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Misleading Advertising: Prevent or Punish?¹

Patrick Fitzgerald*

I

“Promise, great promise,” said Dr. Johnson, “is the soul of advertisement.” But what if the promise isn’t kept? What sort of crime is that? No crime at all, at common law. The common law allotted promises and their breach not to the criminal law but to the law of contract. More important still, the law saw the problem of advertising as part of a wider problem to be solved not by law but by a different institution – the market.

The problem of advertising, after all, is one special facet of the conflict between seller and buyer.² According to orthodox economic theory each seeks to maximise his own interest – the seller to get the highest price, the buyer the best buy. Hence the need for advertisement. For the seller must maximise his persuasion of the buyer, while the buyer must maximise his information about the product. As one writer observes, “the conflict between the seller and the buyer becomes clear: the former must, within the bounds of truth, make claims which will result in the maximum attraction of the buyer to the product; while the latter wants as much relevant factual information, without unnecessary or deceiving puffery, as possible.”³

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1. Based on a study “Strict Liability in Practice” prepared for the Law Reform Commission of Canada. Acknowledgments are due to the personnel in the Department of Consumer and Corporate Affairs and the Department of Justice for their help and co-operation. Also to my research assistant, Mrs. B. Fitzgerald.

2. There is, however, the deeper problem that commercial exploitation through excessive advertising dehumanizes the individual and degrades him to the level of a mere consumer in order to satisfy the wants of the producer and seller. On the whole notion of commercial exploitation I have benefited from some deeply perceptive observations in a forthcoming study paper by Professor R. A. Samek on Obscenity.

3. Ronald I. Cohen, *Misleading Advertising and the Combines Investigation Act (1969)*, 15 McGill L.J. 210.

In an ideal world such a conflict solves itself. For the market produces an equilibrium. Let the seller's claims outstrip the truth and demand for his product eventually slumps. The trouble is, the slump is a long-term affair. In the short run the buyer needs speedier protection. He needs the protection of the law.

Also, in the real world the seller-buyer model is too simple, in at least two different ways. First, advertising in the world of today is big business. Cohen estimated that by 1969 advertising in the United States had grown to an eighteen billion dollar industry, while in Canada it increased 128% between 1954 and 1965.⁴ Secondly, there is more than one party today for the buyer to contend with. In fact there are three — seller, advertiser, and media: typically the seller hires an advertising firm to promote his product on television, radio and so on.

So the consumer needs protection against all three. From the seller he needs protection against dishonesty and deceit. From the advertiser he needs protection against manipulation stultifying freedom of choice. From the media he needs protection against advertisement pollution.

Of these three needs Canadian law satisfies only the first. Whereas in the United States “both the informative and persuasive aspects of the content of any advertisement may be questioned, in Canada the law deals basically only with false information.” And even this position took time to reach. Common law history and doctrine show why. The general attitude of common law was against penalising mere words alone, as can be seen from the time it took to establish that an action lies for careless statements. In any case puffery was always allowed: the huckster had a licence to exaggerate and the more fool he who fell for the line and agreed to be had. And goods that failed to live up to the claims made about them were a matter more for the law of contract than the criminal law, more a question of word-breaking than of lying.

So the common law view was “buyer beware!” It was up to the buyer to keep an eye on the seller and see he gave full weight and full measure. “What is it to the public,” asked the judge in an early case, “whether Richard Webb hath or hath not

4. Cohen, *ibid.*

his eighteen gallons of amber beer?”⁵ But it would be a matter for the public if the utmost prudence on Richard Webb’s part could not have ensured that he got what he paid for. What if the seller’s weights and measures themselves were false? Against that sort of trickery no one but a weights and measures inspector could guard. That sort of trickery was a fraud on the public itself and was established early on as the crime of public cheating.

Private cheating too came under the law in due course. For eventually the offence of obtaining by false pretences came into the criminal law. Here too, though, the law was still careful never to penalise mere puffery or breaking your word. The pretence had always to be one of present and existing fact: the defendant had to lie. The accent was where it has always remained – on deception.

