THE MOTHER'S DAY MASSACRE: A TALE OF REPRODUCTIVE NEGLIGENCE AND A VIABLE LEGAL SOLUTION

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ABSTRACT

In 1978, a scientific breakthrough occurred with the birth of Louise Joy Brown.[1] Louise, was the first child to be born through the then-novel

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technique of in vitro fertilization.[2] Since 1978, this technology has experienced exponential growth.[3] In 2015, almost two percent of all babies born in America were the result of artificial reproductive technology.[4]

A critical aspect of this technology involves cryopreservation, a process which allows for the freezing and storage of genetic material.[5] Once frozen, the genetic material is placed in a storage tank.[6] From there, fertility clinics are responsible for maintaining these tanks to ensure the material is safely preserved.[7]

Over the last forty years these advancements in technology have allowed millions of individuals the opportunity to conceive a biological child when it was not possible on their own.[8] However, this technology is not without significant risk.[9] As a growing number of Americans participate in the storage of their genetic material, errors occur more frequently.[10] Not only has this material been lost and misplaced, clinics are now experiencing storage tank malfunctions causing mass destruction.[11]

For individuals who were given a second chance, the impact of losing their genetic material is life changing. Many of those individuals seek justice within our legal system only to discover it does not exist. Using various approaches, plaintiffs have consistently found that they are unable to recover for their emotional injuries. It is time for this to change. Courts must provide individuals with some predictability and allow for the possibility of compensation. Recognizing a claim for negligent infliction of emotional distress under these circumstances would appropriately redress these devastating losses.

1. LIZA CHARLESWORTH, THE COUPLES GUIDE TO IN VITRO FERTILIZATION: EVERYTHING YOU NEED TO KNOW TO MAXIMIZE YOUR CHANCES OF SUCCESS 1 (2004).

2. *Id.*

3. *Id.* at 2.

4. *See* Saswati Sunderman et. al., *Assisted Reproductive Technology Surveillance—United States, 2015*, 1 MORBIDITY & MORTALITY WKLY. REP. SS-67, 1 (Feb. 16, 2018), https://www.cdc.gov/mmwr/volumes/67/ss/pdfs/ss6703-H.pdf.

5. KAY ELDER & BRIAN DALE, IN VITRO FERTILIZATION 192 (2d ed. 2000).

6. Peter Wieckowski, *Safe With FCNE: Our Management of Cryopreserved Eggs and Embryos*, FERTILITY CTRS. OF NEW ENGLAND (Mar. 13, 2018), https://www.fertilitycenter.com/fertility_cares_blog/safe-with-fcne/.

7. *See id.*

8. CHARLESWORTH, *supra* note 1, at 3.

9. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 152 (2017).

10. *Id.*

11. Kayla Webley Adler, *When Your Dreams of Motherhood Are Destroyed*, MARIECLAIRE (Oct. 1, 2018), http://www.marieclaire.com/health-fitness/a23327231/egg-freezing-embryos-lack-of-regulation.

INTRODUCTION

Meet Rachel. She is a woman in her mid-thirties who has worked hard throughout her career. One day she receives news that will change her life forever. Seated in the cold, sterile room of her doctor's office, she is diagnosed with breast cancer. Still in shock, the doctor discusses her options. By the time she catches her breath, more bad news follows. Chemotherapy, her best option for survival, will leave her sterile. Now she must consider egg removal and preservation. But this also comes with its own risks. The preservation process will delay her life-saving treatment by weeks. She must decide between a biological child and her own life.

Following removal, doctors obtain several healthy eggs. There is still hope for her to conceive a biological child. She undergoes chemotherapy. She survives cancer. Her dreams of her future—dreams of motherhood—are still alive. And eventually that dream comes to a tragic end.

The fertility clinic storing her eggs experiences issues with the preservation tanks. Clinic staff begin manually filling tanks to maintain proper temperatures. Then, someone shuts off the alarm system and the tank fails overnight. She receives a letter about an accident at the clinic. Every single one of her eggs was destroyed in the tank failure. She has lost all hope of a biological child.

As she grieves her loss, the clinic offers an apology. But this gives her no satisfaction. She turns to the court system in her time of need. Surely the clinic's negligent behavior will be addressed there. Instead, she is filled with anger and shock. The court rejected her claim, case dismissed.

This hypothetical illustrates the story of many individuals affected by reproductive negligence. Specifically, those involved in the University Hospital's cryopreservation tank failure[12], commonly referred to as the Mother's Day Massacre.[13] These tragedies continue to occur with greater

12. This story is adapted from a piece written in *Marie Claire* about a woman named Rachel Mehl. Mehl entrusted University Hospital with her eggs prior to undergoing chemotherapy. She lost the chance of conceiving a biological child based on the clinic's failure to properly secure her genetic material. Kayla Webley Adler, *When Your Dreams of Motherhood Are Destroyed*, MARIE CLAIRE (Oct. 1, 2018), http://www.marieclaire.com/health-fitness/a23327231/egg-freezing-embryos-lack-of-regulation.

13. This tragedy has been referred to as the Mother's Day Massacre because the incident occurred in March 2018, and several of the complaints were filed just prior to Mother's Day. Tyler Carey & Phil Trexler, *Judge Denies University Hospitals' Request to Dismiss Fertility Clinic Lawsuit*, WKYC3 (May 18, 2018), https://www.wkyc.com/article/news/health/uh-failure/judge-denies-university-hospitals-request-to-dismiss-fertility-clinic-lawsuit/95-554381441.

frequency as negligence in handling genetic material rises.[14] As the consequences of such negligent actions are so far-reaching, an urgent solution is necessary.[15]

Too often individuals seeking justice in our legal system find it does not exist. Courts have continuously struggled with this issue, failing to reach a fair and equitable solution on how to handle the loss of genetic material.[16] Whether a person should recover for such loss has been heavily debated.[17] Each state has addressed recovery differently, implicating all areas of the law.[18] Until our legal system adopts a consistent method for resolving these claims, the fertility industry will remain the "Wild West" of modern medicine.[19]

This Note addresses various methods used by victims to recover for past losses related to reproductive negligence. It suggests a uniform cause of action that courts should defer to when resolving such claims. Part I covers the history and science behind alternative reproductive technologies and how far this technology has advanced in the last forty years. Part II addresses the various causes of action chosen by plaintiffs while litigating their losses. It will also cover the downfalls of these litigation strategies. Part III suggests that a negligent infliction of emotional distress cause of action is the most viable solution for a fair resolution of reproductive negligence claims. It will explain the benefits of such a claim and address potential concerns. Part IV concludes by summarizing the changes necessary to protect the future of such precious and irreplaceable material.

14. *See* Ariana Eunjung Cha, *Fertility Fraud: People Conceived Through Errors, Misdeeds in the Industry are Pressing for Justice,* WASH. POST (Nov. 22, 2018), https://www.washingtonpost.com/national/health-science/fertility-fraud-people-conceived-through-errors-misdeeds-in-the-industry-are-pressing-for-justice/2018/11/22/02550ab0-c81d-11e8-9b1c-a90f1daae309_story.html?utm_term=.3c9a73ac0579.

