



Court of Appeal, First District, Division 3, California.

Toni Ann DIAZ, Plaintiff and Respondent,  
v.  
OAKLAND TRIBUNE, INC., et al., Defendants and  
Appellants.

**A012961.**  
**Civ. 50954.**

Jan. 18, 1983.  
As Modified Feb. 17, 1983.

Plaintiff Toni Ann Diaz (Diaz) sued the Oakland Tribune, Inc., owners and publishers of the Oakland Tribune (the Tribune), and Sidney Jones (Jones), one of its columnists, for invasion of privacy. Diaz claimed that the publication of highly embarrassing private facts in Jones' March 26, 1978, newspaper column was unwarranted and malicious and caused her to suffer severe emotional distress. The jury awarded Diaz \$250,000 in compensatory damages and \$525,000 in punitive damages (\$25,000 against Jones and \$500,000 against the Tribune). Judgment was entered on February 14, 1980. Defendants' motion for a new trial based on insufficiency of the evidence, errors of law, and excessive damages was denied. This timely appeal followed. As discussed below, we reverse the judgment because of instructional errors.

\*123 The facts are for the most part undisputed. Diaz is a transsexual. She was born in Puerto Rico in 1942 as Antonio Diaz, a male. She moved to California from New York in 1964. Suffice it to say that for most of her life Diaz suffered from a gender identification problem and the anxiety and depression that accompanied it. She testified that since she was young she had had the feeling of being a woman. [FN1] In 1968 Diaz began receiving psychological counseling and hormone therapy. In 1970 or 1971 Diaz embarked on the lengthy process of evaluation as a candidate for gender corrective surgery at the Stanford University Gender Dysphoria Clinic. She was ultimately considered to be a good candidate for surgery. In 1975 gender corrective surgery was performed by the Stanford staff. [FN2]

[FN1] Diaz's therapist, Allen Sable, Ph.D., described a transsexual as "a person whose identity is to being a woman with a man's body, ..."

[FN2] The surgery consists of removal of the external male sexual organs and surgical production of external female genitalia.

According to Diaz the surgery was a success. By all outward appearances she looked and behaved as a woman and was accepted by the public as a woman. According to her therapist, Dr. Sable, her physical and psychological identities were now in harmony.

Diaz scrupulously kept the surgery a secret from all but her immediate family and closest friends. She never sought to publicize the surgery. She changed her name to Toni Ann Diaz and made the necessary changes in her high school records, her social security records, and on her driver's license. She tried unsuccessfully to change her Puerto Rican birth certificate. She did not change the gender designation on her draft card, however, asserting that it would be a useless gesture, since she had previously been turned down for induction.

Following the surgery she no longer suffered from the psychological difficulties that had plagued her previously. In 1975 she enrolled in the College of Alameda (the College), a two-year college. The College was one of five colleges of the Peralta Community College District.

In spring 1977, she was elected student body president for the 1977-1978 academic year, the first woman to hold that office. Her election and an unsuccessful attempt to unseat her were reported in the College newspaper, the Reporter, in the May 17, June 1, and June 14, 1977, editions. At no time during the election did Diaz reveal any information about her sex-change operation.

In 1977 Diaz was also selected to be the student body representative to the Peralta Community College Board of Trustees (the Board). [FN3] Diaz's selection as \*124 student body \*\*766 representative, together with her photograph, appeared in the June 1977 issue of the Peralta Colleges Bulletin.

[FN3] The Board governs the affairs of the community college district and oversees an

annual budget of \$40 million and a student population of almost 34,000.

Near the middle of her term as student body president, Diaz became embroiled in a controversy in which she charged the College administrators with misuse of student funds. The March 15, 1978, issue of the Tribune quoted Diaz's charge that her signature had improperly been "rubber stamped" on checks drawn from the associated students' account.

On March 24, 1978, an article in the Alameda Times-Star, a daily newspaper, mentioned Diaz in connection with the charge of misuse of student body funds. [\[FN4\]](#)

[\[FN4\]](#). The College of Alameda Reporter for March 14, 1978, also reported on the controversy.

Shortly after the controversy arose, Jones was informed by several confidential sources that Diaz was a man. Jones considered the matter newsworthy if he could verify the information. Jones testified that he inspected the Tribune's own files and spoke with an unidentified number of persons at the College to confirm this information. It was not until Richard Paoli, the city editor of the Tribune, checked Oakland city police records that the information that Diaz was born a man was verified. The evidence reveals that in 1970 or 1971, prior to the surgery, Diaz was arrested in Oakland for soliciting an undercover police officer, a misdemeanor. [\[FN5\]](#)

[\[FN5\]](#). The record reveals that pursuant to a plea bargain, Diaz entered a guilty plea to the charge. However, Diaz was later allowed to withdraw her guilty plea. Following a trial she was acquitted of the charge.

