AIDS

Carolina Academic Press Law Casebook Series Advisory Board

0

Gary J. Simson, Chairman Cornell Law School

Raj K. Bhala The George Washington University Law School

> John C. Coffee, Jr. Columbia University School of Law

> Randall Coyne University of Oklahoma Law Center

John S. Dzienkowski University of Texas School of Law

Paul Finkelman University of Tulsa College of Law

> Robert M. Jarvis Shepard Broad Law Center Nova Southeastern University

Vincent R. Johnson St. Mary's University School of Law

Thomas G. Krattenmaker
Director of Research
Federal Communications Commission

Michael A. Olivas University of Houston Law Center

Michael P. Scharf New England School of Law

Peter M. Shane Dean, University of Pittsburgh School of Law

Emily L. Sherwin
University of San Diego School of Law

John F. Sutton, Jr. University of Texas School of Law

David B. Wexler University of Arizona College of Law

AIDSCases and Materials

Third Edition

William E. Adams, Jr.
Professor of Law
Nova Southeastern University

Mary Anne Bobinski Director, Health Law and Policy Institute and George Butler Research Professor of Law University of Houston

> Michael L. Closen Professor of Law John Marshall Law School

Robert M. Jarvis Professor of Law Nova Southeastern University

> Arthur S. Leonard Professor of Law New York Law School

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2002 by William E. Adams, Jr., Mary Anne Bobinski, Michael L. Closen, Robert M. Jarvis, and Arthur S. Leonard All Rights Reserved.

> ISBN: 0-89089-662-3 LCCN: 2002103849

Carolina Academic Press 700 Kent Street Durham, North Carolina 27701 Telephone (919) 489-7486 Fax (919) 493-5668 www.cap-press.com

Printed in the United States of America

This book is dedicated to every lawyer who has labored on behalf of an HIV-positive client



Contents

Table of Cases	xi
Preface	xiv
Acknowledgments	XV
Chapter 1. Introduction	3
A. Overview	3
B. A Brief History of Communicable Diseases	3
Infectious Diseases and Human Population History	3
Emerging and Reemerging Infectious Diseases: Challenges for	
International, National, and State Law	6
People v. Shurly	11
Notes	12
Problem 1	14
C. Common Legal Issues Raised by Communicable Diseases	14
Segregation of Lepers	15
County of Hennepin v. County of Houston	17
City of New Orleans v. Sanford	21
Notes	26
Problem 2	30
Chapter 2. Medical Issues	31
A. Overview	31
B. Medical Aspects of HIV Infection	31
Many Rivers to Cross: Evolving and Emerging Legal Issues in the	
Third Decade of the HIV/AIDS Epidemic	32
Notes	35
Problem 3	38
C. Controlling Health Care Treatment Decisions	39
People v. Privitera	39
Wright v. Johns Hopkins Health Systems Corp.	41
Notes	47
Problem 4	50
Chapter 3. Discrimination	51
A. Overview	51
B. The Protected Class	51
Bragdon v. Abbott	51
Notes	57
Problem 5	58

viii CONTENTS

C. Qualified Discrimination — Direct Threat	59
Bragdon v. Abbott	59
Abbott v. Bragdon	62
Onishea v. Hopper	65
Notes	70
Problem 6	72
D. Reasonable Accommodation	72
Prilliman v. United Air Lines, Inc.	72
Notes	78
Problem 7	79
E. Discrimination Against HIV-Infected Patients	79
Lesley v. Chie	79
Notes	84
Problem 8	86
Chapter 4. Public Health	87
A. Overview	87
B. State Regulatory Powers	87
Jacobson v. Commonwealth of Massachusetts	87
People v. Adams	90
Notes	96
Problem 9	99
C. Limitations on the State's Regulatory Powers	99
Doe v. City of New York	100
City of Newark v. J.S.	103
Notes	107
Problem 10	115
D. Discriminatory Use of the State's Regulatory Power	115
Wong Wai v. Williamson	116
Notes	119
Problem 11	120
Chapter 5. Insurance	121
A. Overview	121
B. Private Health Insurance: Underwriting Concerns	121
American Council of Life Insurance v. District of Columbia	121
Life Insurance Association of Massachusetts v. Commissioner	
of Insurance	125
Notes	127
Problem 12	129
C. Incontestability Clauses and Pre-Existing Condition Exclusions	130
Galanty v. Paul Revere Life Insurance Company	130
Notes	138
Problem 13	138
D. Public Health Insurance Programs	139
Barren River District Health Department v. Hussey	139
Chelte v. Apfel	143
Notes	146
Problem 14	147

