principle is that whether conduct conveys an implied representation must be determined by reference to all the members of the class likely to be affected by the conduct.⁶⁸ The second part of this principle concerns the probative value of certain evidence. Evidence that an implied representation was conveyed to one or a few members of the relevant class is relevant to the Court's decision but is not, by itself, conclusive of the question whether the implied representation is conveyed. This is because the Court must consider all the members of the relevant class. A detailed examination of the types of evidence that may be adduced in connection with this issue is provided in section 2.6 of this chapter.

Wilcox J.'s fifth principle has received a mixed reaction in New Zealand. This principle states that where it is shown as fact that a misrepresentation has been conveyed to members of the relevant class, the Court should consider whether it is fair to hold the defendant responsible for this fact, or whether the defendant should be excused on the basis that the misrepresentation only arose by virtue of unwarranted assumptions on the part of members of the relevant class.

In the High Court decision in *Mills* case,⁶⁹ Sinclair J. explicitly based his decision on this principle. His decision was upheld on appeal but the Court of Appeal did not comment on the principle. In *Trustbank*, the Court of Appeal appeared to disapprove of the principle. Cooke P. stated:

Counsel for the appellants here would extract from the judgment of Mason and Brennan JJ. a proposition formulated by him in the words "consumer confusion based on erroneous assumptions - not least assumptions about legal restrictions on lawful use of a trade name - does not establish a breach of the section" Again, we doubt whether an unqualified general proposition to that

⁶⁸ The problem of determining the class likely to be affected by a television commercial is discussed further in section 6.4.2 in Chapter 6.

⁶⁹ *Mills v United Building Society* (1988) 2 NZBLC 103,337(CA).

effect was intended to be laid down, and, if it were, would respectfully regard it as a gloss on the statute open to misuse.

In the next section, the role that evidence has played in decisions under section 9 is discussed.

2.6 Evidence in section 9 cases

In the previous section, the court's approach to determining whether conduct is misleading or deceptive in the context of injunction applications under section 41 of the Fair Trading Act was discussed. This section discusses the evidence that has been adduced on this issue. Most of the cases decided under section 9 have been applications for interim injunctions. On such applications, the court is not required to undertake an exhaustive evaluation of the evidence. It is merely concerned with whether the applicant has a *prima facie* case. For this reason, many of the judgments contain little detailed information about the evidence adduced.

In several cases decided under section 9, the court has come to the conclusion that a *prima facie* case of misleading or deceptive conduct has been made out without any direct evidence that anyone has perceived the conduct to convey an implied representation. The court has concluded that the conduct conveys an implied misrepresentation to members of the relevant section of the public based only on its own examination of the conduct.

*South Pacific Tyres NZ Ltd v David Craw Cars Ltd*⁷⁰ concerned an application for an interim injunction to restrain the defendant from importing from Japan second-hand tyres bearing the "Dunlop" trademark. The application was based on trademark infringement and breach of section 9.

It was alleged that the sale of such tyres in New Zealand was misleading in that it conveyed two implied representations that were

⁷⁰ *South Pacific Tyres NZ Ltd v David Craw Cars Ltd* (Unreported) High Court Christchurch, CP 346/89, 24 July 89.

false: first, that the tyres were the same as those manufactured and sold by the plaintiff in New Zealand, and second, that the plaintiff would provide warranty and other customer services in respect of the tyres.

Fraser J. found that the plaintiff had made out a strong *prima facie* case both as to trademark infringement and breach of section 9, despite the fact that no evidence was offered as to consumers' perceptions of such tyres.

Although there is no evidence of any actual confusion on the part of any consumer, I infer that persons buying the defendant's second hand tyres which bear the trademark and device of the plaintiffs would naturally assume that the tyres had been made by or with the authority of the plaintiffs, the proprietors and users of the marks. Such an assumption may well carry with it a further assumption as to quality, (e.g. on the basis of previous usage of the plaintiff's tyres) and the risk in future that the quality of the Japanese tyres will be attributed to the plaintiffs' tyres.

I think that the confusion must inevitably follow from the fact that the tyres are sold in the way of trade with a trade mark and device identical to that of the plaintiffs.

Several judges have commented that applications for interim injunctions based on section 9 of the Act, seem to turn largely on the individual judge's reaction to the challenged conduct. The Court of Appeal in *Trustbank*,⁷¹ noted a comment to this effect by Ellis J. in the High Court:

Ellis J. said in his judgment that he acted to no small extent on first impression and inference. Cases about whether tradenames or styles or getups of competitors are too close to be countenanced by the Court, whether the cause of action considered be passing off at common law or breach of the Fair Trading Act or Trade Mark

⁷¹ *Trust Bank Auckland Ltd v ASB Bank New Zealand Ltd* [1988] 2 NZLR 1; (1989) 2 NZBC 103,558.

legislation, tend to depend to a special degree on judicial reaction, however full the evidence and arguments of counsel.

This approach was criticised by Mr Justice Gault, in *Allied Liquor Merchants Ltd v Independent Liquor (NZ) Ltd*,⁷² where His Honour said:

It is said sometimes that it is a matter of impression. Such an approach must be taken with care. Judicial impression can be no more reliable than any other informed impression. It must not be capricious, idiosyncratic or intuitive impression but rather, impression formed having regard to the long-established tests for the assessments of likely reaction to a mark, label or trade description.

In several cases, evidence of what members of the public have inferred from the conduct has been adduced. In interim proceedings, this evidence is usually in the form of affidavits.

Wilson's Army Navy Western Ltd v Recycled Recreation Ltd,⁷³ concerned an application for an interim injunction to restrain the defendant from selling goods similar to that of the plaintiff in the shop next door. The application alleged that such conduct constituted a breach of section 9 in that it implied that the two shops were part of the same business. In support of this contention, affidavits were filed by three members of the public stating their belief that the new shop was an extension of the plaintiff's business. In deciding to grant the interim injunction, Williamson J. stated:

In my view this conduct does come within the meaning of s.9 since it was conduct likely to mislead persons and

⁷² *Allied Liquor Merchants Ltd v Independent Liquor (NZ) Ltd* (Unreported) High Court Auckland, CP 2614/89, 17 August 89.

⁷³ *Wilson's Army Navy Western Ltd v Recycled Recreation Ltd* (Unreported) High Court Dunedin, CP 99/89, 19 May 88.

indeed the evidence is clearly that some persons were misled into thinking that the shop operated by the Respondents was part of the Plaintiff's business.

Griffin & Sons Ltd v Regina,⁷⁴ concerned an application for an interim injunction to restrain the defendant from packaging its pineapple lumps in a way similar to that of the plaintiff. The application was based on section 9 and the common law action of passing off.

Affidavit evidence was submitted by both parties. Evidence was given in support of the application by the plaintiff's marketing manager, regional sales manager, one of its sales representatives, and a supermarket manager. All these stated their opinion that the similarity between packages was such that consumers would believe the defendant's product was produced by the applicant. On behalf of the defendant, evidence was offered by its managing director, one of its sales representatives and the managing directors of two confectionary wholesalers. Each of these stated that they had received no complaints from consumers or retailers concerning the packages.

Fraser J. described in detail the similarities and differences in layout, colours and lettering of the two packages. He had no difficulty in finding a serious question to be tried as to breach of section 9, based "on the affidavits and my own evaluation of the packaging and notwithstanding the affidavits filed by the defendant".

In coming to this conclusion, Fraser J. seems to have had in mind the effect of the packaging on people who had previously bought the plaintiff's product. Yet none of the affidavits were by people who were within this category.

In several cases, expert opinion evidence has been offered as to the public's perception of the challenged conduct. *Television New Zealand*

⁷⁴ *Griffin & Sons Ltd v Regina* (Unreported) High Court Christchurch, CP 72/89, 1 August 89.

Ltd v Gloss Cosmetic Supplies Ltd,⁷⁵ involved an application for an interim injunction to restrain the defendant from using the name "GLOSS" on its planned range of cosmetics. The application was based on both passing off and section 9.

After finding that the word "gloss" was an ordinary descriptive term, Robertson J. turned to consider the argument that it had acquired a secondary meaning by virtue of a television series called "Gloss". His Honour was initially disinclined to accept this view but was persuaded by the testimony of advertising experts:

I confess to a degree of personal cynicism as to the notion of a cult or secondary meaning having developed. Perhaps that reflects an unwillingness to accept the potency of the mass media in fashioning and influencing everyday occurrences. However I am no expert in the field and I cannot overlook the quality or quantity of evidence which the plaintiff has put before me. Dale Walsh Wrightson, the Managing Director of Calypso Communications is of the view that, on the basis of his experience, any cosmetic manufacturer selling a range of cosmetics in New Zealand in July 1988 onwards under the name of "GLOSS", would benefit from the television show's extensive reputation and reap commercial advantage. Catherine Saunders, described as one of the leading communicators in the country, asserts that there is an obvious and irrefutable association of "GLOSS" the cosmetic viz a viz "GLOSS" the television series and expresses surprise that it could be otherwise viewed. Kevin Blight, the proprietor of Media Consultancy, who has 20 years experience in the industry, believes that a "GLOSS" range of cosmetics or fashion gear would inevitably be associated with the TV programme by the public. Terrence Christopher King, the Joint Chief Executive of Saachi and Saachi Advertising Ltd is also

⁷⁵ *Televisor New Zealand Ltd v Gloss Cosmetic Supplies Ltd* (Unreported) High Court Auckland, CP 741/89, 8 May 89.

persuaded of the nexus between any product in the cosmetic world and the show itself. Robert Anster Harvey the Chairman of MacHarman Ayer Advertising Ltd, a leader in advertising for 25 years, expresses surprise that the subject of "passing off" could be in dispute as the connection is obvious and beyond question.⁷⁶

The defendant produced experts in the cosmetics industry but the learned judge seems to have preferred the opinion of communications experts:

I respect their assessment but those who are qualified and experienced in the world of communication are unanimous in the view that an association is inevitable. When the evidence is as strong on that point I am forced to the conclusion that there is a serious question to be argued in respect of the public perception of the use of the word "GLOSS" despite my own scepticism.⁷⁷

There have been only three cases under section 9, where counsel has introduced evidence in the form of consumer research data.⁷⁸ In two of these, surveys had been conducted specifically for the purposes of the litigation. In the other, counsel introduced the results of a survey that had been conducted for purposes unconnected with the litigation.⁷⁹ Discussion of the courts' evaluation of this evidence is delayed until Chapter Four.

2.7 Summary

⁷⁶ *Ibid* at p12.

⁷⁷ *Ibid* at p13.

⁷⁸ *Pitstop Exhaust Ltd v Alan Jones Pit Stop* (1988) 2 NZBLC 102,968; *ASB Bank Ltd v Trust Bank Auckland Ltd* (1989) 2 NZBLC 103,553; *Comite Interprofessionnel du Vin de Champagne v Veuve Clicquot Ponsardin S.A.* (Unreported) CP 672/87, 7 August 1990.

⁷⁹ *Pitstop Exhaust Ltd v Alan Jones Pit Stop* (1988) 2 NZBLC 102,968.

In this chapter, the law relating to deceptive television advertising in New Zealand was reviewed. The purpose of this review was to describe a class of litigation in which empirical studies could provide evidence that might be relevant to the court's decision.

It was concluded that the Fair Trading Act 1986 radically changed the legal consequences of broadcasting a deceptive television commercial. This was due partly to the breadth of the prohibition contained in section 9 of the Act. It was also due to the fact that, under section 41, rival traders can apply to the court for both interim and permanent injunctions. On such applications, the main issue that the court is called upon to decide is whether the advertisement conveys a misrepresentation.

A review of the cases, showed that in deciding this question, the courts have generally followed the approach summarised by Wilcox J. in the *Chase* case. The first issue addressed is whether the conduct conveys either an explicit or an implied misrepresentation. Where the alleged misrepresentation is an implied one, the first step in answering this question is to define the section of the public affected by the conduct. The second step is to decide whether the implied misrepresentation is conveyed to members of this group.

Given this approach, it would seem that the results of empirical tests could provide highly probative evidence. It was noted, however, that the Court frequently decides that an advertisement conveys an implied misrepresentation based on its own interpretation of the advertisement. There is no requirement for any other evidence to be provided. Evidence has been offered by individual members of the audience in some cases. Expert opinion evidence has also been offered as evidence of the public's perception of conduct alleged to contravene section 9. Evidence of the results of market surveys have only been offered in three cases. Discussion of these cases was delayed until Chapter Four.

Chapter Three examines the empirical tests that have been developed to determine whether an advertisement is misleading.

CHAPTER THREE

DECEPTIVE ADVERTISING RESEARCH

3.1 Introduction

In chapter one, three objectives were stated. The first was to define a class of deceptive advertising litigation in which the court might give some weight to the results of consumer tests. This objective was addressed in the previous chapter. The second objective was to describe the type of test that is likely to be given the most weight in this class of litigation. This chapter takes the first step towards meeting this objective. It describes the types of tests that have been proposed by consumer researchers as means of determining whether an advertisement is misleading. Most of these tests have been devised in the United States. It is thus necessary to begin by briefly reviewing the regulation of deceptive advertising in the United States. Following that, the empirical studies of deceptive advertising will be discussed.

3.2 The FTC's regulation of deceptive advertising

In the United States, deceptive advertising is regulated under two federal statutes: the Federal Trade Commission Act 1914 and the Lanham Act 1946.¹

The Federal Trade Commission Act 1914 established the Federal Trade Commission which is commonly referred to as the "FTC". Under section 5 of the Act, the FTC is empowered to institute proceedings against "unfair or deceptive acts or practices in commerce". In its original form, the section prohibited only "unfair methods of competition in commerce". The courts adopted an interpretation of this phrase that meant that the FTC had to show that some injury to competition resulted from the practice. In 1938, the Wheeler Lea Amendment Act extended the scope of section 5 to include "unfair or deceptive acts or practices in commerce". The effect of the Amendment was to remove

¹ Misleading advertisements for prescription drugs are also regulated by the Federal Food Drug and Cosmetics Act.

the need for the FTC to show some injury to a competitor as a result of a deceptive advertisement.²

The main enforcement mechanism available to the FTC is the "cease and desist" order.³ The FTC investigates complaints received from the public. Where it considers that the advertisement is in violation of section 5, it normally sends to the advertiser a proposed order to cease and desist from the violation. The defendant may consent to the order, in which case the matter is resolved. If the defendant chooses not to consent, however, the matter is brought before an administrative law judge for resolution. The administrative law judge's opinion is forwarded to the FTC Commissioners who may agree with or modify the opinion. If they agree with the opinion, a cease and desist order is issued. The defendant may appeal this order within 120 days. If no appeal is filed, the order becomes final. Since the FTC cannot enforce its own orders, a civil action in federal district court seeking civil penalties or injunctive relief is commenced when the order is violated.⁴

In October 1983, the FTC set out a policy statement on deceptive advertising.⁵ This statement summarised the Commission's interpretation of deception as follows:

The Commission will find deception if there is a misrepresentation, omission or practice that is likely to

2 Charlton F.J. and Fawcett W.A. (1969) The FTC and False Advertising, Kansas Law Review Vol 17 (1969) pp 599-623, at p 609.

3 The FTC also has power to order corrective advertising in some circumstances. See: Pridgen D. and Preston I.L. (1980) Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission, Georgia Law Review Vol 14 (Summer 1980) pp 635-679, at p 652.

4 Welti B. (1983) The Need for a Statutory Definition of "Deceptive" Advertising, New England Law Review Vol 19:1, 1983, pp 127-149, at p 128.

5 This statement reflected a previous proposal by FTC Chairman James Miller for a statutory definition of deception to be included in the Federal Trade Commission Act. See Welti B. (1983) *supra* at p 135.

mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.

The statement went on to explain each of the three essential elements:

First there must be a misrepresentation, omission or practice that is likely to mislead the consumer.

Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances.

Third, the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely because consumers are likely to have chosen differently but for the deception.

This statement did not meet the approval of all five Commissioners. Two Commissioners subsequently wrote dissenting statements. The dissenting minority challenged the majority's assertion that the statement was merely a restatement of prior case law.

The FTC has no right to impose fines or award damages. Neither is there a right given to consumers or competitors to institute proceedings in respect of deceptive advertising. However, under section 43 (a) of the Lanham Act 1946, a private citizen or company has the right to bring proceedings against a competitor's deceptive advertising. The usual remedy sought is an injunction preventing further publication of the advertisement. In a few cases, damages have also been awarded. Discussion of proceedings under the Lanham Act is delayed until Chapter 4.

There is a large body of literature, in both the marketing and legal journals, discussing the FTC's approach to regulation of deceptive advertising. Five themes emerge in this literature. First, the need for an operational definition of deceptive advertising. Second, the use of

consumer research evidence in FTC hearings. Third, the FTC's attitude to puffery.⁶ Fourth, the FTC's focus on verbal as opposed to pictorial claims in advertising. Fifth, the effect of the 1983 Policy Statement. Each of these issues is discussed in turn in this section.

3.2.1 Definitions of deceptive advertising

Prior to the 1983 policy statement, the FTC had consistently stated that the standard it applied in deciding whether advertisements contravened section 5 was whether the advertisement had the 'capacity to deceive'. This standard had been accepted by reviewing courts.

Several authors argued that this standard was unacceptably broad and vague. For example, Pollay (1969)⁷ states that the capacity to deceive standard:

. . . gives the illusion that there are real standards by which an advertisement can be classified as nondeceptive; but in fact, all ads *could* be effectively attacked on the basis of their capacity to deceive.⁸

Later he states:

The principal flaw in the employment of the 'capacity to deceive' standard is that it calls for the FTC and courts to make hypothetical suppositions about how consumers might interpret an advertisement, an analytic procedure which, given the complexities of the communication

⁶ "Puffery" is a legal term that refers to exaggerated statements by a seller as to a product's qualities. It is discussed further in section 3.2.3 of this chapter.

⁷ Pollay R. W. (1969) Deceptive Advertising and Consumer Behaviour: A Case for Legislative and Judicial Reform *Kansas Law Review* Vol 17 (1969) pp 625-638.

⁸ Ibid at p 632. Following the literature, the term "ad" is sometimes used in this thesis to avoid tiresome repetition of the word "advertisement".

process, ought always to lead to a judgment of the advertisement's capacity to deceive.⁹

Pollay suggests that criteria based on actual consumer interpretation of advertisements would not only allow the FTC and the courts to have more confidence in their decisions, it would also enable advertisers to make a reliable independant assessment of whether their advertisements are deceptive.

This last point has been echoed in several articles, many of which have offered definitions that are intended to allow a more objective basis for the exercise of the FTC's powers. For example, Aaker (1974)¹⁰ offered a definition of the term 'deception' as follows:

Deception is found when an advertisement is the input into the perceptual processes of some audience and the output of that perceptual process (a) differs from the reality of the situation and (b) affects buying behaviour to the detriment of the consumer.

This definition focused attention on the effect of an advertisement on consumers' *purchasing* behaviour.

Gardiner (1975)¹¹ discussed the need for a clear definition in order to provide an objective test of deceptive advertising. He stated:

What is needed is, first, a common understanding of deception that focuses on the consumer. Then, accepted ways of detecting deception must be devised.¹²

⁹ Ibid at p 637.

¹⁰ Aaker, D.A. (1974) Deceptive Advertising, in : D. A. Aaker & G.S. Day (eds.) Consumerism: Search for the consumer interest., New York : The Free Press, 1974.

¹¹ Gardner D. M. (1975) Deception in Advertising: A Conceptual Approach, Journal of Marketing Vol 39 (January 1975) pp 40-46.

¹² Ibid at p 40.

Gardner praises Aaker's definition as focussing attention on consumer perceptions and purchase behaviour. However, he feels that it fails to explicitly spell out the interaction between the advertisement and the accumulated beliefs and experiences of the consumer.¹³ He therefore offers a definition of "deception" as follows:

If an advertisement (or advertising campaign) leaves the consumer with an impression(s) and/or belief(s) different from what would normally be expected if the consumer has reasonable knowledge, and that impression(s) and/or belief(s) is factually untrue or potentially misleading, then deception is said to exist.

The logic of this definition is difficult to follow. Firstly, having praised Aaker's definition for focusing attention on purchase behaviour, Gardner makes no mention of this factor in his definition. Instead, he identifies consumers' *beliefs* as the critical factor. Secondly, the inclusion of the term "potentially misleading" seems to render the definition circular since a belief that is "potentially misleading" is presumably one that might give rise to "deception".

Jacoby and Small (1975)¹⁴ follow Gardiner in indentifying beliefs as the central concept in an operational definition of misleading advertising. They discuss the powers given to the Food and Drug Administration (FDA) to regulate prescription drug advertisements that are "misleading". Jacoby and Small support the idea of using empirical tests to determine whether physicians are misled by an advertisement. They emphasise the need for an operational definition:

However, to empirically determine whether a given advertisement is misleading one must first have a clear definition of what constitutes having been misled.¹⁵

¹³ Ibid at p 40.

¹⁴ Jacoby J and Small C. (1975) The FDA Approach to Defining Misleading Advertising, Journal of Marketing Vol 39 (October 1975) pp 65-68.

¹⁵ Ibid at p 66.

They propose a definition of the term "misleading prescription drug advertisement" as follows:

A misleading drug advertisement is one which causes - either through (1) its verbal content, (2) its design, structure and/or visual artwork, or (3) the context in which it appears - at least n% of a representative sample of practicing physicians to have common impression or belief regarding the advertised drug which is incorrect or not justified.¹⁶

In the authors' view, the n% figure should vary according to the consequences of a reader being mislead. Where a possible consequence was the death of a patient, a figure of 5% might be appropriate. In other cases, a figure around 25% might be more suitable. Jacoby and Small claim that:

This approach focuses directly on the central issues involved in determining whether an ad is misleading. It is rigorous in a scientific empirical sense relative to any previously published proposal for evaluating whether an ad is misleading, and it is subject to minimal subjective interpretation. Without such an objective, systematic approach to the evaluation of advertisements, judgment regarding the acceptability or unacceptability of advertisements will remain open to legitimate criticism by a variety of concerned groups.¹⁷

Similarly, Olson and Dover (1978)¹⁸ offer a definition that focuses on consumer beliefs about the advertised product.

16 Ibid at p 66.

17 Ibid at p 68.

18 Olson J. C. and Dover P.A. (1978) Cognitive Effects of Deceptive Advertising, *Journal of Marketing* Vol 15 (February 1978) pp 29-38.

A deceptive advertisement is defined as one that creates a false or incorrect belief about the product.¹⁹

Armstrong, Kendall and Russ (1975)²⁰ discuss a limitation of definitions based simply on the existence of false beliefs:

Deception occurs when consumers perceive and believe false claims either made or implied in the ad. To be of any concern however, these false claims must be relevant to consumers' decisions to purchase a brand in the product category. Falsely held beliefs about an irrelevant attribute are technically a deception, but because they are unlikely to affect the decision process it seems useful to distinguish between them and falsely held beliefs that are relevant.²¹

Shimp (1983)²² summarises the literature on definitional issues as follows :

Two major conceptualisations of the nature of deception have been advanced. The encompassing view holds that deception occurs when either a false advertising claim or a true but unqualified claim is perceived and believed, thereby altering the receiver's cognitive structure in a fashion that a nondeceptive claim would not. A more rigorous conceptualisation contends that deception occurs only if purchase behaviour is affected.. . . Based on the

19 Ibid at p 30.

20 Armstrong G.M., Kendall C.L. and Russ F.A. (1975) Applications of Consumer Information Processing Research to Public Policy Issues, Communications Research, Vol 2, pp 232-45.

21 Armstrong G.M., Gurol M.N. and Russ F.A. (1979) Detecting and Correcting Deceptive Advertising, Journal of Consumer Research, Vol 6 (December 1979) pp 237-246, at p 238.

22 Shimp T.A. (1983) Evaluative Verbal Content and Deception in Advertising : A Review and Critical Analysis, in: Harris R.J. (ed) Information Processing Research in Advertising, Lawrence Erlbaum , New Jersey , 1983, pp 195-216.

more rigorous conceptualisation of deception, the following sequence must occur in order for a particular evaluative claim to be regarded as deceptive.

- 1 The consumer *perceives* the claim.
- 2 The claim (or implication therefrom) is *believed*.
- 3 The claim (or implication therefrom) is *important*.
- 4 The belief (or implication therefrom) becomes represented in *memory*.
- 5 The claim (or implication therefrom) is *false*.
- 6 *Behaviour* is influenced as a result of either the deceptive claim or the implication derived from the claim.²³

Preston (1983)²⁴ notes that definitions, such as those discussed above, were intended to provide greater objectivity in FTC deliberations by encouraging greater use of empirical research. He argues however, that such definitions have confused subsequent researchers as the actual approach in FTC proceedings. He states:

The significance of the definitional confusions described here is that readers of this literature may acquire an incorrect appreciation of the relationship to legal proceedings of certain kinds of research findings.²⁵

Preston states that the most accurate definition that can be given of deceptive advertising is as follows:

²³ Ibid at p 201. An identical list is provided in Shimp and Preston (1981) which describes it as a list of necessary and sufficient conditions rather than as a sequence, which clearly it is not. Shimp T. A. and Preston I.L. (1981) Deceptive and Nondeceptive Consequences of Evaluative Advertising, Journal of Marketing Vol 45 (Winter 1981) p 22.

²⁴ Preston I.L.(1983) Research on Deceptive Advertising: Commentary, in: Harris R.J. (ed) Information Processing Research in Advertising, Lawrence Erlbaum, London, 1983, pp 289-305, at p 294.

²⁵ Ibid at p 296.

An ad is legally deceptive when a majority of the five commissioners votes its opinion that the ad has the 'capacity to deceive'.²⁶

He emphasises the point that the FTC can, and often does, make a finding that an advertisement has the 'capacity to deceive' without any evidence apart from the ad itself.

3.2.2 Use of Consumer Research

Rosch (1975)²⁷ states that the courts have shown great deference to the FTC's alleged expertise in the area of deceptive advertising. He states:

First, the Commission has held - and the courts have agreed - that the FTC does not need to find that an ad has actually deceived the public to find that it is deceptive within the meaning of Section 5. It is enough if the ad has the "tendency or capacity" to deceive. Second, the Commission has held - again with the blessing of the courts - that tendency or capacity to deceive need not be proved by marketing research data. The Commission can find such tendency or capacity on the basis of its own expertise as a judicial body dealing constantly with advertising.²⁸

Aaker (1974),²⁹ along with many subsequent commentators, has criticised the FTC's failure to use objective measures. He states:

²⁶ Ibid at p 295.

²⁷ Rosch J. T. (1975) Marketing Research and the Legal Requirements of Advertising, Journal of Marketing Vol 39 (July 1975) pp 69-79.

²⁸ Ibid at p 70.

²⁹ Aaker, D.A. (1974) Deceptive Advertising, in : D. A. Aaker & G.S. Day (eds.) Consumerism: Search for the consumer interest, New York : The Free Press, 1974.

A reasonable approach to this problem would be to develop a scientifically conducted test or survey which would determine exactly what meaning consumers attach to an advertisement. A consumer laboratory test or field survey could determine what percentage of the respondents are misinterpreting the advertisement and even what impact the misinterpretation is having upon their purchasing behaviour.³⁰

Aaker identifies a number of reasons why the FTC has not made much use of empirical evidence. These include the deference shown by the Courts towards the FTC's accumulated expertise, the vagueness of the FTC's test of deceptiveness, the adversarial nature of the legal proceedings and the difficulties of determining the validity of empirical tests.

A proposal put forward by Gellhorn (1969)³¹ attempts to overcome some of these problems. Under this proposal, the rules governing FTC pre-hearing conferences would be amended to give power to the administrative law judge to commission a survey or consumer test from an independent expert.

Aaker discusses some of the difficulties that would arise under Gellhorn's proposal. One of these is that of deciding on the appropriate population from which a sample should be drawn. He argues that it is not clear from FTC decisions whether the appropriate population should be those at whom the advertisement was directed or those whom it actually reached. Alternatively, it could be those who were potential purchasers of the product class or those who had actually bought the particular brand.

³⁰ Ibid at p 223.

³¹ Gellhorn E. (1969) Proof of Consumer Deception Before the Federal Trade Commission, Kansas Law Review 17 (1969) pp 559-572.

3.2.3 The FTC's attitude to puffery

A third common theme in the literature is the FTC's attitude to puffery. 'Puffery' is a legal term that predates the Federal Trade Commission Act. It refers to exaggerated claims as to the product's qualities. Typical examples are claims to the effect that a product is the "best" or "greatest". Traditionally, puffery has been regarded as beyond the scope of section 5. Two reasons have been given for this position. The first is that purchasers recognise such claims to be the biased opinions of the seller and therefore are not influenced by them. The second is that the vagueness of such claims prevents them from being proved false.

Under Aaker's definition of 'deception', such claims would remain beyond the scope of section 5. His definition excludes any 'perceptual outputs' that cannot be shown to differ from reality or cannot be shown to affect purchasing behaviour.

Several authors have criticised the FTC's attitude to puffery. They have noted the prevalence of such claims especially in television advertising. They have argued that the mere fact that advertisers make such frequent use of such claims suggests that they do in fact influence purchase behaviour. Therefore, the FTC should prosecute such claims where they cannot be shown to be true.

For example, Alexander (1969)³² discusses the common use of vague comparative claims where products in the class are functionally equivalent. He states:

An advertisement stating that a product is better, milder, softer, or cheaper than an unspecified competitive product or "Brand X", falsely conveys the impression to consumers that the advertiser's product is actually superior to the major competitive products.³³

³² Alexander G. J. (1969) Federal Regulation of False Advertising Kansas Law Review Vol 17 (1969) pp 573-585.

³³ Ibid at p 583.

Shimp (1979)³⁴ discusses advertising claims which he labels "social psychological representations" or "SPR's". Examples of such claims are that a certain cosmetic "is sexy", or that a certain beer "has gusto", or "Brand X tastes good". He gives two arguments to support his view that such claims are deceptive. The first is that such claims are literally false:

SPR's are false since it is impossible for an advertiser to provide something that is literally not part of the product.³⁵

The second argument is that many SPR's are likely to be deceptive because of their vagueness. People will interpret the claims differently and, as some of these interpretations are likely to be false, some members of the audience will be deceived:

. . . the receiver must introduce his/her beliefs or expectations in order to obtain meaning from the inherently vague and subjective social psychological representation. Because cognitive structures vary from receiver to receiver, the meaning evoked by a particular SPR is also variable. In short, different receivers form different beliefs in response to the same advertising claim. Since not all beliefs are supportable in reality, all receivers who have formed incorrect beliefs have been deceived.³⁶

³⁴ Shimp T.A. (1979) Social Psychological (Mis)Representations in Television Advertising, Journal of Consumer Affairs, Vol 13 (1979) pp 28-40.

³⁵ Ibid at p 37.

³⁶ Ibid at p 33.

Reed and Coalson (1969),³⁷ argue that the FTC should rely on the alternative ground of "unfairness", contained in section 5, to prosecute what they call "emotionally conditioning advertising". This is advertising that:

. . . affects purchasing behaviour by pairing the product with appeals to consumers' internalized psychological and emotional needs. The effectiveness of this type of advertising is largely independent of the product's actual ability to satisfy consumers' needs. Even more significantly, the effectiveness of these ads does not depend on consumers *believing* them. Emotionally conditioning advertisements affect consumers' behaviour by changing the way in which they *perceive* the product, and a deception analysis that focuses on whether consumers might "believe" the advertisement and be misled by it is ineffective when applied to these ads.³⁸

They argue that:

Inducing consumers to purchase higher priced products that are functionally identical to less expensive goods through implicit or explicit portrayals of emotional satisfaction hurts consumers' pocketbooks and teaches through daily, repetitive lessons, that joy, sexual fulfillment, and the maintenance of familial affection in life may be gained through the use of various minor consumer products.³⁹

3.2.4 FTC's focus on verbal claims

³⁷ Reed O.L. Jr. and Coalson J.L. Jr.(1977) Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioned Advertising, Georgia Law Review Vol 11 (Summer 1977) pp 733-782.

³⁸ Ibid at p 761.

³⁹ Ibid at p 782.

Several authors have criticised the FTC's failure to prosecute advertisers for deceptive impressions created by the pictorial content, as opposed to the verbal content, of advertisements.

Kramer (1978)⁴⁰ argues that the true meaning of television advertisements can rarely be determined by reference solely to a written transcript of the verbal content. He suggests that the FTC has relied too heavily on transcripts of television advertisements in their decisions.⁴¹

Richards and Zakia (1981),⁴² argue that misrepresentations conveyed through pictures have received inadequate attention from the FTC. In their view, pictorial content constitutes most of the communicative effect of modern magazine and television advertisements. They conclude that:

If seventy-five percent of the communicative value of an advertisement is in its pictorial content, current efforts regulating only the written (or spoken) word are no more than twenty-five percent efficient.⁴³

3.2.5 The effect of the 1983 policy statement

As discussed above, prior to the 1983 policy statement on deception, the FTC had been criticised for its failure to provide an operational definition of the 'capacity to deceive' standard adopted in the exercise of its powers under section 5 of the Federal Trade Commission Act.

⁴⁰ Kramer A.H. (1978) Marconian Problems, Gutenbergian Remedies: Evaluating the Multiple-Sensory Experience Ad on the Double-Spaced, Typewritten Page, Federal Communications Law Journal Vol 30 (1978) p 35.

⁴¹ Liebler has points out, that the deceptiveness test requires that one clearly defines the claims in an advertisement before one can evaluate such claims for truth or falsity: Liebler W.J. (1978) No Matter What the Sheepskin Looks Like, It is Still the Same of Wolf: Reply to Mr. Kramer, 30 Federal Communications Law Journal Vol 30 (1978) p 45.

⁴² Richards J.I and Zakia R.D. (1981) Pictures and the FTC, Georgia Law Review Vol 16 (1981) pp 77-134.

⁴³ Ibid at p 133.

Without such a definition, the only way of predicting whether an advertisement was illegal was to analyse the statements contained in previous FTC decisions and court judgments. One of the most commonly cited statements related to the type of consumers that were protected by section 5. This statement was as follows:

The law is not made for experts but to protect the public, that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.⁴⁴

Given such a statement, it was reasonable to suppose that virtually any advertisement could be found to have the capacity to deceive, if the FTC decided to prosecute. The crucial question, therefore, became whether the FTC would choose to challenge a particular advertisement.⁴⁵

The main limitation on the FTC's jurisdiction to prosecute deceptive advertisements was the requirement that it act in the "public interest". However, this was not interpreted to mean that the FTC had to show that consumers would suffer harm as a result of the advertisement. Therefore this requirement remained obscure.

The 1983 policy statement produced a heated debate within the FTC as to whether the statement was simply a restatement of the Commission's previous policy or an attempt to reduce the scope to the FTC's powers.

⁴⁴ Scherb C. W. (1985) The FTC Policy Statement on Deception: A New Standard, or a Restatement of the Old? Journal of Competition Law (Spring 85) pp 805-816, at p 816.

⁴⁵ Cavanaugh S.W. (1979) Advertising: The Deception Standard, Washburn Law Review, Vol 18 (1979) pp 600-605, at p 605. See also: Welti B. (1983) The Need for a Statutory Definition of "Deceptive" Advertising, New England Law Review Vol 19 (1983) pp127-149, at p 128.

The first case in which the policy statement was discussed was *In re Cliffdale Associates, Inc.*⁴⁶ All five Commissioners agreed that Cliffdale's advertising was deceptive, in violation of section 5. However, there was a division of opinion as to the significance of the policy statement. The Administrative Law Judge adopted the formulation commonly stated in prior FTC decisions:

Any advertising representation that has the tendency or capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violates the Federal Trade Commission Act.⁴⁷

On this basis, the Administrative Law Judge found the advertisement to be a violation of the Act. The majority of the FTC agreed that the advertisement was a violation but held that the formulation of the test was inadequate. Instead, they relied on the test set out in the policy statement. While agreeing with the outcome, the minority took the opportunity to re-express their objection to each of the three elements in the policy statement.

The first element is that the representation, omission or practice must be "likely to mislead" the consumer. Previous cases had usually adopted a formulation in terms of the "capacity or tendency to mislead". However, the majority argued, that although the "tendency or capacity" language had been used more frequently, the "likely to deceive" formulation articulates the factors actually used in most earlier Commission cases.

In her dissenting opinion in the *Cliffdale* case, Commissioner Bailey disapproved of the "likely to deceive" formulation as implying that, in future, the Commission would need to provide evidence of deception instead of relying on its own expertise as it had done in the past.

⁴⁶ *In re Cliffdale Assocs.,Inc.*, 46 Antitrust & Trade Reg. Rep. (BNA) 703 (Apr. 5, 1984)

⁴⁷ *In re Cliffdale Assocs.,Inc.*, 46 Antitrust & Trade Reg. Rep. (BNA) 703, (Apr. 5, 1984) at p 704.

The second element in the policy statement is that the test of deceptiveness involves a consideration of the "reasonable consumer". Where an advertisement was targeted at a particular group, the effect of the advertisement on a reasonable consumer of that group was the appropriate standard. Commissioner Bailey believed this represented a significant change in policy. She referred to the case of *FTC v Standard Education Society*⁴⁸ as authority for the view that even the uninformed and credulous were given protection by section 5. The majority opinions referred to the *Gelb* case⁴⁹ in which a hair dye was advertised as permanent. This advertisement was found to be deceptive on the basis that some people might think the dye would colour hair that had not yet grown out of the scalp. The majority felt that this case went too far and required correction by imposing the reasonable consumer standard.

The final element of the policy statement was that concerning materiality. The policy statement defines "a material representation or practice" as one that is likely to affect a consumer's choice of, or conduct regarding a product.

Commissioner Bailey agreed that materiality is a necessary element of a finding of deceptiveness. However, she disagreed that materiality equated with injury. In her view, such an equation would imply a new evidentiary standard.

Outside of the Commission, the consensus view of commentators was that the statement did set out a new standard. For example, Scherb (1985) states:

While one can find isolated cases to support each of the three elements of "likely to deceive", "reasonable consumer" and "materiality", the policy statement did not constitute merely a restatement of existing law.

48 *FTC v Standard Education Society*, 302 U.S. 112 (1937).

49 *Clairol Inc.*, 33 F.T.C. 1450 (1941), *aff'd.*, 144 F.2d 580 (2nd Cir. 1944)

However, given the exceptionally broad discretion that existed under the previous law, Scherb doubted that the policy statement would seriously restrict the scope of claims found deceptive.⁵⁰

Ford and Calfee (1986)⁵¹ argue that the main effect of the 1983 statement was to place increased emphasis on economic theory and empirical research. They concluded that:

The new view makes more use of economics and places increased emphasis on the use of market research.⁵²

The extent to which the FTC has placed reliance on market research is examined in chapter four. The next section of this chapter discusses the types of market research that have been undertaken on deceptive advertisements.

3.3 Empirical studies of deceptive advertising

In this section, the literature describing empirical studies of deceptive advertising is reviewed. By "empirical studies" is meant studies of consumers' reactions to advertisements. The aim of this review is to discover the types of tests that could be used to provide evidence in legal proceedings. This section begins by briefly outlining the main models of buyer behaviour that form the conceptual basis of the empirical studies. It then describes the empirical tests that have been devised to determine if an advertisement is deceptive, and the criticisms that have been levelled at each test. In the following chapter, the courts' assessment of evidence based on empirical studies is discussed.

The empirical studies can be divided into two groups. In the first group are studies measuring the extent to which advertisements are *perceived*

⁵⁰ Scherb C. W. (1985) The FTC Policy Statement on Deception: A New Standard, or a Restatement of the Old? Journal of Competition Law (Spring 85) pp 805-816, at p 816.

⁵¹ Ford G. T. and Calfee J. E. (1986) Recent Developments in FTC Policy on Deception, Journal of Marketing Vol 50 (July 1986) pp 82-103.

⁵² Ibid at p 102.

to be misleading. In the second, are studies which attempt to measure the extent to which consumers are misled.

Included in the first group are studies by Haefner (1972),⁵³ Ford, Kuehl and Reksten (1975)⁵⁴ and Schultz and Casey (1981).⁵⁵ These researchers have shown subjects advertisements and then asked if they find them misleading.

This approach has been criticised as conceptually confused. For example, Armstrong et al (1979),⁵⁶ state:

Measuring deception by asking subjects whether certain advertisements . . . are deceptive is inappropriate. Consumers who perceive an ad to be deceptive are not deceived by it.⁵⁷

Similarly, Grunert and Dedler (1985)⁵⁸ state:

- 53 Haefner J.E. (1972) The Legal Versus the Behavioural Meaning of Deception, in: Proceedings of the 3rd Annual Conference of the Association for Consumer Research, M. Ven Venkatesn, (ed.) College Park, Md: Association for Consumer Research, pp 356-60.
- 54 Ford G.T., Kuehl P.G. and Reksten O. (1975) Classifying and Measuring Deceptive Advertising : An Experimental Approach, in: 1975 Combined Proceedings, Edward M. Mazze (ed.) Chicago: American Marketing Association, pp 493-97.
- 55 Schutz H.G. and Casey M. (1981) Consumer Perceptions of Advertising as Misleading, Journal of Consumer Affairs Vol 15 (1981) pp 340-57.
- 56 Armstrong G.M., Gurol M.N. and Russ F.A.(1979) Detecting and Correcting Deceptive Advertising, Journal of Consumer Research, Vol 6 (December 1979) pp 237-246.
- 57 Ibid at p 237.
- 58 Grunert K. G. and Dedler K. (1985) Misleading Advertising: In Search of a Measurement Methodology, Journal of Public Policy and Marketing Vol 4 (1985) , pp 153-165.

The obvious criticism towards such approaches is that a consumer who considers an advertisement to be misleading has not been misled by it.⁵⁹

It appears that this is a purely definitional point. As a definition of misleading advertising, it presents something of a paradox: if 100% of consumers classify an advertisement as misleading then it is not misleading. On the other hand, if no consumers see it as misleading then it might be misleading. This position assumes that a person who recognises an ad as misleading thereby avoids being "fooled" by it. This assumption could be subjected to empirical investigation. However, no one appears to have done so.

The second group contains many more studies. In these studies, subjects are shown advertisements and then asked questions designed to measure the extent to which they have been "tricked" or "fooled" by them. Before describing these studies, it is necessary to briefly outline the main models of consumer behaviour on which the studies are based.⁶⁰

Numerous models have been proposed to explain the process by which advertisements influence consumers. One of the best known early attempts at a comprehensive model of the factors affecting consumer choice was that proposed by Howard and Sheth (1969).⁶¹ Engel, Blackwell and Kollat (1978)⁶² added a number of refinements to this model. According to such models, advertising is only one of a large number of factors that influence consumers' purchasing decisions.

⁵⁹ Ibid at p 155.

⁶⁰ For a comprehensive examination of the consumer behaviour theories underlying empirical studies of deceptive advertising, see: Richards J.I. (1988) A foundation for theory and assessment of deception: The legal and behavioural situs of advertising misrepresentations. Unpublished Ph.D dissertation, University of Wisconsin, Madison, 1988.

⁶¹ Howard J.A. and Sheth J.N. (1963) The Theory of Buyer Behaviour, Wiley, New York, 1969.

⁶² Engel J.F., Blackwell R.D. and Kollat D.T. (1973) Consumer Behaviour (2nd ed) Holt, Rinehart and Winston, Inc New York 1973.

Previous use of the product, reports of acquaintances, and a wide variety of situational and personality characteristics are posited to influence consumers' purchasing behaviour.⁶³ Advertisements can have an impact at various points in the process of arriving at a decision to purchase a product or a particular brand. It can trigger recognition of the need for a product, provide information about alternatives, shape buyers' decision criteria and reinforce past purchasing decisions.

A central component of such models is the "hierarchy of effects" theory of consumer information processing. Consumers are hypothesised to undergo a number of cognitive processes in response to advertisements or other marketing stimuli. Howard and Sheth's model incorporates a five-step sequence beginning with *attention* and moving through *comprehension*, *attitude* and *intention* and ending with purchase. Most of the empirical studies discussed below have adopted the hierarchy of effects model of consumer information processing. The model has also been relied on to some extent in FTC decisions. As discussed in chapter four, the Commission has identified the comprehension stage of the model as the one of most direct relevance to their deliberations. It has also acknowledged that empirical studies using forced exposure to an advertisement may not measure the real impact of advertising under normal viewing conditions.

A key feature of hierarchy of effects theories is that the phenomenon of selective perception entails that consumers perceive only a small proportion of the stimuli to which they are exposed. Interpretation of the meaning of the stimulus is influenced by preconceptions about the product, the advertiser and the advertising medium. Consumers are viewed as active processors and evaluators of advertising messages. They tend to do this in a way that avoids cognitive dissonance.⁶⁴ Messages that conflict with existing beliefs are either rejected or reinterpreted so as to conform to these beliefs. In addition, consumers

⁶³ For a useful description of these factors see: Hawkins D.L., Best R.J. and Coney K.A. (1989) Consumer Behaviour: Implications for Marketing Strategy, Irwin, Boston, 1989.

⁶⁴ Festinger L. A.,(1957) Theory of Cognitive Dissonance, Stanford University Press, 1957.

sometimes undertake external information searches after they have bought a product in order to gain confirmation of their purchase decision.

Several of the empirical studies discussed below have investigated the effects of prior preferences for a product on consumers' responses to advertising claims. These studies reflect the theory that consumers who have pre-existing favourable attitudes to a product will be more likely to believe misleading advertising claims in order to avoid the phenomenon of cognitive dissonance. Other studies have used fictitious product names in order to exclude the influence of pre-existing attitudes on consumers' responses to advertising claims.

The hierarchy of effects model suggests that it is difficult to alter purchase behaviour through advertising. The formation of a favourable brand attitude is viewed as a necessary precursor to purchase of the brand. To alter attitudes, it is necessary to gain the attention of the audience, ensure accurate comprehension of the message, and overcome the tendency to counterargue with messages that conflict with existing beliefs.

Bauer (1964)⁶⁵ states:

Influencing people via communication is a most difficult business. . . Typical communication experiments, including advertising tests show that only a few percentages (sic) of the people exposed to the communication ever change their mind on anything important.⁶⁶

Because of the importance placed by the hierarchy of effects model on attitude change as a precondition of behavioural change, much attention has been directed at understanding the dynamics of attitude change.

⁶⁵ Bauer R.A. (1964) The Obstinate Audience, American Psychologist, Vol. 19, May 64, pp 319-328.

