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# The Legal Regulation of Comparative Advertising

## Old Game, New Rules

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In the world of advertising there is no such thing as a lie, only expedient exaggeration.<sup>1</sup>

### I. Introduction

An advertising technique being used more frequently in Australia today is advertising which compares the quality of a product to those of competitors. Comparative advertising is generally utilised to accentuate the superior aspects of the advertiser's product, although the technique can also be employed to erode a competitor's market share by downgrading the competitor's product. This explains why comparative advertising is also known as 'knocking copy'. Comparisons in many advertisements are made by inference,<sup>2</sup> although increasingly the direct naming of a competitor's product is occurring.<sup>3</sup>

[C]omparative advertising is a hard bitten, attention grabbing way of saying 'We're better than the competition'. Time was when good manners and (perhaps) fear of retaliation limited derogatory comparisons to our brand versus brand X, but today few advertisers are so timid or so cautious as to mask the identity of the competition when contrasting aspects of their own goods against those of the other big player or players in the market.<sup>4</sup>

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1 Cary Grant, playing Roger Thornhill, a Madison Avenue executive, in *North by North West*.

2 See for example: *Makita (Aust) Pty Ltd v Black and Decker (A'asia) Pty Ltd* (1990) ATPR 41-030; *Hanimex Pty Ltd v Kodak (A'asia) Pty Ltd* (1982) ATPR 40-287; *Colgate Palmolive Pty Ltd v Rexona Pty Ltd* (1981) 58 FLR 391.

3 See for example: *TPC v Telstra Corporation Ltd* (1993) ATPR 41-256; *Country Road Clothing Pty Ltd v Najee Nominees Pty Ltd* (1991) ATPR 41-106.

4 B Buchanan and D Goldman, 'Us vs Them: The Minefield of Comparative Ads', *Harvard Business Review*, May-June 1989 (No. 3) p 38.

The risk associated with comparative advertising is that the comparison may be false, misleading or deceptive. The legal regulation of such advertising primarily emanates from two sources. At common law false disparagement of a competitor's product can create liability in the tort of injurious falsehood. Alternatively, comparisons which are misleading or deceptive can lead to liability under the *Trade Practices Act 1974* (Cth).<sup>5</sup>

The aim of this paper is to examine and contrast the approach of the two sources of law relating to comparative advertising. To a large extent the contrasting approaches can be explained by the policy behind the respective laws. The tort of injurious falsehood is designed to be used by one trader against another. The Trade Practices Act, on the other hand, is designed to protect consumers. It will be shown that the common law has allowed the advertiser considerable leeway. By way of contrast, section 52 of the Trade Practices Act has imposed a significant degree of control over advertisers.

To illustrate the effect of section 52 we propose to refer to two cases: *McDonald's Hamburgers Ltd v Burgerking (UK) Ltd*<sup>6</sup> and *White v Mellin*,<sup>7</sup> both of which involved unsuccessful allegations of injurious falsehood, and to speculate whether the outcome would be different if similar fact situations arose under the Trade Practices Act. To further reinforce the comparison, we propose to take two cases where the advertiser was held to have engaged in misleading or deceptive conduct in breach of the Trade Practices Act, *Dewhirst and Kay Rent A Car Pty Ltd v Budget Rent-A-Car System Pty Ltd*<sup>8</sup> and *Duracell Aust Pty Ltd v Union Carbide Aust Ltd*,<sup>9</sup> and to surmise whether the result would have been the same had the tort of injurious falsehood been alleged.

In the course of our paper we intend to focus on a point which has been the subject of judicial controversy in the High Court and Federal Court, viz the make-up of the target audience to be protected by the Trade Practices Act. Should the law continue to employ the 'reasonable man' test which is used at common law, or should the courts take into account that an advertisement may mislead less wary persons? The answer to this question is particularly significant in determining whether an advertisement can be classified as puffery or is misleading.

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5 And mirror State Fair Trading Acts.

6 (1986) FSR 45.

7 [1895] AC 154.

8 (1986) ATPR 40-648.

9 (1988) ATPR 40-918.

## II. The Tort of Injurious Falsehood

### (a) The Elements

The ingredients of the tort of injurious falsehood (sometimes referred to as slander of goods or trade libel) have been outlined as follows:

[I]t is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person and causing such other person damage.<sup>10</sup>

The need to prove malice, and the availability of the defence of puffery to an allegation that a statement is false, means the cause of action is a difficult one to establish. Furthermore, even if these two impediments are overcome, the action will not succeed unless the statement is calculated to produce, and does actually produce, damage.<sup>11</sup> This requirement is vividly illustrated by the old case of *Dickes v Fenne*.<sup>12</sup> The defendant told patrons of the plaintiff, who was a brewer, “that he would give a peck of malt to his mare and she should piss as good beer as Dickes doth brew”. No allegation was made of special damage, such as loss of custom, so the action did not succeed.

The restrictive nature of the tort of injurious falsehood is well illustrated by the following two (previously mentioned) cases:

#### 1. *McDonald’s Hamburgers Ltd v Burgerking (UK) Ltd* [1986]

**Facts:** Burgerking, a large hamburger chain, in an attempt to increase its market share, took a conscious decision to aim its advertising campaign at existing customers of other hamburger restaurants and, in particular, at McDonald’s customers. The advertisement prepared by Burgerking was a poster for display in London buses and underground train compartments. It comprised a coloured photograph of a hamburger with, above it, the prominent headline —

IT’S NOT JUST BIG, MAC

In the bottom righthand corner was displayed the logo of the Burgerking chain, and along the bottom of the advertisement were the words —

YOU KNOW WHEN YOU’VE GOT A WHOPPER

10 Per Lopes LJ in *Mellin v White* [1894] 3 Ch 276 at 281 and quoted by Lord Herschell LC in *White v Mellin* [1895] AC 154 at 157.

11 See, for example, *Evans v Harlow* (1844) 5 QB 624; *Lyne v Nicholls* (1906) 23 TLR 86 (Ch D).

12 (1639) 82 ER 411.

Between this slogan and the photograph of the burger was some text which included the following:

Like some burgers, a Whopper is big. Too big to hold in one hand. Unlike some burgers, it's 100% pure beef, flame grilled never fried, with a unique choice of toppings.

McDonald's had promoted all their hamburgers extensively as being 100% beef, and this was not contested by Burgerking.

McDonald's brought an action, inter alia, alleging trade libel and injurious falsehood. It argued that readers of the advertisement would be led to believe that McDonald's hamburgers, particularly the 'Big Mac', were not 100% pure beef. Although McDonald's did not allege any improper motive (malice), it contended that it should succeed on this ground on the basis of reckless indifference.

**Held:** The judge dismissed the allegation of injurious falsehood on the grounds that (a) no falsehood existed, and (b) no malice could be established:

The plaintiffs' case is that readers of this advertisement would be led to believe that McDonald's hamburgers are not 100% pure beef ... What is in fact being said in the small print is that the Burgerking hamburger can be identified not merely by one characteristic, the presence of 100% pure beef in the patty, but by the presence of all the other characteristics to which reference is made, for example, flame grilling as opposed to frying, and, of course, the 'Big Mac' is not flame grilled.