Deceptive advertising in Canada today, however, is a matter for legislation. It is partly dealt with by sections 36 and 37 of the Combines Investigation Act. In an Act dealing almost exclusively with mergers and monopolies it seems surprising to find these two sections on an apparently unrelated subject. Indeed, s. 37 was originally part of the Criminal Code, where it first appeared in 1914 as s. 406A, then later became and remained s. 306 till its removal to the Combines Investigation Act in 1969, originally as s. 33D. One reason for this removal was its lack of success in the Code. There were few prosecutions under it, because the police, not being specialists in this area, preferred to prosecute in areas closer to their own expertise, i.e. fraud; and there seems to have been only one reported case.

Meanwhile in 1960 s. 33c, later to become s. 36, had been added to the Act. The reason for the addition, as explained by Mr. David Henry,⁶ serves also to reveal the philosophy behind the inclusion of the two sections in this Act: “This provision was inserted after the combines branch had a number of cases brought to its attention where a vendor, in order to make it appear that the price at which he was offering an article was

5. *R. v. Wheatley* (1761), 2 Burr. 1125; and see Lord Holt C. J. “Shall we indict one man for making a fool of another?” in *Jones* (1704), 2 Ld. Raym. 1013.

6. Mr. Justice Henry was formerly Director of Investigation and Research, Combines Investigation Act.

more favourable than was actually the case, misrepresented the price at which the article was ordinarily sold in the market generally. Besides being dishonest and likely to mislead the buying public, this kind of tactics was regarded as unfair as a basis of competition.”⁷

Basically s. 36 prohibits misleading advertising with regard to price and s. 37 is wider and prohibits misleading advertising generally.⁸ Section 36 prohibits misleading representations to the public “concerning the price at which such or like articles have been, are, or will be ordinarily sold”, e.g. advertisements saying “our price \$100, regular price \$150” when the article is ordinarily sold for less than \$150. S. 37 prohibits, *inter alia*, advertisements “containing a statement purporting to be a statement of fact that is untrue, deceptive or misleading.” S. 36 creates a summary offence, s. 37 primarily an indictable one punishable by five years’ imprisonment. Both sections, the courts have held, create offences of strict liability.⁹

II

These two sections, then, are the law’s main weapons in the war against misleading advertising. How well have they worked? First, how have they worked *simpliciter*?

Misleading advertising is not a departmentally policed area of law. In this it is unlike weights and measures or food and drugs, areas where regular routine inspections bring to light many of the violations that end up in court. Misleading advertising is virtually self-policing. That is to say, offences come to the notice of the department primarily through complaints of consumers or competitors. They are dealt with by the Misleading Advertising Division of the Combines Branch.

7. Quoted by Cohen, *ibid.*, p. 629.

8. An excellent recent discussion on the law relating to misleading advertising can be found in “Combines Investigation Act – Misleading Advertising and Deceptive Practices” in (1972), Ottawa, L.J. 276 by J. J. Quinlan, Q.C., Director of Investigation and Research, Combines Investigation Act, Ottawa.

9. *R. v. Allied Towers Merchants Limited* [1965] 2 O.R. 628, [1966] 1 C.C.C. 220, 46 C.P.R. 239; *R. v. Firestone Stores Ltd.* [1972] O.R. p. 327, *R. v. Imperial Tobacco Products Ltd.* [1971] 5 W.W.R. 409. In *R. v. Albert Giftwares* (not yet reported) the question of *mens rea* was argued before the Supreme Court of Canada, but the Supreme Court found it unnecessary to decide the question for that case.

There are, in fact, three avenues leading to the investigation by the department of an instance of misleading advertisement. First, under section 7 any six persons, Canadian citizens, resident in Canada, of twenty-one or over, may make formal application to the Director of Investigation and Research for an inquiry into the matter. Secondly, if the Director has reason to believe that the Act has been or is about to be violated, he must cause an inquiry to be made. Thirdly, whenever he is directed by the Minister of Consumer and Corporate Affairs to inquire whether there is a violation, he must see that an inquiry is held (s. 8).

