CHAPTER TWELVE: RIGHT TO PRIVACY

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Introduction

Resort to the so-called "privacy torts" and similar types of actions has become a favored tactic for plaintiffs seeking to avoid the constitutional barriers of a defamation claim. This chapter covers the four privacy torts of false light, private facts, misappropriation and intrusion, as well as the related areas of trespass, intentional infliction of emotional distress and wiretapping.

Privacy Torts

Although the Illinois Constitution recognizes a citizen's right to be free from invasions by the government, privacy law has generally developed through the common law. While the Illinois Appellate Courts had recognized a limited right to privacy in 1952, it wasn't until 1970 that the Illinois Supreme Court recognized what it described as the right "to be let alone."[1] The Restatement (Second) of Torts has recognized four branches of privacy law: (1) publicity placing a person in a false light; (2) publicity given to private facts; (3) misappropriation of the name or likeness of another; and (4) intrusion upon the seclusion of another.[2] Illinois courts have recognized all four causes of action, although Illinois courts have split on whether a plaintiff may bring a cause of action for intrusion.

[1] Leopold v. Levin, 259 N.E.2d 250, 254 (Ill. 1970).

False Light

In *Lovgren v. Citizens First National Bank of Princeton,* the Illinois Supreme Court recognized and applied the "false light" prong of the privacy tort.[3] Liability may be found if the false light in which the other person was placed would be highly offensive to a reasonable person and the defendant knew or acted with reckless disregard of the false light in which plaintiff would be placed. This second requirement is the actual malice standard involved in many defamation cases.[4] Minor mistakes in reporting, even if made deliberately, or false facts that offend highly sensitive plaintiffs will not satisfy the element of offensiveness.[5] Moreover, when a claim is based on language whose defamatory meaning can be established only from extrinsic facts, a plaintiff must plead special damages.[6] Furthermore, a plaintiff must be able to allege that a specific statement was false in order to state a claim.[7]

As opposed to the tort of intrusion, the heart of the false light tort lies in the publicity of misinformation.[8] Accordingly, there is an overlap between defamation law and the false light tort, such that all defamation cases can be analyzed as false light cases, but not all false light cases can be analyzed as defamation cases.[9] Thus, expressions of opinion protected from defamation liability are also insulated from false light liability.[10] Another similarity between the two torts is the requirement of showing actual malice, or that the defendant knew of the falsity of

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[2] Restatement (Second) of Torts § 652.
[3] 534 N.E.2d 987, 989 (Ill. 1989).
[4] Id. (quoting Restatement (Second) of Torts § 652E).
[5] Id. at 990.
[6] Schaffer v. Zekman, 554 N.E.2d 988, 993-94 (1st Dist. 1990) (finding plaintiff's false light claim insufficient where plaintiff had to rely on extrinsic evidence of prior reports to establish claim because plaintiff didn't allege specific monetary damages).
[7] Kirchner v. Greene, 691 N.E.2d 107, 115-16 (1st Dist. 1998).
[8] Lovgren, 534 N.E.2d at 989.
[9] Id. at 991; Moriarty v. Greene, 732 N.E.2d 730, 741 (1st Dist. 2000).
[10] Moriarty, 732 N.E.2d at 741; Russell v. American Broad. Cos., 1997 WL 598115, at *3 (N.D. Ill. Sept. 19, 1997).

the information or recklessly disregarded the truth.[11] However, although a defamation plaintiff may not always need to prove actual malice to prevail, the false light plaintiff must prove actual malice in all cases, whether he is a public or private figure and whether the issue is one of public or private concern.[12]

The case of *Moriarty v. Greene* is instructive in its application of the law of false light. In *Moriarty*, a newspaper columnist wrote several columns about the plaintiff, a psychologist involved in a high-profile child custody case.[13] Among the columns was one that accused the psychologist of disregarding her professional obligations and another that conveyed the columnist's belief that the psychologist's intention to write a book was misguided.[14] The court held that a jury could find the insinuation of professional irresponsibility offensive to the reasonable person but insulated the latter comment from liability because it qualified as an opinion.[15]

