Shulman v. Group W Productions, Inc.

18 Cal.4th 200

Supreme Court of California

June 1, 1998

RUTH SHULMAN et al., Plaintiffs and Appellants, v. GROUP W PRODUCTIONS, INC., et al., Defendants and Respondents. No. S058629. John D. Rowell, Lewis, Goldberg & Ball, Michael L. Goldberg, Paul & Stuart, Stuart Law Firm, Antony Stuart and William A. Daniels for Plaintiffs and Appellants. Cornell Chulay, Epstein, Becker & Green, Janet Morgan, Terry M. Gordon, Richard A. Hoyer, Tharpe & Howell, Donald F. Austin, Davis, Wright, Tremaine, Kelli L. Sager, Karen N. Fredericksen and Frederick F. Mumm for Defendants and Respondents. James E. Grossberg as Amicus Curiae on behalf of Defendants and Respondents. Neville L. Johnson and David A. Elder as Amici Curiae. Respondents' petition for a rehearing was denied July 29, 1998, and the opinion was modified to read as follows. Mosk, J., and Chin, J., were of the opinion that the petition should be granted.

WERDEGAR, J.

More than 100 years ago, Louis Brandeis and Samuel Warren complained that the press, armed with the then recent invention of "instantaneous photographs" and under the influence of new "business methods," was "overstepping in every direction the obvious bounds of propriety and of decency." (Warren & Brandeis, *The Right to Privacy* (1890) 4 Harv. L.Rev. 193, 195-196 (hereafter Brandeis).) Even more ominously, they noted the "numerous mechanical devices" that "threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' " (*Id.* at p. 195.)Today, of course, the newspapers of 1890 have been joined by the electronic media; today, a vast number of books, journals, television and radio stations, cable channels and Internet content sources all compete to satisfy our thirst for knowledge and our need for news of political, economic and cultural events-as well as our love of gossip, our curiosity about the private lives of others, and "that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors." (*Id.* at p. 196.)~

[W]e conclude summary judgment was proper as to plaintiffs' cause of action for publication of private facts, but not as to their cause of action for intrusion.~

Facts and Procedural History

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.*

The segment begins with the Mercy Air helicopter shown on its way to the accident site. The narrator's voice is heard in the background, setting the scene and describing in general terms what has happened. The pilot can be heard speaking with rescue workers on the ground in order to prepare for his landing. As the helicopter touches down, the narrator says: "[F]our of the patients are leaving by ground ambulance. Two are still trapped inside." (The first part of this statement was wrong, since only four persons were in the car to start.) After Carnahan steps from the helicopter, she can be seen and heard speaking about the situation with various rescue workers. A firefighter assures her they will hose down the area to prevent any fire from the wrecked car.

The videotape shows only a glimpse of Wayne, and his voice is never heard. 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. The narrator states: "Once airborne, Laura and [the flight medic] will update their patients' vital signs and establish communications with the waiting trauma teams at Loma Linda." 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. Wayne is neither shown nor heard.

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 narrator concludes by stating: "Once inside both patients will be further evaluated and moved into emergency surgery if need be. Thanks to the efforts of the crew of Mercy Air, the firefighters, medics and police who responded, patients' lives were saved." As the segment ends, a brief, written epilogue appears on the screen, stating: "Laura's patient spent months in the hospital. She suffered severe back injuries. The others were all released much sooner."

The accident left Ruth a paraplegic. When the segment was broadcast, Wayne phoned Ruth in her hospital room and told her to turn on the television because "Channel 4 is showing our accident now." Shortly afterward, several hospital workers came into the room to mention that a videotaped segment of her accident was being shown. Ruth 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 had the impression from the broadcast "that I was kind of talking nonstop, and I remember hearing some of the things I said, which were not very pleasant." Asked at deposition what part of the broadcast material she considered private, Ruth explained: "I think the whole scene was pretty private. It was pretty gruesome, the parts that I saw, my knee sticking out of the car. I certainly did not look my best, and I don't feel it's for the public to see. I was not at my best in what I was thinking and what I was saying and what was being shown, and it's not for the public to see this trauma that I was going through."

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. ~

Discussion

Influenced by Dean Prosser's analysis of the tort actions for invasion of privacy (Prosser, *Privacy* (1960) 48 Cal.L.Rev. 381) and the exposition of a similar analysis in the Restatement Second of Torts sections 652A -652E (further references to the Restatement are to the Restatement Second of Torts), 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. (See *Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 808 [163 Cal.Rptr. 628, 608 P.2d 716] ; *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35-36 [81 Cal.Rptr. 360, 459 P.2d 912] ; *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1482 [232 Cal.Rptr. 668, 69 A.L.R.4th 1027] ; *Diaz v. Oakland Tribune, Inc* . (1983) 139 Cal.App.3d 118, 126 [188 Cal.Rptr. 762] (*Diaz*).) FN4

> FN4 The other two "Prosser torts" are presentation of the plaintiff to the public in a false light and appropriation of image or personality. (See *Kapellas v. Kofman* , *supra* ,1 Cal.3d at p. 35, fn. 16.)

We shall review the elements of each privacy tort, as well as the common law and constitutional privilege of the press as to each, and shall apply in succession this law to the facts pertinent to each cause of action.

I. *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. In *Diaz* , *supra* ,139 Cal.App.3d at page 126, the appellate court accurately discerned the following elements of the public disclosure tort: "(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." (See *Forsher v. Bugliosi* , *supra* ,26 Cal.3d at pp. 808-809 ; *Gill v. Hearst Publishing Co.* (1953) 40 Cal.2d 224, 228-231 [253 P.2d 441]; *Carlisle v. Fawcett Publications, Inc.* (1962) 201 Cal.App.2d 733, 744-748 [20 Cal.Rptr.

405].) That formulation does not differ significantly from the Restatement's, which provides that "[o]ne 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." (Rest.2d Torts, § 652D .)

