

**TWO ASPECTS OF ADVERTISING LAW:**  
**(1) SOUND-ALIKES, LOOK-ALIKES AND PHOTOGRAPHS**  
**(2) ENVIRONMENTAL ADVERTISING**

**INTRODUCTION**

It is a well-known phenomenon in every decade that, with the wisdom of hindsight, we look back on previous eras with some degree of superiority and derision and marvel at their lack of sophistication. So it is with advertising. Of course today's advertisements are more sophisticated, witty and contemporary - at least until tomorrow.

This paper addresses (in a rather eclectic fashion) two trends or features of modern advertising - (1) the commercialisation of likenesses, voices and persona and (2) environmental or 'green' advertising.

**COMMERCIALISATION OF LIKENESSES, VOICES AND PERSONA**

The use of personalities to endorse or promote a product has been a feature of advertising for many years. Traditionally it took the form of direct product endorsement where the celebrity openly recommended the product or service in question. While this traditional form is still used, personalities today are often used in more subtle ways to capture the public's attention so as to lift that particular advertisement above all the others which crowd in on us - on radio, in print or on television. This subtlety, which is particularly seen in television advertisements, was summarised by Burchett J in one of the Paul Hogan cases<sup>1</sup>:

The whole importance of character merchandising is the creation of an association of the product; not the making of precise representations. Precision would only weaken an impression which is unrelated to logic, and would in general be logically indefensible. Yet the impression must be powerful to be effective. The only medium likely to convey the vague message of character merchandising, while giving it the force and immediacy of exciting visual impact, is television. That is why the technique has grown in importance with the rise of the television industry. Its implications have hardly yet been explored in the courts. The exploration involves the application of established principles in an unfamiliar setting, where a pervasive feature is not so much the making of statements that may mislead the mind directly, as suggestions that may inveigle the emotions into false responses.

The law of character merchandising or personality endorsement has been well discussed in a number of articles and books in recent years<sup>2</sup>. The courts, particularly in Australia, have shown themselves willing in appropriate cases<sup>3</sup> to use a generous form of a passing off action

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<sup>1</sup> *Pacific Dunlop Limited v Hogan* (1989) 14 IPR 398,429-30

<sup>2</sup> S Murumba 'Commercial Exploitation of Personality', Law Book Co (1986); Brown 'Character Merchandising: A view from Australasia' (1986) 2 IPJ 93; Howell 'Character Merchandising: The Marketing Potential Attaching to a Name, Image, Persona or Copyright 'Work' (1991) 6 IPJ 197

<sup>3</sup> *Henderson v Radio Corp Pty Limited* (1960) SR (NSW) 576; [1969] RPC 218; *Childrens Television Workshop Inc v Woolworths (NSW) Ltd* [1981] RPC 187; *IPC Magazines v Black and White Music Corporation* [1983] FSR 348 (UK); *Hogan v Koala Dundee Pty Limited* (1988) 12 IPR 508; *Pacific*

and/or breaches of the Fair Trading Act 1986<sup>4</sup>. The cause of character merchandising, at least as it relates to **real** people, has received some judicial endorsement in New Zealand (albeit in part obiter) in the very recent Buzzy Bee case, *Tot Toys Limited v Mitchell*<sup>5</sup>. Fisher J observed<sup>6</sup> in that case that the desirability of consistency in commercial matters between the two CER countries suggested that if at all possible in New Zealand courts should follow the character merchandising approach favoured in Australia, although he expressed some caution in "following too quickly down that path" - particularly in the case of, what he called, "artificial" character merchandising (ie fictional, inanimate and other man-made characters). The judge drew a distinction between such "artificial" character merchandising and the promotional use of names, reputations and images of real persons<sup>7</sup>:

Few would dispute that real persons should generally have the right to prevent the unauthorised promotional use of their persona. There may be a case for going beyond existing causes of action - defamation, confidentiality, contract and passing off in its less controversial form - to North American causes of action for appropriation of personality and/or breach of rights of privacy and publicity.<sup>8</sup>

Two aspects of personality endorsement merit closer attention. These are:

- The use of Sound-alikes and Look-alikes;
- The unauthorised use of photographs.

#### **The Use of Sound-alikes and look-alikes**

In one recent US case<sup>9</sup> the court stated:

The voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone. At a philosophical level it has been observed that with a sound of a voice 'the other stands before me'.

A face and a voice are both part of a person's unique identity - just as much as their signature or name. The point is illustrated by a few contemporary examples - Sir Harry Secombe's high pitched laugh, the late Sir Robert Muldoon's gravel voice and chuckle and John Cleese's clipped staccato delivery.

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#### *Dunlop Limited v Hogan* (1989) 14 IPR 398

<sup>4</sup> Sections 9, 13(e) and (f); in Australia ss 52, 53(c) and (d) Trade Practices Act 1974

<sup>5</sup> Tauranga CP 186/88, 15 July 1992 - to be reported in IPR

<sup>6</sup> *Ibid*, 54

<sup>7</sup> *Ibid*, 60

<sup>8</sup> Breaches of ss 9 and 13 Fair Trading Act 1986 must be added to the list of causes of action available in New Zealand

<sup>9</sup> *Midler v Ford Motor Co* 849 F 2d 460, 463 (1988)

In radio advertising the use of sound-alikes has become quite common. Local advertising has used sound-alikes of English television presenter Alan Whicker, actor Gordon Kaye from the television series "Allo 'Allo" and the inimitable (but nonetheless imitated) John Cleese. Look-alikes are not as frequently used locally in print or television advertisements but have certainly been the subject of advertisements (and court action) in Australia, the United States and England.

