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Liability For the Loss of Cryopreserved Embryos: "Location, Location, Location" Part I: The Wrongful Death Construct

***MedTech For Solutions, Inc.**, which provides business, risk management and group purchasing services to ART Facilities, provides this quarterly newsletter on matters of interest to the ART community. This is the first part of our examination of the nature of potential liability for the loss of cryopreserved embryos, and how ART centers may address the issue so as to limit liability.*

Every profession has its own, specially crafted nightmare: for reproductive endocrinologists and embryologists, there may be none so haunting as a power failure replete with the destruction of tanks of cryopreserved embryos. And even as we push away such thoughts, we wonder by what method one would value the loss of one embryo, no less thousands. The answer, interestingly, lies in an old bromide about value– borrowed from a very different profession– which instructs that the controlling factors are "location, location, location". Quite simply, in the event of the destruction of cryopreserved embryos, the State you are in will determine the state you are in.

The law has struggled to keep up with advances in assisted reproductive medicine, wrestling with such issues as parental rights[1], custody[2] and the negligent destruction of cyropreserved embryos[3]. Squarely in the middle of each dispute is the ART facility's Consent for Cryopreservation, which, depending on where you are, may be a binding contract, may be a "contract" which allows a patient-signatory to change his/her mind, or may be a "contract" whereby the ART facility promises to take special care of special property. Whatever your locale, then, your Consent for Cryopreservation is a critical document which should (1) keep up with the developing law of your State; (2) operate to define your Center's obligations; and (3) test the law by defining the value of lost gametes or

[1] The issue of parental rights is particularly compelling in the instance of same-sex couples where only one partner bears a genetic relationship to the offspring. *E.g.*, K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

[2] The attempt to define who has the rights to cryopreserved embryos in the instance of divorce has spawned the majority of litigation on the subject of what, precisely, is the legal status of a cryopreserved embryo. Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); Cahill v. Cahill, 757 So.2d 465 (Ala. Civ. App. 2000); Kass v. Kass, 91 N.Y.2d 554, (1998); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[3] *E.g.*, Miller v. American Infertility Group of Illinois, S.C., 844 N.E.2d 424 (Ill. 2006); Jeter v. Mayo Clinic Arizona, 121 P.3d 1256 (Ariz. Ct. App. 2005); Frisina v. Women and Infants Hospital of Rhode Island, 2002 WL 1288784 (Sup. Ct. R.I. 2002).

embryos in the consent itself.

The "value"-- or the potential amount of recovery-- for negligently destroyed embryos rests solidly on the legal theory a court will utilize to recognize such a claim (or not). There are several: (1) "wrongful death"; (2) the loss of irreplaceable property (which permits an award of emotional distress damages to the gamete providers); (3) bailment; or (4) simple negligence leading to the destruction of property. In this issue, we focus on the claim that offers the highest amount of recovery (and the biggest headache) –"wrongful death".

The news is both good and bad. The good news is that, currently, only three jurisdictions – one directly, and two impliedly-- recognize "wrongful death" claims for negligently destroyed embryos: Illinois, Missouri and Louisiana. The key to recognizing a wrongful death claim is, of course, recognizing an embryo (or a non-viable fetus) to be "a person". The bad news? If your jurisdiction recognizes the embryo to be "property", your professional liability insurance may not answer for such a claim[4].

What provoked the interest in wrongful death as a remedy for negligently destroyed embryos? A recent Illinois case, involving an ART facility, that has decided the issue in "pure culture" (i.e., in a factual setting involving embryos outside of the body), and determined that an embryo (or more precisely in that case, a blastocyst)– whatever its state of development, *and whether it exists within or outside of the human body*-- is a "human life" for the purposes of tort liability as defined in the Illinois wrongful death statute.[5] Such a decision holds considerable promise of "ratcheting up" the stakes of potential liability for ART practices–although the Illinois conclusion cannot truly be viewed as the harbinger of a "national" conclusion on the matter, for one major reason: a claim for wrongful death is a creature of statute, with state-wide application, and thus what the Illinois wrongful death statute allows is necessarily peculiar to Illinois. We do not see such viewpoint emerging from other state courts that have had the opportunity to address the matter *unless there is statutory authority defining an embryo as a "person".* In those states without such statutory direction that have weighed in on the issue– for instance, New York, Rhode Island, and Arizona– embryos have been interpreted not to possess the rights of a person.

