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Guarantors of Our Genes: Are Egg Donors Liable for Latent Genetic Disease

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Guarantors of Our Genes: Are Egg Donors Liable for Latent Genetic Disease

Abstract

Assisted reproductive technology ("ART"), including egg donation, is changing the topography of the American family. Heated debates and legislative battles over cloning and stem cell research reveal the complexity of the moral, scientific, and legal implications of emerging alternative reproductive methods. In fact, the field of reproductive medicine is the "Wild West" of the healthcare world where technological development is testing the boundaries of science and ethics. The legal and ethical issues intrinsic to the evolution of the egg donation industry are poised to become central topics of public debate as we, as a culture, reevaluate who and what constitutes a "parent" or "child," whether a human egg is a commodity, and what privacy and medical confidentiality mean relative to the right to know one's genetic make-up. Largely unregulated and untested in court, egg donation spawns a multitude of unanswered legal questions that will inevitably begin to emerge sometime very soon. Litigation in this field is looming. For lack of precedent, conclusions are reached by comparison to the analogous legal issues surrounding adoption, surrogacy, sperm donation, and blood donation, as well as the social trends implied by tangential precedent. Section I reviews the very limited history of litigation in which egg donation was a factor, the comparably scarce state and federal regulation of egg donation, and the case and statutory law covering analogous legal topics. Part II.A explores whether liability could attach under a product liability theory while Part II. B examines an egg donor's potential liability for latent genetic disease inherited by the egg donation child under a negligence theory. Part III offers recommendations for regulating egg donation in order to prevent suits similar to those described in the comment. The comment argues that the burden of care should rest on the fertility clinic doctors and the egg donation agencies to properly screen egg donors.

Keywords

Assisted reproductive technology, Egg donation, Latent genetic disease liability

**GUARANTORS OF OUR GENES:
ARE EGG DONORS LIABLE FOR LATENT
GENETIC DISEASE?**

SURIYA E.P. JAYANTI*

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INTRODUCTION

Assisted reproductive technology (“ART”),¹ including egg donation,² is changing the topography of the American family.³ Heated debates and legislative battles over cloning and stem cell research reveal the complexity of the moral, scientific, and legal implications of emerging alternative reproductive methods.⁴ In fact, the field of reproductive medicine is the “Wild West” of the healthcare world where technological development is testing the boundaries of science and ethics.⁵

1. ART encompasses all asexual human reproduction, including in vitro fertilization (“IVF”), sperm donation and artificial insemination (when coupled with female fertility treatment), and others. It generally involves surgical removal of eggs from the ovaries of an intending mother (the woman intending to raise an ART child, *see infra* note 15 and accompanying text), or an egg donor, fertilization outside the intending mother or surrogate’s womb with the intending father or sperm donor’s sperm, and the implantation of the fertilized embryo(s) back into the womb of the intending mother, or gestational surrogate, who then carries the fetus to term. *See infra* note 2 (discussing egg donation procedures and IVF). *See generally* AM. SOC’Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 3–17 (2003) (explaining in vitro fertilization and other forms of ART that have become accepted medical treatments for infertility).

A “traditional surrogacy” involves the insemination of a surrogate mother, not the intending mother, using the surrogate’s own eggs to conceive a child for the intending mother. A “gestational surrogate,” however, has no genetic relationship to the child she births. Her pregnancy results from an in vitro fertilization implantation using the intending mother or egg donor’s fertilized eggs. A surrogate surrenders the child to the intending mother at its birth. *See* Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R.5TH 567, 574 (2000) (distinguishing the two types of surrogacy).

2. Human egg donation—also known as oocyte, female gamete, ovum, and ova donation—involves the maturation of eggs in the donor using fertility drugs. The eggs are then surgically removed from the donor’s ovaries through vaginal aspiration, then fertilized in a lab, and resulting embryos are inserted into the recipient or intending mother’s womb. The IVF procedure is this “test-tube” fertilization and subsequent implantation of the eggs into the intending mother or surrogate. Egg donation is thus the substitution of a donor’s eggs for the intending mother’s eggs in an otherwise standard IVF procedure. *See* AM. SOC’Y FOR REPROD. MED., THIRD PARTY REPRODUCTION (SPERM, EGG AND EMBRYO DONATION AND SURROGACY): A GUIDE FOR PATIENTS 3–9 (2006) (explaining the processes of egg donation and embryo transfer in greater detail).

3. *See* Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of the Family*, 32 CONN. L. REV. 523, 563 (2000) (discussing the conflict between traditional notions of family and the realities of modern families, which are frequently formed by elective reproduction).

4. *See, e.g.*, Rachel Benson Gold, *Embryonic Stem Cell Research: Old Controversy; New Debate*, GUTTMACHER REP. ON PUB. POL’Y, Oct. 2004, at 4 (noting that President George W. Bush’s move to cut federal funding for embryonic stem cell research was a compromise that left every side frustrated).

5. *See* LIZA MUNDY, EVERYTHING CONCEIVABLE, at xviii (Alfred A. Knopf 2007) (revealing that “[t]here is some truth” to the popular notion that those working in

Our society is still in the adolescence—or even infancy—of ART. The legal and ethical issues intrinsic to the evolution of the egg donation industry are poised to become central topics of public debate as we, as a culture, reevaluate who and what constitutes a “parent” or “child,”⁶ whether a human egg is a commodity,⁷ and what privacy and medical confidentiality mean relative to the right to know one’s genetic make-up.⁸ Of course, arguments over reproduction are not new for a country more than arguably still reeling from *Roe v. Wade*,⁹ but the violent battles to be fought over emerging reproductive technology may well overshadow those accompanying the abortion issue.¹⁰

Largely unregulated and untested in court,¹¹ egg donation spawns a multitude of unanswered legal questions that will inevitably begin to emerge sometime very soon. Litigation in this field is looming. The numbers alone make conflict inevitable: at least 8,075 egg donation procedures resulting in live births were completed in the 1990s, and those children are now at least preteens, if not young adults.¹² As the

the field of ART are “rogue scientists and multimillionaire doctors willing to stuff pretty much anything into a woman’s expensively prepped womb.”)

6. For a well articulated discussion of some of the parentage questions looming larger as ART becomes more common, see *id.* at 20–21, listing some of the relevant questions:

How much do genetic progenitors matter? Does a child who grows up father-free—or any child conceived through donated sperm or egg—have the right, or the need, to know the identity of the donor who helped bring him into being? . . . Do they need to know the truth? Do they need to know the donor?

7. See *infra* Part IIA (analyzing whether human eggs should be considered commodities for the purpose of applying principles of product liability, tort and contract law).

8. See Janet Leach Richards & Sheryl Wolf, *Medical Confidentiality and Disclosure of Paternity*, 48 S.D. L. REV. 409, 427 (2003) (recognizing that “[t]he enactment of legislation permitting adult adoptees to open their sealed adoption records indicates a trend towards acknowledgement of a person’s right to know their biological make-up”). See generally Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150 (1999) (considering the passage of statutes in several states that allow adult adoptees to obtain adoption records upon request and without a judicial hearing).

9. 410 U.S. 113 (1973) (controversially legalizing abortion).

10. See MUNDY, *supra* note 5, at xiv–xx, 19–23 (contrasting infertility treatment with abortion because “the spectacle of someone trying to have a child can be even more inflammatory than the spectacle of someone trying not to have one”).

11. See *infra* Section I.B–C (examining the judicial history relating to and regulation of egg donation).

12. The Centers for Disease Control and Prevention began publishing annual reports in 1996, detailing the success rates of various ART procedures, under the mandate of the Fertility Clinic Success Rate and Certification Act of 1992. 42 U.S.C. § 201 (1992). This statute requires fertility clinics to report ART data, which is accumulated, analyzed and published in annual reports. 42 U.S.C. §§ 263a-1, 263a-5. The number of live births from egg donation procedures is not well-documented; the ART reports start at 1995 and not all fertility clinics have reported their success

new generation of children conceived with eggs donated by strangers¹³ matures, adult-onset diseases will begin to emerge and cases will almost undoubtedly reach the courts seeking resolution of who should bear the burden and the blame, and what degree of care is owed to people who may be genetically related to you, but are most definitely not in your family.¹⁴ Distinct from malpractice suits against fertility doctors, egg donors will face potential liability for imperfections passed through their genes because some parents of egg donation children, known as intending or recipient parents,¹⁵ will feel cheated by the donors from whom they “bought” eggs at great expense.¹⁶ The children themselves will want and may need to know

rates. See *infra* Section I.C (discussing the lack of government regulation of fertility clinics). Nonetheless, even these approximations serve to demonstrate the increasing importance of ART, and egg donation specifically. For further discussion of ART procedures, including success rates and other statistics, see Assisted Reproductive Technology: All Reports, <http://www.cdc.gov/ART/ARTReports.htm> (last visited Oct. 3, 2008).

13. Not all ovum donors are—or remain—anonymous, but the vast majority choose not meet the recipient(s). E.g., Andrew W. Vorzimer, *The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surrogacy Contract*, 21 WHITTIER L. REV. 415, 427 (1999) (estimating that ninety percent of egg donors are effectively anonymous). For a brief explanation of why donors and recipients tend to prefer anonymity in egg donation transactions, see Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 116–17 (examining the complications interpersonal relationships can create in such situations).

For a fascinating discussion of one woman’s extensive experience as an egg donor, see generally JULIA DEREK, *CONFESSIONS OF A SERIAL EGG DONOR* (2004), in which the author, who donated her eggs a total of twelve times, describes her motivations, experiences and the psychological care required for her to distance herself from any children born to recipient couples from her eggs.

14. By comparison, the first “generation” of children conceived through sperm donation and artificial insemination are now reaching adulthood, and a significant number are demanding information about their genetic fathers. See Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine To Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 679 (2004) (arguing that legislative reforms granting children conceived with anonymously donated sperm the right to access their genetic father’s medical information should be extended to children born using anonymously donated embryos).

15. An intending couple or parent is the party that initiates the creation of a child, including through surrogacy or egg donation, with the intention of assuming legal responsibility for the child and raising it as their own. See generally Campbell, *supra* note 1, at 567 (discussing the development of the “intent test” for determining parentage in the era of ART).

16. Typical egg donation fees range between \$5,000 and \$7,000, but the full cost of fertility treatment with IVF and donated eggs ranges between \$10,000 and at least \$30,000. See *infra* Part II.A (exploring the potential liability arising out of the sizable and controversial compensation ovum “donors” receive); see also Pamela D. Bridgewater, *Reconstructing Rationality: Towards a Critical Economic Theory of Reproduction*, 56 EMORY L.J. 1215, 1225 (2007) (noting the “astronomical” out-of-pocket costs associated with egg donation, “rang[ing] from \$7,000 to \$20,000 per cycle”).

who they are genetically.¹⁷ They may feel they should have been warned, however many years have passed.

The issues raised in egg donor tort liability cases will be of first impression in all jurisdictions, and they will include questions about the rights and responsibilities egg donors owe their genetic offspring. At least some of these cases will likely make it to trial. In anticipation, this Comment seeks prospectively to answer the question of whether an egg donor owes a continuing duty to warn such genetic offspring if, after the birth of these children, she discovers she has a hereditary genetic disease that may have passed down through her eggs.¹⁸ This hypothetical—but inevitable—situation involves a child with a genetic disease who is born from the egg of a donor who could not reasonably have known she carried a predisposition to a genetic disease until after the egg donation process.¹⁹ In short, the question is whether egg donors are subject to a continuing duty to warn.

17. See, e.g., Jennifer A. Baines, Note, *Gamete Donors and Mistaken Identities: The Importance of Genetic Awareness and Proposals Favoring Donor Identity Disclosure for Children Born from Gamete Donations in the United States*, 45 FAM. CT. REV. 116, 118–19 (2007) (asserting the medical and psychological reasons why a child born through sperm, egg or embryo donation should have access to his genetic history); Pino D’Orazio, Note, *Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination*, 2 J. HEALTH & BIOMEDICAL L. 249, 253 (2006) (arguing for children’s access to their sperm donor’s genetic history because of the importance of having such information when making health decisions); Amy Shelf, Note, *A Need To Know Basis: Record Keeping, Information Access, and the Uniform Status of Children of Assisted Conception Act*, 51 HASTINGS L.J. 1047, 1047–48 (2000) (arguing for an offspring-oriented approach, based on the Uniform Status of Children of Assisted Conception Act, for regulating access to donors’ genetic information by children conceived through ART).

18. For a compendious discussion of genetic diseases, transmission and testing, see Sonia M. Suter, Note, *Whose Genes Are These Anyway?: Familial Conflicts over Access to Genetic Information*, 91 MICH. L. REV. 1854, 1886–87 (1993) (analyzing the competing interests that may arise when a family member is diagnosed with a genetic disease, because the other family members may or may not want to be informed, but noting that the patient himself should not lose his right to medical confidentiality).

