ADVERTISING AND DEFAMATION IN ENGLISH LAW: THE EVOLUTION OF A CONCEPT

Terence Nevett
Central Michigan University
Mt. Pleasant, MI 48859

ABSTRACT

Under English law the individual does not enjoy a right to privacy. However, the law of libel provides a means of redress to a person used in advertising without his/her consent, provided it can be shown that damage was caused to that person's personality. This concept has evolved through decisions in leading cases from the early nineteenth century onwards. Particular pitfalls have arisen for advertisers in the use of library material and retouched photographs.

INTRODUCTION

Under English law, the unauthorized use of a person's name, photograph or likeness is not in itself unlawful, however much annoyance these acts may cause to the feelings of the person concerned (Gatley 1981, p.40). According to Lord Greer in Tolley v. Fry, "Unless a man's photograph, caricature or name be published in such a context that the publication can be said to be defamatory within the law of libel, it cannot be made the subject-matter of complaint by action at law". The position under English law is thus quite different from that in many American jurisdictions, where the unauthorized use of a person's name or likeness is considered an invasion of privacy, and is actionable without the need to show special damage (Braun 1965, p.56; Gatley 1981, p.40).

Theoretically, the British system of advertising self-regulation should preclude a situation in which a person is featured in an advertisement without his/her consent. The British Code of Advertising Practice, which advertisers, agencies and media are all pledged to uphold and enforce, goes beyond the protection available under the law of defamation and extends to the individual a de facto right to privacy, a concept which English law does not recognize. Section 17 is headed "Protection of privacy and exploitation of the individual". Under the terms of paragraph 17.1:

> . . . Advertisements should not portray or refer to any living persons, in whatever form or by whatever means, unless their expressed prior permission has been obtained. This requirement applies to all persons including public figures and foreign nationals.

The effectiveness of this prohibition is limited by paragraph 17.2 which permits reference or portrayal without prior permission

> When there is, in the advertisement, no reasonable failure to respect the freedom of choice of the person concerned, nothing likely to be perceived as inconsistent with his position, and no abrogation of his rights to enjoy a reasonable degree of privacy.

The Code, however, is not always enforced as rigorously as it should be. As a result, situations still arise in which people in the public eye feel obliged to resort to legal action against advertisers to defend their reputations. In so doing, they invoke the protection available to them under the law of defamation, which is defined in English law as "The publishing of a statement which tends to lower a person in the estimation of right-thinking members of society" (Curzon 1988, p.127). Through an examination of leading cases, this paper traces how the concept of defamation in advertising has evolved over the past two centuries so that it now serves as a warning to advertisers considering the use of an identifiable person without his/her consent, and may offer the possibility of redress to anyone whose name or likeness has been so used.

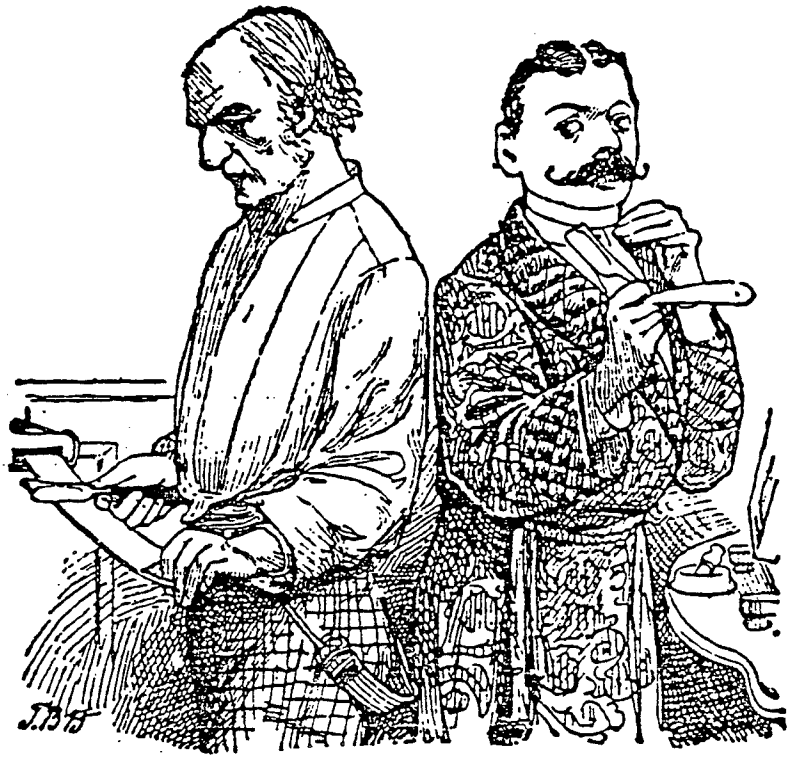
LORD BYRON V. JOHNSTON (1816)