The element critical to this case is the presence or absence of legitimate public interest, i.e., newsworthiness, in the facts disclosed. ~[W]e conclude, inter alia, that lack of newsworthiness is an element of the "private facts" tort, making newsworthiness a complete bar to common law liability. We further conclude that the analysis of newsworthiness inevitably involves accommodating conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution, and that in the circumstances of this case-where the facts disclosed about a private person involuntarily caught up in events of public interest bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance-the broadcast was of legitimate public concern, barring liability under the private facts tort.

The *Diaz* formulation, like the Restatement's, includes as a tort element that the matter published is not of legitimate public concern. *Diaz* thus expressly makes the *lack* of newsworthiness part of the plaintiff's case in a private facts action.~ The *Diaz* approach is consistent with the tort's historical development, in which defining an actionable invasion of privacy has generally been understood to require balancing privacy interests against the press's right to report, and the community's interest in receiving, news and information.^

We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts. (*Kapellas v. Kofman* , *supra* ,1 Cal.3d at pp. 35-36 ; *Diaz* , *supra* ,139 Cal.App.3d at p. 126; Rest.2d Torts, § 652D .) If the contents of a broadcast or publication are of legitimate public concern, the plaintiff cannot establish a necessary element of the tort action, the lack of newsworthiness.~

Newsworthiness-constitutional or common law-is also difficult to define because it may be used as either a descriptive or a normative term. "Is the term 'newsworthy' a descriptive predicate, intended to refer to the fact there is widespread public interest? Or is it a value predicate, intended to indicate that the publication is a meritorious contribution and that the public's interest is praiseworthy?" (Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness* (1963) 30 U. Chi. L.Rev. 722, 725.)A position at either extreme has unpalatable consequences. If "newsworthiness" is completely descriptive-if all coverage that sells papers or boosts ratings is deemed newsworthy-it would seem to swallow the publication of private facts tort, for "it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest." (*Id.* at p. 734.)At the other extreme, if newsworthiness is viewed as a purely normative concept, the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste.

The difficulty of finding a workable standard in the middle ground between the extremes of normative and descriptive analysis, and the variety of factual circumstances in which the issue has been presented, have led to considerable variation in judicial descriptions of the newsworthiness concept. As one commentator has noted, the newsworthiness test "bears an enormous social pressure, and it is not surprising to find that the common law is deeply confused and ambivalent about its application." (Post,

The Social Foundations of Privacy: Community and Self in the Common Law Tort (1989) 77 Cal.L.Rev. 957, 1007.) Without attempting an exhaustive survey, and with particular focus on California decisions, we review some of these attempts below.~

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 those 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. (*Kapellas* , *supra* ,1 Cal.3d at p. 36.) 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 (*ibid.*), and thus on a comparison between the information revealed and the nature of the activity or event that brought the plaintiff to public attention. "Some reasonable proportion is ... to be maintained between the events or activity that makes the individual a public figure and the private facts to which publicity is given. 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." (Rest.2d Torts, § 652D , com. h, p. 391.)~

Courts balancing these interests in cases similar to this have recognized that, when 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. "Most persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view." (*Virgil v. Time, Inc.* , *supra* , 527 F.2d at p. 1131; accord, *Gilbert v. Medical Economics Co.* , *supra* , 665 F.2d at p. 308 (*Gilbert*).) 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. (See *Briscoe* , *supra* ,4 Cal.3d at p. 541 [identification of plaintiff as former criminal]; *Gill v. Curtis* , *supra* ,38 Cal.2d at p. 279 [use of plaintiffs' photograph to illustrate article on love]; *Melvin v. Reid* , *supra* ,112 Cal.App. at pp. 291-292 [identification of plaintiff as former prostitute]; *Barber v. Time, Inc.* , *supra* , 348 Mo. at pp. 1207-1208 [159 S.W.2d at pp. 295-296] [use of plaintiff's name and photograph in article about her unusual medical condition]; *Vassiliades v. Garfinckel's Brooks Bros.* , *supra* , 492 A.2d at pp. 589-590 [use of plaintiff's photograph to illustrate presentations on cosmetic surgery].) For the same reason, a college student's candidacy for president of the student body did not render newsworthy a newspaper's revelation that the student was a transsexual, where the court could find "little if any connection between the information disclosed and [the student's] fitness for office." (*Diaz* , *supra* ,139 Cal.App.3d at p. 134.) 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. (*Green v. Chicago Tribune Co.* (1996) 286 Ill.App.3d 1 [221 Ill.Dec. 342, 675 N.E.2d 249, 255-256].)

Consistent with the above, courts have generally protected the privacy of otherwise private individuals involved in events of public interest "by requiring that a logical nexus exist between the complaining individual and the matter of legitimate public interest." (*Campbell v. Seabury Press* (5th Cir. 1980) 614 F.2d 395, 397.) The contents of the publication or broadcast are protected only if they have "some substantial relevance to a matter of legitimate public interest." (*Gilbert , supra* , 665 F.2d at p. 308.) Thus, recent decisions have generally tested newsworthiness with regard to such individuals by assessing the logical relationship or nexus, or the lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed. These decisions have used a number of similar or equivalent phrases to describe the necessary relationship. (See *Cinel v. Connick* (5th Cir. 1994) 15 F.3d 1338, 1346 ["substantially related"]; *Ross v. Midwest Communications, Inc.* , *supra* , 870 F.2d at p. 274 [5 th Cir.: "logical nexus"]; *Campbell v. Seabury Press* , *supra* , 614 F.2d at p. 397 [5 th Cir.: "logical nexus"]; *Gilbert* , *supra* , 665 F.2d at p. 308 [10 th Cir.: "substantial relevance"]; *Lee v. Calhoun* (10th Cir. 1991) 948 F.2d 1162, 1165-1166 [following *Gilbert*]; *Haynes v. Alfred A. Knopf, Inc.* , *supra* , 8 F.3d at p. 1233 [facts "germane" to story]; *Vassiliades v. Garfinckel's Brooks Bros.* , *supra* , 492 A.2d at p. 590 ["logical nexus"].) This approach accords with our own prior decisions, in that it balances the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report. (Cf. *Kapellas* , *supra* ,1 Cal.3d at p. 37 [in context of political candidacy, truthful information is generally protected if it "may be relevant" to qualifications for office].) 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* ...." (Rest.2d Torts, § 652D , com. h, p. 391, italics added; see, e.g., *Sipple v. Chronicle Publishing Co.* (1984) 154 Cal.App.3d 1040, 1048-1049 [201 Cal.Rptr. 665] ; *Virgil v. Time, Inc.* , *supra* , 527 F.2d at p. 1129 ; *Gilbert* , *supra* , 665 F.2d at pp. 307-308; see also *Haynes v. Alfred A. Knopf, Inc.* , *supra* , 8 F.3d at p. 1232 [private facts not newsworthy "when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger"].)