One of the earliest cases of voice imitation is the 1959 English decision of *Sim v H J Heinz Co Limited*<sup>10</sup>. There a television advertisement used a voice-over impersonating the well-known film and stage actor Alistair Sim. The plaintiff sought an interlocutory injunction to restrain broadcasting of the advertisements on the basis they were defamatory and would lower the plaintiff in the estimation of right-minded people, since it would be beneath his dignity and standing as an actor to endorse commercials. (How far times have changed since then!) A second cause of action, described as "novel", was passing off. The interlocutory injunction was refused (both at first instance and on appeal) on the basis of the established principle of not granting interlocutory injunctions in a defamation action and that it would be equally inappropriate to do so under the passing off action where this was jointly pleaded. In the Court of Appeal the court regarded as a novel, but undecided, point whether the plaintiff's voice could be regarded as property and its imitation could be said to be in the nature of unfair trading or passing off.

Fisher J's observations in the Buzzy Bee<sup>11</sup> case strongly suggest that New Zealand courts would now regard a person's voice as being sufficient to sustain an action in passing off and under the Fair Trading Act. The voice is an essential part of one's persona.

While it would seem an obvious point, it should also be emphasised that for use of sound-alikes and look-alikes even to pass the threshold of actionability, the original personality or characterisation must be sufficiently famous or well-known. This is unlikely to be a problem in most cases since an advertiser will only want to use a recognisable look-alike or sound-alike as the means of attracting the consumer's attention in the first place.

One of the most well-known sound-alike cases is the *Bette Midler*<sup>12</sup> case in the United States. For the purposes of a Ford Motor Company commercial, the advertising agency Young & Rubicam approached Bette Midler to see if she would sing the 1973 hit song "Do You Want to Dance". When she refused, Young & Rubicam hired a former back-up singer for Bette Midler and instructed her to sound as much like the singer as possible. The song was to form part of a yuppie campaign, to bring back memories of the 1970s when the "yuppie baby boomers" were in college so that these could be linked with the cars being advertised. The sound-alike was very successful and most of those who heard the commercial thought it was in fact Bette Midler singing. The Ninth Circuit Court of Appeal held that Bette Midler's distinctive voice was a "common law property right" which had been wrongfully appropriated and was actionable under

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<sup>10</sup> [1959] 1 WLR 313

<sup>11</sup> Supra, fn 5

<sup>12</sup> *Midler v Ford Motor Co* 849 F 2d 460 (1988). For comment see J Thomas McCarthy "Public Personas and Private Property: the Commercialisation of Human Identity", (1989) 79 TMR 681; Leonard M Marks "The Bette Midler case: Judiciary finally listens to sound-alike claim", (1989) *The Licensing Journal* 15.

Californian law as a tort. The Court went on to observe that not every imitation of a voice could be actionable but "only. . . when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product"<sup>13</sup>.

Interestingly Bette Midler was not able to take advantage of a statutory **right of publicity** cause of action granting damages for use of a person's "name, voice, signature, photograph or likeness in any manner" because the voice used was that of the back-up singer not Midler's.

A frequent defence raised in any sound alike or look-alike case is that the advertisement is a parody, a joke or caricature. It is suggested that, on their own, such labels are largely unhelpful since they obscure the real issue, which is whether the ingredients of the appropriate cause of action have been satisfied.

Where reliance is placed on either breach of the Fair Trading Act or passing off, the critical question will be whether there is demonstrable or likely confusion and deception (passing off) or misleading and deception (s9 Fair Trading Act). More specifically, as Beaumont J put it in *Pacific Dunlop Limited v Hogan*<sup>14</sup>:

The question for the judge to decide . . . was whether a significant section [of the relevant public] would be misled into believing, contrary to the fact, that a commercial arrangement had been concluded between the first respondent and the appellant under which the first respondent agreed to the advertising. If such a misrepresentation were established to the satisfaction of the judge, the case of both passing off and conduct contrary to [s9] would be made out.

The label 'parody' **of itself** does not assist in answering or deflecting this question. (In the copyright context, for example, it has been held that parody is not a defence by itself; the key issue is the normal statutory test, ie has the defendant reproduced a substantial part of the plaintiff's work<sup>15</sup>.)

An ever-present irony is that the better the impersonation the more likely it is that the plaintiff will succeed since a greater number of consumers will be misled and deceived. But what of those cases where the impersonation is readily apparent, but not so apparent as to dupe consumers, or a significant number of them, into believing that the voice is from the **real** celebrity? Yet nonetheless the association with the celebrity is still apparent. It is after all the impersonation or sound alike which attracts attention to the advertisement in the first place. Is there not something unfair in allowing the celebrity's persona to be used as "the hook". Furthermore, a sound-alike or look-alike may over-expose a particular celebrity's voice or face - albeit through obvious impersonation. Such debasing of the persona may deprive the genuine celebrity of other endorsement opportunities or reduce the fee which could otherwise be commanded. As it was put by Gummow J in *Hogan v Pacific Dunlop Limited*<sup>16</sup>:

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<sup>13</sup> Ibid, 463

<sup>14</sup> (1989) 14 IPR 398,426

<sup>15</sup> *Schweppes Limited v Wellingtons Limited* [1984] FSR 210, 212. For further discussion of parody see Gummow J in *Hogan v Pacific Dunlop Limited* (1988) 12 IPR 255,243 et seq.

<sup>16</sup> (1988) 12 IPR 225,249

"... the less the celebrity engages in these activities, the more selective he or she is seen as being and the more valuable his or her favour.