This was the first case of note involving the use of a celebrity in advertising, although it was concerned primarily with a fraudulently designated publication. The defendant was a publisher who had advertised for sale works purporting to be those of the celebrated poet-peer. Since Byron was out of the country the action was brought by his agents. The defendant was asked in court to swear as to his belief that a poem in question was actually written by Lord Byron. When he refused, an injunction was granted restraining him from publishing the poems mentioned in the advertisement or any part of them as being the work of Byron.

ROUTH V. WEBSTER (1847)

The appearance of the joint-stock company created a situation in which promoters might use a person's name to give respectability to the venture and to induce others to invest money, without the person concerned being involved in any way whatsoever. Some people used the advertising columns of newspapers to inform the public about their lack of involvement with the company concerned. A typical example appeared in the Morning Chronicle (3 July 1843): "THE PUBLIC ARE CAUTIONED - in consequence of an ADVERTISING CART being sent round the streets, bearing the names of Mr. Ewart, M.P.; Mr. Leader, M.P.; Sir Henry Webb, Bart.; Mr. Pryme (late M.P. for Cambridge); Mr. Lewis (late M.P. for Carmarthen); and Mr. Rothman (on behalf of a Company styled the Anti-Monopoly Coal Company) -

UNITED AT LAST!



G.O.M.—"This Strop is simply grand."
Lord R. C.—"Yes; there is no opposition to that."

DO YOU SHAVE YOURSELF?
DOES YOUR RAZOR CUT?

The latter of these two questions will be easy to solve by stropping your Razor on

ESCOTT'S

PATENT

"ECLIPSE" SPRING DRAW-OUT RAZOR STROP.

Figure 3. Prime Minister Gladstone with opposition leader Lord Randolph Churchill.