An analysis measuring newsworthiness of facts about an otherwise private person involuntarily involved in an event of public interest by their relevance to a newsworthy subject matter incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest. [FN8] In general, it is not for a court or jury to say how a particular story is best covered. The constitutional privilege to publish truthful material "ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest." (*Gilbert* , *supra* , 665 F.2d at p. 308.) By confining our interference to extreme cases, the courts "avoid[] unduly limiting ... the exercise of effective editorial judgment." (*Virgil v. Time, Inc.* , *supra* , 527 F.2d at p. 1129.) Nor is newsworthiness governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it. Our analysis thus does not purport to distinguish among the various legitimate purposes that may be served by truthful publications and broadcasts. As we said in *Gill v. Hearst* , *supra* ,40 Cal.2d at page 229, "the constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature ...." Thus,

newsworthiness 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." (Rest.2d Torts, § 652D , com. j, p. 393; accord, *Gilbert* , *supra* , 665 F.2d at p. 308 ; *Virgil v. Time, Inc.* , *supra* , 527 F.2d at p. 1129; see also *Carlisle v. Fawcett Publications, Inc.* , *supra* ,201 Cal.App.2d at p. 746 [matters of legitimate public interest include, for example, "the reproduction of past events, travelogues and biographies"]; *Vassiliades v. Garfinckel's Brooks Bros.* , *supra* , 492 A.2d at p. 589 [includes " 'information concerning interesting phases of human activity' "].)

> FN8 Although we therefore believe our conclusions in this case accord with the dictates of the federal Constitution, we cannot be sure without clearer guidance from the United States Supreme Court. Unless we abandon the private facts tort completely, we appear to be at a theoretical risk of creating unconstitutional liability, since the high court has thus far declined to decide "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press...." (*Cox Broadcasting Corp.* , *supra* , 420 U.S. at p. 491 [95 S.Ct. at p. 1044]; see also *Florida Star* , *supra* , 491 U.S. at p. 533 [109 S.Ct. at p. 2609] [again declining to answer that question]; *Time, Inc. v. Hill* , *supra* , 385 U.S. at p. 383, fn. 7 [87 S.Ct. at pp. 539-540] [in false light privacy case, reserving question whether *truthful* publication of offensive private facts may constitutionally be punished, and noting a commentator's view that newsworthiness privilege may be so " 'overpowering as virtually to swallow the [privacy] tort' "].)

Finally, an analysis focusing on relevance allows courts and juries to decide most cases involving persons involuntarily involved in events of public interest without "balanc[ing] interests in ad hoc fashion in each case" (*Briscoe* , *supra* ,4 Cal.3d at p. 542, fn. 18). The articulation of standards that do not require "*ad hoc* resolution of the competing interest in each ... case" (*Gertz v. Robert Welch ,Inc* . (1974) 418 U.S. 323, 343 [94 S.Ct. 2997, 3009, 41 L.Ed.2d 789]) is favored in areas affecting First Amendment rights, because the relative predictability of results reached under such standards minimizes the inadvertent chilling of protected speech, and because standards that can be applied objectively provide a stronger shield against the unconstitutional punishment of unpopular speech. (*Ibid.* ; Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy* (1968) 56 Cal.L.Rev. 935, 938-945 (hereafter Nimmer); see also *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844 [117 S.Ct. 2329, 2341, 2344-2345, 138 L.Ed.2d 874] [Internet speech prohibitions employing undefined term "indecent" and appealing to "community standards" of what is "patently offensive" are, absent further narrowing of prohibitions, unconstitutionally vague and uncertain.].)

On the other hand, no mode of analyzing newsworthiness can be applied mechanically or without consideration of its proper boundaries. To observe that the newsworthiness of private facts about a person involuntarily thrust into the public eye depends, in the ordinary case, on the existence of a logical nexus between the

newsworthy event or activity and the facts revealed is not to deny that the balance of free press and privacy interests may require a different conclusion when the intrusiveness of the revelation is greatly disproportionate to its relevance. 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. (See *Kapellas* , *supra* ,1 Cal.3d at pp. 37-38 [public interest in free flow of information will outweigh interest in individual privacy "[i]f the publication does not proceed widely beyond the bounds of propriety and reason in disclosing facts about those closely related to an aspirant for public office ..."]; *Haynes v. Alfred A. Knopf, Inc.* , *supra* , 8 F.3d at pp. 1234-1235 [although personal facts revealed in book at issue were newsworthy because germane to the book's subject matter, that protection may not extend to publication of "intimate physical details the publicizing of which would be not merely embarrassing and painful but deeply shocking to the average person"].) FN9

> FN9 Contrary to Justice Brown's characterization of the foregoing test for newsworthiness as a "radical departure" from *Kapellas* , *supra* ,1 Cal.3d 20 (conc. & dis. opn. of Brown, J., *post* , at p. 251), the stated test is a natural adaptation of *Kapellas* to a different kind of situation, one involving a private figure involuntarily caught up in a newsworthy *event* . (Cf. *Forsher* , *supra* ,26 Cal.3d at p. 812 [applying both the *Kapellas* factors and additional relevant considerations].) To track the language of *Kapellas, supra* ,1 Cal.3d at page 36, the "incident" in this case-i.e., the accident and rescue-concededly is of legitimate public concern. Viewing, therefore, the "facts published" in the context of the whole, the broadcast's intrusion into Ruth's private life is minimal as against the substantial relevance the facts bear to the subject matter, in particular the various aspects of the rescue and Nurse Carnahan's responsibilities in connection therewith. That Ruth did not "voluntarily accede[] to a position of public notoriety" is not determinative, but only one of a "variety of factors" to be weighed.(*Ibid.*)