In order to wholly understand both a Practice's obligations and the potential value of lost embryos, it is imperative to understand both the statutory law that controls your jurisdiction (if any), and the case-made law that has developed to define precisely what an embryo is in the eyes of the law (i.e., a "person", a piece of property, or a "special" type of property that brings different rules into play). A survey of state statutory law reveals that at least eighteen states have chosen to address issues involving cryopreserved embryos or gametes through statutory

[4] Kurchner v. State Farm Fire & Causualty Co., 858 So.2d 1220 (Ct. App. Fla. 2003).

[5] Miller v. American Infertility Group of Illinois, S.C., 844 N.E.2d 424 (Ill. 2006). The case is now on appeal, the Illinois Supreme Court having directed the appellate division (which turned down the original request for appeal) to hear it.

law or state regulation[6], although none address the issue of value, or specifically define the type of claim that arises as the result of negligently destroyed embryos[7]. However, the statutes create a broad spectrum of obligations and duties, again State-specific, ranging from consent obligations, to definitions of parentage, inheritance rights and/or embryo adoption. Only one goes so far as to identify an embryo as a "person".

We shall explore each of the jurisdictions separately.

Louisiana

Louisiana has utilized its statutory law to define a human ovum, fertilized in vitro, as a "juridical person"[8] which can "sue or be sued", and which is "a biological human being"[9] that is not the "property" of the physician, the facility or the donors of the sperm and ovum[10]. This statutory recognition of "personhood", of course, considerably changes the legal landscape: the embryo now has its own legal identity, can sue (direct claims against an ART facility) or be sued (although for what reason, other than as an interested party to a custody battle is hard to fathom), and the standard which will govern disputes between parties will be the "best interests" of the embryo.[11] This definition of an embryo as a "biological person" endows the embryo with all the rights which attach to "personhood", including the right to remain uninjured. Here, then, lies the basis for a viable wrongful death claim. While there are no reported wrongful death claims in Louisiana– in part because the statute provides an immunity to ART practices if they act in good faith-- one can expect such a claim or challenge to be successfully advanced sometime in the near future.

Missouri

Some eleven years ago, Missouri made the "all important step" of recognizing that there is a "wrongful death" claim for non-viable fetuses. While the Missouri Courts have not yet addressed the issue of an embryo which is outside the human body—the "logic" of their law points unequivocally to the conclusion that Missouri will find that a negligently destroyed embryo in the laboratory will support a claim of wrongful death.

In 1995, the Missouri Supreme Court effected a change in the state's law to

[6] See "State Laws and Legislation: Use, Storage and Disposal of Frozen Embryos" (March 2005), at www.ncsl.org/programs/health/embryodisposition.htm. The States include California, Colorado, Connecticut, Florida, Louisiana, Maryland, Massachusetts, New Hampshire, New York, New Jersey, North Dakota, Ohio, Oklahoma, Texas, Utah, Virginia, Washington and Wyoming. New Hampshire's statute can be seen at New Hampshire Rev. Stat. Ann. §168-B. Utah's statute can be seen at Utah Code Ann. 195 §78-45g-706 (2005). There are also statutes which impose criminal penalties for the intentional destruction of human embryos.

[7] Louisiana's statute does create a form of immunity against suits by the fertilized ovum, as against a fertility clinic, for improper "collection" or "cryopreservation" if the facility acts in good faith. La. Rev. Stat. Ann. §9:132 (West. 2006). The statute does not answer the question, however, as to what are the remedies of the "parents" or gamete donors for negligently destroyed embryos.

[8] La. Rev. Stat. Ann. § 9:123 (West 2006).

[9] La. Rev. Stat. Ann. § 9:124 (West 2006).

[10] La. Rev. Stat. Ann. § 9: 126 (West 2006).

[11] La. Rev. Stat. Ann. § 9: 131 (West 2006).

recognize a wrongful death claim on behalf of a 16 week fetus[12], which perished (along with a pregnant woman) in a car accident. The Court was called upon to interpret the word “person” in Missouri’s wrongful death statute, and in doing so, it considered whether a separate 1986 law – stating that life began at conception and that the “unborn” have “protectable interests in life, health, and well-being”[13]—served to require the recognition of an embryo as a “person” for the purposes of wrongful death. The Court concluded that the policy expressed by the Missouri legislature—to recognize life as beginning at conception—compelled the recognition of a non-viable fetus as a “person” for wrongful death purposes.