The vast majority of inquiries fall under the second head, and are made either because the Branch itself has had its eye on certain practices or merchants or because it has received complaints about certain advertising practices. The majority arise from complaints. Indeed, it has been the policy of the department to do all it could to encourage complaints. Considerable publicity was devoted to this end. And the publicity paid off.

Complaints come to the department from consumers, from competitors and from the Consumer Affairs Bureau. They are received either by the Trade Practices Branch in Ottawa, by the departmental regional offices or through Box 99. Since the introduction of s. 37 in mid-1969, the Misleading Advertising Division has received 7,500 complaints as of November 1972. At present the Division is receiving 250 complaints a month about misleading advertising only. About 300 cases have led to charges under ss. 36 and 37 during the period and the majority of prosecutions have been successful.

Another gauge of the size of the problem is the number of files opened each month in the departmental filing office. Each file relates to a complaint that has to be examined. In March, 1972, the number of files opened was 304. In April it was 262. In May, 304. And these were fairly average months repeating much the pattern of the last two years' overall trend.

So the volume of complaints — what we might call the case load — is high. The same can't be said for the human resources that have to cope with it. Without going into too much detail about the administration of the department, it is easy to see that the key person, when it comes to working out how many of the complaints can be dealt with and to what degree, is the

investigator. But the number of investigators across Canada is only twenty-one. It is clear, then, that scarcity of human resources is a crucial limiting factor as regards the processing of complaints and cases under the two sections.

For this reason the Combines Branch has been forced to take stock and articulate for itself a policy to follow. All the complaints must be looked into, in order to see if there is any substance in them. Investigation to this level, however, needn't cause undue strain on resources. The majority of complaints may well turn out to have little or no substance in them, or at least not to be worth pursuing further. For example, a scrutiny of relevant files revealed the following picture:

| | |
|--|-------------|
| Files closed without action, because preliminary investigation revealed no substance | 1767 |
| Files closed without court action after full investigation | 1208 |
| Files closed after court action | <u>167</u> |
| Total | <u>3142</u> |

While the prosecution cases form the biggest burden, especially in view of the evidentiary requirements regarding ordinary and regular price, investigation even only to the level resulting in closing the file without court action but after full investigation can be very time consuming. Added to this the Branch shoulders another, perhaps equally heavy, burden – a burden of an “educational” kind.

In addition to processing complaints and conducting inquiries the Branch also has been giving attention to the promotion of voluntary compliance. The programme of compliance is intended to be a vigorous and sustained programme involving education and explanation, discussion of business problems and the giving of opinions concerning the application of the Act. Businessmen are encouraged to discuss their problems with the department before they decide to introduce policies which might prove to be in conflict with the Act, and the Director and his staff study matters businessmen submit to them and indicate whether or not the adoption of proposed plans would lead the Director to launch an inquiry. As part of the programme of compliance senior staff members

undertake speaking engagements before trade associations and other business societies.

Clearly, then, without some policy of selection with respect to prosecutions, departmental resources would be strained beyond capacity. As the departmental handout dated June, 1972,¹⁰ puts it, staff resources which can be made available to investigate complaints are not unlimited. In order to meet the objectives of bringing about an overall improvement in the quality of market information directed to consumers, it will be necessary to concentrate in the selection of cases on those which are most likely to contribute to the objectives sought by the legislation. The principles followed in assessing the priority of complaints are the degree of coverage of the advertisement, the impact of the advertisement on the public, the deterrent effect of a successful prosecution and the selection of the best cases to allow the courts to establish new principles and clarify the law.

Selectivity, then, is manifestly part of departmental policy and is publicly articulated as such. To a lawyer, however, it is worth notice that of the four principles mentioned above not one is immediately and obviously concerned with the absence of *mens rea*. There is no public statement to the effect that offenders whose offence arises simply from error, inadvertence or mistake will not be prosecuted.