A few words are in order at this point regarding the right of privacy secured by article I, section 1 of the California Constitution . The Court of Appeal, citing *Hill v. National Collegiate Athletic Assn.* , *supra* ,7 Cal.4th at pages 37-38 (*Hill*), equated the judicial balancing undertaken in delineation of the common law right of privacy to the balancing of interests this court has prescribed for evaluating claims raised under our state's constitutional right of privacy. Defendants attack the Court of Appeal's adoption of *Hill* 's balancing test in the common law tort context, arguing that under the *federal* Constitution newsworthiness is a complete bar to liability, rather than merely an interest to be balanced against private or state-protected interests.

We agree with defendants that the publication of truthful, lawfully obtained material of legitimate public concern is constitutionally privileged and does not create liability under the private facts tort.~ [H]owever, a certain amount of interest-balancing *does* occur in deciding whether material is of legitimate public concern, or in formulating rules for that decision. To that extent, the Court of Appeal's analogy to *Hill* was not in error.~

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. If so, summary judgment was

properly entered. "[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. [Citation.] Therefore, summary judgment is a favored remedy [in such cases] ...." (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 685 [150 Cal.Rptr. 258, 586 P.2d 572]; see also *Haynes v. Alfred A. Knopf, Inc.* , *supra* , 8 F.3d at p. 1234 [Affirming summary judgment for defendants in private facts case: "To any suggestion that the outer bounds of liability should be left to a jury to decide we reply that in cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on judicial control of the jury."].) Nonetheless, the basic question raised on a defense motion for summary judgment, and on review of such judgment, is the same in a privacy action against media defendants as in other cases: Does the motion record demonstrate the existence of triable issues of fact, or was the defense entitled to judgment as a matter of law? (Code Civ. Proc., § 437c , subd. (c); *Sipple v. Chronicle Publishing Co.* ,*supra* , 54 Cal.App.3d at p. 1046.)

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). [FN10] 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.

> FN10 Plaintiffs dispute whether there was any such fuel leak. It is undisputed, however, that during the broadcast segment a firefighter or paramedic tells Carnahan there is leaking gasoline, and she nevertheless crawls under the car to minister to Ruth.

Plaintiffs argue that showing Ruth's "intimate private, medical facts and her suffering was not *necessary* to enable the public to understand the significance of the

accident or the rescue as a public event." The standard, however, is not necessity. That the broadcast *could* have been edited to exclude some of Ruth's words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press. (*Ross v. Midwest Communications ,Inc.* , *supra* , 870 F.2d at p. 275 ["Exuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists."]; *Gilbert* , *supra* , 665 F.2d at p. 308 [Liability for disclosure of private facts is limited "to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment."].)

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* ." (Rest.2d Torts, § 652D , com. h, p. 391, italics added.) 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. Summary judgment was therefore properly entered against Ruth on her cause of action for publication of private facts. [FN11] As to Wayne, he is glimpsed only fleetingly in the broadcast video and is never heard. The broadcast includes no images or information regarding him that could be offensive to a reasonable person of ordinary sensibilities. Summary judgment was therefore also proper on Wayne's cause of action for publication of private facts.

> FN11 The United States Supreme Court has expressly reserved the question whether the government, in cases where information has been acquired *unlawfully* by a newspaper or by a source, may ever punish not only the unlawful acquisition, but the ensuing publication as well. (*Florida Star* , *supra* , 491 U.S. at pp. 533-536 [109 S.Ct. at pp. 2609-2611].) We do not decide that question in the present case, regarding it as going to the extent of allowable damages for intrusion. (See fn. 18, *post* .)

One might argue that, while the contents of the broadcast were of legitimate interest in that they reflected on the nature and quality of emergency rescue services, the images and sounds that potentially allowed identification of Ruth as the accident victim were irrelevant and of no legitimate public interest in a broadcast that aired some months after the accident and had little or no value as "hot" news. (See *Briscoe* , *supra* ,4 Cal.3d at p. 537 [While reports of the facts of "long past" crimes are newsworthy, identification of the actor in such crimes "usually serves little independent public purpose."].) We do not take that view. It is difficult to see how the subject broadcast could have been edited to avoid completely any possible identification without severely undercutting its legitimate descriptive and narrative impact. As broadcast, the segment included neither Ruth's full name nor direct display of her face. She was nonetheless arguably identifiable by her first name (used in recorded dialogue), her voice, her general appearance and the recounted circumstances of the accident (which, as noted, had previously been published, with Ruth's full name and city of residence, in a newspaper). [FN12] In a video documentary of this type, however, the use of that degree of truthful detail would seem not only relevant, but essential to the narrative.

FN12 Although *complete* lack of identification or identifiability would seemingly defeat a private facts claim, as there could be no injury, an invasion of privacy does not necessarily depend on whether the plaintiff's full name was broadcast or whether she was identifiable to *all* viewers. (See *Haynes v. Alfred A. Knopf, Inc.* , *supra* , 8 F.3d at p. 1233 [Even if plaintiffs' names had been changed in nonfiction book, factual details would have identified them "to anyone who has known [them] well for a long time (members of their families, for example), or who knew them before they got married; and no more is required for liability either in defamation law [citations] or in privacy law. [Citations.]"].)

II. *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. (See Rest.2d Torts, § 652B , com. b., pp. 378-379, and illustrations.) It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity. "[A] measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant." (Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser* (1964) 39 N.Y.U. L.Rev. 962, 973-974, fn. omitted.)

Despite its conceptual centrality, the intrusion tort has received less judicial attention than the private facts tort, and its parameters are less clearly defined. The leading California decision is *Miller v. National Broadcasting Co.* , *supra* ,187 Cal.App.3d 1463 (*Miller*).*Miller* , which like the present case involved a news organization's videotaping the work of emergency medical personnel, adopted the Restatement's formulation of the cause of action: "One who 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, if the intrusion would be highly offensive to a reasonable person." (Rest.2d Torts, § 652B ; *Miller* , *supra* ,187 Cal.App.3d at p. 1482.)