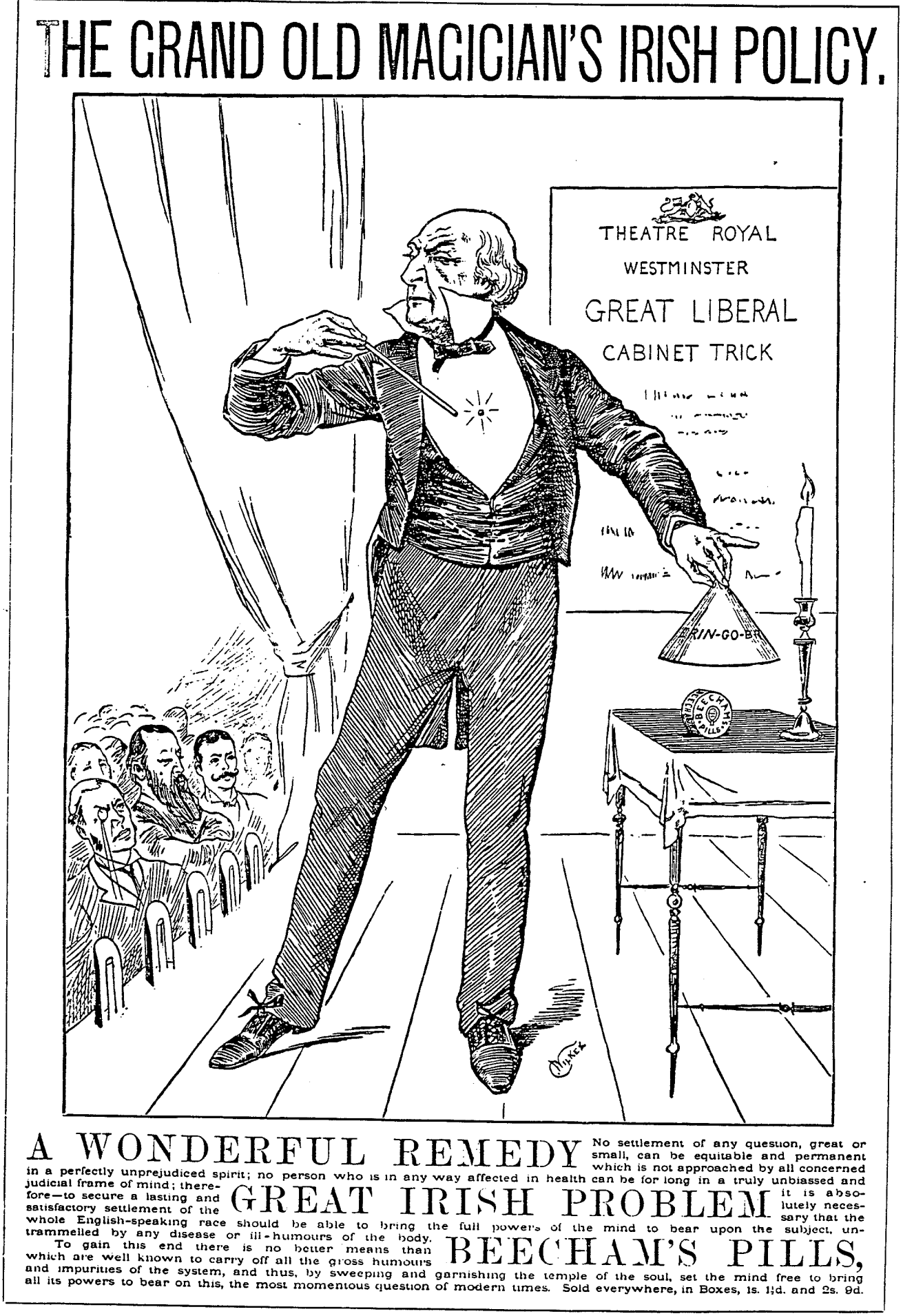


Figure 4. Prime Minister Gladstone featured in an advertisement for Beecham's Pills.

Figure 7. Queen Victoria in her Jubilee year, used in an advertisement for breakfast cereal.

latter recommended a quack medicine, when he had done nothing of the sort". He went on to say that in such a case the jury would probably award considerable damages in addition to any other remedy to which the plaintiff would be entitled (Jones 1906, p.129-30).

TOLLEY V. FRY (1931)

This remains the leading case in the use of persons in an advertisement without their consent. In the late 1920's a campaign for Fry's chocolate had featured such personalities as ex-King Tino of Greece, Michael Arlen, Gerald du Maurier, former Prime Minister Asquith, Woodrow Wilson, industrialist Sir Alfred Mond, and amateur golfer Cyril Tolley. The Fry family, well known Quaker philanthropists, obviously saw nothing wrong in this. Their agency, however, had felt sufficiently uneasy to take counsel's opinion, but having received his reply felt justified in going ahead. There were ample precedents for campaigns of this type. Aspro, a leading analgesic, had run a campaign featuring drawings of prominent British statesmen Lloyd George, Stanley Baldwin, Ramsey MacDonald, and Austen Chamberlain. (An old lady was said to have told an Aspro salesman, "I am glad to see you have such good men behind you.")

An advertisement featuring Cyril Tolley, a member of Britain's Walker Cup team, appeared in 1928. Tolley was well known to the sporting public for his ability to play golfing shots while smoking a pipe, and managing not to knock his teeth out. In the advertisement in question, Tolley was shown pipe in mouth executing an unlikely stroke, with a packet of Fry's chocolate protruding from his pocket. A stanza of doggerel purporting to be the words of the caddy proclaimed the virtues of the product concerned.

Tolley's permission had not been sought. In fact, Frys had told their agency that they would consider such an approach "rather bad form". Tolley accordingly brought an action for libel on the grounds that anyone seeing the advertisement would assume that he had been paid for his endorsement and that this being so, he would automatically forfeit his amateur status.

Frys declined the opportunity of avoiding legal action by giving equal publicity to a statement that the advertisement had been published without Tolley's knowledge or approval, and that he had not been paid for it. The case accordingly came to court.

The jury heard a fellow Walker Cup golfer state that an amateur who appeared to have allowed himself to be used in advertising would damage his reputation, and give the impression that he was surrendering his amateur status. They also heard two golf club secretaries state that in such a situation, unless the golfer could prove that the advertisement was published without his knowledge, he would be asked to resign from the club. The jury then found for Tolley, awarding him L1,000 damages.

(By courtesy of Cadbury Schweppes Ltd.)

Figure 8. The caricature which led to the case of Tolley v. Fry.

Frys appealed and were successful. The case then went to the House of Lords where the decision went in favor of Tolley. Although no general rule was laid down, the concept was now firmly established that a person used in advertising without consent might be able to sustain an action for libel by showing that his or her reputation had suffered damage as a result.

