

# Misleading or Deceptive Marketing of Dietary Supplements in Malaysia: The Criminal Law Aspect

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**Abstract:** One of the effects of globalization is the transformation of many industries from the traditional/conventional ambience to a modern and technology-based industry. Among the transformed industry is the food and pharmaceutical industry which led to the growth of the dietary supplements industry. Dietary supplements are products that are labelled as *dietary supplements* and are not represented for use as a conventional food or as a sole item of a meal or diet. Supplements can be marketed for ingestion in various forms such as capsules, powder, soft gels, tablets, liquid, teas and many other forms. Although dietary supplements are believed to have aided in the maintenance of better quality of life, yet the market is flooded with dietary supplements that are marketed or advertised with deceptive or misleading description. Advertisements in the media, has become a vital source of information about dietary supplements for consumers. Within this context, the extent to which the manufacturers of these dietary supplements adhere to the standards and guidelines of good advertising practices remains relatively unexplored in Malaysia. Where the existing regulatory framework provides for the control of marketing for pharmaceutical related products, the law is absent in providing the same for food related products. This paper will look at the criminal aspects of misleading or deceptive marketing of dietary supplements in relation to the provisions of the Malaysian Penal Code, in particular the offence of cheating; provided under section 415 and section 418 which describes cheating with knowledge that wrongful loss may be caused to a person whose interest the offender is bound to protect.

## 1 INTRODUCTION

There is no doubt that advertisements have become a very powerful marketing tool. Now and again, it has been proven that they are indispensable in building and empowering brands. As such, most if not all businesses have embraced advertising because promoting brands have become critical for a business in a highly competitive commercial environment like we have today.

A powerful visual advertising presentation can compel consumers to purchase goods, services and ideas as a way to achieve an emotional need and fulfilment. According to Tracy Stefan (2018), persuasion is the core mission of advertising. Advertising not only give information about a product, it also tells you how the product, service or idea you are considering will improve your life. Advertising feeds on the concepts of ideology, myth, art, sexual attraction and religion. Advertising infuses images and ideas into products and services, just as

the meanings of products and services are infused into images and ideas.(O'Sullivan, 1998)

It can also be said that advertising has been a major factor that is driving global consumerism. Some have even blamed excessive advertising for the unsustainable consumption patterns in many developed economies. There seems to be an insatiable demand for consumer products and a major cause of this can be said to be because of highly powerful and persuasive advertising.

There have also been instances where the advertisements were proven to be outright lies. These are the kind of advertisements that promises certain things, either in the description of the product, a guarantee on the quality of the product or the properties contained in a certain product that can cure a certain ailment. In many cases, these promises were not honoured by the owner or manufacturer of the product.

This article looks at the law relating to deceptive or misleading advertisements in the context of

criminal law; with specific reference to the offence of cheating. The key principle that will be focused here is the essence of the offence of cheating. The various elements necessary to constitute the offence as required under section 415 of the Penal Code, must be looked at in the relevant context. We shall examine the position of an advertiser, a seller or a person making representations about the qualities of their product as to the extent of their responsibility should there be any instances of deception. The Penal Code prescribes sections 415 and 418 in order to deal with this issue.

## 2 BLOSSOMING OF DECEPTIVE MARKETING/ ADVERTISING

Experts have warned that at the rate the rising global population is consuming, we may soon run out of raw materials to supply the resources that fuel our survival. Advertising is highly effective in persuading change in consumer tastes. That explains why the advertising industry continues to be a growing global business. (Ahmad Ibrahim, 2016).

Although many advertisements are made based on evidence, a big number exaggerates. One can say that a little bit of exaggeration in some advertisements are rather harmless; however, these harmless exaggerations might lead to a confirmation of facts which could mislead consumers depending on the product and the context of the advertisement.

Gullible consumers tend to be taken in by these promises from the advertisements and they ended up suffering from losses, and even worse, their health and wellbeing were affected seriously. These 'gullible' consumers are easily swayed by claims made in the advertisements. According to Ahmad Ibrahim (2016), it is not just the uneducated that fall prey to such adverts. Even the well-informed are easily persuaded. Through the creativity of advertising professionals, most messages appear believable. Consumers are, therefore, easily bought. (Ahmad Ibrahim, 2016)

There have been cases where companies have been taken to court for misleading claims. Take the edible oil business for example. Companies are prohibited from advertising their brands as being cholesterol free just on account of them not containing cholesterol. This is because edible oils taken exceeding a certain amount can raise blood cholesterol. So, if a company claims its product is cholesterol free, that is considered misleading and is liable.