15. *See id.* (discussing errors in fertility medicine requiring action); *see also* Ginger Christ & Julie Washington, *UH Explains How it Lost all the Embryos in its Fertility Clinic*, CLEVELAND.COM (Mar. 28, 2018), https://www.cleveland.com/healthfit/index.ssf/2018/03/uh_explains_how_it_lost_all_th.html (discussing the widespread impact of the Cleveland Clinic failure).

16. *See* I. Glen. Cohen, et al., *Losing Embryos, Finding Justice: Life, Liberty, and the Pursuit of Personhood*, 169 ANNALS OF INTERNAL MED. 800 (2018).

17. *See* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 153–54 (2017) (explaining that courts refuse recovery in most of these cases).

18. *See id.* at 162 (addressing existing actions).

19. *See* Debora L. Spar, *Fertility Industry is a Wild West*, N.Y. TIMES (Sept. 13, 2011), https://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/fertility-industry-is-a-wild-west (discussing the lack of regulation and control over the industry).

I. HISTORY OF ALTERNATIVE REPRODUCTIVE TECHNOLOGIES

Human life begins with a single celled zygote, conceived by the union of sperm and egg through the process of fertilization.[20] These cells continue to divide, forming an embryo.[21] Once the woman reaches her eighth week of pregnancy, the embryo is considered to be a fetus.[22]

Alternative reproductive technology (ART) includes all procedures where eggs or sperm are removed from the prospective parent and transferred into the body of the woman who will carry the baby.[23] Of all ART technologies, in vitro fertilization (IVF) is the most common.[24]

On July 25, 1978, the birth of Louise Brown symbolized a significant change in human reproduction.[25] Louise, a blue-eyed baby girl, was the first child born using IVF.[26] After tremendous research and experimentation, doctors had succeeded in helping couples procreate who could not do so on their own.[27]

The IVF process begins with a surgical procedure where oocytes[28] are removed from the mother's body after she has spent several months injecting various drugs to prepare these oocytes for removal.[29] Following this procedure, doctors inject a single sperm into each oocyte in an attempt to achieve artificial fertilization.[30] These zygotes are then closely monitored for signs of division.[31] Should division occur, the embryos are selected for transfer into the female reproductive tract.[32] A successful

20. KEITH L. MOORE & T.V.N. PERSAUD, BEFORE WE ARE BORN: ESSENTIALS OF EMBRYOLOGY AND BIRTH DEFECTS 2 (5th ed. 1998).

21. LEE M. SILVER, REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD 39 (1997).

22. *Fetal Development: Stages of Growth,* CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth (last visited Dec. 8, 2019).

23. *What is Assisted Reproductive Technology*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/whatis.html (last visited Dec. 8, 2019).

24. *IVF Success Estimator*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/ivf-success-estimator/index.html (last visited Dec. 8, 2019).

25. LIZA CHARLESWORTH, THE COUPLES GUIDE TO IN VITRO FERTILIZATION: EVERYTHING YOU NEED TO KNOW TO MAXIMIZE YOUR CHANCES OF SUCCESS 1 (2004).

26. *Id.*

27. *Id.*

28. *IVF Step-by-Step*, U. OF ROCHESTER MED. CTR., https://www.urmc.rochester.edu/obgyn/fertility-center/services/infertility/ivf/ivf-step-by-step.aspx (last visited Dec. 8, 2019).

29. CHARLESWORTH, *supra* note 25, at 3–5, 8.

30. *Id.* at 3.

31. *Id.* at 9.

32. *Id.*

transfer results in the implantation of an embryo into the uterine wall.[33] At this time, the woman is considered pregnant.[34]

If a couple chooses not to implant an embryo immediately after removal, then cryopreservation occurs.[35] This process involves freezing genetic material so that it may be used later on.[36] The embryo is the most common form of genetic material to be cryopreserved.[37] However, people are also preserving oocytes and sperm at an increasing rate.[38]

IVF has undergone steady progress since the birth of the first "test-tube baby."[39] To date, approximately one million children have been born through the assistance of IVF.[40] With such demand, the number of fertility clinics across the United States have expanded to approximately 480.[41] These numbers will continue to increase as infertility rates rise.[42]

Despite its continued growth, the field of reproductive medicine has encountered significant setbacks in the recent past.[43] Many of these issues relate to the storage of genetic material.[44] Specifically, the failure of cryopreservation tanks housing that material.[45] With these failures, negligence becomes one of many obstacles couples encounter throughout the IVF process.[46] Properly addressing this problem requires holding clinics accountable for failing to provide a safe environment. This cannot be accomplished without support from the legal system which continues to fall short in addressing these types of claims.

33. *Id.* at 10.

34. CHARLESWORTH, *supra* note 25, at 10.

35. KAY ELDER & BRIAN DALE, IN VITRO FERTILIZATION 192 (2d ed. 2000).

36. *See id.* at 193–200 (discussing the process of freezing genetic materials).

37. *See id.* at 192.

38. *See id.* at 215, 218.

39. CHARLESWORTH, *supra* note 25 (referring to Louise Joy Brown, the first child born through IVF).

40. *Id.* at 2.

41. *2018 Fertility Clinics & Infertility Services Industry in the U.S.—Analysis & Forecast (1988-2023)*, GLOBE NEWSWIRE (Nov. 30, 2018), https://globenewswire.com/news-release/2018/11/30/1660087/0/en/2018-Fertility-Clinics-Infertility-Services-Industry-in-the-U-S-Analysis-Forecast-1988-2023.html.

42. CHARLESWORTH, *supra* note 25, at 2.

43. Fox, *supra* note 17, at 152.

44. *See generally Tank Failure at 2nd Clinic Threatens Eggs, Embryos*, WEBMD (Mar. 12, 2018), https://www.webmd.com/infertility-and-reproduction/news/20180312/tank-failure-at-2nd-clinic-threatens-eggs-embryos (discussing multiple clinic failures affecting thousands of individuals).

45. *Id.*

46. *See* Christ & Washington, *supra* note 15 (discussing the widespread impact of the Cleveland Clinic failure); *see also* Fox, *supra* note 17, at 162.