This more subtle form of association was addressed in the well-known case of *Pacific Dunlop Limited v Hogan*<sup>17</sup> where Paul Hogan sued in respect of an advertisement for shoes which used an easily recognisable parody of the "knife scene" from the film *Croccodile Dundee*. The "Mick Dundee" figure in the advertisement did not appear to be Mick Dundee/Paul Hogan but (as Beaumont J observed<sup>18</sup>) you were given the impression that a variant of Dundee was endorsing the shoes. Beaumont J, one of the majority judges in the Full Federal Court, stated the essential question as being whether the advertiser had conveyed the message that the celebrity has agreed to an advertisement in which an image<sup>19</sup> identified with the celebrity is seen to endorse the goods<sup>20</sup>. If there is mere caricature or parody such that viewers or listeners would receive the impression that the celebrity would **not** have agreed, no action will flow, but where there is more than mere caricature, so that the personality or even a **variant** of the personality's image is seen as sponsoring the product, then a remedy is available<sup>21</sup>. Burchett J (also one of the majority) rejected any defence of parody in this case, calling the advertisement a "parasitic copy - parasitic because its vitality is drawn entirely from the audience's memory of the original"<sup>22</sup>:

It would be unfortunate if the law merely prevented a trader using the primitive club of **direct misrepresentation**, while leaving him free to employ the more sophisticated rapier of suggestion, which may deceive more completely.<sup>23</sup>

#### **A New Zealand perspective - the Buzzy Bee case**

In his *Buzzy Bee* decision<sup>24</sup> Fisher J explored some of the subtleties of merchandising and use of images. And, as already seen, he saw an important distinction between, on the one hand, the promotional use of names, reputation and images of **real persons** and, on the other, "**artificial**" character merchandising in the sense of fictional, inanimate and other man-made characters. In the **latter** case Fisher J felt reservations about protection notably:

- (a) Whether the protection in some recent Australian cases might have sprung not so much from a finding of actual deception or damage as the tacit assumption that there should

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<sup>17</sup> (1988) 12 IPR 225; (1989) 14 IPR 398

<sup>18</sup> *Ibid*, 427

<sup>19</sup> Which, it is submitted, would include a voice

<sup>20</sup> *Supra*, 427

<sup>21</sup> *Ibid*, 427-8

<sup>22</sup> *Ibid*, 430

<sup>23</sup> *Ibid*, 431

<sup>24</sup> *Tot Toys Limited v Mitchell* (Tauranga CP186/88 15 July 1992)

be a right of property in names, reputations and artificial images for character merchandising<sup>25</sup>.

- (b) Whether passing off is the best vehicle for protection. "What of the obvious satirist, the obvious backyard copyist or the advertiser who expressly disowns any association with the originator of the image"<sup>26</sup>.
- (c) The identified competing policy issues. The incentive principle favours more protection in that the opportunity to protect a monopoly would encourage individuals to create and promote new images giving pleasure and value to mankind. On the other hand, against creating any fresh monopolies are freedom of enterprise, community access to its progress and the public interest in competition<sup>27</sup>.

Fisher J concluded that no case had been made for a strained or special application of the conventional laws of passing off in order to protect **artificial** character merchandising rights in New Zealand and emphasised that the onus continues to be on the plaintiff to show deception<sup>28</sup>:

This may take the form of inducing the public to falsely believe that there is a commercial connection between the defendant and/or his goods and the plaintiff and/or his but there can be no predisposition towards any particular finding on that essentially factual issue. In addition the plaintiff must be able to point to some form of damage beyond the loss of an opportunity to exploit character merchandising rights the existence of which is the very subject under inquiry.<sup>29</sup>

In standing back from this decision several comments may be offered:

- (a) One wonders whether the distinction between real persons and artificial merchandising is as clear a distinction as the decision makes out. While in some cases an image is close to the celebrity or actor's real persona and physical appearance (Paul Hogan as Mick Dundee; Andrew Sachs as Manuel in Fawlty Towers), in other cases the persona or image is well removed from the real person behind it - for example Bella Lugosi as Dracula, Barry Humphreys as Dame Edna Everage. The voice used for Donald Duck or Woody Woodpecker is a long way from the actor's normal voice. Moreover where there has been a substantial reputation and goodwill created in "artificial" characters such as the Ninja Turtles or Batman (who has crossed the threshold from a comic-strip to

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<sup>25</sup> Ibid, 59

<sup>26</sup> Ibid, 59

<sup>27</sup> Ibid, 61

<sup>28</sup> Ibid, 61

<sup>29</sup> As to the cause of action under section 9 Fair Trading Act, Fisher J held, 69, that to gain a remedy the plaintiff "will normally need to demonstrate that the deception would have a significant impact upon the consumer. If in the particular situation proposed by the defendant a consumer would not be interested in the subject of an association between the two parties, and that his or her conduct would not be influenced by any assumptions on that subject, the plaintiff is likely to be denied a remedy".

reincarnation as a real actor in two movies) why should there be any difference in the scope of protection available?

- (b) Fisher J's requirement that the plaintiff in passing off must be able to point to some form of damage "beyond the loss of an opportunity to exploit character merchandising rights" seems, with respect, not to reflect the commercial reality. Traders in New Zealand already recognise (by entering licences and paying licence fees) the commercial value of associating the name, persona and image of a character with products or services, be they real persons such as John Cleese or cartoon characters such as the Ninja Turtles. Where a plaintiff can show an exclusive reputation in a persona, be it his own, a character he portrays, or an "inanimate" character he has created, why is it necessary to show loss beyond loss of an opportunity to exploit character merchandising rights? The reality is that where others are seeking legitimately or illegitimately to use that reputation to endorse their goods or services they are doing so because of a perceived commercial value in the persona.

### Other look-alike cases

Other look-alike cases have been disposed of on more conventional principles. In *Newton-John v Scholl-Plough (Australia) Limited*<sup>30</sup>, the advertisement in question contained a photograph of an Olivia Newton-John look-alike<sup>31</sup> and bore the words "Olivia? No 'Maybelline!". A further copy of the advertisement used the words 'Maybelline makes anything possible' and 'For the Olivia look' use Blooming colour'. Burchett J held that there was no misleading or deceptive conduct involved. The advertisement told "even the most casual reader, at even the first glance that in fact it is not Olivia Newton-John who is represented in the advertisement"<sup>32</sup>. While the advertising was taking advantage of Olivia Newton-John's name and reputation in a not particularly praiseworthy way, it was equally making it perfectly clear that the product did not have any relevant association with her.