Unfortunately, in Malaysia, such control mechanisms for advertisements, other than advertisements for medical products are not very apparent. Many product claims in advertisements seem to be misleading. This is especially so in dietary/health supplements, cosmetic products and traditional medicines. With sophisticated, borderless communication, such misleading advertisements relating to these products are easily spread at an unbelievable pace. We hear of many such promotions on television, radio and especially on the internet. Most of these supplements have not undergone any clinical trials, but the statements contained in the advertisements somehow portray it as a cure-all.

The same applies to cosmetic items. The whitening and slimming products are especially aggressive in their claims. We have heard of product recalls where it was discovered that banned and dangerous substances were used to make their products effective. Hazardous chemicals have been detected time and again in such products. These include steroids and heavy metals, such as mercury. Such toxic chemicals have long-term chronic ill effects on health. On most occasions they go unnoticed as it will only be discovered if someone makes a report.

There have been suggestions that some companies selling such products are just marketing businesses. They do not manufacture the products themselves. Most of them simply source their products from wholesale manufacturers and suppliers. Many are imported.

The problem with this is that such marketing companies often do not have facilities to undertake their own quality checks. What they do is repack and stamp their own brands. There have been cases of the presence of harmful substances in such products. Even banned items are known to have resurfaced in such products. The ones who bear the brunt of such abuses are the consumers.

In a study conducted by Anis Suhaiza (2010), it was reported that many consumers felt so strongly about the potential health benefits of some of the dietary or health supplement products that they reported that they would continue to take them even if they were shown to be ineffective in scientifically conducted clinical studies. This is also one of the significant impacts of viral marketing for such product. The main issue is the widespread of exaggerated benefits of these products that were not certified through reliable clinical trials. This creates a potential threat to the consumer's safety and may lower the quality of the product.

In many developed countries, like the EU, the messages in advertisements are closely monitored. In the EU, European marketing law has gradually grown to an expansive regulation of commercial practices. The two main Directives on this matter are the Unfair Commercial Practices Directive (2005/29/EC) and the Misleading and Comparative Advertising Directive (2006/114/EC — codified version). The Directives deal with the protection of traders and consumers, respectively. In other parts of the world, like in the US, all claims on products must be supported by scientifically proven evidence. In the US also, product liability is strictly enforced.

### 3 MISLEADING OR DECEPTIVE MARKETING OF DIETARY SUPPLEMENTS IN RELATION TO THE PROVISIONS OF THE MALAYSIAN PENAL CODE

According to the *Penal Code* (Act 574), under section 415 defines the offence of cheating in two parts. It describes that, whoever by deceiving any person, whether such deception was the sole or main inducement or not:

- a) Fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person should retain any property; or
- b) Intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person, in body, mind, reputation or property; is said to cheat.

The elements of the offence of cheating therefore, for the first part, include deception of any person, by fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property. (*Mohd Jalani Bin Saliman v PP* [1997] 5 MLJ 551)

The prevalence of misleading or deceptive advertisements especially in dietary/health supplements, cosmetic products and traditional medicines may give rise to criminal liability for the offence of cheating.

The element of ‘dishonestly’ under section 415 is defined under section 24 of the *Penal Code* (Act 574) as doing anything with the intention to cause wrongful gain to one person or wrongful loss to another. ‘Wrongful gain’ is gain by lawful means of property to which the person gaining is not legally

entitled, while ‘wrongful loss’ is the loss by unlawful means of property to which the person losing it is legally entitled.

When a person is so deceived by an advertisement that he parts with his money, to obtain a benefit (from the product) that is not actually there, it is causing wrongful loss to him while effecting a wrongful gain to the seller. If the misleading advertisement was made with full consciousness of its inaccuracy or untruth, then it is an intentional deception.

Deception means, to cause a person to believe what is false or is misleading as to a matter of fact or leading into error. In constituting the offence of cheating, the deception precedes and induces, the delivery or retention of property. The person deceived need not be a definite person to whom the false representation is made. (*Sunder Singh* (1904) P.R. No 25 of 1904; 2 Cr LJ 126).

It is common knowledge that, when a person seeks to purchase any dietary/health supplement, cosmetic product or traditional medicine, he seeks to gain the benefit from it as being represented by the advertisement or the seller. Should the product not produce the desired effect or contain such beneficial ingredients as claimed, it shall amount to a deception. This falls within the definition of the offence described in section 415 of the Penal code.

The offence of cheating may not be complete without the ‘delivery’ of property, induced by the deception. The first part of section 415 specifically requires that a person be fraudulently or dishonestly induced to deliver property to any person. In the case of *Laxman Ramachandra Suryavanshi v State of Mysore* (1962) 2 Cr LJ 559, it was held that, the moment a person deceived and by the practice of such deception a property is fraudulently or dishonestly obtained from him ... the offence of cheating is committed.