II. SURVEY OF THE COURTS: METHODS FOR RECOVERY AND THEIR OBSTACLES

As the number of individuals affected by infertility rise and more people utilize ART, a pattern of negligence has emerged.[47] Scholars refer to this as "reproductive negligence."[48] Even prominent members of the legal community, including Gloria Allred, have taken notice of this troubling pattern.[49] They have joined the campaign to expose negligent behavior while focusing on the importance of the legal remedies available to victims.[50] However, this urgent call for justice has led to confusion and indeterminacy across our court system.[51]

The failure of our legal system to redress these harms is not the only concern of individuals using ART for treatment of infertility.[52] Despite being a multi-billion dollar industry, the field of reproductive medicine remains fairly unregulated.[53] Currently, there are very few federal and state laws that address proper management of fertility clinics.[54] The industry remains mostly self-regulated.[55]

At a very basic level ART is regulated by state laws governing the licensure of physicians.[56] Through these licensing boards, a state may standardize a physician's conduct.[57] There are even fewer guidelines which exist under federal law.[58] In 1992, the federal government passed the Fertility Clinic Success Rate and Certification Act in an attempt to regulate the industry.[59] The Act called for the Secretary of Health and

47. Fox, *supra* note 17, at 152–53.

48. *Id.* at 153.

49. *See* Bretton Keenan, *Gloria Allred is Representing Three Cancer Survivors who are Suing UH Over Fertility Clinic Failure*, NEWS 5 CLEVELAND (Apr. 2, 2018), https://www.news5cleveland.com/news/local-news/oh-cuyahoga/gloria-allred-representing-3-cancer-survivors-who-risked-their-lives-to-have-families-suing-uh.

50. *Id.*

51. *See* 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 MICH. ST. J. MED. & LAW 55, 57 (2005) (explaining these issues fail to adequately protect the interest of these individuals).

52. Stacey A. Huse, *The Need for Regulation in the Fertility Industry*, 35 U. OF LOUISVILLE J. OF FAM. L. 555, 565 (1996).

53. *Id.*

54. *Id.* at 566.

55. *Id.* at 557.

56. *Oversight of Assisted Reproductive Technology*, AM. SOC'Y REPROD. MED., https://www.asrm.org/globalassets/asrm/asrm-content/about-us/pdfs/oversiteofart.pdf (last visited Mar. 4, 2019) [hereinafter *Oversight ART*].

57. *Id.*

58. Huse, *supra* note 52, at 566.

59. *Oversight ART*, *supra* note 56.

Human Services to create a model program for embryo laboratories.[60] It also required mandatory reporting of pregnancy success rates.[61] However, it fell short in accomplishing its goals.[62] To date, no state has adopted the model program.[63] Additionally, the issue of non-compliance is profuse as the repercussions for failure to report are non-existent.[64]

These limited regulations are insufficient, as negligent destruction of genetic material continues. Such reproductive wrongs prompt those affected to rely on our legal system to take action or give redress. Litigants have used contract, property and tort claims in their attempts at recovery.[65] These diverse types of claims have failed to appropriately compensate individuals for the negligence they have encountered.[66]

A. A Contractual Approach to Recovery

Litigants have attempted to address reproductive negligence for decades by bringing claims sounding in contract law.[67] From the very beginning of the clinic-patient relationship, there are numerous documents and contracts requiring an attentive review.[68] Many patients quickly glance over these forms, signing them without any reservation.[69] However, such documents carry significant legal authority as some courts are resolving negligence issues based on the contractual obligations of both parties.[70]

1. Division in the Court System

Courts are divided as to whether a contract is sufficient to resolve the dispute between a patient and fertility clinic following the occurrence of an adverse event. In *Frisina*, a Rhode Island court held that despite the fact there was a valid contract in place, it was not "sufficiently specific" to represent the party's intentions.[71] There, a couple signed contract

60. Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI & TECH. 505, 541 (2005).

61. *Id.* at 540.

62. *Id.* at 541.

63. *Id.*

64. *Id.* at 540–41

65. Fox, *supra* note 17, at 162–63.

66. *Id.* at 162–63.

67. *See id.* at 172.

68. Richard B. Vaughn & Deborah L. Forman, *Modern Fertility and the Law: Informed Consent Forms,* FERTILITY AUTHORITY (Feb. 26, 2010), https://www.fertilityauthority.com/articles/modern-fertility-and-law-informed-consent-forms.

69. *See id.*

70. *See id.* (discussing consequences of legal contracts in these situations).

71. Frisina v. Women & Infants Hosp. of R.I., No. 95-4037, 2002 R.I. Super. LEXIS 73, at *49–50 (R.I. Super. May 30, 2002).

documents produced by the fertility clinic.[72] The couple sued the clinic for breach of contract following negligent activity which left them with damaged pre-embryos.[73] The fertility clinic argued that the couple signed a valid contract containing an assumption of the risk clause.[74] However, the court found the language within the document did not sufficiently provide for situations involving negligence or lack of due care.[75] The acceptance of these inherent risks related to IVF were vastly different from the negligent behavior demonstrated by the clinic.[76]

Conversely, an Illinois court under similar circumstances came to a very different conclusion.[77] In *Miller*, the couple signed various documents prior to beginning the IVF process.[78] One such document contained an express clause indicating the clinic would not be responsible for inherent risks including, "equipment failure, infection and/or human error or other unforeseen circumstances."[79] The court in this claim for breach of contract upheld the clause in the agreement explaining, "if the language is unequivocal, it will govern, although it fails to express the real intention of the parties."[80]

This court, unlike its counterpart in *Frisina*, refused to focus on the intentions of each party.[81] Instead, it read the language of the agreement precisely as stated, declining to account for the couples' allegations that negligence was not a circumstance they considered as part of the contract.[82] These contradictory decisions arising from similar facts demonstrate many of the issues individuals encounter while attempting to recover for reproductive negligence under a contractual cause of action.

72. *Id.* at *2.

73. *Id.* at *3. A pre-embryo is a fertilized ovum up to fourteen days old, before it becomes implanted in the uterus. *Pre-embryo*, DICTIONARY.COM, https://medical-dictionary.thefreedictionary.com/pre-embryo (last visited Mar. 4, 2019).

74. *Frisina*, No. 95-4037, 2002 R.I. Super. LEXIS 73, at *38.

75. *Id.* at *50.

76. *Id.*

77. Miller v. Am. Infertility Group of Ill., No. 09-L4457, 2009 Ill. Cir. LEXIS 32, at *19 (Ill. Cir. Ct. Sept. 8, 2009); Tondre v. Pontiac School Dist., 342 N.E.2d 290, 293–94 (Ill. App. Ct. 1975).

78. *Id.* at *17–18.

79. *Id.* at *18.

80. *Id.* at *19; *Tondre*, 342 N.E.2d at 294.

81. *See Miller*, No. 09-L4457, 2009 Ill. Cir. LEXIS 32, at *19 (holding the plain meaning of the language of the contract controlled); *Tondre*, 342 N.E.2d at 293–94.

82. *See Miller*, No. 09-4457, 2009 Ill. Cir. LEXIS 32, at *16–19.