⁶⁶ Ibid at p 326.

Fishbein (1967)⁶⁷ proposed a theory whereby consumer attitudes to a brand are a function of beliefs about the attributes of the brand and the importance of those beliefs.⁶⁸ According to this theory, advertising could influence attitudes to a brand, and hence purchase behaviour, either by altering consumers' beliefs about a product's attributes or by altering the importance placed on each attribute.⁶⁹

By contrast with the hierarchy of effects model, a more recent view describes purchases in terms of consumers' involvement with them. Low involvement decisions are those that have become routinized, such as the selection of the usual brand of toothpaste in a supermarket. Further, the model asserts that most purchases fall in the low involvement category. Building on the work of Krugman (1965)⁷⁰, Robertson (1976)⁷¹ has argued that:

A large share of consumption is trivial, unimportant and non-ego involving, such that beliefs and preferences are not strongly held and there is a lack of commitment to the existing purchase modality.⁷²

Under conditions of low involvement, consumers are viewed as passive processors of advertising. Most product information will be gained from product trial. Robertson states that:

⁶⁷ Fishbein M. (1967) Attitudes and Prediction of Behaviour, in: Fishbein (ed.)

Readings in Attitude Theory and Measurement, John Wiley, New York, 1967.

⁶⁸ A later refinement of the theory added the concept of normative compliance as an influence on attitudes to a brand.

⁶⁹ Miniard P.W and Cohen J.B. (1981) An Examination of the Fishbein-Ajzen Behavioural-Intentions Model's Concepts and Measures, Journal of Experimental Social Psychology, May 1981, pp 309-39.

⁷⁰ Krugman H.E. (1965) The Impact of Television Advertising: Learning without Involvement, Public Opinion Quarterly, Vol 29, Fall 1965, pp 349-356.

⁷¹ Robertson T.S. (1976) Low-Commitment Consumer Behaviour, Journal of Advertising Research, Vol 16, Number 2, April 1976, pp 19-24.

⁷² Ibid at p 22

The low-commitment view of advertising effects posits that the audience is largely passive in the sense that pre-purchase information-seeking is relatively rare. In fact, most information seeking under the low-commitment conditions will be based on the trial of the product rather than on the use of evaluative symbolic sources.⁷³

Current models of consumer decision making emphasize the difference between high and low involvement purchasing decisions.⁷⁴ In the case of high involvement decisions, consumers are thought to undertake an extended decision making process whereby they actively seek information about a range of brands and then combine this information with knowledge and attitudes already present in long term memory before arriving at their purchase decision.⁷⁵

For low involvement purchases, little active decision making takes place. The brand choice decision is either a repetition of past decisions that have proved satisfactory or a search for novelty. Brand attitudes are weakly held. In this situation, advertising communications are seen to provide reinforcement of attitudes formed by trial and consumption of the product.

The extent to which a particular consumer will follow the extended problem solving process or a habitual problem solving approach is hypothesised to depend on the degree of involvement in the purchase.⁷⁶

⁷³ Ibid at p 20.

⁷⁴ The Howard-Sheth model recognised that not all purchasing decisions involved a search for external information.

⁷⁵ For a discussion of the way in which consumers combine information to arrive at an overall evaluation of the product see: Anderson N.H. (1974) Information Integration Theory: A Brief Survey, in: Krantz D.H. et al(eds.) Contemporary Development in Mathematical Psychology, Vol 2, Freeman, San Francisco 1974.

⁷⁶ For a list of the factors that determine an individual's level of involvement in the purchase, see: Engel J.F., Blackwell R.D and Kollat D.T.(1973) Consumer Behaviour (2nd ed) Holt, Rinehart and Winston, New York, 1973, at p59-61.

In addition to models that describe the range of factors that impinge on purchasing decisions, advertising researchers have borrowed models from communication theory. This perspective views advertising in terms of three main elements - a source, a message and a receiver.⁷⁷ Two main processes are involved. Encoding is the process by which the source selects suitable message elements so as to accurately capture the meaning of the intended communication. Decoding is the process by which the receiver attempts to extract meaning from the message. The models of the communication process emphasise the need for feedback loops in order to ensure that the objective of the communication has been achieved. The absence of adequate feedback loops in the case of television advertising and other forms of mass communication are seen as likely to produce a high level of miscommunication, where the meaning decoded from the message is different to the one intended by the source.

Empirical studies in the field of deceptive advertising have made use of the models devised by consumer behaviour theorists. These studies are discussed under three headings.

- (i) comprehension studies
- (ii) belief studies
- (iii) purchase intention studies

3.3.1 Comprehension studies

Numerous studies have investigated the extent to which consumers perceive and remember implied claims in advertising. The consistent finding is that laboratory subjects appear to perceive and remember implied claims in much the same way as explicit claims. In the literature, explicit claims are usually called "direct assertions". Implied claims are called "pragmatic implications". Shimp (1983)⁷⁸ uses an

⁷⁷ Kotler P. (1988) Marketing Management: Analysis, Planning, Implementation and Control, (6th ed.) Prentice-Hall, New Jersey, 1988, pp 589-591.

⁷⁸ Shimp T.A. (1983) Evaluative Verbal Content and Deception in Advertising : A Review and Critical Analysis; in: Harris R.J. (ed) Information Processing Research in Advertising, Lawrence Erlbaum , New Jersey (1983) pp 195-216.

example to explain the distinction between logical and pragmatic implications. His example is as follows:

- (i) Direct Assertion: "Brand Y cereal contains 100% natural ingredients."
- (ii) Logical Implication: It has no preservatives or chemical substances.
- (iii) Pragmatic Implication: It is more nutritional (or lower in calories, etc) than cereals which are not 100% natural.⁷⁹

Statement (iii) is described as a "pragmatic inference" from statement (i). It cannot be derived from statement (i) by a process of logical inference but it may in some circumstances be inferred on the basis of assumptions about the intentions of the speaker.

The typical design in comprehension studies, involves exposing subjects a series of advertisements in a laboratory setting and then presenting them with a series of written statements. Some statements are directly asserted in the ad, while others could be pragmatically inferred. Subjects are asked to classify each statement as true or false, based only on the information in the advertisement. Subjects who classify pragmatic implications as true are considered to have confused pragmatic implications and direct assertions.

Most studies have used university students as subjects. The reported findings show that such subjects confuse pragmatic implications and direct assertions from 55% to about 80% of the time.

The first reported study of this type was by Preston (1967).⁸⁰ Subjects were asked to categorise each test statement as either an accurate or inaccurate paraphrase of the content of the advertisement. The main finding was that the pragmatically implied statements were reported as accurate paraphrases in about 65% of instances. Preston's conclusion was that consumers tend:

⁷⁹ Ibid at p 201.

⁸⁰ Preston I.L. (1967) Logic and Illogic in the Advertising Process, Journalism Quarterly, Vol 44 (1967) pp 231-39.

to see claims as conveying more content than they literally claim, doing so in a way that benefits the advertiser by conferring additional values upon the product.⁸¹

A follow-up study by Preston and Scharbach (1971),⁸² investigated whether this process occurred to the same extent for non-advertising communications. The earlier study was replicated by rewriting the content of the ads in the form of news stories, personal letters and business memoranda. It was found that subjects were significantly less likely to classify pragmatic implications as accurate paraphrases when the statement was not part of an advertisement.

A similar procedure was adopted by Harris (1977),⁸³ except that Harris asked subjects to classify test statements as 'true', 'false' or 'neither'. He exposed subjects to a tape recording containing twenty fictitious radio advertisements. Subjects classified pragmatically implied statements as 'true' about 80% of the time compared to 89% for the direct assertions. The main conclusion drawn from this study was that:

Subjects processed and remembered pragmatic implications very much like direct assertions.⁸⁴

This conclusion is puzzling. Both Harris and Preston conclude that consumers do not in general distinguish between statements that are explicitly stated in advertisements and those that are implied. However, neither of these studies asked subjects to try to do this. One asked whether a statement was an accurate paraphrase and the other whether a statement was true.

⁸¹ Ibid at p 237.

⁸² Preston I.L. and Scharbach S.E. (1971) Advertising: More than Meets the Eye? *Journal of Advertising Research* Vol 11 (1971) pp 19-24.

⁸³ Harris R.J. (1977) Comprehension of Pragmatic Implications in Advertising, *Journal of Applied Psychology* Vol 62 (1977) pp 603-608.

⁸⁴ Ibid at p 607.

Shimp (1978)⁸⁵ used a more direct approach in a study of what he called "incomplete comparative" claims in advertising. The study used three TV commercials. One of these was a deodorant commercial which contained the statement "Mennen E goes on warmer and drier". A preliminary study revealed that the three most common interpretations of this claim were that Mennen E went on warmer and drier than:

- (a) any other deodorant on the market.
- (b) deodorants made with chemicals.
- (c) a lot of other spray deodorants.

Shimp asked subjects whether each of these statements was claimed by the ad and if so whether it was directly stated. About 60% of the sample said the ad claimed that Mennen E went on warmer and drier than any other deodorant on the market. Of these, 51% saw the claim as "directly stated" while 38% saw it as "intended but not stated".

Harris, Dubitsky and Bruno (1983)⁸⁶ note a consistent finding in cognitive psychology that subjects not only make pragmatic inferences in the course of comprehension, but in a later memory task, they are unable to distinguish this inferred information from directly asserted facts. They described a research programme which examined this tendency.

Radio advertisements for fictitious products, between twenty five and one hundred words in length, were constructed. Each commercial had two versions: one in which the critical claim was directly asserted and the other where the same claim was implied. For each advertisement, two test statements were written. The first was a paraphrase of the critical claim. The second statement was a control item which was either false or of indeterminate truth value.

⁸⁵ Shimp T. A.(1978) Do Incomplete Comparisons Mislead? Journal of Advertising Research Vol 18 (1978) pp 21-27.

⁸⁶ Harris R.J., Dubitski T.M. and Bruno K.J. (1983) Psycholinguistic Studies of Misleading Advertising, in: Harris R.J. (ed) Information Processing Research in Advertising, Lawrence Erlbaum , New Jersey (1983) pp 241-262.

Immediately after hearing an audio tape containing the twenty four ads, subjects responded to the forty eight test sentences. They judged each sentence on a scale from false (1) to true (5). They were also provided with a "don't recall" option. The dependent variable analysed was the mean response to assertion and implication items.

The consistent finding from this research programme is that subjects draw pragmatic inferences from ads and remember those inferences as though they had been direct assertions. Both direct assertions and pragmatic inferences are rated as 'true' or 'probably true' about 80% of the time.

Using this basic research design, the researchers have investigated a large number of independent variables and response scales.

Several experiments investigated the extent to which the wording of instructions could improve subjects' ability to discriminate between implications and direct assertions.⁸⁷

87 Various aspects of the research programme have been reported in:

Harris R.J. (1977) The comprehension of pragmatic implications in advertising, Journal of Applied Psychology Vol 62 (1977) pp 603-608.

Harris R.J., Dubitski T.M. and Thompson S. (1979) Learning to identify deceptive truths in advertising, in: Leigh J.H. and Martin C.R. Jr. (eds) Current issues and research in advertising 1979, Ann Arbor: University of Michigan Graduate School of Business Administration Division of Research (1979).

Harris R.J., Dubitski T.M., Connizzo J.F., Letcher L.E. and Ellerman C.S. (1981) Training consumers about misleading advertising: Transfer of training and effects of specialised knowledge Current issues and research in advertising 1981, Ann Arbor: University of Michigan Graduate School of Business Administration Division of Research (1981).

Harris R. J. and Monaco G.E. (1978) The psychology of pragmatic implication: Information processing between the lines Journal of Experimental Psychology : General Vol 107 (1978) pp 1-22.

Bruno K. J. (1980) Discrimination of assertions and implications: A training procedure for adults and adolescents Journal of Educational Psychology Vol 72 (1980) pp 850-860.

The effect of a fifteen minute training session prior to testing did not significantly improve subjects' ability to discriminate between directly asserted and implied claims.⁸⁸

Various forms of response scale have been tried. The earliest studies used a three point scale (true, false or indeterminate truth value).⁸⁹ Later studies used a five point scale ranging from true to false.⁹⁰

In addition to measures of recognition, such as those discussed above, recall measures have been used.⁹¹ Subjects were given the name of the product and asked to "write down the most important thing that was said about the product in the commercial that you heard". The disadvantages of this approach were the difficulty of categorising the responses, and the fact that many of the responses failed to mention the critical claim.

One experiment examined subjects' memory of asserted and implied claims in advertisements using real product names and real attributes. Before hearing the ads and completing the five point truth rating scale, subjects were asked to rate the products for trustworthiness. It was found that subjects were much more likely to rate claims as true for products they rated trustworthy. This effect was much larger than whether the claim was asserted or implied, or whether they responded

Bruno K.J. and Harris R.J. (1980) The effect of repetition on the discrimination of asserted and implied claims in advertising Applied Psycholinguistics Vol 1 (1980) pp 307-321.

Harris R.J., Dubitski T.M., Perch K.L., Ellerman C.S. and Larson M.W. (1980) Remembering implied advertising claims as facts: Extensions to the "real world" Bulletin of the Psychonomic Society Vol 16 (1980) pp 317-320.

⁸⁸ Harris, et al (1979) *supra*.

⁸⁹ Harris (1977), Harris, et al (1979) *supra*.

⁹⁰ Bruno (1980) *supra*.

⁹¹ Harris, et al (1979) *supra*.

immediately or after hearing all the ads or whether they had received any prior training.⁹²

Monaco and Kaiser (1983)⁹³ investigated the extent to which processing of advertisements is affected by subjects' prior preference for the product. In particular, they tested whether subjects who are brand loyal are more likely to construct inferences favourable to the advertiser than those who are not. Radio commercials were constructed for the two presidential candidates; Ford and Carter. Subjects were first asked to indicate which of these was their preferred candidate. Each subject then heard two pre-recorded commercials; one for Ford and one for Carter, and then answered a recognition type test which contained twenty questions relating to each ad. The results showed that subjects who had a prior preference for Ford constructed more inferences from the Ford commercial than from the Carter commercial and the reverse was true of those who favoured Carter.

In a subsequent experiment,⁹⁴ the same researchers investigated the effect that the instructions given to subjects has on their responses to the typical recognition test. Subjects' preferences for Ford or Chevrolet cars were first measured by asking them to select one of each of several pairs of cars as the one they preferred. They were then asked to listen to one of two radio commercials which were identical except that the name Ford occurred in place of Chevrolet. Subjects were asked to rate twenty five test statements on a seven point truthfulness scale. Half the subjects received a response sheet that contained instructions to rate the statements "according to how true or false they are, based on the commercial you have just heard". The other half received a response sheet that contained instructions to "rate the statements according to how true or false they are, based on your own opinions and beliefs"

⁹² Harris, et al (1980) *supra*.

⁹³ Monaco G.E. and Kaiser D. (1983) Effects of Prior Preferences, Inferences and Believability in Consumer Advertising, in Harris R.J. (ed) Information Processing Research in Advertising, Lawrence Erlbaum , New Jersey (1983) pp 263-287.

⁹⁴ Ibid at p 276.

It was found that these instructions significantly affected the truth ratings of the twenty five test statements. The authors state:

The results of this experiment indicate that, when asked to respond to implied test statements about a commercial on the basis of the commercial (truth instructions), subjects responded as if they had no prior preference. When asked to respond on the basis of their beliefs (belief instructions), however, subjects responded to the same test statements as if they had never heard the commercial.⁹⁵

The authors conclude that no instructions, neither truth or belief instructions, should be issued to subjects at the start of a recognition type test.

Gaeth and Heath (1987)⁹⁶ noted that the "pragmatic implications research" had used only university students as subjects. They investigated differences between young and old adults in their tendency to confuse direct assertions and pragmatic implications. They hypothesised that elderly consumers would show a greater tendency to confuse direct assertions and pragmatic implications due to age related deficiencies in cognitive processing abilities.

They found no differences in this tendency when subjects responded from memory. Pragmatically implied statements were remembered as direct assertions about 83% of the time by both groups. However, when allowed to view the advertisement while responding, older subjects showed a greater tendency to confuse the two types of statements.

⁹⁵ Ibid at p 285.

⁹⁶ Gaeth G.J. and Heath T. B. The Cognitive Processing of Misleading Advertising in Young and Old Adults: Assessment and Training *Journal of Consumer Research* Vol 14, June 1987, pp 43-54.

Jacoby and Hoyer (1982a)⁹⁷ conducted a study of miscomprehension in televised communications sponsored by the American Association of Advertising Agencies (AAAA). This study addressed four questions:

- (i) Are televised communications miscomprehended?
- (ii) Is miscomprehension related to respondent demographics?
- (iii) Is commercial advertising miscomprehended more or less than other televised communications?
- (iv) Is there a "normative range" of miscomprehension associated with televised communications?

The study used sixty segments of communication that had been broadcast during the previous six months. These included commercial advertisements, "non-commercial advertisements" and programme excerpts. All segments were thirty seconds long.

The subjects consisted of 2,700 people over the age of thirteen who were representative of the total US population on the most common demographic variables. Subjects were intercepted at shopping malls. Each subject was shown two of the sixty test communications using a video player and TV monitor. Immediately after exposure to each test communication, subjects were asked five questions. Two of these related to the main and other messages contained in the segment. The next three related to the number of times they had seen this or a similar segment. They were then asked to complete a six-item comprehension quiz. Each quiz consisted of six brief statements that corresponded to the important information in each communication. Subjects were asked to indicate whether each statement was true or false based only on what was stated or implied in the communication. Two of the six statements were true and four were false. Three of the statements corresponded to direct factual assertions in the communication (one accurate and two inaccurate) and three related to inferences that could be drawn (one accurate and two inaccurate).

⁹⁷ Jacoby J. and Hoyer W.D. (1982a) Viewer Miscomprehension of Televised Communications: Selected Findings, Journal of Marketing, Vol 46 (Fall 1982) pp 12-26.

The major findings of the study were that only 3.5% of viewers answered all twelve questions correctly. No test statement was answered correctly by all subjects. The mean level of incorrect answers over all communications and all subjects was 30%. Using the interquartile range as an indicator of the typical level of miscomprehension, the authors conclude that:

Generalizing from these data suggests that one might expect anywhere from one-fourth to one third of the material content contained in communications that are broadcast over commercial television to be miscomprehended.⁹⁸

On average, advertisements produced slightly lower rates of miscomprehension than other types of communication. Of the demographic variables tested, including gender, age, marital status, education and income, only age and educational level were significantly related to miscomprehension and in both cases the effect was small.

Based on these findings the authors conclude that:

A large proportion of the American television viewing audience tends to miscomprehend communications broadcast over commercial television.⁹⁹

The authors are careful to describe their figure of the average level of miscomprehension (around 30%) as a tentative estimate only. They note two reasons why this might be an overestimate. First, the figure might represent the combined effect of forgetting and miscomprehension. Some delay between exposure to the communication and testing was due to open-ended questions being asked first. Second, incorrect answers could have been due to subjects miscomprehending the written test statements rather than the televised communications. On the other hand, some factors suggest that the true figure might be higher.

98 Ibid at p 19.

99 Ibid at p 21.

Artificially high levels of attention were induced by forced exposure to the communications and the lack of any surrounding context.

Given these provisos, the authors argue that "a zero based" approach to regulating deceptive television advertising is completely unrealistic. The assumption that television advertisers can prevent all viewers from unwarranted interpretations of an advertisement, some of which may be false, overlooks the fact that interpretation is a function of both the ad and accumulated knowledge and experience of the viewer.

Ford and Yalch (1982)¹⁰⁰ criticise the research and suggest that the 30% "normal level" of miscomprehension is likely to be an overestimate. They point out, first, that incorrect answers to the quiz items could be due to subjects misunderstanding the televised segment, or the instructions, or the quiz statements. Second, they suggest that the delay between viewing the segments and answering the quiz meant that instances of forgetting were included in the miscomprehension measure. Third, they note that levels of miscomprehension can be manipulated by including very difficult questions and observe that for more than sixty of the quiz items the majority of respondents disagreed with the authors' view of the correct answer. Fourth, they suggest the inclusion of a "don't know" option would have reduced the effect of guessing. This omission would have inflated the incorrect answers due to a known yea-saying bias among guessers and the fact that more than half of the statements were false.

Furthermore, they doubt whether these findings are generalisable. This is because the study provided only a single exposure to the communication. More importantly, they suggest that miscomprehension by the general population is irrelevant to public policy questions since it is the impact of the communication on the target audience that matters from a public policy viewpoint. This level of miscomprehension would be expected to be lower than for the general population due to greater

¹⁰⁰ Ford G.T. and Yalch R. (1982) Viewer Miscomprehension of Televised Communication: A Comment, *Journal of Marketing* Vol 48 (Fall 1982) pp 27-31.

interest and familiarity with the content of the communication. They conclude that:

The failure to exclude nontarget viewers coupled with the forced, single exposure procedure, limits the applicability to practical issues of all of the reported findings.¹⁰¹

In their reply, Jacoby and Hoyer (1982b),¹⁰² first note the practical difficulty of operationalising the concept of a target audience for all the test communications which included news stories. Second, they point out that they had undertaken a regression analysis to determine the influence of (i) previous exposure to the communication and (ii) previous experience with the product or service on the miscomprehension levels. Together, these factors accounted for less than 8% of the overall variation. Moreover, no significant difference between male and female viewers rates of miscomprehension was found for the two beer commercials tested.¹⁰³ Third, they noted that the FTC does not always use the target audience criterion in their assessment of deceptive advertising.

The researchers agree that the absence of a 'don't know' option increased the influence of guessing. However, two other studies which included this option showed even higher miscomprehension rates.¹⁰⁴ In both of these studies, "don't know" responses constituted less than 10% of total responses.

Mizerski (1982)¹⁰⁵ contends that the "natural error" rate found by Jacoby and Hoyer was mostly attributable to the use of an inappropriate

¹⁰¹ Ibid at p 31.

¹⁰² Jacoby J. and Hoyer W.D. (1982b) On Miscomprehending Televised Communication: A Rejoinder, Journal of Marketing, Vol 46 (Fall 1982) pp 35-43.

¹⁰³ Ibid at p 40.

¹⁰⁴ Ibid at p 39.

¹⁰⁵ Mizerski R. W. (1982) Viewer Miscomprehension Findings are Measurement Bound , Journal of Marketing Vol 46 (Fall 1982), pp 32-34.

measure of comprehension. He describes a study he conducted on behalf of the FTC which used three measures: unaided recall, aided recall and recognition measures. The study tested comprehension of one thirty second television commercial for a non-prescription drug on a total of one hundred and ninety subjects. The techniques used were similar, in many respects, to those adopted by Jacoby and Hoyer. The study involved a mall intercept technique and quota sampling in two geographic locations. Subjects were shown the ad on a television monitor using a single, forced exposure format and then asked a series of questions as follows:

- (i) Other than getting you to buy the product, what do you think was the main point of the commercial?
- (ii) Is there anything else the commercial was trying to get across?
- (iii) What specific discomforts does the commercial say that (brand name) relieves?
- (iv) Is there anything else (brand name) relieves?
- (v) As I read each of the following conditions or discomforts, please tell me, based on what is said or implied in this commercial, which ones do you think (brand name) can relieve?

Mizerski describes the first two of these questions as "unaided recall" measures, the next two as "aided recall" measures and the last as a "recognition" measure. His results showed that, while 98% of subjects recognised the literal claim, only 60% (unaided) and 64% (aided) recalled the claim. This difference was even greater for the implied claim which the FTC suspected to be deceptive. Recall figures were 6% (unaided recall) and 16% (aided recall) compared to 95% for the recognition measure.

Mizerski attempted to measure the effect of a yea-saying bias on the recognition measure by including conditions that were clearly unrelated to the commercial or the drug's area of effectiveness. As many as 10% of subjects reported the bogus claim to be implied by the commercial.

Mizerski argues that the level of miscomprehension one finds depends very heavily on the measures one selects to measure this construct. Because of this, Jacoby and Hoyer's suggestion,

that they have established norms or a natural error rate that can be used as a triggering mechanism is not only simplistic but misleading.¹⁰⁶

In their reply,¹⁰⁷ the researchers dismiss Mizerski's main point as obvious. They cite a 1954 article for the conclusion that:

Open questions, in a sense, ask the respondent to recall something - to produce it spontaneously. Closed questions, on the other hand, ask the respondent to recognize something. The literature on recall versus recognition memory tells us that more will be recognised than will be recalled, and such proves to be the case with open versus closed questions.¹⁰⁸

Jacoby and Hoyer note that slight differences in the wording of true/false questions can lead to very different constructs being assessed. They suggest that Mizerski's fifth question (above) actually asks viewers whether they believe that the drug relieves certain symptoms rather than whether they believe the ad conveys the claim that the drug will relieve certain symptoms.

An obvious issue raised by the American Association of Advertising Agencies (AAAA) investigation was whether the levels of miscomprehension for print and radio communications were similar to

106 Ibid at p 34.

107 Jacoby J. and Hoyer W.D. (1982b) On Miscomprehending Televised Communication: A Rejoinder, *Journal of Marketing* Vol 46, Fall 1982) pp 35-43, at p 40.

108 Maccoby E.E. and Maccoby N. (1954) The Interview: A Tool of Social Science, in *The Handbook of Social Psychology*, Vol 1, G. Lindzey (ed.) Reading, MA: Addison-Wesley, pp 449-487.

those found in the case of televised communications. A study by Jacoby, Hoyer and Zimmer (1983),¹⁰⁹ found that print messages were miscomprehended less than radio messages. The mean figure reported across all media in this study was 22%.

A later study by some of the same researchers,¹¹⁰ undertook a post-hoc analysis of a subset of the AAAA data to investigate the extent to which a range of source, message and audience variables contributed to the level of miscomprehension for TV ads. None of the source factors (similarity of the presenter's race and gender to the respondent's) had any significant effect. Various indices of message complexity were computed. Some of these (number of scenes and the presence of both oral and printed verbal content) were correlated with miscomprehension. Of the receiver characteristics investigated, age, race, income and education had some influence; previous exposure to the advertisement and experience with the product did not. As the authors note, none of these relationships were shown to be causal.

Jacoby and Hoyer (1989)¹¹¹ followed up their previous study on miscomprehension of televised communications by examining miscomprehension in the print media. The study involved one hundred and eight test stimuli, half of which were full page magazine ads and the rest of which were editorial extracts of an equivalent number of words. Two ads and two editorials were shown during in-home face to face interviews to each of 1,347 respondents who were representative of the US adult population. Subjects were asked to read the test stimuli and were then presented with a six-item quiz and asked to

109 Jacoby J., Hoyer W.D. and Zimmer M.A., (1983) To Read, View or Listen? A Cross-Media Comparison of Comprehension, in: Current Issues in Advertising, Leigh J.H. and Martin C.R. (eds.) Ann Arbor, MI; The University of Michigan, pp 201-218.

110 Scrivastava R. K., Hoyer W.D. and Jacoby J. (1984) Sources of Miscomprehension in Television Advertising, Journal of Advertising, Vol 13 (1984) pp 17-27.

111 Jacoby J. and Hoyer W.D. (1989) The Comprehension/Miscomprehension of Print Communication: Selected Findings, Journal of Consumer Research, Vol 15 (March 1989) pp 434-443.

indicate one of the response options (true/false/don't know) based only on what they had just read. The statements in the quiz were either direct paraphrases of the stimulus or logically implied statements or their negation.

The results showed that on average, correct answers were given 63% of the time, incorrect answers 21%, with "don't know" being selected in 15% of all cases. Incorrect answers were given with respect to editorial content more often (23%) than with respect to advertisements (19%). None of demographic variables including age, educational level or income showed any relationship with the percentage of incorrect answers given.

A major finding of the study, as stated by the authors, was that:

Thus, depending on how one interprets a "don't know" response, the average amount of miscomprehension may be as low as 21.4% or as high as 36.9%.¹¹²

The studies reviewed in this section have examined the way in which consumers interpret advertising claims. Those reviewed in the next section examine the extent to which consumers believe advertising claims.

3.3.2 Belief studies

Several studies have been inspired by the FTC's policy on puffery. Rotfeld and Preston (1981),¹¹³ describe puffery as follows:

Puffery consists of superlatives or other praise, often exaggerated, stating no facts explicitly and thus appearing as opinion.¹¹⁴

¹¹² Ibid at p 438.

¹¹³ Rotfeld H.J. and Preston I.L.(1981) The Potential Impact of Research on Advertising Law, Journal of Advertising Research Vol 21 (April 1988) pp 9-17.

¹¹⁴ Ibid at p 10.

As noted above,¹¹⁵ the FTC considers such claims not to be deceptive on the theory that consumers interpret them as statements of opinions and are not influenced by them. Thus, a claim that a product is "the best" is not deceptive even where it can be objectively demonstrated to be the worst. In the literature, puffery claims are referred to as "evaluative" claims to distinguish them from "factual" claims.¹¹⁶ Shimp (1983)¹¹⁷ gives an example of this distinction:

- (i) Our model has a diesel engine (factual)
- (ii) This new model is incomparably luxurious (evaluative)

Shimp discussed two reasons for the prevalence of evaluative claims: the fact that for many of the most heavily advertised product classes, most brands in the product class are functionally equivalent, and the increased risk of legal action for false factual claims that arose in the 1970's due to the aggressive stance of the FTC. He suggested that advertisers tended to invent "subjective differences" for their brands through advertising in order to avoid the forces of direct price competition.

Several researchers have undertaken to show that the FTC's position on puffery is not justified: that evaluative claims are believed to the same extent as factual claims. One problem with this approach is the difficulty of ascribing truth or falsity to vague claims.

¹¹⁵ Section 3.2 in this chapter.

¹¹⁶ Holbrook M.B. (1978) Beyond attitude structure: Toward the informational determinants of attitude, Journal of Marketing Research Vol 15 (1978) pp 545-556.

¹¹⁷ Shimp T.A. (1983) Evaluative Verbal Content and Deception in Advertising : A Review and Critical Analysis; in: Harris R.J. (ed) Information Processing Research in Advertising, Lawrence Erlbaum , New Jersey (1983) pp 195-216, at p 201.

In an early study by R.H. Bruskin Associates in 1971,¹¹⁸ subjects were asked to rate seventeen evaluative claims on the degree to which the claims were true. On average, 30% of subjects saw the claims as 'completely true' and 40% stated they were 'partly true' while the remainder either selected 'not at all true' or 'don't know'. For example, the claim by an aluminum processor that "Today, aluminum is something else" was rated completely true by 47% and partly true by 36%.

A later study by the same researchers reported even stranger results.¹¹⁹ It is difficult to know what subjects had in mind when they rated the following well known slogans as 'completely true':

"When you care you send the very best"	62%
"The quality goes in before the name goes on"	49%
"Kodak makes your pictures count"	60%

Rotfeld (1978)¹²⁰ tested five print advertisements for inexpensive consumer products. Each ad contained both factual and evaluative claims. After reading each ad, subjects were asked whether paraphrased versions of the claims were true. The main finding was that evaluative claims were reported as true to much the same extent as factual claims.

Holbrook (1978)¹²¹ exposed subjects to two versions of an advertisement for a hypothetical foreign car. One version stated claims

¹¹⁸ cited in: Rotfeld H.J. and Preston I.L.(1981) The Potential Impact of Research on Advertising Law, Journal of Advertising Research, Vol 21 (April 1988) pp 9-17, at p 13.

¹¹⁹ cited in: Rotfeld H.J. and Preston I.L.(1981) The Potential Impact of Research on Advertising Law, Journal of Advertising Research, Vol 21 (April 1988) pp 9-17, at p 13.

¹²⁰ Rotfeld H.J. (1978) Advertising Deception, Consumer Research and Puffery: An Inquiry into Puffery's Power to Mislead Consumers, Ph.D. dissertation, University of Illinois.

¹²¹ Holbrook M.B. Beyond Attitude Structure: Toward the Informational Determinants of Attitude, Journal of Marketing Research, Vol 15 (1978) pp 545-56.

about six attributes in factual form (eg. twenty seven miles per gallon on regular gas). The other version stated the "same" claims in a puffed form (eg truly excellent gas mileage). Holbrook measured the extent to which subjects believed the car would have each of the six attributes. The results showed that, for five of the six attributes, there was no statistically significant difference between those that viewed the factual version and those that viewed the puffed version of the ad.

Other researchers have argued that evaluative claims are often deceptive because they imply factual claims which are false. For example, Shimp (1983)¹²² argues that:

Although an evaluative claim *per se* cannot be unambiguously judged true or false, the pragmatic implications inferred therefrom can be.¹²³

Rotfeld and Rotzoll (1980)¹²⁴ exposed one hundred subjects to five ads containing thirteen evaluative claims. They then presented subjects with a series of statements. Some were identical to the evaluative claims, some were factual statements that might be inferred from the evaluative claims and some were "bogus statements" which had no relation to the content of the advertisements. Subjects were asked both whether each statement was conveyed by the advertisement and whether they believed each statement was true.

In the case of the evaluative claims, about 80% of the sample perceived the claim and about 40% believed the claim. For the factual statements, about 44% perceived the statement and 11% believed it to be true. However, these figures must be viewed with caution in view of the fact

¹²² Shimp T.A. (1983) Evaluative Verbal Content and Deception in Advertising : A Review and Critical Analysis; in: Harris R.J. (ed) Information Processing Research in Advertising, Lawrence Erlbaum , New Jersey (1983) pp 195-216.

¹²³ Ibid at p 203.

¹²⁴ Rotfeld H.J. and Preston I.L. (1981) The Potential Impact of Research on Advertising Law, Journal of Advertising Research Vol 21 (April 1988) pp 9-17.

that the "bogus statements" were perceived by 28% and believed by 18%.

Russo, Metcalf and Stephens (1981)¹²⁵ discuss the issue of the appropriate control groups in belief studies. They argued that control groups are necessary in order to demonstrate the causal link between the ad and the false belief. They suggested that the type of control used depends on the type of "misleadingness" being investigated. They described two such types: "incremental misleadingness" and "exploitative misleadingness". The first type is where exposure to the ad increases the level of a false belief. The identification of this type requires the use of a no-ad control group. The second type is where the ad does not increase but free-rides on an existing false belief. Identification of this type of misleading ad requires the use of a corrected-ad control group.

They demonstrated a procedure designed to measure both types in a test of ten print advertisements. Each subject was asked to read seven or eight ads some of which were the original ads and some of which were corrected ads. They were then asked questions about all ten products.

By comparing the beliefs scores for the three treatment conditions (actual ad, corrected ad and no-ad) on the claims that they had independantly established be false, they indentified two ads as "incrementally misleading" and four as "exploitatively misleading".

Grunert and Dedler (1985)¹²⁶ extracted seven claims from a sample of car advertisements. For each claim, they constructed a "corrected" version that rendered the claim non-deceptive in their view. In most

125 Russo J. E., Metcalf B.L. and Stephens D. (1981) Identifying Misleading Advertising, Journal of Consumer Research Vol 8 (September 1981) pp 119-131.

126 Grunert K. G. and Dedler K. (1985) Misleading Advertising: In Search of a Measurement Methodology, Journal of Public Policy and Marketing Vol 4 (1985) pp 153-165.

cases, this involved adding sentences or phrases that limited or qualified the claim in some way.

For each of the seven claims, half of the sample of five hundred licensed drivers was exposed to the test claim and the other half to the corrected version. Subjects were then asked to respond on a seven point rating scale to questions such as: "How big do you think the trunk is ? How susceptible to rust is this car? How quickly do you believe this car accelerates to a speed of 100 kms/hr?" Where the mean level of belief in an attribute was significantly higher for the test claim than the corrected claim, the test claim was categorised as misleading.

Several studies have investigated the way in which consumers perceive and believe "implied superiority claims". These are claims to the effect that there exists no better product in the class than the advertised brand either generally or with respect to some stated attribute. An example of such a claim is: "No shampoo gets you hair cleaner than Brand X". It has been hypothesised that although such claims appear to state equality of performance, they may be interpreted as implying superior performance for the advertised brand.

The suggestion in the literature is that such claims are commonly used where no one brand is superior to the others on any objective measure of performance. In such cases, use of this type of claim by any product in the class would be misleading where it is interpreted as stating superior performance for the brand in question. Furthermore, Wyckham (1987)¹²⁷ has suggested that such claims might also be interpreted as stating that tests have been conducted on all products of the class. Where this had not in fact been done, the claim could be seen as misleading even if the advertised product proved later to be superior.

Wyckham extracted more than forty implied superiority claims from magazine advertisements covering seven product categories. He tested four slogans in a survey of 598 people using in-home face-to-face

¹²⁷ Wyckham R.G. (1987) Implied Superiority Claims, Journal of Advertising Research (February/March 1987) pp 54-63.

interviews conducted as part of a commercial survey. Respondents were presented with one of the following four slogans:

- (i) No beer on the bar tastes better than Oly.
- (ii) No leading brand gets rid of dandruff better than Selsun.
- (iii) Nobody softens better than Fleecy.
- (iv) Nobody knows more about microwave cooking than Litton Moffat.

The study aimed to measure two aspects of such slogans: the extent to which they were interpreted as claiming superior performance for the advertised brand, and the extent to which they were believed to be true. Both open-ended and forced-choice questions were used. The open-ended question asked respondents to describe in their own words what the claim meant to them. About 30% of respondents described the claim as a superiority claim, 10% described it as a parity claim while 60% of responses did not fall into either category. When forced to choose between these two options, 55% chose the superiority option across all four slogans. Two forced-choice questions were used to measure the extent to which the claims were believed:

- (i) Do you believe what the slogan says?
- (ii) Is the slogan the truth?

Across all four slogans, about 25% of the sample answered yes to the first question and 21% to the second.

Wyckham concludes:

The data suggest that implied superiority claims have the potential to deceive consumers. Meaningful proportions of the respondents believed the slogans and see them as truth. Large proportions of the sample interpret the test claims to suggest superiority, not the parity of the literal meaning.¹²⁸

¹²⁸ Ibid at p 60.

Two criticisms may be leveled at this conclusion. First, the published findings only show that about half of the sample interpret the slogan as a superiority claim and about a quarter of the sample believe the slogan. The conclusion that the slogans are potential misleading requires that a "meaningful proportion" of the people, *who interpreted the slogan as a superiority claim*, believed the claim. From the reported data, it is possible to conclude that all of the 25% who believed the slogan interpreted it as a parity claim. Second, the reported findings do not show that belief in the advertised product's superiority was *caused* by the slogan. It is quite possible that the slogan merely happened to correspond to a false belief held by 25% of the sample. To demonstrate that the slogan was misleading, it would have to be shown that a greater proportion of those who saw the slogan believed the product to be superior than those who did not see the slogan. This would be very difficult to do for well known slogans.

Snyder (1989)¹²⁹ aimed to overcome some of the limitations of the earlier study. First, by including both fictitious and familiar brands, he was able to control for the effect of pre-existing beliefs about the brand which remained a possible alternative explanation for the earlier findings. Second, he incorporated a wider range of dependant variables in order to see if perceptions of brand quality and interest in trial of the product were affected in the same way as belief in brand superiority.

A factorial design using one hundred and ninety two student volunteers as subjects, tested slogans for four products (aspirin, shampoo, toothpaste and sunscreen). Of the four slogans tested, two were for familiar brands and two for fictitious brands.

For familiar brands, similar proportions of the sample stated they believed the claim (17%) or thought it was true (24%) to those reported by Wyckham (25% and 21%). A smaller proportion believed the same slogans for fictitious brands:

¹²⁹ Snyder R. (1989) Misleading Characteristics of Implied Superiority Claims
Journal of Advertising Research Vol 18 (1989) pp 54-61.

It is important to recognize that a substantial proportion of subjects not only thought that the claim was made for superiority but also believed this superiority inference (an average of 13 percent for fictitious brands and 26 percent for familiar brands)¹³⁰

The studies discussed above have examined false beliefs produced by exposure to an advertisement as the key factor in deciding whether an advertisement is deceptive. The studies reviewed in the next section have examined the extent to which such beliefs might influence purchase behaviour.

3.3.3 Studies of purchase intentions

Several researchers have investigated the impact of deceptive claims on consumers' intentions to buy the product and how this impact is affected by the opportunity to try the product.

Olson and Dover (1978)¹³¹ investigated the extent to which false beliefs produced by deceptive claims were affected by experience with the product that contradicted the claim. Half of the subjects were exposed to the claim that a fictitious brand of ground coffee " contained no bitterness" while the other half were not. Both groups then tasted the coffee which had been brewed in a form 50% stronger than the instructions in order to make it artificially bitter. Two dependent variables were measured both before and after tasting the coffee. These were belief that the coffee contained no bitterness and intention to buy the coffee.

The results showed that belief in the claim by the experimental group declined after tasting the coffee but remained significantly higher after trial than that of the control group. Although the intention to purchase scores were higher in the experimental group than the control group

¹³⁰ Ibid at p 60.

¹³¹ Olson J.C. and Dover P.A. (1978)Cognitive Effects of Deceptive Advertising, *Journal of Marketing Research* Vol 15 (1978) pp 29-38.

before tasting the product, there was no significant difference after tasting it.

The type of claim investigated by Olson and Dover was one that could be evaluated in a single trial of the product. In such cases, the study suggests that although a deceptive claim might induce initial trial of the product, it is unlikely to induce subsequent purchase of the product.

Vanden Bergh and Reid (1980)¹³² measured the change in a variety of cognitive variables due to use of the product, after subjects had been exposed to one of three levels of claims about a ball point pen: overstated, accurate and understated. The variables measured included: evaluation of the advertising message, evaluation of the advertiser and intention to purchase the pen. The general effect of trial of the product was to increase the score on all these variables for those who had received the understated claims. By contrast, trial of the product reduced the scores on all variables for those that had received both overstated and accurate claims.

Several studies have reported that exposure to an advertisement containing exaggerated claims before trial of the product tends to produce higher post-trial product ratings than trial alone. However, extreme levels of exaggeration produce lower post-trial ratings than moderately exaggerated claims.¹³³

132 Vanden Bergh, B.B. and Reid L.N. (1980) Effects of Product Puffery on Response to Print Advertisements, in: Current Issues and Research in Advertising 1980 Leagh and Martin (eds.) Ann Arbor: University of Michigan Press, 1980.

133 Anderson R.E. (1973) Consumer Dissatisfaction: The Effect of Disconfirmed Expectancy on Perceived Product Performance, Journal of Marketing Research, Vol 10 (February 1973) pp 38-44.

Kamins and Marks (1987)¹³⁴ note that one explanation for this effect is that at extreme levels of puffery, perceptions of the truthfulness of the advertiser decrease. The authors conclude that:

The research indicates that when a claim is puffed to an extreme degree, it becomes evident to the consumer upon product trial. However, more moderate levels of puffery are not as evident upon trial and so the consumer evaluates the product in line with relatively high prior expectations.¹³⁵

Some studies have examined purchase intention scores as the main dependant variable.¹³⁶ These studies have been based on the Fishbein model in which purchase intention scores are viewed as a function of beliefs about the product and the salience of these beliefs.¹³⁷

Mann and Gurol (1978)¹³⁸ examined consumer beliefs resulting from both the deceptive and corrective TV ads involved in the Listerine litigation.¹³⁹ Subjects were randomly assigned to one of four groups. Measures of subjects' beliefs about the product and the salience of each

¹³⁴ Kamins M.A. and Marks L.J. (1987) Advertising Puffery: The Impact of Using Two-Sided Claims on Product Attitude and Purchase Intention, Journal of Advertising Vol 16 (1987) pp 6-15.

¹³⁵ Ibid at p 13.

¹³⁶ Armstrong G.M., Kendall C.L. and Russ F. A. (1975) Applications of Consumer Information Processing Research to Public Policy Issues, Communications Research, Vol 2 (1975) pp 232-45.

¹³⁷ Fishbein M. and Ajzen I. (1975) Belief, Attitude, Intention and Behaviour: An Introduction to Theory and Research (1975)

¹³⁸ Mann R. A. and Gurol M. (1978) An Objective Approach to Detecting and Correcting Deceptive Advertising, Notre Dame Lawyer Vol 54 (1978) pp 73-101.

¹³⁹ The FTC charged that advertisements for Listerine mouthwash created the false impression that Listerine was effective in preventing and treating colds and sore throats. The order that corrective advertising be undertaken to correct this impression was upheld by the courts: Warner-Lambert Co. v FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

belief were taken immediately before and after exposure to the deceptive Listerine (and two other) ads and immediately after exposure to one of two versions of the corrective ad. An additional measure was taken by mail survey six weeks after the laboratory experiment. One of the groups saw neither the deceptive nor the corrective ad but viewed irrelevant ads. A second group observed the deceptive ad but not the corrective ad. Of the two remaining groups, one saw a company-sourced corrective ad and the other a FTC-sourced corrective ad.

A salient deception score (SDS) was calculated for each false claim by multiplying the belief score of every subject by that subject's salience score and summing over the three false claims.

The results showed that the deceptive ad increased the aggregate level of deception as measured by the SDS score. This was due more to changes on the salience scale than on the belief scale. The two versions of the corrective ads were about equally effective in reducing the SDS score. This effect was mostly due to changes on the belief scale rather than on the salience scale.

Burke, DeSarbo, Oliver and Robertson (1988)¹⁴⁰ examined two types of claims defined by Preston.¹⁴¹ They tested the effect of both types of claims for hypothetical brands in a single product class on subjects' beliefs and intentions to purchase. The class chosen, ibuprophen-based brands of pain relievers, was one where pre-existing false beliefs were known to exist.

¹⁴⁰ Burke R.R., DeSarbo W.S., Oliver R.L. and Robertson T.S. (1988) Deception by Implication: An Experimental Investigation, Journal of Consumer Research Vol 14 (March 1988) pp 483-494.

¹⁴¹ The first type, called "expansion implications", are claims that imply a degree of performance beyond that literally stated. The second, called "inconspicuous qualification implications" are similar except that the claims are explicitly qualified in an inconspicuous manner. Preston I.L. (1989) The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising, Cincinnati Law Review Vol 57 (1989).

Their study used both "true information" and "no information" controls to isolate both "incrementally" and "exploitatively" misleading claims. The subjects were eighty university students of which half were involved in the main study. The study used an interactive computer programme which displayed the ads, asked the questions and recorded subjects' answers simultaneously.