I do not think that readers of the advertisement, unprompted, are going to reach the conclusion suggested. I do not think anybody on reading this advertisement on a tube card is going to realise that it is a knocking advertisement at all ... [T]he 'Whopper' has a number of points in its favour which other hamburgers, including the 'Big Mac', do not possess. If flame grilling as opposed to frying is likely to be more satisfactory to some tastes, it is a feature which differentiates the 'Whopper' from the 'Big Mac' ...

I am entirely satisfied that [Burgerking] were never for one moment intending to suggest that McDonald's hamburgers were not 100% pure beef.<sup>13</sup>

The judge also rejected the suggestion that although malice had not been shown in the sense of improper motive, that the plaintiff should succeed on the basis of reckless indifference.

## 2. *White v Mellin* [1895]

**Facts:** The plaintiff was the proprietor of Mellin's food for infants. The defendant, a chemist, sold Dr Vance's infant food. He affixed labels to the plaintiff's bottles of infants' food which read:

The public are recommended to try Dr Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any preparation yet offered.

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13 *Supra* n.6 at 59–60.

The plaintiff adduced medical evidence to show that its food was better than Dr Vance's, especially for infants under the age of six months. Two analysts and a physician were called. They gave evidence that Dr Vance's food could be dangerous for infants under six months.

**Held:** No action would lie, there being no disparagement of the plaintiff's goods. Lord Herschell LC stated:

There is nothing to shew that the object of the defendant was other than to puff his own goods and so sell them, nor is there anything to shew that he did not believe that his food was better than any other ...

I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitors' are ...

Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious ...<sup>14</sup>

Similar sentiments were expressed by Lord Watson:

Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognisance.<sup>15</sup>

### Summary of Cases

Clearly it is very difficult for a trader to succeed under the tort of injurious falsehood, and the reasons are clearly evident from the cases discussed above. Nevertheless, we intend to expand upon two of the impediments to bringing a successful injurious falsehood action, viz puffery and public policy, in order to emphasise the difference between the common law and the newer statutory controls.

#### (b) Puffery and the 'Reasonable Man' Concept

At common law much comparative advertising has traditionally been regarded as harmless puffery. Puffery can generally be described as self evident exaggeration, which begs the question: self evident to whom? The 'reasonable man' has been the traditional benchmark for resolving this issue. The prevailing logic is that the 'reasonable man' does not take advertising claims very seriously. As one US judge has observed,

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14 *Supra* n.7 at 161–165.

15 *Ibid* at 167.

exaggeration, puffing, boasting appear to be the very breath of salesmanship. We never expect detraction, always over-emphasis.<sup>16</sup>

Across the Atlantic similar sentiments have been adopted by the English judiciary. The views of Walton J in another injurious falsehood case, *De Beers Products v Electric Co of New York*, are apposite:

[I]n the kind of situation where one expects, as a matter of ordinary common experience, a person to use a certain amount of hyperbole in the description of goods, property or services, the courts will do what any ordinary reasonable man would do, namely take it with a large pinch of salt.<sup>17</sup>

Walton J proceeded to summarise the law on this point:

... the law is that any trader is entitled to puff his own goods, even though such puff must, as a matter of pure logic, involve the denigration of his rival's goods. Thus in the well known case of the three adjoining tailors who put notices in their respective windows reading: 'The best tailor in the world', 'The best tailor in this town', and 'The best tailor in this street', none of the three committed an actionable offence ... Where, however, the situation is not that the trader is puffing his own goods, but turns to denigrate those of his rival, then ... the situation is not so clear cut. Obviously the statement: 'My goods are better than X's' is only a more dramatic presentation of what is implicit in the statement 'My goods are the best in the world'. Accordingly, I do not think such a statement would be actionable. At the other end of the scale, if what is said is 'My goods are better than X's, because X's are absolute rubbish' ... the statement would be actionable.

Between these two kinds of statements there is obviously still an extremely wide field; and it appears to me that, in order to draw the line, one must apply this test, namely, whether a reasonable man would take the claim being made as being a serious claim or not.<sup>18</sup>

It can thus be observed that the foundation stone underpinning the law of injurious falsehood, and for that matter other torts such as negligence, is the concept of the 'reasonable man'. Clearly then it is important to have some understanding of this enigmatic judicial creation, this 'hypothetical' man.<sup>19</sup>

In theory the law assumes the 'reasonable man' has the knowledge and average amount of competence of the ordinary layperson. However, in practice, the behaviour and competence assumed is higher than that of the 'average' person. No concession is made to the weaknesses of particular individuals.

16 *Union Car Advertising Co v Collier* 189 NE 463 at 468 (1934) per Crane J.

17 [1975] 2 All ER 599 at 605.

18 *Ibid* at 604-5.

19 *King v Phillips* [1953] 1 QB 429, 441 per Denning LJ.

The reasonable man, therefore, is not necessarily bound within the narrow confines of his own skills, for he may assume the mantle of knowledge of others. He is a man free from idiosyncrasies, over-apprehension and over-confidence. He is in fact a man who probably does not exist except in the mind, yet who has been given the rather uninspiring title for so important a figure as 'the man on the Clapham omnibus'.<sup>20</sup>

The 'uninspiring title' referred to in the above quotation is in fact one of a number of descriptions put forward by Greer LJ in *Hall v Brooklands Auto-Racing Club*<sup>21</sup> when attempting to define the standard of care required of the defendant in negligence cases. The standard has been variously expressed as requiring the foresight and caution of the ordinary or average prudent man, that is to say, 'the man in the street', or 'the man on the Clapham omnibus', or 'the man who takes the magazines at home, and in the evening, pushes the lawn mower in his shirt sleeves'.<sup>22</sup>

These descriptions, with their connotations of the commonplace, are consistent with the generally held view that standards must not be set at too high a level. Thus, it has been recognised that 'the reasonable man' has not the courage of Achilles, the wisdom of Ulysses, or the strength of Hercules, nor has he 'the prophetic vision of a clairvoyant'.<sup>23</sup> By way of contrast, however, it should be observed that Baron Bramwell occasionally attributed to 'the reasonable man' the agility of an acrobat and the foresight of a Hebrew prophet.

It can only be concluded that the standards expected of the 'reasonable man' have been set at a relatively high level.

Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our courts of justice, vainly appealing to his fellow citizens to order their lives after his own example.<sup>24</sup>

Dr W J Pengilly has eloquently synthesised the concept of the 'reasonable man' by describing the person as one who:

has a life which is all his own. He never reads a newspaper while walking along a street; he never steps off the pavement without looking both ways; he always tests his tyre pressure before driving his car; he never leaves a letter unanswered for more than forty-eight hours. He has been described as the man who rides in the Clapham

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20 P L Bradbury, *Law Relating to Business*, Butterworths, UK, 1976 at p 277.