19. The hypothetical, prospective problem analyzed in this Comment can be expressed in narrative form:

In 2001, a twenty year-old girl in apparently perfect health entered into an anonymous egg donation contract with a recipient couple who, after eight years of marriage, had failed to conceive. As per the egg donation agency’s procedure, the girl was matched with the couple after providing multiple photographs of herself and her immediate family, submitting a personal statement, completing a psychological profiling test, and compiling brief medical histories of herself and her parents, siblings and grandparents. The donor and the recipient couple chose never to meet, and the contract’s provisions reinforced this choice. The donor then underwent a gynecological exam, and blood tests for sexually transmitted diseases, but no tests were conducted to discover latent genetic disorders. The donor’s “donation cycle” and surgery were successful, and nine months later, the wife bore a child conceived with one of the donated eggs and her own husband’s sperm. The egg donor was never informed of the successful birth.

The answer, developed in detail below, is that it is unlikely liability would attach to the egg donor for latent genetic disorders she passed down to the egg donation child, either under a product liability or negligence theory, though the possibility warrants preemptive regulation. For lack of precedent, conclusions are reached by comparison to the analogous legal issues surrounding adoption, surrogacy, sperm donation, and blood donation, as well as the social trends implied by tangential precedent. Section I reviews the very limited history of litigation in which egg donation was a factor, the comparably scarce state and federal regulation of egg donation, and the case and statutory law covering analogous legal topics.

Part II.A explores whether liability could attach under a product liability theory.²⁰ Egg donation transactions are generally considered renditions of services, not sales of goods,²¹ but the sizeable compensation egg “donors” receive makes this classification controversial.²² Even so, the impossibility of guaranteeing genetic

In 2009, eight years later, the former egg donor is diagnosed with adult-onset diabetes (type II diabetes), a condition she was genetically predisposed toward developing. Her children will inherit this predisposition. The donor never notifies the recipient couple because she has no knowledge of or relationship with them. The same is true of the egg donation child, whom she does not know even exists. Fifteen years after this diagnosis, the child, born to the recipient couple with the donor’s egg, is now twenty-three and is diagnosed with the same disease. After contacting the egg donation agency and fertility clinic that helped bring him to life, the child eventually learns of the egg donor’s diabetes. The child sues his genetic mother, the donor, claiming she breached a duty to warn him of the inheritable disease that he could otherwise have prevented.

20. Cf. Megan D. McIntyre, Comment, *The Potential for Products Liability Actions when Artificial Insemination by an Anonymous Donor Produces Children with Genetic Defects*, 98 DICK. L. REV. 519, 519 (1993) (analyzing whether sperm donors are liable under a product liability theory for genetic defects passed to their genetic offspring through their anonymously donated sperm).

21. But see Jay A. Soled, *The Sale of Donors’ Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919, 919 (1999) (arguing that human eggs are commodities, so payment to egg donors is for purchase of property rather than services rendered, and thus that egg donation transactions fit squarely within the definition of “capital asset” under the Internal Revenue Code).

22. See *infra* Part II.A (analyzing whether egg donation could fall under a product liability scheme based on the tremendous amounts of money intending parents pay donors). Compare Andrew Wancata, Note, *No Value for a Pound of Flesh: Extending Market-Inalienability of the Human Body*, 18 J.L. & HEALTH 199, 221 (2003–2004) (“[S]perm and ova have become market commodities, reaching bids from prospective purchasers as high as \$15,000 and \$50,000, respectively.”), with Ethics Comm. of the Am. Soc’y for Reprod. Med., *ASRM Ethics Committee Report: Financial Compensation of Oocyte Donors*, 8 FERTILITY & STERILITY 305, 305–09 (2007) [hereinafter Ethics Comm., *Compensation*] (describing the variety of compensation schemes, and recognizing that the pain, discomfort and time commitment experienced by egg donors justify and render ethical any compensation under \$5,000, but nothing over \$10,000).

outcomes and the public policy against “baby-selling”²³ will likely prevent successful application of a product liability theory to a civil suit against an egg donor for failing to warn.

Part II.B examines an egg donor’s potential liability for latent genetic disease inherited by the egg donation child under a negligence theory. While genetic “parentage” may well create a legally relevant relationship between the donor and the child, both the law’s preference for traditional family structures²⁴ and the best interests of the child²⁵ suggest the donor should not be held to an ongoing duty to warn.

Part III offers recommendations for regulating egg donation in order to prevent suits similar to the one discussed here. Currently, the industry is almost completely unregulated and the level of donor screening is frequently low.²⁶ Instead of imposing liability on the egg donors, this Comment argues the burden of care should rest on the fertility clinic doctors and the egg donation agencies to properly screen egg donors.

23. See *infra* Part II.A (defining “baby-selling” as the feared commodification of children). This prohibition on selling babies is a broad bar on profiting from the legal transfer of children, encompassing adoption, surrogacy and other activities. See, e.g., *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (explaining that traditional surrogacy agreements violate the public policy against selling children because payment is exchanged for ownership of the child). Kentucky’s statute is illustrative:

A person, agency, institution, or intermediary shall not be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. . . . Contracts or agreements entered into in violation of this subsection shall be void.

KY. REV. STAT. ANN. § 199.590(4) (West 2007).

24. See generally Dolgin, *supra* note 3, at 527–42 (arguing that case law reveals the law’s general preference for maintaining traditional family structures, even if doing so requires subjugation of traditional biological—birth—notions of motherhood).

25. This standard is used in adoption proceedings and surrogacy custody suits. See, e.g., *Baby M*, 537 A.2d at 1246–48 (invalidating a surrogacy contract because a child’s best interests are not served by prenatal determination of custody).

26. Although egg donors are generally tested for communicable and sexually transmitted diseases through blood tests and ultrasound examinations, genetic testing to uncover latent diseases is rare. See ADVISORY GROUP ON ASSISTED REPROD. TECHS., N.Y. STATE TASK FORCE ON LIFE & LAW, THINKING OF BECOMING AN EGG DONOR? GET THE FACTS BEFORE YOU DECIDE! 8–9 (2002), available at http://www.health.state.ny.us/community/reproductive_health/infertility/docs/1127.pdf [hereinafter ADVISORY GROUP, GET THE FACTS] (explaining the industry standards for egg donor screening in New York State, indicating that most tests are discretionary, and noting that egg donation agencies rely a great deal on the prospective donor’s answers to general family medical history questions). These basic tests are the minimum required by the Food and Drug Administration. 21 C.F.R. §§ 1271.75, 1271.80 (2007).

I. BACKGROUND: EGG DONATION AT LAW AND RELATED LEGAL DEVELOPMENTS

A. *A Brief History of Egg Donation*

The first successful in vitro fertilization (“IVF”)²⁷ procedure was completed in 1978.²⁸ Almost thirty years later, in 2006, the world’s three millionth IVF child was born.²⁹ Egg donation is the substitution of a different woman’s eggs to be fertilized and implanted in the intending mother, and is thus an outgrowth of IVF.³⁰ Based on data from the eighty-nine percent of registered American fertility clinics that reported their 2004 data, one percent of all children born in the United States in 2004 were conceived through ART, totaling 49,458 ART children born,³¹ of which 6,653 were conceived with donated eggs.³²

More recent statistics are not yet compiled, but with one in seven U.S. women predicted to experience infertility,³³ the number of children conceived through egg donation is likely to continue growing at startling rates. As our society struggles to keep pace with reproductive technology, our courts will increasingly be called upon to resolve emerging disputes.

B. *Egg Donation in the Courts*

Egg donation, despite its increasing prevalence, has rarely featured in court except in a few custody disputes arising out of breaches of gestational surrogacy contracts. Seminally, in 1993, the California Supreme Court wrestled with alternative reproduction in *Johnson v. Calvert*,³⁴ in which it confronted the question of whether a genetic

27. See *supra* notes 1–2 (describing the role of IVF in ART).

28. MUNDY, *supra* note 5, at 7.

29. Press Release, Eur. Soc’y of Human Reprod. & Embryology, Three Million Babies Born Using Assisted Reproductive Technologies (2006) (on file with the American University Law Review).

30. See *supra* note 2 (describing the egg donation process in detail).

31. Victoria Clay Wright, Jeani Change, Gary Jeng, Michael Chen & Maurizio Macaluso, *Assisted Reproductive Technology Surveillance—United States, 2004*, MORBIDITY & MORTALITY WKLY. REP., June 8, 2007, at 1, available at <http://www.cdc.gov/MMWR/preview/mmwrhtml/ss5606a1.htm>.

32. *Id.*

33. See CTRS. FOR DISEASE CONTROL & PREVENTION, 1996 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS I (1998) [hereinafter CDC, SUCCESS RATES] (finding that fifteen percent of U.S. women of childbearing age had received infertility treatment as of 1996). *But see* MUNDY, *supra* note 5, at 12 (“About 12 percent of women—7.3 million in 2002—find themselves unable to conceive or bring to term children they want.”).

34. 851 P.2d 776 (Cal. 1993).

relationship trumps a biological one.³⁵ The court was asked whether a gestational surrogate is the “natural mother” of a child conceived with the egg and sperm of the intending parents, a situation in which the child is genetically unrelated to its birth mother.³⁶ Shortly before the birth, the gestational surrogate threatened to keep the child if she was not paid the remaining balance owed to her on the surrogacy contract.³⁷ Both sides then filed suits seeking recognition of their lawful parentage over the unborn child.³⁸

Finding for the intending parents, the court refused to hold the child had two mothers,³⁹ though both women had a cognizable claim to motherhood.⁴⁰ It also denied that the Uniform Parentage Act (“UPA”) of 1973,⁴¹ enacted to replace the traditional notion of illegitimacy with a legal definition of “parent” based on the parent-child relationship, was not intended to govern surrogacy disputes.⁴² So, looking to the parental relationships at play, the court held that when consanguinity and giving birth “do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother.”⁴³

In a footnote, the *Johnson* court applied its holding to egg donation situations, concluding that “in a true ‘egg donation’ situation, where a woman gestates and gives birth to a child formed from the egg of

35. *Id.* (“Anna [the gestational surrogate], of course, predicates her claim of maternity on the fact that she gave birth to the child. The Calverts [the intending parents] contend that Crispina’s genetic relationship to the child establishes that she is his mother.”). A biological relationship is established by birth, whereas genes establish a genetic relationship. *See id.* at 778 (explaining that while Anna bore the child, blood tests excluded her as the genetic mother).

36. *Id.* at 777–78.

37. *Id.* at 778.

38. *Id.*

39. *Id.* at 781 n.8 (noting that the gestational surrogate had little contact with the family, and declining to recognize parental rights for the “third party” gestational surrogate because to recognize such parental rights “would diminish Crispina [Calvert]’s role as a mother”).

40. *Id.* at 781–82 (interpreting the Uniform Parentage Act of 1973 to recognize both birth and blood relationships as proof of motherhood, and reasoning that “[b]ecause two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties’ intentions as manifested in the surrogacy agreement”).

41. UNIF. PARENTAGE ACT §§ 1–30 (1973) (amended 2002), 9B U.L.A. 386–505 (2001).

42. *Johnson*, 851 P.2d at 779.

43. *Id.* at 782. *But see* Jennifer S. Hendricks, *Essentially A Mother*, 13 WM. & MARY J. WOMEN & L. 429, 429 (2007) (arguing that defining motherhood by contract or genetics denigrates gestation, and that a gestation-oriented approach to determining maternity would produce better results and be more in line with constitutional precedent).

another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.”⁴⁴

Directly ruling on parentage in an egg donation case in *McDonald v. McDonald*,⁴⁵ a New York appellate court reached the conclusion proposed by the *Johnson* footnote.⁴⁶ There, a father sought sole custody of IVF twins conceived with his sperm and anonymously donated eggs, and birthed by his soon-to-be ex-wife.⁴⁷ He argued that he was the only parent with a genetic relationship to the children.⁴⁸ The court struggled to decide whether the wife, who was both the intending and biological mother but who had no genetic relationship to the children, could be a mother under New York law.⁴⁹ Relying on the reasoning in *Johnson*, the court found the wife to be the lawful mother.⁵⁰

More recently, both the California and United States Supreme Courts denied certiorari in *In re Marriage of Buzzanca*,⁵¹ in which the child was the product of both anonymous sperm and egg donors, and was implanted as an IVF embryo into a third-party gestational surrogate pursuant to the contract between the surrogate and the intending parents.⁵² The intending parents’ marriage dissolved while the surrogate was pregnant, and the husband sought to evade child

44. 851 P.2d at 782 n.10. For an example of a non-“true ‘egg donation’ situation,” see *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005), which held:

A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights.

Id. at 682.

For a critique of that holding, see Heather A. Crews, Recent Development, *Women Be Warned, Egg Donation Isn't All It's Cracked Up To Be: The Copulation of Science and the Courts Makes Multiple Mommies*, 7 N.C. J.L. & TECH. 141 (2005). Crews argues the distinction between an egg donor and a “provider” of eggs is

arbitrary and weakens the protections given to egg donors and recipients through legislation [It] allows not only the opportunity for future donors to assert parental rights over children created with their eggs, but also allows individuals who conceive with donated eggs to impart maternal responsibilities to the donor above and beyond those agreed on at the time of conception.