On March 26, 1978, the following item appeared in Jones' newspaper column: "More Education Stuff: The students at the College of Alameda will be surprised to learn their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio.

"Now I realize, that in these times, such a matter is no big deal, but I suspect his female classmates in

P.E. 97 may wish to make other showering arrangements." [\[FN6\]](#)

[\[FN6\]](#). The complete text of the article appears in the appendix to this opinion.

Upon reading the article, Diaz became very depressed and was forced to reveal her status, which she had worked hard to conceal. Diaz testified that as a result of the article she suffered from insomnia, nightmares, and memory lapses. She also delayed her enrollment in Mills College, scheduled for that fall. [\[FN7\]](#)

[\[FN7\]](#). At the time of trial, January 23, 1980, she still had not enrolled.

\*125 In her complaint Diaz did not charge that any of the information was untrue, only that defendants invaded her privacy by the unwarranted publicity of intimate facts. Defendants defended on the ground that the matter was newsworthy and hence was constitutionally protected.

At trial the jury returned a special verdict and found that (1) defendants did publicly disclose a fact concerning Diaz; (2) the fact was private and not public; (3) the fact was *not* newsworthy; (4) the fact was highly offensive to a reasonable person of ordinary sensibilities; (5) defendants disclosed the fact with knowledge that it was highly offensive or with reckless disregard of whether it was highly offensive; and (6) the disclosure proximately caused injury or damage to Diaz.

In this appeal defendants challenge the jury's finding on issues Nos. (2) and (3) above. Defendants also urge instructional error and attack the awards of compensatory and punitive damages.

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#### 1. *The Right to Privacy*

[\[6\]](#) Plaintiff Diaz proffered a jury instruction properly defining the right to privacy. [\[FN12\]](#) However, the trial court, *sua sponte*, added the following language: "It prevents business or government interests from misusing information gathered for one purpose in order to serve other purposes, or to embarrass us. *This right should be abridged only when there is a compelling public*

need." (Emphasis added.)

[FN12](#). The complete instruction reads as follows: "The California Constitution provides that all persons have an inalienable right of privacy. It is the right to live one's life in seclusion, without being subjected to unwarranted or undesirable publicity. In short, it's the right to be left alone."

The language contained in the last sentence was taken from [White v. Davis \(1975\) 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P.2d 222](#). The trial court misplaced its reliance on that case. In *White, supra*, plaintiff challenged covert police surveillance of University of California at Los Angeles students in their classrooms. There, the court required the government to demonstrate a " 'compelling public need' " for the intrusion. ([Id.](#), at p. 775, 120 Cal.Rptr. 94, 533 P.2d 222.) That case did not attempt to balance the competing rights of free speech and press against the right to privacy. Rather, it recognized the heavy burden on the government to justify interference with First Amendment freedoms. ([Id.](#), at pp. 767-773, 120 Cal.Rptr. 94, 533 P.2d 222.)

Unlike the government's activity in *White*, defendants' publication of the article is a preferred right which is not encumbered by the presumption of illegality. Defendants enjoy the right to publish information in which the public has a *legitimate interest*. (See [Briscoe v. Reader's Digest Association, Inc., supra](#), 4 Cal.3d at p. 541, 93 Cal.Rptr. 866, 483 P.2d 34; [Virgil v. Time, Inc., supra](#), 527 F.2d at pp. 1128-1129; [Rest.2d Torts, supra](#), § 652D, com. d.) To require that the article meet the higher " 'compelling public need' " standard would severely abridge this constitutionally recognized right of free speech and press.

After examining the entire record, we cannot say that this error was harmless. The instruction misstated the law concerning defendants' right to publish newsworthy matters and necessarily lessened plaintiff's burden of proof. Since plaintiff's verdict may have rested on this erroneous theory, the judgment must be reversed. \*\*\*

Our research has discovered no published decision expressly allocating to one of the parties the burden of proving newsworthiness. While a publisher may defend itself against a public disclosure cause of action by proving that the matter was newsworthy, it

is misleading to assert that said defendant has the burden of proving newsworthiness to be free from tort liability. As discussed below, the plaintiff has the burden of proving that the publication was not \*129 privileged, i.e., that it was *not* newsworthy. Of course, defendants may rebut plaintiff's showing with evidence that the matter was newsworthy. However, to assert, as plaintiff does, that defendants have the burden of proving newsworthiness is error.

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## \*\*771 THE PUBLIC DISCLOSURE TORT

### 1. Private Facts

Defendants next argue that the evidence establishes as a matter of law that the fact of Diaz's original gender was a matter of public record, and therefore its publicity was not actionable. [FN16](#) In support of their contention defendants rely on [Cox Broadcasting Corp. v. Cohn, supra](#), 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328. That reliance is misplaced.