This latter comment suggests that the court was uncomfortably aware that the whole "look" of the advertisement was the persona of Olivia Newton-John but, at least on the application of conventional principles, was unable to find a remedy. As has already been seen in the subsequent *Paul Hogan* cases the courts have been prepared to give a remedy where persona is used in more subtle ways.

In *10th Cantanae Pty Limited v Shoshana Pty Limited*<sup>33</sup> the plaintiff, Sue Smith, a well-known Australian television personality, sued an advertiser for publication of an advertisement for a video recorder. The advertisement depicted a young woman in bed watching the screen of a television set and bore a heading in large print "Sue Smith just took total control of her video

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<sup>30</sup> (1986) ATPR 40-697

<sup>31</sup> The model having earlier answered an advertisement seeking a person of similar appearance to Oliver Newton-John

<sup>32</sup> Supra 47,633

<sup>33</sup> (1987) 10 IPR 289

recorder". The plaintiff failed in her action to show that readers would be likely to read the advertisement as containing a reference to her<sup>34</sup>.

"In the present case, there was nothing more than the bare name. The advertisement contained no information pointing unequivocally to Ms Smith. There was no relevant context. The two names "Sue" and "Smith" are common enough, whether considered separately or as a combination. The only additional material was a picture of the "Sue Smith" referred to in the advertisement. But, because it was a picture of a person dissimilar in appearance to the second respondent, it pointed the other way. It should be noted that, although such evidence would not have been conclusive, the respondents did not call any evidence to establish that somebody had in fact been misled into thinking that the "Sue Smith" of the advertisement was the second respondent."

### **Unauthorised use of photographs**

The unauthorised use of a photograph of a person in an advertisement raises a number of challenging issues<sup>35</sup> and can affect not just celebrities but ordinary members of the public. It is generally standard practice for advertising agencies to obtain appropriate consents where the photographs are used, but where such consents are not obtained then liability can arise.

#### **(a) Defamation**

While defamation is not perhaps the first cause of action to spring to mind, this was pleaded in a recent English case<sup>36</sup> where Jill Goolden, a presenter for BBC's Food and Drink Programme, sued in respect of a newspaper advertisement for the cleaner Domestos. Ms Goolden contended that the advertisement (which featured a photograph of her alongside an extract of an article about hygiene from Today newspaper) suggested that her kitchen was dirty. She sued the advertiser and the advertising agency. The advertiser blamed the agency for apparently failing to obtain Ms Goolden's consent to the advertisement. The case was settled before trial for an apology and "substantial undisclosed damages and costs". The case is a salutary example of the risks of such endorsement advertising and the absolute necessity of obtaining the consent of those who are depicted in the advertisement. Other cases where defamation has been pleaded<sup>37</sup> have involved the use of a photograph of an ex-policeman in an advertisement for a cure for sore feet<sup>38</sup> and that of an actress without her teeth in a dentist's advertisement<sup>39</sup>.

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<sup>34</sup> Ibid, 292 per Wilcox J. See the same page for discussion of three ways in which misleading and deception **might** arise in such cases

<sup>35</sup> For a general discussion see Pannam 'Unauthorised Use of Names or Photographs in Advertisements' (1966) ALJ 4; Terry 'The Unauthorised Use of Celebrity Photographs in Advertising' (1991) ALJ 587

<sup>36</sup> Referred to in ISBA Legislative and Regulatory Review, August-September 1992, p10

<sup>37</sup> Cited by Pannam, in 35, supra, 5

<sup>38</sup> *Plumb v Jeyes*, The Times, 15 April 1937

<sup>39</sup> *Funston v Pearson*, The Times, 12 March 1915



In New Zealand one of the leading cases is *Taylor v Beere*<sup>40</sup>. In that case, a grandmother with five children and seven grandchildren had had her photograph taken (in the company of one of her granddaughters) by a skilled amateur photographer. She discovered that the defendant proposed publishing this in a book called "Down Under the Plum Trees". Despite oral and written objection the defendant went ahead and used the photograph. The book purported to be a manual about sex and was subsequently classified by the Indecent Publications Tribunal as indecent in the hands of children under eighteen. The immediate context of the photograph of the book was some text in which a small girl describes staying with her "old grumpy and ugly grandmother". It was claimed that the inclusion of the photograph led to the defamatory meaning that the plaintiff had consented to the use of her photograph in the book and had thereby approved or condoned the book and/or the plaintiff was a person who was willing to approve and be associated with an indecent document or a document closely bordering on the indecent and/or that the plaintiff had in consideration of a money payment allowed a photograph of herself and her granddaughter to appear in an indecent document.