CONTENTS	ix
E. Coverage Issues: AIDS "Caps"	147
McGann v. H & H Music Co.	147
Doe v. Mutual of Omaha Insurance Co.	151
Notes	155
Problem 15	156
F. Coverage Issues: Experimental Treatments	156
Weaver v. Reagen	157
I.V. Services of America, Inc. v. Trustees of the American	
Consulting Engineers Council Insurance Trust Fund	161
Notes	165
Problem 16	166
Chapter 6. Family Law	167
A. Overview	167
B. Marriage, Domestic Partnership, and Divorce	167
Doe v. Doe	167
Whelan v. Whelan	171
Notes	173
Problem 17	174
C. Parenting Issues	174
Doe v. Roe	175
Stewart v. Stewart	177
North v. North	180
In the Matter of Adoption of Johnson	184
In re Interest of John T.	187
In Interest of Micah Alyn R.	197
Notes	202
Problem 18	203
Chapter 7. Estate Planning	205
A. Overview	205
B. Competency	205
Bober v. Harrison	205
Notes	208
Problem 19	208
C. Undue Influence	209
Rudolf Nureyev Dance Foundation v. Noureeva-Francois	209
Notes	224
Problem 20	225
D. Post-Death Matters	225
Clarke v. Reilly	225
Notes	226
Problem 21	227
Chapter 8. Tort Law	229
A. Overview	229
B. Claims by HIV-Infected Persons	229
N.N.V. v. American Association of Blood Banks	229

Doe v. Johnson

237

 \mathbf{x}

CONTENTS

Notes	246
Problem 22	247
C. Claims By Persons Not Infected	248
John & Jane Roes, 1–100 v. FHP, Inc.	248
Chizmar v. Mackie	251
Notes	255
Problem 23	255
D. Dignitary Torts	256
Ozer v. Borquez	256
Notes	259
Problem 24	260
Chapter 9. Criminal Law	261
Â. Overview	261
B. Criminalizing Acts That May Transmit the Virus	261
State v. Thomas	261
Notes	264
Problem 25	264
C. HIV as a Factor in Sentencing	264
Guevara v. Superior Court	264
State v. Richmond	267
Notes	268
Problem 26	268
D. Criminalizing Needle Exchange Activity	269
State v. McCague	269
Spokane County Health District v. Brockett	273
Notes	277
Problem 27	277
Chapter 10. International Law	279
A. Overview	279
B. Comparative Law	279
CLB v. Public Prosecutor	279
Regina v. Genereux	282
B v. Minister of Correctional Services	285
X v. Commonwealth	290
Secretary of State for Social Security v. M	293
Notes	297
Problem 28	298
C. Immigration Law	299
Haitian Centers Council, Inc. v. Sale	299
Maradiaga v. Immigration and Naturalization Service	304
Regina v. Secretary of State for the Home Department Ex Parte "M"	306
Notes	314
Problem 29	315
Index	317

Table of Cases

A v. E.C. Commission, 315

Abbott v. Bragdon, 62 Adams, People v., 90, 96 Addington v. Texas, 114 A.D.H. v. State Dep't of Human Resources, 50 Advincula v. United Blood Servs., 246-47 Aetna Casualty & Surety Co. v. Sheft, 247 Akwai v. Royal Ins. Co., 30 American Council of Life Insurance v. District of Columbia, 121 American National Red Cross, Doe v., 247 Anderson v. Romero, 107-08 Anonymous, People v., 269 Antoinette R., City of New York v., 114 B v. Minister of Correctional Services, 285 Baehr v. Lewin, 174 Barren River District Health Department v. Hussey, 139, 146 Beason v. Harcleroad, 260 Benson v. Northwest Airlines, Inc., 79 Benten v. Kessler, 48 Board of Trustees of University of Alabama v. Garrett, 57 Bober v. Harrison, 205

Shield, 165-66 Bradley v. Univ. of Tex. M.D. Anderson Cancer Center, 70 Bragdon v. Abbott, 51, 59, 85 Brown v. Dibbell, 39 Bryant v. Madigan, 85

Borgess Med. Ctr., Estate of Mauro by and

Bradley v. Empire Blue Cross & Blue

through Mauro v., 70

Bouvia v. Superior Ct., 47

C.A., In re, 50 Carter v. State, 114 Cerio v. New York State Div. of Human Rights, 85

