

# NEGLIGENT DISRUPTION OF GENETIC PLANNING: CARVING OUT A NEW TORT THEORY TO ADDRESS NOVEL QUESTIONS OF LIABILITY IN AN ERA OF REPRODUCTIVE INNOVATION

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## INTRODUCTION

In March 2017, the Singapore Court of Appeal<sup>1</sup> awarded damages for a previously unarticulated tort—the “loss of genetic affinity.”<sup>2</sup> In the case before the Court, a husband and wife underwent in-vitro fertilization (IVF)<sup>3</sup> treatment, and subsequently delivered a baby girl (Baby P).<sup>4</sup> Several months after the birth of Baby P, the parents noticed that the child’s skin tone and hair color were quite different from their own and that of their son, who had also been conceived using IVF.<sup>5</sup> After a brief investigation, the couple learned that the clinic had inadvertently fertilized the mother’s extracted ovum with sperm from a man other than her husband.<sup>6</sup> The couple brought suit for breach of contract and negligence, seeking “upkeep” damages equivalent to the cost of raising Baby P until Baby P is “financially self reliant.”<sup>7</sup> While the court declined to award the full amount of damages

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1. The Court of Appeal is Singapore’s equivalent of the U.S. Supreme Court. *See Structure of the Courts*, SUP. CT. SINGAPORE, <https://www.supremecourt.gov.sg/about-us/the-supreme-court/structure-of-the-courts> [<https://perma.cc/27MS-3J9N>] (last visited Mar. 6, 2019).

2. *ACB v. Thomson Med. Pte. Ltd.*, [2017] SGCA 20, paras. 125–36 (Sing.) [hereinafter Thomson I].

3. The Centers for Disease Control (CDC) defines IVF as “[a]n [assisted reproductive technology] procedure that involves removing eggs from a woman’s ovaries and fertilizing them outside her body. The resulting embryos are then transferred into a woman’s uterus through the cervix.” CTRS. FOR DISEASE CONTROL & PREVENTION, 2015 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 64 (2017) [hereinafter 2015 CDC REPORT].

4. *Thomson I*, SCGA 20 ¶ 3.

5. *ACB v. Thomson Med. Pte. Ltd.*, [2015] SGHC 9 ¶ 3 [hereinafter Thomson II].

6. *Id.*

7. *Id.* ¶ 5.

sought, it ultimately entered judgment for 30 percent of the requested amount on the grounds that the couple's "loss of genetic affinity" with Baby P constituted actual, compensable harm.<sup>8</sup>

With an increasing number of people relying on assisted reproductive technology (ART),<sup>9</sup> issues pertaining to the mishandling of genetic material—like the Singapore case—have made headlines in recent years.<sup>10</sup> Objectively, it is reasonable to enable plaintiffs on the unfortunate end of an ART mishap to seek legal redress, particularly when the outcome of that mishap directly contravenes the agreement between the ART provider and the intended parent(s). But this territory becomes ethically fraught when a healthy child is born following an ART mistake. In these situations, the harm suffered is not a simple tort or contractual breach because it implicates ethically perilous questions concerning the value of a child. Moreover, without careful phrasing of the cause of action for these types of claims, the law threatens to stigmatize the child by undermining the child's very existence.

This Essay will address current concerns pertaining to ART-related negligence, and ultimately recommends the adoption of a new tort—negligent disruption of genetic planning (NDGP). This tort would enable plaintiffs to recover damages when an ART clinic's negligent actions thwart reproductive planning, while simultaneously balancing the serious moral and ethical questions that arise in these situations. This argument proceeds in three Parts. Part I discusses the technological evolution of ART and gives examples of ART-related negligence cases that have occurred in the United States. Part II lays out the current U.S. tort remedies relied on by plaintiffs in these situations, and then discusses alternate tort-based approaches proposed by courts and scholars that find the existing tort landscape inadequate. Finally, Part III evaluates the applicability of existing torts to ART-related negligence cases as well as the proposed novel approaches of other courts and scholars detailed in Part II. Because existing theories do not adequately balance public policy concerns, the need to protect ART patients, and the complex moral and ethical questions surrounding ART, NDGP is proposed as a solution to fill the current gap.

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8. *Thomson I*, SCGA 20 ¶ 150.

9. The CDC defines ART as:

All treatments or procedures that include the handling of human eggs or embryos to help a woman become pregnant. ART includes but is not limited to in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), tubal embryo transfer, egg and embryo cryopreservation, egg and embryo donation, and gestational surrogacy.

2015 CDC REPORT, *supra* note 3, at 63.

10. See, e.g., Lucy Clarke-Billings, *IVF Clinic Error Means Nine Women May Have Given Birth to 'Wrong' Baby*, NEWSWEEK (Dec. 28, 2016, 1:07 PM), <http://www.newsweek.com/ivf-clinic-netherlands-nine-women-birth-wrong-baby-536669> [https://perma.cc/M7P4-5Y2C]; Stephanie Smith, *Fertility Clinic to Couple: You Got the Wrong Embryos*, CNN (Sept. 22, 2009, 5:02 PM), <http://www.cnn.com/2009/HEALTH/09/22/wrong.embryo.family/index.html> [https://perma.cc/MX26-WEU2].

I. THE EVOLUTION OF ART AND RESULTING LEGAL BATTLES WITHIN  
THE UNITED STATES

Prior to the advent of modern technology, many of the claims that fall into the category of ART-related negligence were biological impossibilities. But today, technological advances enable people who want to become parents to conceive in unprecedented ways. Unfortunately, these novel procedures sometimes go awry. This section first discusses the development of ART, and then details examples of U.S. cases concerning ART-related negligence.

A. *Overview of Assisted Reproductive Technology: Technological Development and Current Uses*

Until the 1970s, women with non-functioning fallopian tubes were considered sterile<sup>11</sup> and only had one option if they wanted to conceive—undergo a very risky surgery with incredibly low success rates.<sup>12</sup> But in 1978, a British woman, Lesley Brown, decided that, rather than suffer through a dubiously efficacious surgical procedure, she would try the then-experimental technique of IVF,<sup>13</sup> which until that point, had only resulted “in miscarriages and an unsuccessful pregnancy in the fallopian tube.”<sup>14</sup> In comparison with modern IVF, the technique used on Brown was rudimentary: the doctors retrieved Brown’s eggs laparoscopically, fertilized the eggs in a laboratory, and transferred a single egg back into Brown’s uterus.<sup>15</sup> Astonishingly, the procedure succeeded, and a few months later the world welcomed the birth of the first “test-tube baby.”<sup>16</sup>

Since then, ART has developed at a rapid pace and is more reliable and affordable than ever before.<sup>17</sup> In 2015—the most recent year for which data is available—the CDC reported that American women underwent 231,936 cycles of ART, 80 percent of which “were started with the intent to transfer at least one embryo,” resulting in the births of 72,913 children.<sup>18</sup> This data

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11. See Jeff Wang & Mark Sauer, *In Vitro Fertilization (IVF): A Review of 3 Decades of Clinical Innovation and Technological Advancement*, 4 THERAPEUTIC & CLINICAL RISK MGMT. 355, 355 (2006).

12. *See id.*

13. *See id.*

14. *Id.* at 356.

15. *Id.*

16. See generally P. C. Steptoe & R. G. Edwards, *Birth After the Reimplantation of a Human Embryo*, 12 LANCET 366 (1978) (announcing the successful delivery of a baby conceived with the aid of IVF).

17. See Remah Moustafa Kamel, *Assisted Reproductive Technology After the Birth of Louise Brown*, 14 J. REPROD. INFERTILITY 96, 104–05 (2013). To be sure, IVF is by no means affordable, with the cost per cycle in the United States averaging \$12,400. See J. Farley Ordozensky Staniec & Natalie J. Webb, *Utilization of Infertility Services: How Much Does Money Matter?*, 42 HEALTH SERVICES RES. 971, 975 (2007). The high cost of IVF, and the general unwillingness of insurance companies to cover the procedure, poses important questions of access for low-income, aspiring parents. For an excellent proposal aimed at addressing unequal access to IVF, see Joy J. Liu & Eli Y. Adashi, *Selective Justice: State Mandates for Assisted Reproductive Technology and Reproductive Justice*, 1 AM. J. CLINICAL & EXPERIMENTAL OBSTETRICS & GYNECOLOGY 53, 53 (2013).

18. 2015 CDC REPORT, *supra* note 3, at 3.

represents a 32 percent increase of ART use since 2006, and a 30 percent increase in the number of infants born as a result of ART.<sup>19</sup> Additionally, ART cycles initiated for egg/embryo banking<sup>20</sup> increased from roughly 1 thousand cycles in 2006 to over 45 thousand cycles in 2015.<sup>21</sup> This increased reliance on ART shows the important role these technologies play in helping aspiring parents conceive in the twenty-first century. However, with increased reliance on ART comes a greater risk of errors, like the ones illustrated by the following cases.

*B. Recent Cases of ART-Related Negligence in the United States and the Relevant Tort-Based Causes of Action Propagated by Plaintiffs*

The following U.S. cases<sup>22</sup> raise significant questions about the extent to which ART providers open themselves up to liability when they make a mistake.<sup>23</sup> In each case, the plaintiffs rely on different tort theories in an attempt to encapsulate the harm caused by the clinic's negligence.

1. *Cramblett v. Midwest Sperm Bank: A Child of the "Wrong Race"*

In 2011, Jennifer Cramblett underwent artificial insemination in hopes of conceiving a child.<sup>24</sup> As part of this process, Cramblett contracted with Midwest Sperm Bank (Midwest) to purchase sperm from Donor No. 380 (380), a Caucasian male selected by Cramblett and her partner.<sup>25</sup> Midwest shipped the donor's sperm to Cramblett's local fertility clinic where she was successfully inseminated.<sup>26</sup> Roughly five months into her pregnancy, Cramblett and her partner decided to conceive another child and

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19. *Id.* at 50.

20. The CDC defines "egg/embryo banking cycles" as, "[a]n ART cycle started with the intention of freezing (cryopreserving) all resulting eggs or embryos for potential future use." *Id.* at 63.

21. *Id.* at 51.

22. The focus of this Essay is on tort liability within the U.S. legal system, but it is important to note that these issues do not occur exclusively within the United States. *See supra* text accompanying notes 4–8. For another example of ART-negligence, see Nina Siegal, *Dutch Fertility Clinic Investigates Possible Sperm Mix-Up*, N.Y. TIMES (Dec. 28, 2016), <https://www.nytimes.com/2016/12/28/world/europe/netherlands-fertility-clinic-ivf.html> [<https://perma.cc/XGH2-CQNP>].

23. A number of cases brought within the United States touch on this idea from a family law perspective, asking who should have custody following an ART mix-up. While these cases fall outside the scope of this Essay because they do not focus on the negligence of the clinic, it is interesting to note the complicated questions of parentage and custody that are litigated as a result of ART-related negligence. *See, e.g.*, *Robert B. v. Susan B.*, 109 Cal. App. 4th 1109 (Cal. Ct. App. 2003) (describing a situation in which embryos contractually belonging to a couple, and sharing genetic material with the husband, were mistakenly implanted in a single woman, resulting in birth of half-siblings); *Perry-Rogers v. Fasano*, 276 715 N.Y.S.2d 19 (N.Y. App. Div. 2000) (a woman gave birth to twins and subsequently learned that one child was not biologically related to her because the fertility clinic mistakenly implanted another couple's embryos in her uterus).

24. *Cramblett v. Midwest Sperm Bank LLC*, 230 F. Supp. 3d 865, 867 (N.D. Ill. 2017).

25. *See id.*

26. *See* Complaint at 2–4, *Cramblett v. Midwest Sperm Bank LLC*, No. 2-16-0694, 2017 WL 2800062 (Ill. App. Ct. June 27, 2017).

subsequently contacted Midwest to obtain additional vials of 380's sperm.<sup>27</sup> During this conversation, Midwest informed Cramblett that they had never sent her sperm from 380.<sup>28</sup> Rather, the sperm that Midwest had shipped, and with which Cramblett was inseminated, came from Donor No. 330 (330), an African American man.<sup>29</sup>

Following the birth of her biracial child, Cramblett brought suit against Midwest, filing concurrent actions at the state and federal levels. In her complaints, Cramblett claimed that the sperm bank breached its duty of care by sending Cramblett the wrong sperm, and that, subsequently, Midwest was liable for: (1) wrongful birth;<sup>30</sup> (2) willful and wanton misconduct; and (3) common law negligence.<sup>31</sup> At present, the federal case has been stayed while Cramblett's case is on appeal at the state level.<sup>32</sup>

## 2. *Maheer v. Vaughn, Silverberg & Associates*: Swapping Selected Donors

In 2009, Heidi Maher sought the assistance of Texas Fertility Center and Austin IVF to aid her in becoming pregnant.<sup>33</sup> As part of this process, "Maher purchased sperm from two different donors, one vial from Donor 1999 and two vials from Donor 11076."<sup>34</sup> Maher designated 11076 as a backup, stating that her preference was to conceive a child with 1999's sperm but recognized that because only one vial of his sperm was available, she would be wise to have a substitute.<sup>35</sup> To her delight, Maher successfully conceived using 1999's sperm and gave birth to her first child.<sup>36</sup>

Two years later, Maher returned to Texas Fertility Center and Austin IVF seeking to become pregnant again.<sup>37</sup> Maher desired that her second child be full-siblings with her first, and worked with the clinic to find two other vials of 1999's sperm through the Registration Repository System.<sup>38</sup> In June 2011, Maher underwent an IVF procedure, where the sperm from Donor 1999 was supposed to be used.<sup>39</sup>

Maher became concerned a few weeks later that the IVF treatment failed and contacted Austin IVF to ensure enough of 1999's sperm remained to

27. Nick Viviani, *Ohio Woman Sues Sperm Bank After Racial Mix-Up*, WIBW (Oct. 2, 2014, 3:35 PM), <https://www.wibw.com/home/headlines/Ohio-Woman-Sues-Sperm-Bank-After-Racial-Mix-Up--277937801.html> [<https://perma.cc/H6MH-D9F2>].

28. *See id.*

29. *Cramblett*, 230 F. Supp. at 867.

30. Cramblett alleged wrongful birth in the initial complaint she filed at the state level. *Cramblett*, 2017 WL 2800062, at \*2. Cramblett later amended her state complaint to remove the wrongful birth allegation and did not allege this claim in her federal complaint. *See Cramblett*, 230 F. Supp. 3d at 868.

31. Complaint at 9–11, *Cramblett*, 230 F. Supp. 3d 865.

32. *Cramblett*, 230 F. Supp. 3d at 874.

33. *Maheer v. Vaughn, Silverberg & Assocs., LLP*, 95 F. Supp. 3d 999, 1002 (W.D. Tex. 2015).

34. *Id.*

35. *See id.* at 1002–03.

36. *Id.* at 1003.

37. *Id.*

38. Complaint at 3, *Maheer*, 95 F. Supp. 3d 999 (No. 13-543).

39. *Id.*

perform the procedure again.<sup>40</sup> When the clinic confirmed that they still had two vials of 1999's sperm, Maher asked how that could be possible when one of the vials was used for her most recent round of IVF.<sup>41</sup> After a few hours of phone calls, Maher learned that the clinic had accidentally fertilized her eggs using sperm from 11076—the backup donor.<sup>42</sup>

In her subsequent lawsuit, Maher alleged: (1) negligence per se; (2) negligent hiring, supervision, and/or management; (3) offensive physical contact or battery; and (4) intentional infliction of emotional distress (IIED).<sup>43</sup> Ultimately, Maher's case was dismissed for lack of subject matter jurisdiction.<sup>44</sup>

### 3. *Harnicher v. University of Utah Medical Center*: Mistakenly Used Donor Looked Nothing Like Intended Father

Stephanie and David Harnicher consulted the University of Utah Medical Center to assist with infertility issues.<sup>45</sup> After their initial attempts to conceive using David's sperm were unsuccessful, their doctor suggested the couple try "a procedure known as 'micromanipulation' where[] holes are drilled in the mother's harvested ova to facilitate fertilization."<sup>46</sup> Afterwards, the ova are left in a petri dish with harvested sperm and, once fertilized, are implanted in a woman's uterus.<sup>47</sup> The Harnichers agreed to try micromanipulation with a mixture of David's sperm and the sperm of an anonymous donor.<sup>48</sup>

To choose a donor, the Harnichers reviewed profiles provided by the clinic, and ultimately selected Donor No. 183 (183) because he had similar physical characteristics to David.<sup>49</sup> The sperm mixture was then created and the micromanipulation performed, resulting in the birth of triplets.<sup>50</sup> A few months later, one of the children became ill and required blood tests, leading the Harnichers to discover that the child's blood type did not match David or 183.<sup>51</sup> A subsequent DNA test revealed that the child's father was Donor No. 83, a donor the Harnichers had allegedly selected as a backup to 183, and who looked nothing like David.<sup>52</sup>

The Harnichers brought suit alleging: (1) medical malpractice; and (2) negligent infliction of emotional distress (NIED) "for using sperm from a

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40. *Id.* at 3–4.

41. *Id.*

42. *Id.*

43. *Maher*, 95 F. Supp. 3d at 1003–04.

44. *See id.* at 1012–13.

45. *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 68 (Utah 1998).

46. *Id.*

47. *Id.*

48. *Id.*

49. There was an issue of fact in this case as to whether the Harnichers actually made this donor preference known. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

donor other than the one that the couple had allegedly selected.”<sup>53</sup> The state trial court granted summary judgment in favor of the clinic on the grounds that no physical injury or illness supported a finding of NIED or medical malpractice.<sup>54</sup> The Utah Supreme Court affirmed.<sup>55</sup>

## II. THE ELEMENTS OF EXISTING CAUSES OF ACTION EMPLOYED BY PLAINTIFFS IN ART-RELATED NEGLIGENCE CASES AND PROPOSED ALTERNATIVES

Given ART’s novelty, plaintiffs’ claims often do not fit squarely within one tort. This confusion is illustrated by the cases above; each case alleges a separate tort, even though the plaintiffs suffered similar harms. In an attempt to clarify these disparate theories, this section lays out the torts alleged in *Cramblett*, *Maher*, and *Harnicher*, the Singapore Court of Appeal’s novel “loss of genetic affinity” tort, and the proposed adoption of an all-encompassing tort of “reproductive negligence.”

### A. Existing Tort Theories Relied on by Plaintiffs in ART-Related Negligence Cases

In their respective cases, the plaintiffs in *Cramblett*, *Maher*, and *Harnicher* relied on a number of tort-based causes of action. These claims have been categorized into four groups: (1) wrongful birth, wrongful life, and wrongful conception; (2) emotional distress claims; (3) negligence-based claims; and (4) medical malpractice. The elements of the claims in each of these categories are laid out below.

#### 1. A Trio of Wrongs: Wrongful Birth, Wrongful Life, and Wrongful Conception

In her initial complaint, *Cramblett* relied on the tort theory of “wrongful birth.” Within the U.S. legal framework, wrongful birth is situated as a companion tort to “wrongful life” and “wrongful conception.”<sup>56</sup> While similar in scope, each of these torts addresses a different theory of wrong. For instance, parents bring wrongful birth suits when they believe a defendant’s negligence caused them to give birth to a child with significant genetic abnormalities.<sup>57</sup> Wrongful conception suits are brought when parents contend that “a negligently performed sterilization procedure”

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53. *Id.*

54. *Id.*

55. *Id.* at 72.

56. See MASS. CONTINUING LEG. EDU., INC., CIVIL CAUSES OF ACTION IN MASSACHUSETTS: WRONGFUL BIRTH/CONCEPTION/LIFE 651 (2012).

57. See *Viccaro v. Milunsky*, 551 N.E.2d 8, 9 n.3 (Mass. 1990). While she did not ultimately rely on the claim of “wrongful birth,” and seems to have misconstrued the tort with common law negligence in her initial complaint, *Cramblett*’s even momentary reliance on this tort as a cause of action is egregious—namely, her willingness to conflate the difficulty of raising a child afflicted by serious genetic disorders with the “harm” of raising a biracial child.

occurred, leading to the birth of a healthy, but unplanned for child.<sup>58</sup> And individuals born with severe genetic abnormalities levy allegations of wrongful life when they believe that the defendant's negligence caused them to be born.<sup>59</sup> Damages for these torts may include upkeep costs, which are the costs associated with the challenges of raising the child or, in the case of wrongful life, caring for oneself.<sup>60</sup>

## 2. Emotional Distress Claims: Negligent Infliction of Emotional Distress and Intentional Infliction of Emotional Distress

The plaintiffs in *Maher* and *Harnicher* both relied on emotional distress claims, with *Maher* alleging IIED and the *Harnichers* alleging NIED. These claims are similar in scope because they both require that plaintiffs make a prima facie showing of: (1) extreme emotional distress; and (2) causation between that distress and the defendant's actions. But they differ in the requisite showing of mens rea.<sup>61</sup> IIED requires that the defendant intentionally or recklessly engaged in "extreme and outrageous" conduct, whereas NIED requires merely that the defendant's conduct rose to the level of negligence.<sup>62</sup>

## 3. Shades of Negligence: Common Law Negligence, Negligence Per Se, and Gross Negligence

Many plaintiffs in ART-related negligence cases allege common law negligence in bringing suit against their ART providers, and the plaintiffs in *Maher* and *Cramblett* allege two gradations of common law negligence: negligence per se and gross negligence.

First, *Maher* claimed that the ART clinic's actions amounted to negligence per se. Under the doctrine of negligence per se, "[a]n actor is negligent if, without excuse, the actor violates a statute that is designed to protect against

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58. *Id.*

59. See *Azzolino v. Dingfelder*, 337 S.E.2d 528, 532 (N.C. 1985). Many jurisdictions do not recognize these torts as distinct causes of action, finding instead that these claims fall within the broader framework of negligence. See, e.g., *Philips v. United States*, 508 F. Supp. 537 (D.S.C. 1980); *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000); *Dehn v. Edgcombe*, 834 A.2d 146 (Md. Ct. Spec. App. 2005).

60. See Stephen Todd, *Wrongful Conception, Wrongful Birth and Wrongful Life*, 27 SYDNEY L. REV. 525, 526 (2005).

61. See, e.g., *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir. 2004) ("A cause of action for negligent infliction of emotional distress requires that a plaintiff show '1) serious emotional distress, 2) actually and proximately caused by 3) wrongful conduct 4) by a defendant who should have foreseen that the conduct would cause such distress.'" (quoting *Brooks v. United States*, 29 F. Supp. 2d 613, 618 (N.D. Cal. 1998))); *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998) ("To recover under [IIED], a plaintiff must prove that 1) the defendant acted intentionally or recklessly, 2) the conduct was 'extreme and outrageous,' 3) the actions of the defendant caused the plaintiff emotional distress, and 4) the resulting emotional distress was severe." (citing *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993))).

62. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806, 809 (2007).



the type of accident the actor's conduct causes.”<sup>63</sup> Maher claimed that the clinic's actions violated the Current Good Tissue Practice regulations, which mandate that facilities storing eggs and sperm “must control [their] storage areas and stock room to prevent mix-ups.”<sup>64</sup> Had Maher's case proceeded, she would have needed to show that the mix-up occurred *because of* non-compliance with the statute.

Second, Cramblett alleged that the clinic's actions amounted to gross negligence, which is essentially a heightened form of negligence, requiring that the plaintiff show the negligent party “fail[ed] to exercise[] even slight or scant care of ‘slight diligence.’”<sup>65</sup> Large damage awards, that may include punitive damages, often accompany findings of gross negligence.<sup>66</sup>

#### 4. Medical Malpractice and the Requirement of Physical Injury

The Harnichers alleged medical malpractice. While medical malpractice is highly state-law dependent, it is typically required that the plaintiff show there is a: (1) patient-physician relationship giving rise to a duty of care; (2) violation of the professional standard of care; (3) injury; and (4) causation.<sup>67</sup> Importantly, courts generally only afford relief for physical injury.<sup>68</sup>

#### B. Proposed Alternative Torts for Addressing ART-Related Negligence in the United States

Recognizing the limitations of existing tort theories, courts and scholars have begun considering the legal questions posed by ART-related negligence through new lenses. Two of these new tort-based approaches are discussed in detail here. The first is the “loss of genetic affinity” tort created by the Singapore Court of Appeal, and the second is scholar Dov Fox's proposal for a broad “reproductive negligence” tort.

##### 1. The “Loss of Genetic Affinity”

In the Singapore case, the Singapore Supreme Court awarded damages for the plaintiff-father's loss of genetic affinity with the child. It determined that genetic affinity, and the resulting shared biological experience between parents and their offspring, “carries deep socio-cultural significance[,]” which for some couples is “deeply important to religious and cultural belonging.”<sup>69</sup> Moreover, the Court noted that genetic affinity is not exclusive to the parent-child relationship but rather “affects the parents' relationship

63. RESTATEMENT (THIRD) OF TORTS § 14 (AM. LAW. INST. 2010).

64. Complaint at 5, *Maher v. Vaughn, Silverberg & Assocs., LLP*, 95 F. Supp. 3d 999 (W.D. Tex. 2015) (No. 13-543) (quoting 21 C.F.R. § 1271.260(a)).

65. 57(A) AM. JUR. 2D *Negligence* § 227 (2017).

66. See *Punitive Damages: Available Where There Is Gross Negligence*, 42 ST. JOHN'S L. REV. 137, 137 (1967).

67. See BARRY A. LINDHAL, MODERN TORT LAW: LIABILITY AND LITIGATION § 25:1 (2d ed. 2018).

68. See Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 165–66 (2017).

69. *ACB v. Thomson Med. Pte. Ltd.*, [2017] SCGA 20 ¶ 128.

with their extended relations; the child's relationship with his/her siblings; as well as the family's relationship with the wider community."<sup>70</sup> The Court concluded that the couple's interest in "maintaining the integrity of . . . reproductive plans . . . is one which that law should recognise and protect."<sup>71</sup>

On the issue of damages, the Court concluded that the cost of raising the child, so-called "upkeep damages,"<sup>72</sup> served as a useful benchmark for calculation purposes and awarded the couple 30 percent of the amount initially requested.<sup>73</sup> The Court contended that the substantial award acknowledged and legitimized the harms suffered by the plaintiffs without improperly attempting to place a value on the life of the child.<sup>74</sup>

## 2. Reproductive Negligence

In his article, *Reproductive Negligence*, scholar Dov Fox lays out a framework for addressing an array of harms that plaintiffs may suffer in the field of reproduction. Fox argues that rather than hinge new torts on specific cases, it would be better to adopt a broad framework that enables "citizens to locate their rights when they sense a violation of their interests in procreation."<sup>75</sup> He terms this broad framework "reproductive negligence." Fox believes this broad tort theory—encompassing everything from abortion to IVF to parentage—would give courts more flexibility in addressing reproduction-related harms, lessening the chance that these wrongs would go unaddressed.<sup>76</sup>

Fox argues that incorporation of this tort would accomplish several goals. First, it would underscore the central importance of procreation-based rights, and second, it would "affirm shared values, . . . compensate victims, and . . . deter professional misconduct."<sup>77</sup> Fox also argues this theory's breadth makes it "uniquely equipped to meet emerging challenges about genetic modification that loom on the horizon."<sup>78</sup>

In addressing the issue of damages, Fox suggests a two-step process in which the trier-of-fact first determines the severity of the injury, followed by an analysis of "the extent to which professional wrongdoing is responsible for having caused that injury."<sup>79</sup> After completing this inquiry, Fox proposes that these cases be sorted into three categories: resemblance and race; ability

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70. *Id.*

71. *Id.* ¶ 135.

72. The court stressed that the damage award was not meant to represent upkeep costs, stating, "[l]est there be any confusion, we clarify that an award for loss of genetic affinity and an award of upkeep costs rest on very different theoretical bases. The former is an award of damages for *non-pecuniary* loss as compensation for the *plaintiff-mother's* loss of genetic affinity; the latter is an award for *pecuniary* loss arising from the expenses incurred in relation to the raising of the *child.*" *Id.* ¶ 149.

73. *Id.* ¶¶ 148, 150.

74. *Id.* ¶ 210.

75. Fox, *supra* note 68, at 211.

76. *See id.*

77. *Id.*

78. *Id.* at 241.

79. *Id.* at 226.

and disability; and non-medical trait selection.<sup>80</sup> Under the “resemblance and race” category, Fox argues that situations where a negligent action caused the child’s race to differ from that of the child’s intended parent deserve greater compensation than cases where “inconsequential” phenotypic traits are at issue.<sup>81</sup> Under the “ability and disability” category, Fox argues that selecting against certain categories of disability should be compensated when children are born with the trait that was selected for elimination.<sup>82</sup> And finally, within the third category, Fox argues that non-medical trait selection should also be compensated, albeit to a lesser degree.<sup>83</sup>

### III. NEITHER EXISTING NOR PROPOSED TORT THEORIES ADEQUATELY ENABLE COURTS TO ADDRESS ISSUES OF ART-RELATED NEGLIGENCE

ART-related negligence poses significant challenges for courts due to a dearth of case law and the sensitive ethical and moral questions that these situations raise. As the Singapore Court stressed, damage awards for ART-related negligence tow dangerously close to assigning a value to human life—a moral quagmire that courts must avoid.<sup>84</sup> Allowing these harms to go unaddressed, however, disincentivizes ART clinics from taking necessary precautionary measures to avoid such mishaps, increasing the risk or error. Accordingly, the United States needs a clear framework to enable ART patients to seek redress when their reproductive plans are thwarted by negligence on the part of ART clinics. This section discusses the inadequacies of the existing tort categories for addressing the unique challenges posed by this class of claims, and evaluates whether the novel tort of “loss of genetic affinity” or the broader category of “reproductive negligence” would adequately address these concerns.

#### A. Existing Tort Theories Do Not Adequately Address the Concerns Propagated by ART-Related Negligence

Existing tort theories were not developed to cover the complicated issues posed by ART. The following subsection explains why the torts alleged by the plaintiffs in *Cramblett*, *Maher*, and *Harnicher* were inappropriately alleged.

##### 1. The “Trio of Wrongs” Do Not Apply in Situations Where a Healthy Child Is Born

As illustrated by *Cramblett*, the companion torts of wrongful birth, wrongful life, and wrongful conception do not cover all possible

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80. *See id.* at 231–40.

81. Fox is not concerned with the consequences of this court-sponsored “race-matching” because he believed “racial sorting in family formation will garner broad enough support to sustain public policy objections.” *Id.* at 234.

82. *See id.* at 234–37. This category appears to match the theory behind wrongful birth suits. *See supra* notes 56–60 and accompanying text.

83. *See id.* at 240.

84. *ACB v. Thomson Med. Pte. Ltd.*, [2017] SCGA 20 ¶ 210.

consequences of ART-related negligence. Wrongful birth was developed to cover instances where a child is born with serious genetic defects due to negligent pre-birth screening. Applying this tort to a situation like *Cramblett*, where the plaintiff's predominant concern was the skin color of the child, would force courts to articulate and endorse racial hierarchies by deeming that children born with "unselected" skin tones are effectively born with "serious genetic defects." This result cannot be supported. Accordingly, the base elemental requirements of wrongful birth suits are inappropriate for claims of ART-related negligence in situations where the ART-patient's complaint is that the child does not have the genes that were explicitly selected.

Wrongful conception and wrongful life are similarly ill-suited to encompass these claims. Wrongful conception suits are typically brought following a negligently performed sterilization procedure. But patients in ART-related negligence cases undergo ART procedures in an effort to become pregnant—not to prevent it from happening. Wrongful life is also inapt because it enables individuals born with serious genetic defects to bring suit, not the individual's parents.

Moreover, the terminology employed by these torts is problematic. By deeming the very existence of a human being as "wrongful" courts condone placing a dollar value on the lives of those born outside of the genetic "norm." While this problem exists in current litigation involving these torts, it is even more pronounced when a healthy child is born as courts would be forced to value phenotypic traits like skin or eye color. Accordingly, wrongful birth, wrongful life, and wrongful conception claims are ill-suited to address ART-related negligence.

## 2. Judicial Cabining of Emotional Distress Claims Renders NIED and IIED Inapplicable in ART-Related Negligence Cases

Neither NIED nor IIED can be appropriately applied to ART-related negligence claims. First, IIED requires that the defendant engaged in "extreme and outrageous" conduct, and while there could be situations involving a malicious ART clinic employee, these instances would be few and far between. In the cases described here, the clinic employees simply misread or misheard the instructions as to which sperm vial should be used; conduct which hardly reaches the level of "extreme and outrageous."

The scope of NIED is similarly ill-suited for ART-related negligence cases. NIED has been consciously cabined by courts to the point where it now requires that the defendant's negligent actions caused the plaintiff to either narrowly escape physical injury or bear witness to a traumatic physical injury. Physical injury, whether witnessed or narrowly avoided, plays no role in the claims brought by plaintiffs in these cases. Consequently, allowing an NIED claim to proceed in these cases would inappropriately expand the current scope of the action.

### 3. The Physical Injury Requirements Imposed by Negligence and Medical Malpractice Would Foreclose Plaintiffs' Abilities to Seek Redress

Facially, common law negligence and medical malpractice seem to be the most amenable to adaptation for ART-related negligence claims, but even these torts will be inapplicable in most cases as these torts require a finding of physical injury. Because plaintiffs in these types of cases are not often physically injured, courts are unlikely to find liability under these theories.<sup>85</sup>

Negligence per se is also inapplicable in most ART situations because the United States does not currently have strong regulations surrounding ART,<sup>86</sup> and a showing of negligence per se requires that the negligent action violated a statute or regulation.<sup>87</sup> Given the current lack of political will to regulate this space, it is unlikely that this situation will change anytime soon. Accordingly, the existing tort landscape within the United States does not encompass the harms stemming from ART-related negligence, which leaves plaintiffs without options for redress and disincentivizes ART providers from guarding against these types of mistakes.

#### *B. Novel Approaches to ART-Related Negligence Are Either Over- or Under-Inclusive*

The two novel approaches to ART-related negligence detailed in Part II.B, the “loss of genetic affinity” and the proposal calling for a broad category of “reproductive negligence,” similarly fail to appropriately capture the scope of the harms detailed here. Adoption of the “loss of genetic affinity,” for example, would be too narrow, while “reproductive negligence” would be too broad. This section details why these two approaches lead to a “Goldilocks problem,” and proposes a third pathway that may be “just right.”

##### 1. “Loss of Genetic Affinity” is Too Narrow to Address Even the Cases Discussed Here

The “loss of genetic affinity” applies exclusively to situations in which a child resulting from an ART procedure is not, but was intended to be, genetically related to one or both of the parents opting-into the procedure. While this tort accurately captured the plaintiffs’ injury in the Singapore case, it does not address situations like *Cramblett, Maher, and Harnicher* where the plaintiffs consented to the use of donor sperm. However, the plaintiffs in all of these cases were injured for the same reason—the ART clinic used the wrong sperm. In the Singapore case, the ART clinic used sperm other than the plaintiff’s husband’s, whereas in *Cramblett, Maher, and Harnicher*, the clinic used the sperm from the wrong donor. The identical nature of the negligent action taken by the ART clinics in each of these cases logically implies that the plaintiffs should be able to rely on the same tort category for

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85. This foreclosure also prevents plaintiffs from bringing gross negligence claims, which require a foundational showing of negligence.

86. See Fox, *supra* note 68, at 161–62.

87. See note 63 and accompanying text.

relief. But if the “loss of genetic affinity” tort were adopted by the American legal system, only the plaintiffs like those in the Singapore case would prevail. Accordingly, the “loss of genetic affinity” tort is under-inclusive, failing to capture the array of harms that may arise following a genetic material mix-up.<sup>88</sup> Accordingly, adoption of the narrow tort of “loss of genetic affinity” would not significantly move the needle on courts’ ability to address ART-related negligence.

## 2. The Breadth of “Reproductive Negligence” Undermines Serious Moral and Ethical Concerns Posed by ART-Related Negligence

On the opposite end of the spectrum is Fox’s proposal for a blanket category of “reproductive negligence” that encompasses everything from abortion rights to contraception to ART procedures gone awry. Fox argues this tort would cover all situations in which an individual’s reproductive choices are confounded while maintaining the responsiveness to societal norms that is often associated with common law doctrines.<sup>89</sup>

Courts currently engage in hyper-cautious decision-making in the reproductive realm because of the high probability that any decision rendered will contravene moral or ethical standards. Given the divisiveness of these issues, this caution is appropriate. However, this area lacks a well-developed body of case law, which increases the risk that judges will turn to their personal value systems when evaluating these claims. Fox’s claim that the breadth of the “reproductive negligence” doctrine will confer the benefits associated with common law doctrines is consequently inapt because he fails to recognize that these benefits are derived from the slow, methodical development over time—rather than in the one fell swoop he proposes.

Moreover, Fox’s analysis of damage calculations further highlights the dangers of his approach. Fox’s proposed two-step analysis would allow a trier-of-fact to award higher damages in situations where a child is born with the “wrong” skin tone, as opposed to the “wrong” eye color, on the basis that “race-matching” children and parents is more important than ensuring the parents’ other genetic choices are fulfilled.<sup>90</sup> This scenario would quickly lead to judicially-sanctioned hierarchies of traits where a quick analysis of damage awards would likely reveal that certain traits, for instance white skin, are “worth more” than others. The court system cannot be complicit in endorsing and propagating such a system. Accordingly, Fox’s proposal is inapt.

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88. This incongruence is particularly important in a time when family structures are increasingly diverse. For example, single women and LGBTQ couples rely on donor genetic material to conceive. By limiting recovery for genetic material mix-ups to situations in which the sperm and ova intended for use come from a heterosexual couple, courts would impermissibly favor historically-prescribed reproductive relationships over non-traditional family structures.

89. Fox, *supra* note 68, at 211.

90. *Id.* at 231–34.

*C. Adoption of Negligent Disruption of Genetic Planning Would Give Courts Enough Footing to Begin Building a Common Law Doctrine Capable of Addressing More Reproductive Complex Harms*

While addressing the myriad of harms that fall under the category of “reproductive negligence” is certainly a worthy goal, the complex moral and ethical questions surrounding these issues mandate a slower approach than that advocated by Fox. At the same time, a narrowly construed tort like the “loss of genetic affinity” will not arise often enough to foster change and protect ART patients. For that reason, a middle approach should be taken that enables courts to build a conceptual framework for dealing with sensitive reproduction-related issues, while signaling to the public at large—and consequently legislatures—that norms surrounding these situations must be established.

The harms suffered by plaintiffs in cases like the Singapore case, *Cramblett, Maher*, and *Harnicher* can be captured under the proposed tort category of “negligent disruption of genetic planning” (NDGP). Adoption of this novel tort would enable courts to start addressing issues related to reproductive negligence at a measured pace, and within the confines of a category of claims that does not undermine widely held societal values. To ensure proper doctrinal development, NDGP should be limited to situations where a healthy child is born following an ART procedure but, because of negligence on the part of the ART provider, the child is born without the genes selected by the ART patient. In order to find ART clinic liability under NDGP, a plaintiff would have to establish that: (1) a genetic preference or set of preferences were agreed to between the ART provider and the patient; (2) the ART clinic negligently performed the ART procedure; and (3) this negligence caused the absence of the genetic preferences in the resulting child. These elements adequately cover the cases discussed here, and are specific enough that they would enable courts to begin developing a common law doctrine around ART-related negligence without risking over-stepping judicial bounds.

While the NDGP approach solves the under- and over-inclusiveness problems posed by the proposed adoption of either the “loss of genetic affinity” or “reproductive negligence” torts, the question of damages still remains. Ideally, enough political will could be mustered to impose a damages cap on these claims, thereby limiting the potential for triers-of-fact to award disparate damages based on which traits they personally deem desirable, and avoiding the problem of a judicially-sanctioned hierarchy of physical characteristics. Absent this political will, courts would be wise to use early cases as benchmarks for appropriate compensation to guard against the valuation of, for example, one skin tone over another. By adopting NDGP, courts would be able to address the inadequacies of the current tort landscape in protecting victims of ART-related negligence, and begin a conscientious march towards providing protection for a broader array of reproduction-related harms.

## CONCLUSION

ART use will only continue to grow over the coming decades, and with it, the risk of mistakes. The American tort system must find a way to categorize and compensate individuals whose reproductive choices are thwarted by this negligence. Adopting a tort meant to cover a broad category of reproduction-related wrongs implicates too many moral and ethical questions at once, whereas adoption of a narrow tort that only applies to one-in-a-million cases will not prepare the courts or society for the ever-increasing number of these cases. Accordingly, courts should test the waters of ART-related negligence claims by evaluating harms stemming from NDGP. This approach would put the public on notice that the issues surrounding reproductive negligence need to be addressed without forcing the judiciary to overstep their boundaries.