2. The Problem of Recovering Emotional Damages

Litigants seeking contractual damages encounter additional problems as contracts are generally designed to avoid compensation for emotional harm.[83] As such, individuals lose the ability to receive reimbursement for pain and suffering.[84] Instead, contract damages are generally awarded in an attempt to return the party to the position that he or she would have been in should the contract not have been in place.[85] This is referred to as the expectation interest.[86] To calculate such an award, one must determine the difference between the point where the non-breaching party stands following a breach and where they would have been if the contract have been performed.[87] In reproductive negligence claims, one would be required to calculate the value of the birth of a child.[88] Such a calculation raises serious ethical questions.[89] Assigning a numerical value to a human being is not something public policy would encourage.[90]

3. The Flaws with Form Contracts

Despite the downfalls of a contractual approach, several legal scholars propose that states should require fertility clinics to utilize standard form contracts.[91] Although this may lead to greater consistency, it will likely be a disservice to individuals affected by negligent fertility clinics.

For example, one proposal contains a liquidated damages clause allowing patients to recover for actions involving "negligent, grossly negligent, or intentional acts."[92] The damages recommended by the contract would be $10,000 per oocyte along with reasonable costs.[93] The author also suggests these amounts function as a cap on any other damages including, but not limited to, pain and suffering and the loss of the ability to procreate.[94]

83. Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 118 COLUM. L. REV. 1901, 1907 (2018).

84. *Id.*

85. *Id.*

86. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (AM. LAW INST. 1981).

87. *Id.*

88. Michael A. Mogil, *Misconceptions of the Law: Providing Full Recovery for the Birth of the Unplanned Child,* 1 UTAH L. REV. 827, 835–36 (1996).

89. Heide, *supra* note 51, at 67.

90. *Id.*

91. Alicia J. Paller, *A Chilling Experience: An Analysis of the Legal and Ethical Issues Surrounding Egg Freezing, and a Contractual Solution*, 99 MINN. L. REV. 1571, 1573 (2015).

92. *Id.* at 1610.

93. *Id.*

94. *Id.*

This predetermined number is especially concerning for several reasons. First, the amount is likely inadequate to compensate an individual for his or her loss. Second, this number is not sufficiently large enough to encourage plaintiffs to file claims. This lack of litigation would reinforce the risky behavior of clinics rather than encouraging reform through the legal system. Third, resolving a damages award prior to the occurrence of a negligent event is unfair to individuals under these circumstances. Fertility clinics already have significant bargaining power entering this relationship.[95] Allowing clinics to predetermine an individual's pain and suffering is an abuse of this power. These decisions are more appropriately resolved through our legal system.

4. Individual Choice and the Patient Contract

The contractual approach raises an ethical question concerning whether it is appropriate for fertility clinics to draft patient contracts. These contracts tend to include hold harmless agreements absolving both the clinic and staff from liability.[96] Critics argue that "IVF programs and embryo banks may have such monopoly power that the conditions they offer give couples little real choice, making [their contracts] the equivalent of adhesion contracts."[97]

Patients signing these documents are focused on the prospect of a creating a biological child. During these early stages they are rarely concerned with the possibility of negligence or harm.[98] Many of them sign the documents without the assistance of independent counsel.[99] As such, they are at the mercy of the fertility clinic's highly skilled attorneys.[100]

B. Conversion and the Theory of Reproductive Material as Property

Another litigation strategy that various courts have encountered involves a cause of action for the tort of conversion.[101] Conversion is generally defined as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it

95. Heide, *supra* note 51, at 66.

96. *Id.* at 66.

97. *Id.*

98. Fox, *supra* note 17, at 173.

99. *5 Reasons Why You May Need A Reproductive Attorney*, WINFERTILITY, https://winfertility.com/blog/5-reasons-may-need-reproductive-attorneys/ (last visited Mar. 9, 2019).

100. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer,* 24 J. AM. ACAD. MATRIMONIAL L. 57, 86 (2011); *see also* Fox, *supra* note 17, at 173.

101. Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View,* 32 LOY. L.A. L. REV. 381, 383 (1999).

that the actor may justly be required to pay the other the full value of the chattel."[102] Such claims constitute theft in the form of a civil remedy.[103]

In the context of reproductive negligence the tort of conversion generally involves the misappropriation of oocytes and embryos.[104] The underlying argument asserts that fertility clinics operate as bailees with custody over the material within the clinic's possession.[105] The relationship terminates when the patient, acting as the bailor, requests return of this material.[106] If for some reason the material is destroyed, the patient acquires a conversion cause of action against the clinic.[107] However, for a claim of conversion the material in question must be considered property.[108] This raises an ethical dilemma that courts have encountered numerous times over the last century.[109] The legal system has struggled with the classification of an embryo, failing to reach a consistent approach.[110]

Currently, there are three competing views about the legal status of embryos in this country.[111] First, several courts have held that embryos are property and therefore the tort of conversion is applicable.[112] Second, an embryo may be classified as a person which affords all rights attributed to that status by law.[113] And third, an intermediate view, where the embryo is neither a person or property yet it holds "special respect" resulting in some form of protection under the law.[114] As such, the court's classification of an embryo is central to the outcome of the case.

Recently, some litigants have pressed for all genetic material to be classified as property.[115] Society is shifting and now recognizes property rights in other material such as, blood, cells, and hair.[116] Several legal scholars believe even embryos should be classified as property.[117]

102. RESTATEMENT (SECOND) OF TORTS § 222A (AM. LAW INST. 1965).

103. *Id.*

104. Fischer, *supra* note 101, at 381.

105. *Id.* at 403.

106. *Id.*

107. *Id.*

108. *Id.* at 410.

109. Lynne M. Thomas, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There be a Connection?*, 29 ST. MARY'S L. J. 255, 264 (1997).

110. *Id.* at 257–59.

111. Samantha Malnar, *Frozen In Time: Thawing The Legal Issues Surrounding Cryopreserved Embryos*, 7 TEX. TECH E PLAN COM. PROP. L.J. CODICIL 102, 105 (2015).

112. *Id.* at 106.

113. *Id.* at 106–07.

114. *Id.* at 108.

115. *See generally*, Fischer, *supra* note 101 (describing cases where litigants sought their genetic material to be classified as property).

116. *Id.* at 412.

117. *Id.* at 413.

However, this opinion is not widely shared across the legal community as it raises ethical and moral concerns.[118] Many individuals find this classification highly controversial for various religious, moral, and personal reasons.[119] To them, an embryo is a person from conception and should be treated with the same respect.[120]

The court in *Miller* considered classification of an embryo following an incident of reproductive negligence and also grappled with these definitions.[121] There, a couple sued for conversion, alleging that the fertility clinic "wrongfully and without authority assumed control, dominion, or ownership" when it damaged their personal property.[122] The plaintiffs alleged they had wrongfully incurred medical expenses and suffered extensively from the conversion of this material.[123]

The fertility clinic argued for dismissal of the claim, as conversion addresses the loss of property and a blastocyst[124] does not fit within that classification.[125] The Illinois court responded, taking an expansive view of the term property.[126] It defined property as "anything of value," leading the court to hold a blastocyst had significant value to the plaintiffs and was property under that definition.[127] As such, the plaintiffs had a valid conversion claim.[128]

The *Miller* case demonstrates how a conversion claim may benefit those affected by reproductive negligence. As the court explained, the tort of conversion sets out a unique circumstance where "a defendant can be liable for conversion even though the defendant in good faith did not know with any degree of assurance that his or her act of conversion was

118. *Id.*

119. *Id.* at 413–14.