In *Kolegas v. Heftel Broadcasting Corp.*, the court found that statements made by two radio disc jockeys implying that a caller's wife and child had deformed heads and that he married his wife in a shotgun wedding because she suffered from "Elephant Man" disease stated a claim for false light.[16] The court dismissed the notion that the plaintiff assented to the comments because he voluntarily called the show.[17] The court held that a jury could find that a reasonable person would be highly offended by the comments, especially because the comments were more severe than those made in *Lovgren*.[18]

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[11] Lovgren, 534 N.E.2d at 991.
[12] Id.
[13] Moriarty, 732 N.E.2d at 735.
[14] Id. at 741.
[15] Id.
[16] 607 N.E.2d 201, 209-10 (Ill. 1992).
[17] Id. at 210-11.
[18] Id.

Public Disclosure of Private Facts

The tort of public disclosure of private facts requires that the defendant publicize facts about the private life of a person that would be highly offensive to a reasonable person and are not of legitimate concern to the public.[19] The court in *Leopold* cautioned that the right of privacy must be construed conservatively to protect the freedom of speech.[20] Consequently, the court held that a book about a notorious murder committed by the plaintiff was protected from a privacy claim because the matter was still of public interest.[21] Similarly, in *Haynes v. Alfred Knopf, Inc.* the court held that despite the elapse of 30 years, information on the public record, including the plaintiffs' marital problems and criminal record, was protected from a privacy claim.[22] The court noted that there could be no liability for publicizing public information or for publicizing behavior the plaintiff left open to the public, such as his drinking habits.[23]

Unlike defamation law, which requires only a communication to a third person, a private facts claim requires that the matter be communicated to the public at large or to so many people that the matter must be regarded as one of general knowledge.[24] Generally, any broadcast, handbill, or publication in a newspaper or magazine, no matter how great the circulation, will establish sufficient publicity.[25] Courts also have found the requisite publicity in situations in which there exists a special relationship between the plaintiff and the "public," such as when the disclosure is made to co-workers.[26]

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[19] Roehrborn v. Lambert, 660 N.E.2d 180, 182 (1st Dist. 1995) (quoting Restatement (Second) of Torts, § 652).
[20] Leopold, 259 N.E.2d at 255.
[21] Id.
[22] 1993 WL 68071, at *6 (E.D. Ill. Mar. 10, 1993), affirmed, 8 F.3d 1222 (7th Cir. 1993).
[23] Id.
[24] Roehrborn, 660 N.E.2d at 182.
[25] Miller v. Motorola, Inc., 560 N.E.2d 900, 903 (1st Dist. 1990).
[26] Id.

The case of *Green v. Chicago Tribune Co.* is instructive on the application of the law of disclosure of private facts.[27] In *Green*, the defendant published unauthorized pictures of the plaintiff's son undergoing emergency surgery for a gunshot wound, and published the plaintiff's comments to her dead son in his hospital room despite her refusal to comment to the reporter.[28] The court held that the publication in the newspaper satisfied the publicity element of the tort and that the plaintiff had an expectation of privacy in her son's hospital room, which meant that the matter was private.[29] Although the court recognized that speaking to the press might imply consent, the plaintiff's refusal to comment on her son's death put the defendant on notice that her comments in the hospital room were not intended for publication.[30] The court held that a reasonable jury could have found that the pictures and plaintiff's comments were not necessary to the article and not of public concern, rendering their publication sufficiently outrageous and sensational to trigger liability.[31] However, because a privacy claim is personal and does not survive death, the court limited it's ruling to an article that identified the plaintiff, and refused to find liability where only the picture of the son was published.[32]

Misappropriation

Illinois courts have recognized actions for misappropriation for nearly 50 years,[33] and in 1998 the Illinois legislature passed the Right of Publicity Act. The Act went into effect on January 1, 1999.[34] Under the Act, "[the] right to control and choose whether and how to use an individual's identity for commercial purposes is recognized as each individual's right of

