

Defamation & Privacy 2003 Answer Key

Question 1

- ___ 5 Bowmans v. H & H—Malpractice (denial of treatment) D, B, C, D; professionals
- ___ 10 Duty: H & H have no doctor-patient relationship with any of the Bowmans. Certainly none between parents and researchers (pediatric endocrinologists) v. duty owed to research subjects? v. duty to warn of hereditary disease to prevent future births, but pamphlet warns of “genetic nature,” Safer v. Pack (duty to warn family members of genetically transmittable), cf. Pate v. Threlkel (no duty to non-patient); Bowmans were patients of the Hosp. which owed them a duty
- ___ 10 Standard of care in relevant medical community—researcher or physician? Vergara; national standard of care for specialists in pediatric endocrinology; degree of skill and care practitioners in specialty would exercise under similar circumstances; satisfied standards in research community with “blind control” but departed from professional standard in medical community by failing to inform of positive CF screen
- ___ 5 Breach: prove violation through expert testimony, Walski, Smith; condition worsens without treatment if theory is correct v. not customary to test newborns for CF
- ___ 5 Causation: foreseeable CF would worsen (esp. if parents thought she was screened for it) failure to tell didn’t cause CF, telling won’t cure it, but 16 mos. missed treatment
- ___ 5 Damages: costs of treatment (increased risks because delayed), hard to prove part attributable to H & H not telling; can recover aggrav. existing Miley; emotional damages
- ___ 5 Bowmans v. Hosp.—Malpractice (denial of treatment) std for hospitals (care commensurate with needs of patient)
- ___ 5 Nonfeasance defense (did nothing, didn’t tell about CF) Newton v. Ellis v. can’t disavow knowledge in possession when a professional obligation to tell, and affirmative undertaking by testing
- ___ 5 Bowmans v. H & H/Hosp.—Breach of fiduciary duty (special relationship) when responsib as docs conflicts with responsib as researchers, the former should prevail
- ___ 10 Bowmans v. H & H/Hosp.—Informed consent (DNC form) CF risks are material; was pamphlet suff. informed consent? Wilkerson Fail to inform re conseq. of opting out (just not using blood?) Truman; if don’t consent, still don’t find out about CF; no duty to tell statistical prob., Arato, or info re study (wd kill basic research); therapeutic withhold.
- ___ 5 Standard of disclosure, Harnish (material info reas. patient would want), majority, or Woolley (standard of disclosure for docs or researchers?); application of stds. Pamphlet provided known information under Woolley v. doc wd tell of CF+ of newborn
- ___ 5 Contributory negl./AOR: plaintiffs read pamphlet and did not opt out—consented to not being informed; failure to investigate causes earlier v. symptoms (resp. infections and weight trouble) not enough to alert lay parents, reasonable parent standard, Hartman (reas. care under circs.)

___ 5 *Amelia v. H & H/Hosp.*—Battery/Negl. Admin. (use of blood products) why consistent amounts of excess? Moore v. Regents v. blood already drawn for legitimate reasons, only excess used

___ 5 *Bowmans v. H & H/Hosp.*—Contract (informed consent pamphlet or treatment agreement); deals with physical safety risks, Palka

___ 5 *Bowmans v. H & H/Hosp.*— 324A undertaking to render services + reliance expectable or increased risk: pamphlet + not telling may have encouraged belief *Amelia* was fine, Florence v. Goldberg; like “taking charge” of helpless person, Farwell

___ 5 defense: plaintiffs in no worse position than if research had not been done, unlike Farwell; no actual reliance, Krieg v. Massey

___ 10 *Bowmans v. H & H/Hosp.*—NIED (bystanders) no physical impact, Mitchell, or threat of impact on parents, but duty to protect emotional well-being and SED foreseeable, Sacco, Camper; phys. manifest. req’d; Thing, while close rel. and presumably SED re sick baby, no facts re med. significant and diagnosable distress, Ford v. Aldi, also no traumatic event witnessed; better chance of recovery under Dillon, since test is foresee. and factors flexible, but under majority zone of danger test, parents not in fear of physical harm to themselves, Grube; witnessing child’s med. condition not enough Asaro

___ 5 *Amelia v. H & H/Hosp.*—NIED physical impact, Mitchell, severe emotional distress foreseeable, phys. consequences re CF, old enough to comprehend?

___ 5 *Bowmans v. H & H/Hosp.*—Loss of filial Consortium (healthy child companionship) Boucher most states disallow; derivative claim

___ 5 *Bowmans v. H & H/Hosp.*—Intrusion on seclusion (use of blood drawn) reas. expectation of privacy in medical information Barber, PETA v. surplus blood, already drawn, so no expectation of privacy, and useful purpose Diaz

___ 5 *Bowmans v. H & H/Hosp.*—Public disclosure of private facts (blood) names protected and CF+ not highly offensive info; not made public, just intra-office

___ 5 *Bowmans v. H & H/Hosp.*—§ 1983 const. tort (no sub. d.p. or liberty interest)

___ 5 *Bowmans v. Hosp. & Med. School*—Negligent Supervision/Failure to warn: had control of docs, research done at facility; medical residency program; harm of not telling parents, Darling, Rosales, Dudley, Tarasoff (A spec. identifiable) v. docs not dangerous

___ 10 *Bowmans v. Hosp. & Med. School*—Respondeat sup.—within scope of emp. as both researchers and docs, authorized, serves interests of both university and hosp., exp. related to ped. endo., fame and funds go to institutions, Gatzke, although hosp. says research with surplus blood isn’t related to pt. treatment, after hours v. Bishop; salaried re med. school, hosp. says re research H & H are I.C. but \$ and on call, poss. inh. danger? Hampton; is research so unethical it crosses intent. tort line and not w/in scope? Lisa M.

