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The "Art" of Future Life: Rethinking Personal Injury Law for the Negligent Deprivation of a Patient's Right to Procreation in the Age of Assisted Reproductive Technologies

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THE "ART" OF FUTURE LIFE: RETHINKING PERSONAL INJURY LAW FOR THE NEGLIGENT DEPRIVATION OF A PATIENT'S RIGHT TO PROCREATION IN THE AGE OF ASSISTED REPRODUCTIVE TECHNOLOGIES

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INTRODUCTION

Imagine a series of male patients, all of whom have just received the devastating news that they have been diagnosed with cancer. They are advised by their physicians to cryogenically freeze their sperm in order to safeguard their reproductive futures, as the chemotherapy and radiation they will undergo for their cancer treatments will likely render them sterile. Following their physicians' guidance, with the expectation of beating cancer and starting a family one day, the patients store their sensitive samples with a reproductive facility. The samples are stored in a cryogenic tank filled with liquid nitrogen, until the unthinkable happens. The level of liquid nitrogen in the tank drops dramatically, causing the sperm samples to thaw—leading them to become irreparably damaged—rendering them unusable to conceive a child in the future through reproductive technology efforts.[1] Now, for these patients (and for many, their spouses) who have already overcome so much, they have likely lost their last, and only, opportunity to have biological children.

In an age where an increasing number of individuals and couples are turning to reproductive healthcare professionals to assist them in safeguarding or achieving biological parenthood on a frequent basis, cases of reproductive negligence are becoming shockingly common. In addition to cryogenic tank failures, other pertinent examples include: a fertility center disposing of a cancer patient's cryogenically stored ovarian tissue samples without her consent;[2] a fertility clinic exposing patients' sperm, eggs, and

1. *See, e.g.*, Yearworth v. North Bristol NHS Trust [2009] EWCA (Civ) 37, [2010] QB 1 (Eng.); Doe v. Nw. Mem'l Hosp., 2014 IL App (1st) 140212; Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 9, 1993, 124 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 52 (Ger.); Kurchner v. State Farm Fire & Cas. Co., 858 So. 2d 1220 (Fla. Dist. Ct. App. 2003); Holdich v. Lothian Health Bd. [2013] CSOH 197 (Scot.); Lam v. Univ. of B.C., 2015 CanLII 2 (Can. B.C. C.A.).

2. Witt v. Yale-New Haven Hosp., 977 A.2d 779, 781–82 (Conn. Super. Ct. 2008).

embryos to contaminated human albumin;[3] a fertility center failing to mark a cancer patient's cryogenically stored sperm samples to indicate that no more sperm could be obtained from him due to his cancer treatments, and then thawing and using all of the samples for his wife's first IVF attempt;[4] a fertility clinic embryologist dropping a tray of a patient's fertilized eggs, destroying them;[5] patients' frozen embryos being destroyed in transit from one fertility center to another;[6] and even a fertility doctor misappropriating human eggs and embryos from female patients without their consent and reimplanting them in other unsuspecting women.[7]

"Like any other area of clinical practice, the techniques employed by fertility clinics and practitioners are just as susceptible to human error."[8] However, with the increasing availability of reproductive interventions, the expectations for reproductive practitioners performing these procedures and handling such sensitive patient materials are heightened.[9] This is especially so when a clinical "mishap" turns out to negligently deprive a patient of their ability to potentially *ever* procreate. These instances of negligence are becoming more pervasive considering that, at the present time, assisted reproductive technology ("ART") practices go virtually unregulated.[10] However, the stigma associated with infertility and the fear of drawing public attention to such intimate struggles often keeps the mistakes of reproductive healthcare professionals hidden in the shadows.[11] For the victims who do have the strength to come forward, do they even have a cognizable tort claim under the current and established law?

3. Doe v. Irvine Sci. Sales Co., 7 F. Supp. 2d 737, 739 (E.D. Va. 1998).

4. Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 648 S.E.2d 100, 101–02 (Ga. Ct. App. 2007).

5. Inst. for Women's Health, P.L.L.C. v. Imad, No. 04-05-00555-CV, 2006 WL 334013, at *1 (Tex. App. Feb. 15, 2006).

6. Kazmeirczak v. Reprod. Genetics Inst., Inc., No. 10 C 05253, 2012 WL 4482753, at *1–2 (N.D. Ill. Sept. 26, 2012).

7. *See* Tracy Weber & Julie Marquis, *UCI Fertility Scandal: Fertility Doctors Face New Suit*, L.A. TIMES (May 26, 1995), http://articles.latimes.com/1995-05-26/news/mn-6298_1_fertility-clinic [https://perma.cc/CEH4-4XAT] (compiled from an amended complaint filed May 25, 1995 in Orange County Superior Court, Regents of the Univ. of Cal. v. Asch, No. 747155 (Cal. Super. Ct. filed May 25, 1995)).

8. *See* Nicolette Priaulx, *Managing Novel Reproductive Injuries in the Law of Tort: The Curious Case of Destroyed Sperm*, 17 EUR. J. HEALTH L. 81, 81 (2010).

9. *Id.*

10. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 162 (2017).

11. *Id.* at 152. *See also* Fred Norton, *Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages*, 74 N.Y.U. L. REV. 793, 818–19 (1999) (noting that "[t]he absence of case law on this subject may be attributed to a decided tendency toward settlement, motivated by the interest of all the parties in avoiding publicity, along with the novelty and uncertainty of the legal issues").

Constitutional law has long recognized that the right to procreate (or not) is a fundamental individual right.[12] For example, in *Skinner v. Oklahoma*, the United States Supreme Court struck down an Oklahoma state statute that allowed it to sterilize a "habitual criminal" who was convicted of two or more crimes involving "moral turpitude."[13] In the Court's opinion, Justice Douglas described marriage and procreation as "fundamental," pronouncing that "[a]ny experiment which the state conducts is to [Skinner's] irreparable injury. He is forever deprived of a basic liberty."[14] Not only is the right to procreate a fundamental right, but the decision to use expensive and invasive assisted reproductive techniques is significantly motivated by a desire to share certain personal, familial, and cultural traits with one's offspring.[15] The importance of this desire for genetic affinity, and the decisions that it influences, necessitates the legal recognition of the reproductive injuries incurred when this interest is destroyed through ART practitioners' negligent acts and/or omissions.[16]

One would expect, in accordance with the principles of tort law, that where negligence has occurred, the wrongdoer will be held accountable and the injured party will be entitled to damages. However, in some cases, whether a claim sounding in negligence will be viable is not nearly as straightforward as it may appear. In most negligently deprived procreation cases like the wrongful destruction of cryopreserved sperm, embryos, or ovarian or testicular tissues, there is no personal injury or physical injury that accompanies the wrong. Therefore, under preexisting legal standards, the negligent acts and/or omissions of reproductive practitioners do not qualify for a remedy under tort law.

This is the inherent problem with our current tort legal system—it does not recognize an injury that accommodates the disruption of reproductive plans apart from any unwanted touching, broken agreement, or damaged belongings.[17] As a result, recovery for such claims is often barred under the economic loss doctrine, which dictates that a party who suffers only eco-

12. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (establishing that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education"). *See also* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

13. 316 U.S. 535, 537 (1942).

14. *Id.* at 541.

15. Norton, *supra* note 11, at 797.

16. *Id.* at 799.

