IVF MIX-UP!

How to Handle WRONGFUL FERTILIZATION CASES

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An area of law that is growing rapidly, yet very few people know about, is wrongdoing in fertilization cases.

There are very few guidelines or standards in place to ensure that IVF procedures are safe and proper. Chain-of-custody problems, laboratory mix-ups, and use of mistaken embryos are shockingly common. There is no government agency or board that oversees reproductive clinics. As one defendant clinic candidly wrote in a pre-litigation mediation brief in a case where they inserted the wrong sperm into our client, it's the "Wild Wild West" of medicine. In other words, the defense tried to argue that there was no applicable standard of care due to the lack of standards in the industry.

In a study conducted in the United Kingdom (where, unlike in the United States, there is an agency that oversees fertility clinics), researchers found that 1 in 1,000 IVF embryos were implanted in the wrong woman. Time and time again, families are devastated to discover that the facility used the wrong embryo. Or the wrong sperm. Or egg. Sometimes, the doctor himself will insert his own sperm against the wishes of the family. Even after the infamous UC Irvine fiasco, there have been multiple cases involving doctors illegally stealing eggs or embryos and using them without the consent or knowledge of the biological parents. The horrifying discovery often does not occur until many years after the child's birth.

The public rarely learns of fertility mix-ups or wrongdoing. The fertility business is a very lucrative one, and clinics often wish to settle cases prior to litigation to ensure confidentiality. The family, devastated by the news that their child is not biologically related to one (or both) of the parents, also wishes to avoid the pain and trauma of litigation.

You may get one of these cases. They're not uncommon.

The defense will want to mediate pre-lit, but it can be difficult to value these cases since so few of them have been made public. The point of this article is to help you appropriately assess your case and understand what arguments to make at mediation, so you maximize settlement value for your clients.

Why Has There Been Such an Explosion of Fertility Wrongdoing Cases?

A perfect storm of events has occurred over the last decade, which has caused an explosion in the number of IVF mix-up cases. The first baby born by way of in-vitro fertilization was not until 1978. Since then, 40 million babies have been born worldwide as a result of IVF. Nearly 2 percent of all babies in the U.S.—over 60,000 per year—are now born by way of IVF. When you include babies born by Intrauterine Insemination (IUI), that number is even higher.

Recent advances in technology have also made IVF more affordable and with higher success rates. Clinics are not only able to create a higher quantity and quality of embryos, but laboratories are able to better grade embryo quality. The first time-lapse embryo imaging device was not used until 2009. Even within the last decade, live birth rates dramatically increased despite a corresponding reduction in the number of embryos transferred.

You know what else has increased? Direct-to-consumer genetic testing like 23andMe and AncestryDNA. The first autosomal DNA testing for ancestry did not occur until 2007 and did not become mainstream until the mid-2010s. The cost to sequence a whole human-sized genome went from about $14,000,000 in 2006 to $1,500 by 2015. Now, home DNA tests cost only $200 a person. The proliferation of personal DNA tests has led some couples to discover that their precious baby is not genetically related to mom, dad, or both.

There Are Significant Hurdles to Overcome with Fertility Cases.

First, unless the case involves negligent genetic embryo testing leading to a birth defect, it is extremely unlikely that the child has a case. Under California law, a healthy child has no claim for "wrongful life." As explained in *Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122: "No court . . . has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment." (See also *Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 14, 190 Cal. Rptr. 84 [child born to a patient in a mental facility could not sue the facility and physicians for wrongful life when he was born physically healthy].) The reasoning for barring the child's action is simple: had the fertility clinic acted appropriately, the child would not even exist. (See *Turpin v. Sortini* (1982) 31 Cal.3d 220, 226.)

For the parents who have been wronged, the knee-jerk reaction is that they have a strong case. But the problem is that these parents have typically suffered only emotional harm, without any physical injury. Besides cases involving bystander simultaneous awareness, California courts have only allowed Negligent Infliction of Emotional Distress claims in three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868); (2) the negligent misdiagnosis of a Sexually Transmitted Disease (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916); and (3) a mother's claim based on the harm to her child during childbirth (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064).

Even if you convince a court that your client has cognizable claims despite no physical injuries, there is a real risk that with the wrong court or judge, you will be restricted by MICRA damages caps under Civil Code section 3333.2. To make matters worse, a court may find that there is only one shared cap for "wrongful birth" damages, just as in wrongful death damages. (See *Yates v. Pollock* (1987) 194 Cal.App.3d 195.)

