

Restatement (Second) of Torts (1977)

§ 652D Publicity Given to Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

§ 652B Intrusion upon Seclusion

One who [1] intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, [2] if the intrusion would be highly offensive to a reasonable person.

RUTH SHULMAN et al., Plaintiffs and Appellants,
v.
GROUP W PRODUCTIONS, INC., et al., Defendants and Respondents.

18 Cal.4th 200 (1998)

WERDEGAR, J.

On June 24, 1990, plaintiffs Ruth and Wayne Shulman, mother and son, were injured when the car in which they and two other family members were riding on interstate 10 in Riverside County flew off the highway and tumbled down an embankment into a drainage ditch on state-owned property, coming to rest upside down. Ruth, the most seriously injured of the two, was pinned under the car. Ruth and Wayne both had to be cut free from the vehicle by the device known as “the jaws of life.”

A rescue helicopter operated by Mercy Air was dispatched to the scene. The flight nurse, who would perform the medical care at the scene and on the way to the hospital, was Laura Carnahan. Also on board were the pilot, a medic and Joel Cooke, a video camera operator employed by defendants Group W Productions, Inc., and 4MN Productions. Cooke was recording the rescue operation for later broadcast.

Cooke roamed the accident scene, videotaping the rescue. Nurse Carnahan wore a wireless microphone that picked up her conversations with both Ruth and the other rescue personnel. Cooke’s tape was edited into a piece approximately nine minutes long, which, with the addition of narrative voice-over, was broadcast on September 29, 1990, as a segment of *On Scene: Emergency Response*.

Ruth is shown several times, either by brief shots of a limb or her torso, or with her features blocked by others or obscured by an oxygen mask. She is also heard speaking several times. Carnahan calls her “Ruth,” and her last name is not mentioned on the broadcast.

While Ruth is still trapped under the car, Carnahan asks Ruth’s age. Ruth responds, “I’m old.” On further questioning, Ruth reveals she is 47, and Carnahan observes that “it’s all relative. You’re not that old.” During her extrication from the car, Ruth asks at least twice if she is dreaming. At one point she asks Carnahan, who has told her she will be taken to the hospital in a helicopter: “Are you teasing?” At another point she says: “This is terrible. Am I dreaming?” She also asks what happened and where the rest of her family is, repeating the questions even after being told she was in an accident and the other family members are being cared for. While being loaded into the helicopter on a stretcher, Ruth says: “I just want to die.” Carnahan reassures her that she is “going to do real well,” but Ruth repeats: “I just want to die. I don’t want to go through this.”

Ruth and Wayne are placed in the helicopter, and its door is closed. Carnahan, speaking into what appears to be a radio microphone, transmits some of Ruth’s vital signs and states that Ruth cannot move her feet and has no sensation. The video footage during the helicopter ride includes a few seconds of Ruth’s face, covered by an oxygen mask.

The helicopter lands on the hospital roof. With the door open, Ruth states while being taken out: “My upper back hurts.” Carnahan replies: “Your upper back hurts. That’s what you were saying up

there.” Ruth states: “I don’t feel that great.” Carnahan responds: “You probably don’t.” Finally, Ruth is shown being moved from the helicopter into the hospital.

The accident left Ruth a paraplegic. [When Ruth saw the broadcast, she] was “shocked, so to speak, that this would be run and I would be exploited, have my privacy invaded, which is what I felt had happened.” She did not know her rescue had been recorded in this manner and had never consented to the recording or broadcast. Ruth and Wayne sued the producers of *On Scene: Emergency Response*, as well as others. The first amended complaint included two causes of action for invasion of privacy, one based on defendants’ unlawful intrusion by videotaping the rescue in the first instance and the other based on the public disclosure of private facts, i.e., the broadcast.

California courts have recognized both of the privacy causes of action pleaded by plaintiffs here: (1) public disclosure of private facts, and (2) intrusion into private places, conversations or other matters.

Publication of Private Facts

The claim that a publication has given unwanted publicity to allegedly private aspects of a person’s life is one of the more commonly litigated and well-defined areas of privacy law. [T]he elements of the public disclosure tort [are]: “(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.”

The element critical to this case is the presence or absence of legitimate public interest, i.e., newsworthiness, in the facts disclosed. [L]ack of newsworthiness is an element of the “private facts” tort, making newsworthiness a complete bar to common law liability.

Our prior decisions have not explicitly addressed the type of privacy invasion alleged in this case: the broadcast of embarrassing pictures and speech of a person who, while generally not a public figure, has become involuntarily involved in an event or activity of legitimate public concern. We nonetheless draw guidance from [earlier] decisions, in that they articulate the competing interests to be balanced. First, the analysis of newsworthiness does involve courts to some degree in a normative assessment of the “social value” of a publication. All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of legitimate public interest. Second, the evaluation of newsworthiness depends on the degree of intrusion and the extent to which the plaintiff played an important role in public events, and thus on a comparison between the information revealed and the nature of the activity or event that brought the plaintiff to public attention. “Revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident.”

