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PERSPECTIVE

Our laws must catch up with the rise in fertility clinic misconduct

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In recent years, the use of fertility medicine in the United States has exploded in popularity. More and more couples are seeking fertility treatment, either due to difficulties conceiving, a desire to select the gender, or to conduct genetic screening of their future child. With the rise of fertility treatments, however, has come an alarming increase in fertility clinic misconduct.

In a lawsuit filed this year against one of the largest fertility clinics in Southern California – a couple alleges that the clinic implanted an embryo carrying a rare gene that causes deadly stomach cancer, and then falsified records to cover up its mistake. The baby was essentially born with a death sentence, and will endure an enormous amount of pain and suffering before passing away. Unfortunately, this case is not an isolated incident.

There is no government agency or board that oversees reproductive clinics in the United States. 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 fertility clinics mistakenly used the wrong sperm, used the wrong embryo, botched genetic screening, or even used the doctors' own sperm to impregnate patients. While these fertility scandals occasionally make the news, many more instances of misconduct go undetected or get swept under the rug. The fertility business is a very lucrative one, and clinics often wish to settle cases prior to litigation to ensure confidentiality. Families, devastated by fertility clinic wrongdoing, also typically wish to avoid the pain and trauma of litigation. In our own practice, we have seen this scenario play out numerous times.

The increase in fertility clinic misconduct not only puts patients at risk, but also undermines the public's trust in the industry. There are very little 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 a clear need for increased regulation and oversight of fertility clinics to help prevent such misconduct from occurring in the future. This could include increased inspections of clinics, stricter guidelines for staff training and qualifications, and requirements for clinics to report any instances of misconduct immediately. In addition, patients must be better informed of the risks and potential side effects associated with fertility treatments. This includes educating patients on the risks associated with genetic screening and embryo selection, as well as the potential for human error during the fertility treatment process.

One of the most significant issues that must be addressed is the lack of legal remedies available to families who have been harmed by fertility clinic misconduct. In California,

"wrongful life" claims for botched genetic testing or other malpractice may not include a child's pain and suffering – only economic damages for required medical care. [*Turpin v. Sortini* 31 Cal.3d 220 (1982).] This means that children born with severe disabilities or health conditions due to fertility clinic misconduct are unable to seek legal recourse for the pain and suffering they will experience throughout their lives. In the recent lawsuit alleging botched genetic testing and fraud, the child that was sentenced to a life of constant pain and eventual death would get *nothing*.

We handled a case last year against a hospital and its genetics department where the father was a known carrier of Sandhoff's disease, a devastating recessive genetic disorder that progressively destroys neurons in the central nervous system. It is fatal in 100% of cases and is nearly identical to a child with Tay-Sachs disease. The genetics department negligently tested the mother for the incorrect genetic enzyme and incorrectly told the mother that she was not a carrier.

The family relied on the hospital's representation that the mother was not a carrier and decided to forego genetic testing. Their daughter was born with the terrible disease and died three months after her first birthday. Her parents had to watch, helpless, while their little girl deteriorated. Most of her life was spent in pain while she unnecessarily suffered from severe spasms and acute respiratory failure with associate hypoxemia.

Due to the *Turpin* case and various MICRA laws, the case was very limited in value and we settled it in the low six-figure range. The parties also had to sign a strict confidentiality agreement.

The California Supreme Court's decision in *Turpin* was published only four years after the first IVF baby was born, and long before fertility procedures became commonplace. Much like the recent changes to MICRA, the Turpin case – which was decided over 40 years ago – needs to be revisited in light of our current landscape.

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