17. Fox, *supra* note 10, at 153–54.

nomic harm may recover damages for that harm based only upon a contractual claim and not a tort theory.[18] Categorizing the negligent acts and/or omissions of ART practitioners who cause the loss of an individual's potentially *only* chance at having biological children as a mere "economic harm" flies in the face of the immense personal and emotional injuries that result from the loss of an individual's reproductive future. Similarly, courts are disinclined to award emotional distress damages in the absence of a contemporaneous physical injury or where the individual is not in the "zone of danger."[19]

It is clear that the science of ART has developed more rapidly than has the law's ability to accommodate its development. At present, the law is ill-equipped to hold reproductive practitioners accountable in circumstances where the community would expect such accountability. Because legislatures have not addressed the use of cryopreservation or the status of frozen embryos or sperm, the courts will be forced to do so.

The issues extend beyond what damages should be payable to victims of such immense losses. The primary difficulty facing the courts will be the appropriate characterization of these losses. Until now, courts have struggled with whether to classify the destruction or loss of cryopreserved sperm, embryos, and the like as merely the loss of quasi property rights or as bodily injury.[20] Until courts clarify the appropriate characterization of these losses that appropriately encompass the advances in assisted reproductive medicine and technology, only then can they apply the correct body of law to such claims.[21]

This Note seeks to answer some of these most fundamental questions. Part I begins with an analysis of the existing body of law in this area looking to both international and United States jurisdictions to argue that ART negligence, which deprives individuals of their right to procreate, should not constitute merely the loss of property rights, economic loss, or a breach of contract. Part II sets forth the various legal claims to be made and the potential damages for these reproductive injuries, which requires analogizing to

18. *See, e.g.*, Moorman Mfg. Co. v. Nat'l Tank Co., 91 Ill. 2d 69, 82 (1982) ("Economic loss has been defined as damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property.").

19. *See, e.g.*, Rickey v. Chi. Transit Auth., 98 Ill. 2d 546, 555 (1983) (noting that "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress" caused by the defendant's negligence).

20. *See* cases cited *supra* note 1.

21. Wendy Dullea Bowie, *Multiplication and Division—New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 155, 156 (1990).

other areas of law, in order to fashion a more equitable remedy. Part III advances the argument that courts should legally recognize sensitive genetic materials as part of a person, and thus, capable of being categorized as "personal injuries" under tort law. Also, Part III calls for the formal recognition of reproductive injuries as an independent head of negligence damages for negligently depriving patients of their right to procreate. The Section calls for courts to recognize this as a fundamental human right that is deserving of the utmost protection under tort law. Expanding liability for such unique injuries is crucial in the era of the ever-expanding and patient-relied-upon assisted reproductive technology industry.

I. EXISTING BODY OF LAW ANALYZING ART NEGLIGENCE

A. International Jurisdictions

The paradigmatic international case on this issue, which serves as the introductory illustration to this note, is the English case, *Yearworth v. North Bristol NHS Trust*.[22] In *Yearworth*, six men were diagnosed with cancer and were to undergo chemotherapy at the defendant's hospital.[23] Each patient was warned that the course of chemotherapy might damage his fertility and was invited to supply sperm, which the defendant would store for him to be used in the event that the chemotherapy damaged his ability to have children naturally in the future.[24] Each of the men took up the option of having his sperm stored by the defendant.[25] The defendant hospital promised to take all reasonable care to ensure that the sperm could still be used in five to ten years' time.[26] To preserve the sperm, it was frozen by storing it inside liquid nitrogen tanks.[27] However, before the samples could be used, at some point, the level of liquid nitrogen in the tanks fell below the required level.[28] At the time, the automatic topping up of the tanks with nitrogen was not operative; and no attempt was made to top them up manually.[29] As a result, the sperm thawed out and was permanently damaged. The consequence of this was that if any of the men did experience a permanent loss of fertility due to their

22. Yearworth v. North Bristol NHS Trust [2009] EWCA (Civ) 37, [2010] QB 1 (Eng.).
23. *Id.* at [4]–[5].
24. *Id.* at [5].
25. *Id.*
26. *Id.* at [6].
27. *Id.*
28. *Id.* at [8].
29. *Id.*

course of chemotherapy, there was now no way they would be able to have children.[30]

Five of the six patients claimed that they suffered a psychiatric illness upon learning the devastating news.[31] Of these five men, three subsequently recovered their fertility after the course of their chemotherapy was over.[32] The sixth claimant did not suffer a psychiatric illness, but sued for damages for the distress (falling short of a psychiatric illness) he experienced when he realized that he would likely not have the opportunity to have children anymore.[33] At first instance, the plaintiffs' claims sounded in negligence, since the defendant had a duty to take reasonable care of the sperm and breached this duty by failing to ensure that the cryogenic tanks were topped up manually when it knew, or ought to have known, that the automatic system to fill the liquid nitrogen in the tank was not operative.[34] The defendant denied liability, and averred that, "even if its breach of duty had caused the injury [or emotional] distress, as a matter of law, the men were not entitled to recover damages."[35] The defendant asserted that the loss of the sperm "constituted neither 'personal injury' to the men nor damage to their 'property.'" Thus, the defendant argued that the loss "did not qualify as the sort of damage which is a necessary constituent of an action in negligence."[36]

At first, the court held that the sperm did not amount to the plaintiffs' property and the damage to it did not constitute a personal injury.[37] The case advanced to the Court of Appeals where the plaintiffs argued that: their injury constitutes a personal injury because: (1) the sperm had been inside the bodies of the men; (2) damage to it while there, for example, as a result of radiation of the scrotum, would have constituted a personal injury; (3) the men's ejaculation of it should not make any difference; (4) unlike products of the body which are removed from it with a view to their being abandoned—such as cut hair, clipped nails, excised tissue and amputated limbs—the sperm was ejaculated with a view to its being kept; (5) unlike other products of the body which are removed from it even with a view to their being kept, such as hair to be kept as a memento or blood to be dried and incorporated into a work of art, the ultimate intended function of the stored sperm

30. *Id.* at [9].
31. *Id.* at [10].
32. *Id.*
33. *Id.* at [11].
34. *Id.* at [13].
35. *Id.* at [14].
36. *Id.*
37. *Id.* at [16].

was identical to its function when formerly inside the body, namely to fertilize a human egg; and (6) the sperm retained a significant property, namely that, although such was suspended by having been frozen, it remained in essence biologically active, with the result that it retained a living nexus with the men whose bodies had generated it.[38]

In support of the plaintiffs' position, they cited to the German decision *Bundesgerichtshof*.[39] Strikingly similar to the case at bar, there, the defendant clinic negligently destroyed the plaintiff's sperm, which, prior to undergoing an operation likely to render him infertile, the plaintiff had produced for the clinic to store for his possible future use of it.[40] "The federal court reversed the ruling of the appellate court that the man had no cause of action for consequential pain and suffering."[41] The court held that it was "too narrow to hold that, once a part of the body had been separated from it, it became only a piece of property and that damage to it could not constitute a physical injury to the body."[42] The court analogized to other bodily parts, including a woman's eggs, which are extracted from the body with the expectation that they will be re-implanted, rather than abandoned.[43] Thus, the eggs retain a functional unity with the body, "such that any injury to them would constitute a physical injury."[44] While sperm is not to be re-implanted in the body, it would "be illogical for the law to treat damage to it differently from damage to stored eggs."[45]