III

Empirical inquiry, however, showed a different picture. Research was undertaken to ascertain how far the lack of *mens rea* on the defendant's part led to a Branch decision not to prosecute.¹¹ The research was carried out primarily through a survey of departmental files, which enabled a comparison to be

10. Departmental News sheet, June 1972, p. 3.

11. Research was undertaken for the Law Reform Commission to discover how strictly the strict liability criminal law was enforced in the areas of misleading advertising, weights and measures, and food and drugs. It should be stressed that any conclusions in this paper are solely those arrived at in the research and are not to be taken necessarily as accepted by the Department.

made between prosecuted and non-prosecuted cases.^{11A} A survey was also made of files closed after preliminary investigation revealed that there was no substance in the complaint. And detailed discussions were held with all members of the Branch involved in taking the decision to prosecute or not to prosecute.

Out of files containing cases fully investigated we compared 100 prosecuted cases with 100 non-prosecuted cases. S. 36 accounted for 35 cases in each category, s. 37 for 65. The cases broke down as follows:

S. 36 Prosecuted

| | |
|---|-----------|
| Excuse of mistake not given | 26 |
| Excuse of mistake given — | |
| not accepted by Branch | 7 |
| accepted by Branch | <u>2</u> |
| (both prosecuted and both pleaded guilty). | <u>9</u> |
| Total | <u>35</u> |

S. 36 Non-prosecuted

| | |
|---|-----------|
| Cases dropped for reasons other than mistake (e.g. lapse of time, insufficient evidence) | 28 |
| Cases where mistake seemed to be the only factor | 3 |
| Cases where there was mistake and the advertiser had sought to remedy the harm by satisfying the complaining customer or by rectifying the advertisement or both . . | <u>4</u> |
| Total | <u>35</u> |

11A The total number of prosecuted cases linked for the period September 1970 – May 1972 was compared with a random sample of non-prosecuted cases for the same period.

S. 37 Prosecuted

| | |
|--|-----------|
| Excuse of mistake not given | 51 |
| Excuse of mistake given — | |
| not accepted by Branch | 12 |
| accepted by Branch | <u>2</u> |
| (both prosecuted: one pleaded guilty, the other prosecution was withdrawn) | <u>14</u> |
| Total | <u>65</u> |

S. 37 Non-prosecuted

| | |
|--|-----------|
| Cases dropped for reasons other than mistake | 46 |
| Cases where mistake seemed the only factor | 5 |
| Cases where “remedying the harm” seemed the only factor | 3 |
| Cases of mistake together with “remedying the harm” | <u>11</u> |
| Total | <u>65</u> |

These results suggested that where there is no fault there is no prosecution. Complete support is lacking, however, on account of three counter-examples — two under s. 36 and one under s. 37. The latter seemed explicable from the files: the claim was extravagant, the defendant was the original importer, and the foreign seller whose word he claimed to have relied on could not be prosecuted. Of the other two cases, the ones under s. 36, neither could be squared with the “no fault — no prosecution” hypothesis. So the finding was not there there is a 100% correlation between absence of fault and absence of prosecution, but that there is a high degree of correlation.

To test further the hypothesis that such a correlation exists we did two things. First we further analysed all the “no fault” cases and discussed them thoroughly with the Branch personnel to find out how far lack of fault was or was not a real factor in arriving at the decision. Secondly we made a sample

survey of files closed immediately after preliminary investigation because there was no substance in the complaint.

Our further analysis and discussion was revealing. Our conclusion was that mistake played a lesser role than we had imagined. On the other hand, if we widened the concept of “no moral fault” to cover all cases where for some reason or other it might be true that the seller or advertiser was not really being dishonest, then the hypothesis that the Director’s staff were not inclined to prosecute cases involving no moral fault seemed to stand up.¹² Of the hundred non-prosecuted cases (ss. 36 and 37) 47 were cases where “no fault” in this wider definition was argued and the remainder were cases where “no fault” was not argued and other factors prevented prosecution. Of the 47 cases where “no fault” was argued, 38 seem not to have been prosecuted because of this lack of fault and 9 because of other factors.