The High Court ruled that the publication was capable of conveying each of those meanings and before the Court of Appeal counsel for the appellant was recorded as "quite rightly acknowledg[ing] in argument in this court that he would not dispute that the publication was capable of being defamatory of the plaintiff as alleged and that the jury were entitled to award some damages". Similarly in *Kirk v A H & A W Reed*<sup>41</sup> decimation was pleaded in relation to a coloured picture of the plaintiff printed in a volume called "The New Zealanders in Colour" together with the caption "Christmas Beer. A reveller with his Christmas beer supply waits for the bus at High Street, Lower Hutt". The photograph had been obtained on representations that it was for the photographers personally and not for publication. On a striking out claim Wild CJ held that it was open to a reasonable jury to hold that the publication of the photograph obtained in the way it was and with the caption was defamatory.<sup>42</sup>

(b) **Breach of privacy**

Although in the UK the Court of Appeal has held that English law knows no right of privacy (*Kaye v Robertson*<sup>43</sup>), in New Zealand there has been an acceptance of this cause of action. In *Tucker v News Media Ownership Limited*<sup>44</sup> Jeffries J (in the

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<sup>40</sup> [1982] 1 NZLR 81

<sup>41</sup> [1968] NZLR 801

<sup>42</sup> For a recent example, not involving a real person, see the *Mount Cook Group Limited v Johnstone Motors Limited* [1990] 2 NZLR 488; (1990) 19 IPR 482

<sup>43</sup> [1991] FSR 62. See Comment [1991] 9 EIPR 340

<sup>44</sup> [1986] 2 NZLR 716

interim injunction context) and McGechan J (in a subsequent judgment) both accepted the cause of action - albeit with limitations. Jeffries J stated<sup>45</sup>:

A person who lives an ordinary private life has a right to be left alone and to live the private aspects of his life without being subjected to unwarranted, or undesired publicity or public disclosure. Obviously such a right must be subject to certain exceptions, but on the state of the evidence before the Court the plaintiff does not seem to come within one of them . . . . The gravamen of the action is unwarranted publication of intimate details of the plaintiff's private life which are outside the realm of legitimate public concern, or curiosity.

While McGechan J stated<sup>46</sup>:

I support the introduction into the New Zealand common law of a tort covering invasion of personal privacy at least by public disclosure of private facts.

In several subsequent New Zealand cases<sup>47</sup> breach of privacy has been pleaded - two of them successfully. In the most recent case, *Bradley v Wingnut Films Limited*, the tort of breach of privacy was unsuccessfully pleaded in relation to the inclusion of footage of a family vault bearing the family name in a horror movie "Brain Dead". The scope of the new tort was further commented on by Gallen J<sup>48</sup>:

'The present situation in New Zealand then is that there are three strong statements in the High Court in favour of the acceptance of the existence of such a tort in this country and an acceptance by the Court of Appeal that the concept is at least arguable. I too am prepared to accept that such a cause of action forms part of the law of this country but I also accept at this stage of its development its extent should be regarded with caution and I note too the concerns expressed in the article [Bedingfield "Privacy or Publicity? The enduring confusion surrounding the American tort of invasion of privacy" (1992) 55 MLR 11] so that there is a constant need to bear in mind that the rights and concerns of the individual must be balanced against the significance in a free country of freedom of expression. I note also the difficulty in formulating bounds which will ensure that both concerns are appropriately recognised.'

The possibility that this new tort might conceivably offer a remedy for the unauthorised use of photographs is an intriguing one. The connection is not as tenuous as it might seem at first. Although McGechan J's formulation of this emerging tort in *Tucker*<sup>49</sup> is limited in terms, that of Jeffries J<sup>50</sup> would seem wide enough to cover situations where

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<sup>45</sup> 731-2

<sup>46</sup> *Ibid*, 733

<sup>47</sup> *T v Attorney-General* (1988) 5 NZFLR 357; *Morgan v Television New Zealand Limited* (Christchurch CP 67/90 1 March 1990, Holland J) *Marris v TV3 Network Limited* (Wellington CP 754/91, 14 October 1991, Neazor J) and *Bradley v Wingnut Films Limited* (Wellington CP 248/92, 27 April 1992, Neazor J and 1 August 1992 Gallen J)

<sup>48</sup> *Bradley v Wingnut Films Limited* (Wellington CP 248/92, 1 August 1992 Gallen J, 11-12)

<sup>49</sup> [1986] 2 NZLR 716,733

<sup>50</sup> *Ibid*, 731-2

photographs of a member of the public are used in an advertisement without consent. For non-celebrities such use of a photograph can be acutely embarrassing. In one instance with which I am familiar, an amateur and non-celebrity sportsman claimed to have been ribbed by his work mates and to have suffered serious embarrassment amongst friends when his photograph, taken during a sporting encounter, was featured in a liquor advertisement.

In the United States, Prosser & Keeton on Torts<sup>51</sup> make it clear that there is no one tort of privacy but rather a "complex of four":

To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'.

In the 'Brain Dead' case<sup>52</sup>, Gallen J in fact directly considered two of the four US privacy torts listed by Prosser & Keeton, namely

- (a) Public disclosure of private facts which is highly offensive and objectionable to a reasonable person of ordinary sensibilities; and
- (b) Publicity which places the plaintiff in a false light in the public eye.

However, another of the four US torts of privacy is more apposite to the context we are discussing. It is the tort of "**appropriation**" ie the appropriation for the defendant's benefit or advantages of the plaintiff's name or likeness<sup>53</sup>. As the well-known US commentator, J Thomas McCarthy, has stated in relation to this aspect of privacy:<sup>54</sup>

The theory is that using without permission a persons's identity to help sell products causes an indignity and mental distress analogous to that created if one were physically forced to get up on the stage and tout someone's products.

This aspect of privacy would clearly seem to present an arguable cause of action for **ordinary members of the public** whose photograph is used without consent for commercial purposes<sup>55</sup>. Whether it would also be available in New Zealand for

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<sup>51</sup> Prosser & Keeton on Torts, 5th ed, 851 et seq

<sup>52</sup> Supra, 12

<sup>53</sup> Prosser & Keeton 851

<sup>54</sup> J Thomas McCarthy 'Public Personas and Private Property: The Commercialisation of Human Identity' (1989) 79 TMR 681, 687

<sup>55</sup> As Prosser & Keeton make it clear the US courts have held that where photographs are published by newspapers, magazines, television companies or motion picture companies, there must be some connection "for the purposes of trade" beyond the mere fact that the newspaper is sold or the television item is broadcast. Any other conclusion would lead to interference with the freedom of press (and the constitutional implications in the US). Thus in the English case of *Kaye v Robertson* [1991] FSR 62

celebrities is more contentious since, at least in terms of nomenclature, it would scarcely seem appropriate to refer to **privacy** where persons are already in the public domain.