120. Fischer, *supra* note 101, at 414; *see also*, Nicholas Wade, *Age-Old Question Is New Again*, N.Y. TIMES (Aug. 15, 2001), https://www.nytimes.com/2001/08/15/us/age-old-question-is-new-again.html; Ariana Eunjung Cha, *Who Gets the Embryo? Whoever Wants to Make Them Into Babies, New Law Says*, WASH. POST (July 17, 2018), https://www.washingtonpost.com/national/health-science/who-gets-the-embryos-whoever-wants-to-make-them-into-babies-new-law-says/2018/07/17/8476b840-7e0d-11e8-bb6b-c1cb691f1402_story.html.

121. *Miller*, No. 09-4457, 2009 Ill. Cir. LEXIS 32, at *1–3.

122. *Id.* at *3.

123. *Id.*

124. Early gestational stage of an embryo.

125. *Miller*, No. 09-4457, 2009 Ill. Cir. LEXIS 32, at *7.

126. *Id.* at *23.

127. *Id.*

128. *Id.* at *26

interfering with a personal property interest of the plaintiff."[129] Conversion does not require that the defendant know or predict the unlawful consequences of their actions, only that a defendant intended to commit the act.[130] This decreases the burden on the plaintiff and provides for a greater chance at recovery. However, courts are split on this issue and litigation outcomes are unpredictable.[131]

Additionally, issues exist in applying damages with respect to these cases. Replevin is a traditional remedy for conversion claims.[132] Replevin occurs when the property is returned to the plaintiff seeking recovery.[133] In the case of reproductive negligence, where the material is likely destroyed or unavailable, this remedy is not sufficient to resolve the claim.[134]

If replevin is not an option, then conversion may allow for monetary damages contingent upon statutory restrictions.[135] The traditional measure for monetary damages in this context is the market value of the property at the time the conversion occurred.[136] Here, individuals seeking recovery will encounter significant obstacles while calculating and attempting to substantiate a market value for genetic material.[137] These obstacles will likely prevent an individual from recovering any monetary damages.[138]

Conversion may appear to be a solution to the problem of recovery for reproductive negligence claims. However, the ethical and monetary issues that arise prevent an effective and uniform approach.

129. *Id.* (citing Associates Discount Corp. v. Walker, 39 Ill. App. 2d 148, 153 (2d. Dist. 1963)); *see also* RESTATEMENT (SECOND) OF TORTS § 223 cmt. b, §224 cmt. b, cmt. c (AM. LAW INST. 1965).

130. *Miller*, No. 09-4457, 2009 Ill. Cir. LEXIS 32, at *6.

131. *See* Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1066 (1st App. Div. 1998).

132. Fischer, *supra* note 101, at 418; *see* Dan B. Dobbs, Dobbs Law of Remedies 5.17(1), at 917 (2d ed. 1993).

133. Fischer, *supra* note 101, at 418; s*ee* Lawrence Eisenberg, *What's at Stake in the Trial of Dr. Stone*, ORANGE COUNTY REG. (Oct. 5, 1997), http://nl.newsbank.com/nl-search/we/Archives.

134. Fischer, *supra* note 101, at 418.

135. *Id.* at 419.

136. *Id.*

137. *Id.*

138. *Id.*

C. Wrongful Death

When other causes of action fail, individuals have turned to state tort law, specifically concerning wrongful death.[139] At common law, wrongful death did not exist as a cause of action as the claim generally died with the victim.[140] In 1847, New York was the first state to enact a wrongful death statute, which reflected an existing act passed in England.[141] Today, every state permits a wrongful death cause of action, allowing beneficiaries of a victim to collect damages on their behalf.[142]

Under early revisions of wrongful death statutes, a tortfeasor had no duty to an unborn child.[143] Eventually, courts recognized an independent action for that child's wrongful death.[144] However, many courts limit recognition under the statute to injuries sustained during the period in which an unborn child is considered viable.[145] Currently, only a handful of courts recognize a claim for the wrongful death of a "previable" child, permitting a cause of action during any point in the gestational period.[146]

This issue was raised in *Jeter v. Mayo Clinic Arizona*.[147] There, a fertility clinic lost a couple's frozen pre-embryos.[148] They sued the clinic for negligence under Arizona's wrongful death statute.[149] The clinic responded arguing, "the cryopreserved three-day old, eight-cell, pre-embryos were not 'persons' under the . . . statute[s]."[150] The Arizona Court of Appeals upheld the lower court's decision that for purposes of the wrongful death statute a previable embryo is not considered a person.[151] Although, the court mentioned the term "person" was recently expanded

139. *See* Amber N. Dina, *Wrongful Death And The Legal Status Of The Previable Embryo: Why Illinois is on the Cutting Edge of Determining a Definitive Standard for Embryonic Legal Rights*, 19 REGENT U.L. REV. 251, 254–55 (2006) (citing Torigian v. Watertown News Co., 225 N.E.2d 926, 927 (Mass. 1967)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 254–55.

144. Dina, *supra* note 139, at 255; *see* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

145. Dina, *supra* note 139, at 255; *see Kotz*, 65 F. Supp. at 142; *see also* Danna Hull et al., *Survey of the Definition of Fetal Viability and the Availability Indications, and Decision Making Processes for Post-Viability Termination of Pregnancy for Fetal Abnormalities and Health Conditions in Canada*, 25 J GENET COUNS. 543, 543 (2016) (discussing fetal viability to be the gestational age of an unborn child when it reaches twenty-four weeks).

146. Dina, *supra* note 139, at 255–56.

147. 121 P.3d 1256, 1261 (Ariz. Ct. App. 2005).

148. *Id.* at 1260.

149. *Id.* at 1258–59.

150. *Id.* at 1260.

151. *Id.* at 1276.

to include a viable fetus, it was not willing to unduly broaden its scope.[152] The court reiterated the importance of the distinction between a viable and nonviable fetus.[153]

There were several justifications within *Jeter* as to why the court was not willing to expand the meaning of the word "person."[154] These opinions reflect the legal philosophy of many states other than Arizona.[155] The primary issue raised by the court in *Jeter* concentrated on the "scientific, ethical, social and legal controversy" regarding when life begins.[156] This transcends into the highly debated topic of abortion. A legal solution to the problem of reproductive negligence requiring courts to decide these difficult questions will fail to produce a consistent approach.