Id. at 154.

45. 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).

46. *Id.* at 480 (“[W]e have a true ‘egg donation’ situation, and we find the reasoning of the Supreme Court of California on this issue to be persuasive.”).

47. *Id.* at 478–79.

48. *Id.* at 479.

49. *Id.* at 478.

50. *Id.* at 478, 480.

51. 72 Cal. Rptr. 2d 280 (Ct. App. 1998), *review denied*, No. S069696, 1998 Cal. LEXIS 3830 (Cal. June 10, 1998), *cert. denied*, 447 U.S. 902 (1980).

52. *Id.* at 282.

support payments by arguing that he was not the father.⁵³ The trial court concluded that the baby had no lawful parents because no party was sufficiently related to it.⁵⁴ The appellate court found that conclusion “extraordinary.”⁵⁵ In reversing, it held that the child would never have been conceived but for the intent of the intending parents, who were thus the lawful parents, despite their lack of either a genetic or biological relationship to the child.⁵⁶

Similar cases have been litigated,⁵⁷ as have medical malpractice suits against fertility doctors and clinics,⁵⁸ but an egg donor’s liability for failing to warn of subsequently discovered genetic disease has yet to be heard in court.

C. Regulation of Egg Donation

The legal parameters of assisted reproduction present a vast and unexplored frontier into which only the model Uniform Parentage Act, discussed below, has ventured.⁵⁹ Egg donation is generally unregulated,⁶⁰ and the liability of egg donors themselves is completely unregulated.⁶¹ There is no relevant federal regulation,⁶² and the few

53. *Id.* at 282–83.

54. *Id.* at 282.

55. *Id.*

56. *Id.*

57. See generally Campbell, *supra* note 1 (discussing cases in which determinations of parentage are complicated by assisted reproductive technology, and specifically surrogacy).

58. See, e.g., John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 7 (2004) (discussing the possible physical harm caused to children conceived and born through ART, due to increased likelihood of twins and other multiples, potential transmission of diseases from donors, and complications from low birth weight); Fred Norton, Note, *Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages*, 74 N.Y.U. L. REV. 793, 795 (1999) (describing the psychological injury caused when gametes are negligently used to fertilize or impregnate the wrong eggs or woman or are stolen and fraudulently used for that purpose).

59. UNIF. PARENTAGE ACT §§ 1–30 (1973) (amended 2002), 9B U.L.A. 386–505 (2001).

60. See Alexander N. Hecht, Comment and Note, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL’Y 227, 227–29 (2001) (exploring the lack of regulation of the fertility industry, underlying reasons for that dearth, and the need for legislation to address the issue).

61. See, e.g., J.F. v. D.B., 66 Pa. D. & C.4th 1, 4 n.4 (C.P. Erie County 2004) (noting that most state legislatures have not addressed egg donation because it is a relatively new procedure).

62. See Laura M. Katers, Comment, *Arguing the “Obvious” in Wisconsin: Why State Regulation of Assisted Reproductive Technology Has Not Come To Pass, and How It Should*, 2000 WIS. L. REV. 441, 443–44 (describing the general lack of comprehensive regulation, including at the federal level, of ART). The only federal regulation directly affecting the egg donation industry is the Fertility Clinic Success Rate and Certification Act of 1992, but it only requires medical clinics engaged in the business of ART to annually report their success rates per each type of ART procedure to the

states with statutes even mentioning egg donation—California, Florida, Illinois, Louisiana, and New York—only regulate artificial insemination, sperm donation, or surrogacy agreements.⁶³

Adopted in pertinent part in eighteen states, the model Uniform Parentage Act of 1973, promulgated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), proposed a modern approach to legitimacy and paternity based upon parent-child relationships instead of the marital status of the parents.⁶⁴ The 1973 UPA suggested evidentiary standards for determining paternity, but it did not address issues arising from egg donation.⁶⁵

Centers for Disease Control. Fertility Clinic Success Rate and Certification Act, 42 U.S.C. §§ 263a-1 to -7 (1992).

The United States does prohibit payment for human organs under the National Organ Transplant Act, which levies sanctions upon any person who knowingly acquires, receives or transfers a human organ for payment. 42 U.S.C. §§ 273–274(e) (2006). However, “organ” is narrowly defined and does not include gametes, so the prohibition on buying and selling human organs does not apply to human eggs. *See, e.g.*, Margaret R. Sobota, Note, *The Price of Life: \$50,000 for an Egg, Why Not \$1,500 for a Kidney? An Argument To Establish a Market for Organ Procurement Similar to the Current Market for Human Egg Procurement*, 82 WASH. U. L.Q. 1225, 1243 n.135 (2004) (discussing the disparate legal treatment of egg donation compared to organ donation and advocating for a free market approach to regulating organ donation because of the likelihood of increased social and economic efficiency and utility).

63. CAL. FAM. CODE § 7613 (West 2007); FLA. STAT. § 63.213 (2003); 750 ILL. COMP. STAT. 47/1 (2003); N.Y. DOM. REL. LAW §§ 121–124 (McKinney 2008).

Louisiana is the only state in America that directly regulates egg donation, rather than the parentage of children resulting from ART procedures. LA. REV. STAT. ANN. § 9:122 (2000). The Louisiana statute flatly prohibits “[t]he sale of a human ovum, fertilized human ovum, or human embryo.” *Id.* The underlying policy is recognition of embryos as people and the establishment of appropriate guidelines for their handling and storage. *See* John Bologna Krentel, *The Louisiana “Human Embryo” Statute Revisited: Reasonable Recognition and Protection for the In Vitro Fertilized Ovum*, 45 LOY. L. REV. 239, 241 (1999) (arguing that the Louisiana statute is groundbreaking and should be followed by other states because of its recognition of the human life in embryos). No prosecutions under the statute have been filed. Sobota, *supra* note 62, at 1243.

64. *See* UNIF. PARENTAGE ACT § 2 (1973) (amended 2002), 9B U.L.A. 390 (2001) (“The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”). Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming have each adopted the 1973 UPA in pertinent part. 9B Uniform Laws Annotated 377 tbl. (master ed., West Publ’g Co. 2001) (1968); *see also* Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else’s Basket: Inserting Uniformity into the Uniform Parentage Act’s Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671, 684–91 (2007) (categorizing the five types of state statutes governing sperm and egg donation, and including Kansas, Missouri, Connecticut, and Idaho as states that follow the 1973 UPA, at least in effect).

65. *See, e.g.*, Horstmeyer, *supra* note 64, at 685 (noting that the UPA of 1973 “fail[s] to address the problem of egg donation, likely because [it was] enacted at a time when the technology for most egg donation assisted reproductive procedures was not then feasible”).

Recognizing the inadequacies of the 1973 UPA, the NCCUSL revised it in 2002 to include provisions covering egg and sperm donation situations.⁶⁶ The new, gender-neutral UPA provides:

If a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.⁶⁷

In its own words, “the new [model] Act makes a policy decision to clearly exclude the egg donor from claiming maternity.”⁶⁸

However, though it is significantly better suited to govern the intricacies of modern reproduction, even the revised UPA has little practical use in litigation in which egg donation is a factor. Only four states have adopted the revision,⁶⁹ and it lacks a provision discussing the liability of donors who transmit diseases, viral or genetic, either through fraud or negligence, or because they are uninformed. As such, the UPA leaves unanswered the question of an egg donor’s liability toward her genetic offspring.

D. Related Developments at Law

As so little concerning egg donation has been determined, which direction the law will take as it struggles with these myriad new legal issues can only be analyzed by analogy to tangential and related issues. The most useful of these relevant fields are surrogacy, adoption, and sperm and blood donation. The law’s handling of each, in turn, may foreshadow comparable treatment of cases involving egg donors’ liability concerning the genetic make-up of their eggs.

66. UNIF. PARENTAGE ACT arts. 7–8 (2000) (amended 2002), 9B U.L.A. 355–70 (2001 & Supp. 2008), *available at* <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf> (reproducing the full text of the updated 2002 UPA, including commentary by the issuing NCCUSL).

67. UNIF. PARENTAGE ACT § 702 cmt. (2000) (amended 2002), 9B U.L.A. 355 (2001). The UPA explicitly states: “A donor is not a parent of a child conceived by means of assisted reproduction.” *Id.* § 702, 9B U.L.A. 355.

68. UNIF. PARENTAGE ACT art. 7 cmt. (2000) (amended 2002), 9B U.L.A. 51 (Supp. 2008).

69. See Meghan Anderson, Comment and Casenote, *K.M. v. E.G.: Blurring the Lines of Parentage in the Modern Courts*, 75 U. CIN. L. REV. 275, 279 n.41 (noting that only Delaware, Texas, Washington and Wyoming have adopted the revised version). Cf. Horstmeyer, *supra* note 64, at 687 (comparing the 2002 UPA with a Colorado statute).

1. *Surrogacy: Regulation and case law*

Surrogacy necessarily involves multiple “mothers,” so it is useful for comparison with egg donation, which also muddles legal parentage.⁷⁰ Surrogacy is the most regulated ART, in part because of the fallout from *In re Baby M*,⁷¹ an infamous 1988 custody dispute arising from a traditional surrogacy agreement (the surrogate was artificially inseminated by the intending husband’s sperm).⁷² For \$10,000, the surrogate was to surrender the child at his birth to the intending parents, but she refused to relinquish the baby.⁷³ The New Jersey Supreme Court, considering the child’s best interests, granted custody to the intending parents, but invalidated the surrogacy contract as a violation of the public policy prohibition against baby-selling, codified in all adoption statutes.⁷⁴ In accord, some states still consider paid surrogacy agreements to be criminal.⁷⁵ Other states require that surrogacy contracts, though lawful, be careful not to cross the line into baby-selling.⁷⁶

In *Stiver v. Parker*,⁷⁷ the United States Court of Appeals for the Sixth Circuit held that the relationship between a surrogacy broker (which is akin to an egg donation agency) and the surrogate is sufficiently “special” to create an affirmative duty to protect the children born through the process.⁷⁸ Accidentally, the surrogacy agency’s doctors impregnated the surrogate with her own husband’s sperm instead of the intending father’s, and the child was born with hereditary cytomegalic inclusion disease.⁷⁹ The surrogate sued the agency for

70. However, for analysis of an egg donor’s liability for failing to warn her genetic offspring, surrogacy is only marginally useful because gestational surrogates have no genetic relationship to children they birth, so there is no possibility of genetic disease transferring to offspring.

71. 537 A.2d 1227 (N.J. 1988).

72. See, e.g., Katers, *supra* note 62, at 454–59 (discussing Wisconsin’s legislative reaction to *In re Baby M*, 537 A.2d 1227 (N.J. 1988)).

73. *Baby M*, 537 A.2d at 1227, 1235–37.

74. *Id.* at 1240. See generally Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 67–70 (analyzing the market mechanisms that brought the infertile intending parents and the surrogate together).

75. E.g., N.Y. DOM. REL. LAW §§ 122–123 (McKinney 2008) (“Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.”).

76. E.g., FLA. STAT. § 63.213 (2003) (“A preplanned adoption agreement shall not contain any provision . . . [t]o reduce any amount paid to the volunteer mother if the child is stillborn or is born alive but impaired, or to provide for the payment of a supplement or bonus for any reason.”).

77. 975 F.2d 261 (6th Cir. 1992) (finding that a special relationship giving rise to a fiduciary duty of care exists between a surrogacy broker and the intending mother, husband and intended child).

78. *Id.* at 272.

79. *Id.* at 263.

negligence, and the Sixth Circuit held the agency did owe the surrogate a duty of care because of the special relationship the surrogacy process created between the parties.⁸⁰ The factors giving rise to an affirmative duty of care included the agency's commercial profit, its doctors and lawyers' professional status and control of contract terms, and the fact that the other parties entrusted themselves into the surrogacy agency's care.⁸¹

2. *Adoption: Regulation and case law*

Adoption is useful for comparison with egg donation because an adopted child, or adoptee, is genetically related to the "donating" parent, but the intending parent assumes all legal and parental rights and duties.⁸² Unlike egg donation, adoption is fully regulated by statutes that generally prioritize the best interests of the child by clearly establishing the adopter as the legal parent in order to create the stability and security of a normal parent-child relationship.⁸³

Notwithstanding the severance of all legal relationship between an adoptee and his birth parents, many states recognize an adoptee's need for access to his adoption records in certain situations, provided the birth parent's privacy is protected.⁸⁴ Different mechanisms exist for balancing these two conflicting interests, including mutual consent registries, confidential intermediary systems, and open

80. *Id.* at 272.

81. *Id.* at 271–72.

82. *E.g.*, OHIO REV. CODE ANN. § 3107.15 (LexisNexis 2007) (mandating the complete termination of all legal relationships between the adoptee's biological parents and the intending, adopting parents).

