Shulman v. Group W

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.

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.~

We 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.~

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~, 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.~

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

~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.~

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.^ 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.)~

~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.^ "[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.~

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.~

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*, 187 Cal.App.3d at pp. 1483-1484; cited, e.g., in *Hill*, 7 Cal.4th at p. 26.^ 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*, 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. 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.[17] 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^, 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.~)

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.^ 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.

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 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.~

"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."^ California's intrusion tort~ appl[ies] 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 ; 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.^ 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.~ 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"^, such exception is inapplicable here.[18]

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.~

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, 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.~

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

KENNARD, J., Concurring.

{*First Amendment concerns expressed about the court's test regarding cause of action for publication of 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.~ 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.^ 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.~

Baxter, J., concurred