As stated in *Miller* and the Restatement, therefore, the 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. (Rest.2d Torts, § 652B ; *Miller* , *supra* ,187 Cal.App.3d at p. 1482.) "[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 ...." (Rest.2d Torts, § 652B , com. c., pp. 379-380; see, e.g., *Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 162-163 [269 Cal.Rptr. 379] [where judge who was subject of news story was filmed from public street as he walked from his home to his car, any invasion of privacy was "extremely de minimis"]; see also 1 McCarthy, The Rights of Publicity and Privacy (1997) § 5.10[A][2], pp. 5-111 to 5-113 [collecting cases].) 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. (Rest.2d Torts, § 652B , com. c., p. 379; see, e.g., *PETA v. Bobby Berosini, Ltd.* (1995) 111 Nev. 615 [895 P.2d 1269, 1280-1281] [plaintiff animal trainer had no expectation of seclusion or solitude in backstage preparation area]; *Frankel v. Warwick Hotel* (E.D.Pa. 1995) 881 F.Supp. 183, 188 [father's meddling in son's marriage not intrusion where there was no "physical or sensory penetration of a person's zone of seclusion"].)

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. (Cf. Pen. Code, §§ 409.5 , subd. (d), 409.6, subd. (d) [exempting press representatives from certain emergency closure orders].)

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. (See *Noble v. Sears, Roebuck & Co.* , *supra* ,33 Cal.App.3d at p. 660 [accepting, subject to proof at trial, intrusion plaintiff's theory she had "an exclusive right of occupancy of her hospital room" as against investigator]; *Miller* , *supra* ,187 Cal.App.3d at pp. 1489-1490 [Rejecting intrusion defendant's claim that plaintiff consented to media's entry into home by calling paramedics: "One seeking emergency medical attention does not thereby 'open the door' for persons without any clearly identifiable and justifiable official reason who may wish to enter the premises where the medical aid is being administered."].) 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." (See also *Green v. Chicago Tribune Co.* , *supra* , 675 N.E.2d at p. 252 [hospital room not public place]; *Barber v. Time, Inc.* , *supra* , 159 S.W.2d at p. 295 ["Certainly, if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital ... without personal publicity."].)

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 Court of Appeal held plaintiffs had no reasonable expectation of privacy at the accident scene itself because the scene was within the sight and hearing of members of the public. The summary judgment record, however, does not support the Court of Appeal's conclusion; instead, it reflects, at the least, the existence of triable issues as to the privacy of certain conversations at the accident scene, as in the helicopter. 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 note, however, that several existing legal protections for communications could support the conclusion that Ruth possessed a reasonable expectation of privacy in her conversations with Nurse Carnahan and the other rescuers. A patient's conversation with a provider of medical care in the course of treatment, including emergency treatment, carries a traditional and legally well-established expectation of privacy. (See Evid. Code, §§ 990 -1007 [physician-patient privilege]; Civ. Code, §§ 56 -56.37 [Confidentiality of Medical Information Act].)~ Moreover, California's Invasion of Privacy Act (Pen. Code, §§ 630 -637.6 ; see *Ribas v. Clark* (1985) 38 Cal.3d 355, 359 [212 Cal.Rptr. 143, 696 P.2d 637, 49 A.L.R.4th 417] (*Ribas*)) prohibits the recording of any "confidential communication" without the consent of all parties thereto. (Pen. Code, § 632 , subd. (a).)

A confidential communication, for purposes of Penal Code section 632 (hereafter section 632), need not fall within an evidentiary privilege. Rather, the term includes "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering ... or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (§ 632 , subd. (c).) The Invasion of Privacy Act, as we explained in *Ribas* , provides legal recognition of the individual's reasonable expectation of privacy against unauthorized interception and recording of confidential conversations: "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device.(*Warden v. Kahn* [(1979)] 99 Cal.App.3d 805, 813-814 [160 Cal.Rptr. 471].) [¶] ... [S]uch secret monitoring denies the speaker an important aspect of privacy of communication-the right to control the nature and extent of the firsthand dissemination of his statements." (*Ribas* , *supra* ,38 Cal.3d at pp. 360-361.)~

Ruth's claim, of course, does not require her to prove a statutory violation, only to prove that she had an objectively reasonable expectation of privacy in her conversations.

Whether the circumstances of Ruth's extrication and helicopter rescue would reasonably have indicated to defendants, or to their agent, Cooke, that Ruth would desire and expect her communications to Carnahan and the other rescuers to be confined to them alone, and therefore not to be electronically transmitted and recorded, is a triable issue of fact in this case. As observed earlier, whether anyone present (other than Cooke) was a mere observer, uninvolved in the rescue effort, is unclear from the summary judgment record. Also unclear is who, if anyone, could overhear conversations between Ruth and Carnahan, which were transmitted by a microphone on Carnahan's person, amplified and recorded by defendants. We cannot say, as a matter of law, that Cooke should not have perceived he might be intruding on a confidential communication when he recorded a seriously injured patient's conversations with medical personnel.~

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." (*Miller , supra* ,187 Cal.App.3d at pp. 1483-1484; cited, e.g., in *Hill , supra* ,7 Cal.4th at p. 26 ; *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1487 [59 Cal.Rptr.2d 834] ; *Magenis v. Fisher Broadcasting, Inc.* (1990) 103 Or.App. 555 [798 P.2d 1106, 1110]; and *PETA v. Bobby Berosini, Ltd. , supra* , 895 P.2d at p. 1282.) 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. (*Miller , supra* ,187 Cal.App.3d at p. 1484.)