83. *See, e.g.*, Manning, *supra* note 14, at 711–16 (discussing two requirements for adoption: parents seeking to adopt must be fit and the adoptee is entitled to stability through clear legal parentage determinations); *see also* Michelle L. Anderson, Comment, *Are You My Mommy?: A Call for Regulation of Embryo Donation*, 35 CAP. U. L. REV. 589, 610–11 (2006) (describing the concern for the adoptee's "[r]ight to a [c]lear [d]etermination of [p]arental [r]ights and [r]esponsibilities" manifested in adoption statutes through the severance of all legal relationship between the adoptee and his biological parents, and arguing that such a clear determination is necessary in assisted reproduction situations).

For example, the Georgia adoption statute provides:

[A]doption terminates all legal relationships between the adopted individual and his relatives, including his parent, so that the adopted individual thereafter is a stranger to his former relatives for all purposes . . . [and] creates the relationship of parent and child between each petitioner and the adopted individual, as if the adopted individual were a child of biological issue of that petitioner. The adopted individual shall enjoy every right and privilege of a biological child of that petitioner; shall be deemed a biological child of that petitioner

GA. CODE ANN. § 19-8-19(a)(1)–(2) (2007).

84. *See* Richards & Wolf, *supra* note 8, at 424 n.70 (listing various examples of state statutes permitting and restricting adoptees' access to the medical information of their biological parents).

records.⁸⁵ However, only four states allow an adoptee, upon reaching majority, to access his adoption records upon request without a judicial hearing.⁸⁶ More commonly, an adoptee must show good cause to be granted such access.⁸⁷ For example, a Missouri appellate court refused to open the adoption records for an adult plaintiff suffering from leukemia who sought a match for a bone marrow transplant.⁸⁸ Despite the urgency of his need, the court denied him access to his biological father's identity and medical information because the improbability of finding a viable match outweighed any benefit to be gained from disclosure.⁸⁹

The liability of adoption agencies, which serve an equivalent function to egg donation agencies, has been considered, and many statutes and courts indemnify them except in instances of gross negligence or fraudulent misrepresentation.⁹⁰ In keeping with this policy, in *Olson v. Children's Home Society of California*,⁹¹ biological parents who had given up their first son for adoption unsuccessfully sued the adoption agency for negligence after their second son died

85. See Cahn & Singer, *supra* note 8, at 162–68 (describing the various approaches used by states to open adoption records and the medical information of biological parents for adoptees).

86. ALASKA STAT. § 18.50.500 (2007); OR. REV. STAT. § 109.502 (2005); TENN. CODE ANN. § 36-1-127 (2007); see also Cahn & Singer, *supra* note 8, at 167 (Alaska and Kansas).

87. See Richards & Wolf, *supra* note 8, at 424 n.70 (listing various examples of state statutes permitting and restricting adoptees' access to the medical information of their biological parents, including provisions requiring necessity or show of good cause).

88. *In re George*, 630 S.W.2d 614 (Mo. Ct. App. 1982).

89. *Id.* at 621–23 (balancing “the factual need and the *policy* against disclosure”); see also *Sandra L.G. v. Bouchey*, 576 N.Y.S.2d 767, 769 (N.Y. Fam. Ct. 1991) (refraining from reaching past legislative guidelines to open adoption records because “it is of great concern . . . that any exercise of discretion beyond that mandated by the Legislature will be governed by clear, consistent and effective principles. They must be clear and consistent so that attorneys and others involved in the adoption process can well explain the rules governing confidentiality to the parents and subsequently to the children over the course of a lifetime, if necessary. They must be effective so that any disclosure will pose only a demonstrable physical benefit to the person seeking access as opposed to gratuitous obtaining of emotionally charged information”).

90. Compare *Burr v. Bd. of County Comm'rs*, 491 N.E.2d 1101 (Ohio 1986) (allowing recovery by adopting parents when the adoption agency fraudulently misrepresented the adoptee's health), with *MacMath v. Me. Adoption Placement Servs.*, 635 A.2d 359 (Me. 1993) (refusing to hold adoption agencies to be guarantors of the adoptee's health absent a fiduciary duty to disclose information to the intending parents), and *Ann Marie N. v. City of S.F.*, 2001 Cal. App. Unpub. LEXIS 2463, at *1 (Cal. Ct. App. 2001) (holding for the adoption agency against the adopting mother of an HIV positive baby because, in California, adoption agencies are not liable for mere negligence in providing health information about prospective adoptees).

91. 252 Cal. Rptr. 11 (Ct. App. 1988).

of a genetic disease.⁹² The parents claimed the agency was responsible for the death because it had not informed them their first son died of the same disease after being adopted, and, had they known, they could have timely treated the second son or not conceived again.⁹³ In rejecting the parents' argument, the court found no special relationship between the agency and the biological parents that would create an ongoing duty to warn.⁹⁴

3. *Sperm Donation: Regulation and case law*

Given simple but fundamental similarities between sperm and egg donation, the former offers a very comparable template for analyzing egg donation.⁹⁵ The sperm donation-artificial insemination process is the creation of a child using the gamete of a paid anonymous donor who is chosen on the basis of his photo and a description of his general interests and health, and with little regulatory oversight.⁹⁶

A sperm donor generally has no relationship at all with children conceived artificially with his sperm,⁹⁷ and in some states he is barred by statute from asserting any parental rights.⁹⁸ However, though still a small minority trend, the status of sperm donors is becoming

92. *Id.* at 11.

93. *Id.*

94. *Id.* at 13.

95. The most important difference between egg donation and sperm donation is the very invasive procedures involved in the former compared to the minute time and effort demands of the latter. This is an important difference when determining the liability of the sperm donor compared to the egg donor, because a sperm donor does not develop a doctor-patient relationship with fertility doctors or donation agencies and is thus not entitled to medical confidentiality. *See infra* Part II.B.

96. *See, e.g.,* Katers, *supra* note 62, at 452–54 (discussing the limit of Wisconsin's regulation of artificial insemination and possible reasons why no further legislation has been enacted).

97. *But cf. In re R.C.*, 775 P.2d 27 (Colo. 1989) (reversing the lower court's decision against the biological father of a child conceived through sperm donation who sought parental rights over the child, because the father and mother knew each other and might have agreed not to extinguish the sperm donor's parental rights, and therefore the donor might be the lawful father of the child, despite Colorado's artificial insemination statute).

98. A typical example of state regulation of sperm donation is New Jersey's adoption of the UPA:

Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception

N.J. STAT. ANN. § 9:17-44(b) (West 2007); *see, e.g.,* CAL. FAM. CODE § 7613(a) (Deering 2007) (adopting the UPA's presumption of paternity in favor of the husband when the wife is inseminated with a third party's donated sperm, if the insemination is conducted with the husband's consent and through a licensed physician).

murkier, both socially⁹⁹ and legally, as a few recent cases have imposed child support payments on sperm donors who were known to the women artificially inseminated with their sperm.¹⁰⁰

Relevant for analysis of the hypothetical egg donation case at issue in this Comment, there has been limited litigation over liability for transmission of genetic disorders to children conceived with donated sperm.¹⁰¹ In *Johnson v. California Cryobank, Inc.*,¹⁰² an appellate court adjudicated a negligence and fraud suit against a sperm bank that misrepresented to recipient parents the known medical history of a sperm donor who had an extensive family history of genetic kidney disease.¹⁰³ The resulting child had acute kidney disease that her mother could not have transmitted to her.¹⁰⁴ The suit became a battle over donor anonymity¹⁰⁵ when the parents tried to obtain proof of the

99. Socially, mechanisms are developing to allow children conceived with donated sperm (or eggs) to connect with their genetic siblings or parents. Cf. Amy Harmon, *Sperm Donor Father Ends His Anonymity*, N.Y. TIMES, Feb. 14, 2007, at A18 (describing one former sperm donor's decision to find and meet his genetic offspring, through the Donor Sibling Registry, after reading a newspaper article about the children's search for each other). Founded in 2001, The Donor Sibling Registry "assist[s] individuals conceived as a result of sperm, egg or embryo donation that are seeking to make mutually desired contact with others with whom they share genetic ties." The Donor Sibling Registry, <http://www.donorsiblingregistry.com/about.php> (last visited Oct. 3, 2008). The site describes its mission as facilitating connections in "unchartered territory." The Donor Sibling Registry, *Frequently Asked Questions*, <http://www.donorsiblingregistry.com/FaqPage.php> (last visited Oct. 3, 2008).

100. See, e.g., *Ferguson v. McKiernan*, 855 A.2d 121 (Pa. Super. Ct. 2004) (holding a former lover of the mother who agreed to donate sperm to her to be the lawful father, and thus responsible for child support, even though the mother had promised he would have no parental duties or responsibilities and lied about being married, because the best interests of the children make such a promise unenforceable), *vacated*, 940 A.2d 1236 (Pa. 2007). See generally Karen De Haan, Note, *Whose Child Am I?: A Look at How Consent Affects a Husband's Obligation To Support a Child Conceived Through Heterologous Artificial Insemination*, 37 BRANDEIS L.J. 809, 809 (1998) (discussing the regulation of husbands' duties owed to the children of their wives who are conceived through artificial insemination using a third party's sperm, and are thus genetically and biologically unrelated to the husband); Jason Miller, *Sperm Donor Indispensable Party To Support Proceedings*, 9 LAW J. 2, 2 (2007) (discussing *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007), which found that a sperm donor was indispensable to a proceeding to determine the custody of children born to a lesbian couple who conceived through artificial insemination with his sperm).

101. E.g., *Johnson v. Cal. Cryobank, Inc.*, 95 Cal. Rptr. 2d 864 (Ct. App. 2000) (ordering disclosure by a sperm bank of a sperm donor's medical records, but keeping his identity protected, in a suit by the parents of a child conceived with the sperm of the anonymous donor who had a family history of kidney disease that was not disclosed by the sperm bank).

102. *Id.*

103. *Id.* at 867.

104. *Id.* at 868.

105. The issue of donor anonymity, with respect to egg donation contracts that sever all legal and social ties between the donor and any resulting children, is discussed *infra* Part II.B.

sperm bank's fraudulent misrepresentation.¹⁰⁶ The court found the doctor-patient privilege inapplicable to the sperm donor's situation because, as the donor's only contact with the sperm bank was to sell his sperm, he was not a "patient."¹⁰⁷ The court further found the absolute anonymity agreement signed by all parties to be unenforceable as a matter of public policy because sperm donation children might need access to their medical history in order to treat medical conditions.¹⁰⁸

4. *Blood Donation: Regulation and case law*

Comparable to genetic disease passed through donated eggs, blood donors can carry viruses that are transmitted to patients through blood transfusions.¹⁰⁹ Since the outbreak of AIDS,¹¹⁰ this risk has received considerable attention.¹¹¹

Blood is an exception to a prohibition on the sale of human organs and tissue.¹¹² The underlying policy is protection of the great national need for blood for medical use.¹¹³ To protect blood supply, most states have "blood shield statutes," enacted in response to suits brought by patients infected with contaminated blood, that classify

106. *Cryobank*, 95 Cal. Rptr. 2d at 869-70.

107. *Id.* at 872.

108. *Id.* at 875.

109. *See, e.g., McKee v. Cutter Labs., Inc.*, 866 F.2d 219 (6th Cir. 1989) (upholding summary judgment for the defendant blood product manufacturer whose product infected the plaintiff with AIDS, because Kentucky's blood shield statute barred strict liability claims, and proof of compliance with industry standards of care was sufficient evidence of non-negligence).

110. The Human Immunodeficiency Virus ("HIV") causes AIDS (the Acquired Immune Deficiency Syndrome). *See* Kevin Hopkins, *Blood, Sweat, and Tears: Toward a New Paradigm for Protecting Donor Privacy*, 7 VA. J. SOC. POL'Y & L. 141, 142-50 (2000) (discussing the competing interests of blood donor privacy, recovery by blood recipients for infections caused by contaminated blood, and society's interest in maintaining an adequate blood supply, and arguing in favor of protecting the privacy interest of blood donors now that adequate screening technology is available).

111. *See id.* (noting the fact that few AIDS-related cases result from blood transfusions, but discussing reasons why this risk remains a legitimate concern).

112. For example, Georgia's statute makes it unlawful for any person or entity "to buy or sell, to offer to buy or sell, or to assist . . . buying or selling . . . a human body or any part of a human body or . . . a human fetus or any part thereof." GA. CODE ANN. § 16-12-160(a) (2007). However, "[t]he purchase or sale of whole blood, blood plasma, blood products, blood derivatives, other self-replicating body fluids, or hair" is exempted. *Id.* § 16-12-160(b)(1).