[W]hen a person is involuntarily involved in a newsworthy incident, not all aspects of the person’s life, and not everything the person says or does, is thereby rendered newsworthy. This principle is illustrated in the decisions holding that, while a particular event was newsworthy, identification of the plaintiff as the person involved, or use of the plaintiff’s identifiable image, added nothing of significance to the story and was therefore an unnecessary invasion of privacy. Similarly, a mother’s private words over the body of her slain son as it lay in a hospital room were held nonnewsworthy despite undisputed legitimate public interest in the subjects of gang violence and

murder.

The contents of the publication or broadcast are protected only if they have “some substantial relevance to a matter of legitimate public interest.” This approach also echoes the Restatement commentators’ widely quoted and cited view that legitimate public interest does not include “a morbid and sensational prying into private lives *for its own sake*”

[A] publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it. [N]ewsworthiness is not limited to “news” in the narrow sense of reports of current events. “It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.” On the other hand, no mode of analyzing newsworthiness can be applied mechanically or without consideration of its proper boundaries. Intensely personal or intimate revelations might not, in a given case, be considered newsworthy, especially where they bear only slight relevance to a topic of legitimate public concern.

Turning now to the case at bar, we consider whether the possibly private facts complained of here—broadly speaking, Ruth’s appearance and words during the rescue and evacuation—were of legitimate public interest.

We agree at the outset with defendants that the subject matter of the broadcast as a whole was of legitimate public concern. Automobile accidents are by their nature of interest to that great portion of the public that travels frequently by automobile. The rescue and medical treatment of accident victims is also of legitimate concern to much of the public, involving as it does a critical service that any member of the public may someday need. The story of Ruth’s difficult extrication from the crushed car, the medical attention given her at the scene, and her evacuation by helicopter was of particular interest because it highlighted some of the challenges facing emergency workers dealing with serious accidents.

The more difficult question is whether Ruth’s appearance and words as she was extricated from the overturned car, placed in the helicopter and transported to the hospital were of legitimate public concern. Pursuant to the analysis outlined earlier, we conclude the disputed material was newsworthy as a matter of law. One of the dramatic and interesting aspects of the story as a whole is its focus on flight nurse Carnahan, who appears to be in charge of communications with other emergency workers, the hospital base and Ruth, and who leads the medical assistance to Ruth at the scene. Her work is portrayed as demanding and important and as involving a measure of personal risk (e.g., in crawling under the car to aid Ruth despite warnings that gasoline may be dripping from the car). The broadcast segment makes apparent that this type of emergency care requires not only medical knowledge, concentration and courage, but an ability to talk and listen to severely traumatized patients. One of the challenges Carnahan faces in assisting Ruth is the confusion, pain and fear that Ruth understandably feels in the aftermath of the accident. For that reason the broadcast video depicting Ruth’s injured physical state (which was not luridly shown) and audio showing her disorientation and despair were substantially relevant to the segment’s newsworthy subject matter.

The challenged material was thus substantially relevant to the newsworthy subject matter of the broadcast and did not constitute a “morbid and sensational prying into private lives *for its own*

sake.” Nor can we say the broadcast material was so lurid and sensational in emotional tone, or so intensely personal in content, as to make its intrusiveness disproportionate to its relevance. Under these circumstances, the material was, as a matter of law, of legitimate public concern.

Intrusion

Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an “invasion of privacy.” It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying.

[T]he action for intrusion has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. We consider the elements in that order.

We ask first whether defendants “intentionally intrude[d], physically or otherwise, upon the solitude or seclusion of another,” that is, into a place or conversation private to Wayne or Ruth. “[T]here is no liability for the examination of a public record concerning the plaintiff, ... [or] for observing him or even taking his photograph while he is walking on the public highway” To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.

Cameraman Cooke’s mere presence at the accident scene and filming of the events occurring there cannot be deemed either a physical or sensory intrusion on plaintiffs’ seclusion. Plaintiffs had no right of ownership or possession of the property where the rescue took place, nor any actual control of the premises. Nor could they have had a reasonable expectation that members of the media would be excluded or prevented from photographing the scene; for journalists to attend and record the scenes of accidents and rescues is in no way unusual or unexpected.

Two aspects of defendants’ conduct, however, raise triable issues of intrusion on seclusion. First, a triable issue exists as to whether both plaintiffs had an objectively reasonable expectation of privacy in the interior of the rescue helicopter, which served as an ambulance. Although the attendance of reporters and photographers at the scene of an accident is to be expected, we are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient’s consent. Other than the two patients and Cooke, only three people were present in the helicopter, all Mercy Air staff. As the Court of Appeal observed, “[i]t is neither the custom nor the habit of our society that any member of the public at large or its media representatives may hitch a ride in an ambulance and ogle as paramedics care for an injured stranger.”