[27] 675 N.E.2d 249 (1st Dist. 1996).
[28] Id. at 251.
[29] Id. at 252.
[30] Id. at 253.
[31] Id. at 255-56.
[32] Id. at 254.
[33] Eick v. Perk Dog Food Co., 106 N.E.2d 742, 748 (1st Dist. 1952).
[34] 765 ILCS 1075/1-60.

publicity."[35] In furtherance of its recognition of an individual's right of publicity, the Act decrees that "[a] person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent…"[36] In addition, "[if] an individual's death occurs after the effective date of this Act, a person may not use that individual's identity for commercial purposes for 50 years after the date of the individual's death without having obtained previous written consent…"[37] The seemingly broad reach of the Act is limited, however, by exemptions from its provisions. One such exemption covers "use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign."[38] News stories are therefore exempt from the provisions of the Act. The Act also does not apply to promotional materials, advertisements or commercial announcements used in conjunction with such stories.[39] For instance, blow-up photos of a newspaper's front page could be used in an advertising campaign for the newspaper itself without running afoul of the Act.

The Act supplants rights and remedies previously available for right of publicity actions.[40] However, the Act merely supplements previously recognized rights of privacy such as misappropriation.[41] Under the common law, misappropriation consists of the appropriation of one's name or likeness without consent for another's use or benefit.[42] Illustrations of the tort given by the Restatement (Second) of Torts include publishing of a photograph in an advertisement without permission, operating a corporation named after a public figure without

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[35] 765 ILCS 1075/10.
[36] 765 ILCS 1075/30(a).
[37] 765 ILCS 1075/30(b).
[38] 765 ILCS 1075/35(b)(2).
[39] 765 ILCS 1075/35(b)(4).
[40] 765 ILCS 1075/60.
[41] Id.
[42] Dwyer v. American Express Co., 652 N.E.2d 1351, 1355 (1st Dist. 1995) (citing Restatement (Second) of Torts § 652C).

consent, impersonating a man to obtain information regarding the man's wife and filing a lawsuit in the name of another without consent.[43] There will be no liability, however, when an image or name is used to convey news information despite the fact that the media are engaged in the business of publication.[44]

The right of privacy is also limited in cases of express or implied consent and in areas of legitimate public interest.[45] Two cases illustrate the public interest exception. In *Buzinski v. Doall Co.*, the defendant published a photo of the plaintiff and his "land yacht" in its magazine without permission.[46] The court held that the picture of the unique "land yacht" was of legitimate public interest because it served an informational purpose, and the inclusion of the plaintiff's likeness was incidental and not commercially exploitative.[47] In contrast, in *Ainsworth v. Century Supply Co.* the court found that the defendant was liable for appropriation by using footage of the plaintiff in an advertisement.[48] The court distinguished *Buzinski* on the grounds that the purpose of the advertisement was not to provide information to the public and that the inclusion of the plaintiff's image was deliberate and not incidental.[49]

Although the tort of misappropriation was originally directed toward the use of a name or picture in an advertisement without permission, the United States Court of Appeals for the Seventh Circuit has extended the misappropriation tort to editorial content.[50] The court found that *Hustler* committed the tort when it published unauthorized pictures of the plaintiff that impaired the plaintiff's commercial exploitation of her talents.[51] The court relied on the case of

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[43] Id.
[44] Berkos v. National Broadcasting Company, Inc., 515 N.E.2d 668, 679 (1st Dist. 1987).
[45] Eick, 106 N.E.2d at 745.
[46] 175 N.E.2d 577, 579 (1st Dist. 1961).
[47] Id. at 579-80.
[48] 693 N.E.2d 510, 513 (2d Dist 1998).
[49] Id.
[50] Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1138 (7th Cir. 1985).
[51] Id.