21 [1933] 1 KB 205.

22 *Ibid* at 224.

23 *Hawkins v Coulsdon & Purley UDC* [1954] 1 QB 319, 341 per Romer J.

24 Referred to in the fictitious case of *Fardell v Potts*, A P Herbert, *Uncommon Law*, Bibliophile Books, London, 1984, 1 at p 4.

omnibus; never the man who misses it. To my everlasting dismay he has also been described as the man who, in the evening, pushes the lawnmower in his shirt sleeves. [He] is no reasonable man; [he is at law] an intellectual automaton.<sup>25</sup>

Thus, it can be seen why in so many injurious falsehood cases the courts have been able to conclude that exaggerated advertising claims would not be taken seriously by the 'objective', careful, competent, clear-minded 'reasonable man'.

### (c) Policies Underlying the Tort of Injurious Falsehood

There are also some policy reasons why the common law has been reluctant to become involved in comparative advertising disputes. If puffery as a defence was unavailable, or interpreted more strictly, the courts might be turned into 'a machinery for advertising rival productions by obtaining a judicial determination, which of the two was the better'.<sup>26</sup>

Nevertheless, this view will not prevail where a specific statement is made in advertising which is simply untrue. This was the case in *De Beers Abrasive Products Ltd v International Electric Co of New York*,<sup>27</sup> where the defendant falsely claimed in a report to have scientifically tested its product and that of the plaintiff in a laboratory, with the fictitious results 'proving' the superiority of the defendant's product. Such a report could not be dismissed as a mere idle puff.<sup>28</sup>

The other matter which explains many injurious falsehood decisions is the fact that courts in making their determinations are not governed by the public interest. Injurious falsehood is a private action used by one trade rival against another. In contrast, the public interest in protecting the consumer underpins the Trade Practices Act, so a different judicial approach to determining cases heard under this statute is clearly called for. We will now examine the Trade Practices Act, in the context of advertising regulation, and then consider whether the outcome of the two cases considered in our introduction, *McDonald's Hamburgers Ltd v Burgerking (UK) Ltd* and *White v Mellin*, would be different under section 52.

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25 *Advertising and the Trade Practices Act*, CCH, 1981 at pp 10–12.

26 *White v Mellin* [1895] AC 154, 165 per Lord Herschell LC.

27 [1975] 1 WLR 927; 2 All ER 599.

28 The distinction between vague statements and opinions as opposed to factual statements explains why puffery in advertising is not always available as a defence: see D Harland, *The Control of Advertising — A Comparative Overview* (1993–94) 1 CCLJ 95 at p 101. See also S Barnes and M Blakeney, *Advertising Regulation*, Law Book Co, 1982 at p 39.

### III. The Trade Practices Act 1974 (Cth)

Section 52 of the Trade Practices Act is well known:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

It is this provision which determines the legitimacy of much advertising which is undertaken in Australia.<sup>29</sup>

#### (a) Comparative Advertising and the Trade Practices Act

Whilst in some countries comparative advertising is regarded as a form of unfair competition and is prohibited,<sup>30</sup> in Australia such advertising is permitted provided it is not false, misleading or deceptive. In fact, the Trade Practices Commission has endorsed the proper use of the technique:

[Section 52] does not ... prohibit comparative advertising and the Commission acknowledges the value of comparative advertising if it is factual and informative.<sup>31</sup>

The judiciary in Australia has also endorsed such views. Recently Heerey J in *Country Road Clothing Pty Ltd v Najee Nominees Pty Ltd*<sup>32</sup> observed that:

... advertising does not infringe the Trade Practices Act merely because it is effective. On the contrary, effective advertising is part of that vigorous competition in the marketplace which the Act is intended to protect and promote.

... [T]he comparative advertiser who gets his facts right should have no fear of section 52.

Nevertheless, the use of comparative advertising techniques does have its risks. Accuracy is essential.

Consumers may be misled by ... comparisons between the advertiser's goods or services and those of a competitor that fail to compare 'like with like'. Examples ... would be comparisons of the performance of an eight cylinder car with a competitor's six

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29 Other sections in Part V of the Trade Practices Act, in particular ss 53 and 55, also prohibit false or misleading advertising claims.

30 See D Harland, *The Control of Advertising — A Comparative Overview*, (1993–94) 1 CCLJ 95 at p 109.

31 Trade Practices Commission, *Consumer Protection Advertising Guidelines*, Information Circular No. 10, 20 June 1975. See also Trade Practices Commission, *Advertising and Selling*, Cth of Aust, 1991 at pp 16–17.

32 (1991) ATPR 41-106 at 52,637–52,638.

cylinder model or the price of a standard model with that of a competitor's deluxe model where the material differences between the models are not disclosed.<sup>33</sup>

Examples of such conduct can be seen in *Makita (Aust) Pty Ltd v Black and Decker (Australasia) Pty Ltd*,<sup>34</sup> where a more powerful drill was tested against a competitor's less powerful drill with 'amazing' results; and in *TPC v Telstra Corporation Ltd*<sup>35</sup> where competitive price comparisons were not accurately portrayed.

In the latter case the Trade Practices Commission submitted that where advertising involves comparatives there is a higher burden upon the advertiser to be accurate. It referred to several cases,<sup>36</sup> including *Stuart Alexander & Co v Blenders Pty Ltd* where Lockhart J said:

When a person produces a television commercial that not only boosts his own product but, as in this case, compares it critically with the product of another so that the latter is shown up in an unfavourable light by the comparison, in my view he ought to take particular care to ensure that the statements are correct.<sup>37</sup>

Although Hill J acknowledged that errors in comparative advertising may have a greater potential to mislead consumers than statements made in ordinary advertising which may be perceived as 'puffs',<sup>38</sup> his Honour nevertheless felt it was 'unnecessary to elevate what is said in those cases into a principle of law'.<sup>39</sup>

## **(b) Advantages of the Trade Practices Act Compared to the Tort of Injurious Falsehood**

### **(i) No need to prove falsity**

The common law requires a statement to be false, whereas section 52 regulates conduct which is misleading or deceptive. The courts have recognised that a statement can be misleading, even though it is literally true.<sup>40</sup> Mr Justice Stephen made this point in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd*:

To announce an opera as one in which a named and famous prima donna will appear and then to produce an unknown young lady, bearing by chance that

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33 Trade Practices Commission, *Advertising and Selling*, Cth of Aust, 1991, at p 16 and see *State Government Insurance Commission v J M Insurance Pty Ltd* (1984) ATPR 40-465.

34 (1990) ATPR 41-030.

35 (1993) ATPR 41-256.

36 *SGIC v JM Insurance Pty Ltd* (1984) ATPR 40-465 and *HCF v Switzerland Aust Pty Ltd* (1987) ATPR 40-830.

