Liability for Premature Births Resulting from IVF

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Multiple births are not an uncommon occurrence with infertility treatment. The incidence of multiple pregnancies in women under 35 years of age who are undergoing in vitro fertilization (IVF) is 38.4%. Of these multiple pregnancies, 6.4% are with triplets or more. Although infertile couples undergoing infertility treatment are often initially pleased to discover they are having more than one baby, multiple gestation is a significant risk factor for premature delivery. As the number of fetuses increases, the gestational age and birth weight at delivery decreases. The average length of gestation for singleton (one), twins (two), triplets (three) and quadruplets (four) fetuses is 39, 35, 33 and 29 weeks, respectively. This decrease in gestational age continues with higher order number of fetuses. Virtually all quadruplets (four), quintuplets (five), sextuplets (six), septuplets (seven), and octuplets (eight) deliver prematurely. Depending on the gestation age and birth weight at delivery, there can be a wide range of problems, such as lung immaturity, deafness, blindness, intracranial hemorrhage and impaired neurological development associated with premature delivery. The more premature the delivery, the more likely severe problems are encountered. Low birth weight infants frequently require prolonged intensive neonatal care. Many very low birth weight infants have severe handicaps and continue to require custodial care into their adulthood. The requirements for prolonged health care can devastate a couple both financially and emotionally, especially when a couple has to provide care for multiple handicapped children.

Patients undergoing IVF are confronted with the dilemma of how many embryos to transfer into the uterus. The success rate for IVF increases as the number of embryos transferred into the uterus increases. Desperate to conceive, infertile couples may initially desire and agree to have a high order number of embryos transferred in hopes of increasing their chances for pregnancy. Also, because infertile couples frequently inquire about IVF success rates when deciding which IVF clinic to choose, there is a financial incentive for IVF clinics to maximize their pregnancy rates by transferring a high order number of embryos. There is great competition among infertility clinics, and infertile couples will often seek out infertility clinics that report higher IVF success rates. This is one of the few areas of health care – if not the only area – where there is success rate advertising. Clinics with lower IVF success rates will lose business to clinics that report higher IVF success rates. In choosing one IVF clinic over a competitor clinic, infertile couples commonly place more emphasis on a clinic’s reported IVF success rate rather than inquiring about the complications of multiple pregnancies. However, once pregnant with multiple fetuses, couples are then faced with the realistic adverse consequences of premature multiple births.

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In addition to facing the realistic adverse consequences of premature births, couples with a high order multiple pregnancy are confronted with the difficult option during pregnancy of fetal reduction in utero to decrease the fetal number. Although fetal reduction may decrease the risk of premature delivery, it may also result in death of all the fetuses. Moreover, choosing to cause the death of their offspring is not a morally acceptable alternative for many couples.

Because of the problems associated with higher order multiple pregnancies, the trend now is to limit the number of embryos transferred into the uterus during an IVF cycle. Some European countries like the United Kingdom have enacted laws that mandate no more than two embryos transferred in an IVF cycle. The United States is more liberal in that there is not a statutory restriction on the number of embryos that can be transferred in an IVF cycle. In the United States fertility specialists and infertile couples have more autonomy in deciding how many embryos to transfer. To assist in deciding how many embryos to transfer, the American Society of Reproductive Medicine (“ASRM”) has established guidelines. The American Society of Reproductive Medicine is a national organization made up of physicians and embryologists specializing in infertility. Factors that are relevant in deciding how many embryos to transfer are the patient’s age, quality of the embryos, and the number of previous failed IVF cycles. The ASRM guidelines are as follows:

A. In patients under the age of 35 no more than two embryos should be transferred in the absence of extraordinary circumstances.

B. For patients between age 35 and age 37 having a favorable prognosis, no more that two embryos should be transferred. All others in this age group should have no more that three embryos transferred.

C. For patients between 38 and 40 years of age, no more than four embryos should be transferred.

D. For most patients greater than 40 years of age, no more than five embryos should be transferred.3

Most IVF clinics do follow the recommendations of ASRM and in good faith limit the number of embryos transferred to decrease the risk of high order multiple pregnancy. However, despite recommendations by the ASRM to limit the number of embryos transferred per IVF cycle, some IVF clinics continue to transfer a high order number of embryos. The decision on the number of embryos to transfer should be the result of a collaborative effort between the infertile couple and the fertility specialist. Infertile

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2 Leon Speroff, Robert H. Glass & Nathan G. Kase, CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY Ch. 31 (6th ed. 1999).
3 The Practice Committee of the Society for Assisted Reproductive Technology and the American Society for Reproductive Medicine, Guidelines on the Number of Embryos Transferred, 82 FERTIL. STERIL. 773-774 (2004).
couples should be fully informed of the likelihood and risks associated with a high order multiple pregnancy. Fertility specialist should not transfer a high order of embryos to increase their clinic’s IVF success rates. Likewise, fertility specialist should not be pressured by infertile couples to transfer a high order of embryos to increase chances of pregnancy. The desire to increase IVF success rates should always be balanced with the increase risks of complications associated with multiple pregnancies.

IVF clinics that transfer a high order number of embryos could potentially be held legally accountable for the consequences of premature births caused by transfer of a high number of embryos. To have a cause of action against a fertility specialist, the couple would have to prove by the preponderance of evidence that the fertility specialist breached the standard of medical care by transferring more embryos than is customarily recommended based on the patient’s age and quality of embryos. Alternatively, the couple would have to prove by the preponderance of evidence that they did not receive valid informed consent. They would have to prove that the information they were given by the fertility specialists regarding the risk of premature delivery was insufficient and that, if they had been fully informed of the risk, they would have elected for fewer number of embryos to be transferred. Once this burden is met, couples faced with raising multiple infants with severe handicaps caused by premature delivery could seek damages from the fertility specialist. Actual damages would include the health cost associated with premature delivery, raising severely handicap children, and lifetime custodial care. If it can be proved that the fertility specialist was reckless in transferring a high order of embryos, couples may also be able to recover punitive damages on behalf of the children. A lawsuit can be filed on behalf of the children any time until their 20th birthday.

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