It was because of this apparent contradiction that the US courts (and subsequently State legislatures) have created a **right of publicity** for public figures. Rights of privacy and the right of personal liberty were held to include the right to exhibit oneself before the public at proper times and places and in a proper manner. As a corollary this liberty included the right of a person **not** to be exhibited before the public<sup>56</sup>.

(c) **Passing off; Breach of the Fair Trading Act 1986**

The causes of action most readily available for cases of unauthorised use of photographs in advertising are clearly passing off<sup>57</sup> and breaches of ss 9 and 13(e) of the Fair Trading Act 1986. Where the photograph used is that of a celebrity with a commercial reputation the action will pass the initial threshold of actionability. This is much less certain where photographs of ordinary members of the public are used and no commercial reputation or persona is at stake.

Such a case involving a celebrity was *Honey v Australian Airlines Limited*<sup>58</sup>. Gary Honey was a well-known Australian long jumper and winner of a gold medal at the 1986 Commonwealth Games. Australian Airlines produced a poster (being part of a series depicting persons competing in sport) featuring the plaintiff jumping at the Commonwealth Games. No consent was sought from him for use of the photograph. On the bottom right hand side of the poster, in a much smaller area compared with the size of the poster, there was a statement:

ATHLETICS  
Commonwealth Games  
Edinburgh, Scotland  
Long jump  
Gary Honey, Gold Medal winner  
(Photography by: Tony Feder, Melbourne)  
AUSTRALIAN AIRLINES (Logo)

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where the complaint concerned the taking of unauthorised photographs of actor Gordon Kaye in hospital, there would have been no cause of action in the US since the photographs were used for newspaper reporting rather than any additional commercial purpose.

<sup>56</sup> *Pavesich v New England Life Insurance Co* 50 SE 68 (1905); *Haelan Laboratories Inc v Topps Chewing Gum Inc* 202 F 2d 866 (1953); *Prosser on "Privacy"* 48 California Law Review 383 (1960) In many States of the United States this cause of action has been bolstered by statutory enactment.

<sup>57</sup> *Henderson v Radlo Corporation* (1960) SR (NSW) 576 is one of the earliest successful passing off cases. Here a photograph of a well-known ballroom dancing couple was used without authorisation on the cover of a long-playing record.

<sup>58</sup> (1989) 14 IPR 264 (Northrop J); (1989) 18 IPR 185 (Full Federal Court)

To the right and slightly below the words Australian Airlines appeared the Australian Airlines' logo.

The photograph was also used on the cover of a religious book and of a religious magazine (with the approval of Australian Airlines but again without the plaintiff's consent). The plaintiff claimed that such unauthorised use of his photograph was in breach of the Australian equivalent of ss 9, 13(e) and (f) Fair Trading Act 1986 and passing off.

Surprisingly the plaintiff failed at both first instance and on appeal. As to the **poster** the reasons for this were:

- (i) The photograph was not contrived or posed so as to convey a connection between the athlete and product or services being advertised.
- (ii) Nothing on the poster, apart from the name and logo of Australian Airlines, suggested any association between the athlete and Australian Airlines. The name and logo were not in a prominent position, and the focus of the viewer's attention would be on the photograph.
- (iii) Those to whom the poster was directed and even who saw it for the first time would have concluded it was one of series.
- (iv) Viewers of the poster would perceive it not as an advertisement or promotion of Australian Airlines but rather as promotion of sport by the airline.

As to the **book and magazine**, again there was no liability. Some rather tenuous distinctions were drawn in this regard:

- (i) Only members of the public who visited Christian bookshops would have been likely to see the book.
- (ii) The appellant was not named in the book or magazine, and any perceived association or connection would not be between Gary Honey and the publisher of the book but between Honey and its theme or contents.
- (iii) The Court agreed with Northrop J in the Court below that between Commonwealth and Olympic Games the high profile given to competitors declines and the memories of the public fade.

The impression one has of this case is that the plaintiff was hard done by - particularly in relation to the book and magazine - and that the Court was very conservative in its conclusions. Even if, as Northrop J found, the profile of Gary Honey had declined after the 1986 Games, he would still have been known to a substantial number of Australians. Should it not be his choice as to whether his persona was used on a Christian book and magazine, the contents or theme of which he might not agree.

(d) **Advertising codes of Practice**

The advertising Codes of Practice (Part 7) contain a number of rules governing the portrayal of people in advertising. One particular rule may in some contexts give grounds for complaint where a person's photograph has been used in an advertisement without consent. Rule 1 states:

Advertising should not portray individuals or groups within society in a manner which is likely to expose them to violence, exploitation, hatred, contempt, abuse, denigration or ridicule from other members of the community.

A member of the public or a celebrity may be able to make out a case that use of his or her photograph without consent (for example, in an advertisement for abortion) has or will expose them to denigration or ridicule from other members of the community. Given that advertising agencies in general do obtain consents, it may also be timely for the Advertising Standards Authority to consider adding to part 7 a specific provision covering the unauthorised use of photographs of persons in advertising.

Finally, it is to be noted that rule 6 of this part of the code does contain some allowance for humour and satire:

Humour and satire are natural and accepted features of the relationship between individuals and groups within a community. Humorous and satirical treatment of people and groups of people is equally natural and acceptable in advertising, provided the portrayal does not encourage intolerance, prejudice and bigotry.

