

Legal liability landscape and the person/property divide

The legal liability landscape surrounding mishandled cryopreserved gametes and embryos reveals the struggle that courts and lawmakers confront in attempting to bring justice when a patient's dreams of biologic parenthood are shattered by professional wrongdoing. In their retrospective analysis, Letterie and Fox (1) review the incidence and outcomes of lawsuits alleging embryo loss over a 10-year period. While the number of legal claims is miniscule compared with the total embryo thaw procedures reported during the same period—well less than 1%—the authors are sensitive to the devastation prospective parents experience at the lost opportunity that is perceived to accompany storage mishaps. Their analysis highlights that the vast majority of plaintiffs raise breach of contract and property damage claims, steering clear of seeking redress for the wrongful death of a developing human being. This observation evidences the judiciary's reluctance to address the person/property classification, a reluctance that pervades and hinders the assisted reproductive technology (ART) field as a whole.

Legal strategies that avoid alleging embryo personhood in tort cases are informed by the universal rejection of these claims in prior lawsuits. To date, every court that has considered the wrongful death of an in vitro fertilization (IVF) embryo has rejected that claim on the ground that the term "person" or "human being" does not apply to frozen embryos under the meaning of state law (see, e.g., *Gentry v. Gilmore*, 613 So.2d 1241, 1244 [Ala. 1993]); *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1261–62 [Ariz. Ct. App. 2005]; *McClain v. Univ. of Mich. Bd. of Regents*, 665 N.W.2d 484, 486 [Mich. Ct. App. 2003]; *Miccolis v. Amica Mut. Ins. Co.*, 587 A.2d 67, 71 [R.I. 1991]) (2). Yet patients express a variety of views on the moral status of their frozen embryos. In one survey, one in five patients reported ascribing full moral status to their embryos, a view that informed their decisions about the treatment and retention of unused embryos (3). The remaining respondents ascribed either no (10%) or some intermediate status to their embryos, combining to reflect a classical wide range of views that Americans generally embrace on embryo status. Given this breadth, it is noteworthy that courts, as well as lawmakers, eschew positions that echo the nuanced diversity of viewpoints on the subject.

Labeling a frozen embryo as either person or property (or even some intermediate status) can take on deep meaning because of the emotional symbolism attached to such categorization. We have solid knowledge that minds are unlikely to be changed on the matter, making compromise or productive policy making illusive. In law, precise categorization is favored as an assurance that citizens can reasonably predict the consequences of their actions. In clinical ART practice, the practical implications of favoring one construction over the other loom large. On the one hand, deeming embryos full moral persons risks curtailing or eliminating many of the current techniques (including cryopreservation) that enable patients to realize their parental goals. On the other hand, failing to accord embryos their potential for human

life under the right clinical circumstances is scientifically unsound and inappropriately untethers gamete providers' expectation of parenthood from their cryopreserved concepti.

Today's most pressing clinical dilemma arising from the vexing person/property classification is the large number of embryos in frozen storage without a plan for disposition. Estimates as to the actual number of unclaimed or abandoned embryos varies, but given that U.S. doctors have performed over one million IVF cycles in the past 5 years, the volume of supernumerary embryos placed in frozen storage is considerable and growing. Many patients indicate they are unable to decide upon a disposition option, with some opting to freeze the embryos indefinitely, adding to a growing stockpile (3). Not infrequently, patients fail to pay storage fees and become unreachable by ART clinics and warehousing facilities, shifting the cost of perpetual maintenance to those in possession of the know-how and materials. Caretaking of unclaimed embryos has become a sort of unfunded mandate in reproductive medicine, due in part to concerns over public reaction to a program's unconsented discard of potential human life. The American Society for Reproductive Medicine Ethics Committee has long held that it is ethically acceptable for a program or facility to dispose of unclaimed embryos after the passage of time (5 years is suggested), accompanied by diligent efforts to contact the owners without success (4). Despite this position of the nation's largest reproductive medicine professional society, practitioners have been reluctant to thaw unclaimed embryos without patient consent. The embryos' perception by some as persons collides with their treatment by others as property.

The import that embryo classification takes on in law and clinical practice invites us to consider a relative, rather than an absolute, approach applied situationally. Strict classification as either person or property has its obvious drawbacks, but so does the intermediate approach where embryos are unclassified (that is, neither person nor property) but given special respect because of their potential for human life. Exactly what does that mean and how should this special respect apply? Few, if any, satisfactory answers have been advanced. Instead, a fluid approach that assesses a host of factors in determining embryo status in context could appeal. Factors such as social policy, likelihood of harm to others, ability to assess nonspeculative damages, and alignment with existing laws could be taken into account when claims arise. The law is accustomed to situational relativism, even when preborn life is involved. For example, in many states the non-abortion-related killing of a fetus is considered homicide at any stage of development, whereas a civil claim for wrongful death will proceed only if the fetus is born alive. The social policy of punishing criminal acts that harm fetuses is strong, whereas concerns over damage calculations in the case of negligence linked to an unborn fetus give some states pause over the merit of such lawsuits.

Applying a balancing approach to claims asserting mishandling of frozen embryos could enable just compensation

without imposing language that hijacks the harm into separate and oppositional silos. Professor Fox has penned an elegant and erudite book on this subject that is a must-read for all who contemplate these questions of fairness when machines and mankind go awry in the delivery of reproductive medicine (2). For now, Fox's suggested remedy that the law recognize a new tort of reproductive negligence may linger on the doorstep of the courthouse as the vast majority of cases asserting harm in the course of IVF and its aftermath are settled or dismissed. Even so, structured settlements could consider a balance of factors in awarding compensation to victims, including an acknowledgement of loss of a potential future child, without stirring the personhood pot. Damages could include the cost of acquiring and storing the lost embryos, fees associated with procuring embryos in the future (whether consanguineous or donated), and emotional distress damages (rarely awarded in breach of contract and damage to property cases). While embryos cannot be replaced, the law can work to make whole those who suffer in their absence. In so doing, the culture wars over embryo classification need not be fueled or smothered by an award that focuses exclusively on the harm to the progenitors. The Letterie and Fox analysis makes clear that judicial refusal to regard embryo loss as compensable wrongful death is linked to the

sequelae of resolving the person/property question for all legal intents and purposes. Looking ahead, perhaps justice can see the value of both classifications at the same time, combining to shape a remedy that truly suits the loss.

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