113. National Blood Policy, 39 Fed. Reg. 32,702 (Sept. 10, 1974); *see, e.g.,* *Murphy v. Squibb & Sons, Inc.*, 710 P.2d 247, 252 (Cal. 1985) (contrasting the public policy of maintaining an adequate national blood supply, which underlies California's prohibition on classification of a sale or transfer of blood as a sale of goods in order to prevent strict liability suits if that blood is contaminated, with the sale of a pharmaceutical product).

blood donation as a service, not a sale of a good.¹¹⁴ This insulates blood donors, hospitals and blood banks from strict liability and invocation of the Uniform Commercial Code's ("UCC") warranties that attach to sales of goods.¹¹⁵ Thus, these statutes restrict the liability of donors, banks and hospitals to negligence or fraud.¹¹⁶ Many of the blood shield statutes are not limited in scope to blood, but include all human tissue in their wording, even if that tissue is paid for; a typical statute does not mention human eggs, but refers to human "tissue," which arguably includes gametes.¹¹⁷

In suits against blood donors themselves for negligence, the donor's privacy and medical confidentiality interests are weighed against the public policy of maintaining an adequate blood supply.¹¹⁸ Generally, the public interest is deemed to outweigh an individual donor's privacy interest.¹¹⁹ In many states, statutes authorize disclosure of a blood donor's identity for good cause.¹²⁰ Separate

114. See Kathryn W. Pieplow, Comment, *AIDS, Blood Banks, and the Courts: The Legal Response to Transfusion-Acquired Disease*, 38 S.D. L. REV. 609, 622-24 (1993) (detailing the blood shield statutes enacted in response to negligence and strict liability suits brought by patients infected with AIDS through blood transfusions); see also *Murphy*, 710 P.2d at 252 (noting that the purpose of blood shield statutes is to "avoid application of the doctrine of strict liability" to individuals involved in the production, use, or sale of blood plasma, "thereby promoting the constant availability of an adequate supply of blood"). "In keeping with this purpose, it is held that a hospital using blood in a transfusion, a blood bank supplying the blood and a manufacturer of blood plasma selling it for transfusion are immune from strict liability because the Legislature has declared . . . that they are providing a service rather than making a sale." *Id.* (citations omitted).

115. See, e.g., McIntyre, *supra* note 20, at 529. (explaining that under strict liability precautions taken by the seller would be irrelevant, as the sole determinant of liability would be the quality of the blood).

116. See, e.g., 745 ILL. COMP. STAT. ANN. 40/2 (1993). (declaring that distributing blood in IL is a service and precluding the application of strict tort liability).

117. Illinois's blood shield statute is typical and broadly worded:

[U]sing human whole blood, plasma, blood products, blood derivatives and products, corneas, bones, or organs or other human tissue for the purpose of injecting, transfusing or transplanting any of them in the human body is declared for purposes of liability in tort or contract to be the rendition of a service by every person, firm or corporation participating therein, whether or not any remuneration is paid therefor, and is declared not to be a sale of any such items and no warranties of any kind . . . nor strict tort liability shall be applicable thereto

Id.

118. E.g., *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 374 (Wash. 1991) (applying a balancing test that requires the court to "identify and weigh the comparative and compelling public and private interests of plaintiff, defendant and the donor"). See generally *Hopkins*, *supra* note 110, at 153 (promoting donors' privacy interest now that adequate screening technology exists).

119. *Hopkins*, *supra* note 110, at 156-57.

120. E.g., N.J. STAT. ANN. § 26:5C-9 (West 2007) ("The record of a person who has or is suspected of having AIDS or HIV infection may be disclosed by an order of a court of competent jurisdiction which is granted pursuant to an application showing good cause therefor.").

actions against donors themselves are allowed in instances of misrepresentation, fraud or negligence.¹²¹ As the Sixth Circuit explains:

The donor's privacy interests are substantial, as is the public interest in maintaining a safe and adequate blood supply. However . . . [the plaintiffs'] right to litigate their claims against the donor substantially outweighs the competing interests, especially . . . [if] there is significant evidence to suggest that the donor's conduct was suspect.¹²²

This balancing of interests foreshadows the probable balancing of the similar interests in play in egg donation situations.

II. ANALYSIS: IS AN EGG DONOR LIABLE FOR HER GENETIC DEFECTS?

The two legal theories under which an egg donor might be held liable for transmitting latent genetic disorders to an egg donation child, and both fall within the purview of tort law: product liability and negligence. In Part II, they are discussed in turn, and this Comment concludes that while courts could potentially impose liability under either, the inability to know of genetic predispositions, the public policy implications of recognizing an egg donor as a genetic parent, and the best interests of an egg donation child all support *not* holding the egg donor liable.

A. Human Eggs as Commodities

If human eggs are considered products, egg donors' future liability as producers and sellers of these "marketable goods" may potentially permit actions in tort for failure to warn of "product" defects, namely, a disease carried in their genes.¹²³ Whether human eggs are marketable goods has not been determined in America,¹²⁴ but such a

121. See, e.g., *Coleman v. Am. Red Cross*, 1994 Fed. App. 0156P (6th Cir.), 23 F.3d 1091 (allowing discovery of a donor's identity and medical information when the plaintiff is pursuing a separate claim against the blood donor when the blood donor intentionally misrepresented his risk status prior to repeatedly donating).

122. *Id.* at 1096.

123. RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 402A (1965).

124. See, e.g., Ethics Comm., *Compensation*, *supra* note 22, at 306 (noting that, although some believe that "payment for oocytes implies that they are property or commodities, and thus devalues human life[,] . . . [c]ompensation based on a reasonable assessment of the time, inconvenience, and discomfort associated with oocyte retrieval can and should be distinguished from payment for the oocytes themselves").

By comparison, several western countries, including England and Italy, have banned all payment for human eggs to avoid the ethical quagmires created by "selling" body parts or babies. See Human Fertilisation and Embryology Act, 1990, c. 37, § 12 (Eng.) (prohibiting payment to egg donors other than compensation for actual expenses); see also Law 40/2004 of Feb. 19, 2004, 2004 Gazz. Uff. No. 45, Feb.

determination will have broad implications in a case in which a genetic disease is passed from an egg donor, unknowingly but without negligence, to an egg donation child. Thus, the threshold question in an analysis of the liability of an egg donor is whether eggs are commodities.¹²⁵ While treatment of human eggs as marketable goods—such that egg donors, as vendors, could be held to be guarantors of their genes—is unlikely because of the public policy implications, the tremendous payments donors receive from intending parents leave the possibility open. Classification of eggs as products would allow an egg donation recipient to bring an action against the donor under a product liability theory, discussed in Part II.A.1. It is also conceivable that a recipient parent might argue a breach of implied warranties under the UCC, analyzed in Part II.A.3.

A small-sample American Society for Reproductive Medicine (“ASRM”) survey of egg donation found that the average compensation given to donors is \$5,204, though payment can be considerably higher.¹²⁶ In fact, egg donation received its first major mass media attention in 1999 when an anonymous couple ran an advertisement in elite college newspapers offering \$50,000 for the eggs of a tall woman with SAT scores over 1400.¹²⁷ As many commented at the time, most egg “donors” are perhaps more accurately referred to as “vendors.”¹²⁸ However, others, including the

24, 2004 (restricting ART such that Italy has one of the least permissive approaches to ART of any western country, in part because it defines “embryo” from the moment of fertilization).

125. The essential question is whether one can have a property interest in one’s own body or body part. This debate has been raging for centuries. Compare Donna M. Gitter, *Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants’ Property Rights in Their Biological Material*, 61 WASH. & LEE L. REV. 257 (2004) (critiquing the market-inalienability approach to proprietary interests in human tissue, arguing for recognition of property rights in one’s own body, and proposing a hybrid approach combining the donative and liability-based systems), with Wancata, *supra* note 22, at 201–12 (discussing this debate, analyzing the relevant case law, and arguing in favor of the inalienability of the human body and its component parts).

126. Am. Soc’y for Reprod. Med., Highlights from the 62nd Annual Meeting of the American Society for Reproductive Medicine (2006) [hereinafter ASRM, Highlights]; see also Claudia Kalb, *Baby Boom: The \$50,000 Egg*, NEWSWEEK, Mar. 15, 1999, at 64 (reporting that some highly sought donors—“intelligent, athletic” individuals at Ivy League colleges—have been offered up to \$50,000 in compensation).

127. Kalb, *supra* note 126, at 64 ; Gina Kolata, *\$50,000 Offered to Tall, Smart Egg Donor*, N.Y. TIMES, Mar. 3, 1999, at A10; Irene Sege, *A \$50,000 Dilemma on Campus*, BOSTON GLOBE, Mar. 6, 1999, § 1, at 1.

128. Kalb, *supra* note 126, at 64.

ASRM, argue compensation should be given for a donor's time, discomfort and effort.¹²⁹

Is the donor paid for her time and hassle or for her eggs themselves? There is support for both arguments. In favor of classification as payment for services rendered, most fertility clinics define their fees according to a variety of services, not products.¹³⁰ Also, an egg donor is usually paid regardless of the number or quality of eggs extracted from her, though an unsuccessful cycle (not resulting in conception) sometimes results in a reduction in the amount paid.¹³¹ ASRM guidelines require that payment not be contingent upon successful egg retrieval or the quantity or quality of the eggs.¹³² So, unlike surrogacy agreements, in which money is arguably exchanged for an actual child,¹³³ payment for human eggs is not contingent upon the birth of a child.¹³⁴ Therefore, it probably does not violate the public policy against baby-selling.

On the other hand, because egg donation payments are arguably made for the eggs themselves, rather than the service rendered, courts might find human eggs to be marketable products. In support

129. See Ethics Comm., *Compensation*, *supra* note 22, at 305 (asserting that compensation for egg donation is ethically justified, and "should be structured to acknowledge the time, inconvenience, and discomfort associated with screening, ovarian stimulation, and oocyte retrieval," but that compensation "should not vary according to the planned use of the oocytes, the number or quality of oocytes retrieved, the number or outcome of prior donation cycles, or the donor's ethnic or other personal characteristics," and it should not exceed \$10,000).

130. For example, a Chicago-based fertility clinic explains on its website how its \$23,200 IVF fees break down: \$13,050 is the agency's fee for matching couples with donors, \$2,800 is an administrative donation cycle fee, \$350 is for extra medical insurance, \$7,000 is the donor's compensation, and \$3,000 is for the donor's medical treatment. Advanced Fertility Center of Chicago, Egg Donation Cost, <http://www.advancedfertility.com/eggdonationcost.htm> (last visited Nov. 11, 2007).

131. See, e.g., ADVISORY GROUP, GET THE FACTS, *supra* note 26, at 21–22 (noting that "some (but not all) programs provide partial compensation" when a cycle fails to result in conception).

132. Ethics Comm., *Compensation*, *supra* note 22, at 305.

133. Compare Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL'Y 91 (2002) (comparing the permissibility of gestational surrogacy payment under Israeli, American and Jewish law, and concluding these arrangements subjugate the interests of the surrogate under any system), with Jennifer L. Watson, Note and Comment, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529 (2007) (arguing for payment of gestational surrogates).

134. Similarly, surrogacy contracts are void because they violate the strong public policy against baby-selling if payment is in any way contingent upon or variable according to the successful birth of the anticipated child. For example, Florida's adoption code includes the following surrogacy provision: "A preplanned adoption agreement shall not contain any provision . . . [t]o reduce any amount paid to the volunteer mother if the child is stillborn or is born alive but impaired, or to provide for the payment of a supplement or bonus for any reason." FLA. STAT. § 63.213(3)(a) (2007).

of this side of the argument, the more desirable a donor's genes are—manifested in attractiveness, athleticism, SAT scores, et cetera—the more she receives in payment for donating eggs at many agencies.¹³⁵ This suggests payment is actually for the genes themselves, rather than the services of the girl from whom they are harvested.

The position of state legislatures concerning similar classifications is informative regarding how states may handle classification of egg donation. Surrogacy contracts are unlawful in more than a few states because of the feared commodification of children (baby-selling).¹³⁶ Louisiana, uniquely, takes the extreme approach that even the sale of unfertilized gametes is baby-selling, and thus has banned all payment for eggs.¹³⁷ In keeping, in adoption, any payment to assume legal control of a child is clearly unlawful.¹³⁸ Blood shield statutes, on the other hand, expressly classify blood as non-products.¹³⁹ However, sperm is readily bought and sold, as indicated by some courts' refusal to consider sperm donors to be patients of the clinics they transact with.¹⁴⁰ Sperm also falls easily within the definition of "regenerative" tissue, which is exempted from the ban on the sale of body parts in several states.¹⁴¹

By comparison, egg donation is clearly not analogous to surrogacy or adoption—an unfertilized human egg is not a child, nor is conception guaranteed from mere completion of a donation cycle. Eggs are also unlike sperm because they are not regenerative human

135. See, e.g., Terri Yablonsky Stat, *'Premium' Human Eggs Unsettling Practitioners*, CHI. TRIB., Aug. 6, 2006, at Q8 (describing the egg donation industry's reaction to the ethical issues raised by some women's eggs being considered more valuable than others based on education, proven fertility, or ethnicity).

136. See *supra* Part I.D.1 (discussing a New Jersey Supreme Court decision invalidating a surrogacy contract based on that state's public policy against baby-selling).

