

Misleading Advertising and the Defence of Due Diligence

The concept of absolute liability in relation to public welfare offences was created by the mid-nineteenth century British judiciary "as a means of doing away with mens rea for petty police offences"¹. Its survival in the twentieth century can be attributed to the numerous contemporary public welfare statutes that have been passed to protect the complex and myriad interests of modern society. Prior to the last major revision of the *Combines Investigation Act*,² the fact that liability for misleading advertising offences was imposed without recourse to a defence reflected the widely held view that the interests of the public were better served by the expedient disposition of such cases. However, the plight of the faultless offender, balanced against the interests of the public, has, more than any other factor, caused the erosion of the concept of absolute liability and the recent shift to strict liability both by legislation and by the courts. When the *Combines Investigation Act* was amended in 1976, the legislators acknowledged the current trend away from absolute liability and included a statutory due diligence defence limited in application to two of the expanded list of provisions dealing with deceptive advertising and marketing practices. In light of subsequent events, the partial concession to an express due diligence defence raised issues under the *Combines Investigation Act* that had not been contemplated when the statutory defence came into force.

Section 37.3(2) of the Act provides a defence to persons charged under section 36 or 36.1 who can prove:

- (a) that the act or omission giving rise to the offence with which he is charged was the result of error;
- (b) that he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;
- (c) that he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and
- (d) the measures referred to in paragraph (c) . . . were taken forthwith after the representation was made or the testimonial was published.

¹R. v. *The City of Sault Ste. Marie*, 40 C.C.C. (2d) 353, at page 363.

²R.S.C. 1970, c. C-23; as amended S.C. 1974-75-76, c.76.

Sections 36 and 36.1 have been generally identified as the misleading advertising provisions under the Act since the essence of the offences contained therein lies in the making of representations to the public. The remaining provisions prohibit specific marketing practices wherein the deception lies in the practice itself. Although these provisions are not amenable to section 37.3(2), limited defences have been provided in respect of section 37, the bait and switch selling provision and section 37.1, the prohibition against selling above advertised prices. The pyramid and referral selling provisions provide an exemption in respect of schemes that have been authorized by provincial legislation.

In 1978, the Supreme Court of Canada decision of *R. v. The City of Sault Ste. Marie*,³ while acknowledging the necessity of retaining the concept of absolute liability for some legislative purposes, nevertheless gave judicial recognition to a category of strict liability offences that would henceforth be amenable to a common law due diligence defence. Dickson J., in giving the judgment of the Court, described the category of strict liability offences as follows:

Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.⁴

In distinguishing between offences of strict liability and offences of absolute liability "where it is not open to the accused to exculpate himself by showing that he was free of fault,"⁵ Dickson J. tilted the balance in favour of strict liability offences by holding that public welfare offences would *prima facie* fall within the category of strict liability. Absolute liability offences "would be those in respect of which the legislature had made it clear that the guilt would follow proof merely of the proscribed act"⁶. In determining whether a particular offence fell into the absolute liability category, Dickson J. further elucidated that the primary considerations would be "the overall regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used"⁷. The Supreme Court of Canada reiterated its position in the following year in *R. v. Chapin*⁸ and further limited the category of absolute liability offences by emphasizing that the

³Supra, footnote 1, at 363.

⁴*Ibid.*, p. 374.

⁵*Ibid.*

⁶*Ibid.*

⁷*Ibid.*

⁸(1979), 45 C.C.C. (2d) 333.

severity of the penalty imposed is a major consideration in determining into which of the two categories an offence may fall.

In the wake of *Sault Ste. Marie* and *Chapin*, the following issues were foreseen with respect to the misleading advertising and deceptive marketing practices provisions of the *Combines Investigation Act*:

- (1) Whether the common law defence was available to persons charged under 36 and 36.1 for which a statutory due diligence defence, more restricted in scope, had already been provided.
- (2) Whether the common law defence was available in respect of sections 37 and 37.1 for which specific defences had been provided.
- (3) Whether the remaining provisions fall within the category of prima facie strict liability offences as defined in *Sault Ste. Marie*, and are therefore amenable to the common law defence.