___ 5 *Charlie v. H & H/Hosp.*—Wrongful life (parents would not have had him) impossible to evaluate life v. non-life; most courts reject this claim Greco

___ 10 Mary & Charles v. H & H/Hosp.—Wrongful birth (if results disclosed, no Charlie) depriv. right to choose, Shelton; often not recognized Wilson v. Kuenzi; damages extra. costs of raising child with CF; pamphlet says genetic, parents said read

___ 10 Immunity defense for Hosp. & Med. School: while state entities, acting in a proprietary (\$-generating) capacity?; not one of the state-mandated tests for which results had to be revealed, Loge; conduct of research re excess blood products is discretionary resource decision, Lockett or at least judgment call v. v. medical, not policy, judgment, Griffin; hosp. actually minist. admin. of research while real decisions w/researchers

___ 10 Immunity defense for H & H—Qualified immunity, discr. function, Pletan, and conscious decision not to tell, Dube v. medical, not policy, judgment, Griffin; public duty doctrine, Andrade; failure to disclose not a violation of a clearly established right

___ 10 Thorough analysis/Innovative arguments

___ 10 Use of cases; use of complete, grammatical sentences

___ 5 Organization

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Question 2

___ 5 GP v. LS—Defamation: slander per se (break room) critic work perf. in public = incompetence, rep. harm; falsity since excep. rating, lateness true, but was lateness reason for staff shortages?; negl. re pub. in break room, emot. damages (tears and mood swings; but related to slander or termination?), Time Inc.

___ 5 Elements (false, defamatory (hold up to hatred or ridicule), concerned GP, publication to 3rd party, minimum of negligence re publication, fault, harm)

___ 5 all private person-private concern, not public off. or figure, Jenoff, so no proof of malice required, Dun & Bradstreet; pub. concern re union-busting?; Gertz (negl. standard), but prob. must prove damages

___ 5 defense: protected opinion? Moldea; no falsity (true criticisms)

___ 5 GP v. LS—False light (break room) elements (placing GP before public in false light in a way highly offensive to RP), Lane, not before public (handful of workers, intra-company), no reckless disregard re falsity (accurate)

___ 5 GP v. LS—Public disclosure of private facts (break room): work performance a private fact, but lateness probably visible and not private in workplace, highly offensive to be disciplined in public (conversation should and could have been private) and reckless re embarrassment, but public disclosure element weak; is e-mail to co-workers a waiver?

___ 5 GP v. LS—Defamation: slander (1st conversation with DC) “unsuited for management” directly impugns job performance and is slander per se; performance rating exceptional, but based on employees all of whom she rated exceptional; repeatedly late to work; inability to distinguish among 117 employees; staffing shortages

___ 5 GP v. LS—Defamation: slander (2nd conversation with DC) “started rumors re union busting” reasonable interpretation of e-mails GP sent, Masson; damages difficult to show (by second conversation, Castelan had already decided to terminate

___ 5 GP v. LS—Intrusion on seclusion (“watching like a hawk”); repetitive, harassing; no expect. privacy in arrival time at work, PETA; clocking GP and observing work performance is appropriate for a supervisor, York; no invasive technology, all visible

___ 5 GP v. LS—False light (conversations with DC) highly offensive false portrayal or accurate reporting? Malice or appropriate for supervisor? Not placing before the public

___ 5 GP v. DC—Defamation: slander (directors meeting) “difficulties performing her duties” holds her to ridicule v. true description + “voluntary” gives her cover

___ 5 GP v. DC—False light (directors meeting) “difficulties” is accurate, although resign or be terminated is not voluntary resignation, but comments put her in better light; publicity problem with 12 people, but perhaps enough

___ 5 GP v. DC—Public discl. priv. facts (director’s mtg), same publicity problem re computer tech; not private to report to directors re employees; newsworthy, Diaz, privileged

___ 5 GP v. DC—Defamation: slander (workers meeting) “depressed and sad”; no facts for DC to know GP depressed at the time of statement, even if true after term. v. not false; don’t hold her up to ridicule (plea for sympathy) v. slander per se loathsome? mental disorder or late to work stating general qualities disparaging of occupational habits; emot. distress damages + co-workers unfriendly, although causation weak

___ 5 GP v. DC—False light (workers meeting) characterization of “depressed” + “hard to get up” understood as mental illness v. no reckless disregard for falsity, because true; no malice because he tried to cultivate support for difficult emotional transition

___ 10 GP v. DC—Public disclosure of private facts (workers meeting): 117 is sufficient for publicity v. within company; transfer is not a private fact, Taylor, probably newsworthy, Cape Publications; sadness, esp. if mental illness is hinted, may be private, Barber (privacy of health information), but if crying visible at work, she disclosed with behavior and facts not private; not highly offensive since most people at some point are sad v. disclosure of emotional state highly offensive; no purpose re embarrassment (actually trying to spare her embar. re firing), but was there reckless disregard in choice of words and were comments re mental health relevant to purpose of meeting? Diaz

___ 5 defense: fair comment, amorphous privilege; no neutral reporting privilege a la Audobon (P isn’t public figure, and Ds aren’t prominent people).

___ 5 defense: no publication/intracorporate communication regarding proper work subject Blake; DC & LS conver. and report to directors approp., except computer tech’s presence may destroy latter privilege, but break room conver. wasn’t co. talking to itself

___ 5 GP v. DC & LS—Intrusion on Seclusion (conversations): conversations are not acts of intrusion (no technology); 1st A. defense: would encompass too much speech

___ 5 Thorough analysis/Innovative arguments

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