Non-prosecuted cases under ss. 36-37, where “no fault” was argued:

| | | |
|-----------------|---|-----------|
| | Mistake | 5 |
| | Mistake & cooperation | 5 |
| Reasons | Mistake & other factors | 6 |
| for not | Trivial matter | 5 |
| prose- | Cooperation | 3 |
| cuting | Cooperation & other factors (other than mistake) | 14 |
| | Other factors | 4 |
| | No offence | 5 |
| Total | | <u>47</u> |

Accordingly, the survey and detailed analysis shows that: (1) out of 200 cases in total the number of cases where “no fault” in a wider sense is raised is 71 – 35%; (2) out of 100 prosecuted cases “no fault” is raised in 24 cases – 24%; (3) out of 100 non-prosecuted cases “no fault” is raised in 47 cases – 47%; (4) out of this 100 the number of cases not prosecuted partly because of “no fault” in a wider sense is 38 – 38%.

12. This conclusion is parallel to that of the study by Hadden and Fitzgerald on the Factories Act in England: see Law Commission Working Paper 30: Strict Liability and the Enforcement of the Factories Act 1961.

In conclusion, “no fault” in this wider sense is a factor in the decision. On the other hand, if we narrow the areas of those cases where “no fault” in the wider sense was the only factor, then we find that the total of non-prosecuted cases was only 13.

This makes good sense in view of the law-enforcer’s perennial problem of scarce resources. This problem, though often invisible to the lawyer, is the all-important one to the law-enforcer. A legal researcher is naturally inclined to view the problem from the point of view of possible defences and to focus attention on the question of presence or absence of fault. Discussion with the Director and his staff, however, drew our attention to the quite different considerations which they, as administrators, have to take into account also — considerations which are obvious and based on common sense but which are easily lost sight of in a jurisprudential inquiry. For bearing in mind the extremely limited resources of the Director’s staff, one realises that uppermost in their minds must be the question whether a particular prosecution justifies its cost in terms of time, money, etc. This is why in some of the cases it was decided, however clearly an offence had been committed, that the triviality of the matter was such that it did not justify prosecuting. In our sample at least five cases fell clearly into this category. Moreover, we felt that there were others where, although this was nowhere spelt out and recorded, the same consideration applied. For the impression we got from the staff was that one of the overriding factors in applying and enforcing this area of law was the degree of harm caused by the misleading advertisement and the degree to which the public needed protection. And just as in ordinary law the gravity of an offence appears to be gauged partly by the amount of actual harm done and the “wickedness of intent” on the part of the defendant, so here too the seriousness of the matter seems to be measured partly by the extent of actual harm done and the degree of dishonesty on the advertiser’s part. So the less dishonest the advertiser, the more likely is the staff to regard the matter as not warranting prosecution.

This is partly common sense. It is partly also a result of the social reaction to offences committed “without fault” and above all of the reaction of courts. In this scarce resources operation the staff are highly concerned, as they made clear to us, to preserve their credibility in the courts. To “waste time”

prosecuting cases where the defendant was clearly in no way dishonest would do little to present the courts with the image of a Department seriously concerned with important and “real” offences. Indeed, two cases of our sample of 71 “no fault” cases bear this out. In one the court appears to have acquitted (wrongly surely from a strictly legal point of view) on account of the absence of fault. In the other the court convicted but considered the matter trivial and gave a minimum penalty.

The sample survey of files closed immediately was also revealing. Before examining these files we had a discussion with the staff member solely responsible for the cases at this stage. He gave us to understand that almost half the files are closed because they are without substance and that the rest divide equally into those where there is insufficient evidence, where there is no fault on the advertiser’s part, and where other action is more appropriate. The first half tend to be closed immediately, the second half after further information is received.