The *Yearworth* court made the important distinction regarding the legal context in which the *Bundesgerichtshof* court's holding was made. At the time, under section 847 of the German Civil Code (which was subsequently replaced by section 253) a claim other than for economic loss could *only* be brought "in the case of personal injury or deprivation of liberty."[46] Therefore, if the plaintiff in *Bundesgerichtshof* was to recover, "his injury had to be classified as personal."[47]

38. *Id.* at [19].
39. *Id.* at [21] (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 9, 1993, 124 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 52 (Ger.)).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at [22].
47. *Id.*

Not under the same constraints as the German court in *Bundesgerichtshof,* the *Yearworth* court held that the damage to, and consequential loss of, the sperm did not constitute a personal injury.[48] The court articulated that it would be a "fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constituted a bodily or 'personal injury' to him."[49]

The court next turned to the question of whether the plaintiffs' claims were damage to property.[50] In order for such a claim to stand, the plaintiffs had to either have legal ownership of, or a possessory title to, the property concerned at the time in which the loss or damage occurred.[51] The court ultimately held that the plaintiffs' sperm constituted property that was legally owned by them under the principles that: (1) the men, by their bodies, alone generated and ejaculated the sperm; (2) the sole object of doing so was so that it might later be used for their (and their spouses') benefit; and (3) the sperm could not be stored or continue to be stored without the men's consent under the Human Fertilisation and Embryology Act of 1990, which states that no person, whether human or corporate, other than each man who supplied the sperm, had any *rights* in relation to the sperm which he produced.[52] Accordingly, the plaintiffs had ownership of the sperm for the purposes of their claims.[53]

The court next analyzed whether the plaintiffs asserted a cognizable claim under the law of bailment.[54] A bailment cause of action arises when the bailee acquires exclusive possession of a bailor's chattel, and assumes a duty to take reasonable care of the goods until the bailor can regain possession.[55] The court concluded without hesitation that a bailment claim clearly existed in this case, as the defendant: (1) took possession of the plaintiffs' sperm; (2) the defendant assumed the responsibility to take reasonable care of the sensitive biological materials; (3) the defendant held itself out to the plaintiffs as possessing special skill in preserving the specimens; and (4) the defendant breached its duty of reasonable care by failing to maintain, monitor and store the sperm at the required temperature, thereby allowing the specimens to thaw in the cryogenic storage tank.[56] Accordingly, the court

48. *Id.* at [23].
49. *Id.*
50. *Id.* at [25].
51. *Id.*
52. *Id.* at [45].
53. *Id.*
54. *Id.* at [46].
55. *Id.* at [48].
56. *Id.* at [49].

held the defendant was liable to the plaintiffs under the law of bailment as well as under tort law. However, the court noted that the measure of damages may be more akin to that for breach of contract rather than to tort.[57]

Lastly, the court analyzed whether the plaintiffs could recover damages for the psychiatric illnesses or distress they allegedly suffered as a result of learning their samples had been irreparably damaged.[58] On this issue, the court held that the damages available to the men should fall within the ambit of contract law rather than tort law.[59] Under contract law, damages for distress or psychiatric illness suffered as a result of a breach of contract are available so long as a major object of the contract was the provision of "enjoyment, comfort, or peace of mind."[60] Here, the objective of the contract and bailment relationship that existed between the parties was to preserve the ability of the plaintiffs to become fathers, notwithstanding the imminent threat to their natural fertility because of their cancer treatments.[61] Accordingly, the law of bailment provided the plaintiffs with a remedy to receive compensation for any psychiatric injury or distress, so long as that injury was a foreseeable consequence of the defendant's breach of its duty of care under the bailment.[62]

Six years after *Yearsworth*, in an analogous factual scenario, the Court of Appeals for British Columbia likewise held that human sperm constitutes property.[63] In *Lam v. University of British Columbia*, a class action was brought on behalf of men who deposited their sperm at the defendant's facility after receiving cancer diagnoses.[64] In 2002, it was discovered that the cryogenic freezer in which the patients' samples were stored had suffered a power interruption that either damaged or destroyed the samples.[65] As a result, the class action was filed against the facility alleging negligence and breach of contract.[66] The defendant relied on an exclusion clause in the Sperm Bank Facility Agreement, which each plaintiff had signed, to defend the claims.[67] This clause stated, in pertinent part, that the defendant could not be held liable for any malfunction of the equipment—even if the cause was within the control of the university. Relying heavily on the *Yearsworth*

57. *Id.* at [50].
58. *Id.* at [51].
59. *Id.* at [57].
60. *Id.* at [56].
61. *Id.* at [57].
62. *Id.* at [58].
63. Lam v. Univ. of B.C., 2015 CanLII 2, para. 52 (Can. B.C. C.A.).
64. *Id.* at para. 2.
65. *Id.* at para. 3.
66. *Id.* at para. 85 (Bennett, J., concurring).
67. *Id.* at para. 86.

decision, the Court of Appeals held that the donors possessed ample ownership rights in their specimens, sufficient to be defined as "property," and that the defendant could not rely upon the Agreement's exclusion clause to restrict its obligation to exercise "care and diligence" in regard to the goods.[68]

B. United States Jurisdictions

United States jurisdictions have failed to classify the negligent destruction or loss of cryopreserved sperm, embryos, and related tissues as personal injuries. Instead, many courts have opted to, like their international counterparts, classify the specimens as property or bar recovery under a negligence theory by way of the economic loss doctrine.

For example, in *Doe v. Irvine Scientific Sales Co. Inc.*, a husband and wife brought suit against the defendant seller and distributor of human albumin after the plaintiffs' sperm, eggs, and embryos were exposed to the product during in-vitro, which was potentially contaminated with CJD (a disease which can cause a fatal neurological disorder in humans).[69] The plaintiffs alleged that the defendant was negligent in its recall and withdrawal of the potentially contaminated albumin from the market.[70] As a result, the plaintiffs sought to recover for the loss of their embryos that were rendered unsafe for implantation as a result of being exposed to the recalled albumin.[71]

On appeal, the United States District Court for the Eastern District of Virginia held that the economic loss doctrine barred the plaintiffs' negligence claims.[72] The court stated that "[w]hile [the] Plaintiffs endeavor to characterize this loss as an injury in tort, these embryos are not entitled to the protections granted to persons . . . and this Court has not recognized any status that would entitle them to special treatment because of their potential of human life."[73] Accordingly, the embryos had not suffered an actionable tort for which the plaintiffs could bring a claim on their behalf.[74]

The court also analyzed the plaintiffs' claim for negligent infliction of emotional distress. The plaintiffs alleged that because of the embryos' potential exposure to albumin, rendering them unsuitable for implantation, they were forced to begin the process of finding donor eggs and repeating the in-

68. *Id.* at para. 52–53, 117.
69. 7 F. Supp. 2d 737, 738–39 (E.D. Va. 1998).
70. *Id.* at 739.
71. *Id.* at 743.
72. *Id.*
73. *Id.* at 742.
74. *Id.*

vitro fertilization procedure again.[75] Additionally, the plaintiffs alleged that Jane Doe suffered physical harm from being implanted with embryos exposed to potentially contaminated albumin. This physical harm derived from Jane Doe undergoing the invasive, painful, and emotionally draining implantation procedure, which invariably involved some physical injury.[76]

