

# Researchers offer perspective on legal, ethical implications of lost eggs and embryos

November 19 2018

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On March 3, 2018, a liquid nitrogen storage tank at the University Hospitals Fertility Center in Cleveland failed. Dr. Eli Adashi, a professor of medical science at Brown University's Warren Alpert Medical School, characterized the event as a "tragic accident" in which 950 patients lost more than 4,000 frozen eggs and embryos.

However, one couple's wrongful death lawsuit following the incident, which seeks to establish that embryos should be treated as "persons" under the law, could have "a chain of profound implications for other families," Adashi says.

In an "Ideas and Opinions" article published on Nov. 20 in *Annals of Internal Medicine*, Adashi and co-[authors](#) I. Glenn Cohen, a professor of law at Harvard University, and Dov Fox, a professor of law policy and bioethics at the University of San Diego, wrote about the potential implications should the Ohio court hearing the case rule in favor of the couple. They argue that a ruling in favor of the plaintiffs could lead to limits on abortion, stem cell research and in vitro fertilization (IVF).

"It would be a sad irony if a legal claim aimed at protecting the rights of those who lost their ability to reproduce had the effect of limiting the reproductive rights of countless others," the authors wrote.

The plaintiffs in the case, Wendy and Rick Penniman, are challenging a legal precedent in Ohio establishing that "a fetus that is not yet viable is not a 'person' under its wrongful death law," the authors wrote. The

challenge is based on "the grounds that the 'life of a person begins at the moment of conception,'" the article notes.

A ruling that embryos are "persons" could be used as grounds to limit abortion rights, the authors say, as well as to potentially restrict research on embryonic stem cells. There could be implications for the future of IVF as well.

"IVF would be significantly compromised," Adashi said. "If a clinician were to freeze embryos, and some do not survive the process, how would that be dealt with? Would that be manslaughter? One needs to view this suit in that context. The implications are of national interest. They go beyond the pro-life / pro-choice debate and reach into the very conduct of IVF and other fertility promotion techniques."

## **Legal limitations**

The authors also discuss the limitations of conventional legal strategies tried in similar cases, including breach of contract, [medical malpractice](#), negligent infliction of emotional distress, and loss of property.

Many fertility clinics require patients to sign waivers that explicitly excuse liability for storage failures due to negligence, limiting breach of contract suits, the authors wrote. Medical malpractice also doesn't apply in a case such as this, because the egg-harvesting procedures were performed properly. And in Ohio, negligent infliction of emotional distress requires the plaintiffs to be "bystanders" to a physical threat to another person; in this case, they did not witness the tank failure, the authors wrote.

The last strategy, loss of property and medical costs, doesn't fully capture the painful disruption of "family-building plans," Adashi said. However, these are the legal grounds the other 70 other patients affected

by the accident are pursuing in their class-action lawsuit.

The legal system hasn't established appropriate venues for seeking damages for the destruction of eggs or embryos, he added. "At this point, there's no clarity in the courts as to how to deal with [cases](#) like this."

## Revising regulations

Accidents happen, but more needs to be done to limit and track them, Adashi said.

"It was a wake-up call for a lot of people in the field," he said. "How do we deal with something like this? How do we prevent something like this? Who should be in charge?"

Professional societies in the fertility field are evaluating the root cause of the incident and are working on new recommendations and guidelines, Adashi said, in an effort to avoid similar situations in the future.

The authors note that currently there are few federal regulations pertaining to assisted reproduction technologies and there is no system for tracking reproductive errors in the U.S. Because agents from the U.S. Food and Drug Administration (FDA) already visit IVF labs to screen donated human tissues for communicable diseases, Adashi says the FDA would be the most relevant agency to assume responsibility for the liquid nitrogen freezers involved in assisted reproduction clinics and track accidents involving eggs and embryos.

Provided by Brown University

Citation: Researchers offer perspective on legal, ethical implications of lost eggs and embryos (2018, November 19) retrieved 19 September 2024 from <https://medicalxpress.com/news/2018-11-perspective-legal-ethical-implications-lost.html>

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