Interestingly, though, the Missouri Court “pulled up the reins” on its own holding, noting that while a wrongful death claim may be recognized in Missouri, a plaintiff’s “ability to prove damages is certainly subject to question”[14], because it is highly speculative to determine whether a child will be a “financial boon or burden” (the measure of compensation for wrongful death in Missouri). Accordingly, despite the politics, Missouri has suggested that these will not be worthwhile claims.

Illinois

Which brings us back to Illinois—a state whose vote in favor of a wrongful death claim had a far more complicated path.

The Illinois decision– currently on appeal– was the result of both legislative action and Court interpretation. It began with a legislative response to *Roe v. Wade,* where the legislature stated that it was Illinois state policy that “the unborn child is a human being from the time of conception” and that, should the Supreme Court reverse *Roe v. Wade*, this definition of a human being will be “reinstated”.[15] This turned out to be the first building block toward a recognition of a claim of “wrongful death” for negligently destroyed embryos.

The path was further cleared by the Illinois Supreme Court, when it first recognized “pre-birth” occurring to fetuses. A1973 Illinois case[16] dealt with an automobile accident involving a woman in her 36th week of pregnancy. The fetus did not survive the accident, and the high Court of Illinois was presented with the question of whether there could be a wrongful death claim on behalf of a child which had not been born alive. (States like New York take the simplistic approach that one has to be born “alive” in order to have a wrongful death claim). The Illinois Court, however, concluded that to draw a distinction between (1) a child born “alive” (even for a moment) that has a wrongful death claim, and (2) a fetus which was viable, but because of tortious conduct had been prevented from birth (and thus has no claim), was simply illogical. The Court responded to the identified “illogic” by changing the rule in Illinois to recognize that a wrongful death claim should inure to the benefit of any “viable” child injured *in utero*. The dissenting

[12] Connor v. Monkem Company, Inc., 898 S.W.2d 89 (Mo. 1995).

[13] Mo. Ann. Stat. §1.205 (2006).

[14] Connor v. Monkem Company, Inc., *supra* at 92.

[15] 720 Ill. Comp. Stat. Ann. 510/2.2 (West 2006).

[16] Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88 (Ill. 1973).

opinion in that case argued that if such a change were to be made, it should be made by the Illinois Legislature. The Legislature happily accepted the invitation–but only after the Illinois Supreme Court had spoken[17] on another, "somewhat" related issue, that being a "preconception tort"– or a tort to the mother, prior to pregnancy, that interferes with the health of the embryo, or child, during pregnancy.

The "pre-conception" tort case involved treatment (an improper blood transfusion to the mother when she was 13 years old, which sensitized her to the Rh factor) which, it was alleged, interfered with her pregnancy some eight years later. The child born of that after-occurring pregnancy sought damages occurring as a result of the tort to her mother. Of course, the "stumbling block" to recognizing liability was the prior Illinois holding that "viability" of the embryo, or fetus, was the threshold need to a claim personal to the fetus. The Illinois Supreme Court reversed itself, finding "viability" to be an unacceptable criterion. The opinion turned on the Court's determination that there was a right "to be born free from prenatal injuries forseeably caused by a breach of duty to the child's mother". Accordingly, there was now a duty to the unborn, unconceived child, making Illinois's change to its wrongful death statute a mere heartbeat away.

And so, in 1980, Illinois amended its wrongful death statute to provide for "wrongful death" claims for "entities" irrespective of the period of gestation[18]. Despite the fact that this change was made more than 25 years ago, it took until now for a couple to utilize that change to fashion a claim for wrongful death on behalf of embryos negligently destroyed in the laboratory. That is somewhat of a surprise, but can probably be explained by the fact that most facilities recognize that (1) open and honest communication about the events should be made to the patient; (2) the most effective method for avoiding litigation is to offer the impacted patients "free cycles" (to be accompanied by a release from liability) to create other embryos; and (3) if the ART facility has endeavored to develop a good relationship with the patients, the patients will want to continue treatment with the facility, making such a compromise a "win/win" situation.

But the wrongful death construct, at least for now, has been adopted by Illinois, and now it remains for ART practitioners to examine precisely what effect that will have on their practice. There are several. First, of course, is the increased *value* of the case, for the simple reason that the statutory construct will allow the calculation of damages for loss of life and, depending on the jurisdiction, the loss of the "enjoyment of life". Potential defendants will be called upon to answer, not only to the couple creating the embryo for their "lost opportunity" at parenthood, but, in fact, to the "embryo" for its lost opportunity for "life". Second, what does it mean-- in jurisdictions which recognize wrongful death claims-- to the "creators" of the embryos, and the ART facility, for the normal course of disposing of unwanted embryos? If the

[17] Renslow v. Mennonite Hospital, 367 N.E.2d 1250 (Ill. 1977).

