THE AVERAGE CONSUMER IS ALIVE AND STATISTICAL

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Summary: The legal concept of a "moron in a hurry" has evolved from an object of disparagement, to a criterion for assessing the perceptions of the average consumer. According to growing evidence of how consumers make inferences and judgments, that criterion may not be far off the mark. Human judgment can be hurried and lazy. It is also highly dependent on each individual's personal history and current frame of mind. Legal applications, where the "average consumer" or the "average reaction" is the benchmark, inevitably require statistical analysis of what constitutes "average." That conclusion leads one to question the Supreme Court of Canada's dismissal of consumer evidence as being frequently unnecessary in cases where judges would have familiarity with the products or services in question. Current scientific authority would challenge whether any single trier of fact can put himself/herself in the shoes of the average consumer going about everyday tasks.

The Moron in a Hurry: From Disparaged Outsider to Relevant Consumer

A nameless moron in a hurry was catapulted into notoriety by Justice Foster in the 1979 English case *Morning Star Cooperative Society Ltd. v. Express Newspapers Limited*. That case involved a court action by publishers of the Morning Star, a British Communist Party publication, against the publishers of a new tabloid newspaper called Daily Star. Objection was taken to the use of the word "Star" in the tabloid's name, because of the alleged risk that consumers would confuse the two. But after citing dramatic dissimilarities between the two newspapers, the judge ruled against the Morning Star, noting – now famously – that "if one puts the two papers side by side, I for myself would find that the two papers are so different in every way that only a moron in a hurry would be misled."

Later the same year, Lord Denning of the English Court quoted Justice Foster in explaining which members of the public should be considered relevant to applications of trademark law: "The test is whether the ordinary, sensible members of the public would be confused. It is not sufficient that the only confusion would be to a very small, unobservant section of society; or as Foster J. put it recently, if the only person who would be misled was "a moron in a hurry."[1]

But how "unobservant" must a person be to warrant exclusion from consideration as an "ordinary sensible member of the public?" A quick-witted prosecutor in a subsequent English case recognized that being observant or unobservant is a matter of context for *any* consumer. In *Regina v. Boggs* (1987), the Bank of England took legal action for forgery and counterfeiting against artist J.S.G. Boggs, who drew fanciful replicas of British paper currency on napkins, bar coasters, paper tablecloths, and similar available media. Boggs exchanged his drawings for goods and services with willing recipients – those who seemingly knew they were obtaining artistic renderings. In defending him, Boggs' lawyer argued that only a moron in a hurry would confuse his artwork with official currency of the British realm. Retorted the prosecutor, "Okay, but what about a moron in a hurry in a dimly lighted room?" As it turned, out the jury sided with Boggs, finding him not guilty of forgery or counterfeiting. But no challenge was raised to the prosecutor's depiction of Hurried Moron as consumer surrogate.

Indeed, the next time the phrase was used in an English court, the hapless Moron had finally made it into the club of relevant members of the public. Counsel for Apple Computers, defending the company against a claim of infringement by owners of the Apple record label of the Beatles, argued before the court that "even a moron in a hurry could not be mistaken about the difference between the two." The court ruled in his client's favour.[2]

Canada Yielding to Same, in Appropriate Contexts

Canadian law had, for many years, been rather more sanguine about the care that is taken by ordinary consumers in evaluating trademarks and advertising – or perhaps more polite. Language in Canadian decisions regarding consumers relevant to trademark and advertising law has referred to "persons with an imperfect recollection, who, upon being faced with the defendant's activities, may well believe there is a connection,"[3] "a casual consumer somewhat in a hurry who sees [a trademark] at a time when he or she has no more than an imperfect recollection of the [prior] trade-marks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks,"[4] or "ordinary hurried purchasers ... persons who take no more than ordinary care to observe that which is staring them in the face."[5]

More recently, Justice Russell Zinn gave Canadian credence to the mythical Moron, albeit in a backhanded reference. The case in question, *Atomic Energy of Canada Limited* v. A*REVA NP Canada Ltd.* (2009), involved a dispute between two nuclear power corporations using visually similar logos. The court distinguished the appropriate test from that used by Justice Foster in *Morning Star* (supra), because, it observed, morons in a hurry do not conduct transactions in the nuclear power industry. Wrote the judge, "it is difficult to imagine more sophisticated consumers, and a more prudent procurement process, than exists in the nuclear power business.... In this industry, the fact that Homer Simpson may be confused is insufficient to find confusion." By implication, the perceptions of Homer-Simpson-equivalents may indeed be relevant to findings of confusion in everyday consumer markets. At least the prototypical moron in a hurry now has a name.

