

DELIVERED 30TH SEPTEMBER 1987

SCHMID v. KEITH QUINN MOTOR COMPANY PTY LTD

No.2049 of 1987

Date of Hearing: 16th September 1987

JUSTICES APPEALS

J U D G M E N T of the Honourable Justice Bollen

(On appeal from Mr K. Boxall SM
sitting as a Court of Summary Jurisdiction at Adelaide)

[Complaint alleging making of unfair advertising pursuant to s.3a of Unfair Advertising Act : is the defence "given by Proudman v. Dayman applicable : consideration of the legislation, its object : the words of the section and defence specifically given to like offences under s.3 : HELD the defence of honest mistake on reasonable grounds in a state of facts which, if true, would not inculcate the accused in an offence is available : on the facts HELD that the magistrate's finding that the complainant had not excluded that honest and reasonable mistake on the part of the respondent was correct : HELD that the mind of the director who arranged for the advertising was for the purposes of this case the mind of the respondent]

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JUDGMENT No.168

SCHMID v. KEITH QUINN MOTOR COMPANY PTY LTD

Bollen J.

The respondent is and was a company trading in the sale of used motor cars. It traded as "Motocade". In August 1986 its directors were Keith G. Quinn and Brian A. Quinn. Keith Quinn was also the secretary. It advertised a motor car for sale in the Sunday Mail of 31st August 1986. Keith Quinn and a salesman together arranged for that advertisement to be put in that paper. The advertisement was:-

"CELICA Coupe 5 spd man, 2 litre motor, air-cond, unmarked racing green duco, parchment trim, nominal kms, great car. \$5499. SRR-074. Motocade. 26 Main Nth Rd., Medindie. Ph 269 6666. Ah 269 4998 or 373 0707. LVD 2246"

The important thing to notice is "2 litre motor". In fact it was adequately proved that it was a 1.6 motor. Mr P.J. Ween inspected the car. He brought his wife along later. She bought the vehicle. They wanted a car with a 2 litre motor. They discovered later that it was a car with a 1.6 litre motor. They were content with the performance of the car. They did not want to return it and get their money back. They did not assert that they had paid too much. But they did not like the fact that they had not got the size of engine that they wanted. They complained. An investigator called on Keith Quinn. Quinn said that he believed that the vehicle had a 2 litre motor. He said that he had spoken on the telephone to someone at the Motor Transport Division (Registrar of Motor Vehicles). He said that the records of that Division show the size of engines of motor vehicles registered. That is correct. Quinn says that he rang before he sent in the advertisement. The person to whom he spoke told him that the car had a 2 litre engine. Quinn, therefore, truly believed that the vehicle

had a 2 litre engine. He rang again when Mrs Ween was in his office. He did that as a check. He was again told that this car had a 2 litre engine. Quinn said that he had often made enquiries like that of the Motor Traffic Division. He had never found their answers to be mistaken. Quinn never wavered from this account of what he had done. In the ensuing cross-examination he was closely examined at great length about his account of his telephone calls to the Motor Transport Division and the value of them. Dishonesty in the second call was suggested. It was suggested that he had made that call in the presence of Mrs Ween as a cover, he knowing all the time that, despite the records at Motor Transport Division, the car had a 1.6 litre engine. The magistrate quite properly rejected that suggestion. But I have jumped ahead. I did so to reveal what the respondent, through Quinn, said about the Weens' claim before it was thought fit to launch a prosecution in this matter. I mention, too, that no one contradicted the evidence of Keith Quinn that the fair price for a Celica coupe with a 2 litre engine was the same as the price for a Celica coupe with a 1.6 litre engine.

The respondent was charged for that it "did commit an offence against s.3(a) of the Unfair Advertising Act 1970". Particulars were given on the complaint thus:-

- "1. The defendant is the advertiser in relation to an advertisement that appeared in the Sunday Mail of the 31st day of August, 1986 such advertisement being in relation to the sale by the advertiser of a Celica motor vehicle registration number SRR 074.
2. The advertisement was published for the purpose of the business of the advertiser.
3. The advertisement contained an unfair statement in that it described the motor vehicle as having a 2 litre motor whereas the motor vehicle did not have a 2 litre motor, but had a 1.6 litre motor".