Inspection of the filing indexes and records revealed that by the end of the period under investigation about 3,700 files had been closed after preliminary investigation. We decided to survey a sample of 100 of these files. Accordingly, we took a randomised selection of one in 37 files. Our survey gave us the following figures:

| | |
|--|-------------------|
| Cases without substance | 46 |
| insufficient evidence | 12 |
| Other action more appropriate | 14 |
| Other factors (e.g. out of time) | <u>12</u> |
| | <u>84</u> |
| Mistake or improvement by defendant . . . | 10 |
| Customer satisfied | 3 |
| No further advertisement | <u>3</u> |
| | <u>16</u> |
| Total | <u><u>100</u></u> |

Our conclusion from these figures was that if we group the last three figures together there is a small yet sizable quantity of cases closed at this initial stage because the investigator or

administrator thinks that the lack of fault means that use of resources would not be justified in prosecuting. This was not out of line with our findings on the main survey and the detailed analysis. "No fault" does play some part in the decision not to forward a case for prosecution. It does not, however, play a conclusive part. Added to other factors it can render a case "not worth prosecuting". By itself it may not suffice, as is shown by the main counter-example to our thesis. On the other hand a tendency in the Director's staff not to prosecute if the defendant is not really being dishonest is clearly established. Equally, it is submitted, it is self-evidently justified. The object of the staff is to prevent fraud to the public and to ensure truthful advertising. This is an object best secured by education and enlisting the cooperation of advertisers rather than by too officious policing of the Act. A "strict liability administration" of the Act would be as costly as it would be counterproductive, it seems.

IV

How well have the sections worked? How successful have they been? First, what is the measure of success? The number of complaints received? The number fully investigated? Or the number prosecuted? Or is it the view the Branch takes of its work and its programme? Or the view taken by traders? Or the view taken by the consumer?

At a simple level we can state that the sections have worked to this extent, that a considerable number of complaints were received which would not have been so received in the absence of the Department of Consumer and Corporate Affairs' programme, that a whole lot of cases were fully investigated that would not otherwise have been, and that one hundred and sixty-seven cases were prosecuted that otherwise wouldn't have come to court. In other words the programme was put into operation. But has it done any good?

Again, we have to determine first how to measure this. To one who holds to the retributive ideal, presumably the fact that a number of firms were punished for wrongdoing would itself show that good had been done. The rest of us would want some other evidence — evidence that those firms had improved their practices, that other firms had been deterred by the examples

made of those prosecuted, and that the standard of advertising generally had gone up.

On this no full empirical investigation has yet been done. All we have so far is impressionistic evidence acquired partly from personal observation, partly from discussions with the three interests involved, the Branch, the traders and the Consumer Association of Canada.

Personal observation suggests that traders and dealers are taking increasing care to ensure that their goods and services live up to the promise contained in their advertisements. It is notable, for instance, how thoroughly a firm will check up on an advertisement or representation when faced with a complaint that it hasn't been honoured. And it is notable how far firms will go to satisfy customers' complaints. Noteworthy too is the frequency in the newspapers of published corrections to advertisements, often advertisements of the previous day. On the other hand, personal observation is inevitably limited, and in any case even if it gives an accurate picture how can we be sure that such improvements are due to the misleading advertising laws? Might they not have occurred anyway?

Discussions with the Branch too suggested the sections had brought improvements. Admittedly those in charge of a programme have a natural inclination to regard it as succeeding. Against this it must be remembered that through its investigations and its programme of education and compliance the Branch gains a far wider and more comprehensive picture of the whole field than anyone else can secure. Their conclusion is that traders are taking more care and part of their evidence for this is the number of traders seeking advice from the Branch before launching promotions and advertising programmes and the number showing eagerness to comply with Branch suggestions for improvements to safeguard their advertisements from inaccuracy. Besides, we must remember that many of the complaints to Box 99 come not from consumers but from competitors. For false advertising is seen — and was meant to be seen — as not only unfair to the consumer but also as unfair to competitors, as an unfair trading practice. So it does seem as though consumers and competitors are keeping traders on their toes.