Nobel Prize-Winning Scientist Gives Respectability to the Homer Simpson Test

In his book *Thinking, Fast and Slow*, Nobel prize winner Daniel Kahneman demonstrates that what may appear to be moronic logic to some is just a byproduct of normal fast-action, survival-oriented thinking. Citing more than 40 years of research by psychologists and economists, he describes the two styles of reasoning of the human brain: an automatic, seemingly effortless style that we exercise with no conscious voluntary control ("System 1") and an attentive, deliberative style that we frequently associate with our own decision-making and self-determination ("System 2"). When we think of ourselves, observes Kahneman, "We identify with System 2, the conscious reasoning self that has beliefs, makes choices and decides what to think about and what to do." System 1, however, is actually our inner hero, the driver of our everyday patterns of ideas, perceptions, associations and routine behaviour. We are born to adapt to a complex environment with instinctive judgments, shortcuts in reasoning and fast inferences that become honed by experience.

The connection between Kahneman's authoritative analysis and an apparent hurried moron arises from the former's illustrations of the errors and biases that can sometimes arise from System 1's intuitive processing. Optical illusions trick the eyes; contestants on *Let's Make a Deal* make demonstrably irrational choices;[6] eyewitnesses to crimes confidently report events that never happened. The same judgments and processes that steer us successfully through thousands of swift and reliable responses a day can sometimes let us down. However, Kahneman resists depicting such judgments, when they steer us astray, as mistakes; he rather characterizes them as departures from classical economic rationality or formal logic, departures that we can usually explain in our own terms. Moreover, he suggests: (a) the price of a few bad decisions is worth the precious gift of intuition that we were born with and (b) for people in roles or jobs where much rides on their decisions, the required disciplined thinking can be learned and applied in order to avoid mistakes.

In short, normal, everyday people whom you respect, whom you might deal with professionally or who might live next door to you – these people, like everyone else, are prone to making hurried, visceral decisions that may occasionally seem inattentive, or irrational, or, in Judge Foster's terms, "moronic." Meet the average consumer.

Typically applied to consumer perception of trademarks, advertising and counterfeit goods, the phrase "moron in a hurry" is used to convey why consumers may perceive something more than or less than the facts of what they see, hear or experience. But the underlying principle – the use of shortcuts and intuitions that guide people's judgments with an invisible hand – is equally applicable to all players in the justice system.

Richard v. Time Stretches Credulity for Some

Despite the seeming acceptance of the moron in a hurry standard as the surrogate for the perceptions of everyday consumers, some legal analysts have questioned whether the 2012 *Richard v. Time Inc.* decision went too far in accommodating one consumer's naïveté. In 1999, Jean-Marc Richard received a letter from *Time* magazine with all-caps font showcasing the following words:

> "OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR. JEAN MARC RICHARD HAS WON A CASH PRIZE OF $833,337.00!"

However, upon closer inspection, a careful reader would note that the announcement was merely the second part of a sentence with conditions about how such a cash prize might be won. The first part of the sentence stated, in small, unbolded font, "If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we will officially announce that…"

Four other all-caps, bolded, exciting messages appeared in the letter:

"WE ARE NOW AUTHORIZED TO PAY $833,337.00 IN CASH TO MR. JEAN MARC RICHARD!" "A BANK CHEQUE FOR $833,337.00 IS ON ITS WAY...!" "YOU WILL FORFEIT THE ENTIRE $833,337.00 IF YOU FAIL TO RESPOND TO THIS NOTICE!"

and listed among

"LATEST CASH PRIZE WINNERS: .... MR. JEAN MARC RICHARD, $833,337.00."

As with the main announcement, each of these phrases was preceded, in smaller, unbolded font, by some conditional clause. In actual fact, the letter was an invitation to M. Richard to participate in a sweepstakes draw. The letter is displayed below, reproduced from the Supreme Court of Canada's published decision.