Zacchini v. Scripps-Howard Broadcasting Co., where a television station broadcast a "human cannonball's" entire act, and the court recognized that an important aspect of the right of publicity was to control the place, time, and frequency of one's public appearances.[52]

Intrusion

To state a cause of action for intrusion upon the seclusion of another, a plaintiff must allege that (1) there was an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion was offensive or objectionable to a reasonable person; (3) the matter upon which the intrusion occurred was private; and (4) the intrusion caused anguish and suffering.[53] The Illinois Supreme Court has never officially recognized the tort, and Illinois appellate courts are split on the issue.[54] The confusion has extended to the federal courts, which have also disagreed as to the validity of an intrusion claim in Illinois.[55]

The crux of the tort is that there has been an intrusion upon some protected sphere of privacy.[56] Liability derives not from the publication of information but from the investigation that invades someone's private domain.[57] Thus, there was no violation of a prisoner's privacy where a magazine publicized the prisoner's racist tattoos, which were easily observable by visitors touring the prison.[58] In another case, repeated phone calls and verbal harassment were

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[52] Id. (discussing Zacchini v. Scripps-Howard Broad Co., 433 U.S. 562 (1977)).
[53] Melvin v. Burling, 490 N.E.2d 1011, 1013 (3d Dist. 1986).
[54] Compare Johnson v. K Mart Corp., 723 N.E.2d 1192, 1195-96 (1st Dist.) (recognizing tort), appeal granted, 729 N.E.2d 496 (Ill. 2000); Davis v. Temple, 673 N.E.2d 737, 744 (5th Dist. 1996) (recognizing tort); Benitez v. KFC National Management Co., 714 N.E.2d 1002, 1033-34 (2d Dist. 1999) (recognizing tort); with Bureau of Credit Control v. Scott, 345 N.E.2d 37 (4th Dist. 1974) (not recognizing tort).
[55] Compare Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993) (predicting Illinois Supreme Court would recognize tort); Miles v. LaSalle Fin. Servs., Inc., 1995 WL 599053, at *6 (N.D. Ill. Oct. 5, 1995) (same); with Hultquist v. Hartman, 1994 WL 383952, at *6 (N.D. Ill. Jul. 20, 1994) (predicting Illinois Supreme Court would not recognize tort).
[56] Price v. Chicago Magazine, 1988 WL 61170, at *4 (N.D. Ill. June 1, 1988).
[57] Russell v. American Broad. Co., 1995 WL 330920, at *8 (N.D. Ill May 31, 1995).
[58] Price, 1988 WL 61170, at *4.

insufficient to state a claim for intrusion because the behavior was not severe enough.[59] Examples of conduct that have been found to constitute intrusion include entering someone's bedroom and opening someone's mail.[60] In *Melvin v. Burling*, the court found an invasion of privacy where the defendant used the plaintiff's name to order unwanted items through the mail.[61] In *Benitez v. KFC National Management, Co.*, the court held that the defendants were guilty of intrusion on seclusion when they took pictures of employees and customers using the woman's restroom through discrete holes in the wall.[62] In *Wilson v. Layne*, the Supreme Court held that an invitation from federal marshals for the media to enter a suspect's house during a raid constituted an unconstitutional intrusion that violated the Fourth Amendment.[63]

Trespass

Illinois recognizes both a common law tort of trespass and statutory criminal trespass.[64] The civil tort is committed by entering the land of another without authorization or unlawfully remaining on the premises of another.[65] At common law, however, trespass was not a crime unless it was accompanied by or tended to create a breach of the peace.[66] Therefore, the United States Court of Appeals for the Seventh Circuit has denied a claim for trespass against an investigative reporter who entered premises under false pretenses to gather information because his presence did not disrupt the activities of the office.[67]

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[59] Kelly v. Franco, 391 N.E.2d 54, 58 (1st Dist. 1979).
[60] Thomas, 998 F.2d at 452.
[61] 490 N.E.2d at 1013-14.
[62] 714 N.E.2d at 1006.
[63] 526 U.S. 603 (1999).
[64] 720 ILCS 5/21-3.
[65] People v. Goduto, 174 N.E.2d 385, 387 (Ill. 1961).
[66] Id.
[67] Desnick v. American Broad. Cos., 44 F.3d 1345, 1352 (7th Cir. 1995).