I set out s. 3(1) and (2) and s.3a(1) and (2) of the Unfair Advertising Act. I set out s.3(1) and (2) here because later they assume some importance. Those sections are:-

"3. (1) Subject to subsection (3) of this section, a person shall not publish, or cause directly or indirectly to be published, or be concerned in the publication of, an advertisement of any kind relating to goods, services or land or to the extension of credit for any transaction relating to goods, services or land, if the advertisement contains an unfair statement.

Penalty: One thousand dollars.

(2) It shall be a defence to proceedings in respect of an offence that is a contravention of subsection (1) of this section for the defendant to prove that -

(a) he took all reasonable precautions to ensure that the advertisement complained of did not contain an unfair statement;

and

(b) he believed on reasonable grounds that the advertisement did not contain an unfair statement.

.....

3a (1) Where an advertisement of any kind relating to goods, services or land or to the extension of credit for any transaction relating to goods, services or land is published for the purposes of the business of an advertiser and that advertisement contains an unfair statement that advertiser shall be guilty of an offence and shall be liable to a penalty not exceeding one thousand dollars.

(2) In proceedings in respect of an offence that is a contravention of subsection (1) of this section an allegation in the complaint -

(a) that a person is the advertiser in relation to an advertisement;

or

(b) that an advertisement was published for the purposes of the business of the advertiser,

shall, in the absence of proof by the defendant to the contrary, be deemed to be proved."

The definition of "unfair statement" in s.2(1) of the Act is -

"'unfair statement' in relation to an advertisement means a statement or representation contained in the advertisement that is -

(a) inaccurate or untrue in a material particular;

or

(b) likely to deceive or mislead in a material way a person to whom or a person of a class to which it is directed."

The advertisement here did contain an unfair statement. It inaccurately spoke of the size of the engine. The prosecution made out a case to answer. The fact that the car had a 1.6 litre engine was proved by Mr Young, State Service Manager of the company which distributes Celica cars.

The respondent relied on what is called the defence given by the case of Proudman v. Dayman. It did not assert that the complainant was required to prove that the respondent knowingly or wilfully inserted an unfair advertisement nor that the complainant was required to prove mens rea. I do not think such contentions could have succeeded. But the respondent said that it had an honest and reasonable belief in a state of facts which if true would not have inculpated the respondent in an offence. The respondent said that it had an honest belief which is based on reasonable grounds that the car had a 2 litre motor. The complainant said that that defence was not available for offences under s.3a of the Unfair Advertising Act and, even if it was, the respondent had neither an honest nor a reasonable belief.

The magistrate delivered two sets of reasons. First he delivered ex tempore reasons for holding, as he did, that the defence given by Proudman v. Dayman did apply or was available to a defendant charged under s.3a. Next day he delivered ex tempore

reasons for his final decision. He dismissed the complaint. He held that the complainant had not excluded the reasonable possibility that the respondent had the honest and reasonable belief which it claimed. If I may say so, the two sets of ex tempore judgments are very thorough and very clear.

The complainant appeals. The grounds of appeal are:-

- "1. That the learned Stipendiary Magistrate erred in law in finding that the defence of honest and reasonable mistake of fact, commonly known as the Proudman v. Dayman defence, applies to a person charged with an offence under section 3a of the Unfair Advertising Act, 1970.
2. That the learned Stipendiary Magistrate erred in law and in fact in finding that the defendant's belief that the vehicle it had advertised in the advertisement the subject of the proceedings was a 2 litre vehicle was a belief honestly held by the defendant.
3. That the learned Stipendiary Magistrate's finding that the defendant's belief that the vehicle it had advertised in the advertisement the subject of the proceedings was a 2 litre vehicle was an honest belief was against the evidence and the weight of the evidence.
4. That the learned Stipendiary Magistrate erred in law and in fact in finding that the defendant's belief that the vehicle it had advertised in the advertisement the subject of the proceedings was a 2 litre vehicle was a reasonable belief.
5. That the learned Stipendiary Magistrate's finding that the defendant's belief that the vehicle it had advertised in the advertisement the subject of the proceedings was a reasonable belief was against the evidence and the weight of the evidence.
6. That the learned Stipendiary Magistrate erred in law and in fact in finding that the belief of the witness Keith Quinn that the vehicle the defendant had advertised in the advertisement the subject of the proceedings was a 2 litre vehicle was a belief held by the defendant."