37 (1981) ATPR 40-244 at p 43,203.

38 See also *Country Road Clothing Pty Ltd v Najee Nominees Pty Ltd* (1991) ATPR 41-106 at 52,637.

39 *Supra* n.35 at 41,454.

40 See *P Lorriland Co v FTC* 186 F2d (1950).

name, will clearly be to mislead and deceive. The announcement would be literally true but nonetheless deceptive and this because it conveyed to others something more than the literal meaning which the words spelled out.<sup>41</sup>

As Dr W J Pengilley so accurately says, the 'question of truthful impression is just as important as the question of the literal truth'.<sup>42</sup> In this regard, the courts have recognised that the public does not always carefully scrutinise advertising claims, and that advertisements conveying misleading impressions will infringe section 52. As was said by Lockhart J in *WTH Pty Ltd (t/a Avis Australia) v Budget Rent-A-Car System Pty Ltd*:

Impressions gained by the viewer of a television advertisement such as this are not only from the spoken word but from the visual images in conjunction with the spoken word; it is the overall impression that matters.<sup>43</sup>

(ii) No need to show intent (malice)

It will be recalled that the tort of injurious falsehood requires malice. It is well established that a breach of section 52 does not require intent. As Gibbs CJ said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*:

A corporation which has acted honestly and responsibly may be rendered liable to be restrained by injunction, and to pay damages, if its conduct was in fact misleading or deceptive or is likely to mislead or deceive. The liability imposed by section 52 ... is quite unrelated to fault.<sup>44</sup>

The effect of this is that a plaintiff may be able to bring an action even though the knocking copy was made without any malice or intent.

(iii) No need to prove damage

Actual loss is required for an action to succeed under the tort of injurious falsehood. By way of confirmation one need only refer back to the case involving the brewer and the mare.<sup>45</sup> However, under the Trade Practices Act an injunction can be obtained to restrain an advertisement which is misleading or deceptive without the need to prove loss, although the likelihood of damage will have a bearing on the exercise of the discretion to grant the injunction. Furthermore, it is not necessary to show that any member of the public has actually been misled.<sup>46</sup>

41 (1978) 18 ALR 639 at 646-7.

42 *Trade Practices and You*, Legal Books, 1992, at p 150.

43 (1984) ATPR 40-479 at p 45,404. See also A Terry, *Misleading and Deceptive Conduct*, CCH, 1991, at p 213: 'True statements coupled with other conduct may result in a misleading impression'.

44 (1982) 149 CLR 191 at 197.

45 *Dickes v Fenne* (1639) 82 ER 411.

46 See P Clarke, 'Liability under the Trade Practices Act for Comparative Advertising' (1988) *ABLR* 87 at pp 104-105.

**(iv) No need to show disparagement**

The tort of injurious falsehood requires a disparagement of the plaintiff's goods. This is not essential under section 52. This can be illustrated by reference to *Colgate Palmolive Pty Ltd v Rexona Pty Ltd*<sup>47</sup> where the defendant ran a blockbuster advertising campaign, incurring expenditure of \$4.5 million, in an attempt to show that it had something special to sell. The product was Aim toothpaste, containing both fluoride and citraden. It was advertised as the 'first true anti-plaque toothpaste' which slowed down 'plaque re-growth between brushings by an astonishing 50–90 per cent better than the best known family toothpastes'. Colgate held around 60% of the toothpaste market in Australia. It objected to the advertising claims of Rexona on the grounds that they had not been scientifically proven, and were thus misleading or deceptive in breach of section 52.

Lockhart J in a preliminary hearing granted an injunction because he was not satisfied the claims could be substantiated:

It is the plain purpose of the Act to require truthful conduct in the marketplace and that competition be free and fair. In this case, claims are made by Rexona which consumers themselves cannot verify. They rely on the technical experience of Rexona to assure the validity of the claims. As I have found that a prima facie case has been established, the public interest is to be taken into account, weighing heavily in favour of the granting of interlocutory injunctions.<sup>48</sup>

**(c) Persons Protected by the Trade Practices Act:  
The Target Audience**

The logical approach to ascertaining whether an advertiser has engaged in misleading or deceptive conduct initially involves identifying the relevant section of the public to whom the advertisement is directed.<sup>49</sup> The advertisement must then be judged by reference to all (or some) of the people who come within that target audience. Of course, the class of person protected by section 52 must vary according to the facts of each case. For example, the courts have often emphasised that the price of the product being purchased can be a significant consideration:

The average customer will not be the same for different products ... and will not have the same attitude at the time of purchase. Moreover, the attention and care taken by the same person may vary depending on the product he is buying; someone will probably not exercise the same care in selecting goods from a supermarket shelf

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47 (1981) 37 ALR 391.

48 *Ibid* at 403.

49 See *Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177.

and in choosing a luxury item. In the first case, the misrepresentation is likely to 'catch' more readily.<sup>50</sup>

The key issue, however, is clear. When assessing the impression likely to be made on the minds of persons within the target audience by an advertisement, are such persons to be defined as 'reasonable' persons within that audience, or does one accept that many people do not always act 'reasonably' when making purchasing and other commercial decisions?

One might well have thought that in undertaking this process the courts would turn to the familiar concept of the 'reasonable man', so well known at common law. Naturally enough, some judges have adopted this concept when adjudicating upon an alleged breach of section 52. However, the majority, perhaps cognisant of legislative intention, have turned their backs on the 'reasonable man'.

This divergence of opinion, brought about by the failure to include in the Act a definition of the person targeted for protection, has created 'a tension in the law' according to some commentators:

Contract law, like tort, measures the liability of a defendant by reference to any departure from the standard of behaviour that might be expected of the reasonable man. Should consumer protection law invoke an analogous standard of behaviour and ask whether a reasonable member of the relevant section of the public would be misled or deceived by the defendant's behaviour?; or should it ... ask whether any actual member of that section of the public would be misled or deceived? The latter test is tougher on the defendant. The 'gullible', 'not-so-intelligent', 'poorly educated', the young and the old may be more easily misled or deceived than the reasonable man and a wide range of behaviour that has this effect may be liable to penalty.<sup>51</sup>

This issue has been a long standing one. It was described by S Barnes and M Blakeney (1982) as follows:

To determine whether conduct is misleading or deceptive to the relevant audience the courts must attribute a legal standard of intelligence to the audience against which the conduct can be assessed. For example, it is necessary to consider whether the test is the effect of the conduct on the most stupid person, the reasonable man or on some person falling between these standards. To date the Federal Court has not provided any clear or consistent guidance to the appropriate standard to be applied under the Trade Practices Act. The Act itself provides no standard.<sup>52</sup>

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50 Per Gronthier J in *Ciba-Geigy Canada Ltd v Apotex Inc* (1992) 24 IPR 652 at 661; cited with approval by Davies J in *R & C Products Pty Ltd (t/a Samuel Taylor) v S C Johnson & sons Pty Ltd* (1993) ATPR 41-234. at 41,205 See also: *Sony Music Productions Pty Ltd v Tansing* (1993) ATPR 41-27; *Duracell Aust Pty Ltd v Union Carbide Aust Ltd* (1988) ATPR 40-918; and *Siddons Pty Ltd v The Stanley Works Pty Ltd* (1991) ATPR 41-111.