There is no generally recognized privilege allowing journalists to trespass, however.[68] Although in *Desnick* the Seventh Circuit found no trespass had been committed, the decision turned on the facts that consent, albeit fraudulently procured, had been given, that the business was open to anyone wanting services, and that there had been no interference with the landowner's activities.[69] Courts in other jurisdictions have found journalists liable for trespass. In *Food Lion v. Capital Cities/ABC, Inc.*, Food Lion requested several million dollars in punitive damages based on a damaging *Primetime Live* expose that grew out of an undercover investigation.[70] A federal appellate court ultimately found that the reporters had committed trespass and breached their duty of loyalty to Food Lion, but reduced the damage award to two dollars.[71] Other media trespass cases include *Le Mistral v. Columbia Broadcasting System*, in which the media defendant was found guilty of trespass where a camera crew entered a crowded restaurant and disrupted its business despite the protests of the plaintiff, and *Dietemann v. Time, Inc.*, in which the Ninth Circuit upheld a verdict against a media defendant who had entered the plaintiff's home under false pretenses and videotaped him practicing questionable medicine without a license.[72]

A criminal trespass occurs when a person enters the land or building of another after receiving prior notice that such entry is forbidden or remains on the land after being told to leave.[73] Criminal trespass to real property constitutes a Class B misdemeanor.[74] Trespass law is more restrictive when a home is involved. Criminal trespass to a residence requires only that the

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[68] Id. at 1351. But see Florida Publishing v. Fletcher, 340 So. 2d 914 (Fla. 1976) (finding longstanding custom and practice gave implied consent to entry by news personnel to scene of fire).
[69] Id.
[70] 194 F.3d 505, 511 (4th Cir. 1999).
[71] Id. at 524.
[72] 61 A.D.2d 491 (1978); 449 F.2d 245 (9th Cir. 1971).
[73] 720 ILCS 5/21-3.
[74] Id.

trespasser know he is entering a residence and requires no notice that such entry is forbidden.[75] Moreover, the penalties for trespass to a residence are more severe. Criminal trespass to a residence constitutes a Class A misdemeanor, and, if the trespasser knows or has reason to know that anyone is home, the offense is a Class 4 felony.[76]

Trespass laws apply as well to government property.[77] When public property has traditionally been a forum for speech, or has been designated as such, the government may enact reasonable time, place and manner regulations pertaining to its use.[78] Non-public fora that have not been designated or traditionally recognized as a forum for communication, however, can be reserved for the government's use as long as regulations are reasonable and not designed to suppress a particular view.[79] Accordingly, a police station was held to be a non-public forum to which people were afforded only limited access.[80]

Intentional Infliction of Emotional Distress

Another tort closely related to the four privacy torts is intentional infliction of emotional distress. The Illinois Supreme Court first laid out the contours of the tort in *Public Finance Corp. v. Davis*.[81] The plaintiff must show extreme and outrageous conduct that causes severe emotional distress where the actor knows or is substantially certain that severe emotional distress will result.[82] The outrageousness of the conduct may arise in part from the abuse of a position that gives the actor actual or apparent authority over the plaintiff with power to affect his

[75] 720 ILCS 5/19-4(b)(1).
[76] 720 ILCS 5/19-4(b)(2).
[77] People v. DeRossett, 604 N.E.2d 500, 510 (4th Dist. 1992).
[78] Id.
[79] Id.
[80] Id.

interests.[83] This tort need not be of great concern to a reporter for two reasons. First, the conduct that will trigger liability under this tort must be outrageous - beyond all possible bounds of decency and causing such severe emotional distress that no reasonable person could be expected to bear it.[84] Second, the media are seldom defendants in such actions.