While looking at the advertisements, subjects rated each hypothetical product on four attributes by selecting a point on a seven point bi-polar scale labelled from "Definitely False" to "Definitely True" with the midpoint labelled "Don't Know". They also rated each product in terms of their attitude towards the brand, their preference for the brand, and their likelihood of purchase.

The study found that both types of claims produced stronger beliefs in the four attributes than in either the true or no information conditions.

In general, scores for attitude to the brand, preference for the brand, and intention to purchase the brand, followed a similar pattern to that observed for the belief scores, although the magnitude of these effects was smaller.

Richards (1988)¹⁴² reports a study that had several unique features. He tested ten advertisements; seven of which had been the subject of FTC proceedings. His aim was to devise a technique for detecting advertisements that would be found to be deceptive by the FTC. The technique involved the use of one treatment group and three control groups; one receiving no information, one receiving true information and one which received false information. For each advertisement, he presented a series of test statements to subjects and asked them to respond on a thirteen-point semantic differential scale that aimed to measure subjects' beliefs about the advertised product. The labelling of these scales was unique for each advertisement and depended on the misrepresentations alleged in the FTC's complaint.

¹⁴² Richards J.I. (1988) A foundation for theory and assessment of deception: The legal and behavioural situs of advertising misrepresentations. Unpublished Ph.D dissertation, University of Wisconsin, Madison, 1988.

According to this technique, deceptive advertisements were those where the belief ratings of the experimental group were closer to that of the "false information" group than to that of the "true information" group. The ratings of the "no information" group were of no significance for this purpose. In addition, he asked subjects to rate the importance of each attribute to the purchase decision. He selected the midpoint of the scale as the critical value for a deceptive belief to be material. This technique categorised ads as deceptive or non-deceptive in much the same way as the FTC had.

3.4 Summary

The first part of this chapter reviewed the literature on the regulation of deceptive advertising in the United States by the FTC. A number of criticisms have been made of the way in which the FTC exercised its powers under section 5 of the Federal Trade Commission Act. These criticism included the FTC's failure to provide an operational definition of deceptive advertising, its failure to use consumer research, its tendency to exclude puffery from the scope of section 5 and its failure to regulate non-verbal advertising claims.

Several authors offered definitions of deceptive advertising that they felt would provide a basis for the use of consumer research in FTC deliberations. Some definitions identified consumers' beliefs as the critical variable. Others emphasised consumers' purchasing behaviour as the central element. The 1983 Policy Statement set out a definition of deceptive advertising that emphasised purchase behaviour. It also suggested an increased role for empirical research in FTC decisions.

In the second part of this chapter, the attempts of researchers in the fields of advertising and consumer psychology to provide empirical tests of a deceptive advertisement were discussed.

The standard tests involve exposing subjects to advertisements in a laboratory setting and then asking them questions designed to measure a range of cognitive effects. No consensus was found to exist on the

type of cognitive effect that should be measured in order to detect deceptive advertisements.

One line of research attempted to detect the implied claims conveyed by an advertisement. In relation to these studies, debate has focused on the wording of the instructions accompanying the test statements and the response scales used. In addition, considerable controversy surrounds the conclusions that should be drawn from a finding that a certain percentage of the audience responded to a certain test statement in a certain way. The idea that a normal error rate of about 30% exists has not been disproved.

Another line of research attempted to detect false beliefs caused by an advertisement. These studies have produced a debate about the experimental controls necessary to prove a causal relationship between the advertisement and the false beliefs measured. A variety of control groups have been used, including:

- (i) a group who is not exposed to the advertisement
- (ii) a group who is exposed to accurate information
- (iii) a group who is exposed to false information

In general, such studies do not indicate whether the false belief is a factor in purchase decisions.

A third line of research attempted to detect the effect of deceptive advertising on consumers' stated purchase intentions. Some of these studies have been criticised as ignoring the effect that use of the product might have on these intentions.

In addition to disagreements about the relevant dependent variables in deceptive advertising research, a wide variety of factors have been noted as limiting the validity of the research. The effect of these factors is to cast serious doubt on the extent to which the results of the studies can be generalised.

The main limitations on the research findings relate to the selection of subjects and the unnatural viewing conditions. The vast majority of

studies has used university students as subjects. These subjects have been exposed to advertisements in laboratory settings. Artificially high levels of attention have been guaranteed by using forced exposure to advertisements divorced from their usual context. Few studies have used multiple exposures to the advertisement. Many studies have used fictitious advertisements which exclude interactions between the advertisements and previous knowledge or use of the product .

This chapter has undertaken the first step towards meeting the second objective of this thesis. It has described the range of the empirical tests devised by deceptive advertising researchers. It should be noted that no consensus has emerged as to the type of test that is likely to have the greatest influence in legal proceedings. In the next chapter, this issue is addressed by reviewing the proceedings in which evidence of empirical tests has been introduced.

CHAPTER FOUR

CONSUMER RESEARCH EVIDENCE

4.1 Introduction

The previous chapter undertook the first step towards meeting the second objective stated in chapter one. It examined the range of empirical tests that have been proposed to determine whether an advertisement is deceptive. This chapter undertakes the second step towards meeting this objective. It investigates the weight that has been placed on empirical tests in legal proceedings. The chapter uses the term "consumer research evidence" to describe evidence of both laboratory tests and consumer surveys.

The first section discusses FTC decisions where consumer research evidence has been introduced. The following section reviews cases decided under section 43(a) of the Lanham Act. The final two sections examine the cases decided in Australia and New Zealand.

4.2 FTC decisions

One of the issues that commonly arises in FTC hearings is whether an advertisement conveys an implied claim that is false. In deciding such issues, the FTC has made use of several different forms of evidence, including: dictionary definitions, the opinions of marketing and advertising experts and consumer research. All these are referred to in FTC opinions as types of "extrinsic" evidence. This term is used to distinguish such evidence from "intrinsic" evidence which is the evidence provided by the advertisement itself. It is clear that consumer research is the preferred form of "extrinsic evidence". In *Thompson Medical*,¹ the Commission stated:

The extrinsic evidence that we prefer to use and to which we give great weight is direct evidence of what consumers actually thought upon reading the

¹ *Thompson Medical Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

advertisement in question. Such evidence will be in the form of consumer survey research for widely distributed ads . . . Ads of that sort are directed at so large an audience that it is too costly to obtain the statements of enough individual consumers in another manner (e.g., by way of affidavits) to be reasonably confident that the consumers' views . . . were representative of the entire group to which the ad was addressed.²

Preston (1987)³ notes that most of the FTC decisions in which consumer research has been cited have concerned television advertising. He suggests that :

While nothing in the record discusses that point, an easy explanation is that television must produce most of the types of conveyed messages that require extrinsic evidence. Explicit meanings and obvious implied meanings require little or no such evidence, while non-obvious implied meanings, which do, seem to occur far more often in television than in print or radio advertisements.⁴

He points out that many of the tests cited in FTC decisions had been conducted prior to the litigation as part of the advertiser's normal advertising evaluation programme. In some cases, the results were introduced by the advertiser in an attempt to disprove the FTC's allegations. In other cases, they were introduced by the FTC itself, often over the objections of the advertiser who commissioned them. In such cases, the advertiser was forced into the difficult position of arguing that tests it regularly commissioned were unreliable.

2 *Thompson Medical Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) at 104 F.T.C. pp 789-90.

3 Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, Columbia Business Law Review (1987) pp 633-694.

4 *Ibid* at p 654.

Preston (1987)⁵ argues that the weight placed by the FTC and appeal courts on evidence of consumer tests has depended, to some extent, on two factors. The first is whether the tests used natural or artificial viewing conditions. The second is whether open-ended or forced-choice questions were used. These factors are discussed in turn.

Most tests cited in FTC decisions used natural viewing conditions and open-ended questions. Typical of such tests are Day After Recall tests of television commercials conducted by Burke Market Research, which are commonly referred to as "Burke DAR tests". In these tests, subjects view the commercial at home without any prior contact with the researchers. Within twenty four hours, they are contacted by telephone and asked if they remember seeing the commercial. If they say they do, they are asked a series of open-ended questions, such as "What was the main idea in the commercial?". Such tests are commonly used by advertisers to evaluate the effectiveness of their television advertising.

Tests using artificial viewing conditions are typified by those routinely conducted by Audience Studies Incorporated, which are commonly referred to as "ASI audience reaction tests". The tests are conducted in a theatre. The audience for each night is recruited to attend a preview of a television programme in return for answering some questions about it. Recruitment procedures are designed to produce a representative sample from the city in which the test is conducted.

Each member of the audience is given a questionnaire folder and is asked to answer questions about various demographic characteristics, television programmes, and use of and preferences for various products. Then, subjects are shown a warm-up cartoon. Next, they are shown a regular length television programme and then, five commercials. Immediately after each commercial, subjects fill out their responses to a page of questions about the advertisement. Following that, the audience views another television programme. They fill out a brief questionnaire about the programme. They are then shown a second cartoon and asked to complete a recall document which asks them to write down all they can remember about the five commercials they have

5 Ibid at p 643.

seen. Thus, subjects are presented with the recall question approximately thirty to forty minutes after they have seen the commercials.⁶

Preston cites several cases in which tests using natural viewing conditions and open-ended questions were commented on favourably by the FTC.

Evidence in the *Wonder Bread* case,⁷ included the results of a survey of female heads of households with listed phone numbers in four cities. Subjects were placed in the "test" group if they remembered seeing the ad and in the "control" group if they did not. Both groups were asked questions about the product's attributes and the test group was asked what the advertisement conveyed to them. The FTC commented that exhaustive pretests had been conducted, the interviewers were carefully trained, and validation checks were made on the conduct of the interviews. The results were described as being "nationally projectable".

In the *Sunoco gasoline* case,⁸ the results of a study of male residents of one county, who were listed in the phone book, owned a car, bought gasoline, and had watched the programme containing the Sunoco advertisement was found not to be "nationally projectable", but was held to indicate the public's opinion and to confirm the Commission's own conclusions.

In the *Dry Ban* case,⁹ the results of an 'on air' pre-test of a TV ad were introduced. The tests involved "splicing" the ad to be tested into a programme broadcast in one city. Within twenty four hours, telephone interviews were conducted with people who had been randomly selected from the telephone directory. People were asked if they had seen the

⁶ This description of ASI audience reaction tests is taken from the opinion in *American Home Prods.*, 98 F.T.C. 136 (1981) at pp 170-171.

⁷ *ITT Continental Baking Co.*, 83 F.T.C. 865 (1973), *modified order*, 83 F.T.C. 1105, *modified*, 532 F.2d 207 (2d Cir. 1976), *modified order*, 90 F.T.C. 181 (1977)

⁸ *Sun Oil Co.*, 84 F.T.C. 247 (1974)

⁹ *Bristol Myers Co.*, 85 F.T.C. 688 (1975)

programme, and if they said they had, they were asked about the messages conveyed by the commercial.

Both the advertiser and the advertising agency criticised the research but the Commission dismissed their criticisms on the basis that both the advertiser and the agency were involved in the planning and supervising of the study and that the tests were routinely used by them to obtain information on which to base advertising and marketing decisions.¹⁰

In *Sterling Drug*,¹¹ the advertiser introduced results of Burke DAR tests with the intent of disproving the FTC's allegation. The Commission noted that Burke had conducted fifteen to twenty thousand 'on-air' tests using this standard method. The Commission concluded that:

The copy tests . . . were performed in a standard and reliable fashion. These tests or tests substantially identical to them were and are relied upon by large numbers of businesses . . . for purposes of making normal business decisions . . . They are reliable and probative evidence of consumer recall of advertising content for the ads challenged in this proceeding.¹²

Tests by another research firm using a similar format were introduced in *California Milk*.¹³ Three commercials were broadcast in three Californian cities. The following evening, a total of 465 people who had watched the programmes was interviewed. Although the results were found not to be projectable to any specific portion of the public, they were still found to have value as evidence demonstrating that the

¹⁰ *Bristol Myers Co.*, 85 F.T.C. 688 (1975) at p 726 "Respondents themselves plainly regarded the consumer surveys as accurate and reliable for charting business courses".

¹¹ *Sterling Drug*, 102 F.T.C. 395 (1982)

¹² *Sterling Drug*, 102 F.T.C. 395 (1982) at p 462.

¹³ *California Milk Producers Advisory Bd.*, 94 F.T.C. 429 (1979)

advertisement had the capacity to convey the alleged misrepresentation.¹⁴

Preston (1987)¹⁵ notes some early cases in which tests using artificial viewing conditions were cited. He states that the *Dry Ban* case¹⁶ was the first where evidence of studies by commercial research firms using artificial viewing conditions was discussed in any detail. Subjects were shown a TV commercial in mobile vans parked at shopping centres. One of the research firms questioned subjects immediately afterwards. The other contacted subjects by phone the next day. Both the advertiser and its advertising agency had been involved in planning the techniques and sampling method used. Nevertheless, they argued that the artificial viewing conditions rendered the results of the tests of no probative value. The Administrative Law Judge (ALJ) rejected this argument:

The research reports are not unreliable because the techniques used . . . did not reflect true television viewing . . . The fact that this technique is artificial in many respects does not invalidate the results insofar as the communication of ideas is concerned . . . There may, or course, be fewer distractions in the mobile van, and the commercial is not imbedded in a continuous broadcast of programs and other advertising. But these factors would only bear on the attention viewers might give respondents' commercials, not on the ability of the commercials to communicate ideas in one setting but not in another. In short, if a commercial can communicate an idea in a mobile van showing, it can communicate that idea over network television.¹⁷

¹⁴ Ibid at p 463.

¹⁵ Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, *Columbia Business Law Review* (1987) pp 633-694.

¹⁶ Bristol Myers Co., 85 F.T.C. 688 (1975)

¹⁷ *Bristol Myers Co.*, 85 F.T.C. 688 (1975) at p 727.

Preston notes that in no subsequent case were tests criticised merely on the basis that viewing conditions were artificial.¹⁸

In *Block Drug*,¹⁹ the results of copy tests using artificial conditions were described as supporting the Commission's own conclusions:

If there was any doubt as to the message conveyed by these denture adhesive advertisements, such doubt is dispelled by the results of the 'copy tests', where a not insubstantial number of persons sampled perceived the messages as representing eating benefits similar to the allegations.²⁰

In the 1980's, four cases arose involving analgesic products.²¹ A large amount of consumer research evidence was offered in these cases. Twenty separate ASI audience reaction tests were introduced in *American Home Products*, seventeen in *Bristol-Myers*, and two in *Sterling Drug*. In *American Home Products*, the ALJ stated:

Although the test environment is somewhat artificial and does not purport to simulate the typical home-viewing environment, the ASI tests provide a valuable insight regarding the probable consumer perception of the copy points contained in test ads.²²

The Commission was more cautious in its view of the probative value of such tests :

18 Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, *Columbia Business Law Review* (1987) pp 633-694, at p 649.

19 *Block Drug Co.*, 90 F.T. C. 839 (1977)

20 *Block Drug Co.*, 90 F.T. C. 839 (1977) at p 912.

21 *American Home Prods.*, 98 F.T.C. 136 (1981), modified, 695 F.2d 681 (3d Cir. 1982), modified orders, 101 F.T.C. 57 (1984), 103 F.T.C. 528 (1984).

Bristol-Myers, 102 F.T.C. 21 (1983), aff'd, 738 F.2d 554 (2d Cir. 1984)

Sterling Drug, 102 F.T.C. 395 (1983), aff'd, 741 F.2d 1146 (9th Cir. 1984)

22 *American Home Prods.*, 98 F.T.C. 136, at p 291.

The record contains numerous surveys ("copy tests") which measure viewer reactions to ads. Because of the way in which these studies are conducted . . . participants tend to focus only on the primary idea of the ad being tested and the results are not statistically projectable to the population at large. While this does make the copy tests less useful for our purposes, they are of help to us in confirming whether our interpretation of certain claims is reasonable.²³

In *Thompson Medical*,²⁴ the FTC sponsored an ASI Theatre Test which differed from the standard ASI audience reaction test in that subjects were shown only the test commercial and one other and were not questioned until the following day. The Commission criticised the method as follows:

It is likely that the responses. . . show a bias toward relatively increased estimates of the confusion about the information contained in [the Aspercreme ad]. This is due to the fact that [it] was shown only once, that it was shown along with another commercial, and that participants were not asked questions about the ingredients . . . until the next day. Thus, it is likely that the ASI Theatre Test resulted in an inflated estimate of the percentage of the subjects who . . . believe aspirin is an ingredient in Aspercreme.²⁵

However the Commission concluded that:

Despite the likelihood of a yea-saying bias which appears to exist in the ASI Theatre Test data, the overall results indicate that the net impression conveyed . . . to at least

23 *Bristol-Myers*, 102 F.T.C. 21, at p 326.

24 *Thompson Medical Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986)

25 *Thompson Medical Co.*, 104 F.T.C. 648, at pp 806-07.

one group of average listeners was that Aspercreme contains aspirin.²⁶

Prior to the litigation in that case, Thompson had commissioned copy tests from a research firm called Mapes & Ross. The study was similar to an ASI audience reaction test except that subjects were questioned the following day and the questions included unaided recall, aided recall and brand preference measures. When the FTC sought to rely on the result of these tests, Thompson criticised the design of the tests. The Commission noted that:

Representatives of Thompson had discussed the Mapes & Ross Test during a meeting with its advertising agency, Olgilvy and Mather, and based on that discussion, Thompson decided which commercial to air. Thus Thompson had relied on the Mapes & Ross Test to make an important business decision.²⁷

Although the Commission noted that the study did not use a probability sample and that it did not discuss either survey response rates or non-response bias, it stated :

Such methodology is adequate for the results to be of some probative value, assuming the survey asked probative questions.²⁸

In addition to the Mapes & Ross Tests, which were conducted prior to the broadcast of the ad, Thompson commissioned two other studies especially for the hearing. Both these studies used shopping mall intercept techniques to recruit subjects. Subjects were shown the ad twice, in isolation from any programme or other ads, and were questioned immediately afterwards.

²⁶ *Thompson Medical Co.*, 104 F.T.C. 648, at p 808.

²⁷ *Thompson Medical Co.*, 104 F.T.C. 648, at p 693.

²⁸ *Thompson Medical Co.*, 104 F.T.C. 648, at pp 795-96.

Preston (1987)²⁹ has no doubt that the results of tests using artificial viewing conditions provide more probative evidence than those using natural viewing conditions. He states:

Concluding the discussion of natural versus artificial conditions is the question of which is superior. The answer- artificial conditions- was provided as early as the Dry Ban case, comparing the methods of Schrader (artificial, immediate recall), Ostburg (artificial, day after recall) and Fouriezos (natural, day after recall). All three "were relatively effective in determining the messages and representations communicated to viewers by the commercials being tested, although there is evidence, as indicated, that the Schrader procedure with immediate questioning is superior in this respect". Schrader did not measure the degree of memory of a commercial over time as well as the other two did, but long-term memory was not the issue at hand. Immediate answering is more likely to be based on the message seen, fitting the legal criterion, whereas a later report is likely to be affected by other messages or other intervening experience.³⁰

The second main issue discussed by Preston is the choice between open-ended and forced-choice questions, Preston states that:

Open-ended questions have been used more frequently than forced-choice questions in findings on message conveyance. Under natural conditions they have been used almost exclusively, and under artificial conditions they are in the majority.³¹

The responses to open-ended questions are called "verbatims". These are either the written answer of the subject or interviewer's recording of

²⁹ Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, Columbia Business Law Review (1987) pp 633-694, at p 655.

³⁰ Ibid at p 655. The quotation is from *Bristol-Myers* 85 F.T.C. 688, at p 791.

³¹ Ibid at p 656.

the subject's oral answer. It is usual to group these answers and to report the percentage of verbatims in each group. However, assigning verbatims to groups is a rather subjective process. Consequently, the Commission has routinely demanded that all the verbatims be available for its perusal.³²

The earliest reported use of open-ended questions was in the *HI-C* case³³ where 13,000 subjects who recalled seeing HI-C fruit drink advertisements were asked: "What do you remember about the advertising? What did it say? What did it show? What was the main point they were trying to get across about HI-C?". The fact that only one person saw the ad as comparing HI-C to orange juice was held to refute the FTC's allegation.³⁴

In the *Wonder Bread* case, viewers were asked "What is the most important thing that the commercial told you about Wonder Bread?" Despite the fact that only fifty out of 789 of the verbatims mentioned that Wonder Bread induces remarkable growth, the Commission held that the survey was not inconsistent with their conclusions that this claim was implied. In the Commission's view:

The questions were not designed and would not be likely to elicit consumers' perception of the latent or implied messages contained in the advertising such as those challenged in the complaint. Rather, the questions asked were designed to and usually only elicited the interviewee's recall of the explicit message projected by the advertisement.³⁵

In the *Dry Ban* case, several tests were conducted by different firms. Most of these included open-ended questions such as "What do you think was the main idea in the commercial?" and "In your own words,

³² *Sterling Drug*, 102 F.T.C. 395 (1983) at p 460.

³³ *Coca-Cola Co.*, 83 F.T.C. 746 (1973) at p 773.

³⁴ Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, *Columbia Business Law Review* (1987) pp 633-694, at p 654.

³⁵ *ITT Continental Baking Co.*, 83 F.T.C. 865 (1973) at p 977.

what do you think the manufacturer was trying to tell you in order to get you to try Dry Ban?". The FTC had a communications expert combine all the verbatims and group them into categories. Between 25% and 33% of the 700 verbatims mentioned the challenged claim. The Commission stated:

These are not insignificant numbers . . . Certainly the results are not limited to the persons interviewed, and can be projected to a substantial proportion of the viewing public . . . Hundreds of 'verbatims' are involved, eliminating the significance of conceivable inaccuracies in reporting individual 'verbatim' comments.³⁶

In *California Milk Producers*,³⁷ consumers were asked what they thought "they were trying to tell you about milk". In reply to the argument that the verbatims reflected subjects' pre-existing ideas about milk, the ALJ stated:

Inasmuch as "verbatims" are statements of the person interviewed which are written down by the interviewer, they are a clear indication of the messages and ideas communicated by the commercials . . . Nor is it valid to argue that the 'verbatims' do not reveal the representations made by the ads because they elicited opinions already held about milk . . . Obviously, many have positive ideas about milk, and many may even believe, apart from the respondent's advertising, that milk is a dietary essential. The interviewer, however, did not ask what the person interviewed thought or believed about milk, or his opinions about milk, but what the ads showed, what the ads said and what the ads were trying to tell you about milk . . . Even though it is theoretically possible that a person interviewed might disregard the questions asked and respond with his

³⁶ *Bristol-Myers*, 102 F.T.C. 21, at p 709.

³⁷ *California Milk Producers Advisory Bd.*, 94 F.T.C. 429 (1979)

preconceived opinions, the likelihood that that happened to any significant degree in this particular study is remote and provides no basis for disregarding the 'verbatims' recorded.³⁸

The FTC has noted two problems with open-ended questions. The first is the absence of any objective criteria for categorising verbatims. The second is that such questions tend to illicit only the main point of the commercial. In *American Home Products*, the Commission stated:

It is accepted in marketing research that an open-ended question is not representative of everything stored in subjects' minds . . . Open-ended questions lead most subjects to play back only one theme or point . . . Respondents will play back the dominant theme or primary impression and having done that, will stop.³⁹

Both of these problems can be overcome by using forced-choice questions, either in isolation or after the open-ended questions. However, the FTC has often criticised the structure of forced-choice questions.

In the earliest reported use of forced-choice questions, *Rhodes Pharmacal*, subjects were asked whether certain advertisements meant that Imdrin would provide relief from the pain of arthritis and rheumatism or whether they meant that it would provide a cure for arthritis and rheumatism. Only 9% of subjects indicated the latter option which corresponded to the FTC's allegation, but the Commission held that:

A survey implying that the advertisements either represented a cure or represented pain relief was improperly designed to determine if they did not represent both.⁴⁰

³⁸ Ibid at p 461.

³⁹ *Thompson Medical Co.*, 104 F.T.C. 648, at p 697.

⁴⁰ *Rhodes Pharmacal Co.*, 49 F.T.C. 263, at p 283.

A similar criticism was made of the structure of forced-choice questions in *Firestone*. Consumers were asked which of four statements came closest to what they thought an advertisement said. Fifteen percent indicated the option corresponding to the allegation. However, the Commission felt that the structure of the question prevented subjects indicating that they had perceived more than one of the statements.⁴¹

In *Sun Oil*, a survey conducted by Preston asked subjects to rate each of eleven statements as either accurate or inaccurate restatements of what was stated or implied in the advertisement. This research was criticised by Sun Oil's research expert as forcing subjects to select one of these two options. However, the ALJ held that the survey:

must be deemed reliable and establishing the representations of the challenged ads.⁴²

In *Thompson Medical*, an ASI Theatre Test used both open-ended and forced-choice questions. The forced-choice questions asked "based on the commercial you just saw, does the product in the commercial contain aspirin?". The study included commercials for Aspercreme and two other similar products, Ben-Gay and Mentholatum. The percentage of subjects who thought Aspercreme contained aspirin was 3% (open-ended) and 22% (forced-choice). In response to the forced-choice question, 5% and 6% of subjects thought the other two products contained aspirin. The Commission appeared to approve of this method:

The questions about the content of Ben-Gay and Mentholatum acted as controls for the survey, and permitted an estimate of the 'noise-level' generated by various random factors.⁴³

Drawing conclusions from his review of FTC comments about open-ended and forced-choice questions, Preston notes that forced-choice

⁴¹ *Firestone, Tire & Rubber Co.*, 81 F.T.C. 398, at p 454.

⁴² *Sun Oil Co.*, 84 F.T.C. 247, at p 271.

⁴³ *Thompson Medical Co.*, 104 F.T.C. 648, at p 805.

questions elicit information on the precise issue of the inquiry whereas open-ended questions may or may not elicit the information relevant to the inquiry. However, the disadvantage of forced-choice questions is that they must be specific to each advertisement. In contrast, standard open-ended question can be used for any ad about any product. Preston concludes that:

Standardised methods, because used so many times by so many advertisers and agencies, are likely to obtain favourable judgments about probative weight. It may be impossible for respondents to challenge the validity of standardised methods not because such methods are perfect but because advertisers (typically including the respondent) are known to have relied on them for making normal business decisions.⁴⁴

An obvious possibility is to include both types of questions. In Preston's view, the effect of this would be that:

In cases where both indicate significantly high or low levels of conveyance of a message, they will confirm and validate each other. But where the levels for forced-choice questions are significantly high and the levels for open-ended are not, as can often happen, the forced-choice is likely to be called more valid than the open-ended . . . A definitive conclusion is difficult, however, because the evident superiority of well-constructed forced-choice questions is offset by their scarcity, owing both to the need to customize them to the specific situations (with consequent extra cost), and to the problems of constructing them adequately. Thus, although good forced-choice questions may be better, they often are not available.⁴⁵

⁴⁴ Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, Columbia Business Law Review (1987) pp 633-694, at p 667.

⁴⁵ Ibid at p 667.

The usual way in which results of consumer tests are introduced into FTC proceedings is in the form of expert opinion evidence. Evidence may be offered by experts in two situations. The first is that discussed above where the expert has undertaken tests on the advertisement challenged in the proceedings. In this case, the expert is just a vehicle by which the test results are presented to the court. In the second situation, the expert gives an opinion based either on tests done on other advertisements or on the basis of his or her accumulated experience. In *Thompson Medical*, the FTC described its attitude to such evidence as follows:

We might consider the opinion of a marketing expert who stated his or her view that consumers would interpret an ad in a particular manner. However, where the opinions voiced by experts are not adequately supported, we ordinarily give them little weight . . . We consider to be adequately supported opinions that describe empirical research or analyses based on generally recognised marketing principles or other objective manifestations of professional expertise. Opinions not so supported may be easily contradicted by the contrary opinions of opposing experts and thus may be of little value in resolving the issue.⁴⁶

Similarly in *Crown Central*, the FTC commented:

We do not believe that their opinions about the proper interpretation of these advertisements are worthy of sufficient weight to overcome what we consider to be the obvious representations of the advertisements standing by themselves.⁴⁷

In addition to tests purporting to show how an advertisement is interpreted by members of its audience, tests purporting to show that consumers have developed false beliefs about the advertised product

46 *Thompson Medical Co.*, 104 F.T.C. 648, at p 790.

47 *Crown Central Petroleum Co.p.*, 84 F.T.C. 1493 (1974) at p 1540.

have been introduced in several cases. Many consumer researchers have suggested that such surveys provide more direct evidence of deception than those showing how an advertisement is interpreted.⁴⁸ However, as Preston notes, such surveys do not demonstrate that the false beliefs have been caused by the advertisement. Preston prefers to see them as indirect evidence of deceptiveness. In his view, the Commission is invited to infer that the advertisement was the main cause of the false beliefs. However, there are usually several plausible alternative hypotheses as to how the false beliefs arose. In many of the cases where survey evidence relating to consumers' beliefs about the product has been introduced, the survey has been commissioned by the advertiser prior to the FTC's investigation.

In the *Wonder Bread* case, the complaint alleged that the ads falsely suggested to children that the product induced dramatic growth.⁴⁹ Surveys involving adults were introduced to show that some people believed Wonder Bread stood out among breads in helping children to grow. In answer to the argument that such studies fail to demonstrate any link between the false beliefs and the advertisement, the FTC stated:

We do not agree with the respondents that market surveys directed at measuring consumer attitudes to a *product* offer no guide or are probatively inferior to market surveys testing consumer recall of advertising messages . . . Respondents themselves utilized these survey results in order to monitor the effectiveness of their advertising messages and to guide the development of new advertising strategies for Wonder Bread. Accordingly, we conclude that market surveys of consumer attitudes to the advertised product are relevant

⁴⁸ See, for example Richards J.I. (1988) A foundation for theory and assessment of deception: The legal and behavioural situs of advertising misrepresentations. Unpublished Ph.D dissertation, University of Wisconsin, Madison, 1988.

⁴⁹ *ITT Continental Baking Co.*, 83 F.T.C. 865 (1973), *modified order*, 83 F.T.C. 1105, *modified*, 532 F.2d 207 (2d Cir. 1976), *modified order*, 90 F.T.C. 181 (1977)

to the issues raised with respect to the representations made by the respondent's advertisements.⁵⁰

On appeal, it was argued that since the complaint had specifically referred to the effect of the ads on children, the survey should have been deemed irrelevant in that it purported to show what adults believed. The Court, however, agreed with the Commission that:

It is reasonable to assume that advertisements which would have the capacity to deceive the more sophisticated adult portion of a viewing audience would *a fortiori* have the capacity to deceive the children in that audience.⁵¹

In the cases discussed above, the Commission has described the evidence as having some probative value. Very often, this has been despite the objections of the respondents who commissioned the tests or surveys. Sometimes, the studies have been criticised by the Commission itself, and yet have still been held to corroborate the Commission's own view of the messages conveyed by the challenged advertisement.

On the other hand, there are numerous instances where the Commission has refused to attribute any weight to consumer tests. Sometimes, the reasons given could be applied equally to studies found to be probative in other cases.

In the *Hi-C* case, the allegation was that both the name and the advertising of an artificial fruit drink falsely represented that its Vitamin C content was comparable to that of orange juice.⁵² A study asked subjects what beverage best fits the phrase "highest in Vitamin C". The finding that 85% picked orange juice was offered in support of the complaint. The majority of Commissioners dismissed this finding on the

⁵⁰ *ITT Continental Baking Co.*, 83 F.T.C. 865, at p 978.

⁵¹ *ITT Continental Baking Co.*, 532 F.2d 207, at p 215.

⁵² *Coca-Cola Co.*, 83 F.T.C. 746 (1973)

grounds that the study used the term "highest" whereas both the name and the advertising used the term "high".

In *American Home Products*, the results of "image studies" measuring consumers' perceptions of relative product quality were dismissed as irrelevant in determining how consumers would interpret the advertisements.⁵³ In addition, an expert's testimony on the question of whether advertising caused consumers to switch their purchase preference was deemed to be irrelevant to the issue of deceptiveness.⁵⁴

In several cases, the Commission has dismissed the results of consumer studies on the grounds that the studies tested only *part* of the challenged advertisement. In *Standard Oil*,⁵⁵ the Commission stated:

None of the surveys sought responses to the F-310 advertisements as a whole; all such questions were oriented towards specific slogans or copy lines, and therefore it is "impossible" as Dr. Starr testified, to rely upon the responses as proof of how consumers understood the actual advertisements . . . [I]t is essential that the question be presented in the full context of the advertisement.⁵⁶

The same reason was given for dismissing the results of a consumer study in *Chrysler Corp.*⁵⁷ Chrysler, who was charged with falsely representing that all of its small cars had lower petrol consumption than all Chevrolet Novas, argued that no-one would think of eight cylinder

⁵³ *American Home Prods.*, 98 F.T.C. 136, at p 415. The Commission stated:

"Dr Smith's analysis of the challenged advertisements relied heavily on consumer survey data-'penetration' and 'image' studies. . . These studies, however, do not address the question of whether or not a particular advertisement conveyed a particular claim."

⁵⁴ *American Home Prods.*, 98 F.T.C. 136, at p 416.

⁵⁵ *Standard Oil of Calif.*, 84 F.T.C. 1113

⁵⁶ *Ibid* at p 1423.

⁵⁷ *Chrysler Corp.*, 87 F.T.C. 719 (1976), *modified*, 561 F.2d 357 (D.C. Cir.), *modified order*, 90 F.T.C. 606 (1977)

cars as "small cars". It presented the results showing that most of the 29 participants in a focus group study thought that the words "small cars" meant six or fewer cylinders. The Commission dismissed the study as irrelevant to the issue of how the term would be interpreted in the context of the advertisement.

Not only does it ignore the various contexts in which the term 'small car' may be used, it ignores the specific context in which it was used in these advertisements.⁵⁸

On the other hand, tests of only a portion of an advertisement have been accepted in two cases. In *Firestone*, the complaint alleged that certain tyre advertisements falsely represented that Safety Champion tyres were safe regardless of road conditions.⁵⁹ Consumers were shown a card which listed six tyre names and were asked whether one seemed safer than the others. About half said yes, but only 1.4% picked "Safety Champion" as the one. This test was described as probative in showing how the name "Safety Champion" was perceived.⁶⁰

In *California Milk Producers*, the results of a study were accepted as indicating that the alleged misrepresentation would be conveyed by certain billboard advertisements.⁶¹ In the study, subjects were shown a picture which was similar, but not identical, to the billboards.

In some cases, the results of consumer studies have been found to be of probative value despite inadequacies in the wording of the questions.

⁵⁸ *Chrysler Corp.*, 87 F.T.C. 719, at p 748. Two other reasons have been given for dismissing the results of focus group studies. The first is that respondents are not only responding to the advertisement but also to the comments of other participants. The second is that the small size of the group means that the results may not be representative of the wider audience. In *Thompson Medical*, the FTC stated: "Focus groups are not a research tool whose methodology permits use of their results as the basis for drawing generalizable conclusions." *Thompson Medical Co.*, 104 F.T.C. 648, at p 809.

⁵⁹ *Firestone, Tire & Rubber Co.*, 81 F.T.C. 398

⁶⁰ *Firestone, Tire & Rubber Co.*, 81 F.T.C. 398, at p 461.

⁶¹ *California Milk Producers Advisory Bd.*, 94 F.T.C. 429, at p 462.

However, in other cases, inappropriate question wording has been given as the main reason for placing no weight at all on the results of the study. In *Thompson Medical*, subjects were presented with one of three brandnames (Apercreme, Ben-Gay or Mobisyl) accompanied by the slogan "for the temporary relief of minor arthritis pain".⁶² They were then asked "What ingredient or ingredients are suggested by the name [brandname]?". The FTC dismissed the evidence of responses to this question with the observation that:

If people were asked what ingredients were suggested by a cigarette with the name 'Old Gold', the response 'gold' would be expected from many. If they were instead asked what ingredients the product contained, we would expect that very few would reply 'gold'. The question [at hand] is similarly flawed.⁶³

In the same case, the responses to open-ended questions in two other studies were dismissed on the basis that the question "What was the name of the ingredient in the product you just saw advertised?" was biased in that it suggested that there was only one ingredient.⁶⁴

In *Sterling Drug*, the question "What were the other messages in this aspirin commercial?" was criticised on the basis that it told subjects that there must be other messages.⁶⁵

Preston (1987)⁶⁶ notes two types of research problems that have not attracted much comment from the Commission. The first is inadequacies in the sample. He suggests that the acceptance, in the early cases, that the results need not be "nationally projectable" tended to divert attention away from objections based on sampling

⁶² *Thompson Medical Co.*, 104 F.T.C. 648

⁶³ Ibid at p 838.

⁶⁴ Ibid at p 696.

⁶⁵ *Sterling Drug*, 102 F.T.C. 395 (1982) at p 471.

⁶⁶ Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, Columbia Business Law Review (1987) pp 633-694, at p 685.

methodology.⁶⁷ The second issue is that of "false positives". Preston notes that evidence has been cited of a study in which 22% of subjects claimed to be aware of a product that was completely fictitious.⁶⁸ In *Standard Oil*, the FTC noted that :

There is an overriding problem present in all marketing research . . . that anywhere from 10 to 15% of . . . [consumers] play back elements that are specifically unrelated to the advertising.⁶⁹

Preston draws two main conclusions as a result of his extensive review of FTC decisions. The first is that consumer research provides the best extrinsic evidence of the messages conveyed by an advertisement. He states:

The record shows that the best extrinsic evidence of deceptiveness is methodologically acceptable consumer research that pertains directly to the question of what message is conveyed.⁷⁰

The second is that it is difficult to estimate the weight that has been given to extrinsic evidence. He states:

The FTC, which is empowered to decide without extrinsic evidence if it so chooses, might arbitrarily choose to accept as relevant any indirect evidence that suits its predilection and reject as irrelevant any that does not . . . The same potential for arbitrariness could also exist with respect to methodologically flawed research. While there is no question that such flaws may lead to rejection, the record shows that they sometimes do not prevent the research from yielding findings.⁷¹

⁶⁷ Ibid at p 685.

⁶⁸ Ibid at p 684.

⁶⁹ *Standard Oil of Calif.*, 84 F.T.C. 1113, at p 1424.

⁷⁰ Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, Columbia Business Law Review (1987) pp 633-694, at p 691.

⁷¹ Ibid at p 693.

4.3 Lanham Act cases

This section reviews the cases decided under section 43(a) of the Lanham Act in which consumer research evidence has been discussed.

Section 43(a) of the Lanham Trademark Act 1946 provides for civil proceedings to be commenced against any party who uses a "false description or representation" by anyone who "is likely to be damaged by it".⁷² Early decisions suggested that the application of the section was limited to actions based on trademarks or tradenames.⁷³ However, by 1974 this limitation on the scope of the section had been rejected.⁷⁴

According to Preston (1989),⁷⁵ the elements of the cause of action under section 43 (a) are similar to those in FTC proceedings:

Intent to deceive is not required, nor is actual deception; rather, the appropriate evidence is of a claim conveyed to consumers that is false and material.⁷⁶

⁷² The full text of the section is as follows:"Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of the origin or in the region in which said locality is situated, by any person who believes that he is or is likely to be damaged by the use of such false description or representation." 15 U.S.C. Sec. 1125 (a) (1946)

⁷³ *General Pool v Hallmark Pool*, 259 F.Supp. 383 (N.D. Ill. 1966)

⁷⁴ *Skil v Rockwell International*, 375 F.Supp. 777 (N.D.Ill. 1974)

⁷⁵ Preston I.L. (1989) False or Deceptive Advertising under the Lanham Act: Analysis of Factual Findings and Types of Evidence, Trade Mark Reporter Vol 79 (1989) pp 1-67.

⁷⁶ Ibid at p 4.

As in FTC proceedings, representations amounting to puffery are beyond the scope of the section.⁷⁷

Remedies available under the Lanham Act include both interim and permanent injunctions, damages and orders for corrective advertising.⁷⁸ The usual remedy requested is simply an injunction. This is because in order to obtain an order for either damages or corrective advertising, it is necessary to show that the buying public were actually deceived. In *Toro v. Textron*, the Court stated:

There is no evidence that any consumer, dealer or distributor relied on the Jacobsen advertisement, much less upon the particular claims I have found to be false, to Toro's detriment. This deficiency is fatal to Toro's damage claim. While it did not have the "burden proving detailed individualization of loss of sales" at the trial, it did have the burden to show some customer reliance on the false advertisement.

Later the Court stated:

Toro is not entitled to a mandatory injunction requiring Jacobsen to correct its past misrepresentations in future advertising . . . In light of Toro's inability to show that it has actually been injured by those claims, mandatory injunctive relief of the kind sought is as inappropriate as an award of damages.⁷⁹

⁷⁷ *U-Haul v Jartran* 522 F.Supp. 1238, (DCAriz 1981) at p 1254, where the claim "No one can rent you a truck like Jartran can" was held to amount to puffery. Similarly in *American Home Products v. Johnson & Johnson*, 654 F.Supp. 581, at p 587, claims that a pain reliever had a superior safety profile and caused no stomach upset were held to be "within the acceptable and expected limits of commercial puffery."

⁷⁸ Preston I.L. (1989) False or Deceptive Advertising under the Lanham Act: Analysis of Factual Findings and Types of Evidence, Trade Mark Reporter Vol 79 (1989) pp 1-67.

⁷⁹ *Toro v. Textron* 499 F.Supp. 241,(D.C.Del. 1980) at p 254.

Section 43(a) covers both explicit and implied claims in advertising. In *American Home Products v. Abbot Laboratories*, the Court stated:

A Lanham Act violation may be proved in two ways. First, the plaintiff may show that the challenged advertising statement is actually false . . . Second, the plaintiff may show that, although the challenged statement is ambiguous or literally true, the advertising is nonetheless misleading, in that the message understood by a significant number of consumers is false.⁸⁰

The distinction between explicit claims and implied claims has important consequences for the evidence required by the court. Intrinsic evidence, that provided by the advertisement itself, will suffice where the challenged claim is part of the express words of the ad. However, extrinsic evidence is required to prove the existence of implied claims. In *American Brands v. R.J. Reynolds*, the Court stated:

If a statement is actually false, relief can be granted on the court's own findings without reference to the reaction of the buyer or consumer of the product. . . . The subject matter here is different. . . . We are asked to determine whether a statement acknowledged to be literally true and grammatically correct nevertheless has a tendency to mislead, confuse or deceive. As to such a proposition, the public's reaction to the advertisement will be the starting point . . . The court's reaction is at best not determinative and at worst irrelevant.⁸¹

The principle that extrinsic evidence is mandatory to support the allegation that an advertisement conveys an implied claim has been

⁸⁰ *American Home Products v. Abbot Laboratories*, 522 F.Supp. 1035 (SDNY 1981) at p 1039.

⁸¹ *American Brands v. R.J. Reynolds*, 413 F.Supp. 1352 (SDNY 1976) at p 1356.

repeated many times.⁸² In *Avis v Hertz*, the allegation that the explicit claim that "Hertz has more new cars than Avis has cars" implied that consumers would have a greater chance of hiring a new car from Hertz than Avis (which was false) was rejected for lack of extrinsic evidence that such a claim would be inferred.⁸³

The difference between this approach and the FTC's propensity to find both express and implied claims on the basis of viewing the advertisement alone has been justified in one case by reference to the FTC's accumulated experience in deceptive advertising:

We do not have the same expertise as the Federal Trade Commission when it interprets the language of an advertisement . . . Accordingly, we, as judges, must rely more heavily on the reactions of consumers.⁸⁴

However, this principle does not mean that extrinsic evidence is determinative.

This does not mean that the conclusions of market researchers and other expert witnesses are binding on the court . . . Though the court's own reaction to the advertisements is not determinative, as a finder of fact it is obliged to . . . rely on its own experience and understanding of human nature in drawing reasonable inferences about the reactions of consumers.⁸⁵

After noting two exceptions to the principle that extrinsic evidence is mandatory for implied claims, Preston (1989) notes that:

⁸² See the cases cited in: Preston I.L. (1989) False or Deceptive Advertising under the Lanham Act: Analysis of Factual Findings and Types of Evidence, Trade Mark Reporter Vol 79 (1989) pp 1-67, at note 85.

⁸³ *Avis v Hertz* 782 F. 2d 381 (2d Cir. 1986) at p 386.

⁸⁴ *American Home Products v Johnson & Johnson*, 577 F.2d, at p 172.

⁸⁵ *McNeilab v American Home Products*, 501 F. Supp., at p 525.

The number of exceptions is very low to the basic principle that extrinsic evidence is required for implied claims but not for explicit ones. A remaining difficulty is that while this principle is precise once claims are defined as explicit or implied, the latter decision may be arrived at somewhat arbitrarily.⁸⁶

It appeared for a time that the only extrinsic evidence that the Court would accept to support the allegation of a false implied claim was evidence of consumer tests or surveys. This position was based on a statement in *McNeilab v American Home Products* which was as follows:

The plaintiff must adduce evidence (usually in the form of market research or consumer surveys) showing that the statements are perceived by those who are exposed to them.⁸⁷

References to this statement in some subsequent cases seem to have overlooked the word "usually". Thus, a view prevailed for a time that only consumer research evidence was acceptable to support implied claims.⁸⁸ Evidence of consumer research is regarded as the best form of evidence and has been cited the most frequently.⁸⁹ However, other types of extrinsic evidence have also been accepted as proving the

⁸⁶ Best (1985) suggests that the courts may determine the question of whether a claim is explicit or implied in such a way as to make extrinsic evidence essential or irrelevant depending on their preferred outcome. Best (1985) *Controlling False Advertising : A Comparative Study of Public Regulation, Industry Self-Policing and Private Litigation*, 20 Ga.L. Rev. 1 (1985) at p 38.

⁸⁷ *McNeilab v American Home Products*, 501 F. Supp. 517 (SDNY 1980) at p 525.

⁸⁸ *Upjohn v American Home Products*, 598 F. Supp. 550 (SDNY 1984) at p 556.

⁸⁹ Boal (1983) Techniques for Ascertaining Likelihood of Confusion and the Meaning of Advertising Communications, Trade Mark Reporter Vol 73 (1983) 405

existence of implied claims. These include both expert opinion testimony and evidence of the advertiser's intentions.⁹⁰

Although it is not necessary to prove that the advertiser intended to convey the misrepresentation, this does not mean the advertiser's intention is irrelevant to the proceedings. As the court stated in *McNeilab v. American Home Products* :

Proof that the advertiser intended to communicate a false or misleading claim is evidence that that claim was communicated, since it must be assumed that more often than not, advertisements successfully project the messages they are intended to project, especially when they are professionally designed.⁹¹

Expert opinion evidence has generally been given little weight compared to consumer research evidence. Preston states that when experts disagree with consumer research evidence the latter typically prevails, and when they agree with such evidence, they are redundant.⁹² He cites an example of the court's attitude where two experts gave conflicting testimony.