Second, Ruth was entitled to a degree of privacy in her conversations with Carnahan and other medical rescuers at the accident scene, and in Carnahan’s conversations conveying medical information regarding Ruth to the hospital base. Cooke, perhaps, did not intrude into that zone of privacy merely by being present at a place where he could hear such conversations with unaided ears. But by placing a microphone on Carnahan’s person, amplifying and recording what she said and heard, defendants may have listened in on conversations the parties could reasonably have

expected to be private.

The videotapes (broadcast and raw footage) show the rescue did not take place “on a heavily traveled highway,” as the Court of Appeal stated, but in a ditch many yards from and below the rural superhighway, which is raised somewhat at that point to bridge a nearby crossroad. From the tapes it appears unlikely the plaintiffs’ extrication from their car and medical treatment at the scene could have been observed by any persons who, in the lower court’s words, “passed by” on the roadway. Even more unlikely is that any passersby on the road could have heard Ruth’s conversation with Nurse Carnahan or the other rescuers.

Whether Ruth expected her conversations with Nurse Carnahan or the other rescuers to remain private and whether any such expectation was reasonable are, on the state of the record before us, questions for the jury.

We turn to the second element of the intrusion tort, offensiveness of the intrusion. In a widely followed passage, the *Miller* court explained that determining offensiveness requires consideration of all the circumstances of the intrusion, including its degree and setting and the intruder’s “motives and objectives.” [citations.] The *Miller* court concluded that reasonable people could regard the camera crew’s conduct in filming a man’s emergency medical treatment in his home, without seeking or obtaining his or his wife’s consent, as showing “a cavalier disregard for ordinary citizens’ rights of privacy” and, hence, as highly offensive. We agree with the *Miller* court that all the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element.

In deciding whether a reporter’s alleged intrusion into private matters (i.e., physical space, conversation or data) is “offensive” and hence actionable as an invasion of privacy, courts must consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news. Information-collecting techniques that may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story.

At one extreme, “ ‘routine ... reporting techniques,’ ” such as asking questions of people with information (“including those with confidential or restricted information”) could rarely, if ever, be deemed an actionable intrusion. At the other extreme, violation of well-established legal areas of physical or sensory privacy—trespass into a home or tapping a personal telephone line, for example—could rarely, if ever, be justified by a reporter’s need to get the story. Such acts would be deemed highly offensive even if the information sought was of weighty public concern.

Between these extremes lie difficult cases, many involving the use of photographic and electronic recording equipment. Equipment such as hidden cameras and miniature cordless and directional microphones are powerful investigative tools for newsgathering, but may also be used in ways that severely threaten personal privacy. California tort law provides no bright line on this question; each case must be taken on its facts.

On this summary judgment record, we believe a jury could find defendants’ recording of Ruth’s communications to Carnahan and other rescuers, and filming in the air ambulance, to be “‘highly offensive to a reasonable person.’” With regard to the depth of the intrusion, a reasonable jury could

find highly offensive the placement of a microphone on a medical rescuer in order to intercept what would otherwise be private conversations with an injured patient. In that setting, as defendants could and should have foreseen, the patient would not know her words were being recorded and would not have occasion to ask about, and object or consent to, recording. Defendants, it could reasonably be said, took calculated advantage of the patient's "vulnerability and confusion." Arguably, the last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers.

For much the same reason, a jury could reasonably regard entering and riding in an ambulance—whether on the ground or in the air—with two seriously injured patients to be an egregious intrusion on a place of expected seclusion. Again, the patients, at least in this case, were hardly in a position to keep careful watch on who was riding with them, or to inquire as to everyone's business and consent or object to their presence. A jury could reasonably believe that fundamental respect for human dignity requires the patients' anxious journey be taken only with those whose care is solely for them and out of sight of the prying eyes (or cameras) of others.

Nor can we say as a matter of law that defendants' motive—to gather usable material for a potentially newsworthy story—necessarily privileged their intrusive conduct as a matter of common law tort liability. A reasonable jury could conclude the producers' desire to get footage that would convey the "feel" of the event—the real sights and sounds of a difficult rescue—did not justify either placing a microphone on Nurse Carnahan or filming inside the rescue helicopter. Although defendants' purposes could scarcely be regarded as evil or malicious (in the colloquial sense), their behavior could, even in light of their motives, be thought to show a highly offensive lack of sensitivity and respect for plaintiffs' privacy. A reasonable jury could find that defendants, in placing a microphone on an emergency treatment nurse and recording her conversation with a distressed, disoriented and severely injured patient, without the patient's knowledge or consent, acted with highly offensive disrespect for the patient's personal privacy.

[T]he fact that a reporter may be seeking "newsworthy" material does not in itself privilege the investigatory activity. The reason for the difference [as compared to the "publication of private facts" claim] is simple: The intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publications. Newsworthiness, as we stated earlier, is a complete bar to liability for publication of private facts and is evaluated with a high degree of deference to editorial judgment. The same deference is not due, however, when the issue is not the media's right to publish or broadcast what they choose, but their right to intrude into secluded areas or conversations in pursuit of publishable material.

[N]o constitutional precedent or principle of which we are aware gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast.