**Donovan v. Idant Laboratories: Circumventing the Prohibition Against Wrongful Life Claims through Strict Products Liability Claims**

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Couples having difficulty naturally conceiving a child sometimes resort to various forms of assisted reproductive technology. Some couples utilize sperm from an anonymous donor, but may not know all the possible genetic diseases for which the donor sperm is a carrier. Currently, sperm banks are not required to conduct tests on sperm donors or their semen for all possible genetic abnormalities. However, the Food and Drug Administration (FDA), has mandated the facilities to test specimens from certain sperm donors for the following:

- Human immunodeficiency virus, type 1;
- Human immunodeficiency virus, type 2;
- Hepatitis B virus;
- Hepatitis C virus;
- Treponema pallidum;
- Human T-lymphotropic virus, type 1;
- Human T-lymphotropic virus, type 2;
- Cytomegalovirus;
- Chlamydia trachomatis; and
- Neisseria gonorrhea.1

Although these tests attempt to decrease the transmission of communicable diseases from donors to recipients and subsequent offspring, they do not reveal the potential genetic abnormalities a child may inherit from the donor sperm. However, a 2009 case in Pennsylvania has spoken on the issue – determining whether a sperm bank may be held liable under strict products liability laws for the sale of defective sperm.

**Donovan v. Idant Laboratories and Fragile X**

*Donovan v. Idant Laboratories*2 is a case in which sperm containing a defect in the FMR1 gene, resulting in offspring having Fragile X disease, was passed on to a recipient. Fragile X is an inherited disease passed on by carrier men to "all their daughters but none of their sons."3 Common symptoms of Fragile X include: (1) mental impairment; (2) attention deficit and hyperactivity; (3) anxiety and unstable mood; (4) autistic behaviors; (5) long face, large ears, flat feet; (6) hyperextensible joints; and (7) seizures.4 *Donovan*

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4 *Id.*
has brought up much debate about the claims that may be asserted against a sperm bank because of its failure to test the sperm donor for genetic defects, the claims that may be asserted against a donor who lies about his family or genetic history, and the regulation of sperm banks.

The Case

In the lawsuit, Donna Donovan asserted a host of claims on behalf of herself as well as her minor daughter, Brittany. They included: (1) negligence (2) breach of contract, (3) third-party beneficiary breach of contract, (4) breach of the express warranty of merchantability, (5) breach of implied warranty of merchantability, (6) third-party beneficiary breach of express and implied warranties of merchantability, (7) negligent misrepresentation, (8) strict products liability, and (9) negligent infliction of emotional distress,” alleging that Idant Laboratories (Defendant) failed to test the donor’s semen for Fragile X.5

Plaintiffs Donovan and her daughter specifically allege that the Defendant sperm bank facility informed Donna that the sperm donor, G738, “had been fully tested in accordance with New York Health Regulations and that information did not indicate that he had any genetic defects or a history of mental retardation.”6 Although Ms. Donovan was inseminated with G738’s semen in April of 1995, G738 was not confirmed as a carrier for Fragile X until May 6, 1998.7

The court dismissed the majority of the claims in Donovan because they were barred by the statute of limitations.8 However, the court determined that because the screening and testing at issue in the tort claims occurred in New York, it found that New York law applied with respect to the tort claims. Additionally, the court determined that New York law applied to the contract claims because the majority of the conduct relevant to the contract at issue took place in that state. The trial court applied such New York laws to Brittany Donovan’s claims and found, “the sale of sperm is considered a product and is subject to strict liability.”9 Although the court recognized that the sale of sperm is subject to strict liability, Brittany Donovan’s claims for negligence, negligent misrepresentation, strict liability, and breach of warranty claims have been dismissed because they are “essentially claims for wrongful life.”10

The trial judge noted that Brittany Donovan’s claims for negligence and negligent misrepresentation were “based on the fact that, if [D]efendant had properly tested and screened for genetic abnormalities in Donor G738’s semen, that semen would not have been used and plaintiff Brittany Donovan would not have been born.”11 Furthermore, the court stated that Brittany Donovan has failed to “distinguish the injury she claims to have

5 Donovan, supra note 2, at 264.
6 Id. at 262.
7 Id. at 263.
8 Id. at 268.
9 Id. at 273.
10 Id. at 276.
11 Donovan, supra note 2, at 271.
suffered in her claims for breach of warranty and strict liability from that alleged in a prohibited claim of wrongful life.”¹² The only remaining claims currently pending are Brittany Donovan’s third-party beneficiary claim for breach of contract. The defendant sperm bank facility contends that those claims are also wrongful life claims simply couched as breach of contract claims.¹³

Although the court dismissed the majority of Donna Donovan’s claims, it noted that she may have been able to bring a claim “for the injury of pecuniary losses of the costs incurred in raising a child with disabilities under New York law.”¹⁴ The court views such a claim as an economic issue because the parent of a child with disabilities would not otherwise have been brought to such a position “if the act causing the disability had not occurred.”¹⁵ On the other hand, bringing Brittany Donovan back to “the position in which she would have been had the act causing her genetic disorder not taken place, her genetic identity would be different, so [she] would not exist.”¹⁶

Because the court would have allowed Donna Donovan’s economic claim had it been timely, some fear that the court “might open the floodgates to similar lawsuits . . . assuming that [the defect] could be traced to the donor sperm.”¹⁷ Moreover, Donovan “raises questions about liability on the part of the sperm donor.”¹⁸ Suits against sperm donors are less likely to occur, however, because of the donor’s anonymity and a widespread inability to collect on judgments against sperm donors. Furthermore, sperm donors may argue that they should not be held liable on the grounds that “they forgot or were unaware of a family history of [a] mutation.”¹⁹

The Aftermath

Some commentators contend that the resolution for cases like this “may be for states to pass laws placing sperm beyond the reach of product liability claims.”²⁰ If Donna Donovan’s claims were not time barred, they would have proceeded because New York does not shield sperm from its strict products liability laws.²¹ However, some jurisdictions that do not shield sperm from their strict products liability laws may not see the need to change their laws because the claims asserted in Donovan would be prohibited regardless; they would be seen as wrongful life claims. If jurisdictions view these types of claims as prohibited wrongful life claims, then parents are left without a

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¹² Id. at 276, n.3.
¹⁴ Id. (citing Becker v. Schwartz, 46 N.Y.2d 401, 412-13 (1978)).
¹⁵ Id.
¹⁶ Id. (citing Becker v. Schwartz, 46 N.Y.2d 401, 413 (1978)).
¹⁸ Id.
¹⁹ Id.
²¹ Donovan, supra note 2, at 273, n. 20.
remedy against the sperm bank or the sperm donor.

**American Society for Reproductive Medicine’s Recommendations**

States or federal agencies should promulgate regulations to provide some protection for sperm bank consumers. In addition to the FDA’s required testing for communicable diseases, the American Society for Reproductive Medicine (ASRM) has issued the following guidelines regarding genetic evaluations that should be performed for sperm donors:

- **[T]esting for cystic fibrosis carrier status should be performed on all donors.**
- **Other genetic testing should be performed based on the donor’s ethnic background in accordance with current recommendations after obtaining a proper family history.** Some institutions perform chromosomal analyses on all donors, but such evaluation is not required.22

In addition to these genetic testing guidelines, the ASRM provides minimum genetic screening guidelines for donors.23 A donor should be screened for major Mendelian disorders, including “[a]utosomal dominant or X-linked disorders in which the onset extends beyond the age of the donor.”24 Additionally, the donor “[s]hould not have (or have had) any major malformation of complex cause (multifactorial/polygenic), such as spina bifida or heart malformation.”25 The ASRM also advises that the donor “[s]hould not have any significant familial disease with a major genetic component.”26

Requiring sperm banks to test for every possible genetic abnormality is not feasible because not every genetic abnormality is known. However, state or federal agencies should promulgate rules mandating some minimum genetic testing and genetic screening for certain sperm donors in addition to the FDA testing requirements for communicable diseases. For example, state or federal agencies could mandate sperm banks to do the minimum testing that is recommended by the ASRM. Some have suggested an alternative may be for a sperm bank to “specify which disorders it did not test for.”27

Furthermore, regulations should be promulgated to establish a recordkeeping mechanism for each sperm bank to follow-up with children conceived through anonymous sperm donations. Currently, there are no follow-up record requirements, but non-profit organizations such as Donor Offspring Health have created websites for women who use sperm donation to post information regarding the “health problems of the resulting

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23 Id. at S44.
24 Id.
25 Id.
26 Id.
27 Supra note 17.
children." In addition to Donor Offspring Health, other groups such as Donor Offspring Matches, Donor Sibling Groups, and Americans for Open Records provide free websites where siblings and donors may post information about themselves. Not only will this information be helpful to the resulting children currently, but also in the future if these children choose to donate eggs or sperm, they will have an accurate family history regarding their biological siblings or half-siblings.

Conclusion

All sperm bank consumers will not necessarily sue because they end up with a child with genetic abnormalities. Donovan appears to provide an avenue for parents to circumvent the prohibition against wrongful life claims under New York law. In other jurisdictions, however, particularly where a similar claim would not be recognized, state and federal agencies need to establish regulations regarding minimum genetic testing requirements for sperm donors and recordkeeping mechanisms for following up with the resulting children to at least give sperm bank consumers the opportunity to make an informed decision regarding the products they ultimately choose.

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