In short, we found neither expert's opinions to be very reliable and have concluded that they are significant only to the extent that they corroborate, or were corroborated by, the test data itself.⁹³

Preston points out that only once has the court attempted to provide general guidelines on the factors it considers in evaluating consumer

⁹⁰ Kellar (1985) How Do You Spell Relief? Private Regulation of Advertising Under Section 43(a) of the Lanham Act, Trade Mark Reporter Vol 75 (1985) 227, at pp 239-43.

⁹¹ *McNeilab v American Home Products*, 501 F. Supp. 517 (SDNY 1980) at p 530.

⁹² Preston I.L. (1989) False or Deceptive Advertising under the Lanham Act: Analysis of Factual Findings and Types of Evidence, Trade Mark Reporter Vol 79 (1989) pp 1-67, at p 18.

⁹³ *American Home Products v Johnson & Johnson*, 577 F.2d. at p 167.

research evidence. In *Borden v Kraft*,⁹⁴ the court cited standards from the Handbook of Recommended Procedures for the Trial of Protracted Cases.⁹⁵ These were as follows:

The offeror has the burden of establishing that a preferred poll was conducted in accordance with accepted principles of survey research, ie that the proper universe was examined, that a representative sample was drawn from that universe, and that the mode of questioning the interviewees was correct. He should be required to show that: the persons conducting the survey were recognised experts; the data gathered was accurately reported; the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys; the sample design and the interviews were conducted independantly of the attorneys; and the interviewers, trained in this field, had no knowledge of the litigation or the purposes for which the survey was to be used. Normally this showing will be made through the testimony of the persons responsible for the various parts of the survey.⁹⁶

Preston comments that the guidelines are too vague to be of much use and have not been cited in any subsequent cases.⁹⁷ He states that Court has arrived at the same conclusion as the FTC as far as the probative value of tests using artificial compared to natural testing conditions. He cites a long passage from the judgment in *American Home Products v Johnson & Johnson*, which is as follows:

⁹⁴ *Borden v Kraft*, 224 U.S.P.Q. at p 821.

⁹⁵ Report of the Judicial Conference Study Group of the United States: Recommended Procedures for the Trial of Protracted Cases 25 F.R.D. 351 (1960)

⁹⁶ *Ibid* at p 429.

⁹⁷ Preston I.L. (1989) False or Deceptive Advertising under the Lanham Act: Analysis of Factual Findings and Types of Evidence, Trade Mark Reporter Vol 79 (1989) pp 1-67, at note 110.

Initially we were disposed to think that the G&R method of testing would be better, because the consumer saw the commercial in the normal context - viewing TV at home. However, the verbatims caused us to seriously doubt the reliability of this method, at least when the need was to find out how the consumer interpreted the advertisement's language, i.e. what the consumer took the message to be from the particular language used. The G&R technique . . . revealed . . . how an ad for a familiar product seemed to leave its impact by triggering the viewer' s past association with the product as well as by hooking the viewer's interest in the particular new advertising copy being aired. But we are not confident that the G&R technique really tested what message the consumer took from the language used as opposed to the broader issue of what mental processes viewers went through. . . . We think that the format of the ASI presentation was likely to cause the audience to attend to the programs and ads more closely and thus more accurately reflect what the average consumer who heard and saw the ad took the message(s) to be, although it probably less accurately reflects the real impact . . . on the viewer.⁹⁸

In general, it is accepted that the entire advertisement should be used in artificial tests. However, in few instances, the court has described as probative, tests where only a part of the ad was shown.⁹⁹ Evidence has been rejected as irrelevant where even slight differences in wording existed between the ad challenged and the ad tested. Thus, results of consumer research on an ad claiming "extra strength" was rejected as irrelevant where the challenged ad claimed "added strength" even though the court agreed that the literal content was identical:

⁹⁸ *American Home Products v Johnson & Johnson*, 436 F.Supp. 785 (SDNY1977) at p 749.

⁹⁹ *McNeilab v American Home Products*, 501 F. Supp. 517 (SDNY 1980) at p 528.

We agree that the change in terminology does not alter the literal meaning of the commercials. That does not mean, however, that their message as perceived by viewers is unchanged.¹⁰⁰

Preston notes that open-ended questions have been used more often than forced-choice questions in Lanham Act cases. A problem commonly mentioned by the courts in relation to open-ended questions is that the verbatim responses need to be grouped into categories in order to summarise the data. Both the definition of the categories and the way these definitions are applied to individual verbatims have been subject to criticism.¹⁰¹ In order for the results of open-ended questions to be probative, the verbatims must be available to the court.¹⁰² In a few cases, the court has undertaken its own coding of responses.¹⁰³

Consumer tests using forced-choice questions have been offered as evidence in a number of cases.¹⁰⁴ Such questions have been subjected to a variety of criticisms. The most common criticisms have been that they encouraged guessing, that they were biased, or that they were ambiguous. Each of these criticisms is discussed in turn.

In *American Home Products v. Johnson and Johnson*, forced-choice questions were criticised as encouraging guessing:

100 Ibid at p 532.

101 *American Home Products v Johnson & Johnson*, 436 F.Supp. at p 794; *McNeilab v American Home Products*, 675 F. Supp. at p 824.

102 *American Home Products v Johnson & Johnson*, 577 F.2d. at p 168.

103 See, for example: *American Home Products v Johnson & Johnson*, 436 F.Supp. 785 (SDNY1977) at p 794.

104 *McNeilab v American Home Products*, 501 F. Supp. at p 528, where the argument that a "yes/no" forced-choice question suggested a yes answer was rejected. See also: *U-Haul v Jartran* 522 F.Supp. 1238 (DCAriz 1981) at p 1250, *Vidal Sassoon v Bristol-Myers*, 661 F.2d 269, at p 275, *Upjohn v American Home Products*, 598 F.Supp. at pp 556-7.

It is well recognized that closed-end or multiple choice questions are inherently suggestive and invite guessing by those who did not get any clear message at all.¹⁰⁵

In the same case, the forced-choice questions were also held to be biased. One question provided four response options. The court criticised two of the options as being so obviously false that they were unlikely to be selected.¹⁰⁶ The fact that some people had selected these options prompted the judge to question the reliability of forced-choice questions:

They were asked to choose from a series of improbable descriptions, including one in each survey which, although factually true, was so alien to the message literally conveyed as to be downright fatuous: 'Anacin is more likely to cause stomach upset than aspirin-free pain relievers.' Anyone who really believes that AHP is spending a fortune to disseminate that message must be freshly arrived from another galaxy. Yet 4.9% of the subjects in one survey and 8% in the other selected that option. So much for the reliability of closed-end survey questions.¹⁰⁷

Later, he stated:

It is difficult to believe that it is mere coincidence that when each party retained a supposedly independent and objective survey organisation, it ended up with survey questions which were virtually certain to produce the particular result it sought. This strongly suggests that those who drafted the survey questions were more likely knaves than fools. If they were indeed the former, they must have assumed that judges are the latter.¹⁰⁸

¹⁰⁵ *American Home Products v Johnson & Johnson*, 654 F.Supp. 581

¹⁰⁶ Ibid at p 581.

¹⁰⁷ Ibid at p 587.

¹⁰⁸ Ibid at p 582.

Forced-choice questions have also been criticised as being capable of several interpretations. Questions asking whether one mint has fewer calories than another were criticised for not specifying whether this was to be answered on a per-weight basis or a per package basis.¹⁰⁹ Similarly, a question directed to whether an ad claimed superior effectiveness for one painkiller over another was criticised for not specifying the dosage.¹¹⁰

Tests using forced-choice questions generally show a larger proportion of the audience to have perceived the implied claim than tests using open-ended questions. In one case, two separate artificial viewing tests using forced-choice questions showed that 36% and 46% of consumers perceived an implied claim. Only 12% were found to have perceived the same claim in a Burke DAR test.¹¹¹

Preston notes that the Court has never specified the proportion of the audience that must perceive an implied claim in order to support the conclusion of law that the implication is conveyed.¹¹² The closest statement to this effect is one made in the context of an application for an interim injunction:

A level of consumer confusion significantly below 15% does not indicate the plaintiff's probable success on the merits.¹¹³

109 *Ragold v Ferrero*, 506 F.Supp. 117 (NDIIL 1980) at p 127.

110 *McNeilab v Bristol-Myers*, 656 F.Supp. at p 90.

111 *Johnson & Johnson v Carter-Wallace* 645 F.Supp. 981 (1981)

112 Preston I.L. (1989) False or Deceptive Advertising under the Lanham Act: Analysis of Factual Findings and Types of Evidence, Trade Mark Reporter Vol 79 (1989) pp 1-67, at p 19.

113 *Coca-Cola v Tropicana*, 538 F.2d at p 1096.

On appeal, the judgment merely referred to "a significant number of consumers".¹¹⁴

In summary, the Court's approach to evidence of consumer research in Lanham Act cases has generally been similar to that of the FTC. This similarity was recognised in an appeal from an FTC decision. In *FTC v Brown & Williamson*, the Court stated:

The FTC argues that pronouncements in Lanham Act cases regarding the evidentiary value of empirical consumer data should not apply to this case. . . We disagree. . . We find the difference not to be significant for the evidentiary point at stake here. . . In both instances, the factual predicate for the cause of action rests in deception of the public.¹¹⁵

4.4 Australian cases

This section reviews the cases in Australia where consumer research evidence has been considered. Australian judges have usually used the term "survey evidence" to describe evidence of consumer research. Most of the cases have concerned the question of whether such evidence is inadmissible due to the rule excluding hearsay evidence.¹¹⁶

¹¹⁴ Ibid at p 317. Similarly, the judgment in *McNeilab v American Home Products*, referred to "a not insubstantial number of consumers" 501 F. Supp. 517 (SDNY 1980) at p 528.

¹¹⁵ *FTC v Brown & Williamson*, 778 F.2d 35 (DC. Cir. 1985) at p 40.

¹¹⁶ The hearsay objection was overcome in the United States more than 20 years ago. Some of the early cases upheld the hearsay objection to survey evidence: *Elgin National Watch Co. v Elgin Clock Co.* 26 F.2d 376,377 (1928). However survey evidence is now readily admitted in the United States either on the basis that it is not hearsay at all: *Zippo Manufacturing Co. v. Rogers Imports* 216 F.Supp. 670, 683 (1963), or on the basis that it provides the best evidence available of the matters in dispute: *United States v. 88 Cases, More of Less*, 187 F.2d. 967 (1951). For a useful review of the early cases in the United States see: Sorenson R.C. and Sorenson T.C. (1953) The Admissibility and Use of Opinion Research Evidence, New York University Law Review Vol 28 (1953) 1213.

This rule prevents evidence of the out-of-court statements of people who are not called as witnesses from being introduced in order to prove the truth of the statement. A variety of reasons have traditionally been given for excluding such evidence. These include the fact that statements are not made under oath, that the maker of the statement is not available for cross examination, that allowing such evidence would increase the total amount of evidence tendered, and that such evidence would enable a party to be unfairly surprised at the hearing.¹¹⁷

The first case in Australia in which the admissibility of survey evidence was discussed was an appeal from a decision of the South Australian Licensing Court.¹¹⁸ A survey had been conducted to determine whether there was public demand for an additional hotel. The results of the survey were admitted but only as corroborating other evidence. On appeal to the Supreme Court of South Australia, Bray C.J. described the evidence as "not only hearsay, but double, perhaps even treble, hearsay" and held the evidence to be inadmissible for this reason.¹¹⁹

A similar decision was reached in an appeal from the decision of the Registrar of Trademarks not to register the name "Mobil" in Part A Class 28 of the Register. Mobil Oil Corporation offered affidavit evidence of a survey in which members of the public were asked for their reaction after being shown the word "Mobil". Despite finding that the survey was properly conducted, King J. held the survey results to be

¹¹⁷ Farmer J.A. (1988) *The Use of Survey Evidence in Trade Practice Cases*, A.T.P.R. ¶ 15-000, at ¶ 15-035, citing a 1978 report of the N.S.W. Law Reform Commission.

¹¹⁸ *Re Firle Hotel Pty. Ltd.* (1972) S.A.L.C.R.162 at pp168,175.

¹¹⁹ *Hoban's Glynde Pty Ltd. v Firle Hotel Pty. Ltd.* (1973) 4 S.A.S.R. 504, at p 509. His Honour seemed to feel that the questions asked, which included "Are you in favour of a hotel on the site?" and "Would you use the hotel for various purposes?", did not adequately address the issue faced by the Court. The first he held to be irrelevant to the question of need and the answers to the second were "worthless, without knowing how regularly or on what occasions the answerer would patronise the hotel and without knowing how and where he now satisfies his demands for liquor and what hardship or inconvenience there would be in his continuing in his present course.".

inadmissible on three separate grounds: they were irrelevant, they were expressions of opinion, and they were hearsay.¹²⁰

The first case under the Trade Practices Act 1974, which considered survey evidence, was *United Telecasters Sydney Pty. Ltd. v Pan Hotels International Ltd.*¹²¹ The plaintiff sought to restrain the defendant from using the name "The Zoo" in connection with a nightclub, on the basis that such use was "misleading or deceptive", in contravention of section 52(1) of the Act. The plaintiff was a television station which had broadcast a television series based on the movie "Thank God It's Friday" which featured a bar called "The Zoo". In support of its contention that members of the public would be misled into thinking that the nightclub was associated with the television station, the plaintiff offered evidence of a number of interviews conducted outside a movie theatre and at a railway station. The interviews, which were recorded on video and audio tape, involved showing subjects a newspaper advertisement publicising the opening of the nightclub. The advertisement contained an offer of free tickets to the movie "Thank God It's Friday". Franki J. found the survey of no persuasive value. This was because the responses were clearly addressed to the advertisement which included mention of the movie on which the television series was based. It did not show that subjects would believe that any night club called "The Zoo" would be associated with the television station which was the substance of the plaintiff's case. Franki J. expressly left open the question of whether the evidence would be admissible at a final hearing.

The second case to consider survey evidence was *McDonald's System of Australia Pty. Ltd. v McWilliams Wines Pty. Ltd.*¹²² McWilliams had marketed a wine in a large bottle under the label "McWilliams Big Mac". McDonald's, who marketed a hamburger under the name "Big Mac", alleged that this was misleading in that it suggested a business

120 *Mobil Oil Corp. v The Registrar of Trademarks* (1983) 51 A.L.R. 735

121 *United Telecasters Sydney Pty. Ltd. v. Pan Hotels International Ltd.* (1978) ATPR ¶ 40-085.

122 *McDonald's System of Australia Pty. Ltd. v. McWilliams Wines Pty. Ltd.* (1979) ATPR ¶ 40-136; (1979) 28 A.L.R. 236

connection between McWilliams and themselves. At an interim injunction hearing, they offered evidence of a survey undertaken by a market research consultant in support of this contention. The survey comprised only two questions: "What does McWilliams Big Mac mean to you?" and "Where would you expect to buy a McWilliams Big Mac?" Forty seven completed questionnaires were tendered.¹²³

Franki J. granted an interim injunction restraining McWilliams from using the term "Big Mac" until final determination of the case. However, he placed little weight on the survey evidence:

Even for the purposes of an interlocutory application it is extremely difficult to draw any valid conclusion for answers to such questions. In saying this, I am not in any way being critical of the formulation of the questions, or the conduct of the survey but one must be extremely cautious drawing any conclusions from material which is no more than the answers to two questions and where there is no explanation of the background knowledge of the person answering the questions nor are the persons answering subject to any cross-examination.

The case came back to Franki J. for final determination. In the meantime, McDonald's had commissioned another survey. This survey was undertaken by an experienced market researcher according to recognised survey methods. Counsel for McWilliams objected to the admissibility of the results of the survey and also to evidence of the interviewers. Franki J. held that neither the results of the survey nor the evidence of the interviewers was admissible.

He held that the results of the survey were "an analysis of pieces of hearsay". This was despite the fact that the interviewers were to be called to give evidence and available for cross-examination. He rejected the argument that this evidence fell within a recognised exception to the

123 The judgment does not record the responses to these questions.

hearsay rule whereby the opinion of a person, if material, may be proved by statements made by him about the time in question.¹²⁴

It was argued before Franki J. that even if the evidence was hearsay, it should be admitted under the principle that it was the best evidence available of the facts sought to be proved. His Honour stated that he was not inclined to extend exceptions to the hearsay rule. He commented on two aspects of the survey. The first related to the wording of the questions and the second to the way the responses were recorded by the interviewers. Subjects were first shown a copy of the advertisement which contained the words "McWilliams Big Mac". They were first asked " Is there anything at all surprising about the words "McWilliams Big Mac"?" If the respondent said yes, he or she was asked what it was about those words that they found unexpected. Next, they were asked whether, on the basis of the advertisement, they tended to agree or disagree with certain propositions such as "McWilliams has been allowed by McDonald's to use the name "Big Mac" and "McWilliams has the sponsorship of McDonald's for Rosedale Wines". Franki J. doubted "whether a question of this sort, together with the supply of a series of answers, is entirely appropriate in the circumstances of this case".

Commenting on this point, Farmer (1988)¹²⁵ contends that had this same series of questions been asked of a witness in court, the objection that they were leading would have been dismissed. He states:

124 In Franki J.'s opinion, this exception was limited to situations where such statements were part of the res gestae. Farmer (1988) argues that the statements of subjects to questions put to them immediately after being shown an advertisement should be seen as part of the res gestae and hence admissible. He notes that this line of reasoning would appear to render inadmissible two other forms of evidence of which Franki J. expressly approved. One was evidence of 'trap orders'. The other was evidence given by salesmen of the way in which customers ask for goods sold under a certain trademark. Franki J. viewed both of these statements as part of the res gestae.

125 Farmer J.A. (1988) *The Use of Survey Evidence in Trade Practice Cases*, A.T.P.R. ¶ 15-000 , at ¶ 15-095.

It is surely inevitable that an analysis of any question, or series of questions, whether contained in a survey or asked in court, will always be able to reveal certain assumptions contained in the question or questions which might be said to make a particular question to some extent leading. The mere asking of a question as a sequel to an earlier question on the same subject matter will necessarily involve the predication of the earlier question and hence to some extent pre-condition the response. It is respectfully submitted therefore that, in analysing the objectivity of the form of a questionnaire used in a survey, a reasonably realistic approach should be taken. Surveys should not be judged more harshly in this respect than other kinds of evidence.¹²⁶

Franki J. also objected to the way that the answers given to some of the questions were coded by the interviewer ticking a box on the questionnaire rather than writing out verbatim what the respondent said. He viewed this as a form of interpretation of the answer. Farmer (1988)¹²⁷ makes the point that a similar process occurs where a witnesses testify in court as to statements previously made to them since such statements are not recalled verbatim.

A different attitude to survey evidence was shown by Burchett J. in *Shoshana Pty. Ltd. & Anor v. 10th Cantanae Pty. Ltd. & Ors.*¹²⁸ Sue Smith, who was a well known television personality in Australia, sought damages in respect of a magazine advertisement on the basis of section 52(1) of the Trade Practices Act and the common law tort of passing off. The advertisement contained a picture of a woman watching television and holding a remote control. A caption in large print read "Sue Smith just took control of her video recorder". Sue Smith argued that some people seeing the advertisement would be misled into thinking that she was the person pictured in the ad or that she had consented to the ad.

126 Ibid at ¶ 15-095.

127 Ibid at ¶ 15-095.

128 *Shoshana Pty. Ltd. & Anor v. 10th Cantanae Pty. Ltd. & Ors* (1988) A.T.P.R. ¶ 40-851

Burchett J. found that this was likely to be the case although the majority of judges on appeal disagreed with him. No survey evidence was offered on this issue. However, survey results did form the basis of evidence led as to the extent of her reputation, which was relevant mainly to the question of damages. The evidence was in the form of popularity ratings that were collected on a regular basis for purposes unconnected with the litigation. This fact was of great importance in Burchett J.'s decision to admit the evidence.

Evidence was tendered by the managing director of the company responsible for the surveys. The evidence was in the form of reports giving statistical summaries of the questionnaires filled in by the interviewers. It was argued that his evidence amounted to double hearsay in that, not only were the oral responses of subjects hearsay, but so were the written questionnaires.

Burchett J. held that the completed questionnaires and the statistical analysis of these were "business records" of the research firm. By virtue of the Evidence Act 1905, such statements were admissible, without the need to call the interviewers who had filled out the questionnaires, provided the oral responses of the interviewees would have been admissible.

Burchett held that subjects' oral statements were not hearsay. Even if they were hearsay, they fell within the recognised exception to rule allowing statements tending to prove the public state of mind. However, Burchett J. would not have admitted the evidence if the survey had been conducted specifically for the purposes of the litigation:

If he had conducted a survey specifically for the purposes
of the applicant's case, his evidence would not have been
admissible.¹²⁹

129 Ibid at ¶ 40-851.

Commenting on this point, Farmer (1988)¹³⁰ argues that:

There would appear to be no compelling reason to demand that as a precondition of admissibility the survey form part of material compiled over a field which is wider than the issue before the court. This may be relevant to expert opinion evidence in general but "scientific evidence", where an expert is merely asked to verify and interpret, stands or falls on its own merits or shortcomings. It would certainly take away much of the usefulness of surveys if their use was restricted to the odd adventitious occasion that a relevant survey happened to exist prior to litigation, as happened to be the situation in this case. Such a requirement was not insisted upon in the English and New Zealand authorities which his honour cited with approval, nor indeed has it been mentioned in other cases also approving of survey evidence which his honour did not cite.¹³¹

In the context of a pre-trial hearing in *Greynell Investments Pty. Ltd. v. Hunter Douglas Ltd*, Lockhart J. made an order, with the consent of the parties, that an intended survey would not be rendered inadmissible as hearsay, provided it conformed to certain guidelines.¹³²

These guidelines were as follows:

- (a) The respondent establishes that the survey was designed and conducted in accordance with accepted principles of survey research producing a result which is

¹³⁰ Farmer J.A. (1988) The Use of Survey Evidence in Trade Practice Cases, A.T.P.R. ¶ 15-000 , at ¶ 15-105.

¹³¹ Ibid at ¶ 15-105.

¹³² *Greynell Investments Pty. Ltd. v Hunter Douglas Ltd .* (1983) A.T.P.R. ¶ 40-321. The guidelines are stated for the case where it is the party against whom an injunction is sought (respondent) who seeks to introduce the survey evidence. The applicant is the party applying for the injunction.

trustworthy, including (without limiting the generality of the foregoing):

- (i) That the proper universe was examined.
- (ii) That a representative sample was drawn from that universe.
- (iii) That the persons conducting the survey were recognised experts.
- (iv) That the data gathered was accurately recorded.
- (v) That the questionnaire, sample design and interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys.

(b) A complete record of:

- (i) The methods by which the universe and sample were selected, and of the techniques employed for selecting and instructing the interviewers, and the experience of those interviewers.
- (ii) Any data underlying the survey , methods of interpretation and conclusions reached.
- (iii) The responses to the survey with names and addresses of those interviewed deleted.
- (iv) Any tests applied and the results of any tests applied to determine the extent to which the survey or results of the survey can be trusted.
- (v) The nature of and results of any audit applied in connection with the survey.
- (vi) The method employed in assigning the answers to open-ended questions to categories is supplied to the applicant in reasonable time in advance of the hearing.

- (c) Such persons as were involved in the conduct of the survey are, if required by the applicant, called by the respondent as witnesses in the proceedings.

In *TV-am plc v Amalgamated Television Services Pty.*, affidavit evidence of the results of three surveys were offered by the producers of an English breakfast television programme entitled "TV-am". They argued that they had a reputation in Australia that was being appropriated by the defendant's television programme called "TV-AM".¹³³ The survey comprised a hundred and sixty seven interviews in which respondents were first asked "Have you heard of tv-am?". If they answered that they had, they were then asked "What is it?" The results of the first survey, prior to the launch of the Channel 7 programme, showed that 12% of subjects were aware of the plaintiff TV-am plc. and 0.5% of subjects were aware of the TV-AM programme. Shortly after the programme began, two further surveys were undertaken. These showed that of the fifty seven people interviewed, 70% had never heard of TV-am, 20% had heard of the Channel 7 TV-AM programme and 3% had heard of TV-am plc.

The defendant objected to the admissibility of the survey evidence on the grounds of the questions and the sample. Einfeld J. decided to admit the evidence but then gave little weight to the survey results.

I think that here the evidence is admissible as to reputation but its worth must be greatly reduced by the small samples, the conflicting results and the novelty of the respondent's programme.¹³⁴

4.5 New Zealand cases

The first case in which survey evidence was considered in New Zealand was *Customglass Boats Ltd. v. Salthouse Bros. Ltd.*¹³⁵ The plaintiff

¹³³ *TV-am plc v Amalgamated Television Services Pty. Ltd.* 12 IPR 85

¹³⁴ Ibid at p 90.

¹³⁵ *Customglass Boats Ltd. v Salthouse Bros. Ltd.* (1976) 1 N.Z.L.R. 36; (1976) R.P.C. 589.

alleged a passing off in the use of the name "Cavalier" as a tradename for yachts. Survey evidence was introduced by the plaintiff as proof of its reputation in the name. Mahon J. decided that this evidence was not hearsay, since it was not offered as proof of the truth of the statements contained therein but merely to show that such statements were in fact made. Even if the evidence was hearsay, Mahon J. was prepared to admit the evidence on the basis that it fell within a recognised exception to the rule. This exception permitted hearsay statements that were offered "to prove the public state of mind".

In arriving at this conclusion, Mahon J. undertook an extensive review of the cases in which such evidence had been admitted in other jurisdictions. He noted that in the United States, survey evidence had been accepted either on the basis that it was not hearsay or on the basis that it was the best evidence available of the matters sought to be proved.

In the United Kingdom, survey evidence had originally been accepted in intellectual property cases without any consideration of the basis of its admissibility. In *A. Bailey & Co. v Clark, Son and Morland*, the House of Lords held that such evidence was admissible only where some of the subjects filed affidavits certifying that the answers they had given were those recorded on the questionnaires.¹³⁶

In *General Electric Co. v General Electric Co. Ltd.*, evidence was introduced, in connection with a trademark dispute, of a survey involving five hundred and sixty nine interviews each asking four questions.¹³⁷ Affidavits were sworn by seventy three subjects testifying as to their answers. The House of Lords agreed with the trial judge's criticisms of the questions but did not suggest that such evidence might be rendered inadmissible by the hearsay rule.

¹³⁶ *A. Bailey & Co v. Clark, Son and Morland* (1939) A.C. 557; 55 R.P.C. 253. This requirement became known as the "Glastonbury" procedure.

¹³⁷ *General Electric Co. v General Electric Co. Ltd.* (1969) R.P.C. 418; (1970) R.P.C. 339 (C.A.); (1972) 1 W.L.R. 729; (1973) R.P.C. 297 (H.L.)

In *Lego Ltd. v Lego M. Lemelshtrich Ltd.*,¹³⁸ Falconer J. stated that the *General Electric* case was authority for the proposition that:

Expert evidence based on the results of a survey carried out on a representative sample of the relevant public on accepted market research principles is admissible, although, no doubt, the value of the evidence will be subject to any criticism which may properly be made as to such matters as the representativeness of the sample, the form of the questions and the manner in which the survey has actually been carried out.

Falconer J. expressly followed the judgment of Mahon J. in the *Customglass* case in holding that the survey was not hearsay evidence but rather "evidence proving an external fact, namely, that a particular opinion was held by the public or a class of the public". Mahon J.'s decision has been approved by the New Zealand Court of Appeal¹³⁹ and in several High Court cases.¹⁴⁰

In *Auckland Regional Airport v Mutual Rental Cars*, evidence was offered of the results of a survey of consumers' preferences for the services offered by rental car firms and their attitudes to the availability of these services at Auckland airport.¹⁴¹ Barker J. would have admitted the evidence if it had conformed to the guidelines stated by Lockhart J. in the *Hunter Douglas* case.¹⁴² However, the evidence failed to meet these guidelines in two respects. First, the subjects were not shown to be representative and second, the instructions given to interviewers

¹³⁸ *Lego Ltd. v Lego M. Lemelshtrich Ltd.* (1983) F.S.R. 155

¹³⁹ *Bevan Investments Ltd. v Blackall and Struthers* (No 2) (1978) 2 N.Z.L.R. 97, at p 124.

¹⁴⁰ *Klissers Farmhouse Bakeries Ltd. v Harvest Bakeries Ltd.* (1985) 2 N.Z.L.R. 129; *Auckland Regional Authority v Mutual Rental Cars* (1988) 2 N.Z.B.L.C. 103,041.

¹⁴¹ *Auckland Regional Authority v Mutual Rental Cars* (1988) 2 N.Z.B.L.C. 103,041.

¹⁴² *Greynell Investments Pty. Ltd. v Hunter Douglas Ltd.* (1983) A.T.P.R. ¶ 40-321.

were not disclosed to the Court. Barker J. held that these factors rendered the evidence inadmissible.

In *Noel Leeming Television Ltd & Ors v Noel's Appliance Centre Ltd*, the plaintiff, who alleged a passing off as to its name, commissioned a survey mainly for the purposes of establishing its reputation in its name.¹⁴³ The survey also included questions designed to measure the extent to which deception or confusion resulted from the respondent's use of a similar name.

The results of the survey which comprised 500 telephone interviews were presented in court by the managing director of the research firm who had been responsible for drafting the questions, supervising the telephone interviews, and arranging the computer analysis. His evidence was followed by that of all seven of the telephone interviewers who each produced the questionnaires on which they had recorded the responses and who gave evidence of their experience and training.

The respondent objected to the admissibility of this evidence on the basis of the hearsay rule. Holland J. admitted the evidence of the managing director of the survey firm as to results of the survey. His reasoning was that such evidence was admissible as expert opinion evidence:

The evidence given by the interviewers of the results of their interviews was no more than testimony tendered as a foundation for the expert opinion evidence.¹⁴⁴

Weston (1987)¹⁴⁵ notes that the *Noel Leeming* decision was cited with apparent approval by the Chief Justice, in the Court of Appeal, in

¹⁴³ *Noel Leeming Television Ltd. & Ors. v Noel's Appliance Centre Ltd*, [1985] BCL 1669.

¹⁴⁴ *Noel Leeming Television Ltd. & Ors. v Noel's Appliance Centre Ltd*, [1985] BCL 1669.

¹⁴⁵ Weston T.C. (1987) Market survey evidence- Admissibility and weight, *New Zealand Law Journal*, January 1987, pp 28-29

*Klissers Farmhouse Bakeries Ltd. v Harvest Bakeries Ltd.*¹⁴⁶ From this, he concludes that:

Market survey evidence per se is now admissible, the argument being directed to the weight to be attached to it.¹⁴⁷

As to the weight given to such surveys, Weston notes the comment of Holland J. that:

Little weight is likely to be given to public surveys in the course of litigation if they are produced by one side and the other side has not had an adequate opportunity to check the honesty and accuracy of the survey.

Weston points out that this comment can give rise to practical difficulties. The survey firm is ethically bound not to reveal the identity of subjects. In the *Noel Leeming* case, copies of a hundred randomly selected questionnaires, with the identity of the subjects deleted, were provided to the opposing party several days prior to the trial.

There appear to be only three cases decided under section 9 of the Fair Trading Act where survey evidence has been offered.¹⁴⁸ In two of these, the survey was conducted specifically for the purposes of litigation. In the other, counsel introduced the results of a survey that was conducted for purposes unconnected with the litigation.¹⁴⁹

¹⁴⁶ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 N.Z.L.R. 129

¹⁴⁷ Weston T.C. (1987) Market survey evidence: Admissibility and weight, New Zealand Law Journal (January 1987) pp 28-29.

¹⁴⁸ *Pitstop Exhaust Ltd v Alan Jones Pit Stop* (1988) 2 NZBLC 102,968; *ASB Ltd v Trust Bank Auckland Ltd.*, [1989] 3 NZLR 385; *Comite Interprofessionnel du Vin de Champagne v. Wineworths Group Ltd.* (Unreported) High Court Wellington, CP672/87, 7 August 1990.

¹⁴⁹ *Pitstop Exhaust Ltd v Alan Jones Pit Stop* (1988) 2 NZBLC 102,968

In *Pitstop Exhaust Ltd v Alan Jones Pit Stop*,¹⁵⁰ the plaintiff sought an interim injunction to restrain use of the words "pit stop" by the respondent pending trial at which a permanent injunction was sought. The application was based on an alleged contravention of section 9 and passing off. In considering the passing off claim, Wylie J. began with the observation that the words "pit stop" appeared to him to be descriptive words. He then turned to the question of whether the words might have acquired a secondary use as a distinctive mark of the plaintiffs.

Affidavit evidence was tendered by a market researcher which purported to establish the degree of market recognition of the plaintiff's business and its name. The survey consisted of three hundred interviews. The judgment cites some of the questions asked and the responses obtained:

- (i) Pitstop was the most mentioned response (16.3%) to the request to name any places that specialise in the repair of exhaust systems.
- (ii) 60% of subjects recognised the Pitstop name when asked.
- (iii) 9% said they had been to the business premises; although 25% of those people did not know what the business did.¹⁵¹

Wylie J. found the survey evidence of little probative value. He gave three reasons for this finding. First, some of the reported results did not make sense:

Other figures were given. Some simply did not make sense to me, e.g. 1.4% of 27 people knew of Pitstop from television advertising. On its face the percentage mentioned is absurd. What it all means in the present context I fail to understand.¹⁵²

¹⁵⁰ *Pitstop Exhaust Ltd v Alan Jones Pit Stop* (1988) 2 NZBLC 102,968

¹⁵¹ Ibid at p 102,979.

¹⁵² Ibid at p 102,980.

Second, he felt the sample size was inadequate:

I place little weight on this. It was a survey of only 300 people.¹⁵³

Third, the questions asked of subjects were not directed at the issue before the court which was whether the plaintiff was uniquely identified with the name "Pitstop". Wylie J. recognised that the irrelevance of the questions to the issues before him was not the fault of the researcher:

In fairness to the researcher, it should be made clear that this exercise was not undertaken for the purpose of these proceedings, but for other quite different purposes. Thus his survey was not directed to the points in issue here.¹⁵⁴

The second case under the Fair Trading Act, in which market survey evidence was offered was *Trust Bank Auckland Ltd. v ASB Bank Ltd.*¹⁵⁵ As in *Pitstop Exhausts*, the case involved an application for an interim injunction based on passing off and contravention of section 9. However, it differed from that case in that the survey in *Trust Bank* had been specifically commissioned by the defendant for the purposes of litigation.

ASB Bank alleged that use of the term "HIT account" by Trust Bank was misleading in that it would cause members of the banking public to:

- (i) think that the HIT account offered by the defendant was the same as that marketed by the plaintiff
- (ii) mistakenly bank with the defendant.
- (iii) mistakenly believe that the defendant is owned by the plaintiff.

¹⁵³ Ibid at p 102,980.

¹⁵⁴ Ibid at p 102,981.

¹⁵⁵ *Trust Bank Auckland Ltd.v ASB Bank Ltd.* [1988] 2 NZLR 1; (1989) 2 NZBLC 103,558.

Trust Bank argued that its use of the term "HIT account" did not result in any confusion. In support of this contention, it offered evidence of two surveys which purported to show how people who had recently opened an account at Trust Bank had made this decision.

In the High Court,¹⁵⁶ Ellis J. granted an interim injunction restraining Trust Bank from using the words "Hit Account" in the Auckland area. He held there was a strong *prima facie* case on both the passing off and section 9 claims. His Honour stated:

It is easy to infer that if a member of the public was attracted by, say, ASB Bank advertising of its HIT account, he or she would most likely infer that Trust Bank Auckland's HIT account was the same. And vice versa.¹⁵⁷

The judgment of Ellis J. makes no mention of the surveys. The defendants appealed to the Court of Appeal. They argued that there was no risk that the banking public would be misled into opening an account with the defendant while believing it to be with the plaintiffs. They argued that this conclusion was supported by the results of the two surveys. The first one was a survey of staff at ASB which purported to show that although many customers were confused when they entered the bank, none left the bank under a mistaken impression. The Court seems to have considered this survey as irrelevant to the issue at hand:

One was a questionnaire of staff conducted by ASB on the 11 November 1988. It was completed by staff involved with the opening of accounts at the Queen Street branch up to 9 November 1988. The answers of nine staff members are in evidence; 19 questions were put but the answers to two are especially relevant. Every one of the staff members said people were confused about whether it was Trust Bank or the ASB.

¹⁵⁶ *ASB Bank Ltd.v Trust Bank Auckland Ltd.* [1989] 3 NZLR 385.

¹⁵⁷ *Ibid* at p 390.

Every one of them also asserted that no people or customers left the office or workstation believing that Trust Bank was ASB. This was because of the explanation given to the person by the staff member answering the questionnaire. It is convenient to comment as we shall not return to this survey, that a system which depends for avoidance of confusion with a competitor on explanations by staff members is in our opinion inherently unsatisfactory.¹⁵⁸

The second survey involved a telephone survey of ninety six Trust Bank Auckland (TBA) customers. Cooke P. described this survey as follows:

But Mr Hodder placed more weight on a survey by the research organisation Phoenix Research Limited commissioned by TBA and conducted between 18 and 21 November 1988 by telephone questioning of a sample totalling 96 persons who had opened accounts with TBA up to 9 November 1988. The object was to assess how customers made their decision to go to this bank. The telephone interviews were conducted "using a largely structured questionnaire" containing many questions, the answers to which were filled in by the person conducting the interview. The inescapable fact, as counsel put it, is that the survey showed that none of the 96 went to TBA because of the bank's HIT account. Further, only two of the 96 after opening an account there thought when they came out of the bank that it was part of another bank in Auckland; and those two had not opened HIT accounts. We regard this survey as of more help to the appellants than the internal staff survey, but it has obvious limitations in evidential value. One of these is that none of the persons interviewed were asked expressly whether or not they thought that there was a connection between TBA's HIT account and ASB's HIT account. ¹⁵⁹

158 Ibid at p 391.

159 Ibid at p 392.

In the Court's view, the survey failed to address the critical issue in the case. It dismissed the appeal on the basis that:

In our opinion the likelihood of a mistaken impression on the part of a significant number of the Auckland public that there is some link in savings accounts is inevitable if TBA promotes what it described in an initial advertisement as 'A Trust Bank HIT account'.¹⁶⁰

The third case under section 9, in which survey evidence has been introduced is *Comite Interprofessionnel du Vin de Champagne v Wineworths Group Ltd.*¹⁶¹ The case concerned an application for a permanent injunction to restrain the defendant from importing wine from Australia labelled as "champagne". The application was based on section 9 and passing off. The central issue to be decided by the Court was whether the word "champagne" referred to wine made in a particular region of France or whether it stood for a type of wine made in any country. Jeffries J. stated:

The task of the Court is to decide how the adult population of New Zealand as a group perceives the word. One has only to frame the task in that way to demonstrate its immense difficulty.¹⁶²

His Honour described the evidence offered on this issue as follows:

The Court could not complain under any circumstances of counsels' failure to place evidence into the record to assist the Court. Every avenue has been explored. I mention the more important evidence. About 35 dictionary definitions were put in evidence. Two highly

¹⁶⁰ Ibid at p 394.

¹⁶¹ *Comite Interprofessionnel du Vin de Champagne v Wineworths Group Ltd.* (Unreported) High Court Wellington, CP672/87, 7 August 1990.

¹⁶² Ibid at p 18.

qualified professors of English language gave evidence. Two market research projects were completed to discover New Zealanders' perception of the word champagne and what it stands for. Dozens of articles on wine. About 30 books on wine, mainly champagne. Trade catalogues. Plaintiffs' ten or so writers and wine experts gave evidence.¹⁶³

In a judgment of 41 pages, Jeffries J. devoted only two paragraphs to the market research evidence. These were as follows:

Market research is a powerful source of information but its value is not always consistent. There were two studies performed in New Zealand, one in 1987 for the defendant and one in 1989 for the plaintiffs. The Court felt that the defendant's research study had some flaws in its questions and conclusions, and this was supported by the evidence of Professor Wayne Cartwright who holds the chair of marketing at the University of Auckland. Professor Cartwright is also a consultant in marketing and business management. However, market research methods are almost as arguable as some of the conclusions.

The Court eschews arguments on methodology and goes to the general conclusions. The Court holds both studies supported the contention that there is significant evidence that champagne is not a generic word by usage in New Zealand. The evidence of plaintiff's survey in 1989 shows that about 43% link champagne with France as the country of origin. The defendant's survey of 1987 less directly confirmed the link between the word and France. Possibly up to half the population make the word/country link.¹⁶⁴

¹⁶³ Ibid at p 19.

¹⁶⁴ Ibid at p 23.

Having found that the word "champagne" was not a generic one in New Zealand, and that its use by Australian producers amounted to passing off, Jeffries J. turned to consider section 9 of the Fair Trading Act. He stated that:

The Court does not believe that the defendant should be branded as in breach of s.9 in view of the fine deception pleaded and argued by the plaintiffs which until this decision, the defendant was without plain statutory or judicial guidance.¹⁶⁵

4.6 Summary

This chapter reviewed the legal decisions in which evidence of consumer research has been discussed. The purpose of this review was to investigate the extent to which the various tests proposed by consumer psychologists have been given weight by the courts.

It was found that the courts in Australia and New Zealand have not placed much reliance on consumer research evidence. In Australia, such evidence has usually been excluded altogether on the grounds that it offends the rule against hearsay evidence. In New Zealand, the courts have generally admitted such evidence despite the hearsay rule, but have usually given it little weight.

In the United States, consumer research evidence is clearly admissible. Such evidence is described in both FTC and Lanham decisions as superior to all other types of extrinsic evidence in determining the implied claims conveyed by an advertisement. Tests using artificial viewing conditions and forced-choice questions appear to be given more weight than other types of studies. However, doubt remains about the weight attributed to such evidence compared to the tribunal's own perception of the advertisement. This is discussed further in the next chapter.

165 Ibid at p 40.

CHAPTER FIVE

CONCLUSIONS FROM THE LITERATURE

5.1 Introduction

In chapter one, the broad aim of this thesis was stated to be to determine the weight that consumer research evidence would have in determining whether a television advertisement was misleading in litigation under section 9 of the Fair Trading Act. This aim was restated in terms of three specific objectives as follows:

- 1 To identify a class of deceptive advertising litigation in which the court might give some weight to consumer research evidence.
- 2 To describe the type of evidence that would be given the most weight in such litigation.
- 3 To estimate the weight that would be given to this type of evidence in this class of litigation.

The first two objectives have been met, as far as is possible, by a review of the literature and legal decisions. The third objective is yet to be addressed.

This chapter summarises the main conclusions arrived at in relation to the first two objectives. It then restates the final objective in terms of these conclusions. The following two chapters address the final objective.

5.2 Summary of the literature

Chapter two reviewed the leading court cases in which section 9 of the Fair Trading Act 1986 has been discussed. The main conclusions that were arrived at in that chapter were :

- (i) In order for a television advertisement to be held to contravene the section, it must be shown to convey a misrepresentation.

- (ii) Whether a television advertisement conveys a misrepresentation is a question of fact.
- (iii) The question of fact is to be answered by considering the effect of the advertisement on all the people who are likely to be affected by it.
- (iv) Consumer testimony, expert opinion evidence and survey evidence are all admissible in such cases, but their weight is decided by the Court.
- (v) Where only an injunction is sought, there is no need to show that the misrepresentation would influence purchasing behaviour.

Chapter three reviewed the literature on empirical studies of deceptive advertising. It was found that these studies followed one of three basic approaches:

- (i) Some researchers have devised tests to detect the implied claims conveyed by an advertisement. They have shown the advertisement to a sample of the audience and then presented subjects with a set of statements and asked them to indicate whether these statements are stated or implied by the advertisement.
- (ii) Other researchers have devised tests to detect the effect of advertisements on consumers' beliefs about the advertised product. They have shown the advertisement to a sample of the audience and then asked them questions about the advertised product. A common problem with these tests is that of providing appropriate controls in order to show that the beliefs measured are caused by the advertisement.

- (iii) A third group of researchers have attempted to test the impact of an advertisement on consumers' propensity to purchase the advertised product. They have shown the advertisement to a sample of the audience and sometimes asked them to use the advertised product. They have then asked them how likely they are to buy it.

Chapter four reviewed the legal decisions in the United States, Australia and New Zealand, where consumer research evidence has been discussed. It was found that:

- (i) In the United States, both "intrinsic" and "extrinsic" evidence are cited in decisions as to whether an advertisement conveys an implied representation. Consumer tests are described as the most probative type of "extrinsic" evidence. This is especially true in cases concerning television commercials. The type of tests that have been described as carrying the most weight are "audience reaction tests". These are tests where subjects are shown the advertisement in the context of a television programme and are then asked to respond to a series of written questions designed to measure the perceived claims in the advertisement. Tests using forced-choice questions appear to be given more weight than those using open-ended questions.

However, consumer research evidence is never described as conclusive evidence of the implied claims conveyed by an advertisement. Such evidence is typically described as merely corroborating the judge's or the Commission's own perception of the implied claims in the advertisement.

- (ii) In Australia, consumer research has often been held to be inadmissible due to the rule excluding hearsay evidence. Recent cases suggest a trend to admit such evidence, at least where it was commissioned for purposes unconnected with the litigation.
- (iii) Consumer research evidence, commissioned specifically for the litigation, is admissible in section 9 cases in New Zealand, provided it conforms to accepted principles of survey research and sufficient information is given to the court about the design and implementation of the research. However, such evidence has tended to be classified as having little probative value.

5.3 Conclusions

On the basis of the literature and cases reviewed in the previous three chapters, it is concluded that the class of litigation in which consumer research evidence is likely to be given the most weight is that where a permanent injunction is sought, on the ground that a television advertisement conveys an implied claim that is false. In such cases, there is no need to show that the advertisement would affect purchasing decisions. The main issue is whether the claim is, in fact, conveyed to its audience.