[18] 740 Ill. Comp. Stat. Ann. 180/1 (West 2006).

embryos are "life", do they not have an independent right to continue to be sustained through cryopreservation? Do the "parents" themselves, have the right to determine to discard the embryos, because they do not wish to be parents? Is the consent of the "parents" sufficient for the ART facility to arrange for such disposition? What should the nature of that consent for the disposition of cryopreserved embryos look like in a state which recognizes an embryo as a "person"? It is not unthinkable that a right-to-life group, or "embryo adoption" group will bring a class action, as a guardian of all cryopreserved embryos.

The wrongful death construct also undermines certainty in the law. The law is built on fairness that comes from the likelihood of events. For this reason, the law does not allow recovery of "speculative damages"– or damages that one cannot prove, with some minimum amount of certainty. Yet, defining an embryo in an ART laboratory as a "person" undermines the key notion of certainty. There can be no proof that, but for the dropping of the dish, those embryos would have developed into live births. Indeed, the statistics are affirmatively against that notion.

The Centers for Disease Control and Prevention's 2003 Assisted Reproductive Technology Report reports that the national live birth rate per transfer[19] for fresh embryo (nondonor egg) cycles is 43.2% in women under the age of 35, and that percentage goes steadily down within age categories, with a 15.1% live birth rate in women between the ages of 41-42. With respect to cryo cycles, the 2003 national statistics report that the live birth rate per cycle is 29.4% in women under 35, and 16.5% in women between the ages of 41-42. Accordingly, the national average, amongst the youngest age group, instructs that there is less than a 1/3 chance that any individual embryo will mature to delivery and birth. Defining an embryo as a "person", then, is most assuredly a leap in logic that is soundly defied by the numbers.

While the "wrongful death" construct is a hard one to fathom, it has only one advantage: the "injury" will be bodily injury, which will be covered on your professional liability insurance. Most professional liability policies *exclude property damage*, as one Florida ART practice found out the hard way[20].

<u>Advice</u>*: *Know your jurisdiction, amend your consent documents to conform to your State's law, and keep an eye out for your Insurance coverage.

[19] We have utilized the "per transfer" numbers because we assume that the destruction of the embryos in a laboratory accident has occurred after fertilization and prior to transfer.

[20] See Footnote 4.

***Next Issue*: The concept of the cryopreserved embryo as "special property" and efforts to define "value" in the consent documents**

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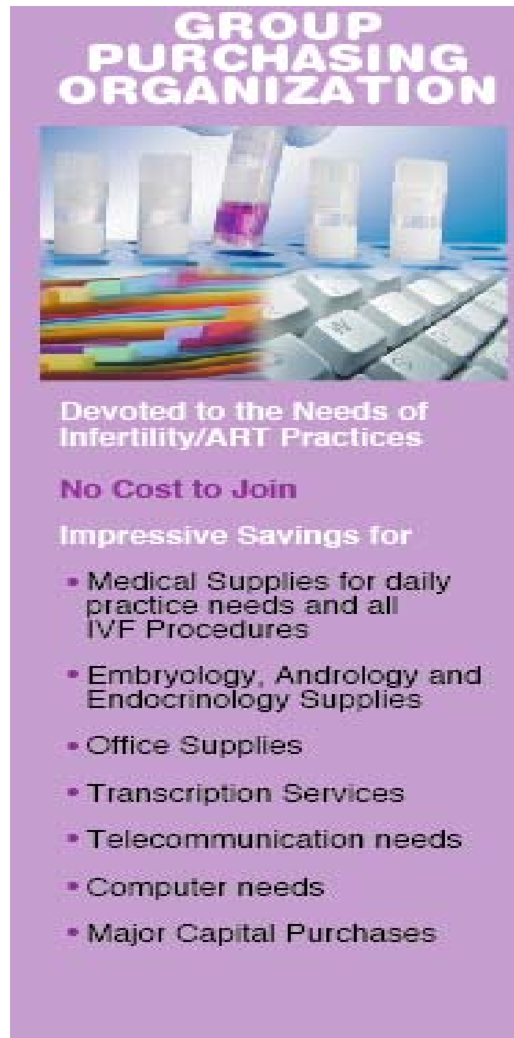

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