Worse yet, your entire case could get knocked out under MICRA's draconian 1 year statute of limitations. Pursuant to Code of Civil Procedure section 340.5, the one-year clock does not start until the plaintiff suspected, or a reasonable person would have suspected, that someone had done something wrong. In cases where a child appears to be a different race from the parents, this can create a real risk that the claim will be time-barred. And don't forget that unlike general personal injury cases, in med-mal cases, the defense has a right to a bifurcated trial in order to try the limitations issue first. (See *Kelemen v. Superior Court* (1982) 136 Cal.App.3d 861 [bifurcation required under CCP §597.5 where statute of limitations is pleaded and motion for separate trial is made].) In both Rob and Ben's cases described below (brought several years after birth of the child), the defense repeatedly argued that given the different ethnicity of the child, the claims were time-barred because parents should have immediately recognized wrongdoing.

The other problem is the three-year outside limit. Under section 340.5, the action must also be brought within three years after the harm occurred. (See also *Garabet v. Superior Court* (2007) 151 Cal.App.4th 1538.) While the three-year period is tolled by fraud or intentional concealment, in cases involving a negligent mix-up of an embryo, there is a real risk that the wrong court may apply the three-year outside limit. While the family should argue that the "harm" did not occur until the discovery that the child is unrelated to a parent (see *Filosa v. Alagappan* (2020) 59 Cal.App.5th 722), the defense will argue that the "harm" occurred when the wrong embryo was first implanted.

So What Are These IVF Mix-Up Cases Worth? How Do I Get Around the MICRA Argument?

In Rob's case, the wrong man's sperm was inserted into his client's uterus during an intrauterine insemination (IUI) procedure. Seven years after birth, the family conducted a 23andMe test on their child. The DNA tests revealed that the child was half Asian even though neither of his parents were of Asian descent. The defense attorney repeatedly postured that the case was time-barred and that the "best case scenario" was an award of $250,000 under the MICRA cap. Rob framed this as a "Medical Battery" case (to which MICRA does NOT apply) and refused to attend a mediation unless the defense started the mediation with an offer of $500,000. While the case did not settle at the first mediation, it settled at a second mediation with a different mediator for $2,500,000. In Rob's case, he gave a mediation presentation to the defense in which he shared detailed

focus group results. The mock jurors from the focus group were outraged at what had happened; most of them found the clinic liable for Medical Battery and awarded multimillions. The focus group results also showed that jurors were not buying the defense's statute of limitations argument.

Ben's case involved Intracytoplasmic Sperm Injection due to the father's low sperm count. While the child was born healthy, the mother in Ben's case developed a pregnancy-related spontaneous coronary artery dissection, an extremely rare but serious life-threatening condition. Given the cardiac condition, the parents were not able to have any more children. Fourteen years later, their teenage daughter conducted testing through Ancestory.com and learned that her biological father was of East Indian descent. Formal DNA testing confirmed that the father was not related to the daughter. The family was devastated. What's more, the father feared that he had a biological child somewhere that he had never met. Only after three, separate, all-day mediations over a 6-month period did the case settle for $2,100,000.

In both cases, the defense strenuously argued that MICRA applied. The strongest argument against MICRA is to assert medical battery. In the medical context, "a battery occurs if the physician performs a 'substantially different treatment' from that covered by the patient's expressed consent." (*Kaplan v. Mamelak* (2008) 162 Cal. App.4th 637, 645.) You should argue that it does not get more "substantially different" than putting the wrong sperm/egg/embryo inside your client's body.

Really focus on the *Ashcraft v. King* (1991) 228 Cal.App.3d 604 case. In that case, a 16-year old patient who received a transfusion of blood contaminated with HIV brought an action against the surgeon for medical battery. Specifically, prior to the orthopedic procedure, the patient's mother consented only to the use of family-donated blood. Without the patient's consent, the surgeon used blood from the general supply. The trial court granted a nonsuit as to medical battery. The Court of Appeal reversed, finding that it was error to grant the nonsuit as using the wrong blood constituted a medical battery. (*Id* at p. 905.) If using the wrong blood, as in *Ashcraft*, supports a cause of action for battery, then using a stranger's sperm/egg/embryo certainly supports a cause of action for battery.