137. See *supra* Part I.C (noting that, while various states regulate artificial insemination, sperm donation, and surrogacy, only Louisiana directly regulates egg donation).

138. See *supra* Part I.D.2 (discussing legal regulation of adoption).

139. See *supra* Part I.D.4 (examining blood shield statutes, and noting that many of them are not limited to blood, but rather apply to all human tissue, which arguably includes human gametes).

140. E.g., *Johnson v. Cal. Cryobank, Inc.*, 95 Cal. Rptr. 2d 864 (Ct. App. 2000). See generally Wancata, *supra* note 22, at 220–23 (using economic theory to explain the discrepancy between the compensation paid for the sale of sperm and the amount given to egg donors, and noting women have a fixed number of eggs, whereas sperm regenerates).

141. See, e.g., CAL. PENAL CODE § 367f(c)(1) (West 1999) (Defining "human organ" as including "a human kidney, liver, heart, lung, pancreas, or any other human organ or nonrenewable or nonregenerative tissue except plasma and sperm").

tissue.¹⁴² The same is true of a comparison with blood. Despite the market incentives created by such high compensation, human eggs are arguably included in the broad “human tissue” language¹⁴³ of many blood shield statutes, which bar classification of blood donation as a sale of goods.¹⁴⁴

However, though availability of human eggs is emotionally important for some, it is not medically imperative for many,¹⁴⁵ so the public policy underlying blood shield statutes is inapplicable to egg donation. Some courts refuse to extend the statutes’ protections to cover defendants not specifically intended by the enacting legislatures, which were exclusively concerned with blood supply.¹⁴⁶ It follows that, though some blood shield statutes could be interpreted to classify egg donation as a service, given the public policy impetus for their enactment, courts may well refuse to interpret these perceived “luxury”¹⁴⁷ goods to be within a legislature’s intended scope.¹⁴⁸

Thus, unless legislatures act to classify egg donation as a non-sale rendition of a service, it is likely that a recipient parent or egg donation child will at least try to seek recovery under a product liability or UCC theory for a disease inherited from the egg donor. On balance, as will be discussed below, egg donation will probably be treated as a service by a reviewing court on policy grounds, denying use of either theory against an egg donor for failure to warn.

142. See Wancata, *supra* note 22, at 200 (contrasting between the nearly “limitless supply” of sperm and the “restricted . . . supply” of eggs).

143. See *supra* Part I.D.4 (describing blood shield statutes). See generally Pieplow, *supra* note 114, at 622–25 (discussing three different types of blood shield statutes enacted in different jurisdictions).

144. Though inclusion of human eggs within the scope of blood shield statutes has not been thoroughly analyzed to date, the analogous issue of sperm’s potential inclusion is analyzed in McIntyre, *supra* note 20, at 529–30 & nn.57–59, in which the public policy behind blood shield statutes is applied to an analysis of sperm donation liability under product liability theories.

145. See, e.g., Lynette Reid et al., *Compensation for Gamete Donation: The Analogy with Jury Duty*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 35, 37–38 (2007) (rejecting the notion that egg donation is a public service by comparing it to jury duty).

146. See, e.g., *J.K.B. v. Armour Pharm. Co.*, 660 N.E.2d 602 (Ind. Ct. App. 1996) (denying the defendant pharmaceutical company protection under Indiana’s blood shield statute because the statute’s enumeration of banks, storage facilities, and hospitals implied the legislature intentionally omitted pharmaceutical companies from the statute’s protective scope when interpreted using standard rules of statutory construction).

147. Because of the tremendous costs associated with IVF and egg donation, totaling thousands of dollars, these ARTs are usually not accessible to less than wealthy individuals or couples.

148. McIntyre makes this argument for semen’s exclusion from blood shield statutes’ coverage. McIntyre, *supra* note 20, at 530.

1. *Product liability*

If eggs are commodities, then egg donors may be liable for defects just as a manufacturer is subject to product liability. Product liability places the burden of liability on a product's manufacturer as a matter of public policy; producers are in the best position to discover dangerous defects in their products, so the burden of protection, including a duty to warn, is better placed on their shoulders than upon those of the uninformed consumer.¹⁴⁹ Producers and sellers are also better equipped to bear the cost of discovering and fixing defects, as well as the cost of remedying injuries caused by their products.¹⁵⁰

To succeed under a traditional product liability theory, a consumer must show he was injured by a product defect present at the time of manufacture, about which he was not adequately warned, regardless of any care exercised by the manufacturer.¹⁵¹ As the Restatement (Third) of Torts explains, someone "engaged [commercially] in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm . . .

149. See RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 402A cmt. c (1998) ("[J]ustification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.").

150. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962) (justifying product liability as a means "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves").

151. See ME. REV. STAT. ANN. tit. 14, § 221 (2004). Maine's products liability statute is a typical example:

One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.; see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998) (defining several categories of product defect); 63 AM. JUR. 2D PROD. LIAB. § 517 (2007) (providing an overview of strict liability for product defects).

caused by the defect.”¹⁵² The Third Restatement includes a product liability provision that extends the duty to warn to cover defects the seller learns of after the sale.¹⁵³ However, the seller must or should know of the risk, otherwise a duty to warn cannot exist,¹⁵⁴ and the seller must be able to identify those to whom a warning should be given.¹⁵⁵ Also, the risk of harm must be sufficiently great to justify imposing a duty to warn on the seller, the warning must be feasible and able to be acted upon, and a consumer must be reasonably assumed not to otherwise know of the risk.¹⁵⁶ One limitation is that the producer must be commercially engaged in the regular activity of making or selling the product in question.¹⁵⁷ Importantly, because the contracts governing egg donation sever all rights and responsibilities between the donor and eggs,¹⁵⁸ privity of contract between the buyer and seller is not required.¹⁵⁹

If human eggs are products, and thus donors are producers, the elements of a failure to warn *prima facie* case are likely met.¹⁶⁰ Egg donors do produce eggs, which they sell to recipients for foreseeable fertility purposes. If those eggs carry a genetic disease, then they are defective for their intended purpose, and the danger is a potentially crippling illness or even death. Of course, this is also true of sperm and blood donation, though a product liability action has never

152. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998).

153. *Id.* § 10.

154. *Id.* § 10 cmt. c.

155. *Id.* § 10(b).

156. *Id.*

157. *Id.* § 2 cmt. a; *see also* RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 402A cmt. f (1965) (noting that strict liability for harms caused by a defective product only applies to a person “engaged in the business of selling” the product).

158. The contractual provisions severing any relationship between the egg donor and the eggs harvested from her are critical components of the egg donation process that serve to protect the recipient parents and any ensuing egg donation children from future conflicts of parentage. *See infra* Part II.B.2 (discussing defenses available to an egg donor in an action based on the donor’s failure to warn of the possibility of a genetic disease). Without such a termination of any and all relationship, the donor might later assert parental rights. *Id.* The effect of these contracts on future liability of the kind analyzed in this comment will be discussed in greater detail in Section II.B.1–2.

159. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998); RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 402A(2)(b) (1965).

160. The elements are only probably met because the element of causation is difficult to prove when the egg, which then grew into the child, was always a carrier of the genetic disease, and therefore the injury was arguably not caused by donor’s failure to warn of the preexisting defect when she became aware of it. *See infra* Part II.B.1.c (providing a more detailed discussion of the difficulties of proving causation).

successfully been brought against a sperm donor, and blood shield statutes bar such actions against blood donors.¹⁶¹

However, as a threshold matter, even if human eggs are marketable goods, egg donors are not often “engaged in the business” of selling or otherwise distributing them.¹⁶² Though there are rare cases where a single donor has sold her eggs as many as twelve times, most donors donate no more than once or twice.¹⁶³ It is therefore unlikely that a product liability action could prevail against an egg donor, except in the extremely rare case of abnormally frequent donations.

2. *Defenses available to the egg donor*

Several defenses are readily available to a defendant egg donor in this situation. First, a manufacturer is not liable for a failure to warn if the danger is “open and obvious” or “readily ascertainable.”¹⁶⁴ Here, the risks of reproduction are commonplace and commonsense; birth defects and complications during pregnancy and labor are universally understood to be inherent in human reproduction.¹⁶⁵ Certainly the danger of genetic disease is no greater when conception is achieved through egg donation.¹⁶⁶ As such, the risk that a child may have a disorder is arguably open and obvious, and is thus not actionable under a product liability theory.

Second, a manufacturer is not liable if the consumer is better informed, or a “sophisticated user,” which is a corollary to the open and obvious defense because a consumer’s experience with the product amplifies that which should be open and obvious.¹⁶⁷ Product liability assumes the manufacturer is considerably more knowledgeable in the relevant area than the consumer and is therefore better, and more properly able to avert or fix product

161. See *supra* Part I.D.3–4 (discussing the regulation of blood and semen donation, including blood shield statutes that insulate blood donors from strict liability for damages caused by diseased or defective blood).

162. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a (1998); RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 402A cmt. f (1965).

163. See, e.g., DEREK, *supra* note 13, at 201 (describing the eleventh cycle of a self-described egg donation “junkie”).

164. 63 AM. JUR. 2D *Prod. Liab.* § 92 (2007).

165. See McIntyre, *supra* note 20, at 543 (noting the risk of passing on genetic disease exists in sexual reproduction, but that situation provides the parties the opportunity to investigate the partner’s genetic make-up in advance).

166. See Robertson, *supra* note 58, at 8 (recognizing the dangers inherent to ART are also inherent to coital reproduction).

167. See, e.g., *Koken v. Black & Veatch Constr., Inc.*, 426 F.3d 39, 45-46 (1st Cir. 2005) (upholding summary judgment for the defendant manufacturer because the plaintiff consumer was a sophisticated user, and the danger posed by a fire blanket was open and obvious to a reasonable sophisticated user).

defects.¹⁶⁸ Here, however, the egg “seller” is usually less knowledgeable than the “consumer,” the recipient parents.¹⁶⁹ Egg donors are very rarely medical experts.¹⁷⁰ This is because the average age of donors is approximately twenty-four, many donate in order to pay down student loans or credit card debt, and many would not donate again for less than the \$5,000 initially received.¹⁷¹ Though there are exceptions, young, money-motivated donors usually know less about egg donation and IVF than the recipient parents, who are heavily invested financially, emotionally and medically.¹⁷²

Further, the recipient couple will know enough about genetics and reproduction to have chosen a donor based on her appearance and medical history, while the reverse is not true because donors do not select recipients.¹⁷³ The recipient couple is thus, at least arguably, a sufficiently sophisticated user of the eggs not to require a warning from the egg donor. Moreover, as the child in this hypothetical suit is already at least several years old when the failure to warn occurs, his birth parents are exclusively well-situated to be the best informed of

168. *Cf.* *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 63 (Cal. 1962) (implying the discrepancy between manufacturers and “powerless” consumers is the rationale for holding manufacturers to strict liability for product defects).

169. In 2004, IVF with donated eggs was only successful in 50.5 % of transfers, and only 30.5 % of the time when the embryos were frozen prior to implantation. CTR. FOR DISEASE CONTROL, 2004 ASSISTED REPRODUCTIVE TECHNOLOGY (ART) REPORT 81 (2006). This fact hints at the number of repeat attempts recipient parents make. Furthermore, many intending parents start first trying to use their own gametes before turning to donors. Thus, while a given cycle is usually at most a second experience with donating eggs for the donor herself, the recipient parents may well be in their fourth or fifth attempt. *E.g.*, *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (deciding a case in which the divorcing couple underwent ten failed IVF cycles, costing over \$75,000).

170. This statement is qualified only because it is possible that some egg donors are medical students or professionals.

171. ASRM, Highlights, *supra* note 126; *see, e.g.*, Carlene Hempel, *Golden Eggs: Drowning in Credit Card Debt and Student Loans, Young Women Are Selling Their Eggs for Big Payoffs. But Can They Really Make the Right Medical and Moral Decisions When They're Tempted with \$15,000?*, BOSTON GLOBE MAG., June 25, 2006, at 19 (profiling Jamie Galbraith, a repeat egg donor who has donated, in part, in order to earn money to pay student loans and a down payment for a house).

172. This level of investment is necessarily true given the more than \$20,000 a full egg donation and IVF cycle costs. *See* Bridgewater, *supra* note 16 (noting the significant financial costs involved in IVF). Though reliable statistics have not been accumulated, and because success rates vary tremendously based on a multiplicity of factors, many intending parents undergo several cycles before successful conception and birth, as shown in the fact that IVF success rates are at best 50%. CDC, SUCCESS RATES, *supra* note 33, at 17. For further discussion of IVF success rates, *see supra* note 169 and accompanying text.