The court rejected the plaintiffs' contentions, stating that the exposure to contaminated products, like albumin, does not constitute a physical injury or an adequate basis for a claim of emotional distress.[77] Furthermore, the implantation procedure was not an injury *caused* by the defendant's actions, but rather, an elective process that Jane Doe *chose* to undergo.[78] The implantation of the embryos into Jane Doe's uterine cavity would subject her to the same physical impact regardless of whether the embryos were contaminated or not. Moreover, there was no evidence that Jane Doe was exposed to agents carrying CJD, nor was she infected with the disease.[79] Because the plaintiffs lacked a cognizable physical injury, they failed to state a claim for negligent infliction of emotional distress against the defendant.[80]

In a matter of first impression, the Third District Court of Florida held that the destruction of sperm samples in malfunctioning cryogenic tanks constituted "property damage" rather than "bodily injury."[81] The plaintiff argued that he was entitled to recover damages for bodily injury arising from the destruction of his cryopreserved samples under an insurance policy because the plaintiff's sperm, as a part of his body, accorded with the definition "bodily" defined as "of or pertaining to the body."[82] Looking to other jurisdictions, Florida statutes, and the common understanding of the relevant terms, however, the Court found that cells, once *removed* from the body, no longer are considered a *part* of the body. Instead, they constitute property whose destruction does not fall within the ambit of bodily injury.[83] The Court reinforced its argument based upon holdings from other jurisdictions that likewise held preserved sperm or eggs constitute personal property.[84]

75. *Id.* at 741.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. Kurchner v. State Farm Fire & Cas. Co., 858 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 2003).
82. *Id.*
83. *Id.*
84. *Id.* (citing Hecht v. Superior Court, 16 Cal. App. 4th 836, 850 (1993) (holding that a deceased sperm donor had an interest in his sperm which fell within the broad definition of "property" under the state's probate code); Moore v. Regents of Univ. of Cal., 793 P.2d 479, 487 (Cal. 1990) (treating patient's excised cells as "property" for purposes of a conversion action)).

Lastly, some courts have explicitly recognized the dearth of case law in the area of ART negligence and have accordingly failed to address these unique and important issues—punting the issues back down to the lower courts to be resolved. For example, in *Kazmeirczak v. Reprod. Genetics Inst., Inc*., two couples sued Federal Express and a reproductive institute when six of their frozen embryos were destroyed in transit from a fertility clinic in Illinois to another clinic in Michigan.[85] After the destroyed embryos arrived in Michigan, the plaintiffs filed their lawsuit in Illinois state court, invoking causes of action for negligence, breach of fiduciary duty, breach of contract, and bailment.[86] Among the negligent acts and omissions alleged by the plaintiffs was the defendant's failure to properly safeguard the embryos and their failure to properly preserve the cryopreservation tank for transportation.[87] Federal Express removed the case to federal court based upon its federal question jurisdiction over claims relating to lost or damaged goods transported by a common carrier.[88] The United States District Court for the Northern District of Illinois declined to resolve the issues before it—opting instead to remand the case back to the state court, stating:

> Illinois does not yet have a substantial body of case law addressing the duties and standard of care of fertility clinics involved in the rights of ownership, transport, preservation and handling of human genetic material. It remains to be seen how Illinois courts will treat different theories of recovery for the wrongful destruction of human embryos, pre-embryos, and genetic material, but given the novelty and importance of these issues, they are best addressed by the state courts in the first instance.[89]

As illustrated by both international and United States jurisdictions, courts that have analyzed ART negligence cases have either declined to resolve the issues altogether, or almost unanimously found that such losses merely constitute property loss or economic loss and do not qualify as personal injuries under traditional tort law theories. Not only does such a classification fly in the face of the immense personal and emotional harm that results from the loss of an individual's sensitive genetic materials (and potentially their reproductive future), but property law seems ill-equipped to serve as an adequate remedy in this unique context.

85. *See* Kazmeirczak v. Reprod. Genetics Inst., Inc., No. 10 C 05253, 2012 WL 4482753, at *1 (N.D. Ill. Sept. 26, 2012).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

1. Categorizing the Destruction or Loss of Sperm, Embryos, Ovarian, and Other Human Tissues as Mere Property Loss is Wholly Insufficient.

Property damages are typically calculated in terms of the cost of replacement. In the context of ART negligence, what would such property damages be? In some instances, where the genetic materials can be re-collected, it may be only a few dollars for sperm, a few thousand for eggs, and another few hundred for medications needed to undergo procedures to create new embryos.[90] However, what about patients whose only opportunity to have biological children has now been foreclosed due to the negligent acts or omissions of ART practitioners? What market value can the courts place on the loss of an individual's physical ability to have a biological family?

In *Frisina v. Women and Infants Hospital of Rhode Island*, the Superior Court of Rhode Island stated that for the loss and destruction of three couples' embryos by the defendant fertility hospital, to which the plaintiffs alleged they suffered the "loss of irreplaceable property," the plaintiffs did have an "interest in the nature of ownership."[91] However, the Court shockingly analogized the immeasurable loss of the couple's embryos to that of the "inconvenience, discomfort, and annoyance" that comes from the denied use of a homeowner's basement from flooding, which renders the premises uninhabitable.[92]

The loss of one's reproductive autonomy and future extends far beyond property damage or economic harm. The real value in what is lost lies in the deep emotional significance that the genetic materials carry—the deep-felt longing for a child of one's own.[93] Accordingly, equating the loss of one's reproductive future to the nuisance of property loss or damage distorts and severely devalues the immense reproductive injuries that ART negligence inflicts on its victims.[94]

Furthermore, society should be uncomfortable with valuing oftentimes irreplaceable genetic materials alongside other property loss or damage like a leaky roof. Also, classifying parts of the human body as property inevitably evokes specters of slavery. As a result, it is abundantly clear that tort law must broaden the definition of "personal injury" to encompass the destruction or loss of cryopreserved sperm, embryos, and human tissues—despite

90. Fox, *supra* note 10, at 175.

91. No. CIV. A. 95-4037, 2002 WL 1288784, at *2, 4 (R.I. Super. May 30, 2002) (quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)).

92. *Frisina*, 2002 WL 1288784, at *8 (citing Hawkins v. Scituate Oil, 723 A.2d 771, 772 (R.I. 1999)).

93. Norton, *supra* note 11, at 801–02.

94. *Id.*

the lack of a physical injury that accompanies such losses. This is necessary in order to appropriately account for the advances in assisted reproductive medicine and technologies that can have a devastating impact on individuals' emotional wellbeing and reproductive future.

2. Breach of Contract Likewise Provides an Insufficient Remedy for Compensating Victims of ART Negligence that Deprives Them of Their Fundamental Right to Procreate.

In light of reproductive injuries from ART negligence failing to qualify as "personal injuries" under traditional tort law theories, it would appear logical for courts to resolve the disputes between patients and reproductive healthcare professionals under a breach of contract theory—as broken agreements concerning ART practitioners' performance of medical services and/or procedures.[95] However, there are several important issues with doing so.