It is further concluded, based on the American case law, that in this class of litigation, evidence of properly conducted consumer tests would be given greater weight than either testimony of individual consumers or the opinions of advertising experts. On the same basis, it is concluded that evidence of audience reaction tests using forced-choice questions designed to measure the perceived claims in the advertisement, would be given more weight than evidence of other types of consumer tests.

However considerable uncertainty surrounds the question of the extent to which the results of such tests would outweigh the judge's own perception of the meaning of a television commercial.

In an attempt to resolve this uncertainty, a number of legal advisors who had acquired expertise in the Fair Trading Act were consulted. In the course of these discussions, a number of issues emerged. These are discussed in turn.

It was generally agreed that empirical tests might be more appropriate in litigation involving television commercials than in other types of deceptive advertising litigation. First, television advertisements are typically more complex pieces of communication than advertisements in other media. Information is conveyed via spoken words, written words, music and moving images. Thus, the average thirty second television commercial conveys a large number of implied claims. Second, it was suggested that judges might feel less confident in interpreting television commercials than written advertisements. Judges have extensive training in interpreting written documents. Thus, they are likely to feel more qualified than the average person in deciding what written advertisements imply. However, they may feel less qualified in interpreting the meaning of a sequence of complex images such as those found in television advertisements. In view of these considerations, the scope of the research was confined to litigation concerning television commercials.

A second theme that emerged in preliminary discussions with legal advisors was that consumer research evidence is perceived as a very expensive form of evidence. Thus, only litigation involving large potential gains or losses would justify the commissioning of such evidence. Because substantial doubt exists as to the impact that such evidence would have on the outcome of a case, legal advisors considered obtaining market research evidence only in exceptional cases. It was decided to limit the scope of the research to the problem of estimating the extent to which consumer research evidence would affect the outcome of the litigation.

Problems of estimating the economic value of the evidence in individual cases were excluded from consideration. Techniques based on Bayesian analysis offer one avenue for investigating such problems. The analysis would have to recognise that the value of the information

might well be different at the interim hearing, final hearing and appeal stages. In addition, the value of the information may differ as between the parties. The justification for excluding the question of the economic value of consumer research evidence was that the problem of estimating the weight given to such evidence required an answer before the issue of the economic value of the evidence assumed any significance.

A further issue that arose in the preliminary research was that, consumer research evidence might be of relevance to disputes that are settled out of court. The majority of disputes referred to legal advisors are resolved without court action. This is especially true of print and radio advertisements where minor amendments to an advertisement can be incorporated quickly and cheaply. In such situations, negotiated solutions are generally easy to obtain. It was suggested that consumer research evidence might provide a mechanism whereby disputes could be resolved. An example of this approach occurred in the dispute between the FTC and Yamaha Motorcycle Corporation of America. The FTC alleged that Yamaha's advertising for its motorcycle riding lessons implied that, with proper instruction, motorcycles were as safe as cars. Yamaha disputed that this meaning would be inferred by consumers, but agreed that if empirical tests showed such a meaning was inferred, they would amend their advertising campaign. As a result of the tests, Yamaha voluntarily terminated the campaign. Further consideration of the circumstances in which survey evidence might provide an acceptable alternative to litigation is beyond the scope of the thesis.

5.4 Restatement of final objective

The final objective of this thesis is to estimate the weight that would be given to evidence of audience reaction tests in determining whether a television commercial conveys an implied claim, in litigation where a permanent injunction is sought under section 9 of the Fair Trading Act.

Methods other than those typically adopted by legal researchers are required to meet this objective. This is due to two reasons: First, evidence of audience reaction tests has never been offered in a court case in New Zealand. Second, none of the cases decided under section

9 of the Fair Trading Act has concerned television commercials. Thus, the final objective cannot be met by reviewing similar cases. All the cases that are remotely relevant to this objective have already been reviewed in relation to the first two objectives.

Therefore, the first step in meeting the final objective was to devise a method of predicting the weight that would be given to a particular piece of evidence in a particular court case. The second step was to use this method to estimate the weight that would be given to evidence of audience reaction tests in determining the implied claims in a television commercial in litigation under section 9 of the Fair Trading Act.

The way in which these steps were taken is described in the next chapter.

CHAPTER SIX

METHODOLOGY

6.1 Introduction

This chapter describes an empirical method of estimating the weight that would be given to evidence of audience reaction tests in litigation where a television advertisement is alleged to contravene section 9 of the Fair Trading Act.

The chapter begins by discussing a number of issues that arise in attempts to empirically assess the weight that would be given to a piece of evidence in a court case. It then considers problems in defining the class of litigation where evidence of audience reaction tests would be given most weight. Next, it discusses a number of features of audience reaction tests that could affect the weight given to such evidence. Finally, it explains the method that was chosen to estimate the effect that this type of evidence would have in the class of deceptive advertising litigation defined.

6.1 The weight of a piece of evidence

The first problem that arose in the attempt to devise an empirical method for estimating the weight given to a piece of evidence was the vagueness of the concept of "the weight given to a piece of evidence in a court case".

In this study, the concept was defined as follows:

The weight given to a certain piece of evidence in a certain case is defined as the change in probability of the plaintiff succeeding due to the evidence being introduced at the trial.

Where there are several factual issues in dispute, the change in probability of the outcome due to a piece of evidence will be a function of *both* the weight given to the evidence and the relative importance of

the factual issue to which the evidence relates. The definition proposed above assumes that there is only one factual issue in dispute.

Under the definition, the weight of a piece of evidence is "large" if it substantially affects the likelihood of the plaintiff being successful, irrespective of whether the evidence is highly prejudicial or highly beneficial to the plaintiff's case.¹ This feature of the definition accords with common usage.

If this definition is accepted as a reasonable approximation of the legal concept of "the weight of a piece of evidence", it follows that this weight can be calculated if two probabilities can be estimated; the probability of success with the evidence, and the probability of success without the evidence.

Various approaches to estimating these probabilities were considered. The first was to use a sample of judges to estimate these probabilities. This approach was found not to be available in practice. A convention exists whereby judges do not predict the outcome of hypothetical cases.

One way of overcoming this obstacle, would be to use a sample of retired judges. However, this method would be unreliable in the present context, since only judges who had retired very recently would have experience with the Fair Trading Act 1986.

The approach adopted in this study was to use a sample of lawyers. Estimating the outcome of trials is part of a lawyer's professional training and work.

The second problem that arose was one of experimental design. Two designs were considered. The first involved a before-and-after design. Subjects would be given a brief description of a hypothetical case and asked to estimate the probability of the plaintiff succeeding at trial. They would then be given a description of the evidence and asked to

¹ For the sake of simplicity, the term "plaintiff" is used to describe the party initiating legal proceedings, irrespective of the type of proceedings or the remedy sought.

assume that it had been adduced at the trial. They would then be asked for a second estimate of the probable outcome. A weakness of this design is that of confounding the effect of the evidence with the effect of testing. Any change in the estimates could be attributed to either the evidence, or the fact that it was a second estimate, or to the interaction of these two factors.

The second experimental design considered, involved random assignment of subjects to one of two groups - experimental and control groups. The experimental group would receive the evidence sought to be evaluated while the control group would not, all other factors remaining the same. This design would allow an inference that the mean difference between the estimates of the two groups was due to the effect of the additional evidence. However a potential problem with this design was envisaged because the between-subject variation was expected to be large relative to the between-group variation.

The chosen design used a combination of both approaches. The details of this design are described in section 6.9 below.

The third problem that arose was the need to precisely describe the type of hypothetical case and the type of evidence on which lawyers' estimates would be based. These problems are discussed in the next two sections.

6.3 The type of case

As noted above, the effect of a piece of evidence on the outcome of the case depends both on the weight given to the evidence and on the importance of the issue to which the evidence relates. For this reason, it was necessary to define the hypothetical cases so that the main issue at trial was whether the advertisement conveyed an implied representation.

Deceptive advertising litigation under section 9 of the Fair Trading Act is commenced by the plaintiff lodging a statement of claim. This document specifies the representations that are alleged to be conveyed by the advertisement. It also alleges that these representations are

false and describes the remedy sought. The defendant has the choice of admitting or denying that each of the specified representations is conveyed. Where the defendant admits this allegation, the court is not called on to determine the issue and it follows that evidence of audience reaction tests would be irrelevant to the proceedings.

The class of litigation chosen for the purposes of the study was where the plaintiff is seeking only a permanent injunction and the defendant, admits that the representation is false, but denies that the advertisement conveys the representation. In this class of case, no issue arises as to the effect of the misrepresentation because no damages or corrective advertising orders are sought. In addition, unlike applications for interim injunctions, there is no account taken of the "balance of convenience".

The weight given to consumer research evidence is likely to depend on the type of misrepresentation alleged. Preston argues that extrinsic evidence will not be given any weight where the alleged representation is explicitly stated in the advertisement or closely resembles the express verbal content of the advertisement.²

Therefore, the class of case in which the weight attributed to audience reaction tests was investigated, was one where the only factual issue in dispute is whether a television advertisement conveys an implied representation.

The justification for selecting this class of case is that, on the basis of the available literature and caselaw, this was thought to be the class of case in which evidence of audience reaction tests would have the greatest impact on the outcome of the case.³

6.4 The type of evidence

² See section 4.2 and 4.3 in chapter four.

³ Other types of survey evidence could, of course, be relevant to other issues faced by the court. For example, survey evidence could be found probative in showing whether an explicit claim that "Most dentists prefer Jaguar cars" is true or false. Survey evidence of this type is beyond the scope of this thesis.

The weight placed on evidence of audience reaction tests is likely to depend on a number of factors. These include the sample size, the choice of test subjects, the viewing conditions, the questions asked, the response scales used, and the results obtained. It was decided that only one version of audience reaction tests could be evaluated in connection with the final objective. However, the degree to which minor variations to this version would influence the weight placed on the evidence was investigated to a limited extent by asking lawyers to assess the impact of these variations. The factors considered in arriving at the version of audience reaction tests evaluated are discussed below.

6.4.1 Sample size

It was decided to consider audience reaction tests where the sample size was sufficiently large so as to effectively exclude challenges to the evidence on this basis. The sample size chosen was one thousand. The statistical margin of error of the results was described as being about 5% for a sample of this size. The justification for this approach is that it effectively removed the issue of the adequacy of the sample as a factor in the study.

6.4.2 Choice of test subjects

It is not clear from the decided cases who the courts would see as the "class of persons likely to be affected" by deceptive television advertisements.

One approach is to define this class as the general population on the basis that virtually everyone has some chance of being exposed to a TV commercial.⁴

⁴ At least in the case of ads not specially aimed at children, one might exclude children on the basis that they are not generally permitted to give evidence in court. Tests using written questions obviously presume a certain level of literacy which would exclude very young children.

A second approach is to argue that only those people who actually saw an advertisement can be affected by it. Therefore, evidence of the reactions of this group are more directly relevant to the court's investigation than those of the general population.

A third approach is to argue that only people who are potential purchasers of the class of product advertised, have any chance of having their purchase behaviour affected by the ad. The fact that rival traders can bring proceedings under the section provides some support for this approach. It might be argued that the most directly relevant evidence would be the reactions of those who are prospective purchasers of not just the class of products but the advertised brand. The reactions of consumers who are "brand loyal" to competing brands are irrelevant.⁵

A fourth approach is to define the population of interest as those who are potential purchasers *and* are exposed to the ad.

A fifth approach is to say that the most relevant evidence is the reaction of those who were considered by the advertiser, to be within the primary target market. This group would, in some cases, be specified in the company's marketing plan or advertising brief. In cases of niche marketing, it may be a much narrower group of people than either those who actually see the ad or those who are potential purchasers of the product class or the brand.

The uncertainty surrounding the question of whose reactions the court is concerned with, has been noted as serious practical difficulty in the design of a probative survey. However, in the US, as Preston notes, the courts have shown little concern for this question and have, on several occasions, used evidence of the reactions of one group to infer the opinions of a quite different group.⁶

A practical solution to this problem is to define the population in the broadest terms possible and to break the results down into various

⁵ This population could be further narrowed to "brand switchers" thereby excluding those loyal to the advertised brand.

⁶ See section 4.2 in chapter four.

subgroups if necessary. This approach avoids the risk of the court rejecting the entire survey as irrelevant to its inquiry.

Thus, it was decided to estimate the weight attributed to audience reaction tests where the sample was representative of the general adult population. This approach had the added advantage of simplicity, since it avoided difficult questions of how to define whether someone had seen the ad, or was a prospective purchaser, or was within the advertiser's primary target market. In addition, it was decided to investigate whether a consensus of legal opinion supported this approach.

6.4.3 Viewing conditions

Another issue that arises in the design of audience reaction tests is whether the advertisement should be presented in the context of programmes and other advertisements. To do so, would represent an attempt to simulate natural viewing conditions more closely. The results presented in court would be more directly relevant to the issue of the effect of the ad on its audience. The opposing view is that reactions to an advertisement depend to a degree on the specific programme in which it occurs. Television commercials are typically shown in a variety of programme and advertising contexts.

It was decided to assess audience reaction tests in which the advertisement is shown to subjects in the context of a television programme along with other advertisements as in the standard tests conducted by ASI in the United States.⁷

Another question arises as to the number of times subjects should see the commercial before answering questions about it. A common criticism of the empirical studies reviewed in chapter three was that such tests only included one exposure to the advertisement. It was argued that the implied claims perceived in an television advertisement could depend on the number of exposures.

⁷ See the description of ASI tests in section 4.2 in chapter four.

It was decided to assess evidence of audience reactions tests where the advertisement is shown only once. This is the case in the standard ASI testing procedure. In addition, it was decided to investigate whether a consensus of legal opinion supported this approach.

6.4.4 Question format

Audience reaction tests can include both open-ended and forced-choice questions. Preston (1987)⁸ has argued that forced-choice questions have tended to be given more weight by the courts, especially where the alleged representation does not relate to the central theme of the commercial. Forced-choice questions were chosen because the responses to such questions may be described much more briefly than those to open-ended questions. The form of question chosen was "Is the advertisement claiming that X?" where X stands for the representation alleged to be conveyed by the commercial. This form of question was chosen for three reasons. First, it allowed a standard question format to be used for all advertisements. Second, it permitted the use of a simple set of response options (yes / no / don't know). Third, it appeared to be the question that is most directly relevant to the court's inquiry.

In addition, it was decided to investigate whether a consensus of legal opinion favoured the use of forced-choice questions.

6.4.5 Response options

As discussed in chapter three, a wide range of scales have been used in empirical studies designed to measure the implied claims in an advertisement. These scales include accurate/inaccurate scales; binary true/false scales; four and five point true/false scales; and seven, eleven and thirteen point semantic differential scales. Many of these scales would be difficult to concisely explain to people unfamiliar with the empirical literature.

⁸ See sections 4.2 and 4.3 in chapter four.

In several cases in the United States, the courts have been concerned at the possible influence of a yea-saying bias in forced-choice questions. They have generally approved of the inclusion of a "don't know" option to reduce this influence.

For these reasons, the response scale selected for the audience reaction tests was "yes / no / don't know".

6.4.6 Results of audience reaction tests

The outcome of the type of audience reaction tests described above is the percentage of the audience who selected each of the three response options. A convenient abbreviation for these results is the term "ART scores" which stands for "audience reaction test scores". The results can take a large range of values.

In this study, it was decided to test only three possible values. The values chosen were as follows:

	Yes	No	Don't know
Low score	5%	65%	30%
Medium score	35%	35%	30%
High score	65%	5%	30%

These values were chosen for a number of reasons. First, the low and high values represented extreme values, given the way the hypothetical cases were selected which is described in section 6.6 below. Second, the medium value represented the midpoint between the high and low values. Third, it allowed the number of "don't know" responses to remain constant.

In summary, the attempt to estimate the weight given to evidence of audience reaction tests by obtaining lawyers' estimates of the likely outcome of hypothetical cases, required that both the type of case and the type of test were clearly specified. The type of case chosen was one where the only factual issue in dispute is whether the advertisement conveys an implied representation. The type of test chosen was one in which a sample of the general population is shown the ad in the context

of other material and is asked to select one of three options (yes/no/don't know) in response to a question of the form "Is the advertisement claiming that X?". In addition, the extent to which four minor variations in such tests might affect the value of the evidence was examined to a limited extent.

The remaining sections of this chapter describe the method by which the effect of this evidence was measured.

6.5 Selection of Subjects

In order to be able to provide a reasonably reliable estimate of the outcome of the type of case under investigation, it was decided that subjects required experience in commercial litigation as well as experience with the Fair Trading Act 1986. These requirements severely limited the number of lawyers who qualified as potential subjects.

Copies of the judgments for all of the thirty four cases litigated in the first three years of the Act's operation were obtained.⁹ A list was compiled of counsel who had appeared in these cases. Copies of the New Zealand Law Register for the years 1989 and 1990 were consulted in order to identify the business address, phone and fax numbers of those on the list.¹⁰ In a few instances, it was not possible to identify these items due to insufficient details being given in the judgements.¹¹

The final list contained forty five lawyers who satisfied the criteria of having appeared as counsel in a case involving the Fair Trading Act and being listed in the New Zealand Law Register.

⁹ There is no comprehensive system of reporting court cases. The judgments obtained were all those cited in The Capital Letter which is a weekly newsletter of the legal profession. This newsletter had an initial policy of citing all Fair Trading Act cases due to the Act's novelty and broad scope.

¹⁰ New Zealand Law Register, Butterworths, Wellington, 1989 and 1990.

¹¹ Many judgments fail to identify the gender of counsel and several contain errors in either their initials and the spelling of their surname.

6.6 Selection of Television Commercials

The advertisements included in the study had all been broadcast on one of the three national networks in the two years prior to the study. They were selected from a convenience sample of more than five hundred advertisements that had been recorded 'off-air' for use as teaching materials in the Marketing Department at Massey University.

Initially, fifteen commercials were selected on the basis that it was possible to formulate a concise factual statement that might be perceived to be implied by the commercial. A preliminary test of these commercials was conducted using a convenience sample of seven lawyers. The lawyers were shown the advertisement twice. In between each showing they were asked to assume that it had been alleged that the advertisement conveyed the factual statement and that this statement was false. After the second showing, they were asked to estimate, on an eleven point probability scale, the likelihood of the plaintiff succeeding at trial.

As a result of this preliminary test, ten cases¹² whose mean estimates were closest to the midpoint of the scale were selected for inclusion in the main experiment.

The justification for this approach is that extrinsic evidence is likely to have the largest impact where a non-obvious, but not extremely "remote", implied claim is alleged. Appendix F contains a brief description of each advertisement and an exact statement of the claim alleged to be conveyed.

¹² Nine of the cases represented test cases in the survey. The tenth case was included as a practice example, as is described in the next section.

6.7 The survey instrument

The survey instrument comprised a VHS video tape, a printed questionnaire and a covering letter. These are described in turn below.

(i) Covering letter

The covering letter was addressed to each respondent by name at their business address. It outlined the purpose of the study, the basis on which they had been selected as a participant, and explained that participation would only require thirty seven minutes of their time.¹³

(ii) Printed questionnaire

The printed questionnaire comprised four pages. The first merely identified the names of the research team and stated that instructions were provided at the beginning of the video tape. The second page included a copy of the probability scale on which the lawyers' estimates were measured. It then listed the names of ten advertisements.

The third and fourth pages contained questions asking respondents to estimate the effect of variations in the format of audience reaction tests and to provided brief background information relating to their professional experience.¹⁴

(iii) Video tape

The video tape was thirty three minutes long. It contained ten advertisements. These advertisements were divided into three groups of three ads, and the remaining ad was a practice example used to illustrate the standard format of presentation and to explain the response scale, both of which are described below.

At the beginning of the tape, the researcher introduced himself, his supervisors and the general topic of the study. Respondents were

¹³ A sample covering letter is included as Appendix A.

¹⁴ Sample questionnaires are included as Appendix B.

informed that they were going to be asked to estimate the outcome of a number of cases where television advertisements were alleged to contravene section 9 of the Fair Trading Act. The wording of this section was presented both visually and aurally. A probability scale was then shown on the screen as follows:

Certain, practically certain	(99 in 100)	10
Almost sure	(9 in 10)	9
Very probable	(8 in 10)	8
Probable	(7 in 10)	7
Good possibility	(6 in 10)	6
Fairly good possibility	(5 in 10)	5
Fair possibility	(4 in 10)	4
Some possibility	(3 in 10)	3
Slight possibility	(2 in 10)	2
Very slight possibility	(1 in 10)	1
No chance, almost no chance	(1 in 100)	0

While the scale was shown, the audio content was as follows:

According to this scale, if you think it is certain, or practically certain that the plaintiff would succeed on the assumptions outlined, then you would circle the number ten. If you think there is no chance, or practically no chance that the plaintiff would succeed, then you would circle the number zero. In cases where you are less sure of the outcome, you would circle one of the numbers between one and nine that corresponds to your estimate of the likelihood that the High Court would find the ad to contravene section nine.

A practice example was included to illustrate the way in which the hypothetical cases would be presented. The standard procedure involved the following steps. First, the ad was shown. Next, respondents were asked to make two assumptions both of which were read while appearing on the screen. The first assumption stated the representation that was alleged to be conveyed by the ad. The second assumption stated that the defendant had admitted the representation was false. Then the ad was shown again. Finally, while the probability

scale appeared on the screen, respondents were asked to estimate the likelihood that the High Court would find the ad to contravene section 9 on the assumptions provided. At the end of the practice example, respondents were asked to turn to the second page of the printed questionnaire. The top of this page was shown on the screen and a hand was shown circling the number four on the scale opposite the label "practice question".

Following the practice example, the researcher informed respondents that if, at any stage, they wanted more time to select a point on the scale, they should use the pause button on their video player to stop the tape. They were also asked not to replay the tape or alter a previous estimate and were assured that their estimates would remain confidential to the researcher and his supervisors.

Following this assurance, three advertisements were presented in the standard format. That is, the ad was shown twice. In between the showings, two assumptions were provided: one alleging a certain representation was conveyed and the other admitting this representation to be false. After the second showing, the probability scale was shown on the screen while respondents were asked to select a point on the scale. At this point the term "Pause?" appeared on the screen to remind respondents of their ability to stop the tape while making their estimates.

After these three advertisements, the researcher described the format of audience reaction tests. In the verbatim extract which follows, the images that appeared on the screen, apart from the researcher, are shown in brackets.

Audience reaction tests are conducted in a theatre, just like a movie theatre. One thousand subjects are randomly selected from all those who are over the age of fifteen and live in one of New Zealand's six largest cities. They are invited in groups of fifty to attend a preview of a television programme in return for answering some questions about it. Into the sixty minute programme, four groups of four advertisements are inserted every fifteen

minutes. Subjects are shown a fifteen minute segment and four ads and then the showing is interrupted. Subjects are then asked to respond to a series of ten written questions about the programme content and three written questions about each advertisement they have just seen. In the simplest case, subjects are asked to select one of three options in response to each question. (Yes [] No [] Don't Know []) Analysis of the survey involves merely calculating the percentage of the audience who selected each option. (Yes 50% No 20% Don't Know 30%)

Now you might wonder how reliable these audience reaction tests are. The answer is that the statistical margin of error is about five percent. This means that, where for example a figure of fifty percent is stated, there is a ninety five percent chance that the true value for the whole population is between forty five and fifty five percent.

Respondents were then informed that, in the following six examples, the assumptions provided would include the fact that the judge had decided to admit evidence of the results of audience reaction tests. In these examples, they were asked to assume that the evidence conformed to the guidelines for admissibility of survey evidence referred to by Barker J. in the *ARA v Mutual Rental Cars* case.¹⁵ These guidelines were then described aurally in the form of three propositions while an abbreviated version of each proposition appeared on the screen. The verbatim description of the guidelines was as follows:

One, the survey was designed and carried out in accordance with accepted principles of survey research.
 Two, complete records are available to the court of the design, implementation and analysis of the survey.
 Three, all those associated with the survey are available to be called as witnesses if required.

¹⁵ These guidelines are discussed in section 4.5 in chapter four.

Immediately following this, three more advertisements were presented in the standard format, with one important modification. In addition to the two standard assumptions, a third assumption was provided to the effect that the judge had admitted evidence of an audience reaction test. Respondents were provided both aurally and visually with the exact wording of the question asked and the percentage of respondents who selected each of the three response options. In every example, the question asked was of the form "Is the advertisement claiming that X?" where X was identical to the representation alleged to be conveyed by the advertisement.

The percentages of the audience who were stated to have selected each response option in these three examples was as follows:

	Yes	No	Don't know
Fourth case	35%	35%	30%
Fifth case	5%	65%	30%
Sixth case	65%	5%	30%

Apart from the addition of the third assumption, this second group of three examples was identical to the first three examples. In particular, the ads were shown twice and respondents were asked to estimate the likely outcome in the same way as previously.

Following the second group of three examples, the researcher informed respondents that in the final group of three examples, they would be asked to estimate the likely outcome twice, under two different scenarios. In the first scenario, no audience reaction test results would be available. In the second scenario, the judge would have admitted the results of audience reaction tests.

Then the last group of three examples was presented. In each case, respondents provided their first estimate based on the standard format. They were then given the additional assumption and asked for their second estimate immediately afterwards. The percentages of the

audience who were stated to have selected each response option was as follows:

	Yes	No	Don't know
Seventh case	65%	5%	30%
Eighth case	35%	35%	30%
Ninth case	5%	65%	30%

Finally, the researcher thanked respondents for their contribution to the study, requested that they complete the final two pages of the questionnaire, and provided instructions as to the return of the questionnaire and video tape in the reply-paid, self-addressed box provided.

6.8 Rationale for the survey instrument

In the course of developing the survey instrument described above, a number of issues arose. These included anticipated problems in achieving a satisfactory response rate, the wording of the dependant measure, and the probability scale used. These issues are discussed in turn.

An overriding concern in the development of the survey instrument was the belief that it would be difficult to persuade lawyers to respond to a survey of this kind. There were several reasons for this belief. First, the instrument asked them for their professional opinion on the outcome of a potential court case. This is the type of opinion for which lawyers usually expect to be paid. Second, it was thought that lawyers perceive their own time to be very valuable. They are often required to record their time in units as small as 6 minutes and to attribute this either to a client or to unproductive labour.

Several features of the survey instrument were designed to address this concern. First, it was decided to use a mail survey rather than face to face interviews as it was felt that permitting respondents to respond at their convenience would produce a lower refusal rate than requesting an interview, even if a wide range of possible interview times was offered.

Second, the total time required to respond to the survey was restricted as closely as possible to half an hour.

Third, the printed questionnaire was kept as short as possible to maintain the suggestion that little reading was involved and to stimulate interest in watching the video tape to discover the purpose of the survey. This required that most of the instructions and survey questions were presented in the video.

Fourth, the production quality of the video programme was made as high as possible. Filming of both graphics and presentations to camera were done using broadcast quality Betacam cameras. Editing of the VHS master tapes was performed using a professional quality VHS editing suite. Finally, fifteen copies of each master tape were made. This process ensured that, although the tape viewed by respondents was third generation material, the fidelity of both the video and audio components remained close to that achieved by normal off-air home recording.

Fifth, the cover letter aimed to demonstrate that the researcher had a legal training and was familiar with the legal literature in the field of survey evidence. It also gave an undertaking to provide respondents with a summary of the results of the survey within four weeks of the return of their questionnaires.

Turning to the issue of the dependant measure chosen, the question asked was identical in every case. While the probability scale was shown on the screen, the voice of the researcher asked:

What is the likelihood that the High Court would find this advertisement to contravene section 9 of the Fair Trading Act on the assumptions provided?

Proceedings under section 9 may be taken in either the District Court or the High Court. In the District Court, the remedy sought would be damages. In such cases, complicated questions often arise as to whether the plaintiff has suffered any loss as a result of the

advertisement.¹⁶ While theoretically, whether the ad breaches the section and whether the plaintiff has suffered damage are independent questions, it is often difficult to separate these issues in practice. For this reason, it was decided to refer to only the High Court. This reference would suggest to respondents that it was an injunction that was being sought.¹⁷

The remaining dilemma was whether the question should ask respondents to estimate the likelihood that an injunction would be granted. This question would seem to be closer to the type of question typically asked of legal advisors. However such a question would introduce additional complications. First, it would have to specify whether a permanent or interim injunction was being sought. This is because the standard of proof is recognised to depend on the type of injunction.

Furthermore, an injunction is a discretionary remedy. This means that factors other than the technical question of whether the section has been breached enter into the court's decision. In the case of interim injunctions, these factors are usually referred to as "the balance of convenience".¹⁸ In the case of permanent injunctions, a variety of factors relating to the conduct of the applicant, such as any delay in bringing proceedings, are considered.

One way of overcoming the problems identified above would have been to provide additional assumptions in respect of such matters. However, this solution would have substantially increased the length of the video and the information that respondents would be required to remember when responding to the questions.

Therefore, for reasons of brevity and simplicity, it was decided to ask for an estimate as to the court's decision on the issue of liability only, and to avoid reference to the type of remedy sought. While court cases usually involve both issues, it is normal for judgments to describe the

¹⁶ See section 2.4 in chapter two.

¹⁷ See section 2.4 in chapter two.

¹⁸ See section 2.4 in chapter two.

decision arrived at with respect to each issue separately. Furthermore, the issue of liability is usually, but not always, described first.

The probability scale chosen was a version of the scale proposed by Juster as a means of estimating purchase behaviour.¹⁹ The scale has been tested on a wide variety of products and in a number of versions.²⁰ It has also been used in both face to face and mail surveys. In general, the scale has been found to provide a better estimate of purchase behaviour than several of the commonly used alternatives.²¹ It has also been found to be easily understood by a variety of survey samples.²²

The author is not aware of any previous attempt to use the scale to estimate the outcome of court decisions. However, there is no apparent reason why the scale should be limited to predicting purchase behaviour. The scale was chosen as being largely self-explanatory and because of its established reputation in predicting purchase behaviour.

The complete scale was shown at the top of the page on which respondents gave their estimates of the outcome of the nine hypothetical cases. It was also shown on the screen when the scale was mentioned for the first time in the video programme. It was further shown on each subsequent occasion that respondents were asked to make an estimate. This amounted to fourteen occasions including the practice question. For reasons of brevity the complete scale was not reproduced on the printed questionnaire next to the name of each advertisement. Instead, the numbers zero to ten were presented in a horizontal series next to the name of each advertisement.

¹⁹ Juster F.T. (1966) Consumer Buying Intentions and Purchase Probability
Columbia University Press, 1966.

²⁰ Day D. (1987) Examination of the Accuracy of Two Versions of the Juster Scale
for Predicting Consumer Purchase Behaviour using Self-Completion
Questionnaires Unpublished Student Research Report, Massey University, 1987.

²¹ Gan B.C., Esslemont D.H.B. and Gendall P.J. (1986) Market Research Centre,
Massey University, 1986.

²² Hamilton-Gibbs D.J. (1989) Predicting the Demand for Frequently Purchased
Items Unpublished Student Research Report, Massey University, 1989.

6.9 Description of experimental design

The forty five subjects were randomly assigned to one of three treatment groups of fifteen subjects each. Members of each group received an identical covering letter, printed questionnaire and video tape except in one respect. The order of presentation of the advertisements was varied between the groups. The order of presentation of the ads for each group is shown in Figure 6.9 below.

Figure 6.9 Order of presentation of advertisements

	Tape A	Tape B	Tape C
Practice question	White Magic	White Magic	White Magic
1 Standard	British Air	British Air	British Air
2 Standard	Simpson	Mitsubishi	Simpson
3 Standard	Honda	Pine'o Cleen	Honda
4 Medium ART	Reach	Reach	Reach
5 Low ART	Mitsubishi	Simpson	Pine 'o Cleen
6 High ART	Pine'o Cleen	Honda	Mitsubishi
7 A Standard B High ART	Panadol	Palmolive	Toyota
8 A Standard B Medium ART	Palmolive	Toyota	Panadol
9 A Standard B Low ART	Toyota	Panadol	Palmolive

6.10 Rationale for the experimental design

Two constraints were critical in the design of the experiment. The first was that only forty five lawyers had gained experience in litigation relating to the Fair Trading Act at the time of the study. The second was that no more than nine advertisements could be included if the total video programme was limited to half an hour. A further practical constraint was that each additional version of the video programme demanded more than thirty hours in the editing suite. It was therefore

decided to prefer experimental designs that required no more than four separate programmes be produced.

The initial design aimed to test each of the nine advertisements in each of the three treatment conditions: low ART score, medium ART score and high ART score and in the control condition (standard assumptions only). If each lawyer was required to give only one estimate for each ad, the design required four groups of 11 subjects each. This design was rejected on the basis that the small size of each cell rendered the experiment too sensitive to the anticipated level of non-response.

A second solution entailed asking each subject to estimate the likely outcome under all four conditions, three treatment conditions and the control condition. The advantage of this approach was that it gave forty five estimates for each cell in the design. However, it was felt that this approach would reduce the amount of serious reflection subjects would give to their estimates. First, the survey would be highly repetitious with the same four estimates being required for each ad. Second, it would become quickly apparent that the ART scores had been invented by the researcher.

Other disadvantages of this design were noted. The time required to make several estimates for each ad would limit the number of ads that could be included within the thirty minutes. The design was likely to be highly reactive. That is, each estimate given might be a function of both the particular ART score provided and the fact that prior estimates had been given on the basis of different ART scores. In view of the above considerations, this design was rejected.

The design chosen represented a compromise between the two designs discussed above. Three of the ads were tested in the multiple conditions mode. However, this was limited to two conditions: first, the control condition where only the two standard assumptions were provided, and second, one of the three treatment conditions. This approached entailed that at least three versions of the video programme needed to be produced. By only testing three ads in this mode, it was possible to avoid repeating any ART score for any one respondent.

For the remaining six advertisements, subjects were asked to provide only one estimate. This was either in the control condition or in one of the three treatment conditions.

Two of the advertisements were tested in only one of the conditions. The first advertisement (British Airways) was tested only in the control condition. This allowed some check on the degree to which the groups were similar in their estimates. The fourth advertisement in each tape (Reach toothbrush) was tested only in the medium ART score condition. This again allowed a measure of the similarity of the groups in their response to ART scores.

The effect of the chosen design is that seven true test advertisements were included. Two were tested in one of the treatments. Two were tested in two treatments and three were tested in three treatments. In addition, each of the seven ads was tested in the control condition.

Due to an editing error, the final tapes produced did not conform to the design described in Figure 6.9. This design called for a medium ART score to be included in Scenario B for the eighth ad on each tape. However, it was found that Tape A included a low ART score. This error was not detected until more than one third of questionnaires had been return. It was noticed because the results for this example appeared anomalous. All tapes were subsequently checked and no other errors were detected.

6.11 Summary

This chapter described an empirical method of estimating the weight that evidence of audience reaction tests would be given by a court in deciding one class of deceptive advertising case.

The method involved a mail survey in which forty five expert lawyers were asked to predict the outcome of nine hypothetical court cases. These were cases where the main issue for the court was whether a television advertisement conveyed an implied claim.

The results of audience reaction tests (ART scores) were provided in some of the hypothetical cases. The version of audience reaction test chosen was one in which a representative sample of the population is shown the advertisement, in its normal context, and is then asked to respond to a written question of the form "Is the advertisement claiming that X?". In some cases, subjects were asked to predict the outcome twice: both before and after the ART scores were provided.

In addition, subjects were asked to assess the effect of four minor variations to the version of audience reaction test described in the video.

In the next chapter, the results of the survey are described and analysed.

CHAPTER SEVEN

RESULTS AND ANALYSIS

7.1 Introduction

This chapter reports on the results of the survey which was undertaken to meet the final objective of the thesis.

The chapter begins by considering the extent to which the survey was successful in obtaining lawyers' predictions of the outcome of hypothetical court cases. Next, the predictions obtained by the survey are described. Following that, the analysis that was undertaken to assess the impact that evidence of audience reaction tests had on these predictions is explained. Finally, lawyers' opinions about the effect of minor changes in the format of audience reaction tests are described.

Discussion of the implications of these findings is delayed until the next chapter.

7.2 The survey's ability to obtain lawyers' predictions

As noted in the previous chapter, a major concern in addressing the final objective was the extent to which lawyers would respond to a survey which asked them to predict the outcome of hypothetical court cases.

The final response rate was just over 90%. Of the forty five questionnaires posted, forty one were completed and returned. To achieve this response rate, a series of reminder faxes and telephone calls was used. Copies of the reminder faxes are contained in Appendices C and D. The relationship between the reminders and the response rate is summarised in Table 7.2 below.

Table 7.2 Reminders and responses

		Responses	
	Date	Cum. No.	Cum. %
Initial posting (45)	12 Sept	10	22%
First reminder fax	27 Sept	19	40%
First reminder phone call	5 Oct	24	53%
Second reminder phone call	12 Oct	30	73%
Third reminder phone call	19 Oct	32	77%
Second reminder fax	31 Oct	37	86%
Fourth reminder phone call	5 Nov	40	89%
Fifth reminder phone call	15 Nov	41	91%
Total responses		41	91%

All questions were answered in each of the returned questionnaires. In two instances, the questionnaire was not completed by the person to whom it was addressed. In both instances, respondents had the necessary legal experience to qualify as members of the sample. This could be checked because three questions measured respondents' experience in litigation under section 9 of the Fair Trading Act and in commercial litigation generally. The responses to these questions are shown in Appendix E.

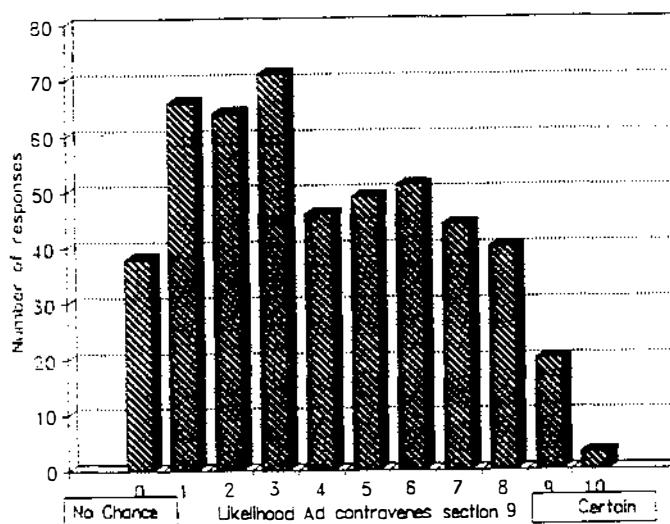
7.3 Predictions of the outcome of the hypothetical cases

A total of 492 predictions was received. For the first six cases, respondents gave one estimate of the likelihood that the High Court would find the advertisement to contravene section 9. For each of the last three cases, respondents gave two predictions; one before ART scores were provided and one afterwards. Thus each of the forty one respondents gave twelve predictions. The predictions were points on the probability scale described in the previous chapter.¹ On the scale, an estimate of zero represents a prediction that there is "no chance, or

¹ See sections 6.7 and 6.8 in chapter six.

"almost no chance" that the advertisement would be found to be deceptive. An estimate of ten represents a prediction that it is "certain, or practically certain" that the advertisement would be found to be deceptive. The distribution of the total predictions is shown in Figure 7.3.1 below.

Figure 7.3.1 Distribution of total predictions



As can be seen from Figure 7.3.1, there was a large variation in the predictions. In only three instances were lawyers "certain" the plaintiff would succeed. In thirty eight instances, respondents thought there was "no chance" that the plaintiff would succeed on the assumptions provided.

A series of ANOVA procedures was used to investigate the extent to which a variety of possible influences might explain the pattern of predictions. These potential influences included:

- (i) differences between the results of the audience reaction tests
- (ii) differences between the hypothetical cases
- (iii) differences between the lawyers who watched each tape
- (iv) differences in the order in which the cases were presented on each tape

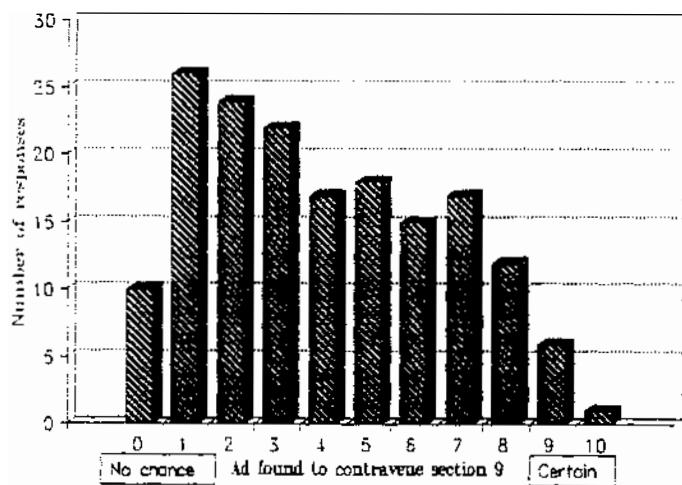
- (v) differences between the number of assumptions provided in each case

The main objective of the study was to assess the extent to which the variation in predictions could be explained by the results of the audience reaction tests. Prior to addressing this objective, the effect of the other potentially confounding factors was investigated using a series of one way analyses of variance procedures.

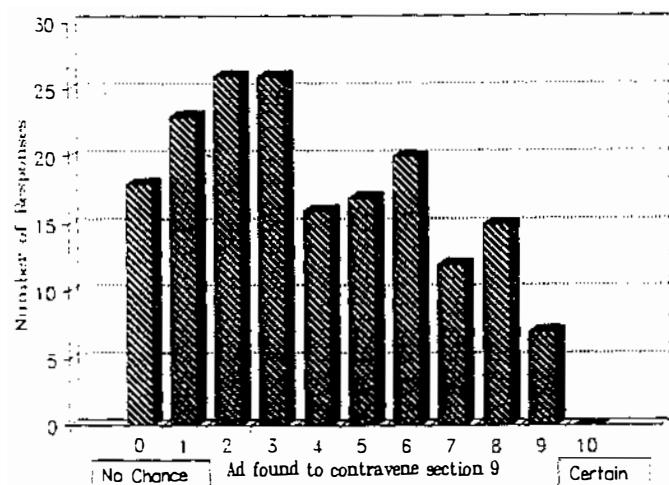
The first question investigated was the extent to which the variation in predictions could be explained by the fact that respondents watched different tapes. Figure 7.3.2 shows the total predictions broken down by the tape viewed.

Figure 7.3.2 Total predictions broken down by the tape viewed.

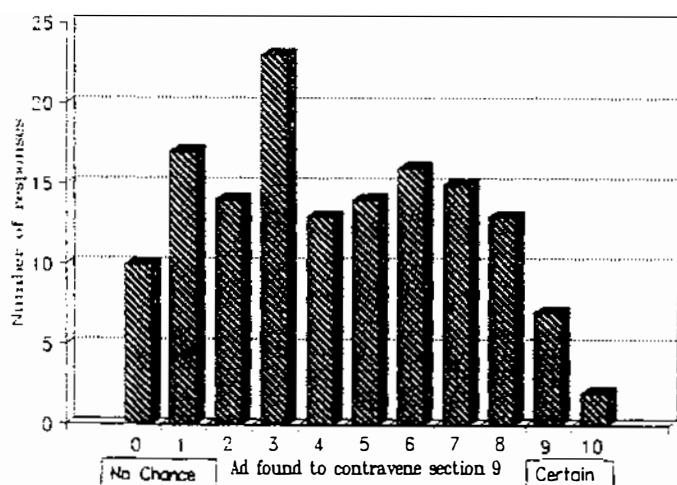
Tape A



Tape B



Tape C



The mean prediction for each tape was:

Tape A	3.97
Tape B	3.55
Tape C	3.88

The difference in means might be explained by two possible factors. The first is that, although respondents were randomly assigned to each of the groups, the resulting groups differed in their mean propensity to predict the plaintiff being successful in deceptive advertising cases. The second is that the ads occurred in a different order on each tape. It is not possible to determine the extent to which one or both of these factors is responsible the observed difference.

However, the observed difference is not statistically significant ($p < 0.05$) as measured by the standard F ratio produced by a one way analysis of variance.²

A second possible source of variation related to differences between the hypothetical cases. Figures 7.3.3, 7.3.4, and 7.3.5 show the predictions for each of the nine cases. For the first six cases, each lawyer gave one prediction. For the last three cases, two predictions were given by each lawyer under different scenarios.