LATEST CASH PRIZE WINNERS:

WINNER:	J. FULLER
RESIDING IN:	BOISE, ID
PRIZE AMOUNT:	$100,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	MR JEAN MARC RICHARD
RESIDING IN:	LAVAL, QC
PRIZE AMOUNT:	$833,337.00 IN CASH
PRIZE STATUS:	AUTHORIZED FOR PAYMENT
WINNER:	EDNA WILLIAMSON
RESIDING IN:	ST. CATHARINES, ON
PRIZE AMOUNT:	$100,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	ARTHUR DAMMARELL
RESIDING IN:	KENDRICK, ID
PRIZE AMOUNT:	$50,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	WANDA FROST
RESIDING IN:	RICHFIELD, MN
PRIZE AMOUNT:	$50,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	LEON ROSZYK
RESIDING IN:	SPRING HILL, FL
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	D. SACHARKO
RESIDING IN:	NEW BRITAIN, CT
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	OKEY J. GREEN
RESIDING IN:	MIDLAND, GA
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	JACK DEFALCO
RESIDING IN:	LAS VEGAS, NV
PRIZE AMOUNT:	$15,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	T. VANOVER
RESIDING IN:	FORKED RIVER, NJ
PRIZE AMOUNT:	$10,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	M. SMITH
RESIDING IN:	OREM, UT
PRIZE AMOUNT:	$10,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	CHRISTOPHER WAGLEY
RESIDING IN:	TERRE HAUTE, IN
PRIZE AMOUNT:	$1,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	LEWIS HOFFMAN
RESIDING IN:	WEBSTER GROVES, MO
PRIZE AMOUNT:	$1,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL

OUR SWEEPSTAKES RESULTS ARE NOW FINAL:
MR JEAN MARC RICHARD HAS WON
A CASH PRIZE OF $833,337.00!

ATTENTION MR JEAN MARC RICHARD: WE NOW HAVE APPROVAL TO PAY THE ENTIRE $833,337.00 PRIZE IN A SINGLE CASH PAYMENT!

WE ARE NOW AUTHORIZED TO PAY
$833,337.00 IN CASH TO
MR JEAN MARC RICHARD!

Dear Mr Jean Marc Richard:

A BANK CHEQUE FOR $833,337.00 IS ON
ITS WAY TO [redacted] ST!

YOU WILL FORFEIT THE ENTIRE $833,337.00
IF YOU FAIL TO RESPOND TO THIS NOTICE!

Apparently unfamiliar with the magazine's timeworn promotional ploy, Mr. Richard believed that he had won the $833,337. He returned the reply coupon to *Time*, enrolling at the same time for a subscription to the magazine as invited on the coupon. When the monetary prize failed to materialize, he contacted the magazine and learned that his reply coupon did not bear the winning number. He would not be receiving the $833,337 after all, although he would be receiving the monthly subscription for which he had paid. M. Richard took legal action against *Time*. The case eventually found its way to the Supreme Court of Canada, that court ruling in favour of the complainant. Although the court agreed that the *Time* magazine letter did not contain any literally false statements, it found that the layout and choice of words misled the recipient into honestly believing he had won the sweepstakes. As such, the letter, "riddled with misleading representations," said the Court, contravened the *Consumer Protection Act* of M. Richard's home province of Quebec. M. Richard was awarded damages of $16,000.

Of particular note, the Supreme Court decision articulates clearly the nature of consumers whose "general impressions" should be considered in such cases: the general impression is to be analyzed from the perspective of a *credulous and inexperienced consumer*, one who "is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations" (para. 71). Those who have smugly detected the scam being perpetrated in emails from a Nigerian prince offering million-dollar commissions for accepting overseas money transfers, or from a ship captain leaving you a personal voicemail inviting you on a free cruise, may find it overreaching for Canadian law to now be modified to accommodate consumers whose credulity and inexperience lead them to make foolish choices.

But those with such concerns may draw comfort from one undisputed point. The standard is still one of "averages." The Supreme Court decision explicitly said so. The Richard case need not be thought of as setting the bar too low for what should be considered an average consumer taking ordinary care: M. Richard was gainfully employed, bilingual and methodical; the Quebec Court of Appeal had described him as "a well-informed businessman." He had read the *Time* letter several times, and solicited a second opinion on its meaning from his boss. His priority attention to bolded words in the letter from *Time* magazine, his expectation of truth in the bolded phrases and his subsequent search for confirmation of his first impression are all consistent with Kahneman's explicitly stated examples of normal human judgment.