Additionally, should litigants continue to advocate for the word "person" to include a previable embryo, the medical field may be adversely affected.[157] One medical professor, Eli Adashi, has stated that declaring a previable embryo to be a person would "significantly compromise" medical research with respect to infertility.[158] He has argued that likening an embryo to a person in this context is analogous to declaring that negligence in reproductive medicine could constitute manslaughter.[159] As such, an individual who desires to litigate this issue under a wrongful death cause of action should think twice about its widespread implications before proceeding.[160]

Another concern raised by the court in *Jeter*, involved "but for" causation.[161] The court found it difficult to hold that a clinic's negligence was the "but for" cause of a couple's injury when the odds of whether a previable embryo would lead to the birth of a healthy child were not well-known.[162] As the court concluded, the science available at the time did

152. *Jeter*, 121 P.3d at 1265.

153. *Id.*

154. *Id.*

155. *See* Stevens v. Flynn, No. 2010-CA-001096, 2011 Ky. App. LEXIS 561, at *9, *12 (Ky. Ct. App. July 29, 2011) (affirming the order of the lower court that Kentucky law does not recognize an action for the wrongful death of a nonviable fetus).

156. *Jeter*, 121 P.3d at 1265.

157. Mollie Rappe-Brown, *Experts Weigh In On Lost Embryos Lawsuit*, FUTURITY (Nov. 20, 2018), https://www.futurity.org/embryos-lawsuits-legal-rights-1915162-2/.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Jeter*, 121 P.3d at 1262 (citing Robertson v. Sixpence Inns of Am., 789 P.2d 1040, 1047 (Ariz. 1990)).

162. *Id.*

not support the notion that a previable embryo, specifically one that has yet to be implanted, should be considered a person.[163]

For these reasons, this court and others have refused to consider wrongful death in the context of a previable embryo. As such, the legal system must cultivate a solution out of existing tort law.

III. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS —A SOLUTION

When reproductive negligence occurs, an unexpected relationship emerges between the fertility clinic and patient. After such a loss, patients suffer with limited recourse while clinics reap the benefits of the relationship. From the very beginning, clinics attract patients through brightly colored advertisements covered with smiling mothers and babies.[164] The goal being to influence consumers to utilize their services in order to achieve the dream of becoming a parent.[165] With that prospect in mind, consumers pay thousands of dollars[166] to these clinics for "high-quality doctors" and "excellent technology."[167] In reality, consumers are paying for removal, safe storage and implantation of their genetic material.

Where negligence occurs and material is destroyed, it is the clinic that derives the benefit from this relationship. Despite not having fulfilled its duties under the agreement, the clinic retains the money, leaving patients with little recourse and significant harm.[168] These individuals experience unimaginable pain, while the clinic enjoys an improved financial status.[169]

A court's acceptance of a negligent infliction of emotional distress (NIED) claim is an essential piece of the solution to eliminate this disparity. NIED provides an equitable remedy for individuals like Mehl who have suffered tremendous loss. As an existing remedy in tort law, NIED

163. *Id.* at 1262, 1265.

164. *See generally ARTbaby Infertility Clinic Brochure*, ARTBABY, www.artbaby.in/art-baby-infertility-clinic-brochure/ (last visited Jan. 13, 2020).

165. *See* Rachel Walden, *Direct-to-Consumer: Fertility Clinic Advertising on the Web*, NAT'L WOMEN'S HEALTH NETWORK, https://www.nwhn.org/direct-to-consumer-fertility-clinic-advertising-on-the-web/ (last visited Mar. 4, 2019) (clinics commonly use advertising language such as "dream" and "excellent technology" to influence consumers through their websites and advertising).

166. *See id.* (in 2013 this number averaged $12,400 per cycle).

167. *Id.*

168. *See, e.g.*, Agreement for Medical Services (In vitro Fertilization and Embryo Transfer Program) (supportive of idea of patients having little recourse but sustaining the bulk of the loss).

169. *Id.* (supportive of notion that so long as hospital provides services they profit since Plaintiff has no material grounds for seeking compensation or damages upon agreeing to contractual terms of service contract).

is easily incorporated into each state's legal system and will effectuate regulatory change in the fertility industry.

A. An Equitable Approach

In resolving reproductive negligence cases, many courts in this country have lost sight of traditional notions of law and equity. Although most American courts no longer recognize separate systems, these principles are intrinsic in everyday legal vocabulary. Equity deals with "the exceptional case, the unforeseen circumstance, the extension of a law to a case that is within its spirit but not quite within its letter."[170] Reproductive negligence is one of these "exceptional cases" requiring equitable remedies to redress substantial harm.[171]

Principles of equity demand flexibility in our legal system to navigate roadblocks that litigants may encounter. This system which was designed to redress harm, is failing to do just that for victims of reproductive negligence. Both men and women have suffered tremendous loss and emotional harm through the negligence of fertility clinics. To properly address these harms, our courts should utilize NIED by broadening its scope as it has been done in the past.[172]

Equity is based in concepts of fairness, remedying situations where even our comprehensive legal system falls short.[173] However, American courts have allowed individuals to recover $473.5 million for the inconvenient location of pig waste near their homes, while victims of reproductive negligence are left without any form of recovery.[174] This imbalance diminishes the cornerstone of our legal system and requires immediate action. The quick and efficient way to remedy this imbalance is to broaden the reach of NIED, allowing for individuals to recover for their reproductive harms.

170. Samuel L. Bray, *A Student's Guide to the Meaning of "Equity,"* OPEN SCI. FRAMEWORK (July 20, 2016), https://osf.io/sabev/ (on file with the Washington and Lee Law Review).

171. *Id.*

172. *See* Ginsberg v. Manchester Memorial Hosp., No. 09-5030482, 2010 Conn. Super. LEXIS 268, at *21–22 (Sup. Ct. Feb. 2, 2010) (allowing for NIED claim where the decedent's corpse was damaged); Johnson v. State, 334 N.E.2d 590, 591 (N.Y. 1975) (allowing for NIED claim to apply where plaintiff was falsely informed of her mother's death).

173. Bray, ***s****upra* note 170.

174. *See* Travis Fain, *Jury awards $473.5 Million to Neighbors who Sued Smithfield over Hog Waste*, NCCAPITOL (Aug. 2, 2018), https://www.wral.com/third-hog-trial-to-jury-plaintiffs-ask-for-millions/17743873/ (jury awarding $473.5 million to neighbors of a pig farm who were complaining of infringement on their property due to hog waste on the adjacent farm).