173. *See, e.g.*, HELANE S. ROSENBERG & YAKOV M. EPSTEIN, THE AMERICAN SURROGACY CENTER, INC., EGG DONATION: PSYCHOLOGICAL EXPERIENCES OF RECIPIENTS 1 (1996), http://www.surrogacy.com/Articles/news_view.asp?ID=46. (discussing the in-depth psychological analysis and corresponding factors weighed in selecting an egg donor).

his health.¹⁷⁴ Therefore, the donor can assert that she does not owe a continuing duty to warn, because the recipient parents are better informed than she is, and are sophisticated users.

Third, the Learned Intermediary Doctrine, applicable in medical contexts,¹⁷⁵ would likely intercept the egg donor's liability for failing to warn the egg donation child of her subsequently discovered genetic disease. The doctrine indemnifies medical manufacturers from liability for failing to warn patients about a product if the manufacturer informs an expert directly in the supply chain, and upon whom the patient relies.¹⁷⁶ So, a pharmaceutical company is not liable for harm caused by failing to warn a patient-consumer about a drug it produces if the company warned the doctor who prescribed the drug to the patient.¹⁷⁷

In this case, the egg donation agency and fertility clinic are learned intermediaries, and they are substantially more informed than either the egg donor or the recipient parents.¹⁷⁸ Also, both the donor and the parents reasonably rely fully on the medical expertise of the agency and clinic.¹⁷⁹ All screening is done by one of these intermediaries, as is the aspiration surgery, the selection of eggs, the fertilization, and the implantation.¹⁸⁰ At least one court has found that an agency has a fiduciary duty.¹⁸¹ It follows that warnings about genetic defects possibly carried by the eggs should be given by the fertility clinic or agency rather than the egg donor.

Lastly, the danger must be an unreasonable one for liability to attach to a manufacturer or seller for not warning a consumer.¹⁸² Egg

174. Obviously, a child's parents are most familiar with his medical history and needs as they are uniquely positioned to observe him from birth and on a day-to-day basis.

175. See, e.g., *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001) (explaining that for a manufacturer to discharge its duty to warn by informing a knowledgeable party in the supply chain, and thereby be able to assert the doctrine of learned intermediaries as a defense, it "must be able to reasonably rely on the intermediary to warn the ultimate user").

176. Diane Schmauder Kane, Annotation, *Construction and Application of Learned-Intermediary Doctrine*, 57 A.L.R.5TH 1 (2007).

177. *Id.*

178. This is true of any professional vis-à-vis his patients or customers because that relationship involves one party's dependence on another's skill and expertise, and is thus the principle underlying why professionals are held to a higher duty of care than lay people. See *infra* notes 198–199, 202 and accompanying text.

179. See *infra* Part II.B.1.a (questioning whether an egg donor owes a duty of care to a child born as a product of the donor's egg).

180. See *supra* notes 1–3 (providing an overview of IVF and other forms of ART).

181. See *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992) (holding the surrogacy agency had a fiduciary duty to protect the parties).

182. E.g., McIntyre, *supra* note 20, at 534–37 (explaining the unreasonably dangerous requirement and applying it to an analysis of a sperm donor's liability under a product liability theory, and arguing that mandatory consent forms ensure

donors are normal members of the population at large with no distinguishing characteristics other than their choice to donate, so the risk of their carrying a genetic disease is no higher than any other individual and thus the risks of conception through egg donation are no more unreasonable than those posed by traditional human reproduction.

Most importantly, holding an egg donor to a continuing duty to warn under a product liability theory demands that she guarantee her genetic make-up. Just as strict liability in tort holds manufacturers liable for any dangerous, injury-causing defect, regardless of care taken, strict liability, if applied to egg donation, would mandate that egg donors foresee the unforeseeable. Given genetic unpredictability, which remains despite the availability of gene mapping and genetic tests, the hypothetical child conceived with a donated egg subsequently discovered to carry a genetic defect probably will not recover under a product liability theory.¹⁸³

3. *Implied warranties of fitness and merchantability*

The UCC governs sales of goods by merchants, so if eggs are classified as a marketable good and egg donors are considered merchants,¹⁸⁴ then egg donation would fall within the UCC's scope.¹⁸⁵ The UCC, adopted in every state, requires that goods "pass without objection in the trade under the contract description; and . . . are fit for the ordinary purposes for which goods of that description are used."¹⁸⁶ However, for these requirements to apply, the seller must be "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."¹⁸⁷

Certainly, adoption and surrogacy are not governed by the UCC, because payment cannot lawfully be made for children.¹⁸⁸ Blood donation is governed by blood shield statutes that specifically bar use

consumers of donated sperm know of the possibility of genetic or birth defects, but may not know the degree of danger faced).

183. See *supra* Part II.A (discussing whether human eggs may properly be considered commodities for the purpose of applying principles of strict tort liability).

184. U.C.C. § 2-314(1) (1986) ("[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.").

185. Cf. McIntyre, *supra* note 20, at 528-33 (analyzing the application of the implied warranty of merchantability to sperm donation).

186. U.C.C. § 2-314(2)(a), (c).

187. *Id.* § 2-204.

188. See *supra* Part I.D.1 (indicating that a surrogacy contract was invalidated and that adoption statutes prohibit the sale of babies).

of implied warranties in actions against blood donors or banks.¹⁸⁹ Sperm donation is analogous to egg donation, except that sperm is a regenerative bodily product, so sperm donors can more easily be considered persons dealing in their body's "product."¹⁹⁰ Egg donors rarely donate more than a few times and have little expertise compared with other parties to the transaction.¹⁹¹ Therefore, it is unlikely an egg donor could be a dealer in eggs, so the UCC is likely inapplicable.

Furthermore, if warranties attach to the sale of human eggs, then egg donors will have to guarantee that their "product" is fit for creating a child who does not suffer from a genetic disease. At the current level of genetic expertise, this is impossible. However, the egg donation child might bring a negligence action against the donor for failure to warn him of her inheritable genetic disease once she was diagnosed.

B. Negligence

To prove a prima facie case of negligence, the egg donation child must prove the egg donor owed him a duty of care, which she breached, and her breach actually and proximately caused his injury.¹⁹² Each of these elements presents discrete challenges to the prospective egg donation child's case.

1. *The prima facie negligence case*

a. *A duty of care*

At common law, a person owes no duty to affirmatively act to protect another from danger not caused by his own action or inaction, unless a special relationship exists between the two people, such as a parent-child relationship or that between a doctor and

189. See *supra* Part I.D.4 (noting that the donation of blood is classified as a service and not a good because of public policy implications and national need for blood for medical reasons).

190. Men can sell sperm weekly over periods of years. See, e.g., Wancata, *supra* note 22, at 221–22 (illustrating how the donation of sperm is a market commodity); cf. McIntyre, *supra* note 20, at 531–33 (explaining that characterizing sperm as a commodity is resonant of baby-selling, so a plaintiff asserting that sperm is a marketable good in order to recover under an implied warranty theory would find himself in the "catch-22" of defeating his own theory on public policy grounds).

191. The egg donation process is invasive and frequently uncomfortable, and the health effects are not yet properly known, so most egg donors are cautioned against multiple donations. See, e.g., ADVISORY GROUP, GET THE FACTS, *supra* note 26, at 23–24 (detailing the potential health consequences of multiple donations, and cautioning against signing a consent form for multiple donations).

192. 57A AM. JUR. 2D *Negligence* § 71 (2007).

patient.¹⁹³ Thus, there is generally no duty to warn absent a special relationship creating an elevated duty of care.¹⁹⁴ In the context of genetics, the egg donor cannot jeopardize anyone simply by having a genetic disease, so there is no affirmative duty to warn absent a special relationship.¹⁹⁵

In a negligence action brought by the egg donation child, the special relationship between him and the egg donor might be established either through genetic parentage or under a “risk imports relation”¹⁹⁶ theory whereby a special relationship is created by the magnitude of the harm involved and the fact that the egg donor is the only person who could prevent or mitigate that harm.¹⁹⁷ The former is unlikely to prevail because of the negative public policy implications of recognizing, however narrowly, an egg donor as a parent. Conversely, the public policy interests implicated by the latter theory may well persuade a court to find a continuing duty to warn, and though the egg donation contract severs any legal relationship between the parties, it is likely a court would invalidate such an absolute agreement as void against public policy.

193. RESTATEMENT (SECOND) OF TORTS § 315 (1965). According to the Restatement:

There is no duty so to control the conduct of a third person as to prevent him from causing harm to another unless (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

194. *Id.* § 314 (“The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.”).

195. See, e.g., Suter, *supra* note 18, at 1881 (discussing whether an injury can arise from a family member's disclosure to another family member about having a genetic disorder, and noting “[t]heir relatives have no risk of becoming carriers; they only have the risk of finding out that they are carriers”).

196. The “risk imports relation” theory was articulated by Judge Cardozo in *Palsgraf v. Long Island Railroad Co.*, and establishes that what constitutes reasonable care taken to avert or minimize a risk depends on the nature of the risk as reasonably understood by the person with the duty of care, and so the larger the risk the greater the duty of care reasonably anticipated by the actor becomes. 162 N.E. 99, 100 (N.Y. 1928) (“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension.”).

197. See generally Matthew Browne, Note, *Preconception Tort Law in an Era of Assisted Reproduction: Applying a Nexus Test for Duty*, 69 FORDHAM L. REV. 2555, 2555 (analyzing the legal and ethical dilemmas associated with finding that someone not yet born, or not yet conceived, is nonetheless owed a duty of care, and arguing for tort liability in cases of injury to children conceived with ART to be determined based on the relationship between the activity causing harm and the harm actually caused).

The doctor-patient dynamic is the classic example of a special relationship because it is necessarily of the most intimate nature,¹⁹⁸ and the patient submits to the doctor's care in reliance upon his skill and experience.¹⁹⁹ Originally, physicians were obligated to inform only their patients of possible transmission of contagious or genetic diseases to known or foreseeable third parties,²⁰⁰ but they are now required to directly warn foreseeable third parties who are not their patients.²⁰¹ These duties to warn arise only because of the special relationship, backed by public policy imperatives that individuals responsible for life and death operate at a high level of care.²⁰²

Similarly, parent-child relationships are characterized by intimacy, dependency, and one party's responsibility for the other. Consequently, they give rise to an elevated duty of care.²⁰³ However, parental status can be severed such that no relationship exists between a mother and child. For example, an adoption agency is not considered to owe any duty to warn, especially not a continuing duty, to the biological parents of a child relinquished through adoption.²⁰⁴

198. See, e.g., *Adams v. Ison*, 249 S.W.2d 791, 793-94 (Ky. 1952) (noting that the doctor-patient relationship is unique because of the patient's reliance on the doctor's expertise and the doctor's duty of good faith towards the patient).

199. See, e.g., *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (comparing the civil, statutory and common law considerations of special relationships characterized by dependence by one party on the other that give rise to duties of care).

200. See, e.g., *Pate v. Threlkel*, 661 So. 2d 278, 279 (Fla. 1995) (mandating that a physician warn his patient that the congenital illness suffered from is likely to develop in the patient's children when a reasonably prudent physician would issue a warning in the same circumstance).

201. Seminally, *Tarasoff v. Regents of the University of California* expanded a medical professional's duty to warn to encompass foreseeable third parties known to be at risk of danger, even when such a third party is not one of the medical professional's patients. 551 P.2d 334 (Cal. 1976). The court rejected the traditional rule that no duty was owed and reasoned that the doctors' professional duty of care for the patient extended to the foreseeable victim, despite concerns about medical confidentiality. *Id.* at 343; see, e.g., *Safer v. Estate of Pack*, 677 A.2d 1188, 1192 (N.J. Super. Ct. App. Div. 1996) (articulating a new duty to warn not just the patient that her genetic disease might affect her children, but also to take reasonable steps to warn those third party children themselves). See generally Susan M. Denbo, *What Your Genes Know Affects Them: Should Patient Confidentiality Prevent Disclosure of Genetic Test Results to a Patient's Biological Relatives?*, 43 AM. BUS. L.J. 561, 580-86 (2006) (tracing the development of the duty to warn relatives of genetic disease suffered by patients that is the exception to the doctor-patient privilege).

202. See, e.g., 61 AM. JUR. 2D *Negligence* § 185 ("The welfare of the citizens of a state, and therefore of a state itself, demands that those persons practicing medicine and surgery must be duly able and careful.").

203. See, e.g., Romualdo P. Eclavea, Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R.4TH 1066 (2007) (describing the parent-child relationship and the various ways different jurisdictions assess the liability of the parent for injury to the child caused by the parent).