First, most ART practitioners and fertility clinics attempt to limit their potential liability by having patients sign agreements that contain liability waivers for even implied breach.[96] While some courts, like in *Lam*, which held that the defendant could not rely upon its agreement's exclusion clause to restrict its obligation to exercise "care and diligence" in regard to the goods,[97] courts do oftentimes enforce these agreements.[98] This tendency is illustrated in the *Frisina* case, where, as previously stated, a hospital lost three couples' embryos.[99] The couples each signed consent forms, which stipulated that "despite the Hospital, its physicians and its employees proceeding with due care, it is possible that a laboratory accident in the Hospital may result in loss or damage to one or more of said frozen embryos."[100] The Court found that the agreement between the parties was not sufficiently specific and did not clearly and unequivocally express the parties' intention to hold the other harmless.[101] However, the Court did make clear that it *would* have upheld the sweeping "exculpatory clauses" that appear in the vast majority of "agreements between IVF clinics and progenitors."[102]

95. Fox, *supra* note 10, at 172.
96. *Id.*
97. *See* Lam v. Univ. of B.C., 2015 CanLII 2, para. 117 (Can. B.C. C.A.).
98. Fox, *supra* note 10, at 172.
99. *See* Frisina v. Women & Infants Hosp. of R.I., No. CIV. A. 95-4037, 2002 WL 1288784, at *1 (R.I. Super. May 30, 2002).
100. *Id.* at *11.
101. *Id.* at *13.
102. *Id.* at *12.

The vulnerability, desperation, and trust that most patients seeking care from ART practitioners exhibit when signing such liability waivers seems entirely disparate from that of parties to general commercial contracts. Coupled with their vulnerable and oftentimes desperate state, patients are often ignorant about the relevant medical facts contained in such agreements, which limits their bargaining power relative to the ART practitioners and clinics that draft these agreements.[103] This involuntary quality to liability waivers in the ART context would seem to justify their unenforceability. However, as courts have interpreted these agreements thus far, they have failed to make this distinction—making a breach of contract theory wholly insufficient for victims of ART negligence.

Another inherent issue with basing a victim of ART negligence's remedy on a breach of contract cause of action rather than in tort, is that the two areas of law serve entirely different objectives. Tort law, although concerned with compensation, is also concerned with the deterrence and punishment of misconduct.[104] "Fault and motive emerge as key determinants of liability."[105] Consequently, tort law "protects members of society from wrongdoing by imposing standards of conduct."[106] On the other hand, the primary purpose of contracts is compensation. "Contract law is not comprehended as evoking public policy concerns *per se*."[107] Rather, "[c]ontract law serves society by promoting standardized conduct in the performance of promises and produces uniform, stable, and efficient business transactions. . . . The traditional goals of contract law, therefore, stress economic principles, not social justice."[108]

The two areas of law also differ significantly in their remedial goals. The primary remedial goal in tort is "to restore the victim to the position held before the tort, usually by replacing or correcting the loss through [compensatory damages]", including mental distress damages.[109] In contrast, "[t]he primary remedial goal of contract is to protect the aggrieved party's interests by giving the victim damages equivalent to the value of the breaching party's

103. Fox, *supra* note 10, at 173.

104. W. PROSSER & P. KEETON, KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 4 (5th ed. 1984).

105. Frank J. Cavico, Jr., *Punitive Damages for Breach of Contract—A Principled Approach*, 22 ST. MARY'S L.J. 357, 361 (1990).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 362–63.

promised performance."[110] Generally, damages awards for breach of contract do not include those for mental suffering—regardless of the willfulness of the breach.[111]

The one exception to this general rule, which many jurisdictions follow, is the rule articulated in the leading English contract law case, *Hadley v. Baxendale*,[112] that recoverable damages for mental suffering exist "where the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."[113] Where a defendant has "reason to know, when the contract was made, that its breach would cause mental suffering for reasons other than mere pecuniary loss," mental distress damages may be recoverable.[114] Thus, for already vulnerable patients seeking the expertise and guidance of ART practitioners to safeguard their reproductive futures, it would certainly be foreseeable that any negligent acts and/or omissions on the part of the practitioner or clinic would result in severe emotional disturbance. Accordingly, despite contract law's contrary remedial goal, its one redeeming feature is that it may create a vehicle for victims of reproductive negligence to receive mental suffering damages under a breach of contract theory.

Most importantly, as a result of tort and contract law's divergent remedial goals, for a victim of ART negligence—whose ability to have biological children has now potentially been ever foreclosed—they would be unable to receive punitive damages in a breach of contract cause of action. This makes sense because punitive damages "stress the admonitory and educative functions of a traditional fault-based tort system."[115] In contrast, a contract is "simply a set of alternative promises either to perform or pay damages for non-performance."[116] Thus, compensatory damages, substituting for performance, equate the damages caused to the injured party, and serve as a sufficient remedy for a breach of contract. They also serve as an adequate means

110. *Id.* at 363.

111. *Id.*

112. (1854) 156 Eng. Rep. 145.

113. *See, e.g.*, Doe v. Roe, 289 Ill. App. 3d 116, 130 (1st Dist. 1997) (citing RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (AM. LAW INST. 1981)).

114. Maere v. Churchill, 116 Ill. App. 3d 939, 944 (3d Dist. 1983). *See also* Buenzle v. Newport Amusement Ass'n, 68 A. 721, 722 (R.I. 1908) (damages for mental suffering exist for breaches of contract as contracts of marriage and contracts relating to illness, death, and burial, "where the feelings and sentiments of the complaining party are so involved . . . that they form a necessary and unavoidable ingredient . . . of the contract, and are very properly held to be within the contemplation of both parties as an inducement and consideration of the contract, and so to be considered in the award of damages for the breach.").

115. Cavico, Jr., *supra* note 105, at 365.

116. *Id.* at 366 (citing O.W. HOLMES, THE COMMON LAW 301 (1923)).

to deter breaches of contract.[117] Moreover, breaches of contract are not thought to provoke the same type of emotional distress or community outrage as wrongs designated as torts. As a result, breach of contract cases do not merit imposing the same severe sanctions to satisfy a victim's feelings or to mollify society.[118]

Additionally, contract law deals primarily with economic interactions. "The failure to keep one's promises in an economic relationship . . . does not [typically] entail sufficient social approbation to make the punishment and deterrence elements of a punitive damages award readily acceptable."[119] Moreover, the amount of damages required to compensate for the harm for a party's breach of contract can be more objectively measured as opposed to tort law, which must compensate for harm to one's person and personal interests, and is more difficult to ascertain.[120]

For victims of ART negligence, the public policy objectives and remedial goals underscoring tort law fit squarely within the immeasurable harms incurred by them. Victims in this context are not merely seeking compensatory damages for the breach of an "economic" transaction. When as a result of an ART practitioner's negligence, a patient has lost the chance of having children of their own, they seek social justice, to admonish and hold the wrongdoer accountable, formulate community expectations by imposing stricter standards of conduct, and deter future professional misconduct. The economic principles of contract law serve as a disingenuous attempt to compensate victims of ART negligence for the loss of their reproductive futures, which cannot be calculated.

Accordingly, despite a breach of contract cause of action's one redeeming feature of potentially providing a vehicle for victims of reproductive negligence to obtain mental suffering damages, the propensity of courts to enforce liability waivers, and the law's divergent objectives and remedial goals, make it an ill-fitting tool to adequately compensate victims of ART negligence who have been deprived of their fundamental right to procreate.