2 See appendix G.

Figure 7.3.3 Predictions for the first three cases

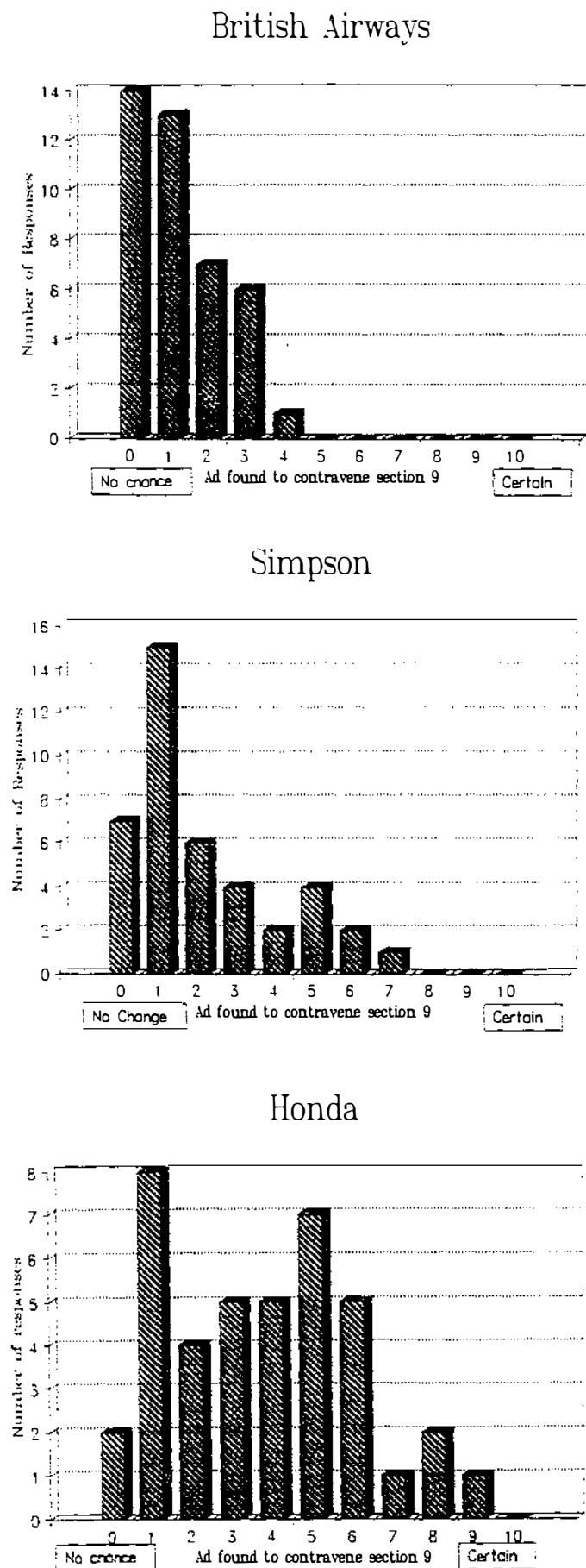


Figure 7.3.4 Predictions for the second three cases

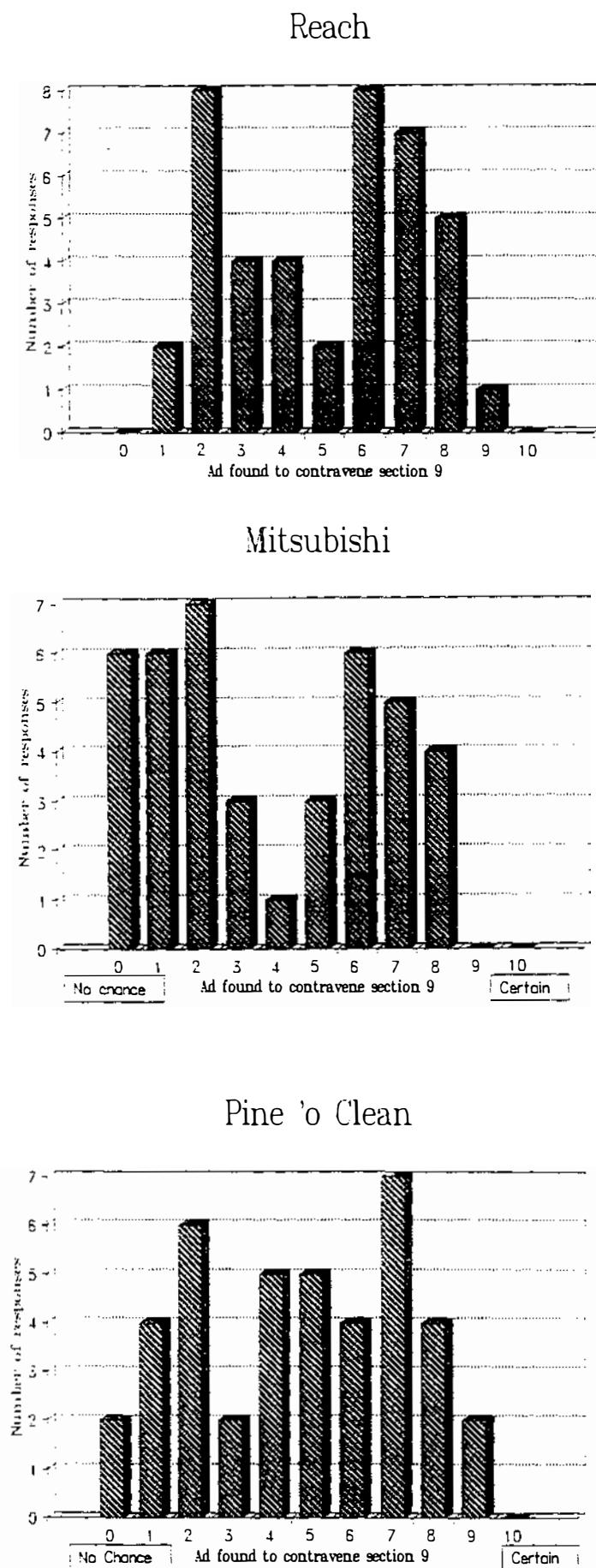
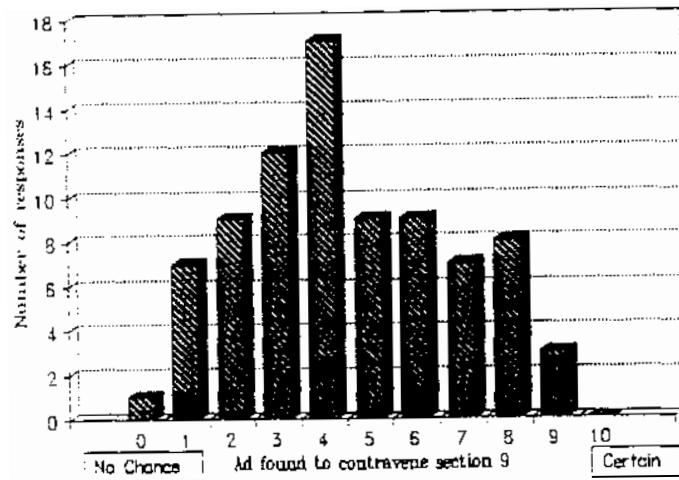
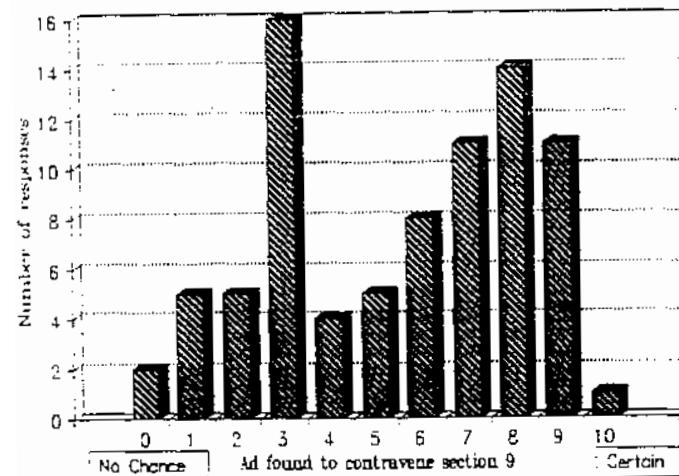


Figure 7.3.5 Predictions for the last three cases

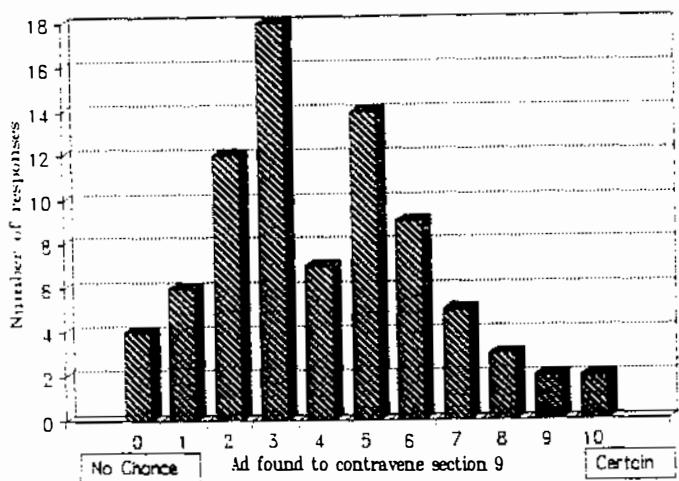
Palmolive



Panadol



Toyota



As is evident from Figures 7.3.3 to 7.3.5, some of the overall variation in the predictions appears to be due to differences between the nine cases. The mean prediction for each case is shown in Table 7.3.6 below.

Table 7.3.6 Mean prediction for each of the nine cases

Case	Mean
British Airways	1.20
Simpson	2.05
Honda	3.54
Reach	4.71
Mitsubishi	3.46
Pine o' Cleen	4.44
Palmolive	5.16
Panadol	4.23
Toyota	3.71

The F ratio produced by a single factor ANOVA is significant ($p<0.01$).³ This shows that a statistically significant proportion of the total variation in predictions can be attributed to the differences between the cases.

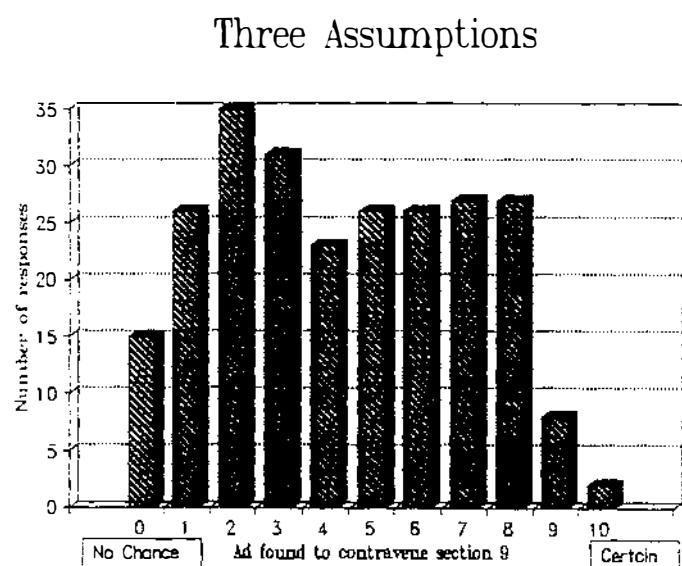
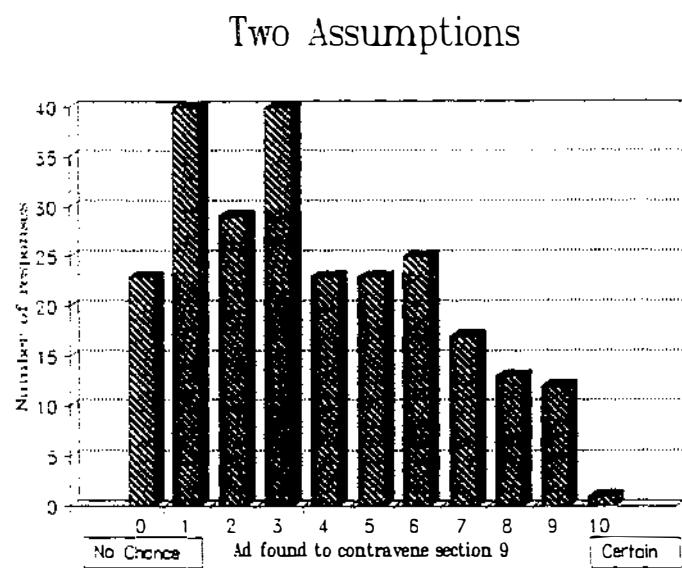
The most likely explanation for the observed differences between cases is that the implied representation alleged to be conveyed was more "obvious" in some cases than in others. This source of variation was not of central interest in the study. The central concern was the extent to which evidence of audience reaction tests explained the overall variation in predictions.

7.4 Evidence of audience reaction tests

The extent to which evidence of audience reaction tests influenced lawyers' predictions was analysed in several stages. The first stage was to see if there was a significant difference between cases in which the third assumption providing evidence of audience reaction tests was included, compared to those where only the two standard assumptions were provided. Half of all predictions fell into each category. Figure 7.4.1 shows the total predictions broken down by the number of assumptions.

3 See appendix G.

Figure 7.4.1 Total predictions broken down by the number of assumptions

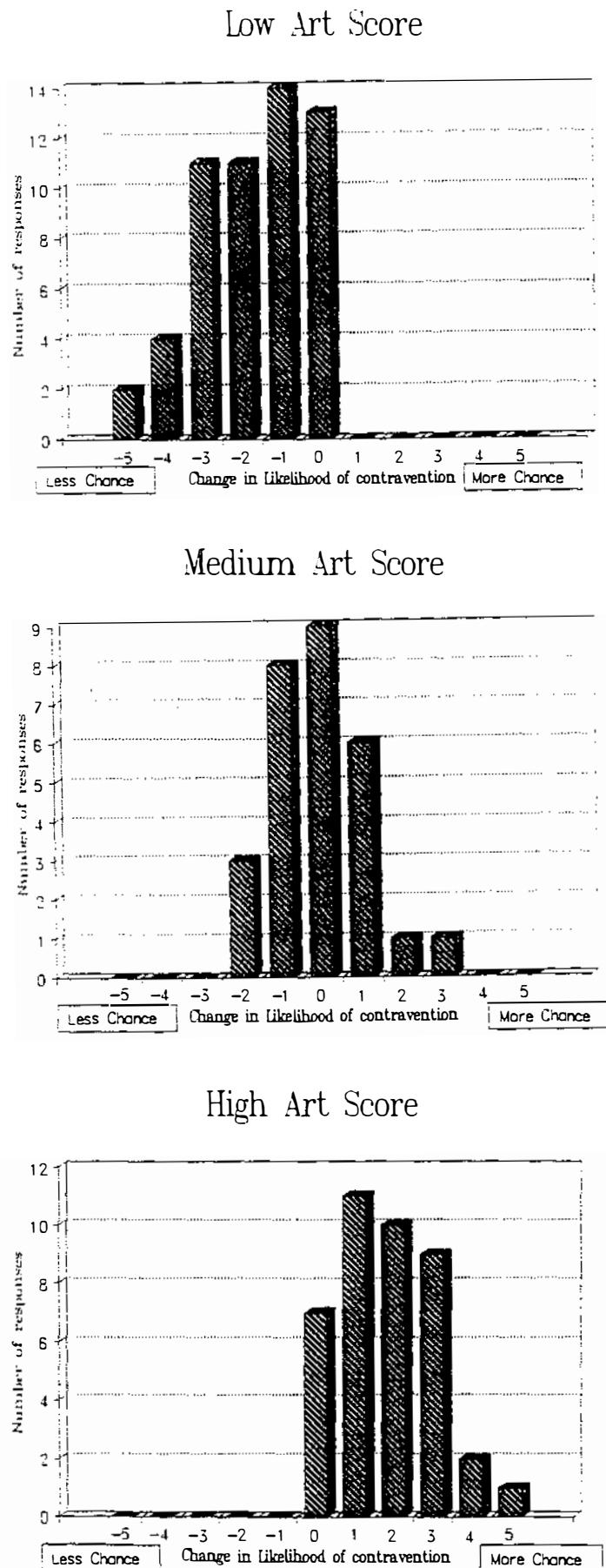


The difference between the means of these two groups is not statistically significant ($p < 0.05$).

One possible conclusion from this finding is that evidence of audience reaction tests do not, in general, affect lawyers' predictions of the likelihood of the plaintiff succeeding at trial. However, this conclusion overlooks the possibility that the effect is masked by the fact that an approximately equal number of instances occurred where the evidence significantly increased and significantly reduced this probability.

This possibility was investigated in a number of steps. The first step was to examine the predictions for only the last three cases (Palmolive, Panadol and Toyota). In these three cases, respondents were asked to predict the outcome twice, under different scenarios. Only the two standard assumptions were provided in the first scenario. The second scenario included evidence of either a low, medium or high ART score. The change between the first and second predictions was calculated for each lawyer. Figure 7.4.2 shows the changes broken down by the ART score provided in the second scenario.

Figure 7.4.2 Changes broken down by the ART score provided in the second scenario

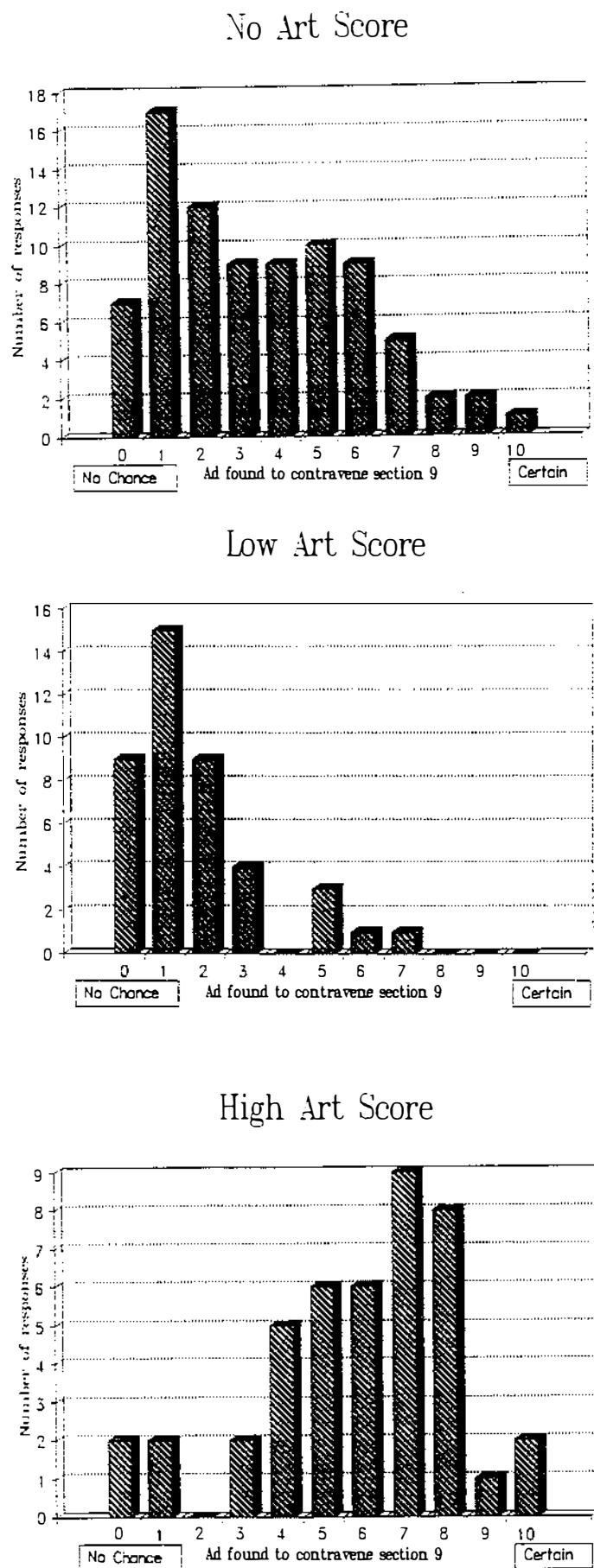


A single factor ANOVA test revealed that a significant proportion of the variation in the changes was attributable to the value of the ART score ($p < 0.01$).⁴ Thus, lawyers' second predictions were affected by the value of the ART score provided. It is possible that this effect only occurs where second predictions are given. That is, it is possible that the observed differences are the result of an interaction between the effect of prior testing and the effect of the ART score.

This possibility was examined by a single factor ANOVA of the predictions to four of the first six cases (Simpson, Honda, Mitsubishi and Pine o' Cleen). In each of these four cases, respondents were asked to estimate the outcome only once. In some instances, only the two standard assumptions were included. In other instances, a third assumption was provided giving either a high or a low ART score. Figure 7.4.3 shows the predictions for these four cases broken down by the value of the ART score.

4 See appendix G.

Figure 7.4.3 Predictions for four cases broken down by ART score.



The observed difference between the means is statistically significant ($p<0.01$),⁵ indicating that the effect of evidence of ART scores is not limited to instances where a prior estimate has been made.

The results described above show that lawyers' estimates of the chances of the High Court finding an ad to contravene section 9 are affected by both evidence of ART scores and by aspects of the individual case. In the next section, the relative importance of these two effects is discussed.

7.5 The relative importance of ART scores

A two factor ANOVA procedure was undertaken on those predictions where the assumptions included evidence of ART scores to examine the influence of evidence of ART scores, relative to the other characteristics of the case. Table 7.5.1 shows the results of this procedure.

Table 7.5.1. Effect of the ART score and the ad on predictions

Multiple analysis of variance table

Source of Variation	Sum of Squares	DF	Mean Squares	F	Signif of F
Main effect	705.062	9	78.340	16.488	.000
ARTSCORE	447.384	2	223.692	47.078	.000
AD	186.622	7	26.660	5.611	.000
2-way interactions	10.027	5	2.005	.422	.833
ARTSCORE AD	10.027	5	2.005	.422	.833
Explained	715.089	14	51.078	10.750	.000
Residual	1097.594	231	4.751		
Total	1812.683	245	7.399		

⁵ See appendix G

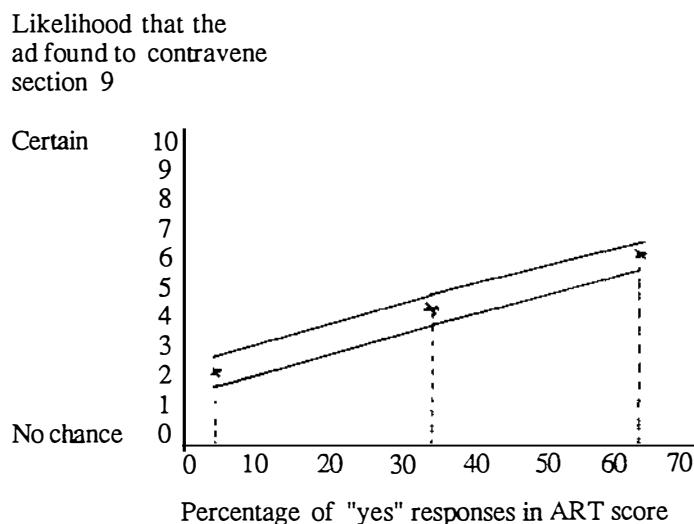
From Table 7.5.1, it is concluded that the variation due to the ART scores is about ten times larger than that due to the other aspects of the case. Furthermore, there is no statistically significant interaction between these two effects. This means that the effect of evidence of ART scores is largely independant of other features of the case.

7.6 Relationship between ART scores and predicted outcomes

In the previous section, it was concluded that the largest single influence on lawyers' estimates of the chances of the advertisement being found deceptive was the value of the ART score stated in the assumptions.

The relationship between the ART score and the chances of the ad being found deceptive across all cases is shown in Figure 7.6.1 below.

Figure 7.6.1 Relationship between the ART score and the ad being found deceptive



Note: 70% is the highest possible proportion of "yes" responses because 30% were "don't know" responses.

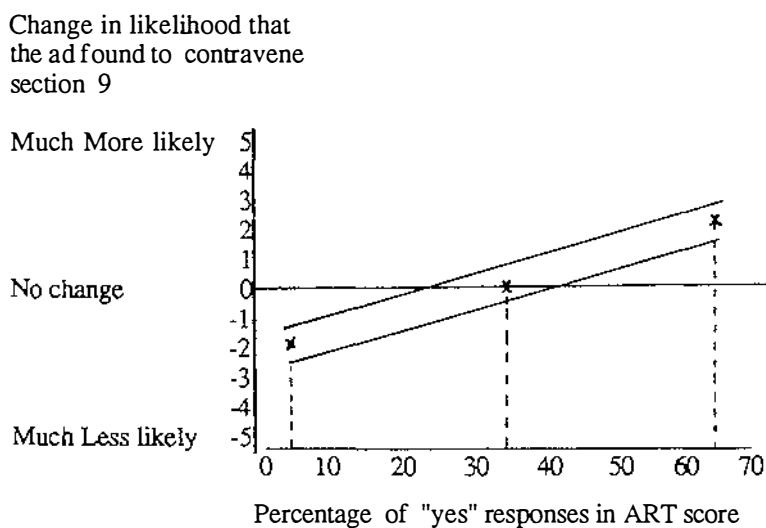
The figure shows the 95% percent confidence interval for the mean prediction where one of three values of ART scores is introduced at the trial. On the assumption that the relationship is linear, the straight lines joining the top and bottom of these intervals show the range within

which it can be concluded with 95% confidence that the true mean falls for each value of the ART score.

Where evidence of the low ART score was introduced, the mean prediction of the plaintiff's chances of success at trial would be expected to be within the range of $25\% \pm 4\%$. Where evidence of a high ART score was introduced, the mean prediction would be expected to be within the range of $61\% \pm 5\%$. Thus, the difference in the mean estimates of the plaintiff's chances of success between a low and a high ART score was about 36%.

In an attempt to eliminate the influence of variations between lawyers, the relationship was estimated based only on the predictions in the last three cases. In these cases, each lawyer offered two predictions: one before and one after the ART score was provided. The relationship between the change in these two predictions and the ART score is shown in Figure 7.6.2.

Figure 7.6.2 Change in prediction due to value of the ART score



Note: 70% is the highest possible proportion of "yes" responses because 30% were "don't know" responses.

Across the three cases, evidence of a low ART score reduced the mean estimate of the plaintiff's chances of success by 17%. Evidence of a high ART score increased the mean estimate by 16%. Thus, the change in the mean prediction of the plaintiff's chances of success between

evidence of a low ART score and evidence of a high ART score amounts to about 33%.

7.7 Changes to audience reaction tests

In addition to predicting the outcome of the nine cases, survey respondents were asked whether a number of minor changes to the format of the audience reactions tests would affect the weight given to the evidence by the court. They were also asked which of four groups would be the best group to sample for audience reaction tests.

Figures 7.7.1, 7.7.2 and 7.7.3 show respondents' opinions about the effect that three minor changes to audience reaction tests would have on the weight accorded to the tests by the court.

Figure 7.7.1 Effect of doubling the sample size

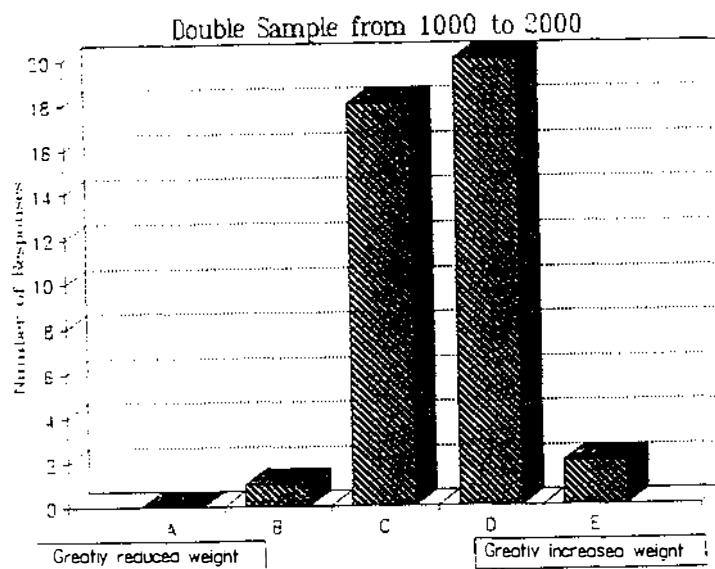


Figure 7.7.2 Effect of showing the ad twice

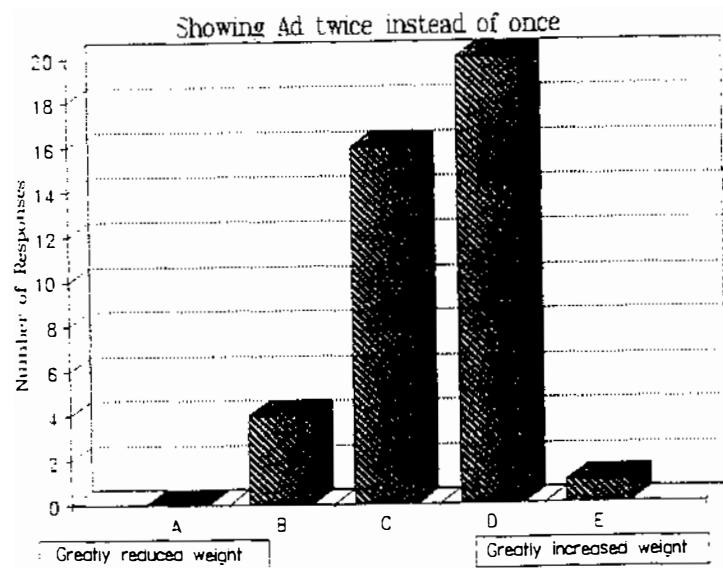
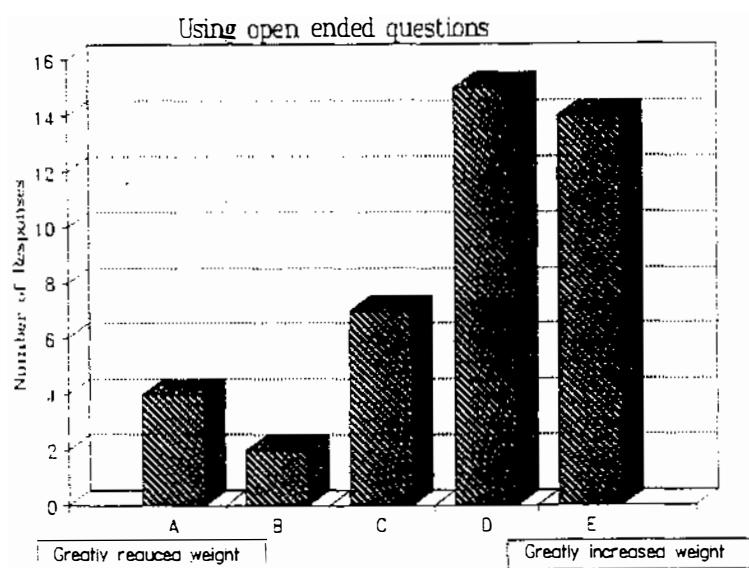


Figure 7.7.3 Effect of using open-ended questions

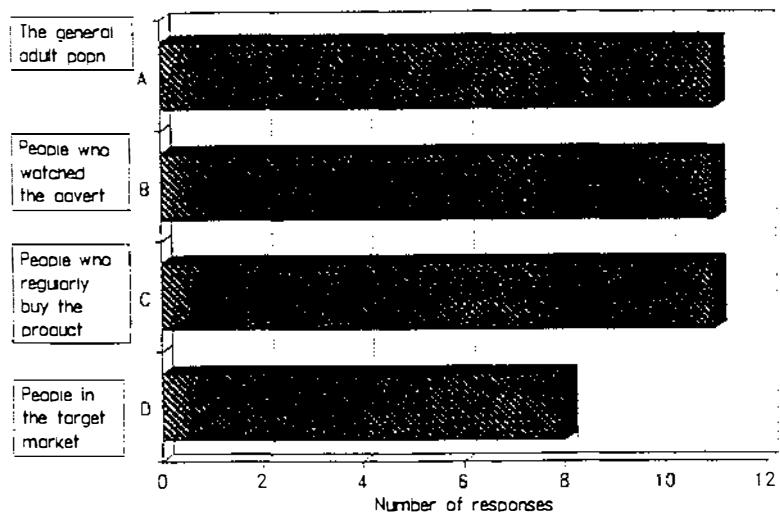


Respondents were also asked from which of four possible groups should subjects for audience reaction tests be selected, in order to provide the most probative evidence. These four groups were defined as follows:

- (i) The general adult population
- (ii) The people who watched the programme(s) in which the advertisement was shown
- (iii) The people who regularly buy products of the type advertised
- (iv) The people who fall within the "target market" as defined by the advertiser

Figure 7.7.4 shows the number of respondents who selected each group.

Figure 7.7.4 The best group to sample



7.8 Summary

This chapter reported on the results of the survey of expert lawyers undertaken to address the final objective of the thesis.

It was found that, using a combination of reminder faxes and phone calls, the survey was able to obtain responses from more than 90% of the sample.

Experts' predictions about nine hypothetical court cases, each involving the allegation that a television advertisement conveys an implied false claim, were described. A number of potentially confounding influences on these predictions were investigated and found to have no statistically significant effect. The only factors that did have a statistically significant influence on the predictions were the identity of the case and value of the ART score. The largest single influence on the predictions was found to be the value of the ART score.

The relationship between the value of the ART score and the chances of the advertisements being found deceptive was described.

Finally, respondents' opinions about the effect of three minor changes to the format of audience reaction tests and four ways of selecting the sample were reported.

In the final chapter, the implications of these results are discussed, as are the conclusions arrived at in addressing the first two objectives.

CHAPTER EIGHT

DISCUSSION AND CONCLUSIONS

8.1 Introduction

In chapter one, the broad aim of this thesis was stated to be to assess the weight that would be placed on consumer research evidence in deceptive advertising litigation under section 9 of the Fair Trading Act. This aim was restated in terms of three specific objectives:

- 1 To identify the class of litigation in which the court would give the most weight to consumer research evidence.
- 2 To describe the type of evidence that would be given the most weight in such litigation.
- 3 To estimate the weight that would be given to this type of evidence in this class of litigation.

This final chapter discusses the extent to which each of these objectives has been met. It then briefly considers some implications of this research. Finally, it provides a concise summary of the thesis.

8.2 The class of deceptive advertising litigation

The conclusion reached, in relation to the first objective, was that evidence of empirical studies would be given the greatest weight in litigation which has the following three features:

- (i) The litigation concerns a television commercial.
- (ii) A permanent injunction is the only remedy sought.
- (iii) The sole factual issue before the court is whether the advertisement conveys an implied claim.

This section examines the validity of this conclusion.

Litigation concerning television commercials was identified based on Preston's analysis of FTC decisions.¹ Preston pointed out that most FTC decisions in which consumer research evidence has been introduced have concerned television commercials. His explanation for this fact was as follows:

While nothing in the record discusses that point, an easy explanation is that television must produce most of the types of conveyed messages that require extrinsic evidence. Explicit meanings and obvious implied meanings require little or no such evidence, while non-obvious implied meanings, which do, seem to occur far more often in television than in print or radio advertisements.²

The conclusion that empirical studies would be given more weight in cases concerning television advertisements than in other litigation could be tested in future research.

Applications for permanent injunctions were identified because of the simplicity of the issues that arise in such cases. It could be argued that greater weight would be placed on empirical studies in applications for interim injunctions.

The standard approach in such applications is for the court to consider whether there is a "serious question to be tried" and whether the "balance of convenience" favours the granting of an interim injunction. Because the "balance of convenience" usually favours the granting of temporary relief,³ the critical issue becomes whether there is "a serious case to be tried" as to whether the commercial contravenes section 9. In deciding this issue, the trial judge is, in effect, estimating the

¹ Preston I.L. (1987) Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, Columbia Business Law Review (1987) pp 633-694

² Ibid at p 654.

³ This conclusion assumes the application is brought by a rival trader, seeking both a permanent injunction and damages at the final hearing, as is often the case.

likelihood that another High Court judge would find the advertisement to convey the alleged claim.⁴

The task given to survey respondents in this research was similar to that performed by judges in interim injunction proceedings. In such proceedings, only a superficial examination of the evidence is attempted. Thus the predictions obtained by the survey may provide a better indication of the effect of consumer research evidence in interim, than in permanent injunction proceedings.

Criminal prosecutions were excluded from consideration for two reasons. First, no prosecution can be brought for contravention of section 9. Second, the standard of proof required in criminal proceedings is "proof beyond reasonable doubt". This standard means that prosecutions are unlikely to be brought except where the alleged misrepresentation is explicitly stated in the advertisement or is an obvious implication therefrom.⁵

Civil actions seeking either damages or corrective advertising orders were discussed only briefly.⁶ In such cases, the issue of whether a claim is "material", in the sense that it influences purchasing behaviour, assumes major importance. No attempt was made to assess the extent to which consumer research evidence might be found probative in relation to this issue. Future research might address this question.

The final feature of the litigation identified, was that the alleged misrepresentation was implied rather than expressly stated in the commercial. The implied claims tested in the survey were specially selected to be "borderline" cases. It could be argued that any

⁴ It is unusual for the interim and final hearing to be before the same judge. However this happened in the *Big Mac* case, discussed in section 4.4 of chapter four.

⁵ In most of the criminal proceeding brought under sections 10 to 13 of the Act, the advertiser has pleaded guilty to the charge, and merely contested the penalty that should be imposed. See the cases discussed in Dean M. R., *The Fair Trading Act 1986: An exocet missile?*, Proceedings of the Fourth Commonwealth Law Conference, Auckland, New Zealand, 1990.

⁶ See section 2.2 in chapter two.

conclusions drawn about the weight given to consumer research evidence, should be expressly limited to such cases. Two points can be made in response to this argument. First, the types of cases that are litigated tend to be borderline cases. Other cases are usually settled prior to the hearing, unless issues other than the implied claims conveyed by the advertisement are in dispute. Second, a reasonable range of claims was included in the survey.⁷ It included several of the types of claim discussed in the literature including, both verbal and pictorial claims,⁸ implied superiority claims,⁹ incomplete comparative claims,¹⁰ and inconspicuously qualified claims.¹¹

Thus, the class of litigation defined in answer to the first objective is broad enough to be of practical significance. Whether it is the class in which consumer research evidence would be given the greatest weight has not been empirically demonstrated. However, analysis of the legal decisions in New Zealand, Australia and the United States provides some support for this conclusion.

8.3 The type of consumer research evidence

The second objective was to describe the type of empirical study that would be given the most weight in the class of litigation defined in the first objective. The answer arrived at was audience reaction tests which use artificial viewing conditions and ask subjects to respond in writing shortly after the commercials are shown. This conclusion relied heavily on Preston's analysis of FTC and Lanham Act cases.

The survey only assessed the weight that would be given to one version of audience reaction test. Respondents' generally supported the conclusion that alterations in the population sampled,¹² the size of the

⁷ See Appendix F for a description of the claims alleged to be conveyed in each case.

⁸ See section 3.2.4 in chapter three

⁹ See section 3.3.2 in chapter three

¹⁰ See section 3.3.1 in chapter three

¹¹ See section 3.3.1 in chapter three

¹² See Figure 7.7.4 in the previous chapter.

sample,¹³ and the number of exposures to the advertisement,¹⁴ would produce little change in the probative value of the evidence. Based on Preston's analysis, it was concluded that responses to forced-choice questions would be given greater weight than those to open-ended questions. This conclusion was not supported by expert lawyers. One third of respondents thought that using open-ended questions would greatly increase the weight given to the evidence.¹⁵ However, their views may just demonstrate an ignorance of the United States legal decisions and a poor understanding of the problems associated with open-ended questions. Future research could address this issue.

The conclusion that audience reaction tests would provide the most probative evidence, is confined to cases where the main issue in dispute is whether the advertisement conveys an implied claim. Other types of studies might be given more weight where different issues arise at the trial. Studies measuring subjects' belief in a claim might be more probative where the advertiser argues that the claim amounts to puffery. Similarly, where damages or corrective advertising orders are sought, purchase intention studies might be appropriate. Future research could address these issues.

8.4 The weight of the evidence

The conclusion arrived at in response to the third objective is that the version of audience reaction test described in the survey would provide highly probative evidence of whether an advertisement conveys an implied claim. This conclusion is based on the finding that expert lawyers' predictions of the outcome of nine hypothetical cases were significantly affected by the results of such tests. Predictions of the plaintiff's chances of success changed by an average of about 35% in response to evidence of ART scores.

This finding can be challenged on a number of grounds. First, it could be argued that evidence presented was too unrealistic, given the way in

¹³ See Figure 7.7.1 in the previous chapter.

¹⁴ See Figure 7.7.2 in the previous chapter.

¹⁵ See Figure 7.7.3 in the previous chapter.

which the cases were selected. If the "don't know" responses are excluded from the analysis, a low ART score represented the situation where only 7% of the audience thought that the claim was conveyed. A high ART score represented the situation where 93% of the audience thought the claim was conveyed. The cases were selected on the basis that the alleged claims were neither "obvious" nor extremely "remote" inferences from the advertisement. Thus, only the medium ART score represented a realistic test of the evidence.

Extreme values were used in order to estimate the extent to which judges would forego their own interpretation of the advertisement in favour of conflicting evidence. Where ART scores correspond to the judge's own perception of the advertisement, the question of the probative value of the evidence does not arise. The survey aimed to estimate the extent to which this form of evidence had the power to change a judge's mind about the meaning of the advertisement.

The second ground on which the finding might be challenged is that the survey ignored the impact that cross examination of the evidence might have. In general, evidence may be attacked as being either irrelevant or unreliable.¹⁶ At least in the class of litigation identified, the relevance of the evidence would be difficult to dispute. Furthermore, many of the grounds on which survey evidence has been found to be unreliable in previous cases would not apply to audience reaction tests. In particular, the absence of interviewers removes many of the reasons judges have appeared to distrust survey evidence in Australia and New Zealand.¹⁷ A basis on which the reliability of audience reaction tests might be successfully attacked in court, is that the results are sensitive to changes in the wording of the forced-choice questions. As noted in chapter four, both the FTC and judges in Lanham Act cases have been

¹⁶ See the cases discussed in chapter four.

¹⁷ The entire testing procedure could be made transparent to the judge by producing a video tape of the process. A video would show the range of people present and the attentiveness of subjects to the test process. Video recordings of face to face interviews were offered as evidence in the *Big Mac* case. See section 4.4 in chapter four.

sympathetic to this form of criticism. Research is required to determine the validity of this criticism.

8.5 Implications of research findings

One implication of this research is that it demonstrates an empirical method of testing hypotheses about the "best test that an ad is deceptive". The literature reveals an unresolved debate about which of many different tests is best. Plausible arguments have been advanced in support of each test. Preston (1983)¹⁸ has pointed out, that the significant question is whether a test is superior in determining if an advertisement breaches the legal rules prohibiting deceptive advertising. On this view, the best test is the one that would be given the most weight in legal proceedings. The methods outlined in this research provide a practical method of advancing research on this issue.

Another implication of this research is that empirical techniques can be used to predict the outcome of court cases. Such techniques provide a useful addition to those traditionally adopted by legal researchers. The traditional method of predicting the outcome of a case is to undertake a content analysis of judges' comments in previous analogous cases. Where no previous cases have been litigated in a jurisdiction, legal researchers examine cases in other jurisdictions, as was done in this thesis. Survey research methods deserve more attention by legal researchers.

The research reported here appears to be the first in which survey methods have been used to assess the probative value of a piece of evidence. It might be argued that such methods are only applicable for evaluating a very narrow class evidence. This class is one where the reliability of the evidence does not depend to any great extent on the credibility of the witness. However, the use of a video questionnaire enables virtually any evidence to be evaluated, since a video tape can

¹⁸ Preston I.L.(1983) Research on Deceptive advertising: A commentary, in Harris R. J. (ed) Information Processing Research in Advertising, Lawrence Erbaum, New Jersey (1983) pp 289-305.

show both the witness's appearance and demeanour as well as conveying the voice inflections used when testifying.

8.6 Summary

The Fair Trading Act 1986 removed many of the obstacles that had previously restricted the use of legal action to prevent the broadcast of deceptive television advertisements. Under the Act, to obtain an injunction against further broadcast of a TV commercial, it is necessary to show merely that the advertisement is misleading. Moreover, a rival trader can usually obtain an interim injunction on the basis that the commercial *might* be misleading.

The main objective of this research was to determine the weight that would be given to consumer research evidence in determining whether an advertisement is misleading.

A class of case was defined in which the main factual issue before the Court is whether a television advertisement conveys an implied claim. Following Preston (1987),¹⁹ it was concluded that empirical studies using artificial viewing conditions and forced-choice questions would provide the most probative type of evidence in this class of case.

An empirical method was developed to estimate the weight that would be given to such studies. It was found that the results of such studies significantly influenced expert lawyers' predictions of the outcome of litigation. On this basis, it was concluded that the court is likely to give substantial weight to the evidence.

Some implications of this finding were discussed and a number of directions for future research were identified.

19 Ibid at p 296.

LIST OF APPENDICES

- Appendix A Covering Letter (reduced)
- Appendix B Questionnaires (reduced)
- Appendix C First reminder fax (reduced)
- Appendix D Second reminder fax (reduced)
- Appendix E Respondents' experience in Fair Trading Act litigation
- Appendix F Description and results of each case.
- Appendix G ANOVA tables

Appendix A

Covering Letter (reduced)



Facsimile (063) 505-608

12 September 1990

Palmerston North
New Zealand
Telephone (063) 69-099

FACULTY OF
BUSINESS STUDIES

DEPARTMENT OF
MARKETING

Dear

Unless I am mistaken, you are one of the relatively few people who have acquired some experience in litigation involving the Fair Trading Act 1986.

It is for this reason that I seek your assistance. I am undertaking a study which examines the value of market surveys as evidence in litigation under the Fair Trading Act.

The position in the United States is that survey evidence has become virtually mandatory in some "Fair Trading" cases.¹ It appears that this position could soon be reached here.

You will no doubt be aware that survey evidence recently played a major part in the Trustbank litigation in New Zealand.² Even more recently, in the Arnotts decision in Australia, survey evidence has been introduced in connection with Part IV of the Trade Practices Act 1974.³

¹ McNeilab v American Home Products, 501 F. Supp. 517 at 525 (SDNY 1980); for a recent analysis of the US position see Preston I. L., False or Deceptive Advertising under the Lanham Act: Analysis of Factual Findings and Types of Evidence, Trademark Reporter (July-August 89)

² Trustbank Auckland Limited v ASB Bank Limited, (1989) 2 NZBLC 103,558 , where the results of two surveys commissioned specifically for the purposes of litigation were introduced in an (unsuccessful) attempt to show that the use of the words " Hit Account " by Trustbank was not misleading or deceptive as a matter of fact. For a previous attempt to use a survey commissioned for purposes unconnected with the litigation, see Pitstop Exhausts Ltd v Alan Jones Pit Stop [1988] 2 NZBLC 102. Both these cases involved applications for interim injunctions.

³ Trade Practices Commission v Arnotts Limited & Ors (1989) ATPR ¶ 40-979 where survey evidence was relied on to support an argument that there existed no separate market for biscuits in Australia.

These developments have been welcomed by the leading commentators on both sides of the Tasman:

"This writer hopes that in the not too distant future surveys specifically commissioned for particular cases may also be admissible subject to demonstration of criteria such as those canvassed by Barker J. in *Auckland Regional Airport*. There appears to be no doubt that in due course this position will be reached if for no other reason than that the results obtained from alternative methods of gathering evidence in areas properly subject to survey are so much less reliable than the evidence obtained by such properly conducted surveys."⁴

"In general therefore, such [survey] evidence will be more representative, more objective and hence more trustworthy and reliable [than that traditionally employed]."⁵

The present study is part of a wider research project that addresses the following issues:

- (i) In what types of Fair Trading case should one consider commissioning a survey?
- (ii) What type of survey should be commissioned?
- (iii) How much weight is the Court likely to give to the survey evidence?
- (iv) What would the survey have to show in order for it to assist one's case?

The current phase of the project examines the likely impact of survey evidence in cases where a television advertisement is alleged to contravene section 9 of the Fair Trading Act 1986.

⁴ Warren Pengilley, Survey Evidence in Trade Practice Cases, 5 AMLB 1 at page 3.

⁵ James A Farmer Q.C., The Use of Survey Evidence in Trade Practice Cases, Australian Trade Practices Reporter, ¶ 15-005 at ¶ 15-015.