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. [FN17] Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material. Although, as will be discussed more fully later, the First Amendment does not immunize the press from liability for torts or crimes committed in an effort to gather news (*Cohen v. Cowles Media Co.* (1991) 501 U.S. 663, 669 [111 S.Ct. 2513, 2518, 115 L.Ed.2d 586] ; *Dietemann v. Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 249 (*Dietemann*); *Miller , supra* ,187 Cal.App.3d at p. 1492), the constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may-as a matter of tort law-justify an intrusion that would otherwise be considered offensive. While refusing to recognize a broad privilege in newsgathering against application of generally applicable laws, the United States Supreme Court has also observed that "without some protection for seeking out the news, freedom of the press could be eviscerated." (*Branzburg v. Hayes* (1972) 408 U.S. 665, 681 [92 S.Ct. 2646, 2656, 33 L.Ed.2d 626]; see also *Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d 509, 519-520 [223 Cal.Rptr. 58].)

> FN17 Among other factors, an intrusion may be deemed more offensive to the extent the intruder's behavior created a risk that the target's efforts to evade or resist the intrusion would lead to physical harm to the intruder, the target or others.

In deciding, therefore, 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. Thus, for example, "a continuous surveillance which is tortious when practiced by a creditor upon a debtor may not be tortious when practiced by media representatives in a situation where there is significant public interest [in discovery of the information sought]." (Hill, *Defamation and Privacy Under the First Amendment* (1976) 76 Colum. L.Rev. 1205, 1284, fn. omitted.)

The mere fact the intruder was in pursuit of a "story" does not, however, generally justify an otherwise offensive intrusion; offensiveness depends as well on the particular method of investigation used. 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. (*Nicholson v. McClatchy Newspapers* , *supra* ,177 Cal.App.3d at p. 519; accord, *Wolfson v. Lewis* (E.D.Pa. 1996) 924 F.Supp. 1413, 1417.) 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; they would also be outside any protection the Constitution provides to newsgathering. (*Cohen v. Cowles Media Co.* , *supra* , 501 U.S. at p. 669 [111 S.Ct. at p. 2518] ; *Dietemann* , *supra* , 449 F.2d at p. 249.)

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.' " (*Miller* , *supra* ,187 Cal.App.3d at p. 1482, italics omitted.) With regard to the depth of the intrusion (*id.* at p. 1483), 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." (*Id.* at p. 1484.) 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. (*Miller* , *supra* ,187 Cal.App.3d at p. 1484.) 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 comparable to, if not quite as extreme as, the disrespect and insensitivity demonstrated in *Miller.*

Turning to the question of constitutional protection for newsgathering, one finds the decisional law reflects a general rule of *nonprotection* : the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws. (*Cohen v. Cowles Media Co.* , *supra* , 501 U.S. at pp. 669-670 [111 S.Ct. at pp. 2518-2519]; see *Branzburg v. Hayes* , *supra* , 408 U.S. at pp. 680-695 [92 S.Ct. at pp. 2656-2664] [extensive discussion, concluding press enjoys no special immunity from questioning regarding sources with information on criminal activities under investigation by grand jury]; *Pell v. Procunier* (1974) 417 U.S. 817, 832-835 [94 S.Ct. 2800, 2809-2810, 41 L.Ed.2d 495] [no special right of access to state prisoners for interviews]; *Dietemann* , *supra* , 449 F.2d at p. 249 [First Amendment is not a license for electronic intrusion; investigative journalism can be successfully practiced without secret recording]; *Shevin v. Sunbeam Television Corp.* (Fla. 1977) 351 So.2d 723, 725-727 [under *Branzburg* ,*Pell* , and *Dietemann* , Florida statute prohibiting nonconsensual recording of private conversations may constitutionally be applied to news reporters].)

"It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil and criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." (*Branzburg* v. *Hayes* , *supra* , 408 U.S. at pp. 682-683 [92 S.Ct. at p. 2657].) California's intrusion tort and section 632 are both laws of general applicability. They apply to all private investigative activity, whatever its purpose and whoever the investigator, and impose no greater restrictions on the media than on anyone else. (If anything, the media enjoy some degree of *favorable* treatment under the California intrusion tort, as a reporter's motive to discover socially important information may reduce the offensiveness of the intrusion.) These laws serve the undisputedly substantial public interest in allowing each person to maintain an area of physical and sensory privacy in which to live. Thus, defendants enjoyed no constitutional privilege, merely by virtue of their status as members of the news media, to eavesdrop in violation of section 632 or otherwise to intrude tortiously on private places, conversations or information.

Courts have impliedly recognized that a generally applicable law might, under some circumstances, impose an "impermissible burden" on newsgathering (*Miller* , *supra*

,187 Cal.App.3d at p. 1493); such a burden might be found in a law that, as applied to the press, would result in "a significant constriction of the flow of news to the public" and thus "eviscerate[]" the freedom of the press. (*Branzburg v. Hayes* , *supra* , 408 U.S. at pp. 693, 681 [92 S.Ct. at pp. 2663, 2656-2657].) No basis exists, however, for concluding that either section 632 or the intrusion tort places such a burden on the press, either in general or under the circumstances of this case. The conduct of journalism does not depend, as a general matter, on the use of secret devices to record private conversations. (Accord, *Dietemann* , *supra* , 449 F.2d at p. 249 ["We strongly disagree ... that hidden mechanical contrivances are 'indispensable tools' of newsgathering. Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices."]; *Shevin v. Sunbeam Television Corp.* , *supra* , 351 So.2d at p. 727 ["News gathering is an integral part of news dissemination, but hidden mechanical contrivances are not indispensable tools of news gathering."].) More specifically, nothing in the record or briefing here suggests that reporting on automobile accidents and medical rescue activities depends on secretly recording accident victims' conversations with rescue personnel or on filming inside an occupied ambulance. Thus, if any exception exists to the general rule that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally" (*Branzburg v. Hayes* , *supra* , 408 U.S. at p. 684 [92 S.Ct. at p. 2658]), such exception is inapplicable here. FN18

> FN18 Defendants urge us to hold that any damages for intrusion do not include compensation for injury resulting from the publication of material gathered through intrusion. The only intrusion case defendants cite on this point is against them. (*Dietemann* , *supra* , 449 F.2d at pp. 249-250 [allowing publication damages in intrusion case]; see generally, Hill, *Defamation and Privacy Under the First Amendment* , *supra* , 76 Colum. L.Rev. at pp. 1281-1286 [discussing various approaches].) We do not reach the question, as the measure of plaintiffs' damages is not before us on this appeal from summary judgment in favor of the defense.