117. RESTATEMENT (SECOND) OF CONTRACTS § 355 cmt. a (AM. LAW INST. 1981).
118. Cavico, Jr., *supra* note 105, at 368.
119. *Id.*
120. *Id.*

II. POTENTIAL LEGAL CLAIMS AND APPROPRIATE DAMAGES IN ART NEGLIGENCE CASES

A. Mental Suffering Damages

Traditionally, in most states, a plaintiff may not recover damages for emotional distress or mental suffering without sustaining a physical impact resulting in a physical injury. Alternatively, they must be a bystander present in the "zone of physical danger" in order to sustain a right of action for physical injury or illness resulting from the emotional distress caused by that fear.[121] In ART negligence cases, the plaintiffs' mental suffering, while a directly traceable byproduct of reproductive practitioners' negligence, is not a byproduct of a *physical* injury. Thus, the only way that a court would allow an instruction permitting a jury to consider mental suffering damages in reproductive negligence cases is by convincing them that the unique nature of these cases warrants extending mental suffering damages. In order to do so, one must analogize to other areas of law.

1. Analogizing ART Negligence Injuries to the Mutilation and Mishandling of Corpses.

This may occur, for example, in what are referred to as the "dead body" cases. Illinois common law recognizes a right by a decedent's next-of-kin to possession of the decedent's body to make "appropriate disposition thereof, whether by burial or otherwise."[122] For more than a century, Illinois courts have recognized that interference with this right is an actionable wrong and that the plaintiff in such cases is entitled to recover damages for the mental suffering that is proximately caused by the defendant's misconduct.[123]

In *Cochran*, the plaintiff brought suit against the defendant, a private security firm charged with receiving her son's body from the morgue, for tortious interference with the plaintiff's right to possess her son's body.[124] The plaintiff alleged that the defendant's employees breached their duty to not interfere with the plaintiff's right to possession and disposition by failing

121. *See, e.g.*, Ill. Pattern Jury Instr.-Civ. § 30.01. *See also* Weber & Marquis, *supra* note 7; Villamil v. Elmhurst Mem'l Hosp., 175 Ill. App. 3d 668, 671 (1st Dist. 1988) (holding parents failed to state cause of action against hospital for negligent infliction of emotional distress arising out of incident in which baby fell from delivery table to floor in mother's presence, where mother did not allege that she feared falling off delivery table herself, or that she experienced physical injury from her emotional distress).

122. Cochran v. Securitas Sec. Servs. USA, Inc., 2017 IL 121200, ¶ 12.

123. *Id.* (citing Drakeford v. Univ. of Chi. Hosps., 2013 IL App (1st) 111366, ¶ 14; Rekosh v. Parks, 316 Ill. App. 3d 58, 68 (2d Dist. 2000); Kelso v. Watson, 204 Ill. App. 3d 727, 731 (3d Dist. 1990); Hearon v. City of Chi., 157 Ill. App. 3d 633, 637 (1st Dist. 1987); Courtney v. St. Joseph Hosp., 149 Ill. App. 3d 397, 398 (1st Dist. 1986); Mensinger v. O'Hara 189 Ill. App. 48, 55–56 (1st Dist. 1914)).

124. 2017 IL 121200, at ¶ 4–5.

to follow industry standards and hospital policy. For example, the defendant employees failed to place an identification tag on the decedent's body, nor did they affix a label to the case containing the decedent's body.[125] The defendant employees also erroneously recorded the wrong decedent in the morgue's logbook.[126] Relying on the incorrect logbook entry, and without conducting any visual inspection of the body, the defendant employees released the wrong body to the funeral home.[127] As a proximate result of these acts and omissions, the plaintiff alleged that she suffered severe emotional distress and mental suffering.[128]

The Illinois Supreme Court distinguished that the "zone of danger" rule applies only in cases where the plaintiff's theory of liability is the negligent infliction of emotional distress. It does not apply where a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort.[129] Applying this concept to the plaintiff's case, the Court held that the plaintiff would be entitled to emotional distress damages as a proximate cause of the defendant's tortious interference with the plaintiff's right to possess her son's corpse.[130] The Court reasoned that such damages are justified because the infliction of emotional distress was not itself the wrong that was committed, but rather, it was part and parcel of the damage that results from the actionable wrong (interference with the plaintiff's right to possess the decedent's remains).[131]

More akin to the ART negligence cases discussed in this Note, mental suffering damages have been recovered in assisted reproductive technology malpractice cases. In *Custodio v. Bauer*, the First District in California recognized the plaintiffs' potential right to recover damages for mental suffering in conjunction with a negligently performed sterilization operation, which led to the birth of a healthy child.[132] In that case, the Court held that if physicians negligently performed the operation, the mother and father, who already had nine children, would have been entitled to recover more than nominal damages.[133] The plaintiffs were entitled to such damages even

125. *Id.* at ¶ 4.
126. *Id.*
127. *Id.*
128. *Id.* at ¶ 5.
129. *Id.* at ¶ 22 (citing Clark v. Children's Mem'l Hosp., 2011 IL 108656, ¶ 113).
130. *Id.* at ¶ 26.
131. *Id.*
132. 251 Cal. App. 2d 303, 325 (1967).
133. *Id.*

though the child was born healthy and the mother did not suffer physical injury as a result of the pregnancy.[134]

Likewise, pursuant to the Illinois Wrongful Death Act, a jury may award damages including grief, sorrow, and mental suffering, to the surviving spouse and next of kin of the deceased person.[135]

Similar to awarding mental suffering damages for the tortious interference with a loved one's body, the unique nature of ART negligence cases likewise warrants mental suffering damages. Akin to *Cochran*, the infliction of emotional distress is not itself the wrong committed by ART practitioners, but rather, is part of the damages resulting from the ART practitioners' wrongful acts and/or omissions. In the "dead body" cases, the necessity of a physical injury or that the plaintiffs be bystanders present in a zone of physical danger is irrelevant. No physical injury can be inflicted upon a dead body. As such, mental suffering damages must be defined in terms of the injury to the limited group of persons affected. Also, the requirement that a bystander be present in a zone of physical danger is inapplicable. Family members are typically not present during the funeral preparation process—much like many ART negligence scenarios, like cryogenic freezing and failures, do not occur in the presence of the patient. Requiring victims to be present when the negligent act occurred, or to suffer a contemporaneous physical injury, would provide ART practitioners with blanket immunity and prevent potential plaintiffs from recovering "from their egregious conduct."[136] Further, the mental suffering experienced by patients under these circumstances is clearly foreseeable to reproductive healthcare practitioners, as the profession invariably concerns issues of deep emotional significance to already vulnerable patients.

Allowing potential recovery for mental suffering in the context of ART negligence cases, like the "dead body" cases, also protects similar dignitary interests. In the "dead body" cases, it protects the dignity of human remains (*e.g.*, to facilitate their dignified handling and burial). Here, it protects the dignitary interest of a patient's sensitive genetic material, as well as protecting respect, and potential for, human life.[137] Both hold special societal significance that merits the utmost protection.

134. *Id.*

135. *See* 740 ILL. COMP. STAT. ANN. 180/2 (West 2017).

136. Ingrid H. Heide, *Negligence in the Creation of Healthy Babies: Negligent Infliction of Emotional Distress in Cases of Alternative Reproductive Technology Malpractice Without Physical Injury*, 9 J. MED. & L. 55, 78 (2005).

137. *Id.* at 63.