Retailers certainly give this impression. Discussions with certain retailers and the Retail Council of Canada indicate that

the law has forced retailers to make extensive modifications to their advertising. Indeed retailers are not wholly displeased at this. Basically our impression is that as well as maximising profits they are also keen to give value and that any developments that help them improve or maintain standards are not unwelcome. There is also evidence, however, of anxiety in the trade arising from the fact that the offences under the two sections are offences of strict liability. The possibility of a gaol sentence for something done by error or mistake they find alarming. Nor do they subscribe fully to the conclusions of our survey, that by and large offenders without fault are not prosecuted. By contrast, they point to the Weights and Measures and the Food and Drugs legislation, which is also strict liability law but which is operated so as to incorporate in practice a highly articulated warning system, whereby (in general) prosecutions are only taken against those who are deliberately and knowingly violating the law or against those who are negligent because they have already been adequately warned by the inspector. This system the representatives of the retailers seemed to find quite unobjectionable. They only wished some similar feature could be written into the misleading advertising law.

The same can't be said of the consumer. According to discussions with the Consumer Association the fact that the offences under the two sections are offences of strict liability is by no means objectionable. For the consumer's main interest is that advertisements should be correct and accurate. He has no concern with the question whether inaccuracies are due to accident, mistake, carelessness or dishonesty. To him they are all inaccuracies — inaccuracies against which he wants to be protected and against which he is confident that the misleading advertising law and the Branch's programme is protecting him. In his view any improvement in advertising is wholly due to this very programme.¹³ The sections are protecting him against harm.

13. A recent opinion poll reported in the *Ottawa Citizen* September 22, 1973, suggests that there is little public confidence that advertising is more truthful now than it was. Of 700 adults personally interviewed across Canada in July, 43% thought most advertising was less truthful today than it was five years ago, 25% thought it was more truthful, 25% thought it was the same and 7% didn't know.

This, however, prompts a reconsideration of the whole concept of the “welfare” offence. The conventional wisdom about such offences is that we need them to protect the public against negligence and inefficiency in trade and that this protection is well secured by prosecuting offences in the criminal courts. In such offences, then, the prime consideration is the harm done to the public. It doesn’t really matter whether or not the defendant has been at fault. Whatever his moral culpability, it has no bearing whatsoever on the damage done to the consumer.

There is a parallel argument about road accidents. If I am run down and injured, what does it matter that the driver was not negligent? Does it lessen my injuries? Does it diminish my need for compensation? Blame and negligence have no place in the law of road accidents. All that matters is that I get my compensation. In other words, the driver – or society – must be made the insurer of the victim’s injuries.

What this suggests is not so much that drivers must be subject to strict liability, but that the whole subject must be removed from the area of tort. Likewise, the emphasis on harm to the public in the welfare offence discussions suggests, not that such offences should be offences of strict liability, but that they should be expunged from the criminal law. For in these cases too the main question is not “was the defendant at fault?” but “how can we prevent or undo the harm?”

Does prosecuting offenders do it? Is it the *best* way of doing it? Practice shows that law enforcers don’t necessarily think so. Basically there are two objectives: (a) to prevent harm, and (b) to undo such harm as has been done. As regards (a) law enforcers seem to rely less on prosecution and more on (1) education and (2) enforcement remedies. Admittedly education derives some – though not all – of its force from the support of criminal sanctions. On the other hand, the superiority of enforcement remedies over the ordinary criminal sanctions is striking. All that the latter can do is punish the defendant for his wrongdoing in the hope of teaching him a lesson and giving an example to others for the future. Enforcement remedies by contrast deal immediately with the harmful situation: the faulty scale can be sealed against use, the adulterated meat seized, the deceptive labels stickered and so on. Such remedies allow the

inspector to concentrate on the prime objective: getting rid of the danger or harm.

But what about (b), cases where the harm has already been done? What about the store that has already sold short weight? How else can we deal with this than by the criminal law? The snag here, though, in practice, is that conviction only derives its full force from publicity.

A similar problem arises in misleading advertising because there would be little point in impounding the advertisements after they have gone out and misled the public. You can seize wrong and deceptive labels even if it means putting a firm out of business. You can impound products. In other areas of life you can take analogous action, e.g. you can cut a non-payer off the telephone or the electricity. And the law tries (without success) to cut bad drivers off the road. But what can you do to cut misleading advertisers off from their advertisements?