B. Negligent Infliction of Emotional Distress

In general, the assertion of physical harm is the central focus of tort law.[175] Historically, an actor was not liable for conduct that only resulted in emotional harm.[176] Eventually, recognition of an emotional harm emerged.[177] Referred to as negligent infliction of emotional distress, this tort has been a cognizable cause of action in the last half century."[178]

The Restatement (Third) of Torts addresses NIED in the following manner:

> An actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct:
>
> (a) places the other in danger of immediate bodily harm and the emotional harm results from the danger; or
>
> (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.[179]

In allowing recovery for emotional distress claims, various states have taken a similar approach to the one described in Section (a).[180] As courts adopted this cause of action, new tests began to emerge, limiting its scope.[181] For a plaintiff to prevail in many jurisdictions, the individual claiming harm had to witness or be in close proximity to the event leading to the physical or emotional injury.[182] As such, victims affected by an event that occurred in the past would not qualify under most state interpretations of this section. Specifically, in reproductive negligence cases, the emotional harm does not place individuals in any imminent danger.[183] Additionally, their subsequent discovery of a loss is not contemporaneous enough to allow for recovery.[184]

Section (b) of the Restatement is better suited to handle reproductive negligence cases as it allows for exceptions based on special circumstances "fraught with the risk of emotional harm."[185] Specifically, courts

175. Fox, *supra* note 17, at 165; *see generally* RESTATEMENT (THIRD) OF TORTS § 47 cmt. b (AM. LAW INST. 2012).

176. RESTATEMENT (THIRD) OF TORTS § 47 cmt. b.

177. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 807–08 (2007).

178. *Id.*

179. RESTATEMENT (THIRD) OF TORTS § 47.

180. *Id.* at cmt. e, illus. 1, 2.

181. *Id*. at cmt. b (explaining zone of danger, impact, and bystander rules).

182. *Id*. at cmt. b; *see also* Kircher, *supra* note 177, at 815.

183. *Id.* at cmt. m.

184. Kircher, *supra* note 177, at 818–19.

185. RESTATEMENT (THIRD) OF TORTS § 47 cmt. b.

have imposed liability on funeral homes for the negligent handling of human remains and on messengers for providing a recipient with false information regarding the death of their loved one.[186] This expansion generally covers individuals "engaged in other undertakings, activities, or relationships."[187] Courts are able to limit recovery for emotional harm to only the individuals in those relationships where the undertaking or activity was being performed.[188] This functions to confine the scope of such liability for emotional injury.[189] However, many courts remain apprehensive in recognizing a cause of action for emotional harm and continue to limit its application.[190]

C. Broadening the Application of NIED

As stated above, courts have broadened the scope of NIED to include scenarios where "logic compels [this] conclusion."[191] Examples of such circumstances include, the mishandling of human remains and falsely informing loved ones that a family member has died.[192] Recently, a court in Connecticut accepted NIED as a cause of action for reproductive negligence claims as well.[193]

1. Duty

In general, courts do not dispute that a duty exists between plaintiffs and the facilities where they have entrusted their loved ones.[194] That same duty should remain where fertility clinics are entrusted with protecting genetic material. The need for recognition of such a duty is just as compelling as in cases involving the negligent handling of human remains. In either scenario, the material, or corpse, cannot be safely stored in the plaintiff's home. It must be entrusted to a facility equipped to handle the demands of storing this matter. In such an analogous scenario, there is no persuasive reason for a court to find a duty within one relationship and not the other.

186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. Kircher, *supra* note 177, at 808.
191. Johnson v. State, 334 N.E.2d 590, 591 (N.Y. 1975).
192. *See generally* Ginsberg v. Manchester Mem'l Hosp., No. 09-5030482, 2010 Conn. Super LEXIS 268, at *1, *4–*5, *18 (Conn. Super. Ct. Feb. 2, 2010) (allowing for NIED claim where the decedent's corpse was damaged); *see also id.* (allowing for NIED claim to apply when plaintiff was falsely informed of her mother's death).
193. Witt v. Yale-New Haven Hosp., 51 Conn. Supp. 155, 168–69 (Conn. Super. Ct. 2008).
194. *Ginsberg*, No. 09-5030482, 2010 Conn. Super LEXIS, at *21.

2. Foreseeability

The determining factor for the court's decision in several of these cases relied upon whether or not the emotional injury was foreseeable to the defendant.[195] The decision in *Witt v. Yale-New Haven Hospital* directly addressed the foreseeability of reproductive negligence claims.[196] There, the court held NIED was an appropriate cause of action as the defendant created an unreasonable risk which led to the plaintiff's emotional harm.[197] In its discussion, the court noted several reasons supporting a finding of foreseeability.[198]

Foreseeability is difficult to deny as clinics are in the business of providing reproductive technology services.[199] As such, clinical staff handle this material on a daily basis with the understanding that people are relying on it to conceive a child.[200] With this knowledge, it is foreseeable that any loss or damage to the material will cause significant emotional harm.[201]

Additionally, there is evidence that a reasonable health care professional in this setting is aware of the heightened emotional distress patients would experience with the negligent loss of their genetic material.[202] These individuals are forsaking emotional, physical and financial stability in order to one day achieve their dreams of conceiving a biological child.[203] Patients are increasingly aware this goal is fully attainable as improved technology has diminished the experimental nature of ART.[204] Clinics also acknowledge the "significant emotional investment" of individuals in the process.[205] Based on this evidence, it is foreseeable that the negligent destruction of genetic material would cause a patient severe emotional distress. As such harm is foreseeable, the court should expand its interpretation of NIED to encompass reproductive negligence claims.

195. *See Witt*, 51 Conn. Supp. at 164; *see also id.* at *22.

196. *Witt*, 51 Conn. Supp. at 165–66.

197. *Id.* at 169.

198. *Id.*

199. *Id.* at 163–66.

200. *Id.* at 165 (citing Tanya Feliciano, Note, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 308–09 (1993)).

201. *Witt*, 51 Conn. Supp. at 165.

202. *Id.*

203. *Id.* at 166 (citing Feliciano, *supra* note 200).

204. *Id.* at 163.

205. *See* Walden, *supra* note 165 (clinics advertise success rates as they attempt to appeal to a person's dream of conceiving a biological child).

3. Physical Injury

In some jurisdictions NIED claims require the element of physical injury.[206] There, a plaintiff must prove exposure to the traumatic event caused some kind of physical injury.[207] Generally, this physical element does not include emotional trauma.[208] However, in *Toney v. Chester County Hospital*, the court redefined the physical contact element.[209] There, the court held that allegations of "severe shock, grief, rage [and] emotional pain" were sufficient to satisfy a requirement of "immediate and substantial physical harm."[210]

In allowing for severe emotional trauma to replace the requirement of physical contact, the court has broadened the scope of NIED. Instead of using strict legal interpretation, the court takes an equitable approach in resolving these claims.[211] Recognizing that despite the lack of physical contact, an actual life altering injury occurred.[212] As such, this element of physical contact should be expanded to include emotional trauma related to reproductive negligence claims.

D. Addressing Damages

1. Application of the Lost Chance Doctrine in Calculating Damages

The issue of damages has been a primary concern for many courts in deciding whether to allow a cause of action for NIED.[213] Traditionally, courts struggle with the concept of calculating damages, especially when no physical injury exists.[214] In addition, the notion of an emotional injury has historically generated suspicion within our legal system.[215] To award damages, courts must be satisfied that the harm is not "speculative, exaggerated, fictitious, or unforeseeable."[216] As emotional harm is less tangible than physical harm, the legal system hesitates to recognize or redress

206. *See, e.g.*, Toney v. Chester Cty. Hosp., 961 A.2d 192, 200 (Pa. Super. Ct. 2008) (citing Armstrong v. Paoli Memorial Hosp., 633 A.2d 605, 609 (Pa. Super. Ct. 1992)).