In addition to a loss of a normal life jury instruction, victims of ART negligence should be entitled to a grief and sorrow jury instruction, despite the fact that such cases are not brought under the Wrongful Death Act. The grief and sorrow experienced by these victims—whose opportunities to have biological children may be forever disclosed due to ART practitioners' negligence—is no less significant than that of a surviving spouse or child upon the death of a loved one. Accordingly, separate grief and sorrow instructions should be allowed.

Lastly, victims of ART negligence should be entitled to mental suffering damages because they essentially entrusted ART practitioners with the duty to act akin to a surrogate to incubate their sensitive genetic materials until they could regain possession and use the samples in assisted reproductive efforts. As a result of the practitioners' negligence, many individuals lose any remaining hope of achieving genetic parenthood. Some jurisdictions have awarded mental suffering damages in similar situations.

This scenario presented itself in the case of *Mokry v. University of Texas Health Science Center*, where the Court of Civil Appeals in Dallas awarded mental anguish damages resulting from the negligent loss of the plaintiff's left eyeball.[138] The plaintiff had his left eye surgically removed by his physician, which was then delivered to the defendant for pathological examination.[139] While the eye was in the custody of the defendant, it came out of the container in which it was being washed and was lost down the drain.[140] The defendant argued that the plaintiff could not recover damages for mental suffering since he did not allege that he suffered actual physical harm.[141] The Court held that the plaintiff did in fact suffer personal injuries in the form of headaches and nervousness as a result of the negligence of employees of the state.[142] Accordingly, he was entitled to recover damages for mental anguish.[143]

As in *Mokry*, reproductive practitioners are charged with the safekeeping of their patients' sensitive biological materials until they can regain possession. As a result of their acts and/or omissions, victims of ART negligence have suffered personal injuries and are likewise entitled to mental suffering damages. The failure to include the element of mental distress in such cases

138. 529 S.W.2d 802, 803 (Tex. App. 1975).
139. *Id.*
140. *Id.*
141. *Id.* at 803–04.
142. *Id.* at 805.
143. *Id.*

would be "impotent of results and of no significance or value as a remedy."[144]

B. Bailment Cause of Action

Victims of ART negligence, as illustrated in the *Yearworth* case, will also oftentimes be able to assert a cognizable bailment claim. A bailment is the "delivery of property for some purpose upon a contract, express or implied, that after the purpose has been fulfilled, the property shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept until he reclaims it."[145] In order to recover under a bailment theory, the plaintiff must allege: "(1) an express or implied agreement to establish a bailment; (2) delivery of the property in good condition; (3) the bailee's acceptance of the property; and (4) the bailee's failure to return the property or the bailee's re-delivery of the property in a damaged condition."[146]

When a *prima facie* case of bailment is established, there is a *presumption* of the defendant's negligence.[147] The defendant must then rebut this presumption by presenting "sufficient evidence to support a finding that the presumed fact did not exist and that the defendant was free from fault."[148]

"When bailed property is damaged, lost, or stolen, the bailor is entitled to bring an action for recovery of damages from the bailee based on breach of bailment, negligence, or both."[149] As a practical matter, a breach of contract claim has distinct advantages over a general negligence claim because as long as "the bailor can establish the elements of a *prima facie* case of breach of bailment contract . . . the burdens of proof and persuasion are much more favorable to the bailor under a breach of bailment theory as opposed to a general negligence theory."[150] Under a bailment theory, the bailor "does not bear the initial burden of producing evidence of the negligent acts or omissions of the bailee; however, the bailor does bear that burden when negligence is asserted."[151]

144. Beaulieu v. Great N. Ry. Co., 114 N.W. 353, 355 (Minn. 1907).

145. Am. Ambassador Cas. Co. v. Jackson, 295 Ill. App. 3d 485, 490 (1st Dist. 1998).

146. *See, e.g.*, Longo Realty v. Menard, Inc., 2016 IL App (1st) 151231, ¶ 21. *See also* Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1275 (Ariz. Ct. App. 2005) (couple sufficiently pled cause of action for breach of bailment against reproductive clinic for losing or destroying couple's pre-embryos after submitting three written agreements evidencing a bailment contract between the parties); York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989) (cryopreservation agreement created bailor-bailee relationship between the parties).

147. Magee v. Walbro, Inc., 171 Ill. App. 3d 774, 778 (1st Dist. 1988) (emphasis added).

148. *Am. Ambassador Cas. Co.*, 295 Ill. App. 3d at 490 (citing *Magee*, 171 Ill. App. 3d at 778).

149. *See* 46 AM. JUR. *Proof of Facts 3d 361* § 7 (1998).

150. *Id.*

151. *Id.*

It is well-established under bailment jurisprudence that where the object destroyed has no discernable market value, the measure of compensatory damages to be applied under a bailment theory is the "*actual* value of the object to the owner" and "may include some element of sentimental value in order to avoid limiting the plaintiff to merely nominal damages."[152] For example, in the New York case, *Brousseau v. Rosenthal*, the plaintiff asserted a bailment cause of action for the defendant dog boarding kennel's negligence in causing the death of her healthy eight-year-old dog.[153] Under the law of bailment, the plaintiff asserted that the defendant failed to return her bailed dog in the condition in which she left it, presumptively establishing the defendant's negligence.[154] Even though the dog was a gift and a mixed breed, thus having no ascertainable market value, the Court assessed the dog's *actual* value to the owner, including the owner's loss of companionship as an additional element of damages.[155] Finding that the plaintiff received the dog shortly after losing her husband, the dog was her sole and constant companion, and it provided her with protection, the Court found that the plaintiff was entitled to an award of $550 plus costs for the loss of the dog's companionship and protective value.[156]

In many instances, a victim of ART negligence will be able to establish a *prima facie* case of bailment if, for example: (1) the plaintiff entered into a storage agreement with the defendant to store, preserve, and/or transport their sensitive genetic materials in exchange for the plaintiff paying the requisite fees; (2) the plaintiff delivered their samples in good condition; (3) the defendant accepted the specimens; (4) and the plaintiff's samples were irreparably damaged without their knowledge or consent while under the defendant's care. In successfully establishing a *prima facie* case of bailment, the defendant's negligence is presumed and can *only* be overcome by providing "sufficient evidence to support a finding that the presumed fact did not exist and that the defendant was free from fault."[157] Accordingly, a plaintiff would be under no obligation to produce evidence of the defendant ART practitioner and/or clinic's negligent acts or omissions under this theory of recovery.

152. Jankoski v. Preser Animal Hosp., Ltd., 157 Ill. App. 3d 818, 821 (1st Dist. 1987) (citing Brousseau v. Rosenthal, 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980)) (emphasis added). *See also* Anzalone v. Kragness, 356 Ill. App. 3d 365, 372–73 (1st Dist. 2005) (plaintiff allowed to pursue her claim seeking recovery for the loss of her cat, the cat's society and companionship because, while the plaintiff's $100,000 valuation may be excessive, the value of the property to the owner is largely determined by trier of fact).

153. *Brousseau*, 443 N.Y.S.2d at 285.

154. *Id.*

155. *Id.* at 285–86.

156. *Id.* at 287.