[FN16](#). Defendants do not challenge the jury's findings that (1) the matter was publicized and (2) the fact was highly offensive to a reasonable person. There is ample evidence in the record to support these findings.

[\[10\]](#) Generally speaking, matter which is already in the public domain is not private, and its publication is protected. (See [Kapellas v. Kofman, supra](#), 1 Cal.3d at p. 38, 81 Cal.Rptr. 360, 459 P.2d 912; but see [Briscoe v. Reader's Digest Association, Inc., supra](#), 4 Cal.3d at pp. 538-539, 93 Cal.Rptr. 866, 483 P.2d 34; [Melvin v. Reid, supra](#), 112 Cal.App. at pp. 290- 291, 297 P. 91.)

In *Cox Broadcasting Corp.*, the Supreme Court ruled that Cohn, the father of a deceased rape victim, could not maintain a disclosure action against media defendants who identified Cohn's daughter as the victim during the television coverage of the murder trial. ([Cox Broadcasting Corp. v. Cohn, supra](#), 420 U.S. at pp. 496-497, 95 S.Ct. at 1046-47.) Central to the court's conclusion was the fact that the reporter obtained the victim's name from the indictment, which had been shown to him in open court. ([Id.](#), at p. 496, 95 S.Ct. at 1046.)

In a very narrow holding, the court ruled that a state

may not impose sanctions on the accurate publication of the name of a rape victim obtained from judicial records which are maintained in connection with a public prosecution \*132 and which themselves are open to public inspection. (*Id.*, at p. 491, 95 S.Ct. at 1044.) Importantly, the court expressly refused to address the broader question of whether the truthful publication of facts obtained from public records can ever be subjected to civil or criminal liability. (*Ibid.*)

Because of its narrow holding, *Cox Broadcasting Corp.* gives us little guidance. [FN17]

[FN17]. See *The Privacy Disclosure Tort*, *supra*, at page 201.

[11] Here there is no evidence to suggest that the fact of Diaz's gender- corrective surgery was part of the public record. To the contrary, the evidence reveals that Diaz took affirmative steps to conceal this fact by changing her driver's license, social security, and high school records, and by lawfully changing her name. The police records, upon which Jones relied, contained information concerning one Antonio Diaz. No mention was made of Diaz's new name or gender. In order to draw the connection, Jones relied upon unidentified confidential sources. Under these circumstances, we conclude that Diaz's sexual identity was a private matter.

We also do not consider Diaz's *Puerto Rican* birth certificate to be a public record in this instance. In any event, defendants did not rely on that document and cannot be heard to argue that the information contained therein is public.

[12] Moreover, matter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy. (See *Briscoe v. Reader's Digest Association, Inc.*, *supra*, 4 Cal.3d at pp. 537-538, 93 Cal.Rptr. 866, 483 P.2d 34 [publication of identity of ex- offender for past crime was held to be improper]; *Melvin v. Reid*, *supra*, 112 Cal.App. at pp. 290-291, 297 P. 91 [disclosure of plaintiff's past life as a prostitute, seven years after she reformed, was actionable].)

## 2. Newsworthiness

[13] As discussed above, whether the fact of Diaz's sexual identity was newsworthy is measured along a sliding scale of competing interests; the individual's

right to keep private facts from the public's gaze versus the public's right to know. (See \*\*772 *Kapellas v. Kofman*, *supra*, 1 Cal.3d at p. 36, 81 Cal.Rptr. 360, 459 P.2d 912.) In an effort to reconcile these competing interests, our courts have settled on a three-part test for determining whether matter published is newsworthy: "[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety. [Citations.]' [Citation.]" (*Briscoe v. Reader's Digest Association, Inc.*, *supra*, 4 Cal.3d at p. 541, 93 Cal.Rptr. 866, 483 P.2d 34.)

\*133 Defendants argue that in light of Diaz's position as the first female student body president of the College, her "questionable gender" was a newsworthy item. As a subsidiary contention, they assert that the issue of newsworthiness should not have been submitted to the jury. We address the latter contention first.

### a. Newsworthiness as a Jury Question

[14] Whether a publication is or is not newsworthy depends upon contemporary community mores and standards of decency. (See *Briscoe v. Reader's Digest Association, Inc.*, *supra*, at p. 541, 93 Cal.Rptr. 866, 483 P.2d 34; *Virgil v. Time, Inc.*, *supra*, 527 F.2d at p. 1129; *Rest.2d Torts*, *supra*, § 652D, com. h.) This is largely a question of fact, which a jury is uniquely well-suited to decide. [FN18] (*Virgil v. Time, Inc.*, *supra*, 527 F.2d at p. 1129, fn. 12.)

[FN18]. See *The Privacy Disclosure Tort*, *supra*, at pages 223-229.