51 A Hurley and G Wiffen, *Outline of Trade Practices and Consumer Protection Law*, Butterworths, 1994, at p 206.

52 *Advertising Regulation*, Law Book Co, 1982, at p 97.

Several years on J D Heydon QC<sup>53</sup> analysed the authorities and concluded that the situation had changed little. According to Heydon, the authorities provide support for three possible approaches to defining the minimum standard to be expected of persons to whom alleged misleading or deceptive conduct is addressed.

The first group of cases asserts that there is either no standard or a very low one: 'once the relevant section of the public is established, the matter is to be considered by reference to all who come within it'.<sup>54</sup> Representative of this view is the judgment of Murphy J in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*:

The prudent buyer may not be misled, but not all buyers are prudent. The Act aims to protect the imprudent as well as the prudent. What degree of imprudence is protected? In applying a similar provision of the *Consumer Protection Act 1969* (NSW) the Industrial Commission said that an advertiser's responsibility extended to readers both 'shrewd ... and ingenuous, ... educated and ... uneducated and ... inexperienced in commercial transactions ... An advertisement might be misleading even though it fails to deceive more wary readers' ... In the United States the standard adopted under the *Federal Trade Commission Act 1914* in relation to a somewhat similar provision takes into account 'the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyse, but are governed by appearances and general impressions'. (See *Florence Mfg Co v J C Dowd & Co* (1910) 178 at p 75; also *Aronberg v Federal Trade Commission*). In *Federal Trade Commission v Standard Education Society* the Supreme Court pointed out that the fact that a false statement is obviously false (or an imitation obviously an imitation) 'to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious ...'<sup>55</sup>

The second group of cases asserts a slightly higher standard. Rather than including all persons falling within the target audience, it excludes 'quite unusually stupid' persons. This view can be found in the judgment of Franki J in *Annand and Thompson Pty Ltd v TPC*:

Broadly speaking, it is fair to say that the question is to be tested by the effect on a person, not particularly intelligent or well-informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is, for example, quite unusually stupid.<sup>56</sup>

The third view requires the objects of the conduct to take reasonable care of their own interests. Such an approach was adopted by Gibbs CJ in *Parkdale Custom Build Furniture Pty Ltd v Puxu Pty Ltd*:

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53 *Trade Practices Law*, Butterworths, 1989, at pp 5611–5615.

54 *Taco Co of Aust Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202 per Deane and Fitzgerald JJ.

55 *Supra* n.44 at 214–215.

56 (1979) 25 ALR 81 at 102.

Section 52 does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. It seems clear enough that consideration must be given to the class of consumers likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests.<sup>57</sup>

Given these divergent views, can a preferred approach be identified? Whilst one can glean support for each approach,<sup>58</sup> the view currently in vogue certainly appears to be the one outlined by Franki J.

A recent Federal Court decision squarely confronted the alternative approaches. In *Siddons Pty Ltd v The Stanley Works Pty Ltd* Wilcox and Heerey JJ concluded:

In *Finucane v NSW Egg Corporation* (1988) TPR 40-863 at pp 49,343–49,344; 80 ALR 486 at pp 515–516 Lockhart J preferred the second approach and held that the reasoning of Franki J was not overruled by the decision of the High Court in *Parkdale*. We would respectfully agree. As Lockhart J noted, Mason J spoke in *Parkdale* (at p 210) of the ‘ordinary purchaser’, without adopting what Lockhart J called ‘the more restrictive approach’ of Gibbs CJ. Brennan J, the other member of the court, did not deal with the point. **In practice, applicants who failed to take reasonable care of their own interests have frequently succeeded in section 52 claims.**<sup>59</sup>

Most textbook writers seem to have accepted that the second approach has the weight of authority behind it. According to J D Heydon QC, ‘For the time being the second approach must be regarded as having the bulk of support in authority’.<sup>60</sup> J Goldring, L Maher and J McKeough also conclude that despite ‘a possible reservation expressed by Gibbs CJ in the *Puxu* case (1982)’, the ‘prevailing view in Australia’ is that this is ‘one area of the law where the “reasonable man or woman” is replaced by the least sophisticated man or woman’.<sup>61</sup>

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57 *Supra* n.44 at 199.

58 Support for the first approach appears to have been given by Deane and Fitzgerald JJ in *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177; and support for the third approach can be seen in *Service Station Association Ltd v Berg Bennett & Assoc Pty Ltd* (1993) ATPR 41-266 per Gummow J.

59 Emphasis added. (1991) ATPR 41-111 at 52,719–52,720.

60 *Supra* n.53 at p 5614.

61 *Consumer Protection Law in Australia*, Federation Press, 4th ed, 1993, at p 245.

In *The Laws of Australia* the following view is put:

Although there are differences of judicial opinion on the minimum standard to be expected of a particular target audience, it is clear that conduct will be assessed by reference to what may be called the lowest common denominator, that is, those who are most likely to be misled. The inquiry is whether the conduct misled or is likely to mislead someone, not everyone. It is conceded by virtually all who have attempted a definition, however, that a line must be drawn to exclude those whose capacity falls well below the vast majority of those forming the group ...

The test which has attracted the most support is that which recognises that the entire target audience falls within the protection of [section 52] with the probable exclusion of the 'quite unusually stupid'.<sup>62</sup>

Given this considerable consistency of views, perhaps the law can be represented as follows:

#### THE AUDIENCE PROTECTED BY THE LAW

From: <b>The Reasonable Man</b>	<b>THE PROGRESSION</b>	
	To: <b>The Ordinary Person</b>	But excluding: <b>The Inane</b>
The man riding the omnibus	'He who just missed the Clapham omnibus'(1)	'He who expects Clapham the Clapham omnibus to detour to his front door'(1)
Is an average prudent person	Does not always act reasonably	
Is free from idiosyncrasies, over-apprehension and over-confidence	Can be ignorant, unthinking and credulous	Includes dullards or dotards(2)
	Is often inexperienced and uneducated	Is 'abnormally foolish or deranged'(3)
	Is perhaps slightly below average intelligence	Includes 'the moron in a hurry'(4)
Is an intellectual automaton	Is a fairly imperfect type of person	Is 'one with a propensity for unbounded flights of fancy' (5)
Probably does not exist	A bountiful thriving species	An 'insignificant and unrepresentative segment of the public'(6)
<p>(1) W J Pengilly, 'Section 52 of the Trade Practices Act: A Plaintiff's New Exocet?' (1987) <i>ABLR</i> 247 at p 225.  (2) Per Foster J in <i>Tobacco Institute v AFCO</i> (1993) ATPR 41-199 at pp 40,775-40,776.  (3) J D Heydon QC, <i>Trade Practices Law</i>, Butterworths, 1989, at pp 5616/1-5617.  (4) Per Spender J in <i>Pacific Hotels Pty Ltd v Asian Pacific International Ltd</i> (1986) ATPR 40-730 at p 47,967.  (5) See <i>FTC v Sterling Drug Inc</i> 317 F2d 669 at 676 (1963).  (6) Trade Practices Commission, <i>Advertising Guidelines</i>, Information Circular No. 10 (1975) para 17(2)(b).</p>		

62 35 'Unfair Dealing', Law Book Co, at pp 68-70.