157. Am. Ambassador Cas. Co. v. Jackson, 295 Ill. App. 3d 485, 490 (1st Dist. 1998).

Under a bailment theory, a victim of ART negligence would be entitled to compensatory and nominal damages—to which sentimental value is a factor—because their bailed property (their irreparably damaged samples) has no discernable market value. Thus, the measure of damages to be applied would be the actual value of the samples to the plaintiff. The value of these samples would far surpass the value of the deceased dog at issue in *Brousseau*, as the lost specimens constitute the loss of the plaintiff's likely *only* opportunity for achieving biological parenthood. Moreover, the samples may not be able to be replaced or reproduced due to chemotherapy and radiation treatments or simply because of age. While the samples would be seen as clearly inapposite to the deceased dog at issue in *Brousseau,* the clear import of the Court's holding in that case and similar cases in established bailment jurisprudence would dictate the ability of a victim of ART negligence to likewise recover compensatory, nominal and sentimental damages in such an instance.

III. A CALL TO CLASSIFY THE NEGLIGENT LOSS OR DESTRUCTION OF SPERM, EMBRYOS, AND RELATED SENSITIVE GENETIC MATERIALS AS PERSONAL INJURIES AND THE RECOGNITION OF THESE INJURIES AS AN INDEPENDENT HEAD OF NEGLIGENCE DAMAGES

As a growing number of individuals and couples turn to reproductive healthcare professionals to assist them in safeguarding or achieving biological parenthood, the time has come for tort law to broaden its definition of "personal injury" in order to appropriately encompass the advances in assisted reproductive medicine and technologies and accommodate the immense personal and emotional harm that results from the loss of an individual's fundamental right to procreate.

As the plaintiffs in *Yearworth* similarly argued, when a genetic material is removed from one's body with the intent for it to be either re-inserted back into the body, or that of the individual's partner, the intervening negligent loss or destruction of that genetic material is akin to one's body being injured. Currently, the U.S. doctrinal landscape offers only a mixed bag of ill-fitting theories unequipped to compensate victims of ART negligence.[158] The failure to classify such immeasurable losses as personal injuries, and rather, as mere property loss, economic loss, or a breach of contract distorts and severely devalues the loss of an individual's ability to have a biological

158. Fox, *supra* note 10, at 209.

child of one's own. Furthermore, the failure to classify these losses as a personal injuries worthy of a remedy in tort poses the risk of providing ART practitioners with blanket immunity—potentially preventing plaintiffs from recovering from their egregious conduct.

Accordingly, the negligent loss or destruction of sperm, eggs, embryos, and related materials should be classified as personal injuries under tort law. Also, this Note would call for the formal recognition of reproductive injuries as an independent head of negligence damages for negligently depriving patients of their right to procreate.[159] As Lord Millett poignantly stated in the English decision, *Rees v. Darlington Mem'l Hosp.*:

> This is an important aspect of human dignity, which is increasingly being regarded as an important human right which should be protected by law. The parents have lost the opportunity to live their lives in the way that they wished and planned to do. The loss of this opportunity, whether characterized as a right or freedom, is a proper subject by way of damages.[160]

The creation of this cause of action against ART practitioners' professional misconduct would serve the normative function of reflecting and promoting the societal significance that children and family creation play in people's lives.[161] It would also serve to protect the dignitary interest in protecting respect, and potential for, human life.

Additionally, the classification of these reproductive injuries as personal injuries and recognizing them as an independent head of negligence damages would help to compensate victims in ways that a property loss or breach of contract cause of action is wholly insufficient to do. While one may argue that the lack of objective criteria for measuring the severity of reproductive injuries would make it impossible for the court to fashion equitable remedies, this difficulty is no greater than in any other case alleging intangible losses.[162] These losses include tort actions for the humiliation of the privacy intrusion, the betrayal of fiduciary breach, and the lost choice of uninformed consent.[163]

In this context, damages awards, while obviously incapable of returning victims to their pre-injury state, would be calculated by assessing: (1) the severity of the injury sustained to the individual (or couple's) procreation interests; and (2) the extent to which professional wrongdoing is responsible

159. *See* Priaulx, *supra* note 8, at 84.
160. *Id.* at 92 (citing Rees v. Darlington Mem'l Hosp. NHS Trust, [2003] UKHL 52 [123] (Eng.)).
161. Fox, *supra* note 10, at 212.
162. Norton, *supra* note 11, at 819.
163. Fox, *supra* note 10, at 225.

for having caused that injury.[164] For an individual or couple whose ability to have biological children has now been foreclosed due to an ART practitioner's negligent acts and/or omissions (the focus of this Note) the severity of the injury would be the highest. In assessing the second prong, the jury would reduce the level of compensation to the extent that a victim's loss-of-chance to procreate was caused by other factors other than professional negligence, including infertility and age.[165] This would ensure that ART practitioners are *only* liable for the percentage of the injury that their negligent acts and/or omissions caused.

One may argue that allowing the classification of these reproductive injuries as personal injuries and recognizing the injuries as an independent head of negligence damages would place too high of a burden on ART practitioners. Fear of litigation could potentially chill continued development in the realm of assisted reproductive medicine. It could also lead to practitioners having to secure greater malpractice insurance to guard against the imposition of potential damages awards (including punitive damages), therefore increasing costs for patients who desperately desire these services. Certainly, it is axiomatic that the legislature be called upon to ensure the continued availability and affordability of assisted reproductive procedures and techniques in light of the proposed reform. However, this reform would also create greater certainty to ART practitioners (and their patients) as to the conduct and heightened standard of care they must meet when making decisions and rendering care to vulnerable fertility patients that could affect their entire reproductive futures.[166]

Furthermore, any policy concerns to the contrary do not outweigh the need society has to hold ART practitioners accountable for their egregious acts and/or omissions that deprive a patient of their fundamental right to procreate. The immense personal and emotional damages endured by these victims takes priority over any policy concerns from a medical perspective that would serve to deny victims, who have already lost so much, of a proper remedy.

164. *Id.*

165. *Id.* at 227.

166. *See, e.g.*, Stiver v. Parker, 975 F.2d 261, 270 (6th Cir. 1992) (finding that the relationship between surrogacy broker and participating medical and legal assistants on one hand, and surrogate mother and contracting father on the other, creates a "special relationship" giving rise to heightened affirmative duties "in order to reduce risk of harm to child").

CONCLUSION

When an ART practitioner fails to monitor and maintain a cryogenic tank, causing a patient's sperm samples to thaw and become irreparably damaged; disposes of a cancer patient's ovarian tissue samples without her consent; exposes patient samples to contaminated materials; fails to mark a now infertile cancer patient's samples adequately and then thaws and uses all samples for a singular IVF attempt; drops a tray of a patient's fertilized eggs, destroying them; and negligently destroys patient samples in transit from one fertility center to another—only for the courts to classify these irreparable losses as property loss, economic loss, or breach of contract, the time has come to seriously re-evaluate what constitutes as a "personal injury" under tort law theories. Because these genetic materials were removed from the patient's body with the intent for them to be either re-inserted back into the body, or that of the individual's partner, the intervening negligent loss or destruction of that genetic material should be viewed by the courts as akin to one's body being injured, and thus, a personal injury. Classifying the loss or destruction of human materials in this way and recognizing these injuries as an independent head of negligence damages would not only reaffirm the societal importance that children and family creation plays in peoples' lives, but also serve the public policy objectives and remedial goals underscoring tort law. While the proposed reform is not a panacea, it is an important first step towards creating a solution for victims of ART negligence.