The assistance I seek is for you to agree to watch the enclosed video and to complete the attached three page questionnaire. The total time involved is 37 minutes.

The video contains nine precisely defined scenarios each involving the allegation that a television advertisement contravenes section 9 of the Fair Trading Act. You are invited to evaluate the evidence offered by the Managing Director of an Advertising Research firm. His evidence concerns the results of surveys he has conducted specifically for the purposes of litigation.

In order to be in a position to evaluate this evidence, you will need to have some knowledge of the Fair Trading Act and some experience in litigation. If I have made a mistake, and you do not fall into both of these categories, please do not complete the questionnaire. Simply return the complete package in the box provided.

If you do have the appropriate experience, and can spare 37 minutes to participate in the study, could you please do so as soon as possible. I am undertaking to provide a summary of results to all participants within four weeks of their response. Any delay on your part will render the results incomplete.

I assume that you will have no difficulty in gaining access to a video recorder, either at home or at work. Ideally, the video recorder would be equipped with a remote control. Should your participation require that you have to hire a video recorder for an evening, I would be happy to pay the costs of your so doing.

If you have any queries about the study or the wider research project, please do not hesitate to contact me. I may be reached by telephone 24 hours a day, 7 days a week, at one of the following numbers:

Work: (063) 69-099 extn 8093 (Massey University)
Home: (063) 78-762

Yours sincerely,

Robert Langton B.A.(Hons), LL.B., M.B.A.
Lecturer in Marketing.

Appendix B**Questionnaires (reduced)**

Tape 1 Pink

Tape 2 Blue

Tape 3 Green

Survey Evidence

and the

Fair Trading Act

Project Supervisors :

Dr Tony Lewis Associate Professor of Marketing

Mr Lindsay Trotman Senior Lecturer in Business Law

Researcher :

Mr Robert Langton Lecturer in Marketing

GUIDELINES FOR PARTICIPANTS

If at all possible, could you arrange to avoid interruptions for the 37 minutes required to watch the video. Your undivided attention is vital to the success of the study.

Before playing the video, you will need to have a pen ready and this questionnaire. It will also help if you have a remote control with a PAUSE/STILL button on it. This will enable you to stop the tape while you write down your answer.

Guidance on how to proceed next is provided at the beginning of the video.

RESPONSE SHEET

Certain, practically certain	(99 in 100)	10
Almost sure	(9 in 10)	9
Very probable	(8 in 10)	8
Probable	(7 in 10)	7
Good possibility	(6 in 10)	6
Fairly good possibility	(5 in 10)	5
Fair possibility	(4 in 10)	4
Some possibility	(3 in 10)	3
Slight possibility	(2 in 10)	2
Very slight possibility	(1 in 10)	1
No chance, almost no chance	(1 in 100)	0

Practice Question

	0 White Magic	0	1	2	3	4	5	6	7	8	9	10	
1	British Airways	0	1	2	3	4	5	6	7	8	9	10	
2	Simpson	0	1	2	3	4	5	6	7	8	9	10	
3	Honda	0	1	2	3	4	5	6	7	8	9	10	
4	Reach	0	1	2	3	4	5	6	7	8	9	10	
5	Mitsubishi	0	1	2	3	4	5	6	7	8	9	10	
6	Pine'o Cleen	0	1	2	3	4	5	6	7	8	9	10	
7	Panadol	Scenario A	0	1	2	3	4	5	6	7	8	9	10
		Scenario B	0	1	2	3	4	5	6	7	8	9	10
8	Palmolive	Scenario A	0	1	2	3	4	5	6	7	8	9	10
		Scenario B	0	1	2	3	4	5	6	7	8	9	10
9	Toyota	Scenario A	0	1	2	3	4	5	6	7	8	9	10
		Scenario B	0	1	2	3	4	5	6	7	8	9	10

For each of the following questions, please tick one box only.

10 Listed below are a number of modifications that could be made to the format of Audience Reaction Tests. Please indicate how you think each of these changes would affect the weight placed on the test results by the Court.

(i) Increasing the number of subjects from 1000 to 2000.

Greatly reduced weight [] [] [] [] Greatly increased weight

(ii) Showing subjects each advertisement twice instead of once.

Greatly reduced weight [] [] [] [] Greatly increased weight

(iii) Asking open-ended questions such as "What do you think the advertisement is claiming?" instead of forced-choice (yes/no) questions such as those in the video.

Greatly reduced weight [] [] [] [] Greatly increased weight

11 Subjects for Audience Reaction Tests could be selected according to a number of different criteria. From which of the following groups should subjects be randomly selected in order for the evidence to be given the greatest weight by the Court?

(Please tick one box only)

[] the general adult population

[] the people who watched the programme(s) in which the advertisement was shown?

[] the people who regularly buy products of the type advertised?

[] the people who fall within the "target market" as defined by the advertiser.

12 Please indicate the extent of your experience in the field of commercial litigation.

- less than 3 years
- between 3 and 10 years
- more than 10 years.

13 Please indicate the number of disputes in which your professional opinion has been sought on the application of **Section 9** of the Fair Trading Act 1986.

- less than 5 disputes
- between 5 and 20 disputes
- more than 20 disputes

14 In how many of these disputes were Statements of Claim filed ?

- less than 5 disputes
- between 5 and 10 disputes
- more than 10 disputes

Thank you again for your contribution to this project. You will receive a summary of the results within four weeks of returning the package.

Please note that the assumptions listed in connection with each advertisement in the video were purely hypothetical and were not based on fact. All the allegations, admissions and the results of the audience reaction tests were invented for the purposes of this study.

Please ensure that both the video and the questionnaire are included in the self-addressed, reply-paid box and that this box is securely fastened with the adhesive tape supplied.

If you hired a video player in order to watch the video, please include your name and the costs incurred.

Name: _____ Cost of Hire _____

Survey Evidence

and the

Fair Trading Act

Project Supervisors :

Dr Tony Lewis Associate Professor of Marketing

Mr Lindsay Trotman Senior Lecturer in Business Law

Researcher :

Mr Robert Langton Lecturer in Marketing

GUIDELINES FOR PARTICIPANTS

If at all possible, could you arrange to avoid interruptions for the 37 minutes required to watch the video. Your undivided attention is vital to the success of the study.

Before playing the video, you will need to have a pen ready and this questionnaire. It will also help if you have a remote control with a PAUSE/STILL button on it. This will enable you to stop the tape while you write down your answer.

Guidance on how to proceed next is provided at the beginning of the video.

RESPONSE SHEET

Certain, practically certain	(99 in 100)	10
Almost sure	(9 in 10)	9
Very probable	(8 in 10)	8
Probable	(7 in 10)	7
Good possibility	(6 in 10)	6
Fairly good possibility	(5 in 10)	5
Fair possibility	(4 in 10)	4
Some possibility	(3 in 10)	3
Slight possibility	(2 in 10)	2
Very slight possibility	(1 in 10)	1
No chance, almost no chance	(1 in 100)	0

Practice Question

0 White Magic	0	1	2	3	4	5	6	7	8	9	10
1 British Airways	0	1	2	3	4	5	6	7	8	9	10
2 Mitsubishi	0	1	2	3	4	5	6	7	8	9	10
3 Pine 'o Cleen	0	1	2	3	4	5	6	7	8	9	10
4 Reach	0	1	2	3	4	5	6	7	8	9	10
5 Simpson	0	1	2	3	4	5	6	7	8	9	10
6 Honda	0	1	2	3	4	5	6	7	8	9	10
7 Palmolive Scenario A	0	1	2	3	4	5	6	7	8	9	10
Scenario B	0	1	2	3	4	5	6	7	8	9	10
8 Toyota Scenario A	0	1	2	3	4	5	6	7	8	9	10
Scenario B	0	1	2	3	4	5	6	7	8	9	10
9 Panadol Scenario A	0	1	2	3	4	5	6	7	8	9	10
Scenario B	0	1	2	3	4	5	6	7	8	9	10

For each of the following questions, please tick one box only.

10 Listed below are a number of modifications that could be made to the format of Audience Reaction Tests. Please indicate how you think each of these changes would affect the weight placed on the test results by the Court.

(i) Increasing the number of subjects from 1000 to 2000.

Greatly reduced weight [] [] [] [] Greatly increased weight

(ii) Showing subjects each advertisement twice instead of once.

Greatly reduced weight [] [] [] [] Greatly increased weight

(iii) Asking open-ended questions such as "What do you think the advertisement is claiming?" instead of forced-choice (yes/no) questions such as those in the video.

Greatly reduced weight [] [] [] [] Greatly increased weight

11 Subjects for Audience Reaction Tests could be selected according to a number of different criteria. From which of the following groups should subjects be randomly selected in order for the evidence to be given the greatest weight by the Court?

(Please tick one box only)

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[] the people who watched the programme(s) in which the advertisement was shown?

[] the people who regularly buy products of the type advertised?

[] the people who fall within the "target market" as defined by the advertiser.

12 Please indicate the extent of your experience in the field of commercial litigation.

- less than 3 years
- between 3 and 10 years
- more than 10 years.

13 Please indicate the number of disputes in which your professional opinion has been sought on the application of **Section 9** of the Fair Trading Act 1986.

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- more than 20 disputes

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Survey Evidence

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Some possibility	(3 in 10)	3
Slight possibility	(2 in 10)	2
Very slight possibility	(1 in 10)	1
No chance, almost no chance	(1 in 100)	0

Practice Question

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1 British Airways	0	1	2	3	4	5	6	7	8	9	10	
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3 Honda	0	1	2	3	4	5	6	7	8	9	10	
4 Reach	0	1	2	3	4	5	6	7	8	9	10	
5 Pine'o Cleen	0	1	2	3	4	5	6	7	8	9	10	
6 Mitsubishi	0	1	2	3	4	5	6	7	8	9	10	
7 Toyota	Scenario A	0	1	2	3	4	5	6	7	8	9	10
	Scenario B	0	1	2	3	4	5	6	7	8	9	10
8 Panadol	Scenario A	0	1	2	3	4	5	6	7	8	9	10
	Scenario B	0	1	2	3	4	5	6	7	8	9	10
9 Palmolive	Scenario A	0	1	2	3	4	5	6	7	8	9	10
	Scenario B	0	1	2	3	4	5	6	7	8	9	10

For each of the following questions, please tick one box only.

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(ii) Showing subjects each advertisement twice instead of once.

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(iii) Asking open-ended questions such as "What do you think the advertisement is claiming?" instead of forced-choice (yes/no) questions such as those in the video.

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[] the people who watched the programme(s) in which the advertisement was shown?

[] the people who regularly buy products of the type advertised?

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- less than 3 years
- between 3 and 10 years
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- between 5 and 20 disputes
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Please ensure that both the video and the questionnaire are included in the self-addressed, reply-paid box and that this box is securely fastened with the adhesive tape supplied.

If you hired a video player in order to watch the video, please include your name and the costs incurred.

Name: _____ Cost of Hire _____

Appendix C

First reminder fax (reduced)

FACSIMILE MESSAGE



To

From Robert Langton

At

At Massey University

MASSEY
UNIVERSITY

Palmerston North
New Zealand
Telephone (063) 69-
Marketing De

Fax No. (063) 505-608

Fax No.

No. of Pages one
including this page

Date 27 September 1990



Dear

RE SURVEY EVIDENCE AND THE FAIR TRADING ACT

I refer to my letter of 12 September which included a video tape and short questionnaire.

- 1 If you failed to receive this package, could you please ask your secretary to phone or fax me today. I will arrange for a replacement package to be delivered within 48 hours.
- 2 If you received the package and have already responded, please accept my thanks and ignore this fax. You will receive a summary of the results within three weeks.
- 3 If you have managed to find time to watch the video but have some doubts about participating in the study, please telephone or fax me today.
- 4 If you have not yet been able to find the 37 minutes required to participate in the study, may I implore you to try to do so this weekend. I need to receive your response next week in order to be able to provide all participants with a summary of the results within the time promised.

I may be contacted by telephone 24 hours a day, 7 days a week, either at home [(063) 78-762] or at the number listed above.

Yours sincerely,

RL Langton

Robert Langton

Appendix D

Second reminder fax (reduced)



MASSEY
UNIVERSITY

Palmerston North
New Zealand
Telephone (063) 69-099

FACULTY OF
BUSINESS STUDIES

DEPARTMENT OF
MARKETING

FACSIMILE MESSAGE

To

From Robert Langton

At

At Massey University

Fax No.

Fax No. (063) 505-608

No of pages One
including this page

Date 31 October 1990

RE: STUDY OF SURVEY EVIDENCE AND THE FAIR TRADING ACT

I refer to my letter of 12 September which included a video tape and short questionnaire and to my fax of 27 September.

More than three quarters of participants have already responded to the survey. However, this does not mean that your participation is no longer essential. Because of the scarcity of people who have experience in Fair Trading litigation, it is vital that all participants' views are included. Otherwise, any conclusions drawn from the study will be severely undermined by the possibility of a non-response bias.

I realize, of course, that there are many unpredictable and urgent demands on your time and that my initial request for 37 minutes had a relatively low priority. However the validity of the study now lies largely in your hands.

Could you please make a special effort to set aside half an hour in front of a video player over the coming weekend. If the video tape or questionnaire has been lost or damaged, please ask your secretary to contact me and I will have a replacement delivered to you within 24 hours.

I will phone you next week to see if you have been able to watch the tape.

Yours sincerely

A handwritten signature in black ink that appears to read "Robert Langton".

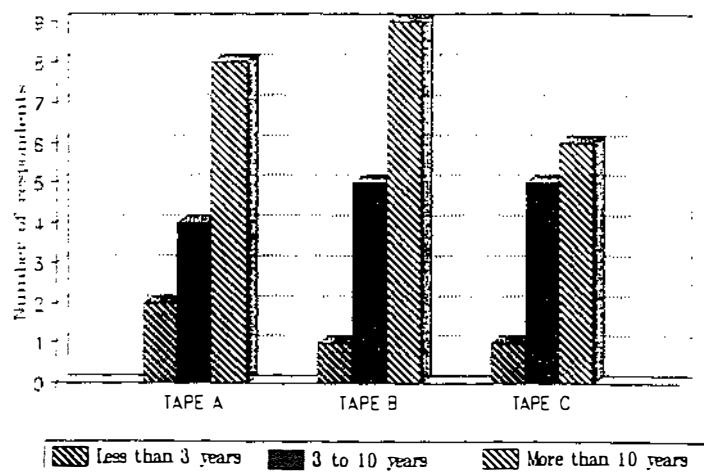
Robert Langton

If you do not receive all pages of this fax, or if it is unclear, please contact us at the above phone number

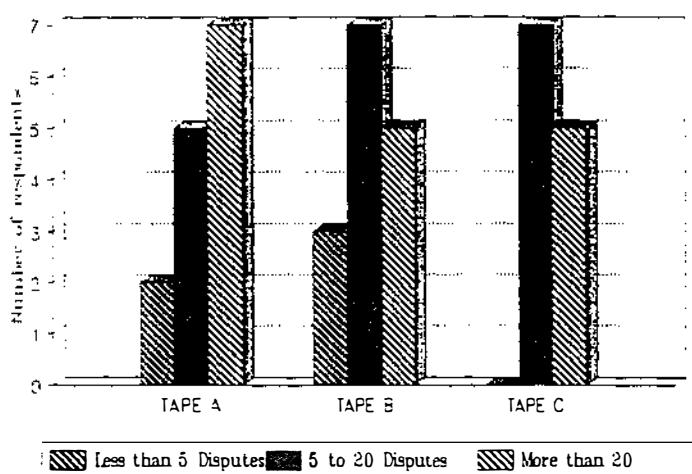
Appendix E

Respondents' experience in Fair Trading Act litigation

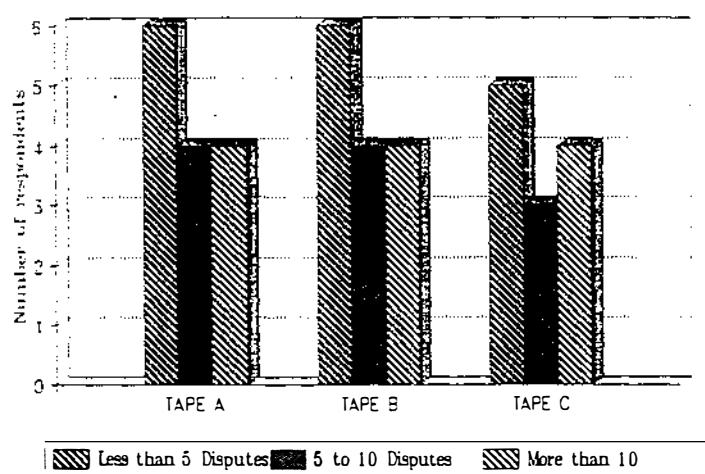
Experience in Commercial Litigation



Advice sought on Section 9



Section 9 Statements of Claim Filed



Appendix F

Description and results of each case

This appendix briefly describes each of the nine advertisements tested, and the assumptions that were included on each of the three video tapes. The three video tapes were identical except for the order in which the advertisements were presented. The order is shown in Figure 6.9 which is reproduced below.

Figure 6.9 Order of presentation of advertisements

	Tape A	Tape B	Tape C
(Practice question)	White Magic	White Magic	White Magic
1 Standard	British Air	British Air	British Air
2 Standard	Simpson	Mitsubishi	Simpson
3 Standard	Honda	Pine'o Cleen	Honda
4 Medium ART	Reach	Reach	Reach
5 Low ART	Mitsubishi	Simpson	Pine 'o Cleen
6 High ART	Pine'o Cleen	Honda	Mitsubishi
7 A Standard B High ART	Panadol	Palmolive	Toyota
8 A Standard B Medium ART	Palmolive	Toyota	Panadol
9 A Standard B Low ART	Toyota	Panadol	Palmolive

BRITISH AIRWAYS CASE

The Commercial

The visual component was very elaborate. Hundreds of people dressed in red, white or blue, marched from various directions so as to come together in a large field in the shape of a face. The main theme of the commercial appeared to be simply its visual beauty and geometric appeal. The alleged misrepresentation related purely to the verbal content of the advertisement which was as follows:

Every year . . . British Airways . . . brings twenty four million people . . . together. . . . British Airways. . . The world's favourite airline.

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that British Airways carried more passengers in 1989 than any other airline.
- 2 It is admitted by the defendant that in 1989 Aeroflot Airlines carried more passengers than British Airways.

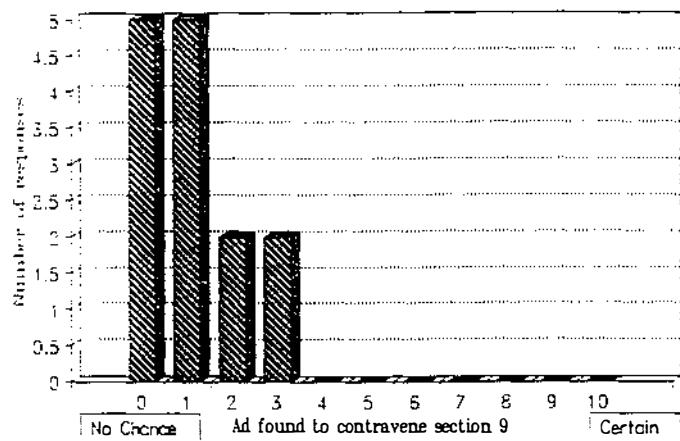
Additional assumption providing evidence of ART scores

- 3 The judge has decided to admit evidence of an audience reaction test in which one of the questions asked was:
Is the advertisement claiming that British Airways carried more passengers in 1989 than any other airline?

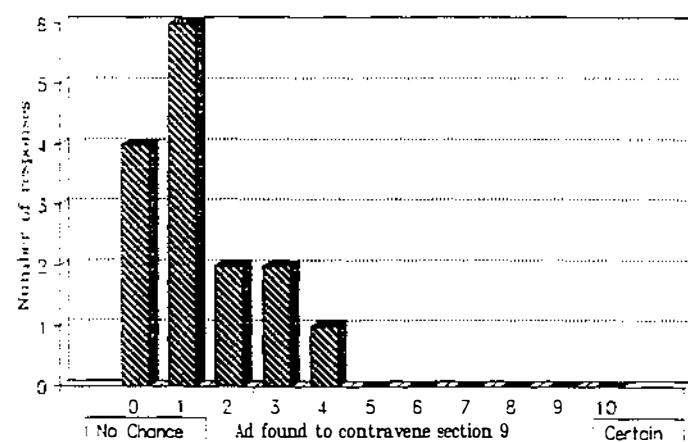
The ART scores on each tape

A	none
B	none
C	none

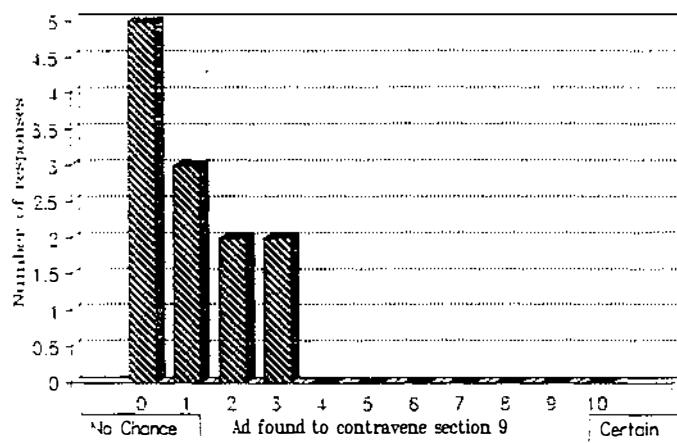
British Airways
No Art Score - Tape A



British Airways
No Art Score - Tape B



British Airways
No Art Score - Tape C



SIMPSON CASE

The Commercial

The Simpson commercial was very simple in its execution. The visual component showed a presenter standing next to a washing machine. The alleged misrepresentation related purely to the verbal content of the advertisement which was spoken by the presenter directly to the camera. The main copy points in the ad related to the large capacity of the machine which was called the Simpson Acquarius. Part of the the presenter's monologue was as follows:

... Hey . . . the bowl is top suspended too. There's no other large washing machine quite like it. . . .

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that the Simpson Acquarius is the only washing machine of its size where the bowl is top suspended.
- 2 It is admitted by the defendant that the Simpson Acquarius is not the only washing machine of its size where the bowl is top suspended.

Additional assumption providing evidence of ART scores

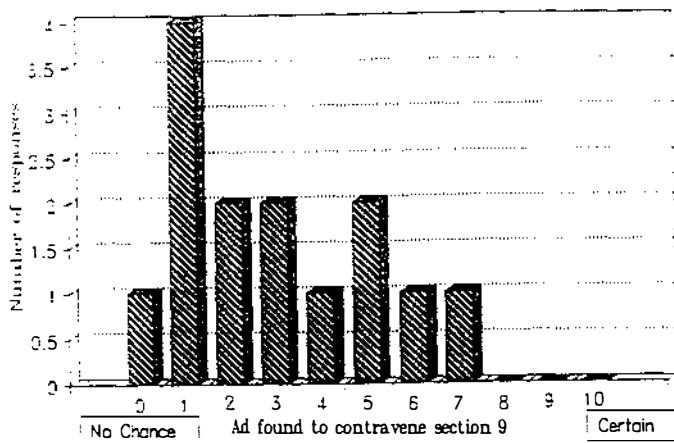
- 3 The judge has decided to admit evidence of an audience reaction test in which one of the questions asked was:

Is the advertisement claiming that the Simpson Acquarius is the only washing machine of its size where the bowl is top suspended ?

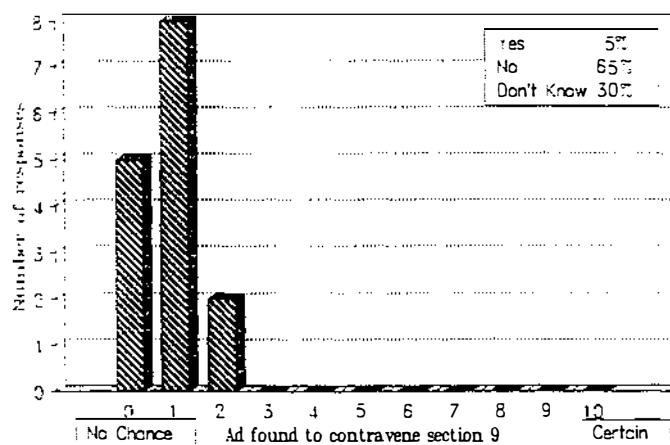
The ART scores on each tape

- | | |
|---|---------------|
| A | none |
| B | low ART score |
| C | none |

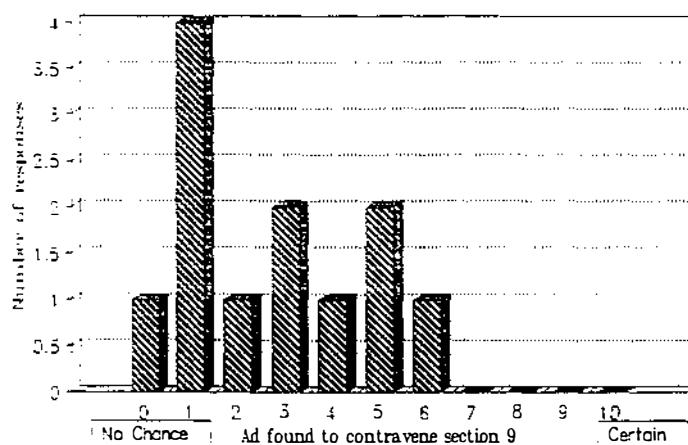
Simpson
No Art Score - Tape A



Simpson
Low Art Score - Tape B



Simpson
No Art Score - Tape C



HONDA CONCERTO CASE

The Commercial

The commercial showed a car driving around a parking building without a driver and without apparently being noticed. The alleged misrepresentation related purely to the verbal content of the advertisement which was entirely by voice over.

The beginning of the voice over was as follows:

What makes new the Honda Concerto the fear of other liftbacks? Is it because its so quiet? At 100 kms per hour, the noise level is only 65 decibels.

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that the noise level inside all liftbacks, apart from the Honda Concerto, is above 65 decibels when driven at 100 kms per hour.
- 2 It is admitted by the defendant that the noise level inside some liftbacks, apart from the Honda Concerto, is below 65 decibels when driven at 100 kms per hour.

Additional assumption providing evidence of ART scores

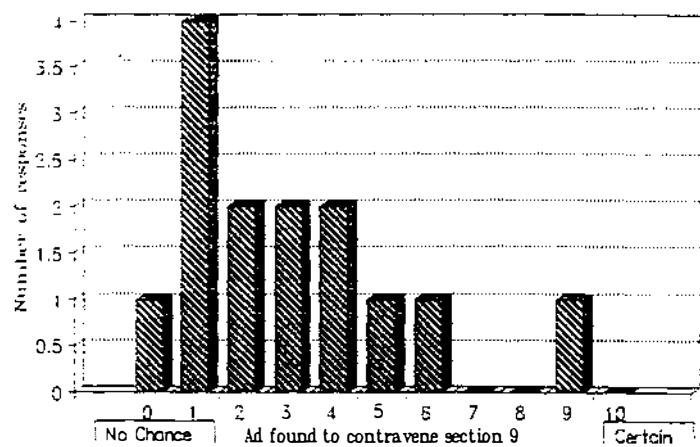
- 3 The judge has decided to admit evidence of an audience reaction test in which one of the questions asked was:

Is the advertisement claiming that the noise level inside all liftbacks, apart from the Honda Concerto, is above 65 decibels when driven at 100 kms per hour?

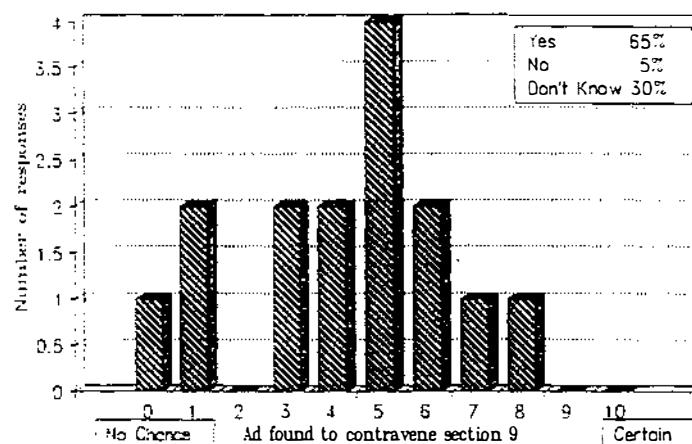
The ART scores on each tape

- | | |
|---|----------------|
| A | none |
| B | high ART score |
| C | none |

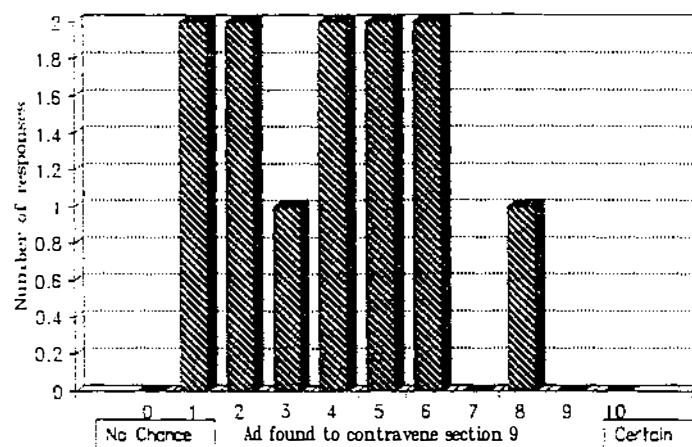
Honda Concerto
No Art Score - Tape A



Honda Concerto
High Art Score - Tape B



Honda Concerto
No Art Score - Tape C



REACH TOOTHBRUSH CASE

The Commercial

The visual component of the commercial was a cartoon. It showed a head cleaning its teeth. The alleged misrepresentation related to words scribbled on the screen "Cleans 51% better" while the voice over stated:

Reach . . . The toothbrush that cleans 51% better than the leading straight-necked brush.

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that scientifically controlled tests have been undertaken in New Zealand comparing the teeth of those who use Reach toothbrushes with the teeth of those who use the most popular, straight-necked toothbrush.
- 2 It is admitted by the defendant that no scientifically controlled tests have been undertaken in New Zealand comparing the teeth of those who use Reach toothbrushes with the teeth of those who use the most popular, straight-necked toothbrush.

Additional assumption providing evidence of ART scores

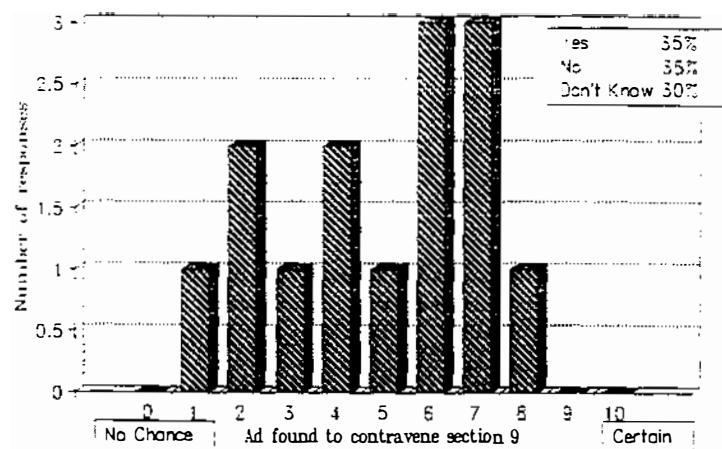
- 3 The judge has decided to admit evidence of an audience reaction test in which one of the questions asked was:

Is the advertisement claiming that scientifically controlled tests have been undertaken in New Zealand comparing the teeth of those who use Reach toothbrushes with the teeth of those who use the most popular, straight-necked toothbrush?

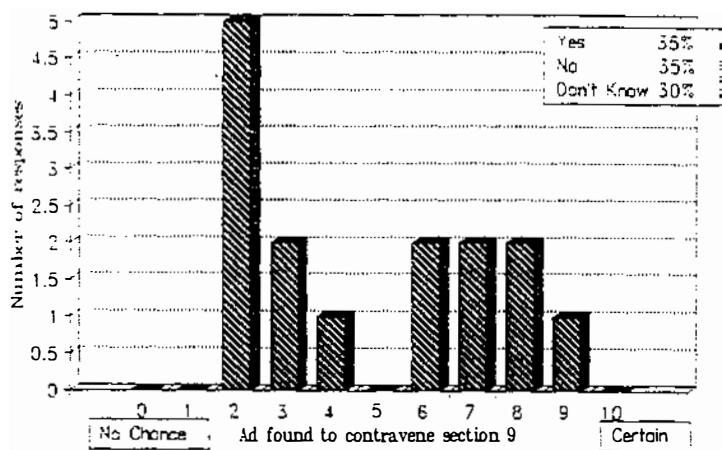
The ART scores on each tape

- A medim ART score
- B medim ART scoree
- C medim ART score

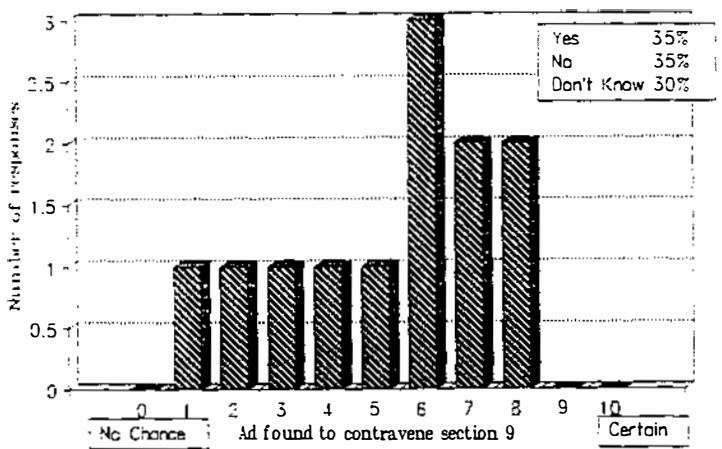
Reach Toothbrush Medium Art Score - Tape A



Reach Toothbrush Medium Art Score - Tape B



Reach Toothbrush Medium Art Score - Tape C



MITSUBISHI CASE

The Commercial

The commercial showed a vehicle driving up and down a ski road, in between shots of the New Zealand ski team skiing. The alleged misrepresentation related to the verbal content of the advertisement which was entirely by voice over. Part of the voice over was:

Mitsubishi advance technology four wheel drive has been winning against the world's best . . . with legendary off-road performance all around the world . . .

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that Mitsubishi has won some of the major international four wheel drive rallies in the last 3 years.
- 2 It is admitted by the defendant that Mitsubishi has not won any major international four wheel drive rally in the last 3 years.

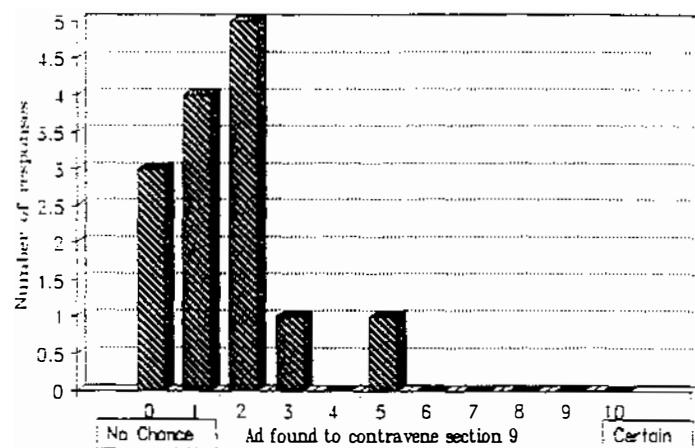
Additional assumption providing evidence of ART scores

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Is the advertisement claiming that that Mitsubishi has won some of the major international four wheel drive rallies in the last 3 years?

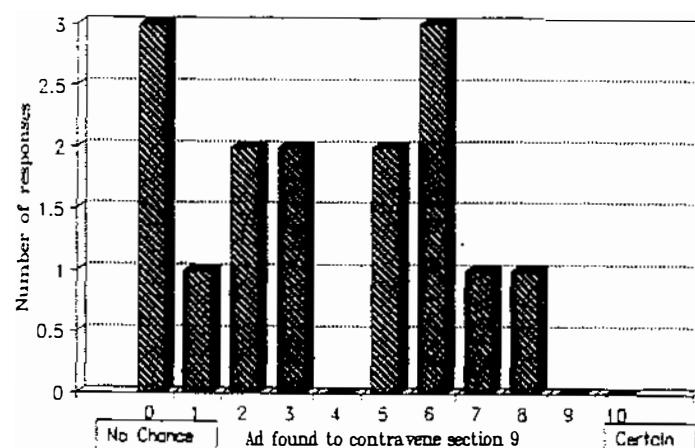
The ART scores on each tape

- | | |
|---|----------------|
| A | low ART score |
| B | none |
| C | high ART score |

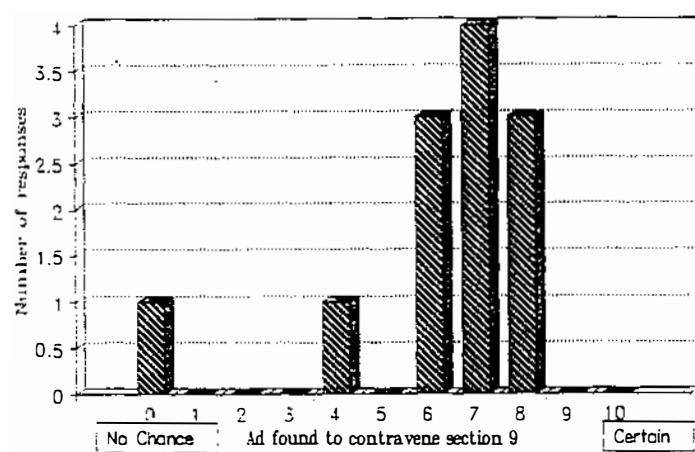
Mitsubishi
Low Art Score - Tape A



Mitsubishi
No Art Score - Tape B



Mitsubishi
High Art Score - Tape C



PINE 'O CLEEN CASE

The Commercial

The visual component showed a baby crawling around on a kitchen floor, looking in the rubbish bin and licking a large rubber ball. A humorous song, in which the baby told us that he enjoyed eating germs when no one was watching, him formed most of the audio component. The alleged misrepresentation related to a brief voice over by an adult presenter in the final few seconds of the ad. This was as follows:

Pine 'o Cleen . . . New Zealand's number one disinfectant.

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that more Pine 'o Cleen is sold in a year than any other brand of disinfectant.
- 2 It is admitted by the defendant that less Pine 'o Cleen was sold last year than two other brands of disinfectant.

Additional assumption providing evidence of ART scores

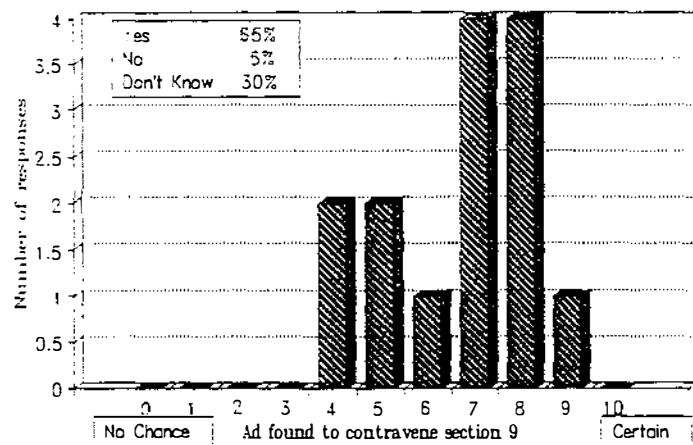
- 3 The judge has decided to admit evidence of an audience reaction test in which one of the questions asked was:

Is the advertisement claiming that more Pine 'o Cleen is sold in a year than any other brand of disinfectant?

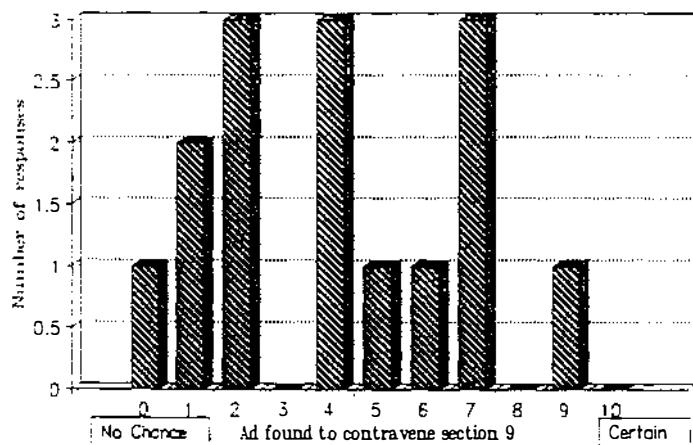
The ART scores on each tape

- | | |
|---|----------------|
| A | high ART score |
| B | none |
| C | low ART score |

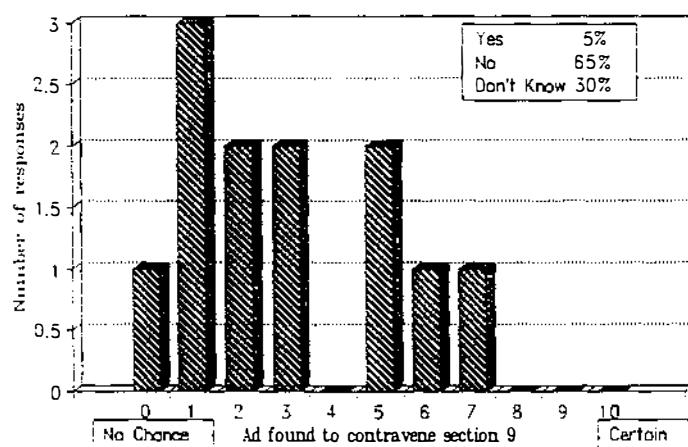
Pine'o Cleen
High Art Score - Tape A



Pine'o Cleen
No Art Score - Tape B



Pine'o Cleen
Low Art Score - Tape C



PANADOL CASE

The Commercial

The visual component showed a woman closing a book titled "Clinical Tests". She then turned to the camera and said:

I've been researching the facts and the clinical tests prove, there isn't a pain reliever more gentle to the stomach, than Panadol.

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that clinical tests show that Panadol is more gentle on the stomach than any other pain reliever.
- 2 It is admitted by the defendant that clinical tests show that Panadol is no more gentle on the stomach than two other pain relievers.

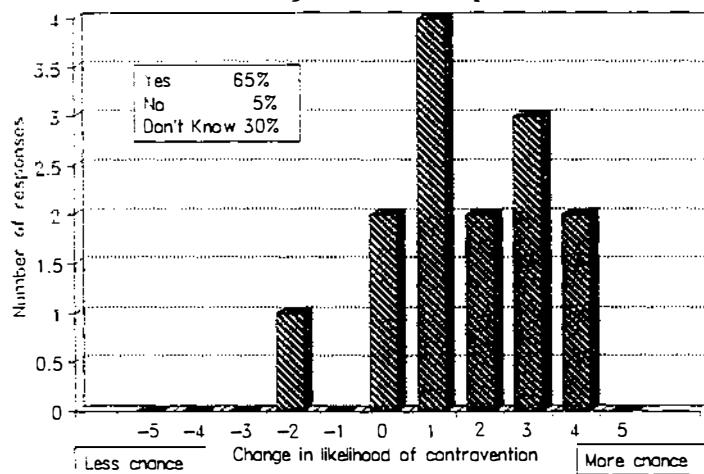
Additional assumption providing evidence of ART scores

- 3 The judge has decided to admit evidence of an audience reaction test in which one of the questions asked was:
Is the advertisement claiming that clinical tests show that Panadol is more gentle on the stomach than any other pain reliever?