"It is the shared understandings of the community that establish the conventions by which it is understood just when others are invited into our lives and when they are not." (Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, *supra*, 9 Hastings Const.L.Q. at p. 397, fn. omitted.)

Defendants argue that the right to publish would suffer at the hands of a jury which, unlike the trial judge, would be more likely to use a general verdict in order to punish unpopular speech and persons. In *Virgil v. Time, Inc.*, *supra*, 527 F.2d 1122, the Court of Appeals for the Ninth Circuit in a California case

recognized this danger. However, that court concluded that any risk of prejudice may be checked by close judicial scrutiny at the stages of litigation such as summary judgment, directed verdict, and judgment notwithstanding the verdict. (*Id.*, at p. 1130.) [FN19] Our trial court judges are entirely capable of correcting such jury overreaching.

[FN19] See footnote 18, *ante*.

[15] These same concerns are present in the related field of obscenity law, where community standards define what speech is constitutionally protected. (See *Miller v. California*, *supra*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419.) In an obscenity prosecution the jury is required to make an equally important constitutional decision and has been found to be up to the task. (See *id.*, at p. 25, 93 S.Ct. at 2615.) Accordingly, where reasonable minds could differ, we see no constitutional infirmity in allowing the jury to decide the issue of newsworthiness. (See *Briscoe v. Reader's Digest Association, Inc.*, *supra*, 4 Cal.3d at p. 543, 93 Cal.Rptr. 866, 483 P.2d 34.)

\*134 b. *Newsworthiness as a Matter of Law*

Next, defendants urge that, as the first female student body president of the College, Diaz was a public figure, and the fact of her sexual identity was a newsworthy item as a matter of law. We disagree.

[16] It is well settled that persons who voluntarily seek public office or willingly become involved in public affairs waive their right to privacy of matters connected with their public conduct. (*Kapellas v. Kofman*, *supra*, 1 Cal.3d at pp. 36-38, 81 Cal.Rptr. 360, 459 P.2d 912.) The reason behind this rule is that the public should be afforded every opportunity of learning about any facet which may affect that person's fitness for office. (See *Briscoe v. Reader's Digest Association, Inc.*, *supra*, 4 Cal.3d at p. 535, fn. 5, \*\*77393 Cal.Rptr. 866, 483 P.2d 34; *Rest.2d Torts*, *supra*, § 652D, com. e.) [FN20]

[FN20] *The Privacy Disclosure Tort*, *supra*, at page 194.

[17] However, the extent to which Diaz voluntarily acceded to a position of public notoriety and the degree to which she opened her private life are questions of fact. (*Briscoe v. Reader's Digest*

*Association, Inc.*, *supra*, 4 Cal.3d at p. 541, 93 Cal.Rptr. 866, 483 P.2d 34.) As student body president, Diaz was a public figure for some purposes. However, applying the three-part test enunciated in *Briscoe*, we cannot state that the fact of her gender was newsworthy per se.

Contrary to defendants' claim, we find little if any connection between the information disclosed and Diaz's fitness for office. The fact that she is a transsexual does not adversely reflect on her honesty or judgment. (Cf. *Kapellas v. Kofman*, *supra*, 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 [plaintiff, a mother and candidate for Alameda City Council, who repeatedly left her minor children unsupervised, could not maintain an action against a newspaper for publishing information taken from police records of her children's criminal behavior]; *Beruan v. French* (1976) 56 Cal.App.3d 825, 128 Cal.Rptr. 869 [candidate for secretary-treasurer of union local could not maintain action based on publication of a letter disclosing his six prior criminal convictions].)

Nor does the fact that she was the first woman student body president, in itself, warrant that her entire private life be open to public inspection. The public arena entered by Diaz is concededly small. Public figures more celebrated than she are entitled to keep some information of their domestic activities and sexual relations private. (See *Rest.2d Torts*, *supra*, § 652D, com. h.) [FN21]

[FN21] See *The Right to Speak*, *supra*, at page 962: "[S]peech necessary for an effective and meaningful democratic dialogue by and large does not require references to the intimate activities of named individuals." (Fn. omitted.)

\*135 Nor is there merit to defendants' claim that the changing roles of women in society make this story newsworthy. This assertion rings hollow. The tenor of the article was by no means an attempt to enlighten the public on a contemporary social issue. Rather, as Jones himself admitted, the article was directed to the students at the College about their newly elected president. Moreover, Jones' attempt at humor at Diaz's expense removes all pretense that the article was meant to educate the reading public. The social utility of the information must be viewed in context, and not based upon some arguably meritorious and unintended purpose.

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8 Ed. Law Rep. 746, 9 Media L. Rep. 1121  
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Therefore, we conclude that the jury was the proper body to answer the question whether the article was newsworthy or whether it extended beyond the bounds of decency. \*\*\*