The first attack is against the finding that the defence given by Proudman v. Dayman applies to s.3a. The questions of "intent in statutory offences" and the availability of the Proudman v. Dayman defence are rather intertwined. There has been

much litigation around and about these issues. In my opinion, the less that a single Judge says about them the better. A single Judge should, I think, attend to the authorities and say the minimum necessary for his decision. Perhaps that is always sound. But even more so in the area of "intent in statutory offences" and Proudman v. Dayman. I have attended to the authorities cited to me. I do not refer to them all. In Proudman v. Dayman itself [(1941) 67 CLR 536] Dixon J (as he then was) said that even where the statute excludes the necessity for positive knowledge on the accused, honest and reasonable mistake of fact will still be a ground for exculpation (pp.540-541). Speaking of this and other cases Gibbs CJ in He Kaw Teh v. The Queen [(1985) 157 CLR 523 at 533] said:-

"These cases establish that if it is held that guilty knowledge is not an ingredient of an offence, it does not follow that the offence is an absolute one. A middle course, between imposing absolute liability and requiring proof of guilty knowledge or intention, is to hold that an accused will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made his act innocent. However there are a number of questions which have not been clearly answered. The first is whether the absence of an honest and reasonable belief in the existence of facts which would have made the act innocent is a form of mens rea or whether, on the other hand, an honest and reasonable mistake affords the accused a defence only when he is charged with an offence of which mens rea is not an element. A second question is whether the accused bears the onus of proving on the balance of probabilities that he acted under an honest and reasonable mistake of fact or whether it is enough if the evidence raises a reasonable doubt. Thirdly, it is a question whether the so-called defence of honest and reasonable but mistaken belief is available when the offence charged is of a truly criminal character, or whether it applies only to statutory offences of a regulatory kind.

The Supreme Court of Canada, in an important judgment, has given confident answers to these questions. In Reg. v. Sault Ste. Marie [1978] 2 SCR 1299 it was held that where an offence is truly criminal the prosecution must establish a mental element, and negligence is not enough for that purpose. However, it was held, there is a

middle position between cases where full mens rea is required and cases of absolute liability, namely, cases in which it is a defence for the defendant to prove, on the balance of probabilities, that he was not negligent. Prima facie, 'public welfare offences', or 'regulatory offences', are in this last-mentioned class. Dickson J, who delivered the judgment of the Court, accordingly, held that offences could be classified into three categories, as follows (at pp.1325-1326):-

- '1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
2. 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. These offences may properly be called offences of strict liability.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.'

The Supreme Court of Canada has further held that in cases in which the prosecution is required to prove mens rea, there can be no conviction if the accused honestly believed that the facts were such as to make his actions innocent, whether or not the mistake was reasonable: Pappajohn v. The Queen (1980) 14 CR (3d) 243. It is of course clear that if guilty knowledge is an element of an offence, an honest belief, even if unreasonably based, may negative the existence of the guilty knowledge, and thus lead to an acquittal.

It appears that in Reg. v. Tolson (1889) 23 QBD 168 and Bank of NSW v. Piper [1897] AC 383 the absence of mens rea was equated with the honest and reasonable but mistaken belief of the accused. Lord Diplock in Sweet v. Parsley [1970] AC at p.163, and Menzies J in Reg. v. Reynhoudt (1962) 107 CLR 381 at p.400 viewed the matter in that way. It may be that little turns on the question whether honest and reasonable mistake should be regarded as a special defence available only in cases not requiring mens rea, or as something the absence of which constitutes mens rea. The matter is largely one of words. On either view the words of the statute and the nature of the offence must be considered in deciding what

mental state is required, and whether an objective test of reasonableness is to be applied together with the subjective test of whether there was a mistaken belief.