## ENVIRONMENTAL ADVERTISING

One of the great consumer movements in the last 10 years has been the phenomenon of "green consumerism", ie consumers who wish to eat food and use products which have minimal impact on the environment and are healthy, clean, and safe. Amongst the public there has been a growing awareness of the degree to which harmful pesticides, fertilisers, processing methods, and packaging have become part of the products we buy, and how they can affect dramatically the food we eat and the environment we live in.

The environmental movement of the 1970s swept up many of the baby boomers' generation. Green consumerism arguably reflects the fact that this generation has reached positions of affluence and consumer spending power. Furthermore, the environmental message of organisations such as Greenpeace and the Maruia Society has had an impact on the population and on consumer purchase decisions. In turn, businesses have realised that there is money to be made in having products which are (and can be advertised) as having no or minimal impact on the environment.

The late 1980s brought a startling outbreak of green consumerism. In Britain a poll taken by the research organisation MORI between November 1988 and May 1989 found that the proportion of respondents who said that they had chosen the product because of its "environmental friendliness" shot from 19% to 42%<sup>59</sup>. This coincided with a strong environmental emphasis by the government and the media in Britain (and indeed in many other countries).

Research in New Zealand has shown similar trends towards green consumerism. In one survey<sup>60</sup> 70% of consumers interviewed stated that they were prepared to pay a little more for a "green product". In another survey 86% of consumers questioned put in at least some effort to buy greener products<sup>61</sup>.

The first environmentally friendly product labelling scheme began in West Germany in 1977 with the "Blue Angel" scheme. This is now regarded as rather unsophisticated and far too narrow in its environmental assessment of products. One local commentator has observed, however, that the Blue Angel Scheme has "done the world a great service because it has brought attention to the labelling of environmentally friendly products"<sup>62</sup>. Where previously caring for the environment used to be a battle and a chore, it has now become a marketing opportunity. A perceptive comment made by Economist Magazine in September 1990 was that green

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<sup>59</sup> "Spend a pound and save the planet", The Economist, September 8 1990. This reports that in Autumn 1988 a number of forces came together in the UK. Margaret Thatcher made her major two famous "green speeches"; the press gave considerable space to such environmental topics as dying seals, burning rain forests and diminishing ozone; and a consultancy published a "green consumer guide" giving a star rating to companies and products.

<sup>60</sup> Admark, National Business Review, 20 February 1991, "Sanctions Plan to Ensure Green is Really Green"

<sup>61</sup> "False Labelling Comes Unstuck" Marketing, May 1991, 37

<sup>62</sup> Comment by Fiona McKenzie, Marketing Manager, Telarc, 'Marketing', May 1991 38

consumerism "has done more to bring the environment to the attention of managing directors than any number of worthy commissions and earnest reports".

Green marketing has also received a major boost in New Zealand as a result of governmental and other trade development initiatives to emphasise New Zealand's clean, green image in the marketing overseas of this country and its products. Feedback from the 1991 ANUGA trade fair in Germany testified to New Zealand's image as a leading environmentally friendly country whose products carry a consumer perception that they are "clean and green". This strategic emphasis in our marketing has been carried through to the theme of New Zealand's Expo pavilion in Seville 1992 and the trading drive in Europe which has accompanied it<sup>63</sup>.

### **Downsides of environmental/green claims**

The consumer mania and consumer receptiveness that has accompanied the "environmentally friendly" product boom has, however, real dangers to both consumers and responsible companies alike. Where conflicting claims are made about so-called green products then consumer scepticism will arise. Where there is no independent definition or regulation of the seductive marketing buzz words such as "environmentally friendly", "natural", "organic", "compostable", "recycled", or "100 percent ecologically sound", then consumer frustration and confusion results. For example, a claim may be made that something is "biodegradable". But how long does it take - two hours or two hundred years?

To be effectively "green", consumers need to be able to make educated and fully informed decisions. Consumers have been faced with the understandable dilemma of determining which products and companies are **genuinely** green. Conversely bona fide "green" manufacturers have had equal difficulty defending their integrity.

In New Zealand one particular range of cleaning products came under the scrutiny of "Fair Go" and Consumer Magazine. Was it misleading to advertise that products were "phosphate free" when all popular handwashing detergents are too? Forest and Bird Magazine<sup>64</sup> gave some publicity to "Naturelle milk" which had gone onto the market in 1990 bearing on the packaging the words "Fresh Organic". The magazine reported that "unfortunately pesticide residues turned up in this brand".

### **New Zealand moves to regulate green advertising and labelling**

Following the lead of Germany, Canada, the European community and Australia, three different governmental and private initiatives have been taken in New Zealand to control and regulate environmental labelling and advertising.

#### **1. Environmental Choice labelling**

Arising out of a government discussion paper of December 1989, an "environmentally-friendly" labelling scheme has been set up through the government quango, Telarc. The scheme, known as Environmental Choice New Zealand (**ECNZ**) awards ECNZ labels to those products that can prove they cause as little damage to the environment as is

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<sup>63</sup> 'Exposure in Seville for Kiwi Creativity', New Zealand Herald 10 October 1992

<sup>64</sup> Major, "Eco-labelling" Forest & Bird Magazine (1991) p48



practically possible. The scheme is an environmental rather than a green scheme, the difference being that "green" has connotations of no negative impact on the environment, whereas "environmental" means an objective independent assessment of the impact. The aim of the ECNZ scheme is to encourage manufacturers to meet minimum standards so that they can qualify to use the Environmental Choice label. Telarc has chosen various product categories and has been releasing final criteria which will enable companies to apply for the ECNZ label. Batteries and recycled plastics are two product categories which have already been considered. Other areas which Telarc are considering are engine oil, recycled paper, household detergents and paints. Telarc wishes to encourage manufacturers to meet the criteria and recognises that this may take some time.

A licence to use the ECNZ label will last for two years and must then be renewed.