As should be apparent from the above discussion, the constitutional protection accorded newsgathering, if any, is far narrower than the protection surrounding the publication of truthful material; consequently, the fact that a reporter may be seeking "newsworthy" material does not in itself privilege the investigatory activity. The reason for the difference 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. At most, the Constitution may preclude tort liability that would "place an impermissible burden on newsgatherers" (*Miller* , *supra* ,187 Cal.App.3d at p. 1493) by depriving them of their " 'indispensable tools' " (*Dietemann* , *supra* , 449 F.2d at p. 249) .

Defendants urge a rule more protective of press investigative activity. Specifically, they seek a holding that "when intrusion claims are brought in the context of newsgathering conduct, that conduct be deemed protected so long as (1) the information

being gathered is about a matter of legitimate concern to the public and (2) the underlying conduct is lawful (i.e., was undertaken without fraud, trespass, etc.)." Neither tort law nor constitutional precedent and policy support such a broad privilege. *Miller* ,*Dietemann* , and *Wolfson v. Lewis* , *supra* , 924 F.Supp. 1413, were all cases in which the reporters and photographers were acting in pursuit of newsworthy material, but were held to have tortiously intruded on the plaintiffs' privacy because their conduct was highly offensive to a reasonable person, not because they had committed any independent crime or tort. [FN19] (See also *Baugh v. CBS, Inc.* (N.D.Cal. 1993) 828 F.Supp. 745, 757 [intrusion tort does not require existence of technical trespass]; *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1030-1032 [37 Cal.Rptr.2d 431] [no newsgathering defense to claim of intentional infliction of emotional harm for television reporter's telling small children their neighbors had been killed while filming their shocked reaction, even if reporter hoped the children's reaction would be " 'newsworthy,' e.g., suitable to redeem a promise of 'film at eleven' "]; Rest.2d Torts, § 652B , illus. 1, p. 379 ["A, a woman, is sick in a hospital room with a rare disease that arouses public curiosity. B, a newspaper reporter, calls her on the telephone and asks for an interview, but she refuses to see him. B then goes to the hospital, enters A's room and over her objection takes her photograph. B has invaded A's privacy."].)

> FN19 In *Miller* the camera crew's entry into the Miller home was also deemed a trespass (*Miller* , *supra* ,187 Cal.App.3d at p. 1480), but the court's discussion of the intrusion tort does not depend on this fact.(*Id.* at pp. 1482-1484.)
> In *Dietemann* , *supra* , 449 F.2d 245, reporters for Life Magazine gained consensual access to the home office of a quack doctor, where they secretly photographed him and recorded his remarks as he purportedly diagnosed a medical condition of one of the reporters. (449 F.2d at p. 246.) The federal court, applying California law, concluded the facts showed an invasion of privacy. (*Id.* at pp. 247-249.) Presumably because a peaceable entry by consent does not constitute trespass under California law (see 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 607, p. 706) , no question of liability for trespass arose in *Dietemann* .
> In *Wolfson* v. *Lewis* , *supra* , 924 F.Supp. 1413, television reporters doing a story on the high salaries paid to executives of health care companies physically pursued a family that included three such executives in an effort to get "ambush" interviews with them, and attempted to intercept with a directional microphone conversations they had at a family home. The federal district court granted preliminary injunctive relief against such behavior, finding the plaintiffs likely to prevail on their claim the reporters' harassment and spying was a highly offensive intrusion into their privacy. (*Id.* at pp. 1432-1434.) The court expressly stated its finding of a tortious intrusion was not based on any alleged trespass.(*Id.* at p. 1434.) Nor was the court's finding of a tortious intrusion logically dependent on violation of state anti-eavesdropping statutes, although two such statutes were cited in support of the privacy element of the intrusion tort (in the same manner as we have cited section 632). (924 F.Supp. at p. 1434.)

As to constitutional policy, we repeat that the threat of infringement on the liberties of the press from intrusion liability is minor compared with the threat from liability for

publication of private facts. Indeed, the distinction led one influential commentator to assert flatly that "[i]ntrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression." (Nimmer, *supra* , 56 Cal.L.Rev. at p. 957.)Such a broad statement is probably not warranted; a liability rule, for example, that punished as intrusive a reporter's merely asking questions about matters an organization or person did not choose to publicize would likely be deemed an impermissible restriction on press freedom. But no 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.

Conclusion

~In short, the state may not intrude into the proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering. Summary judgment for the defense was proper as to plaintiffs' cause of action for publication of private facts (the second cause of action), but improper as to the cause of action for invasion of privacy by intrusion (the first cause of action).

Disposition

The judgment of the Court of Appeal is affirmed except insofar as the Court of Appeal reversed and remanded for further proceedings on Ruth Shulman's cause of action for publication of private facts.

George, C. J., and Kennard, J., concurred.

KENNARD, J.,

Concurring.-Applying existing California tort law, the plurality opinion holds that to establish a cause of action for invasion of privacy by publication of private facts the plaintiff must show that a private fact was publicly disclosed, that the disclosure would be offensive and objectionable to a reasonable person, and that the private fact was not newsworthy. I agree that here summary judgment was properly entered against plaintiffs on that cause of action. There is, however, a tension between the plurality opinion's rule of liability for publication of private facts and some aspects of the United States Supreme Court's current First Amendment jurisprudence. In my view, the potential clash in this area of law between personal privacy interests and the First Amendment's guarantee of freedom of speech and of the press warrants a more detailed examination than the plurality opinion has undertaken.~

I leave open the possibility that the plurality opinion's "newsworthiness" rule may require further adjustment and revision in the future when we are presented with a case in which its application, unlike the situation here, would affirm liability for the publication of truthful private facts.

Mosk, J., concurred.