I should say immediately that if s.233B(1)(b) does not require the prosecution to prove guilty knowledge, but has the effect that an accused is entitled to be acquitted if he acted with the honest and reasonable belief that his baggage contained no narcotic goods, in my opinion the onus of proving the absence of any such belief lies on the prosecution. Mahe v. Musson (1934) 52 CLR 100 suggests the contrary, but that case was decided before Woolmington v. Director of Public Prosecutions [1935] AC 462. In Proudman v. Dayman (supra at p.541), Dixon J may have intended to say that the accused bore only an evidentiary onus, but his words were somewhat equivocal, and in Sweet v. Parsley Lord Pearce [1970] AC (at p.158) and Lord Diplock (at p.164) understood them in different senses. In some later cases judges still spoke as though the onus of proof lay on the accused: see Dowling v. Bowie (1952) 86 CLR 136 at pp.141, 149-151; Bergin v. Stack (1953) 88 CLR at p.261 and Reg. v. Reynhoudt (supra at pp.395-396, 399-400). However it has now become more generally recognized, consistently with principle, that provided that there is evidence which raises the question the jury cannot convict unless they are satisfied that the accused did not act under the honest and reasonable mistake: see Iannella v. French (1968) 119 CLR at pp.110-111; Kidd v. Reeves [1972] VR 563 at p.565; Mayer v. Marchant (1973) 5 SASR 567, but cf. Reg. v. Bonnor [1957] VR 227. This view has also been accepted in New Zealand: Reg v. Strawbridge [1970] NZLR 909. As I have said, it is in my opinion the correct view.

I am not sure that we can accept the opinion held in Canada that the defence of honest and reasonable but mistaken belief may be raised only in the case of regulatory offences. Thomas v. The King (1937) 59 CLR 279 dealt with a crime that was truly criminal (bigamy) and so possibly did Reg. v. Strawbridge (supra) (the cultivation of marijuana). However it is more likely that the Parliament will have intended that full mens rea, in the sense of guilty intention or guilty knowledge, will be an element if an offence is one of a serious kind."

It will be seen that Gibbs CJ agrees with the view that there can be no conviction unless "the jury is satisfied that the accused did not act under an honest and reasonable mistake". I say that the same applies to a magistrate's court. Dawson J said (at p.591, 592):-

"In this country it is well established by authority that whatever the presumption, if any, that mens rea, to be proved by the prosecution, is an ingredient of a statutory offence, there does exist a presumption that honest and reasonable mistake is to be treated as a ground of exculpation. It is commonly referred to as a defence, and to prove honest and reasonable mistake meant, in a common law setting and at a time when the ultimate burden of proof upon all issues did not rest so positively upon the prosecution, the same thing as establishing the absence of intent: Bank of N.S.W. v. Piper (supra at pp.389-390). Since the decision in Woolmington v. Director of Public Prosecutions (supra), it is for the prosecution to prove beyond reasonable doubt the elements of a crime, including any mental element. That means that honest and reasonable mistake as a composite concept now has a part to play only in statutory offences where the legislature has excluded guilty intent as an ingredient of an offence to be proved by the prosecution, leaving the absence of mens rea to be raised by way of exculpation."

As to onus of proof Brennan J said (pp.592, 593):-

"There is, however, no justification since Woolmington v. Director of Public Prosecutions (supra) for regarding the defence of honest and reasonable mistake as placing any special onus upon an accused who relies upon it. No doubt the burden of providing the necessary foundation in evidence will in most cases fall upon the accused. But it is not inconceivable that during the case for the prosecution sufficient evidence may be elicited by way of cross-examination or otherwise to establish honest and reasonable mistake or to cast sufficient doubt upon the prosecution case to entitle the accused to an acquittal. The governing principle must be that which applies generally in the criminal law. There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. The prosecution must prove his guilt and the accused is not bound to establish his innocence. It is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted."

He Kaw Teh v. R. (supra) is, of course, very useful. But it was not mainly concerned with the applicability of the defence given by Proudman v. Daymen to a statutory offence. In Davis v. Bates (1986) 43 SASR 149 the Full Court held that the defence of honest and mistaken belief based on reasonable grounds in the existence of facts which had they been true would have rendered the

appellant's conduct innocent is open to a defendant charged with driving a motor vehicle whilst he is disqualified from holding or obtaining a driver's licence. King CJ said (page 150):-

"The learned Special Magistrate held that an intention to drive whilst disqualified was not an element of the offence and that a mistaken belief by the defendant that his disqualification had expired and that he held a valid licence was not a defence. Both these propositions were challenged on the appeal.

The law relating to the ascertainment of the mental element of offences created by statute, has recently been the subject of authoritative exposition in the High Court (He Kaw Teh v. The Queen supra), and elaboration of the principles developed in that case is unnecessary for the purpose of the present appeal. Offences created by statute fall, for the present purpose, into three classes. The first class is that of offences an element of which is the relevant guilty knowledge or intention, which element the prosecution must prove in order to prove a charge of the commission of the offence. The second consists of offences of which guilty knowledge or intention is not an element to be proved by the prosecution but which are nevertheless not committed if the person doing the prohibited act believes on reasonable grounds in a state of facts which, if true, would render the doing of the act innocent. The third class consists of offences which are committed by the mere infringement of the statutory prohibition irrespective of knowledge or intention. The criteria emerging from the authorities, for distinguishing these classes one from the others, are far from clear or easy of application.

The language in which the prohibition imposed by s.91 of the Motor Vehicles Act is couched, contains no reference to a mental element. The words 'knowingly', 'intentionally' or 'wilfully' do not appear. The absence of such words is by no means conclusive as to whether mens rea is an element of the offence. When Parliament creates an offence it does so subject to the general principles governing criminal liability including the presumption that mens rea is a condition of the existence of criminal liability for grave crimes. The offence under consideration is not a grave crime but it is serious enough to attract a maximum sentence of six months' imprisonment. The section creating the offence appears, however, in a statute containing sections creating many offences of which mens rea is plainly not an element and in those circumstances, I think, the absence of words denoting mens rea has some significance. A further consideration against mens rea being an element of the offence, is that the essential wrongdoing which is penalized by the section, is disobedience of a court order. It is to be expected that the legislature would require a person against whom a court order is made to take care to familiarize himself with the terms

of the order and to comply with it. It is unlikely that the legislature would have intended that mere subjective ignorance of the terms of the order should exonerate such a person or that the prosecution would be required to prove that such person was aware that he was driving in breach of the order for disqualification. I consider that mens rea is not an element of the offence to be proved by the prosecution.

The next question for consideration is whether the offence is an absolute offence involving no mental element, or whether the common law defence of reasonable mistake of fact is available. The trend of the authorities is towards recognizing reasonable mistake of fact as a defence in the case of all statutory offences except that limited class of regulatory offences, usually relating to public health or safety, in respect of which, from the subject matter of the offence or the context in which the provision creating it is found, it is clear that the legislature intends to penalize the offending conduct irrespective of the subjective guilt of the offender. I think that the penalty provided for the offence under consideration is itself sufficient to exclude any implication that the offence is an absolute offence of that kind."

His Honour later said (p.152):-

"It is now clear that where there is evidence which raises the issue whether the defendant was under a mistaken belief on reasonable grounds as to the existence of facts which, if they existed, would have rendered the conduct innocent, the onus is on the prosecution to exclude such belief. It is immaterial, therefore, whether mistake is regarded as a defence to charges of offences not involving mens rea or whether the offences in the relevant class are regarded as offences involving a particular kind of mens rea, namely the absence of a belief on reasonable grounds in the existence of facts which, if they existed, would render the conduct innocent.

The learned Magistrate, because he regarded the offence in question as an absolute offence, did not apply his mind to the question of mistake. There was, in my opinion, material before him which raised the issue. I express no opinion about its cogency. There is an undoubted responsibility upon persons convicted of offences to take proper steps to ascertain particulars of the orders made against them and to observe those orders. The Courts cannot countenance laxity in that regard. It is, however, for a Magistrate to judge whether the appellant in truth entertained the relevant belief and, if so, whether there were reasonable grounds for that belief. There being material which raises the issue, it is not for this Court to determine its cogency. The issue should be properly tried."

von Doussa J emphasised the need to consider the subject matter of the legislation. He said:-

"Section 91(5) imposes the penalty of imprisonment to punish the contempt of the court or administrative order which disqualified or suspended that person's licence. In my view it would be inconsistent with the concept of contemptuous conduct to impose liability on a person in the absence of some blameworthy state of mind, and the penalty could not provide a deterrent against the prohibited conduct to a person who believed on reasonable grounds that his licence was not disqualified. For these reasons I find it impossible to suppose that Parliament intended to make the offence one of absolute liability.

Having reached this conclusion, and for the reasons given by my brethren, I agree that the offence created by s.91(5) is not one which has as an element guilty knowledge or intention which the prosecution must prove in order to establish the commission of the offence; and that the Proudman v. Dayman (supra) defence is available, although of course it is now recognised that this is not a 'defence' in the sense that the defendant carries an onus of proof where there is evidence which raises the issue."

In speaking of "an element of guilty knowledge or intention" von Doussa J was not, I think, referring to conventional mens rea. His later reference to Proudman v. Dayman shows that he was saying that the relevant section was not so absolute that an honest and reasonably mistaken mind could not be relevant.

It is generally accepted that statutory provisions which create regulatory obligations and impose guilt for failure to comply with these obligations may (but not must) be absolute and beyond the reach of an honest and reasonable mistake. Perhaps it does not avail a motorist to say that he thought he was lawfully parked. Certainly it does not avail him to say that he thought his speedometer accurate, that he found later that it was not and he thought that his speed was lawful. So with food and drug legislation. It will not avail a butcher to say that he thought on stated grounds that his sausages had the correct amount of meat in them. Nor will a milk vendor be heard to say that it was

pure and that it was a surprise to him to find that it failed the methylene blue reduction test. The subject of legislation about food, about cleanliness of food premises, about some actions on the road, about health, may cause legislation to be absolute, not merely strict. If that be so the complainant will not be called upon to exclude the reasonable possibility that the defendant had an honest mistake on reasonable grounds.

In deciding whether legislation is so absolute one must examine the object of the legislation, the words in the whole Act, the scheme of the Act and the words of the relevant section or sections. One should, too, stand back to consider whether by the imposition of strict liability you will readily assist the object of the legislation and not merely catch a luckless victim [Lim Chin Aick v. R. (1963) AC 160 at 174].

With all this in mind I consider the Act and s.3a. Parliament has acted to ensure so far as is possible that advertisements should be accurate and not misleading. But, of course, the subject of advertising is capable of lending itself to error. I think that the community can expect no more than that great care should be taken in and an honest belief held about the contents of an advertisement. I do not think that the community expects that Parliament intends that advertisers should, on pain of penalty for any error, be held to be insurers of the accuracy of everything said or represented or depicted in an advertisement. No mens rea, certainly. But he who advertises with an honest belief based on reasonable grounds should suffer no penalty if he makes a mistake in his advertisement. Section 3a is strict. It is not absolute.

But has Parliament by words used in the Act or by the provisions of the Act itself ousted the defence given by Proudman v.

Dayman. I hark back to the quoting of ss.3(1) and (2) as well as ss.3a (1) and (2) earlier. It will be seen that Parliament has provided special defences available to a defendant charged under s.3. One relates to a defendant's state of mind. It is almost but not quite a statement of the defence based on Proudman v. Dayman.

Sometimes Parliament provides, as here, a defence for one of the offences created by an Act without providing such a defence for a related type of offence created by another section. Speaking of the defence based on Proudman v. Dayman in 1971 Bray CJ said in Kain and Shelton v. McDonald 1 SASR 39 at 44: "Of course Parliament can exclude this defence if it wants to, but extraordinary and unusual cases apart, I see no reason why it should be presumed to have excluded it unless it expressly says so". If this be read literally it is, with respect, too sweeping. Sometimes the words and scheme of an Act will by necessary implication, not by expressed statement oust Proudman v. Dayman. But the implication must be plainly there. Parliament has not expressly said that the defence of honest and reasonable mistake shall not apply to a defendant charged under s.3a. But the fact that it has provided a defence at least very similar to that based on Proudman v. Dayman to a defendant charged under s.3 in certain circumstances does give a base from which to argue that Parliament intends s.3a to be absolute. The question of *inclusio unius exclusio alterius* was discussed by von Doussa J in Davis v. Bates (supra at pp.157-160). His Honour treated the question as one of deciding whether Parliament intended the operation of the relevant section to be absolute. He pointed out that in He Kaw Teh (supra) Gibbs CJ "identified three considerations" (see p.158 of Davis v. Bates). They are the words of the section, "the subject matter with which the statute deals - does it deal with a

grave social evil which Parliament naturally intended should be vigorously suppressed" and whether putting the defendant under strict liability would really assist in the enforcement of the Act. I respectfully agree with this approach.

The words of s.3a do not tell us, yea or nay, what Parliament intended on this score. I turn to the subject matter of the Act. I repeat my earlier remarks. The good of the community does not demand that Parliament create liability to a penalty for a man who truly believes, on reasonable grounds, that his advertisement is accurate. Parliament enacted the Act to prevent unfair advertising. As I have said advertising can lend itself to error. If it be a strict offence to put out an inaccurate advertisement Parliament will have done all that the community can expect. That is what Parliament has done. The enactment of s.3a necessarily casts on the advertisers who advertise for the purpose of their business the need to exercise great care in checking to see that what they say is accurate. If they fall short of the exercise of that care they will not be able to offer sound evidence that they had a belief based on reasonable grounds. No more can be expected of Parliament. It cannot be expected that Parliament should or would seek to impose penal liability on someone who has (to use the words of von Doussa J) "a blameless state of mind". So to expect and require would amount to the catching of a luckless victim (Lim Chin Aick v. R. supra).

Moreover, I respectfully agree with the view suggested of the Road Traffic Act by Zelling J in Mayer v. Marchant (1973) 5 SASR 584 that "defences given in relation to other offences of a different kind and introduced at different dates" do not give much assistance in deciding this case despite the similarity of the offences created by s.3 and s.3a. As the magistrate pointed

out Mr D.C. Pearce in his work "Statutory Interpretation in Australia" (2nd Edition p.45) correctly said that the "unius inclusio" principle must be used with "extreme caution". Here Parliament has provided a defence based on the defendant's state of mind for some offences created by s.3. It has not done so for those created by s.3a. Well then, it may be said, Parliament intended s.3a to be of absolute operation with no answer based on state of mind available. On the other hand it may be said that Parliament intended to leave the operation of s.3a to the law as it is. In my opinion, the law as it is admits an answer based on honest and reasonable mistake to be advanced by the defendant charged under s.3a. I do not think that the words used in or the provisions or the scheme of the Act "oust Proudman v. Dayman" from consideration in a charge laid under s.3a.

The magistrate said, speaking of Keith Quinn:-

"I therefore accept his belief was honest and reasonable. It was an honest and reasonable belief as to a fact, namely that the motor car engine was a 2-litre engine and if that fact had been correct then the advertisement would not have been unfair and the charge would not be well-founded. I have not been persuaded beyond reasonable doubt to the contrary. I therefore hold that the matter has not been made out and dismiss the charge against the company."

The magistrate saw and heard the witnesses. Most importantly he saw and heard Quinn. He found, plump and plain, that Quinn spoke the truth and that he had an honest belief that the car had a 2 litre engine. Mr Loftus sought to attack this finding. He advanced arguments said to show that the magistrate's finding of honest belief was wrong. I would have none of it. Those arguments were, no doubt, fit to be advanced to the magistrate. An appellate court is no place for the rehashing of argument about positive findings of fact based on the belief of the lower Court that a person spoke the truth.

Mr Loftus said, too, that the magistrate was wrong in finding that Quinn's belief that the car had a 2 litre engine was reasonable and should not be sustained. I agree with the magistrate. No doubt the absence of a badge was odd. Quinn did not know that the handbook in the car would have told him something about the size of the engine. It is not apparent from a look at the handbook. A visual inspection of the vehicle would not have helped him. He rang the Motor Transport Division. That was, in my opinion, a reasonable thing to do. It had worked often on other occasions. No doubt he could have enquired of the distributors. But we must avoid the wisdom of hindsight. Moreover, the defence created by Proudman v. Dayman requires a belief based on reasonable grounds, not on perfectly ascertained grounds.

The magistrate was correct.

Mr Loftus submitted that the mind of Keith Quinn was not the mind of the defendant at the relevant time. The relevant time was the time of the insertion of the advertisement. A company can think only by its officers. Keith Quinn was the director who thought about the advertisement. There is no evidence of the state of mind of his co-director. Nor need there have been. Keith Quinn thought about the advertisement on behalf of the company. His mind for these purposes was the mind of the company.

The magistrate was correct in each and every conclusion which he reached. He reached all those conclusions by sound reasoning

I dismiss the appeal.