207. *See, e.g.*, *id.*

208. *Id.*

209. *Id.* (citing Love v. Cramer, 606 A.2d 1175, 1179 (Pa. Super Ct. 1991)).

210. *Id.* (citing Doe v. Phila. Cmty. Health Alts. Aid Task Force, 745 A.2d 25, 28 (Pa. Super Ct. 1998)).

211. Bray, *supra* note 170.

212. *See Toney*, 961 A.2d at 195.

213. Heide, *supra* note 51.

214. *Id.* at 79.

215. *Id.* at 83.

216. RESTATEMENT (THIRD) OF TORTS § 47 cmt. b (AM. LAW INST. 2012).

such an injury.[217] In order to relieve this apprehension, courts should consider the doctrine of lost chance to adopt a uniform, structured approach when awarding damages in NIED claims.

The lost chance doctrine allows for a patient to recover damages under a tort cause of action without establishing that the treating medical provider was "probably" the cause of the patient's injury.[218] This doctrine allows for previously ill individuals to recover where medical malpractice results in a lower chance at survival than what they previously faced.[219] Courts adopted this doctrine as way to supplement the traditional rule for negligence, which called for an individual to prove that "more likely than not" the provider caused the injury.[220] This standard left many patients without recourse and allowed providers to escape liability.[221] The requirement for a proportional approach was necessary to protect the equitable rights of the patient.[222]

In applying this doctrine to the calculation of damages in NIED cases, litigants will determine the chance an individual had in achieving the birth of a biological child.[223] That percentage is then balanced against the impact of the clinic's negligence on those chances.[224] This calculation will account for the variation in the success of ART procedures. It will also address the concern that individuals may be awarded more than they deserve, removing any previous apprehension held by many courts.

2. Tort Litigation as a Method for Self-Regulation

The issue of large jury verdicts is a related concern of courts when considering NIED causes of action.[225] Juries are known to base entire

217. *Id.*

218. Steven R. Koch, *Whose Loss Is It Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C.L. REV. 595, 598 (2010).

219. *Id.* at 605.

220. *Id.*

221. *Id.*

222. *Id.*

223. Currently this number is approximately 21.3% depending on age and other factors. *IVF by the Numbers*, PENN MED. (Mar. 14, 2018) https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbers.

224. This is likely to be 100% when the genetic material is completely destroyed but may differ depending on whether the patient has more genetic material to provide.

225. *See The Rise of Sky-High Jury Awards*, AMEDNEWS.COM (July 16, 2012) https://amednews.com/article/20120716/profession/307169940/4/ (New York City woman awarded $120 million where a neurologist failed to diagnose her with a skin disorder, Pennsylvania jury awarded $78.5 million for a breach in the standard of care, $178 million verdict against a Florida medical center where the hospital failed to properly treat complications following gastric bypass).

verdicts on their emotional attachment to a case.[226] It is likely that they are especially susceptible to this distraction in cases involving NIED.

However, there is a strong counterargument in allowing for such verdicts. Deterrence is commonly regarded as one of the main functions of tort law.[227] As such, tort litigation has addressed many social problems.[228] With this, the concept of regulation through tort litigation has emerged.[229] Verdicts from private lawsuits function to encourage change in policy and regulation.[230]

Regulation in the field of ART is severely lacking.[231] However, regulation is likely the only long-term solution to prevent the negligent conduct that occurs within fertility clinics. Despite this fact, regulatory change in the industry is stagnant.[232] A large jury verdict awarded against a fertility clinic, which draws the attention of regulatory bodies and other clinics, may encourage these changes. This was exactly the scenario which took place within the gun industry.[233] An increase in litigation pertaining to gun related violence cases caused the industry to take notice.[234] Although most of these claims did not reach a jury, this enhanced awareness helped "fill[] the gaps in preexisting regulatory schemes."[235]

Additionally, other industries have experienced change resulting from large jury awards.[236] One infamous example involves McDonalds' coffee.[237] The award in that case, close to $3 million, forced a complete overhaul of the restaurant's hot beverage policies.[238] Although the case received a great deal of criticism, the resulting policy changes and regulations led to the implementation of superior consumer protections.[239]

226. *See* Todd E. Pettys, *The Use of Prejudicial Evidence: The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1625 (2007).

227. Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1842 (2008).

228. *Id.* at 1837.

229. *Id.*

230. *Id.*

231. Huse, *supra* note 52.

232. *Id.*

233. Lytton, *supra* note 227, at 1843.

234. *Id.*

235. *Id.* at 1847.

236. German Lopez, *What a Lot of People Get Wrong About the Infamous 1993 McDonald's Hot Coffee Lawsuit*, VOX (Dec. 16, 2016) https://www.vox.com/policy-and-politics/2016/12/16/13971482/mcdonalds-coffee-lawsuit-stella-liebeck.

237. *Id.*

238. *Id.*

239. *Id.*

For these reasons, large jury verdicts will likely lead to self-regulation in field of ART. These awards will compel clinics to take notice and implement change. As this occurs, enhanced regulations will emerge, and with these improvements the need for litigation will decline. Even though the arguments against such awards are persuasive, the ensuing improvements for both patients and fertility clinics outweigh any such concerns.

IV. CONCLUSION

Individuals who seek recovery for reproductive wrongs should be able to recover for the harms committed against them. Under NIED, the legal system will help accomplish such recovery. Here, the court will analyze the relationship between the clinic and patient to determine if a duty of care existed, whether that duty was breached and whether significant emotional trauma occurred.

Courts are well situated to individually assess the injury to the plaintiff on a case-by-case basis. Where it finds the circumstances created an emotional injury so significant that in some cases it has led to a physical manifestation, then the harm is sufficient to satisfy the requirement of physical injury. However, where there is no physical injury, significant emotional harm will also satisfy the requirement. In awarding damages, the court will apply the lost chance doctrine to assist with calculating appropriate amounts.

NIED will allow for and appropriately limit recovery in this area. No other cause of action provides such an effective opportunity for the plaintiff while maintaining a high level of integrity among our legal system. It does not call for the establishment of an entirely new cause of action, nor does it take any length of time to implement. With such an approach, individuals and fertility clinics may be assured their rights and interests are protected. Victims will be appropriately compensated for pain and suffering. Although this does not completely atone for the loss of chance at a biological child, it will encourage improved regulations eventually protecting what truly matters, this irreplaceable genetic material.

The tragic stories of loss prove these errors are not harmless, insignificant mistakes. Reproductive negligence has destroyed the lives of thousands of individuals. With a unified approach yielding consistent results, litigants will be able to hold fertility clinics accountable. Negligence is not acceptable, and there will be consequences.