Having spent some time discussing and detailing how the target audience in advertising should be defined, it is important to keep the issue in perspective. In *TPC v Telstra Corporation Limited* Hill J said:

Perhaps too much emphasis can be placed on this apparent divergence of opinion. In the end, the question is not whether account is to be taken of the effect of the conduct upon the gullible, but whether the conduct in question is misleading or deceptive. The statutory question is best tested in a case such as the present, by reference to the effect of the conduct upon the class of persons who are likely to read and consider the advertisement, the class having the qualities discussed by Franki J ...

[T]he advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error ...<sup>63</sup>

Whilst the comments of Hill J are legitimate, his Honour still appears to support the concept of the 'ordinary person'. When all is said and done, there is little doubt that such a concept is a more realistic one than the concept of the 'reasonable man'.

#### (d) Puffery and the Trade Practices Act

The common law, as previously observed, has tended to take a liberal view towards puffery. The logic is that the public, represented by the 'reasonable man', will be dismissive of many advertising claims. 'The defence of puffery arose at a time when the common law assumed a healthy scepticism on the part of consumers'.<sup>64</sup>

Is 'puffery' a legitimate defence to an alleged breach of the Trade Practices Act? The answer is a qualified 'yes'. In *Stuart Alexander & Co v Blenders Pty Ltd*,<sup>65</sup> a television advertisement compared the price of the applicant's 'Moccona' brand of coffee with the respondent's 'Andronicus' brand of coffee. The means of comparison was a shower of silver coins into jars representing the product of the respective parties. The pile of coins in the applicant's jar was about twice as high as that in the defendant's. In the retail marketplace evidence revealed that the applicant's coffee was only about 50% more expensive than the defendant's. Lockhart J did not consider this means of price comparison to be a contravention of the section, suggesting that

... a robust approach is called for when determining whether television advertisements of this kind are false, misleading or deceptive. The public is accustomed to puffery of products in advertising. Although the class of persons likely to see this commercial is wide, it is inappropriate to make distinctions that are too fine and precise.<sup>66</sup>

63 (1993) ATPR 41-256 at 41,453.

64 S Barnes and M Blakeney, *Advertising Regulation*, Law Book Co, 1982, at p 39.

65 (1981) 37 ALR 161.

66 *Ibid* at 164-165. See also *Glev Pty Ltd v Kentucky Fried Chicken Pty Ltd* (1994) ATPR 41-299.

Despite this judicial recognition of puffery, it must be recognised that the concept of puffery 'has undergone progressive modification over time'.<sup>67</sup> A number of commentators have suggested that the courts will gradually adopt a less benevolent approach when dealing with puffery as a defence to an alleged breach of the Trade Practices Act. In 1987 Dr W J Pengilley predicted:

It is not at all unlikely that courts in the future will show a less tolerant attitude towards product puff than they have to date.<sup>68</sup>

Such a conclusion is hardly unexpected. With widespread judicial recognition being given to the need to protect the consumer of 'slightly below average intelligent', as opposed to the 'reasonable' person, advertising claims are now judged according to whether they are believable to a target audience which includes the gullible and incautious, the poorly educated and the inexperienced. As D W Greig and J L R Davis suggest, the:

latitude afforded to sellers of goods during the 19th century in the 'sales talk' (or puffs) in which they could indulge without incurring legal liability ... is quite alien to the philosophy of the Trade Practices Act. It is scarcely an answer to the charge of misleading or deceptive conduct to say that no reasonable person would have believed the commendation, although it might be an answer for the respondent to establish that no one could have believed an especially preposterous claim.<sup>69</sup>

Given this background, it is not surprising that the Trade Practices Commission, whilst acknowledging the legitimacy of some forms of puffery in advertising, has expressed the view that:

The law does not prohibit imaginative advertising or the use of humour, cartoons, slogans etc. Regardless of how the message is communicated, the message itself should not be 'misleading or deceptive' or 'likely to mislead or deceive' ... Superlatives and comparatives that are self-evident exaggeration or puffing are unlikely to mislead anyone ... However, representations and claims that take on a factual character, particularly in quality and price terms, may amount to a breach unless they are capable of substantiation.<sup>70</sup>

Support for this view has also come from the Federal Court. In *Budget Rent-A-Car Systems Pty Ltd v Dewhirst & Ors*<sup>71</sup> Budget complained when its competitor

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67 S Barnes and M Blakeney, *Advertising Regulation*, Law Book Co, 1982, at p 39.

68 W J Pengilley, 'Section 52 of the Trade Practices Act: A Plaintiff's New Excuse?' (1987) *ABLR* 247 at p 258.

69 *Law of Contract*, Law Book Co, 1987, at p 810.

70 Trade Practices Commission, *Advertising and Selling*, Cth of Aust, 1991, at p 16.

71 (1984) ATPR 40-485.

in the car rental market, Hertz, advertised a credit card as follows: 'It puts you way ahead even before you start because it works like no other card'. This was held to be misleading, because the credit card provided by Budget offered very similar benefits.

I have ... come to the conclusion that the statements made in the brochures should be given weight — that they do have a significant effect. In this light, it seems to me that the statements cannot be looked upon as mere puffing. They are not statements which are mere exaggeration or statements incapable of objective proof, rather they are statements of fact and they are wrong.<sup>72</sup>

There have been several cases where comparative statements have been made, claimed to be puffery by the advertiser, which the courts have held to be misleading. Thus, statements that new home units would be 'bigger and better' than certain existing ones,<sup>73</sup> that a firm's health insurance cover was 'the best value health cover you can buy',<sup>74</sup> and a car insurance company's claim that if you did not insure with it 'you will pay too much',<sup>75</sup> have all been held not to be puffs.

Whether particular statements constitute puffery is not easy to determine. Apart from the text itself, much will depend on the context in which the statement is made, the overall impression conveyed, and the target audience.<sup>76</sup>

### (e) Summary

The Trade Practices Act has established a new and effective regime for regulating advertising in Australia. It was arguably long overdue. The ease of bringing an action compared to the problems of proof associated with the tort of injurious falsehood has been detailed above.