## 2. **The Fair Trading Act - guidelines on environmental claims**

In March 1992 the Commerce Commission issued guidelines to manufacturers, distributors and retailers on environmental claims made on labelling and in advertising<sup>65</sup>. The Fair Trading Act, in ss10 and 13(a) and (e) contains provisions prohibiting misleading and deceptive conduct and misrepresentations of various kinds. Environmental claims about a product or service will be in breach of one or more of these sections of the Act if they mislead or deceive the ordinary consumer about:

- a product's impact on the environment
- an endorsement given to a product by an organisation concerned with environmental issues

Some of the Commission's guidelines are:

- (a) Do not make sweeping statements about a product's "environmental friendliness".
- (b) Do not claim benefits which cannot be substantiated.
- (c) Do not use misleading graphics or logos on product packaging.
- (d) Do not claim benefits which are unreal or illusory.
- (e) Do not make unauthorised use of endorsements.

The Commerce Commission has already taken action in relation to an advertising campaign by Suzuki New Zealand for its Swift motorcar<sup>66</sup>. After an approach by the Commission Suzuki cancelled an advertising campaign which proclaimed how "clean" and "green" its Swift cars were. According to the Commission publicity:

Suzuki used independent American research which judged the new one litre Swift to be 'the most environmentally effective vehicle in the USA'.

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<sup>65</sup> "Environmental Claims and the Fair Trading Act" March 1992, Commerce Commission

<sup>66</sup> 'Fair's Fair', Commerce Commission, May 1992, 5

The model generated the lowest CO<sub>2</sub> exhaust emissions of the tested cars and used the least fuel. However, the model was required by American law to have a catalytic converter to reduce CO<sub>2</sub> emissions.

There is no such requirement in New Zealand the models sold here did not have the converter, but Suzuki did not state this in their advertisements.

Such a claim was clearly misleading under the Fair Trading Act. The Commission approached Suzuki which agreed to run advertisements in all the Sunday newspapers in mid-April to correct the impression.

Suzuki also instructed its dealers to destroy all advertising material relating to the model.<sup>67</sup>

### 3. **Advertising Standards Authority - code for environmental claims**

In February 1991 the Advertising Standards Authority issued new guidelines on environmental claims. The code came into effect on 1 March 1991 for new advertising material and on 1 June 1991 for existing material. The introductory comments to the code expressed generally the concerns which the Authority had:

The spurious use of environmental claims and claims which mislead by omission or by implication may not only bring the advertiser into conflict with this Code and the Fair Trading Act but may also cause confusion amongst consumers and potentially lessen their confidence in advertising generally.

This code covers all advertising containing claims for environmental benefit and includes packaging shown in advertisements.

The six guidelines set by the Advertising Standards Authority are as follows:

- (a) Generalised claims for environmental benefit must be assessed on the complete life-cycle of the product and its packaging taking into account any effects on the environment of its manufacture, distribution, use, disposal, etc. Thus absolute claims for environmental benefit, either stated or implied, are not appropriate.

eg "Environmentally friendly"  
"Environmentally safe"  
"Environmentally kind"  
"Product X has no effect on the environment"  
"100% ecologically sound"

are absolute claims and therefore not acceptable.

- (b) Qualified claims such as "environmentally friendlier/safer/kinder" may be acceptable where the advertised product, service or company can demonstrate a significant environmental advantage over its competitors or a significant improvement on its previous formulation, components, packaging, method of manufacture or operation.

- (c) All claims must:

- (i) be able to be substantiated, and  
(ii) meet local or international standards of biodegradability if such a benefit is claimed (ie to Australian or OECD standards), and  
(iii) explain clearly the nature of the benefit.

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<sup>67</sup>

Ibid

eg "our product X is kinder to Mother Nature" is unclear and thus unacceptable but "our CFC-free product X is kinder to the ozone layer" would be acceptable.

- (d) Advertisements, packaging and promotional material must not falsely suggest or imply official approval for a product, whether by words, symbols or any other means.
- (e) Claims based on the absence of a harmful chemical or damaging effect are not acceptable when other products in the category do not include the chemical or cause the effect.
- (f) Scientific terminology is acceptable provided it is relevant and used in a way that can be readily understood by consumers without specialist knowledge.

The Advertising Standards Complaint Board has had occasion to consider a number of claims of infringement of the code. In complaint 92/87 a complaint was made concerning a brochure published by Kapiti Cove Developments which promoted a subdivision in Paraparaumu. In describing the development the brochure used such phrases as "environmentally friendly", "unprecedented attention to preservation of the natural environment" and "the emphasis on environment and lifestyle is such that about 50% of the completed first stage of the development will be water". There was also a billboard which included the words "this environmentally unique lakeside residential development". The Board accepted an assurance from the advertiser that it was unaware that the words "environmentally friendly" could not be used (Rule 1 of the code) and that they would be removed from future promotional material. As to other aspects of the promotion, the evidence provided by the advertiser satisfied the Board that their claims in the advertisement were justified.

In complaint 91/36, a complainant contended that an advertisement for Johnsons Toilet Duck infringed the code since it made the claim that the product was "friendly on the environment". Again this was held to breach rule 1 of the code because it was an absolute claim. Similarly an advertisement by BP for its Envron oil was held to contravene this same provision (complaint 91/57). BP's television advertisement contained a voice-over stating:

Every year New Zealanders dump 30 million litres of crude oil. It finds its way into our rivers, lakes and sea, but now BP is turning this tide of waste by collecting, purifying and refining the oil. . . .So now you can protect your engine and the environment.

The Board held that the meaning attributable to this statement was that all the total waste oil of 30 million litres was being re-refined. However as collection sites existed in Auckland and Christchurch only, the statement was incorrect. The Board therefore construed it as an absolute claim and held it breached rule 1 of the code.