Under the circumstances, the offence may be established only after the person makes his purchase complete.

Section 418 of the *Penal Code* (Act 574) presents a more serious variant of the offence of cheating in the context discussed above.

It states that, “whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law or by legal contract, to protect, shall be punished with imprisonment ...”

This provision provides for a heavier punishment compared to section 415 due to the fact, that the wrongdoer is by law or contract, bound to protect the victim. For instance, if a medical practitioner who

owes a duty to his patient prescribes or recommends such product to his patient, while fully aware of its elements of deception, then he may fall under the purview of section 418.

In dietary or food supplements advertisements, most of the representations made are describing the product, the quality of the product, and how the product can improve a person's health and wellbeing. If it improves a person's general health, maybe that is not too misleading (although whether there are clinical evidence or not is the issue here). But if the supplement claims that it can cure serious medical conditions such as diabetes, high blood pressure and to a certain extent cancer, then clearly the representations are not true. In such a situation, the writers believe that section 418 can be applied.

As a company that markets a product that can be consumed, surely, they are responsible in making sure that consumers will not be adversely affected by their products. Whatever representations they make in their advertisement to sell the product must be taken to be a true statement made in good faith. After all, a company generally possess the skill expertise and financial means to ensure that all due care and attention had been given in the manufacture of their products. The word 'good faith' is defined under Section 52, *Penal Code* (Act 574) as something done or believed after having given due care and attention. If it is not, then such act shall be considered as not having been done in good faith.

#### **4 PENALISING THE CRIMINAL UNDER THE TRADE DESCRIPTION ACT 2011**

Besides the Penal Code, another aspect of criminal sanction can be seen under the *Trade Description Act 2011* (Act 730). This legislation was enacted with the aim to combat misleading or false description of goods, services, accommodation or facilities as under Section 3(1)(a) and 3(1) (b). It also protects the customer against false claims where it requires any descriptions of goods, services, given by a person acting in the course of a trade or business to be true and not misleading. The former statute has been criticized (Ahmad Hidayat, 2012, cited in Nurazlina Abdul Aziz, 2014) on its inability to effectively safeguarding the Muslim consumer from false halal certification and related matters. In responding to the inadequacy of the 1972 Trade Description Act, the government had repealed and replaced the Trade Description Act 1972 with the Trade Description Act

2011. Zalina Zakaria et. Al (2014) commented that the Trade Description Act 2011 imposed the responsibility on the manufacturer to ensure that the content and ingredients of a product matches the description attached to a product. In compliance with issue of safety and quality of the dietary supplement requirements, manufacturers are obliged to act responsibly to maintain the status that they claim of their products. (Rosita Husain et al, 2012) It needs to be highlighted that the amendment of the old Trade Description Act 1972 have been plagued by many flaws of the previous laws to address upcoming trade issues. It is worthy to highlight that, since the Act is prohibitive in nature, it does not provide compensatory remedies for victims.

The 2011 Act is the recognition of matters that may assist the activities of enforcement and raids in reported case based audit. The act of tipping off and whistle blowing are very much relevant to ensure the reliability of the dietary supplement products controlling and monitoring system. Discovering the ineffective raids made by the enforcement officers which was caused by the act of tipping off, the 2011 Act now prohibit any act disclosing information to another person which may prejudice an investigation as per under Section 44 of *Trade Description Act 2011* (Act 730). Furthermore the evidence which has been obtained through abetting and provoking another person to commit an offence can be admissible in court as per Section 53 of *Trade Description Act 2011* (Act 730) and role of whistle-blowers has been recognized as they may be rewarded fifty percent of the fee as per Section 66 of *Trade Description Act 2011* (Act 730).

#### **5 CONCLUSIONS**

As stated earlier, this article is focussed on the criminal aspects of deceiving or misleading advertisements of dietary or food supplements. In the event of a consumer relying on the misleading advertisement in buying the product, the provisions illustrated above may be a basis for criminal prosecution.

Should a person suffer physical injury or bodily harm, a tortuous legal action may be a more appropriate redress along with several other legislations relating to consumer protection laws relevant to this issue.

Having stated all the above, it must be stressed that the advertising of dietary supplements in all media channels must be regulated; probably the same way regulations on advertising medicines and

medical products are imposed. Claims that the product can perform miracles in terms of healing serious illnesses without any scientific or clinical proof must be treated as deceiving and misleading statements which may come within the purview of sections 415 and 418 of the Penal code, classified as the offence of cheating as discussed above.

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