CHIN, J.,

Concurring and Dissenting.- I concur in part I of the plurality opinion. The newsworthy nature of the disclosure absolutely precludes plaintiffs' recovery under this theory, and summary judgment for defendants on this cause of action was therefore proper.

I dissent, however, from the plurality's holding that plaintiffs' "intrusion" cause of action should be remanded for trial. The critical question is whether defendants' privacy intrusion was " *'highly* offensive to a reasonable person.' " (Plur. opn., *ante* , at p. 231 , italics added.) As the plurality explains, "the constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may-as a matter of law-justify an intrusion that *would otherwise be considered offensive* ." (*Id.* at p. 236 , italics added.) I also agree with the plurality that "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." (*Id.* at p. 237 , italics added.)

Although I agree with the plurality's premises, I disagree with the conclusion it draws from those premises. The plurality concludes that a reasonable person in Ruth Shulman's position might well have assumed that her conversation with the nurses and doctors assisting her rescue would be kept private. Likewise, the plurality believes, a reasonable person in Ruth's position might not expect to find media personnel aboard a rescue helicopter. A jury might well decide that defendants' desire for complete footage did not justify these privacy intrusions. (Plur. opn., *ante,* at pp. 237-238 .)

Ruth's expectations notwithstanding, I do not believe that a reasonable trier of fact could find that defendants' conduct in this case was "highly offensive to a reasonable person," the test adopted by the plurality. Plaintiffs do not allege that defendants, though present at the accident rescue scene and in the helicopter, interfered with either the rescue or medical efforts, elicited embarrassing or offensive information from plaintiffs, or even tried to interrogate or interview them. Defendants' news team evidently merely recorded newsworthy events "of legitimate public concern" (plur. opn., *ante,* at p. 228) as they transpired. Defendants' apparent motive in undertaking the supposed privacy invasion was a reasonable and nonmalicious one: to obtain an accurate depiction of the rescue efforts from start to finish. The event was newsworthy, and the ultimate broadcast was both dramatic and educational, rather than tawdry or embarrassing.

No illegal trespass on private property occurred, and any technical illegality arising from defendants' recording Ruth's conversations with medical personnel was not so "highly offensive" as to justify liability. Recording the innocuous, inoffensive conversations that occurred between Ruth and the nurse assisting her (see plur. opn., *ante* , at p. 211) and filming the seemingly routine, though certainly newsworthy, helicopter ride (*id.* at pp. 211-212) may have technically invaded plaintiffs' private "space," but in my view no "highly offensive" invasion of their privacy occurred.

We should bear in mind we are not dealing here with a true "interception"-e.g., a surreptitious wiretap by a third party-of words spoken in a truly private place-e.g., in a psychiatrist's examining room, an attorney's office, or a priest's confessional. Rather,

here the broadcast showed Ruth speaking in settings where others could hear her, and the fact that she did not realize she was being recorded does not ipso facto transform defendants' newsgathering procedures into *highly* offensive conduct within the meaning of the law of intrusion.

In short, to turn a jury loose on the defendants in this case is itself "highly offensive" to me. I would reverse the judgment of the Court of Appeal with directions to affirm the summary judgment for defendants on all causes of action.

Mosk, J., concurred.

BROWN, J.,

Concurring and Dissenting.- I concur in the plurality's conclusion that summary judgment should not have been granted as to the cause of action for intrusion, and I generally concur in its analysis of that cause of action. [FN1] I respectfully dissent, however, from the conclusion that summary judgment was proper as to plaintiff Ruth Shulman's cause of action for publication of private facts. For the reasons discussed below, I would hold that there are triable issues of material fact as to that cause of action as well.~

> FN1 I decline to join the plurality opinion's discussion of the intrusion cause of action in its entirety. As the plurality notes, "[t]he conduct of journalism does not depend, as a general matter, on the use of secret devices to record private conversations." (Plur. opn., *ante* , at p. 239 .) Therefore, I do not share the view that "[e]quipment such as hidden cameras and miniature cordless and directional microphones are powerful investigative tools for newsgathering...." (*Id.* at p. 237 .) On a more fundamental level, I disagree with the artificial barrier the plurality erects between the publication of private facts and the intrusion causes of action. Unlike the plurality, for instance, I would hold that the depth of the intrusion into private affairs and the lawfulness of the news media's conduct are relevant to *both* causes of action.

In this case, a straightforward application of the *Kapellas* newsworthiness test leads to one inescapable conclusion-that, at the very least, there are triable issues of material fact on the question of newsworthiness. The private facts broadcast had little, if any, social value. (*Kapellas* , *supra* ,1 Cal.3d at p. 36.) The public has no legitimate interest in witnessing Ruth's disorientation and despair. Nor does it have any legitimate interest in knowing Ruth's personal and innermost thoughts immediately after sustaining injuries that rendered her a paraplegic and left her hospitalized for months-"I just want to die. I don't want to go through this." The depth of the broadcast's intrusion into ostensibly private affairs was substantial. (*Ibid.*) As the plurality later acknowledges in analyzing "the depth of the intrusion" for purposes of Ruth's intrusion cause of action, "[a]rguably, 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.... 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." (Plur. opn., *ante* , at p. 238 .) There was nothing voluntary about Ruth's position of public notoriety. (*Kapellas* , *supra* ,1 Cal.3d at p. 36.) She was "involuntarily caught up in events of public interest" (plur. opn., *ante* , at p. 215), all the more so because defendants appear to have surreptitiously and unlawfully recorded her private conversations with Nurse Laura Carnahan. (See *id* . at pp. 233-235.)~

In short, I see no reason to abandon our traditional newsworthiness test, which has produced consistent and predictable results over the course of nearly three decades. As I have explained, a straightforward application of that test demonstrates there are triable issues of material fact on the question of newsworthiness and, hence, that summary judgment should not have been granted on Ruth's cause of action for publication of private facts.

For the reasons discussed above, I would affirm the judgment of the Court of Appeal in its entirety.

Baxter, J., concurred.

Legend: ~ *matter omitted* ^ *citation matter omitted*

Brackets changed to parentheses without note.