The first issue was conclusively settled by the Ontario Court of Appeal in *R. v. Consumers Distributing Company Limited*,⁹ a case which involved a false representation, in the form of point-of-purchase signs, respecting the fuel savings caused by a fuel saving device. It was established as fact that the company had not complied with the requirements of paragraphs 37.3(2)(c) and (d). Consumers Distributing raised in its defence the fact that it had honestly believed in the accuracy of the representation and that such belief was based on its consideration of the independent test results and the testimonials of reliable users provided by the supplier of the device. The Court indicated that the common law test as enunciated in *Sault Ste. Marie* was met by the company in that its consideration of the materials, provided by a reputable supplier, constituted the taking of reasonable steps to ensure the accuracy of the representation. However, the Court concluded that Parliament, by providing a defence to a charge under paragraph 36(1)(a) several years before the common law defence was established by the Supreme Court of Canada, intended that it should be the only defence available to the charge. Therefore, since the accused had failed to take the immediate corrective measures of advising persons of the error contained in its advertisement, it was unable to rely on section 37.3(2).

The second foreseeable issue was considered by an Ontario County Court on appeal from a provincial court decision. In *R. v. International Vacations Ltd.*,¹⁰ section 36(1)(a) and section 37, the bait and switch provision, were subjected to an analysis by the Court under the *Sault Ste.*

⁹(1980), 57 C.C.C. (2d) 317.

¹⁰Unreported, February 28, 1980, Ont. Co. Ct., reversed on another ground by (1981), 59 C.C.C. (2d) 557 (Ont. C.A.).

Marie doctrine. Section 37 makes it an offence for a person to advertise at a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement. There are three specific defences available in respect of this offence. The Court, in determining that section 36(1)(a) and section 37 fell within the category of strict liability offences, followed the reasoning of *Chapin* and concluded that the severity of the penalties imposed under the sections precluded them from being absolute liability offences. With reference to the particular defence available to the accused, the court held:

As a result, absent an express legislative defence, if an accused under these sections established on a balance of probabilities the defence of reasonable care as elucidated in *Sault Ste. Marie*, he would be entitled to acquittal. Parliament, however, by enacting the express defences that are contained in subsection 37.3(2) with respect to the section 36(1) offence and in subsection 37(3) with respect to the 37(2) offence, excluded by necessary implication the reasonableness or due diligence defences that would otherwise have availed the accused at common law.¹¹

Despite the decision of *R. v. International Vacations Limited*, the influence exerted by the *Sault Ste. Marie* doctrine can be seen at work in subsequent cases wherein section 37.1 was at issue. Section 37.1 prohibits the supplying of products at prices higher than advertised. By virtue of subsection 37.1(3), the offence does not apply with respect to an advertisement in a catalogue if the catalogue states that prices are subject to error and if the person establishes that the price was in error; with respect to an advertisement that is immediately followed by a correction; or with respect to the sale of a security obtained during the existence of a current prospectus. What these express defences do not contemplate is the common situation where the advertised price is correct, but higher prices are charged due to the lack of an efficient system of ensuring that shelf prices conform with advertised prices, and that check-out cashiers charge the appropriate prices. In 1981, three supermarkets¹² in British Columbia were tried separately in the provincial courts for having supplied products at higher than advertised prices. In all three cases, the stores demonstrated that management had effected a system whereby advertised specials could be easily identified by the cashiers; and in all three cases, the *Sault Ste. Marie* defence was successfully raised. In each case, the court applied the common law defence without initially determining whether in fact it was applicable, having regard to the existence of specific statutory defences. Although *R. v. Commercial Supermarket (1971) Ltd.* was subsequently appealed,¹³ the decision of the trial judge was upheld by the

¹¹*Ibid.*

¹²*R. v. McLellan's Supermarket Ltd.*, Unreported, December 12, 1981, *R. v. Commercial Supermarket (1971) Ltd.*, Unreported, January 13, 1981, B.C. Prov. Ct. *R. v. Lockhart Foods Ltd.*, Unreported, January 20, 1981, B.C. Prov. Ct.

¹³Unreported, October 7, 1981, B.C. Co. Ct.

County Court without reference to *International Vacations Limited*. The lack of proper analysis of a central issue renders the foregoing cases vulnerable to future reconsideration by the Courts. However, the super-market cases do reflect the general shift in judicial attitude in favour of the faultless offender.

There remains the issue of whether the common law defence is applicable with respect to the remaining offences for which no statutory defences have been expressly provided. Although this aspect was not specifically addressed in either *Consumers Distributing* or *International Vacations*, the courts in each case indicated that, but for the presence of the statutory defences, the due diligence defence as enunciated in *Sault Ste. Marie* would apply.

Whatever the original intent of Parliament in expressly providing limited defences with respect to only some of the misleading advertising and deceptive marketing practices provisions, subsequent events indicate that the gaps are being gradually filled in by the courts. The result of the combined efforts of the legislators and the judiciary is that while some persons charged under the provisions may be able to avail themselves of the much broader common law defence, others will be limited to the defences imposed by statute.

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