The types of approach ... towards establishing that conduct is misleading or deceptive have become well recognised in many jurisdictions. They were developed because it was recognised that insistence on such matters as proof of actual damage, that the hypothetical 'reasonable man' would have been deceived and intention to deceive would make effective control under modern marketing conditions extremely difficult and that the necessity in many cases for proof of such elements was one important reason why the traditional criminal law and law of obligations had proved quite inadequate to control consumer deception.<sup>77</sup>

72 *Ibid* at p 45,594.

73 *Byers v Dorotea Pty Ltd* (1987) ATPR 40-760.

74 *HCF of Aust Ltd v Switzerland Australia Health Fund Pty Ltd* (1988) ATPR 40-846.

75 *State Government Insurance Commission v J M Insurance Pty Ltd* (1984) ATPR 40-465.

76 See *Hoover (Aust) Pty Ltd v Email Ltd* (1991) ATPR 41-149 which involved an audience of specialists.

77 D Harland, 'The Control of Advertising — A Comparative Overview' (1993-94) 1 *CCLJ* 95 at p 103.

## IV. Comparison of Injurious Falsehood and s 52 Trade Practices Act

Injurious falsehood	Section 52
False statement must be made	Misleading or deceptive conduct must be engaged in — impression important
Malice required	No intent necessary
Actual damage must be incurred	No need to establish loss to obtain a remedy such as an injunction
Disparagement essential	Disparagement not required if advertisement is misleading or deceptive
Puffery often available as a defence	Puffery available as a defence, but in a more limited form
Reasonable man utilised	Credulous consumer protected
Trader brings action	Trader can bring action, but public interest also important
Damages and injunction available	Wider range of remedies available, including corrective advertising

### Case Law Analysis

As previously indicated, we intend to now refer to the two injurious falsehood cases outlined earlier in this article and pose the question — would they have been decided differently under the Trade Practices Act?

#### 1. *McDonald's Hamburgers Ltd v Burgerking (UK) Ltd* [1986]

We suggest that the result of this case would be different under the Trade Practices Act. We believe a significant number of ordinary credulous consumers would be left with the impression that the 'Big Mac' is not made of 100% pure beef after viewing an advertisement such as the one used in this case. Admittedly, the statement that 'Unlike some burgers, [the Whopper's] 100% pure beef, flame grilled never fried, with a unique choice of toppings' was literally true. However, given that the 'Big Mac' patty is fried, and that the 'Big Mac' does not come with a choice of toppings, we believe the overall impression the advertisement conveys is that the 'Whopper' is being compared to the 'Big Mac'. If so, it is logical to conclude that the 'Big Mac' patty is also not 100% pure beef. A deceptive or misleading impression arguably has been created, in breach of section 52.

It is true that knowledgeable consumers familiar with the 'Big Mac' would not have been misled or deceived by the advertisement. However, in *World Services*

*Cricket Pty Ltd v Parish*<sup>78</sup> the Full Court of the Federal Court took a wide view of the audience for an advertisement for cricket matches appearing in the *Australian Women's Weekly*. It was said to include both persons knowledgeable about cricket and those without such knowledge. The fact that experts would be aware that the advertised cricket matches were not organised by or with the approval of the Australian Cricket Board was irrelevant.

The advertiser must be assumed to know that the readers will include both the shrewd and the ingenuous, the educated and the uneducated and the experienced and inexperienced in commercial transactions. He is not entitled to assume that the reader will be able to supply for himself or (often) herself omitted facts or to resolve ambiguities. An advertisement may be misleading even though it fails to deceive more vary readers.<sup>79</sup>

On this basis the non-expert or infrequent purchaser of hamburgers might well be misled by Burgerking's advertisement, thus involving a breach of section 52.

In the judgment delivered in *McDonald's v Burgerking* Whitford J recognised that some people read advertisements more carefully than others, but concluded that the majority would only be left with the impression that the 'Whopper' 'was something better than just the ordinary "Big Mac"'.

Advertisements are not to be read as if they were some testamentary provision in a will or a clause in some agreement with every word being carefully considered and the words as a whole being compared.<sup>80</sup>

However, in connection with section 52 of the Trade Practices Act, the words of Jenkinson J in *Calsil Ltd v TVW Enterprises Ltd* should be observed:

It may fairly be said that there is a degree of unreality in distinctions based on minor variations in verbiage of texts, neither of which is likely to be read attentively by more than a small proportion of those who look at advertisements. But if only a few persons—those who trouble to read in an effort to understand—are likely to be misled into an erroneous belief, the publication of the advertisement will constitute misleading conduct.<sup>81</sup>

The final defence Burgerking could rely on under the Trade Practices Act would be the argument that succeeded in *McDonald's Systems of Aust Pty Ltd v McWilliams Wines Pty Ltd*<sup>82</sup> viz that consumers reading this advertisement might wonder or be confused by the claims made, but would not be misled or deceived. On the facts, as indicated, we believe the advertisement read as a whole is

78 (1977) 16 ALR 181.

79 *Ibid* at 198.

80 *Supra* n.6 at 58.

81 (1984) ATPR 40-451 at p 45,217.

82 (1979) ATPR 40-108.

misleading. Of course, in contrast to injurious falsehood, intention to mislead is not required in a section 52 action. This was the major stumbling block in the actual case brought by McDonald's against Burgerking in the United Kingdom.

## 2. *White v Mellin* [1895]

Predicting the outcome of this case if brought under the Trade Practices Act is more difficult. The defendant would again rely upon the defence of 'puffery'. On balance, however, we believe the advertising claim made by the defendant would not be classified as mere puffery and would be actionable under section 52.<sup>83</sup> The claim made by the defendant could be objectively assessed. Expert evidence was presented which suggested that Dr Vance's health food was not suitable for children under six months.

In *Colgate Palmolive Pty Ltd v Rexona Pty Ltd* Lockhart J stated:

The relevance of public health or safety, although always an important consideration, admits of degrees of importance. Some claims may go to matters of life and death whilst others may be at the other end of the scale. Claims like those in the present case, relating to dental health, lie somewhere in between.<sup>84</sup>

Along the same lines was the view expressed by Shepherd J in *Tobacco Institute of Aust Ltd v AFCO*:

The advertisement in question related to a matter affecting the wellbeing and health of the nation. Plainly the public interest was very much involved. Those responsible for the advertisement were under a heavy responsibility to be accurate about what was said in it. The advertisement ought to be strictly construed. It should not be given any benevolent construction favourable to the advertiser.<sup>85</sup>

J D Heydon QC suggests that a defendant may infringe section 52 where the gullibility of the public is taken advantage of by conduct deliberately pandering to some deep-seated human fear or desire.<sup>86</sup> Appeals to parental love of children and concern for their health can be utilised, as was the case in an advertisement for bread which claimed to contain nutritional elements which would produce dramatic growth in children.<sup>87</sup>

The claim made by the defendant in *White v Mellin* was quite specific viz that the product was far more nutritious. It arguably leaves the ordinary member of the public, particularly young mothers and fathers, with a misleading impression.