Cite to other cases that support a medical battery cause of action, such as *Kaplan v. Mamelak* (2008) 162 Cal. App.4th 637, 647 [whether operating on the wrong disc constitutes medical battery is a question of fact], *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.* (2003) 107 Cal.App.4th 1260, 1267 [finding that "[a] typical medical battery case" would be when "the patient consents to an operation on his right ear, but the doctor operates on his left ear"], *Yun Hee So v. Sook Ja Shin* (2013) 212 Cal.App.4th 652, 670 [finding that a demurrer was improperly sustained as to battery when the patient was shown the remains of her miscarried fetus] and *Burchell v. Faculty Physicians & Surgeons of Loma Linda University School of Medicine* (2020) 54 Cal.App.5th 515 [surgeon removing part of a patient's penis even though he was only authorized to remove a testicular mass constituted medical battery].)

You should also assert other intentional torts such as Intentional Misrepresentation, Fraudulent Concealment, Intentional Infliction of Emotional Distress and Conversion. Make sure the defense knows that you will be conducting extensive discovery to investigate what happened, who was there, and who knew about it.

In the alternative, you should also argue that even if MICRA applied, it's not a "one cap" case. Instead, you should assert that there should be at least four caps. Argue that both parents are direct victims of the clinic's wrongdoing. They are both patients for the purposes of any medical malpractice claim. They have suffered their own, unique injuries.

For example, in *Reisner v. Regents of University of California* (1995) 31 Cal.App.4th 1195, 1202, a patient underwent surgery at UCLA and was given blood contaminated by HIV. No one at UCLA told the patient that she was given contaminated blood. (*Id.*) Three years later, the patient unknowingly infected her boyfriend with HIV. (*Id.*) The boyfriend sued UCLA. (*Id.*) The trial court granted a motion for judgment on the pleadings, finding that the boyfriend was not a patient of UCLA and thus had no cause of action. (*Id.*)

The Court of Appeal reversed, finding that the duty of a healthcare provider "extends to those within the foreseeable orbit of risk of harm." (*Id* at p. 1203.) In other words, because it was foreseeable that failing to tell a patient that she was exposed to HIV could infect third parties, those third parties also had a valid claim against UCLA. Accordingly, the Court of Appeal unambiguously held that the boyfriend had his own valid cause of action against UCLA separate and apart from his girlfriend's potential cause of action. (*Id.*; see also *Myers v. Quesenberry* (1983) 144 Cal.App.3d 888, 892 [plaintiff driver had a valid cause of action against physicians when those physicians allowed their patient to drive in an uncontrolled diabetic condition from a medical appointment, causing a foreseeable vehicle collision]; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 433 [psychotherapist liable to family of a third-party victim due to failure to warn her of his patient's intent to murder].)

Moreover, due to their unique injuries, argue that the marital relationship between the parents has been permanently damaged. As such, each parent has a valid cause of action for loss of consortium based on their spouse's injuries. This entitles the parents to an additional MICRA cap

each for loss of consortium. (See *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1395.)

Strategies to Increase Your Odds of A Favorable Outcome

Absent compelling circumstances, you should always try to settle these cases prior to filing suit, as the fertility clinic has a strong incentive to avoid litigation. Once you file a fertility case, it will immediately lose a substantial amount of value—at least until you get past the inevitable Motion for Summary Judgment on your intentional tort claims and the statute of limitations.

Sadly, many of these cases in California appear to confidentially settle in the $250,000 to $500,000 range. This is despite the fact that the fertility industry market exceeded $15.74 billion in 2021 and most fertility clinics make millions and millions of dollars annually. The defense firms (and likely even your mediator) will be pushing you to take a settlement for MICRA caps. Aim higher.

Final Considerations With Settlement

Before completing any settlement, your client may want to obtain an advisory letter from a tax attorney. As we all know, under 26 U.S.C. § 104(a)(2) of the taxation code, damages "on account of personal physical injuries or physical sickness" are not taxable. Depending on the circumstances of your case, you may be able to assert physical injuries, which could alleviate a huge tax burden for your client. In Ben's case, he was able to secure a helpful taxation opinion because the mother suffered serious physical injuries as a result of the pregnancy.

Regarding settlement confidentiality, make sure that confidentiality is bilateral. Given the sensitive nature of the case, your clients will want assurances of confidentiality.

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