32. Privacy Torts

"I never said, 'I want to be alone.' I only said 'I want to be *let* alone!' There is all the difference."

– Greta Garbo, c. 1955

Introduction

The value people place on their privacy is famously reflected in the Constitution. But it is also reflected in tort law.

Back in 1890, in one of the most cited law review articles of all time, future U.S. Supreme Court Justice Louis D. Brandeis and his friend Samuel D. Warren argued that there existed a common-law right of privacy: Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy,* 4 HARV. L. REV. 193 (1890). Courts followed that lead in construing tort law to protect the right of privacy. Then, around the middle of the 20th Century, a few writers began to break up the right of privacy into separate torts. Chief among them was William L. Prosser, who identified four separate torts within "right of privacy." See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

In this chapter, we will discuss three of the four privacy torts that Prosser identified: (1) false light, (2) intrusion upon seclusion, and (3) public disclosure of embarrassing facts.

The fourth tort that Prosser identified, appropriation of name or likeness (or "the right of publicity"), concerns the right of people – often celebrities – to exclusively control the use of their name and image on merchandise, in advertising, and in other means of commercial exploitation. The right-of-publicity cause of action has evolved to go beyond notions of privacy and has been increasingly discussed in terms of analogies drawn to intellectual property. It is not covered in this chapter.

The three torts of false light, intrusion, and public disclosure all protect various aspects of what you might informally call a person's right "not to be messed with" or "to be let alone."

The tort of false light is very similar to defamation, except that it is harnessed to ideas of privacy and dignity rather than reputation. It allows a cause of action where a defendant spreads a highly offensive, false statement to the public.

The tort of intrusion upon seclusion provides a cause of action against the most stereotypical invasions of privacy, such as when someone spies or peeps on someone.

The tort of public disclosure allows suit against defendants who spread to the public embarrassing facts about the plaintiff that, while true, are none of anyone's business.

Taken together, defamation and the privacy torts seek to protect a person's non-corporeal integrity – that part of ourselves that is reflected in what people thinks about us. Like defamation, the privacy torts routinely implicate First Amendment values, and they are often brought against media defendants. Because of this, a rich constitutional jurisprudence has developed to constantly patrol the perimeters of these torts.

False Light

Here is the blackletter statement for a claim for false light:

> A **prima face case for false light** is established where the defendant makes (1) a public statement (2) with actual malice (3) placing the plaintiff in a (4) false light (5) that is highly offensive to the reasonable person.

As you can see, false light is very similar to defamation. Both concern falsehoods told about the plaintiff. In fact, some jurisdictions have rejected the false light cause of action as being needlessly duplicative of defamation. Yet there are some key differences between the doctrines. And because of those differences, there are some situations in which there will be liability for defamation but not for false light, and vice versa.

The most important difference is that false light does not require reputational harm. For false light, a plaintiff can sue over a false statement even if it is reputation-enhancing rather than being

reputation-harming. Saying that someone is a war hero, for instance, when the person actually never served in the military, would be an example of a falsehood that is not reputation-harming but nonetheless could be considered highly offensive.

Notice also that false light requires that the statement be made to the public – a much higher threshold than defamation's requirement of only one other person receiving the communication.

First Amendment values are just as much implicated by the tort of false light as they are with defamation, and because of this, all the First Amendment limits to defamation apply to false light. But note that the common-law structure of the false light tort, as it is typically set forth by the courts, has built-in First Amendment compliance: Falsity and actual malice must be proved as part of the prima facie case.

Intrusion Upon Seclusion and Public Disclosure

Intrusion upon seclusion and public disclosure are quite different from false light. To sum them up as concisely as possible, you can think of intrusion upon seclusion as the tort of *peeping or creeping*, and public disclosure as the tort of *blabbing*.

Here is the blackletter for each:

> A **prima facie case for intrusion upon seclusion** is established where the defendant effects (1) an intrusion, physical or otherwise, (2) into a zone where the plaintiff has a reasonable expectation of privacy, which is (3) highly offensive to the reasonable person.
>
> A **prima facie case for public disclosure** is established where the defendant effects (1) a public disclosure of (2) private facts, which is (3) highly offensive to the reasonable person.

The public disclosure tort, in particular, is limited by a newsworthiness privilege, and it necessarily engages First Amendment concerns which courts will apply along the lines of the teachings of *New York Times v. Sullivan* and its progeny.