This brings us to the whole question of techniques of enforcement. While there is no doubt that the whole misleading advertising programme has all the marks of being a successful one, we were nevertheless struck by the fact that the weapons available to the law enforcers in this area are far inferior to those available to the Food and Drugs and the Weights and Measures inspectors. Indubitably part of the reason for the success of law enforcement in these areas is the power the inspectors have to take enforcement action by way of seizure, sealing, and so forth. In misleading advertising there is no real analogue.

The nearest approach is the Prohibition Order. This indeed has been highly successful and is greatly feared by all defendants. The reasons for this fear are partly that the order speaks to individuals so that whereas normally conviction results in a fine, disobedience to a prohibition order can land the directors in gaol. Another reason is the extent of the order in terms of space and time. The order can be unlimited in respect of time and can affect the operations of a whole chain of stores, i.e. the total operation of a company. Our understanding was that the existence of an order against a firm really made it make sure it was careful.

V

Finally, some general but very tentative suggestions. They are put forward for exploration and as pointers to further research rather than as definite conclusions.

(1) Perhaps the law of misleading advertising is concentrating on the wrong party. The law and its enforcement sees as its prime target the advertiser. Special defences of good faith are afforded to the publisher, and cases against publishers seem rare. Yet could we not consider it this way? The publisher, especially a television station, radio company or newspaper makes an enormous revenue out of advertising. In other words he is hugely paid for pumping out a continuous streak of information, some of it misleading and injurious to the public, yet he himself is saddled it seems with no responsibility whatsoever for the accuracy of its contents. Yet the freedom of the air — what Lord Thompson has called a licence to print your own money — is a uniquely valuable possession. Can it not be argued that society, in allowing a television or radio company the privilege of broadcasting, has a right to put a duty on that company to see to it that all its material, advertisements not excepted, are accurate? If we really were serious¹⁴ about wanting to put an end to deceptive advertising, wouldn't the first step be to insist that such publishers bear absolute responsibility for advertising content?

(2) This by no means entails that publishers would be subject to strict liability regulations in the criminal law, however. What it does mean, or could mean, is something far more effective. For the procedure appropriate to deal with deceptive or misleading advertising may well not be criminal proceedings at all. For consider the case of a television commercial repeated *ad nauseam* and totally misleading. Surely the only adequate remedy for this is something that will wholly undo the harm by completely removing the false impression that the advertisement has created in the minds of the public. And the step that will do this is certainly not that of criminal prosecution. It can only be something by way of counter-advertisement. In other words the suggestion is that where a

14. Not that the Department is not very serious; nor has its programme been without success, to judge from discussions with the Consumer Association of Canada.

publisher has (whether with or without fault) published misleading advertisements, he be bound to publish denials together with the true facts in such manner as will most effectively counter the wrong impression created.

(3) Of course much scope for argument would arise as to what would be enough to be effective, and one can imagine publishers making token denials and leaving it at that. But the law already has an example to follow. We already have the law of libel and the remedy whereby the defendant has to issue an apology in terms demanded by the plaintiff or else required by the court. What is suggested here is that the misleading advertising branch could set up a monitoring section to scrutinise the accuracy of advertisements partly on a sample basis and partly following up consumer and competitor complaints, and could also settle the terms, manner and so forth of the denial or counter-advertisement required.

(4) So far as the actual advertiser is concerned, to some extent the responsibility of the publisher would have its undoubted repercussions on him too. But he too could be required to issue counter-advertisements.

(5) A further possible penalty for both publisher and advertiser (though of a non-criminal kind) could be to be debarred from advertising. Again the law provides an example. Vexatious litigants can be debarred from the right to bring actions in the courts, not so much because they are at fault as because they are (perhaps without any malice on their part) simply wasting everyone's time. An advertiser or publisher who is simply misleading everyone (even with the best intentions) could surely be reasonably debarred for a time at least from being able to advertise his products within a prescribed area.

(6) The only remaining function for the criminal law here would be of supporting enforcement. The publisher, advertiser or trader who flouts the seizure, sealing or order to "counter-advertise" is wilfully disobeying authority. With him the ordinary criminal law can rightfully deal.