Chabner v. United of Omaha Life Insurance Co., 156 Chelte v. Apfel, 143 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 99 Chizmar v. Mackie, 251 City of See name of other party Clarke v. Reilly, 225 CLB v. Public Prosecutor, 279 Cleveland v. Policy Mgmt. Sys. Corp., 71, Cloutier v. Prudential Ins. Co. of America,

129

See name of other party

Commonwealth of

DeSario v. Thomas, 165

Dunn v. White, 97

Conservatorship of Wendland, 49 Cooper v. State, 268 County of See name of other party Courtney v. Courtney, 255 Crocker v. Runyon, 78 Cruzan by Cruzan v. Director, Missouri Dep't of Health, 47, 48-49 Cutter Biological, Doe v., 247

Dilling, Doe v., 248 DiSanto v. McGraw-Hill, Inc./Platt's Div., 71 Doe v. See also name of other party Doe, City of New York v., 114 Doe v. City of New York, 100 Doe v. Doe, 167, 173 Dorsey v. U.S. Department of Labor, 79

Echazabal v. Chevron USA, Inc., 71, 85-Eckles v. Consolidated Rail Corp., 79 EEOC v. Prevo's Family Mkt., Inc., 71

xii

Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 57

Estate of

See name of other party Estelle v. Gamble, 38

Facchina v. Mutual Benefits Corp., 260
Fairfield Improvement Company of Baltimore City, Mayor of Baltimore v., 26
First Penn-Pacific Life Ins. Co. v. William R. Evans, Chartered, 227
Funeral Services by Gregory, Inc. v. Bluefield Community Hospital, 255

Galanty v. Paul Revere Life Insurance Company, 130 Garvey v. St. Elizabeth Hospital, 246 Genereux, Regina v., 282 Glanz v. Vernick, 85 Gonzales v. Garner Food Servs., Inc., 58 Griffin v. American Red Cross, 255 Grzan v. Charter Hosp. of Northwest Ind.,

Guayante, State v., 268 Guevara v. Superior Court, 264, 268

Haitian Centers Council, Inc. v. Sale, 299, 314

Hawley v. Evans, 47 Heiner v. Moretuzzo, 255 Henderson, Matter of, 225 Herring v. Keenan, 107

Hilton v. Southwestern Bell Tel. Co., 71 Holiday v. City of Chattanooga, 72

Houston, County of, County of Hennepin v., 17, 27

Howe v. Hull, 85

Hyland Therapeutics v. Superior Court, 246

Ibrahim v. Metro Health Systems, 255 In Interest of

See name of party

In re

See name of party

In the Matter of

See name of party

I.V. Services of America, Inc. v. Trustees of the American Consulting Engineers Council Insurance Trust Fund, 161 Jacobson v. Commonwealth of Massachusetts, 47, 87, 96
Jairath v. Dyer, 86
J.G., State in Interest of, 97
John & Jane Roes, 1-100 v. FHP, Inc., 248, 255

John T., In re Interest of, 187 Johnson by Johnson v. Thompson, 85 Johnson, Doe v., 237, 247 Johnson, In the Matter of Adoption of, 184

Jones v. Rehabilitation Hosp. of Indiana, 58

Jones v. Stanko, 14 J.S., City of Newark v., 103, 113 Juveniles A-E, In the Matter of, 97

Kansas v. Hendricks, 115 Kimel v. Florida Board of Regents, 57 K-Mart v. Evenson, 147 Kohler v. Blue Cross & Blue Shield of Virginia, 139

Leno, Commonwealth v., 48
Lesley v. Chie, 79, 85
Life Insurance Association of Massachusetts v. Commissioner of Insurance, 125
Lo Chi Keung R. v. 298

Lo Chi Keung, R. v., 298 Lonergan, People v., 277

Machesny v. Larry Bruni, M.D., P.C., 255 Maradiaga v. Immigration and Naturalization Service, 304, 314

Marselle, Doe v., 86 Mathews v. Eldridge, 114

Matter of

See name of party

Moore v. Mabus, 97

Mayor of

See name of other party
McAlindin v. County of San Diego, 57
McCague, State v., 48, 269, 277
McGann v. H & H Music Co., 147, 155-56
McKee v. Cutter Labs., Inc., 246
McNally v. Prison Health Serv., 38
McVickers, People v., 97
Micah Alyn R., In Interest of, 197, 203
Miller v. Spicer, 85
M.M.H. v. United States, 255

Mutual of Omaha Insurance Co., Doe v., 151, 156

Mwai, R. v., 298

Neimes v. Ta, 114 Nikolas E., In re, 203

N.N.V. v. American Association of Blood Banks, 229

Norman-Bloodsaw v. Lawrence Berkeley Lab., 86

North v. North, 180, 202-03

Oakland Cannabis Buyers' Co-op., United States v., 47

O'Neill v. O'Neill, 174 Onishea v. Hopper, 65, 71 Owens v. Storehouse, Inc., 156 Ozer v. Borquez, 256

Paoloni v. Goldstein, 227

People v.

