

Oblique Torts

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Konomark - Most rights sharable.

Fraud

The Elements:

1. Material misrepresentation by defendant
2. Scierer
 - (at least recklessness; it's a lie)
3. Intent to induce reliance
4. Causation
 - (victim must be deceived; actual reliance)
5. Justifiable reliance
6. Damages

Intentional Economic Interference

The Elements:

1. Valid contract or economic expectancy between plaintiff and third party (not defendant!)
2. Defendant's knowledge of contract or expectancy
3. Intent to interfere
4. Actually caused interference
5. Damages (to plaintiff, not third party)

NOTE: Wide ranging, nebulously defined "justifications" are the key defense.

Defamation

The Elements:

1. A communication to at least one other person
2. That tends to be harmful to the reputation
3. Of and concerning the plaintiff

**(But don't use these elements! Defamation is too complicated!
Use the handout!)**

False Light

The Elements:

1. A public statement
2. Made with actual malice
3. Placing the plaintiff in a false light
4. That is highly offensive to the reasonable person

Intrusion

The Elements:

1. Physical or other intrusion
2. Into a zone in which the plaintiff has a reasonable expectation of privacy
3. Which is highly offensive to the reasonable person

Disclosure

The Elements:

1. A public disclosure
2. Of private facts
3. That is highly offensive to the reasonable person

Right of Publicity Infringement

(a/k/a Commercial Misappropriation)

The Elements:

1. A commercial use
2. Of a person's name, likeness, voice, or other indicia of identity

NOTE: This blackletter formulation is overbroad.

The scope of the doctrine is greatly limited by:

- First Amendment freedom of expression
- Copyright preemption
- Ad-hoc "spin"

§230 Safe Harbor

Applicable to Defamation,
Outrage, and Privacy Torts

47 U.S.C. §230

(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(1) TREATMENT OF PUBLISHER OR SPEAKER. — No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY. — No provider or user of an interactive computer service shall be held liable on account of —

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

§230 safe harbor provides broad immunity against torts against site owners:

- Includes:
 - Defamation
 - Privacy torts
 - Outrage (IIED)
 - Nuisance
 - and more ...
- Even works with e-mail and other contexts outside the web.
- Does not include:
 - Intellectual property infringement
- Does not apply to the original poster!

Broad applicability

- "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.
- Not limited to special kinds of websites. Includes blogs, Twitter, consumer review sites, etc.

Site operators shouldn't lose immunity by:

- Exercising traditional editorial functions, such as pre-screening, selectively deleting.
- Encouraging or paying third-parties for contributions.
- Editing material (unless the editing materially alter the meaning of the content).

The Indignancy Matrix

The Indignancy Matrix

	To how many?	True or false?	Highly offensive?	Intent requirement?	After death?
Intrusion	n/a	n/a	yes	intent	n/a
Disclosure	public	true	yes	intent	no
False light	public	false	yes	actual malice	no
Defamation	1	false	no	[complex]	no
Outrage / IED	n/a	n/a	yes+ <small>(extreme & outrageous)</small>	intent	n/a
Publicity right	commerical	either	no	none	often

Other oblique torts cover:

- Economic relations
- Misuse of legal process
- Marriage and sex
- Whistleblowing and organized crime

Some more economic relations oblique torts:

- Tortious breach of the covenant of good faith and fair dealing
 - e.g., wrongful denial of insurance claims
- Implied private rights of action under unfair competition statutes
 - e.g., California B&P Code §17200

Misuse of legal process:

- Malicious prosecution
- Malicious institution of civil proceedings

Marriage and sex:

- Causes of action:
 - Seduction
 - Alienation of Affection
 - Criminal Conversation
- These are generally being de-recognized in today's courts when they come up.

Seduction

Elements:

1. Enticement, including promise of marriage
2. Chastity of female at the time
3. Sexual intercourse resulting from enticement

Standing:

- Can be brought by parent (generally father)
- Cannot be brought by female

Theories of damages:

- Loss of services
- Humiliation

Alienation of Affections

Elements:

1. Defendant engaged in wrongful conduct
2. Plaintiff lost the affections or consortium of his or her spouse as a result
3. Causal connection between conduct and loss

Standing:

- Can be brought by spouse

Criminal Conversation

Elements:

1. An actual marriage
2. Defendant's sexual intercourse with plaintiff's spouse

Standing:

- Cuckolded spouse

Whistleblowing and Organized Crime

Whistleblower statutes:

- Statutes may protect some whistleblowers from retaliation.
- Qui tam actions can allow employees to recover portion of money company wrongfully retained from government.

RICO:

- Civil actions can be maintained under Federal RICO (Racketeer Influenced and Corrupt Organizations Act).
- Sometimes usable where a group of people engaged in a pattern of illegal activity. (But there are many hurdles.)
- Treble damages!
- Doesn't have to be traditional gangsters!
 - Expos owners suing Major League Baseball
 - Chevron suing environmental activists