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83 But see Philip Clarke, 'Liability under the Trade Practices Act for Comparative Advertising' (1988) ABLR 98 at p 109.

84 *Supra* n.47 at p 403.

85 (1993) ATPR 41-199 at p 40,759.

86 *Supra* n.53 at p 5618.

87 *ITT Continental Baking Co v FTC* (1976) 1 Trade Cases 60758.

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Finally, we will examine two cases where the Trade Practices Act was successfully relied on, and ask whether the tort of injurious falsehood would also have been infringed. We believe not, thus confirming the wider application of section 52 to advertising claims.

1. *Dewhirst & Kay Rent A Car Pty Ltd v Budget Rent-A-Car Systems Pty Ltd*<sup>88</sup> [1986]

**Facts:** The defendant conducted a large business hiring motor vehicles to the public. In a magazine it made a statement that it had established itself as the leader in the rental car market for luxury cars. Budget objected to this statement on the grounds that it amounted to an assertion that the defendant had the largest market share of the rental car market for luxury cars. Budget in fact had a larger share than the defendant.

**Held:** A claim to leadership in the market, in the context of this case, is to be understood in current parlance as a claim to have the largest share of that market. This is a specific and reasonably precise assertion of fact, one which is incorrect, and therefore misleading in breach of section 52.

**Summary:** We believe that the defence raised by the defendant, puffery, would have succeeded in relation to the tort of injurious falsehood. The word 'leader' could be understood as meaning one who is innovative, for example, as was contended by the defendant in this case.

We suggest that claiming to be a 'leader' in the marketplace is not greatly different from claiming to be the 'best in the world', a claim treated as mere puffery in *De Beers Products v Electric Co of New York*.<sup>89</sup> The 'reasonable man' would arguably take such claims with 'a large pinch of salt'.

2. *Duracell Aust Pty Ltd v Union Carbide Aust Ltd*<sup>90</sup> [1988]

**Facts:** The defendant utilised a boisterous and short-lived 30 second television advertisement, featuring Mark Jackson, to claim superiority for its batteries over those of Duracell. The claim was made with regard to the 'new Energizer Double AA batteries'. The claim was that the batteries 'last longer on average than Duracell' and 'Tests prove it in AA size'. Because of the nature of the advertisement Duracell alleged that it did not invite careful analysis, and thus gave the overall impression to viewers that the comparison being made was general and not limited to the new AA batteries (the old form of AA battery still being on the market).

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88 *Supra* n.8.

89 [1975] 2 All ER 599.

90 *Supra* n.9.

**Held:** A prima facie case that the advertisement was misleading in breach of section 52 was made out. A viewer would be unlikely to understand this claim as being limited to new batteries of a particular size.

**Summary:** Under the tort of injurious falsehood a false statement must be made. In this case the defendant could argue that literally it had told the truth. In the advertisement itself the new AA size battery was the only battery shown visually on the screen, and the words used only made mention of the new AA size battery. Only under the Trade Practices Act can one succeed on the grounds that a misleading impression is given to consumers. In reaching his conclusion in this case Burchett J emphasised that only a:

... consumer with excellent vision, exceptional powers of observation, and a retentive memory, might perhaps notice that the batteries he was about to buy were not exactly as illustrated in the television advertisement.<sup>91</sup>

Could this extract not describe the hypothetical 'reasonable man' so long recognised at common law? If so, it could be argued that such a person would not assume that the advertising claim was a claim for superiority of the entire range of Energizer batteries over those of Duracell, but would recognise it as a claim confined to the new AA size battery. It follows that no false statement as required to establish injurious falsehood would exist.

Putting this argument to one side, it would still be possible at common law to argue that an advertising claim that a product 'lasts longer' than a competitor's product is acceptable puffery or hyperbole. The 'reasonable man' never expects detraction, 'always over-emphasis'.

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Although the latter of these two cases was admittedly only an interlocutory hearing, the Federal Court held that there was a prima facie case established and granted an interlocutory injunction. In the other case an infringement was established and a restraining order granted. Can there be much doubt that the common law courts would have dismissed these actions on the grounds of puffery, whilst at the same time pronouncing that the courts are not designed to be a forum for determining which of two products is better?

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91 *Ibid* at p 49,860.

## V. Conclusion

The primary object of this article has been to show that the Trade Practices Act, as with other areas of the law, has significantly changed the legal position relating to comparative advertising. The goal posts have shifted, although how far is not precisely clear. As a consequence, it is likely that the tort of injurious falsehood will rarely be used in the future. The irony is that although section 52 of the Trade Practices Act is primarily concerned with protecting consumers, traders have been the major beneficiaries of the section.<sup>92</sup>

The main reason behind this change to the rules of the game is the adoption of standards designed to protect the ordinary credulous consumer. The 'reasonable man', who looks upon advertising claims with scepticism, appears to play a small part in this area of the law, so much so that most judges have banished him altogether. On the other hand, some members of the judiciary have suggested that too much emphasis has been given to this aspect of section 52. It must be acknowledged that, whilst the concept of the 'ordinary person' is certainly a more realistic one than the concept of the 'reasonable man', in truth both the 'reasonable man' and the 'ordinary person' are merely the personification of the court's social judgment. The change in legal standards which has led to the gradual disappearance of the 'reasonable man' from the world of advertising regulation is simply an inevitable consequence of social change.

The underlying rationale for this change is easy to identify. For the courts to allow comparative advertisers to utilise the puffing defence to the same extent as it was available at common law would be diametrically 'opposed to the current legislative sensitivity to consumer interests'.<sup>93</sup> It is for this reason that we have little doubt that many of the common law decisions on comparative advertising would be decided differently under section 52 of the Trade Practices Act. As Wilcox J has observed:

To discerning customers comparative advertising may be the most persuasive of all advertising. Because a comparative advertisement purports to state precise facts regarding the qualities or prices of competing products, it is apt to be believed and directly to influence purchasing decisions. It follows that errors in such advertisements are especially significant. They have the potential to mislead consumers, to the disadvantage both of the consumers themselves and of the competitor about whose product the mis-statement is made.<sup>94</sup>

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92 Provided an action is designed to prohibit behaviour misleading or deceptive to consumers, the High Court has confirmed that a private trader action can be brought under s 52: see *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 140 CLR 216. Even the 'consumer protection' element no longer seems necessary, as long as the conduct occurs 'in trade or commerce': *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

93 S Barnes and M Blakeney, *Advertising Regulation*, Law Book Co, 1982, at p 41.

94 *HCF v Switzerland Aust Pty Ltd* (1987) ATPR 40-830 at pp 48,950-48,951.

His Honour concluded with a remark which would provide little comfort to the Roger Thornhills<sup>95</sup> of this world.

In the area of comparative advertising there is little scope for copywriter's licence.

It can thus be seen that the foundations which have traditionally supported the advertising industry — the concepts of puffery and the 'reasonable man' — appear to have crumbled, or at the very least to be in a serious state of decay.

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95 See quote at commencement of this paper.