See name of other party Perkins v. Kansas Dep't of Corrections, 38 Powell v. Schriver, 107 Prilliman v. United Air Lines, Inc., 72 Privitera, People v., 39

Ray v. American Nat'l Red Cross, 247 Ray v. Cutter Labs., 247

Regina v.

202

See name of other party Reisner v. Regents of Univ. of California,

Reynolds v. McNichols, 113 R.G.H. v. Abbott Labs., 58 Richmond, State v., 267

R.J. v. Humana of Florida, Inc., 255 Roberts v. Unidynamics Corp., 58

Roe, Doe v. (N.Y.S. App. Div. 1994), 86 Roe, Doe v. (N.Y.S. Sup. Ct. 1988), 175,

Rudolf Nureyev Dance Foundation v. Noureeva-Francois, 209

Runnebaum v. NationsBank of Maryland, N.A., 59

Rutherford v. United States, 47, 48

Samuels v. Health and Hosps. Corp. of City of New York, 246 Sanford, City of New Orleans v., 21, 28 Schulman v. Prudential Ins. Co. of Am., 255

Secretary of State for Social Security v. M, 293

Secretary of State for the Home Department Ex Parte "M", Regina v., 306

Segregation of Lepers, 15, 26

Shalala, Estate of Aitken v., 166

Shurly, People v., 11

Smallwood v. States, 264

Spokane County Health District v. Brockett, 273

State in Interest of

See name of party

State v.

See name of other party Stewart v. Stewart, 177, 202 Sutton v. United Air Lines, Inc., 58

T.E.P. v. Leavitt, 99 Thomas, People v., 97, 111 Thomas, State v., 261 Trans World Airlines, Inc. v. Hardison, 79 Turner v. Safley, 97

United Blood Servs. v. Quintana, 246 United States v.

See name of other party

Univ. Hosp. S.U.N.Y. at Stony Brook, United States v., 85 Univ. of Md. Med. Sys. Corp., Doe v., 70

Vacco v. Quill, 47

Vernonia School Dist. 47J v. Acton, 120

Washington v. Glucksberg, 47

Weaver v. Reagan, 157, 165

Whalen v. Roe, 107

Whelan v. Whelan, 171

Whitley v. Lewis, 208

Wigginton, Doe v., 107

Williamson v. Waldman, 255

Wong Wai v. Williamson, 116

Wright v. Johns Hopkins Health Systems Corp., 41, 49

X v. Commonwealth, 290

Yuridia G., In re, 203

Z v. Finland, 298

Preface

The first edition of this book ran more than 950 pages of small print. At its publication in 1989, it was the only casebook on AIDS law published for use primarily in law schools. Due to the lack of other resources available for such courses, the co-authors leaned toward inclusivity rather than selectivity, leaving it to instructors to determine what to assign and what to pass over.

For the second edition, the primary goal was to produce a text that would be more manageable for a two or three credit-hour course. The co-authors therefore exercised greater selectivity, assuming that teachers and students had available a wider variety of other information sources in 1995.

The third edition continues to strive to provide greater selectivity so that the book can be used along with other resources. Nevertheless, we have sought to provide sufficient materials for a basic understanding of the impact of the disease in each major substantive area.

In editing cases, statutes, and other sources, citations and text have been omitted without indication.

The co-authors hope that the addition of problems will prove helpful to instructors and students in reflecting upon the important policy issues raised by the AIDS epidemic. We invite comments and questions, which can be directed to Professor William E. Adams, Jr., at the Shepard Broad Law Center at Nova Southeastern University, 3305 College Ave., Ft. Lauderdale, FL 33314-7721, (954) 262-6133, adamsb@nsu.law.nova.edu.

Acknowledgments

William E. Adams, Jr: To David Halpern and Veresa Jones Adams for their research assistance and to the Shephard Broad Law Center at Nova Southeastern University for its financial support.

Mary Anne Bobinski: To Holly J. Harlow, various students of the University of Houston Law Center for their research assistance, and the University of Houston Law Foundation for its financial support.

Thanks is also expressed to the various publishers and authors whose works are reprinted herein by permission.