BLENNERHASSETT V. NOVELTY SALES SERVICES LTD. (1933)

The defendants on this case were suppliers of the yo-yo, a craze for which was sweeping across Britain at the time. Their advertising agency prepared and placed a campaign which depicted a fictional Mr. Blennerhassett, a staid and respectable member of the London Stock Exchange, being driven insane by the toy. As it happened, there actually was a member of the Stock Exchange with that name, whose life became miserable through the teasing of colleagues. However, the copywriter who created the campaign testified that he had chosen the name because it was used by his daughter for one of her dolls. The real Mr. Blennerhassett failed to convince the court that the advertisement carried a defamatory meaning, or that a reasonable person would take him as being the character depicted in the advertisement (Braun 1965, chapter 4).

PLUMB V. JEYES SANITARY COMPOUND COMPANY LIMITED (1937)

This case illustrates how unintentional defamation can occur when proper clearance of an illustration has not been obtained. In 1935 an advertisement for Jeyes Fluid showed a photograph of a perspiring policeman on traffic control duty in London. The headline read "Phew! I am going to get my feet into a Jeyes' Fluid foot bath." The photograph in question had originally appeared as an editorial illustration in a national newspaper some six years earlier. Since then the officer concerned, P. C. Plumb, had retired from the police and was working for the Post Office. At that time Post Office employees were civil servants (i.e. employees of the Government) who to this day are not allowed to appear in advertising. Even had Jeyes sought his permission, therefore, it would not have been given. Further, his counsel sought to show innuendo in that "the publication meant that by reason of slovenly and uncleanly habits, or otherwise, the exudation and/or general condition of his feet was so unpleasant and noisome, that a bath or wash would be inadequate and a solution of Jeyes Sanitary Compound would be necessary to deodorize his feet." P. C. Plumb was awarded L100 damages and costs.

RETOUCHED AND COMPOSITE PHOTOGRAPHS: A PARTICULAR HAZARD

If it can be hazardous under certain circumstances to use a person in an advertisement without that person's consent, the hazard is compounded when the use consists of a photograph which has been in some way retouched or which forms part of a composite illustration.

Three cases help explain this point. The first, Funston v. Pearson (1915) concerned an advertisement for a dentist, the copy in which read:

> Laugh and the world laughs with you,
> But not if your teeth are bad:
> So hustle and pay us a visit
> And get the laugh that's glad.

It was accompanied by a photograph of an actress which had been retouched to make it appear that she had no teeth. Her claim that this had caused damage to her reputation was upheld.

In Griffiths v. Bondor Hosiery Co. Ltd. (1935) it was stated that an advertisement for silk stockings with the headline "Leg Appeal" carried an illustration in which the head and shoulders of a professional model had been superimposed on another woman's legs. The model in question alleged that this implied that she had consented to being photographed in an indecent manner, and that her professional reputation would suffer in consequence. She was awarded L125 damages.

In Stockwell v. Kellogg Company of Great Britain (1975) the defendants had retouched a library photograph of a nurse to make it appear as though she were pregnant. The plaintiff was not in fact pregnant, was not aware that the photograph was to be used in this way, and at the time the advertisement appeared was engaged to be married. The defendants settled out of court.

CONCLUSION

Under English law, a person used in advertising without his/her authority can bring a successful action for defamation if it can be shown that damage was caused to that person's reputation. The mere fact of such use is not in itself defamatory. In Dockrell v. Dougall (1899), Lord Romer in the Court of Appeal was also emphatic that a man has no property in his own name: "There is no authority for such a proposition; it goes too far and is unsound." Nor will an action succeed if the defence can show that no reasonable person would take the advertisement as referring to the plaintiff (Blennerhasset v. Novelty Sales Service Ltd. (1933)). Even if the plaintiff clearly is the person featured in the advertisement, it was made clear in the Court of Appeal in Tolley v. Fry (1931) that defamation cannot be shown unless members of the public believe the plaintiff to have given his/her consent (Lawson 1978, p.72).

It is possible that the Trade Descriptions Act (1968) can be applied to make unauthorized endorsements a criminal offence, particularly section 13 which makes it unlawful to give a false indication that goods and services are of a kind supplied to any person. However, no examples of prosecutions for unauthorized endorsement under this Act have been discovered.

The Royal Family are now protected by rules published by the Lord Chamberlain's office which govern the use of royal photographs. While these do not have legal standing, as Lawson (1978, p.69) observes, "royal displeasure is not to be lightly entertained."

TABLE OF CASES

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175 L.T.J. 393

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10 Beav.10, 132

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