The wildcard factor for determining future cases is simply – perhaps not simply – how "average" should be defined. It is not implausible that it be defined differently for different consumer contexts. As Kahneman well illustrates, consumers themselves exercise judgment and logic differently in different contexts. There is no single average consumer living happily in some rural town in Alberta. Average reaction is situation-specific.

Troubling Implications for the Legacy of Masterpiece

In deciding the trademark case *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), the Supreme Court of Canada chided the parties for arguing over unnecessary consumer evidence. Judges are also consumers, observed Justice Rothstein, writing for the court. For products and services marketed to the general public, judges "should use their own common sense, excluding influences of their 'own idiosyncratic knowledge or temperament' to determine whether the casual consumer would be likely to be confused."[7] Then, citing a fellow judge's comments in a hair-product dispute, he quoted: "In expressing my view, I am putting myself in the position of the average person going into the market to purchase a dandruff remover and hair tonic."

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The paragraphs in the decision concerning marketplace evidence have proven controversial. The Marketing Research and Intelligence Association (MRIA) issued a respectful statement of disagreement. Judges cannot plausibly put themselves in the shoes of a notional moron in a hurry. "Idiosyncratic knowledge and temperament," in Justice Rothstein's words, are fundamental drivers of perceptions, and, according to Kahneman, their influence can barely be detected, let alone excluded. Further, rational analysis by a trier of fact cannot reliably predict how anyone will behave in fleeting or unexpected situations – situations governed by not-always-rational System 1 reasoning. Finally, no one person's opinion can be guaranteed to approximate the statistical average on any given day – if it were otherwise, then surveys could be replaced by a single random passerby.

The view expressed in *Masterpiece* – that a single judge might reasonably anticipate the opinions of the broad consumer population – stands in stark contrast to Justice Macfarland's characterization of such a view as "pure judicial fantasy."[8] In its public statement on *Masterpiece*, MRIA advised that "direct interviews with consumers or observations of consumer behaviour remain the most statistically reliable source of conclusions about what the relevant consumer population is likely to perceive..."

Surveys may no longer be the gold standard for statistical reliability, given declining participation rates of RDD telephone surveys, and the growth of less easily controlled on-line technologies. However, as described in an earlier *Vue* story entitled "A Duck Walking Through the Court of Public Opinion," other methods of social science have been recruited into action in a broad array of cases to strengthen the validity of survey findings or to provide alternatives to survey evidence altogether. Like surveys, such methods can readily address the Supreme Court's ultimate criteria for social science evidence of reliability, validity and relevance.

Summary

In summary, while the moron in a hurry may have evolved to an acceptable theoretical construct, there is no single average person for all purposes. Broad statistical capture of public opinion or perception, carried out to scientific standard, has been used to produce the notional average consumer for relevant market contexts. The range of statistical research methods comes with safeguards. By limiting interest to the 95 per cent confidence interval around an average, one can ensure that no extreme case or outlier can pervert the outcome. Courts can also set a minimum level of materiality, a minimum of 15 per cent, say, for a finding of confusion or misleading promotion, before considering that relief is in order. It is implausible, without objective evidence, for any one person to anticipate all the important nuances of how "average" consumers will think and react in the bustle of everyday life. When the application of a law depends on gauging the opinion or perception of the average consumer, statistical evidence would seem indispensable.

[1] *Newsweek Inc. v. British Broadcasting Corp.*, [1979] R.P.C. 441 at p. 446.

[2] (*Apple Corps Limited v. Apple Computer, Inc.* [2006] EWHC 996 (Ch)).

[3] *Walt Disney productions v. Triple Five Corporation* (1992) A.R. 321.

[4] *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 S.C.R. 824, para. 20.

[5] *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772 para. 58.

[6] The so-called Monty Hall problem is so frequently addressed incorrectly, that dozens of websites have sprung up to explain it. See for example: http://mathforum.org/dr.math/faq/faq.monty.hall.html, accessed January 11, 2015.

[7] Ibid, at para. 92.

[8] *Sun Life Assurance Co. of Canada v. Sunlife Juice Ltd.*, 22 CPR (3d) 244, 249 (Superior Court of Ontario, 1988).

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