Courts have rarely found behavior "outrageous" enough to satisfy the high standards for an emotional distress claim. For instance, in *Public Finance* the court found that the defendant's persistent calls to collect a lawful debt from the plaintiff did not constitute a severe infliction of emotional distress.[85] One court, despite determining that a newspaper article about the drug overdose of the plaintiff's son caused the plaintiff's humiliation and suffering, nonetheless rejected an emotional distress claim.[86] Another court rejected a plaintiff's claim where a well-known television host repeatedly accused the plaintiff of being a liar because he was unable to demonstrate distress and the conduct did not reach beyond a mere defamatory comment.[87]

The U.S. Supreme Court addressed the issue in *Hustler v. Falwell* where a parody in *Hustler* magazine implied that the Reverend Jerry Falwell had engaged in an incestuous relationship with his mother in an outhouse.[88] Falwell's claim of intentional infliction of emotional distress was clearly an attempt to sidestep the requirements of a defamation claim. Despite whatever impure motives the defendant may have had, the Court refused to create an outrageousness standard and ruled that a public figure could not recover for infliction of emotional distress unless the statement was made with actual malice.[89] Because the parody

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[81] 360 N.E.2d 765, 767 (Ill. 1976).
[82] Id.
[83] Id.
[84] Id.
[85] Id. at 769.
[86] Beresky v. Teschner, 381 N.E.2d 979, 984-85 (2d Dist. 1978).
[87] Cook v. Winfrey, 141 F.3d 322, 331-32 (7th Cir. 1998).
[88] 485 U.S. 46, 48-49 (1988).
[89] Id. at 53-54, 56.

could not reasonably be interpreted as asserting actual facts, the Court rejected the plaintiff's claim.[90] [CHECK]

In *Van Duyn v. Smith*, however, the court found that the conduct was sufficiently outrageous to state a claim for infliction of emotional distress.[91] The defendant in that case was accused of harassing the plaintiff for several years because of the plaintiff's employment at an abortion clinic.[92] The defendant picketed the plaintiff's home, distributed a "wanted" poster featuring the plaintiff to friends and neighbors, confronted the plaintiff at the airport, and followed the plaintiff in her car.[93] The defendant's actions allegedly resulted in humiliation and embarrassment, as well as physical problems including high blood pressure, impaired vision, anxiety and others.[94] The court held that the plaintiff stated a claim for intentional infliction of emotional distress and distinguished *Hustler* on the grounds that it involved only publication and not conduct.[95] Additionally, the plaintiff in *Van Duyn* was not a public figure like the plaintiff in *Hustler* and therefore was not required to prove actual malice.[96]

Eavesdropping

Two statutes, one state and one federal, determine the legality of intercepting and recording communications. Federal law generally prohibits the intentional interception of wire, oral or electronic communications.[97] The federal statute, however, allows interception and recording where the recorder is a party to the communication or one of the parties to the

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[90] Id. at 57.
[91] 527 N.E.2d 1005 (3d Dist. 1988).
[92] Id. at 1006-1007.
[93] Id.
[94] Id.
[95] Id. at 1010.

communication has consented to interception, as long as the interception is not intended for committing any criminal or tortious act.[98]

Under the Illinois Eavesdropping Act, it is generally a crime to record a conversation without the consent of all parties involved.[99] Illinois courts formerly interpreted the Act in a manner that allowed one party to record a conversation without the other's consent.[100] In 1994, the legislature amended the Act and made clear that consent of all parties was necessary for recordation.[101] Recently, the legislature amended the Act to criminalize the surreptitious interception of electronic communications such as pages and e-mails.[102] However, such an interception will be actionable only if the sending and receiving parties intended the communication to be private.[103]

The authors would like to thank Jonathan Katz for his assistance with this chapter.

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[96] Id. at 1011.
[97] 18 U.S.C. § 2511(1).
[98] 18 U.S.C. § 2511(2)(d).
[99] 720 ILCS 5/14-2(a).
[100] People v. Herrington, 645 N.E.2d 957, 958-59 (Ill. 1994); Russell, 1995 WL 330920, at **2-3.
[101] 720 ILCS 5/14-2(a)(1).
[102] 720 ILCS 5/14-1(e).
[103] Id.