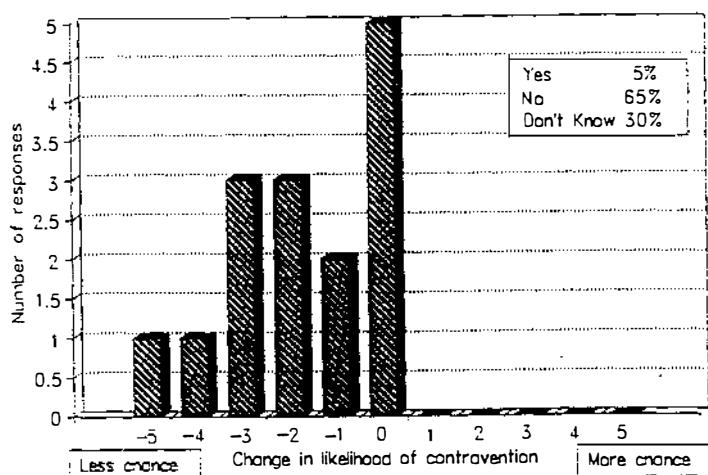
The ART scores on each tape

	Scenario A	Scenario B	
A	none	high	ART score
B	none	low	ART score
C	none	medium	ART score

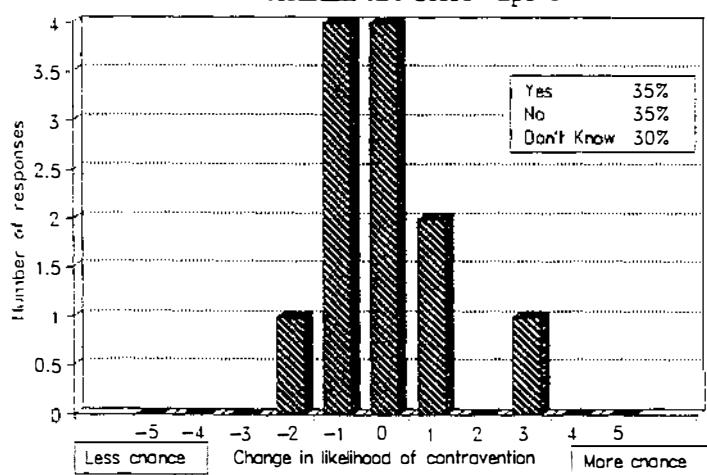
Panadol
High Art Score Tape A

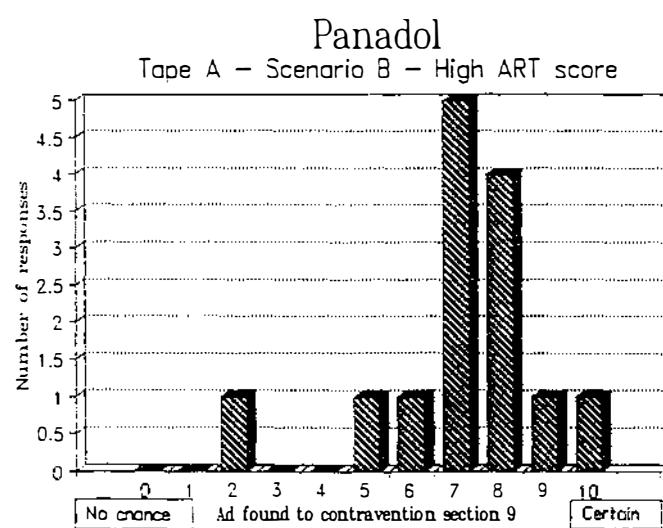
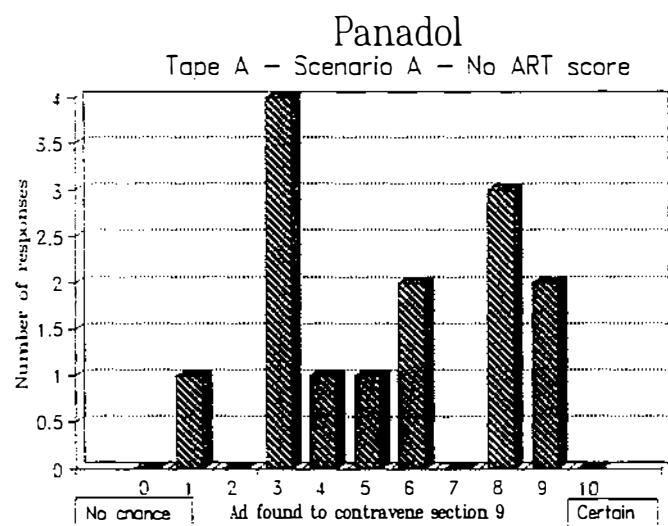


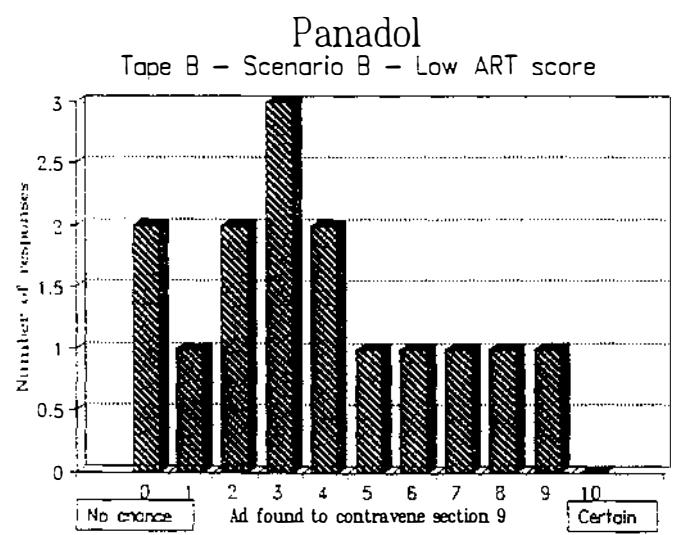
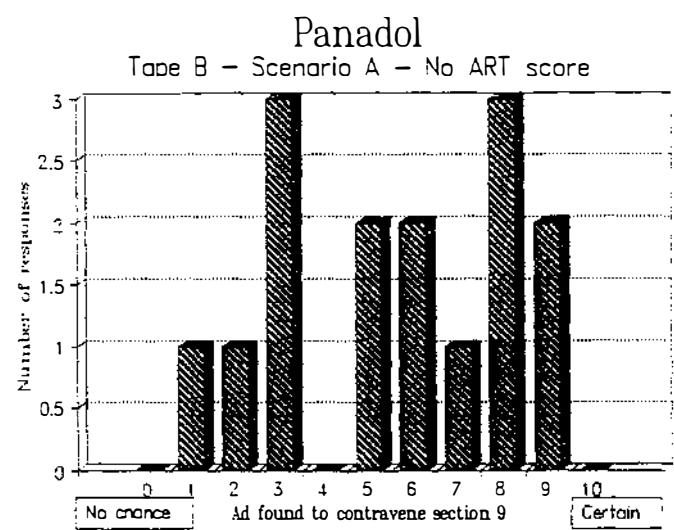
Panadol
Low Art Score Tape B

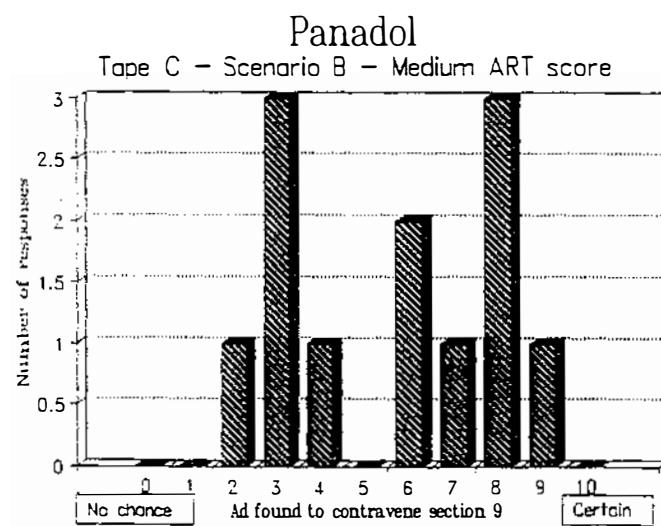
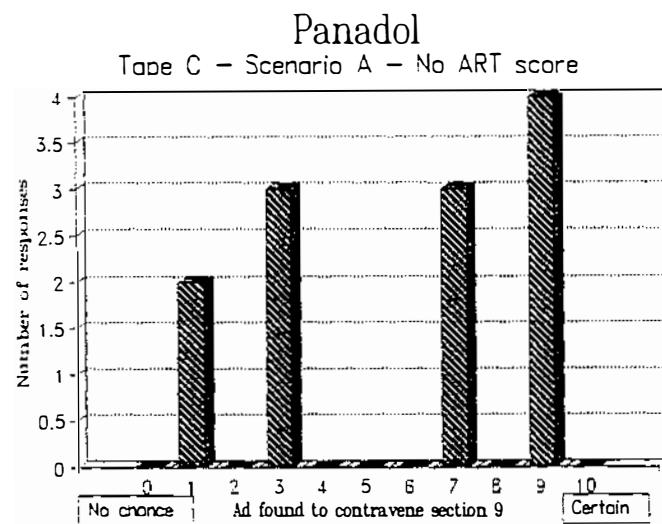


Panadol
Medium Art Score Tape C









PALMOLIVE CASE

The Commercial

The visual component showed a woman going to a beauty clinic where she explained that she had a problem with her hands. She was told to put her fingers in Palmolive dishwashing detergent. The beautician said:

You're not using Palmolive. Its mild on hands while you do dishes. . . You're soaking in it. Relax, Pamolive takes care of your hands and your dishes.

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that soaking one's fingers in undiluted Palmolive is beneficial for the skin of most people.
- 2 It is admitted by the defendant that soaking one's fingers in undiluted Palmolive is not beneficial for the skin of most people.

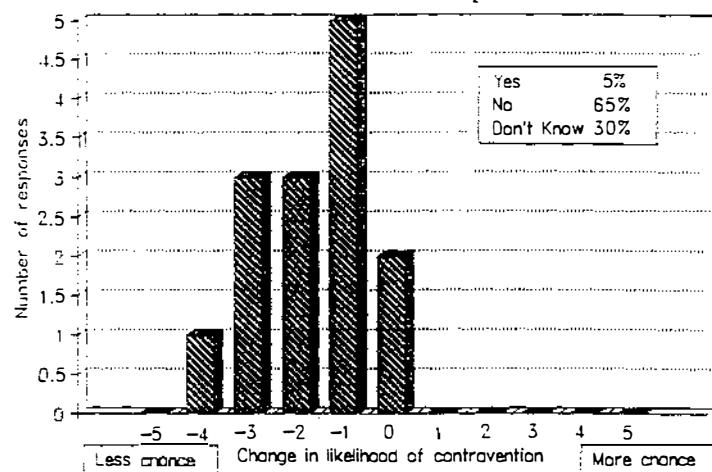
Additional assumption providing evidence of ART scores

- 3 The judge has decided to admit evidence of an audience reaction test in which one of the questions asked was:
Is the advertisement claiming that soaking one's fingers in undiluted Palmolive is beneficial for the skin of most people?

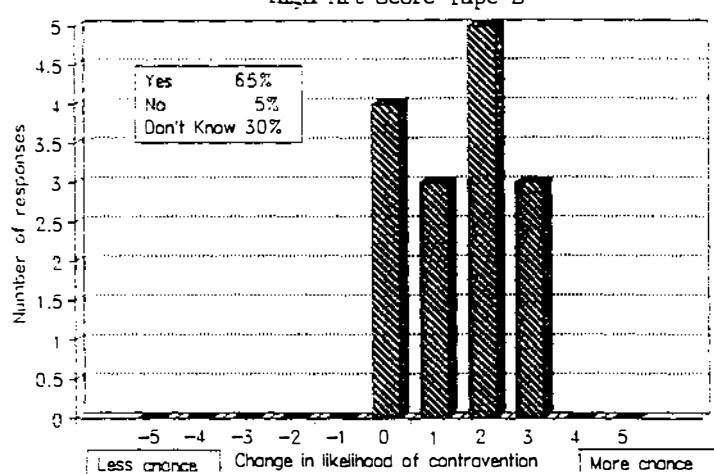
The ART scores on each tape

	Scenario A	Scenario B	
A	none	low	ART score
B	none	high	ART score
C	none	low	ART score

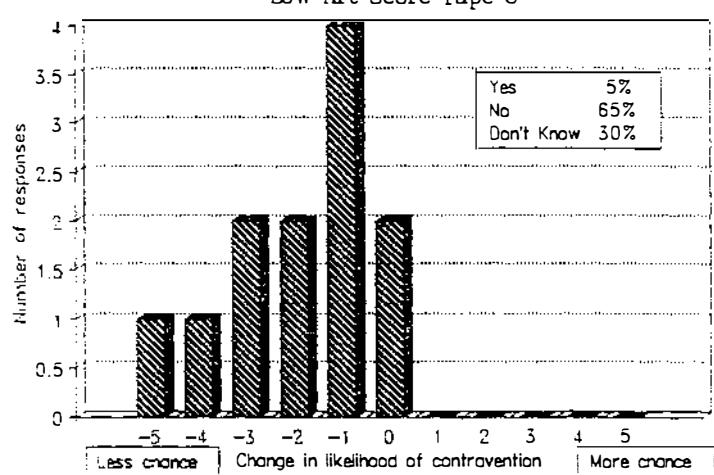
Palmolive
Low Art Score Tape A



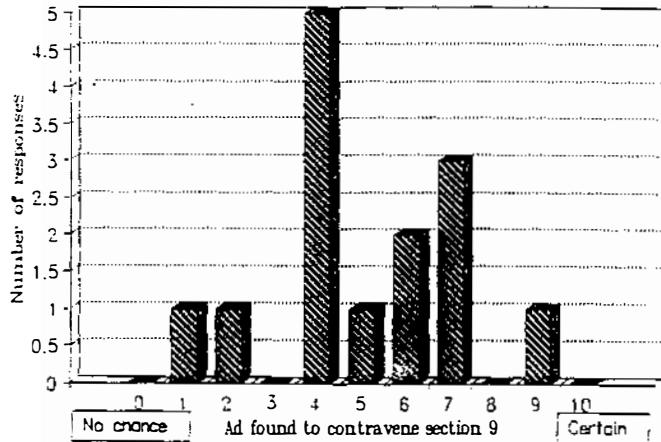
Palmolive
High Art Score Tape B



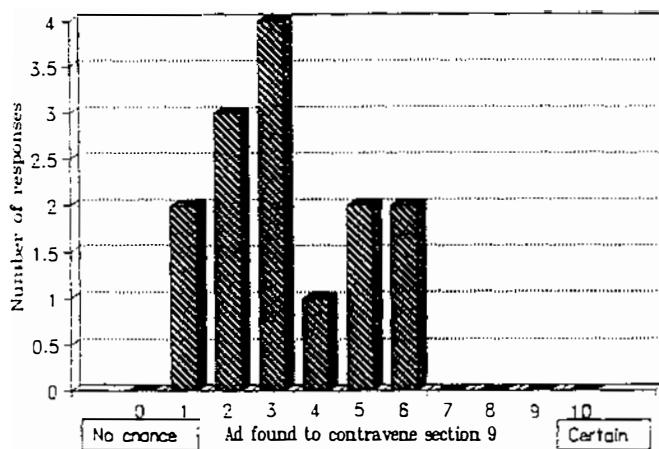
Palmolive
Low Art Score Tape C

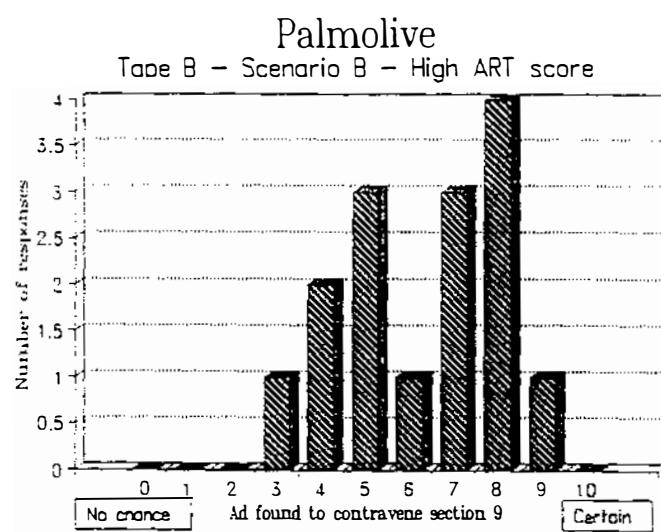
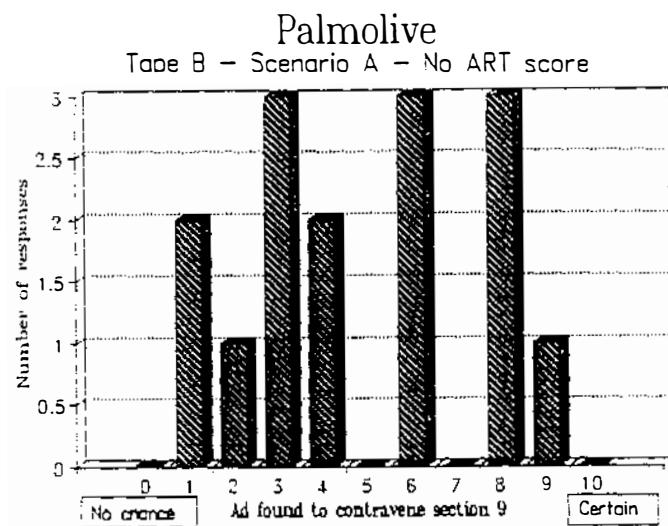


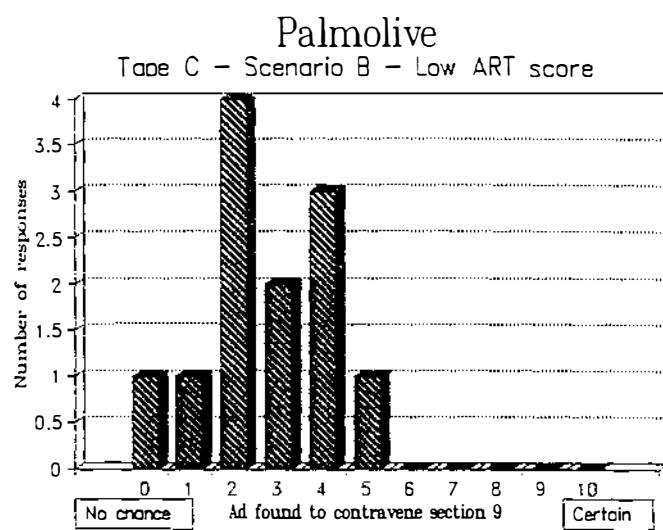
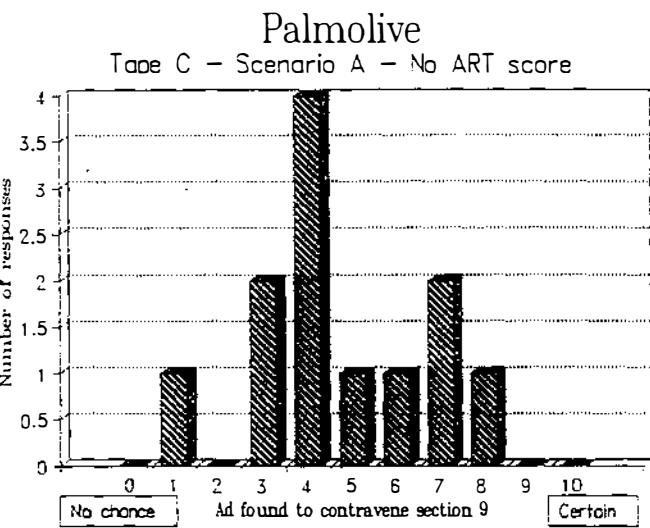
Palmolive
Tape A - Scenario A - No ART score



Palmolive
Tape A - Scenario B - Low ART score







TOYOTA CASE

The Commercial

The commercial showed Lee Majors, famous for his TV role as the Six Million Dollar Man, wandering around an air base. He spoke directly to the camera. Part of his monologue was as follows:

The first lesson of excellence is, you get back exactly what you put in. Over the last three years, Toyota has invested more than six billion dollars in research and development . . . One of the cars that research and development produced was this one . . . the new Toyota Corona twin cam . . a six billion dollar car.

The slogan "A six billion dollar car" appeared on the screen at the conclusion of the commercial.

Standard assumptions provided on all tapes

- 1 It is alleged that this advertisement conveys the representation that six billion dollars was spent on research and development directly related to the Toyota Corona.
- 2 It is admitted by the defendant that less than one quarter of the six billion dollars spent on research and development was related to the Toyota Corona.

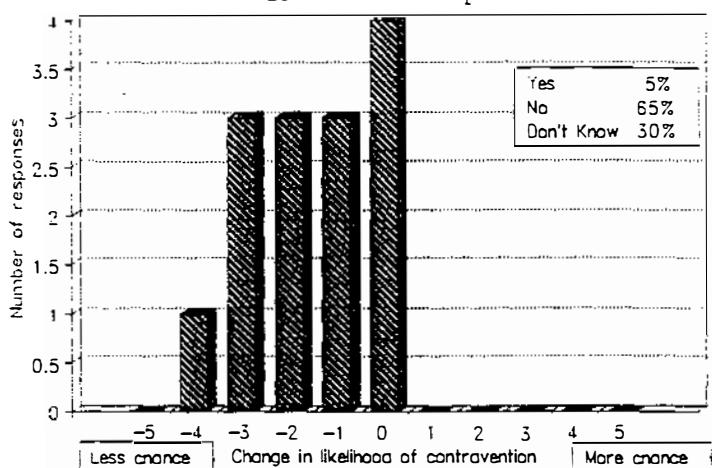
Additional assumption providing evidence of ART scores

- 3 The judge has decided to admit evidence of an audience reaction test in which one of the questions asked was:
Is the advertisement claiming that six billion dollars was spent on research and development directly related to the Toyota Corona?

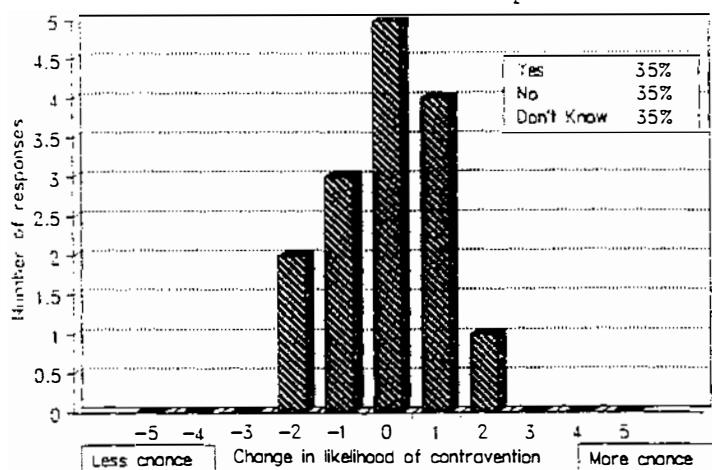
The ART scores on each tape

	Scenario A	Scenario B
A	none	low ART score
B	none	medium ART score
C	none	high ART score

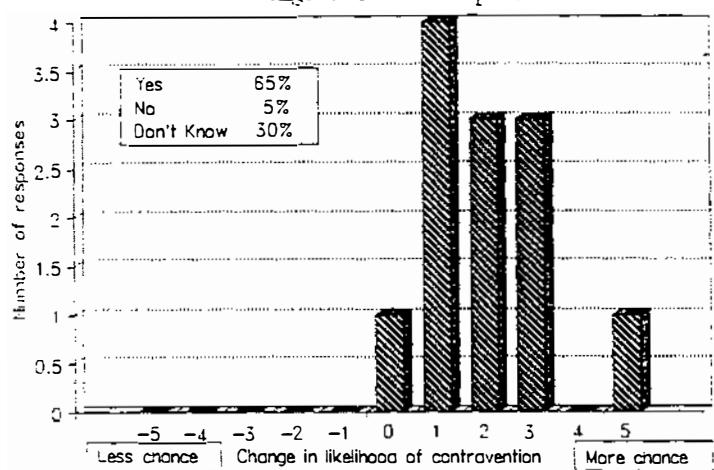
Toyota
Low Art Score Tape A



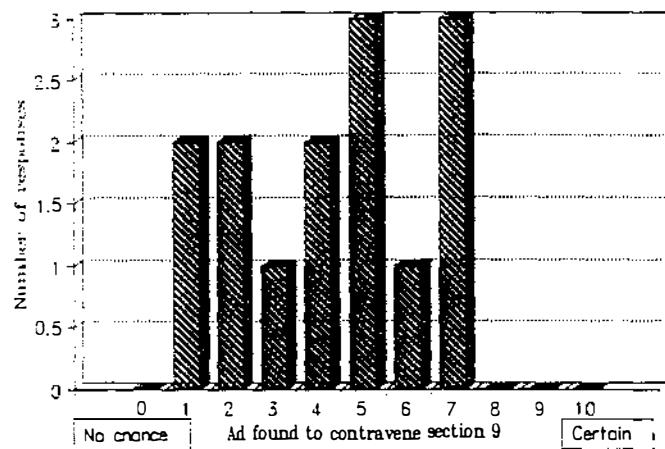
Toyota
Medium Art Score Tape B



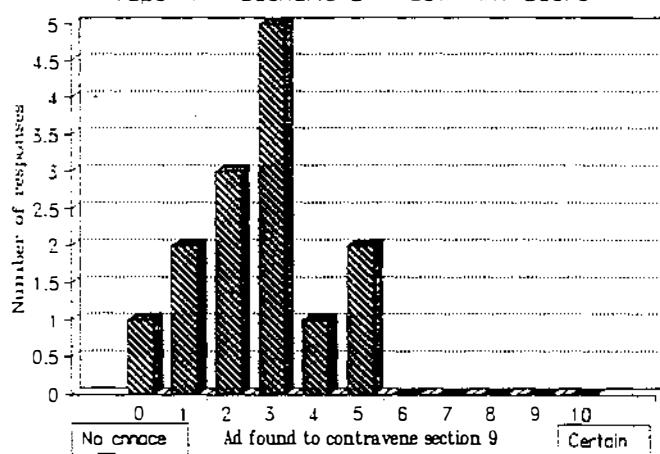
Toyota
High Art Score Tape C

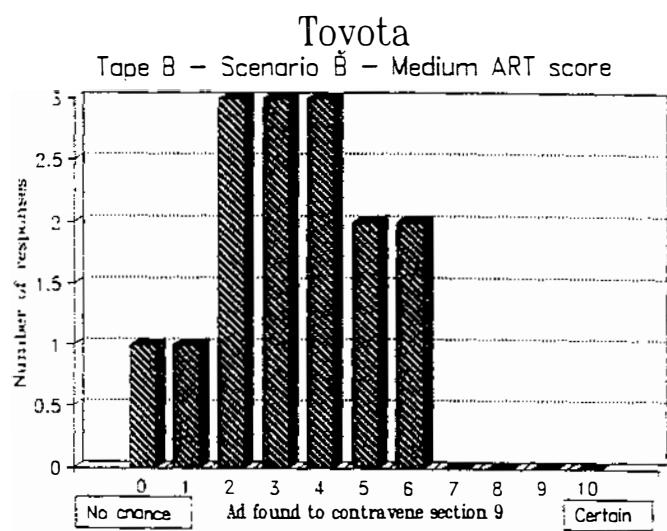
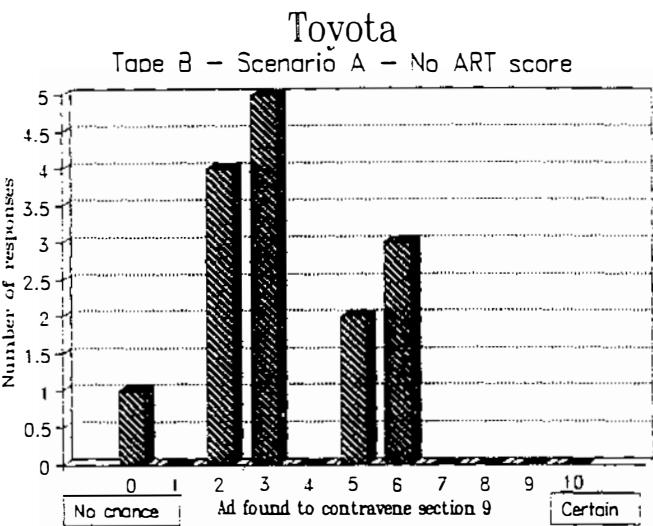


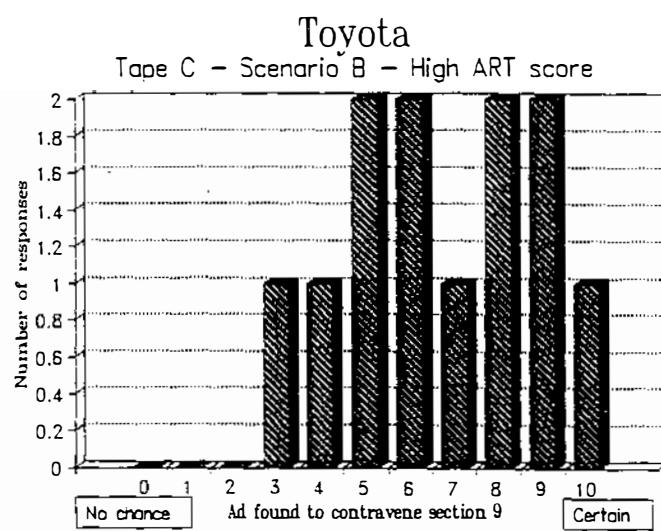
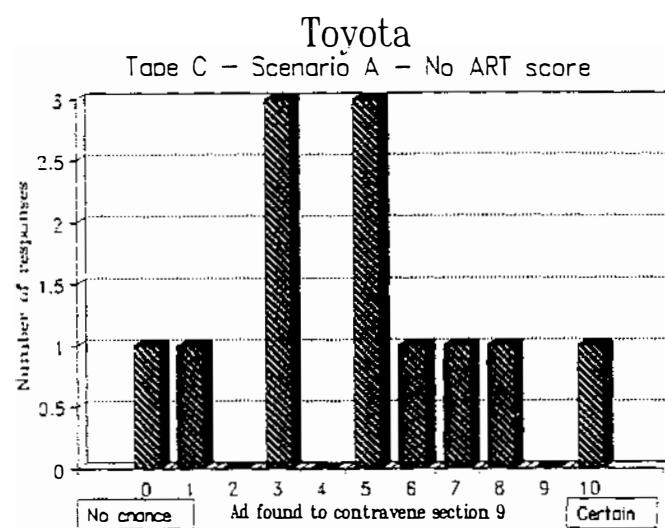
Toyota
Tape A - Scenario A - No ART score



Toyota
Tape A - Scenario B - Low ART score







Appendix G

Analyses of variance tables

SPSS/PC+ The Statistical Package for IBM PC 11/26/90
SET BOXSTRING='-'+''.
SET HIST='o'.
SET BLOCK='O'.

GET /FILE 'sys1'.
The SPSS/PC+ system file is read from
file sys1
The file was created on 11/23/90 at 16:24:03
and is titled SPSS/PC+
The SPSS/PC+ system file contains
492 cases, each consisting of
67 variables (including system variables).
67 variables will be used in this session.

Page 2 SPSS/PC+ 11/26/90

This procedure was completed at 11:06:34
ANOVA /VARIABLES juster by artscore (2,4) ad (1,9) tape (1,3)
/statistics 1
/options 4.

'ANOVA' PROBLEM REQUIRES 21462 BYTES OF MEMORY.

Page 3 SPSS/PC+ 11/26/90

* * * A N A L Y S I S O F V A R I A N C E * * *

BY JUSTER juster estimate of winning case
ARTSCORE artscore contained in assumptions
AD identity of the ad viewed
TAPE version of tape viewed

Source of Variation	Sum of Squares	DF	Mean Square	F	Signif of F
Main Effects	713.830	11	64.894	13.819	.000
ARTSCORE	451.407	2	225.704	48.063	.000
AD	135.594	7	19.371	4.125	.000
TAPE	8.768	2	4.384	.934	.395
Explained	713.830	11	64.894	13.819	.000
Residual	1098.853	234	4.696		

Total	1812.683	245	7.399
Page 4	SPSS/PC+	11/26/90	

492 Cases were processed.
246 Cases (50.0 PCT) were missing.

Due to empty cells or a singular matrix,
higher order interactions have been suppressed.

Page 5	SPSS/PC+	11/26/90
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* * * M U L T I P L E C L A S S I F I C A T I O N A N A L Y S I S * * *

By JUSTER juster estimate of winning case
ARTSCORE artscore contained in assumptions
AD identity of the ad viewed
TAPE version of tape viewed

Variable + Category	N	Unadjusted Dev'n	Eta	Adjusted for Independents Dev'n	Adjusted for + Covariates Dev'n	Beta
ARTSCORE						
2 Low	96	-1.68		-1.47		
3 Med	68	.29		-.40		
4 High	82	1.72		2.05		
		.53		.56		

Page 6	SPSS/PC+	11/26/90
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* * * M U L T I P L E C L A S S I F I C A T I O N A N A L Y S I S * * *

By JUSTER juster estimate of winning case
ARTSCORE artscore contained in assumptions
AD identity of the ad viewed
TAPE version of tape viewed

Grand Mean = 4.073 Adjusted for

Variable + Category	N	Unadjusted		Adjusted for		Independents	
		Dev'n	Eta	Dev'n	Beta	Dev'n	Beta
AD							
2 Simpson	15	-3.34		-1.56			
3 Honda	15	-.14		-1.88			
4 Reach	41	.63		1.03			
5 Mitsub	26	-.61		-.95			
6 Pineo	26	.66		.05			
7 Panadol	41	1.07		1.03			

Page 7 SPSS/PC+ 11/26/90

* * * M U L T I P L E C L A S S I F I C A T I O N A N A L Y S I S * * *

By JUSTER juster estimate of winning case
 ARTSCORE artscore contained in assumptions
 AD identity of the ad viewed
 TAPE version of tape viewed

Variable + Category	N	Unadjusted		Adjusted for		Independents	
		Dev'n	Eta	Dev'n	Beta	Dev'n	Beta
Grand Mean = 4.073							
8 Palmoliv	41	-.12		.06			
9 Toyota	41	-.34		-.29			
			.38		.34		
TAPE							
1 Tape A	84	.26		.22			
2 Tape B	90	-.52		-.31			
3 Tape C	72	.34		.13			
			.15		.09		

Multiple R Squared .394
 Multiple R .628

Page 8 SPSS/PC+ 11/26/90

Page 9 SPSS/PC+ 11/26/90

This procedure was completed at 11:08:11

SPSS/PC+ The Statistical Package for IBM PC 11/23/90
SET BOXSTRING='-'+''.
SET HIST='o'.
SET BLOCK='O'.

GET /FILE 'sys1'.
The SPSS/PC+ system file is read from
file sys1
The file was created on 11/23/90 at 16:24:03
and is titled SPSS/PC+
The SPSS/PC+ system file contains
492 cases, each consisting of
67 variables (including system variables).
67 variables will be used in this session.

Page 2 SPSS/PC+ 11/23/90

This procedure was completed at 19:13:06
ONEWAY /VARIABLES juster by ad (1,9).

Page 3 SPSS/PC+ 11/23/90

----- O N E W A Y -----

Variable JUSTER juster estimate of winning case
By Variable AD identity of the ad viewed

Analysis of Variance

Source	D.F.	Sum of Squares	Mean Squares	F Ratio	F Prob.
Between Groups	8	650.2805	81.2851	13.4520	.0000
Within Groups	483	2918.5732	6.0426		
Total	491	3568.8537			

Page 4 SPSS/PC+ 11/23/90

This procedure was completed at 19:13:46
ONEWAY /VARIABLES juster by tape.

ERROR 11404, (End of command)
MISSING MIN/MAX RANGE ON ONEWAY COMMAND.

This command not executed.

Page 5 SPSS/PC+ 11/23/90

GET /FILE 'sys1'.
The SPSS/PC+ system file is read from
file sys1

Page 6 SPSS/PC+ 11/23/90

This procedure was completed at 19:16:18
ONEWAY /VARIABLES juster by ad (1,9).

Page 7 SPSS/PC+ 11/23/90

- - - - - O N E W A Y - - - - -

Variable JUSTER juster estimate of winning case
By Variable AD identity of the ad viewed

Analysis of Variance

Source	D.F.	Sum of Squares	Mean Squares	F Ratio	F Prob.
Between Groups	8	650.2805	81.2851	13.4520	.0000
Within Groups	483	2918.5732	6.0426		
Total	491	3568.8537			

Page 8 SPSS/PC+ 11/23/90

This procedure was completed at 19:16:40
ONEWAY /VARIABLES juster by tape (1,3).

Page 9 SPSS/PC+ 11/23/90

- - - - - O N E W A Y - - - - -

Variable JUSTER juster estimate of winning case
By Variable TAPE version of tape viewed

Analysis of Variance

Source	D.F.	Sum of Squares	Mean Squares	F Ratio	F Prob.
Between Groups	2	16.5650	8.2825	1.1401	.3206
Within Groups	489	3552.2887	7.2644		
Total	491	3568.8537			

Page 10 SPSS/PC+ 11/23/90

This procedure was completed at 19:17:41

Page 11 SPSS/PC+ 11/23/90

GET /FILE 'sys1'.
The SPSS/PC+ system file is read from
file sys1

Page 12 SPSS/PC+ 11/23/90

This procedure was completed at 19:29:28
ONEWAY /VARIABLES juster by ad (1,9).

Page 13 SPSS/PC+ 11/23/90

----- O N E W A Y -----
Variable JUSTER juster estimate of winning case
By Variable AD identity of the ad viewed

Analysis of Variance

Source	D.F.	Sum of Squares	Mean Squares	F Ratio	F Prob.
Between Groups	8	650.2805	81.2851	13.4520	.0000

Within Groups	483	2918.5732	6.0426
Total	491	3568.8537	

Page 14 SPSS/PC+ 11/23/90

This procedure was completed at 19:29:44
 /STATISTICS 1.

ERROR 1, Text: /STATISTICS 1
 INVALID COMMAND--Check spelling. If it is intended as a continuation of a previous line, the terminator must not be specified on the previous line.
 If a DATA LIST is in error, in-line data can also cause this error.
 This command not executed.

Page 15 SPSS/PC+ 11/23/90

GET /FILE 'sys1'.
 The SPSS/PC+ system file is read from
 file sys1

Page 16 SPSS/PC+ 11/23/90

This procedure was completed at 19:30:33
 ONEWAY /VARIABLES juster by ad (1,9)
 /STATISTICS 1.

Page 17 SPSS/PC+ 11/23/90

- - - - - O N E W A Y - - - - -

Variable JUSTER juster estimate of winning case
 By Variable AD identity of the ad viewed

Analysis of Variance

Source	D.F.	Sum of Squares	Mean Squares	F Ratio	F Prob.
Between Groups	8	650.2805	81.2851	13.4520	.0000
Within Groups	483	2918.5732	6.0426		

Total 491 3568.8537
Page 18 SPSS/PC+ 11/23/90

- - - - - O N E W A Y - - - - -

Group	Count	Mean	Standard Deviation	Standard Error	95 Pct Conf Int for Mean
Grp 1	41	1.0976	1.1359	.1774	.7390 To 1.4561
Grp 2	41	2.0488	1.9615	.3063	1.4296 To 2.6679
Grp 3	41	3.5366	2.4403	.3811	2.7663 To 4.3068
Grp 4	41	4.7073	2.5617	.4001	3.8988 To 5.5159
Grp 5	41	3.4634	2.8469	.4446	2.5648 To 4.3620
Grp 6	41	4.4390	2.7753	.4334	3.5630 To 5.3150
Grp 7	82	5.1585	2.9249	.3230	4.5159 To 5.8012
Grp 8	82	4.2317	2.4052	.2656	3.7032 To 4.7602
Grp 9	82	3.7195	2.2732	.2510	3.2200 To 4.2190
Total	492	3.7927	2.6960	.1215	3.5539 To 4.0315

Group	Minimum	Maximum
Grp 1	.0000	4.0000
Grp 2	.0000	7.0000

Page 19 SPSS/PC+ 11/23/90

- - - - - O N E W A Y - - - - -

Group	Minimum	Maximum
Grp 3	.0000	9.0000
Grp 4	.0000	9.0000
Grp 5	.0000	8.0000
Grp 6	.0000	9.0000
Grp 7	.0000	10.0000
Grp 8	.0000	9.0000
Grp 9	.0000	9.0000
Total	.0000	10.0000

Page 20 SPSS/PC+ 11/23/90

This procedure was completed at 19:31:20
ONEWAY /VARIABLES juster by tape (1,3)
/STATISTICS 1.

Page 21 SPSS/PC+ 11/23/90

- - - - - O N E W A Y - - - - -

Variable JUSTER juster estimate of winning case
By Variable TAPE version of tape viewed

Analysis of Variance

Source	D.F.	Sum of Squares	Mean Squares	F Ratio	F Prob.
Between Groups	2	16.5650	8.2825	1.1401	.3206
Within Groups	489	3552.2887	7.2644		
Total	491	3568.8537			

Page 22 SPSS/PC+ 11/23/90

- - - - - O N E W A Y - - - - -

Group	Count	Mean	Standard Deviation	Standard Error	95 Pct Conf Int for Mean
Grp 1	168	3.9702	2.5907	.1999	3.5756 To 4.3648
Grp 2	180	3.5556	2.7609	.2058	3.1495 To 3.9616
Grp 3	144	3.8819	2.7316	.2276	3.4320 To 4.3319
Total	492	3.7927	2.6960	.1215	3.5539 To 4.0315

Group Minimum Maximum

Grp 1	.0000	10.0000
Grp 2	.0000	9.0000
Grp 3	.0000	9.0000

Total .0000 10.0000

Page 23 SPSS/PC+ 11/23/90

This procedure was completed at 19:32:21

Page 24 SPSS/PC+ 11/23/90

GET /FILE 'sys1'.
The SPSS/PC+ system file is read from
file sys1

Page 25 SPSS/PC+ 11/23/90

This procedure was completed at 19:48:04
ANOVA /VARIABLES juster by artscore (1,4).

'ANOVA' PROBLEM REQUIRES 374 BYTES OF MEMORY.

Page 26 SPSS/PC+ 11/23/90

* * * A N A L Y S I S O F V A R I A N C E * * *

JUSTER juster estimate of winning case
BY ARTSCORE artscore contained in assumptions

Source of Variation	Sum of Squares	DF	Mean Square	F	Signif of F
Main Effects	557.147	3	185.716	30.092	.000
ARTSCORE	557.147	3	185.716	30.092	.000
Explained	557.147	3	185.716	30.092	.000
Residual	3011.706	488	6.172		
Total	3568.854	491	7.269		

492 Cases were processed.
0 Cases (.0 PCT) were missing.

Page 27 SPSS/PC+ 11/23/90

This procedure was completed at 19:48:50
ANOVA /VARIABLES juster by artscore (2,4).

'ANOVA' PROBLEM REQUIRES 254 BYTES OF MEMORY.

Page 28 SPSS/PC+ 11/23/90

* * * A N A L Y S I S O F V A R I A N C E * * *

JUSTER juster estimate of winning case
BY ARTSCORE artscore contained in assumptions

Source of Variation	Sum of Squares	DF	Mean Square	F	Signif of F
Main Effects	518.440	2	259.220	48.670	.000
ARTSCORE	518.440	2	259.220	48.670	.000
Explained	518.440	2	259.220	48.670	.000
Residual	1294.243	243	5.326		
Total	1812.683	245	7.399		

492 Cases were processed.
246 Cases (50.0 PCT) were missing.

Page 29 SPSS/PC+ 11/23/90

This procedure was completed at 19:49:23
ANOVA /VARIABLES juster by artscore (2,4) ad (1,9)
/statistics 3
/options 4.

'ANOVA' PROBLEM REQUIRES 7160 BYTES OF MEMORY.

Page 30 SPSS/PC+ 11/23/90

* * * C E L L M E A N S * * *

JUSTER juster estimate of winning case
BY ARTSCORE artscore contained in assumptions
AD identity of the ad viewed

TOTAL POPULATION

4.07
(246)

ARTSCORE

	2	3	4
	2.40	4.37	5.79
{	96)	(68)	(82)

Page 31

SPSS/PC+

11/23/90

AD

	1	2	3	4	5	6	7
	.00	.73	3.93	4.71	3.46	4.73	5.15
{	(0)	(15)	(15)	(41)	(26)	(26)	(41)
	8	9					
	3.95	3.73					
{	(41)	(41)					

AD

	1	2	3	4	5	6
ARTSCORE						
2	.00	.73	.00	.00	1.64	2.58
{	(0)	(15)	(0)	(0)	(14)	(12)
3	.00	.00	.00	4.71	.00	.00
{	(0)	(0)	(0)	(41)	(0)	(0)

 Page 32 SPSS/PC+ 11/23/90
 4 .00 .00 3.93 .00 5.58 6.57
 (0) (0) (15) (0) (12) (14)

	AD		
	7	8	9
ARTSCORE	2 3.53 (15)	2.88 (26)	2.64 (14)
	3 4.92 (12)	.00 (0)	3.00 (15)
	4 7.07 (14)	5.80 (15)	5.92 (12)

 Page 33 SPSS/PC+ 11/23/90

* * * A N A L Y S I S O F V A R I A N C E * * *

BY JUSTER juster estimate of winning case
 ARTSCORE artscore contained in assumptions
 AD identity of the ad viewed

Source of Variation	Sum of Squares	DF	Mean Square	F	Signif of F
Main Effects	705.062	9	78.340	16.488	.000
ARTSCORE	447.384	2	223.692	47.078	.000
AD	186.622	7	26.660	5.611	.000
2-way Interactions	10.027	5	2.005	.422	.833
ARTSCORE AD	10.027	5	2.005	.422	.833
Explained	715.089	14	51.078	10.750	.000
Residual	1097.594	231	4.751		
Total	1812.683	245	7.399		

12	1	1.00	.00	9	2
20	7	6.00	1.00	7	4
22	6	7.00	-1.00	8	2
24	5	5.00	.00	9	2
32	7	4.00	3.00	7	4
34	5	6.00	-1.00	8	2
36	3	4.00	-1.00	9	2
44	9	8.00	1.00	7	4

Number of cases read = 10 Number of cases listed = 10

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This procedure was completed at 18:37:01
ANOVA /VARIABLES diff by artscore (2,4).

'ANOVA' PROBLEM REQUIRES 254 BYTES OF MEMORY.

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* * * A N A L Y S I S O F V A R I A N C E * * *

DIFF
BY ARTSCORE artscore contained in assumptions

Source of Variation	Sum of Squares	DF	Mean Square	F	Signif of F
Main Effects	276.996	2	138.498	72.523	.000
ARTSCORE	276.996	2	138.498	72.523	.000
Explained	276.996	2	138.498	72.523	.000
Residual	229.166	120	1.910		
Total	506.163	122	4.149		

123 Cases were processed.
0 Cases (.0 PCT) were missing.

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This procedure was completed at 18:37:28
ANOVA /VARIABLES diff by artscore (2,4) ad (7,9)
/Options=4
/Statistics=3.

'ANOVA' PROBLEM REQUIRES 1136 BYTES OF MEMORY.

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* * * C E L L M E A N S * * *

DIFF
BY ARTSCORE artscore contained in assumptions
AD identity of the ad viewed

TOTAL POPULATION

-.24
(123)

ARTSCORE

2	3	4
-1.75 (55)	-.07 (27)	1.68 (41)

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AD

7	8	9
-.10 (41)	-.63 (41)	.02 (41)

AD

7	8	9	
2	-1.73 (15)	-1.85 (26)	-1.57 (14)

$$3 \quad - .08 \quad .00 \quad - .07 \\ (\quad 12) \quad (\quad 0) \quad (\quad 15)$$

4 1.64 (14) 1.47 (15) 2.00 (12)

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SPSS/PC+

11/26/9

* * * ANALYSIS OF VARIANCE * * *

BY DIFF ARTSCORE artscore contained in assumptions
AD identity of the ad viewed

Source of Variation	Sum of Squares	DF	Mean Square	F	Signif. of F
Main Effects	279.103	4	69.776	35.420	.000
ARTSCORE	269.038	2	134.519	68.286	.000
AD	2.107	2	1.053	.535	.587
2-way Interactions	.515	3	.172	.087	.967
ARTSCORE AD	.515	3	.172	.087	.967
Explained	279.618	7	39.945	20.277	.000
Residual	226.544	115	1.970		
Total	506.163	122	4.149		

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123 Cases were processed.
0 Cases (.0 PCT) were missing.

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This procedure was completed at 18:38:55

11/26/9

This procedure was completed at 18:38:55

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FINISH.