204. See *Olson v. Children's Home Soc'y of Cal.*, 252 Cal. Rptr. 11, 13 (Ct. App. 1988) (finding no nexus between the injury and the actions undertaken by the

This is true even when the adoptee dies of a genetic disease that future children of the biological parents will also suffer from.²⁰⁵

The complication in an egg donation situation is how one defines “parent.” Traditionally, the biological connection established by birth defined “mother.”²⁰⁶ In an egg donation context, a child can potentially have five distinct “parents” through biological, genetic and social relationships.²⁰⁷ In the few cases in which egg donation has been a factor, starting with *Johnson v. Calvert*,²⁰⁸ courts have struggled with how to assign relative weight to genetic relationships versus biological and social ones.²⁰⁹ In that case, the court recognized both genetic and biological maternity under the UPA, but declined to rule the child had two mothers.²¹⁰

As indicated in *Johnson*, the genetic relationship between the egg donor and the egg donation child is substantial enough to create at least a quasi-parental relationship that may give rise to a duty to warn.²¹¹ The nature of this relationship could only be a parent-child relationship, unless a court chooses to carve out a distinct genetic basis on which a duty to warn can be premised. Yet, courts have almost invariably recognized the parental rights of intending parents over those of genetic parents.²¹² The California Supreme Court’s rationale for this preference, in *Johnson*, was that the intent to bring the child into existence, manifested in the surrogacy agreement, served as a tiebreaker between the two versions of maternity.²¹³ Many scholars have argued that this preference for intent-based family

adoption agency, and thus no special relationship giving rise to a continuing duty to warn), *review denied*, No. S007860, 1988 Cal. LEXIS 308 (Cal. Dec. 22, 1988).

205. *Olson*, 252 Cal. Rptr. at 12.

206. *See Dolgin*, *supra* note 3, at 524 (noting that, traditionally, “familial bonds [were] predicated on, and [were] understood to flow from shared biogenetic substance”) (footnote omitted).

207. *Cf. In re Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (overturning the trial court’s determination that out of the pool of potential parents, including the anonymous sperm and egg donors, the intending mother and father, and the gestational surrogate, the baby in question had no parents at law).

208. 851 P.2d 776, 779 (Cal. 1993).

209. *See supra* Part I.B (analyzing the limited cases addressing egg donation in the context of custody disputes arising out of breaches of surrogacy agreements).

210. *Johnson*, 851 P.2d at 781 n.8.

211. *Id.* at 781.

212. *See Dolgin*, *supra* note 3, at 534–35 (analyzing cases in which courts have considered competing claims of maternity, and concluding that courts have exhibited a “startling readiness to displace completely the biogenetic component of family bonds as courts expressly privilege parental intention over biological connections in determining maternity”).

213. *Johnson*, 851 P.2d at 782 (“Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties’ intentions as manifested in the surrogacy agreement.”).

structure is part of a general societal trend toward recognition of choice as the ultimate determining factor.²¹⁴

If a court decides to impose a duty to warn on the hypothetical egg donor, it will probably not be on the basis of a special, genetic parent-child relationship. Courts are loath to recognize two mothers at law, and they clearly favor recognition of the intending parent over the egg donor or surrogate.²¹⁵ Presumably, as is the case with adoption policy, protecting the best interests of the child requires providing the certainty and stability that comes from preventing legal confusion over parentage.²¹⁶ It follows that a court would likely shy away from recognizing any parental relationship between an egg donor and an egg donation child.

Further, in support of reserving parentage for the intending parents, egg donation contracts manifest a clear demarcation of legal parentage over any ensuing children. In this way, they mimic adoption statutes.²¹⁷ Nonetheless, as the willingness to void surrogacy contracts on public policy grounds indicates, if policy interests outweigh an egg donor's interest in enforcing the contract to avoid liability, a court would likely void the contract.²¹⁸ One practitioner in the area of reproductive law notes that "it is important to explain to client couples that they cannot necessarily rely upon [enforcement

214. See, e.g., Susan Frelich Appleton, "Planned Parenthood": *Adoption, Assisted Reproduction, and the New Ideal Family*, 1 WASH. U. J.L. & POL'Y 85, 89-90 (1999) (commenting on the controlling role intent plays in various alternative reproduction situations); Malina Coleman, *Gestation, Intent, and the Seed: Definition Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 504-05 (1996) (noting national polls show a preference for intent-based determinations of parentage); Dolgin, *supra* note 3, at 542 (noting that the trend in the law is part of a greater sociological trend in which "[b]iology becomes less important as contract and its correlates (choice, intention, and promise) become more important"). See generally Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265 (1995) (describing the role of intent in egg donation situations and applying the "intent" test to various parentage scenarios).

215. See *supra* Part I.B (supporting the public policy concern that intending parents serve a child's best interests).

216. See, e.g., Anderson, *supra* note 83, at 610-11 (calling for clear determinations of legal parentage to govern assisted reproduction situations in the way adoption is regulated); Manning, *supra* note 14, at 711-16 (discussing the adoptee's entitlement to stability through clear legal parentage determinations). See generally Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 439 (2004) (analyzing the best interests of the child in gestational surrogacy agreements).

217. See *supra* Part I.D.2 (comparing adoption and egg donation because the child in each situation is genetically related to its biological parent but the intending parent assumes all legal rights and parental duties).

218. Cf. Vorzimer, *supra* note 13, at 417 (noting no California court has enforced a surrogacy contract exactly, but have rather "considered the contract in an attempt to adduce the parties' intentions upon entering into the reproductive arrangement").

of] their surrogacy contract.”²¹⁹ Though surrogacy edges closer to baby-selling than egg donation, the best interests of the child are still at issue. Thus, an egg donation contract impeding those interests is possibly void.²²⁰

Nonetheless, liability might attach to the egg donor for failing to warn her offspring under a “risk imports relation” theory.²²¹ Essentially, this principle extends a duty of care to reasonably foreseeable persons.²²² Moreover, it suggests that the greater the magnitude of a given danger, the more reasonably and readily it should be perceived, and perception of the danger creates—imports—a relationship giving rise to a duty of care.

In this situation, the egg donor discovers she has a hereditary genetic disease, but she does not warn her offspring. Knowledge that a disease is hereditary reasonably triggers thoughts of transmission to children, which arguably would include any possible egg donation children. Therefore, the egg donation child is foreseeable. Also, the magnitude of the danger is substantial because the disease might be life threatening. Thus, once the egg donor realizes the risk that her children will inherit her disease, a duty to warn might develop between her and the egg donation child.

b. Breach

Once a duty of care is established, negligence analysis requires a finding of breach of that duty.²²³ Failure to actually warn the egg donation child is not a per se breach of the egg donor’s duty of care because only reasonable effort is required.²²⁴ For example, if the egg donor were denied contact information by the egg donation agency when she called in search of the recipient couple, her duty of care

219. *Id.*

220. *But cf.* *Humphers v. First Interstate Bank of Or.*, 696 P.2d 527, 534–36 (Or. 1985) (permitting a biological mother to sue the birthing physician who divulged her identity to a daughter she put up for adoption, because the doctor-patient relationship created an implied contract of secrecy which he breached, causing her injury). *But see* Lynn M. Squillace, Note, *Too Much of a Good Thing: Toward a Regulated Market in Human Eggs*, 1 J. HEALTH & BIOMEDICAL L. 135, 146 (2005) (arguing that the only grounds on which an egg donation contract should be determined are principles of contract law, because any other approach inherently implies that women need protecting because they are not able to knowingly and voluntarily enter into a contract).

221. *See supra* note 196 and accompanying text (indicating that reasonable care must be taken to avert or minimize a risk, and that what is reasonable care depends on the severity of the risk).

222. *E.g.*, W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 963 (2005).

223. 57A AM. JUR. 2D *Negligence* § 130 (2007).

224. RESTATEMENT (SECOND) OF TORTS § 4 cmt. b (1965).

would probably be satisfied.²²⁵ It might even be reasonable for the donor to feel bound by the privacy provisions of the egg donation contract that, for the sake of the recipient couple and the child's stability and privacy, mandate contact not be made.²²⁶ However, if a court decides to find a duty to warn on public policy or "risk imports relation" grounds, it is likely it would also find that substantial effort to warn the egg donation child is reasonable by virtue of the magnitude of the pending harm.²²⁷

c. Causation

Causation is an extremely complicated factor in cases of genetic disease because, by definition, the plaintiff is born with the disease-bearing genes in question.²²⁸ Consequently, the egg donor's failure to warn neither causes nor changes anything.²²⁹ Yet, to make a prima facie case for negligence the egg donation child must prove he would be healthy but for the egg donor's negligent failure to warn him of her hereditary disease.²³⁰ Logically, this threshold requirement can

225. The egg donation agency and the fertility clinic that facilitated the egg donation process are bound by a fiduciary and medical confidentiality duty to all parties. *See, e.g., Stiver v. Parker*, 975 F.2d 261, 268 (6th Cir. 1992) (holding that the surrogacy agency served as a broker between the parties, and therefore had a fiduciary duty to protect the parties). In adoption situations, disclosure of the identity of the biological parents is actionable if there is a state statute that closes adoption records, or if disclosure breaches the duty of medical confidentiality. *Cf. Humphers*, 696 P.2d at 530–36 (analyzing an invasion of privacy claim against a doctor who disclosed the biological mother's identity to the daughter, who was relinquished through adoption, and holding that breach of confidentiality controlled in the circumstances, but not deciding whether informing the daughter constituted breach when she was a party to the birth).

226. The donor may subject herself to liability if she breaches the privacy provisions in the egg donation contract, but neither courts, scholars, nor practitioners have yet analyzed this question. *But see Squillace, supra* note 220, at 146–47 (arguing for application of contract law principles to egg donation contract issues).

227. *See* RESTATEMENT (SECOND) OF TORTS § 285 (1965) (indicating that what is reasonable in a given set of circumstances can be determined by legislative or administrative action; by a court applying a legislative or administrative action; by a prior judicial decision; or, in the absence of any such legislative, judicial, or administrative action, by the trial judge or jury looking at the facts of the case).

228. *See, e.g., Robertson, supra* note 58, at 13–14 (describing the complication the issue of causation presents in preconception tort liability cases as the "paradox of offspring harm").

229. *See Denbo, supra* note 201, at 577 n.70 (distinguishing the duty to warn in *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), from warning of genetic disease because "[o]nce the patient with a genetic disorder has reproduced, the potential harm already exists in the patient's child," so the notion of special relationships articulated in the Restatement is inapplicable to genetics situations) (citing Michelle R. King, *Physician Duty To Warn a Patient's Offspring of Hereditary Genetic Defects: Balancing the Patient's Right to Confidentiality Against the Family Member's Right To Know—Can or Should Tarasoff Apply*, 4 QUINNAPAC HEALTH L.J. 1, 31 (2000)).

230. RESTATEMENT (SECOND) OF TORTS § 281(c) (1965).

only be met if the genetic disease in question is one that could have been averted or mitigated through caution or preemptive medical care.²³¹ If the disease was definitely going to manifest in the child, then the failure to warn caused nothing more than a delay in discovery of the disease. Illnesses that arise from a combination of genetic predisposition and lifestyle choices, and are thus preventable in some circumstances, include, for example, type II diabetes and certain types of cancer.²³² Only in these cases would a failure to warn have any effect on the egg donation child's health.²³³

However, if poor habits and lifestyle choices can also cause the disease, regardless of any genetic predisposition, the egg donation child will face the evidentiary hurdle of proving his own actions did not substantially contribute to the disease's onset.²³⁴ Known as the Doctrine of Contributory Negligence, this affirmative defense prevents recovery for injury caused by the negligent act of another when the plaintiff's own negligence is also a substantial cause of the injury.²³⁵ Some jurisdictions have rejected this "all-or-nothing" approach in favor of a comparative fault analysis, under which the plaintiff will recover if he is less responsible for causing his own injury

231. An example of a hereditary genetic disease that can be averted through lifestyle choices or preemptive medical treatment is diabetes. MARIA MCCARREN, AM. DIABETES ASS'N, A FIELD GUIDE TO TYPE 2 DIABETES 4-8 (2004). Type II diabetes can potentially develop in anyone, but is frequently caused by strong hereditary predispositions coupled with unhealthy lifestyle choices. *Id.* So, if the egg donor finds out she is diabetic twenty years after donating eggs, her failure to warn her genetic offspring could easily result in the egg donation child not taking preventative dietary and exercise measures to avoid developing diabetes himself. *See, e.g.,* Denbo, *supra* note 201, at 565-71 (describing the various types of genetic tests and noting that testing positive for a genetic predisposition does not mean one will become ill in later life).

232. For example, diabetes is a disease resulting from the body's underproduction (type 1) or misuse (type 2) of insulin, a hormone that is essential for the conversion of sugar into energy. MCCARREN, *supra* note 231. Though the exact cause is unknown, both genetic predispositions and environmental factors, including poor diet and obesity, are known to contribute to the development of adult-onset diabetes. *Id.* The disease is frequently fatal because of complications, such as diabetic eye disease, and nerve and kidney damage. *Id.*

233. *Cf.* Robertson, *supra* note 58, at 15 ("A key point about the paradox of non-wrongful life is that the person could not have been born without the condition of concern. If so, refusing the act or omission that causes the child to be born with that condition cannot harm the child. Of course, if changes in technique or treatment protocols could reduce the frequency of the condition, there would be an obligation to adopt those changes. However, in situations in which no improvement can be made one cannot show that the child has been harmed as a result.")

234. *See, e.g.,* 57B AM. JUR. 2D *Negligence* § 797 (2007) ("Contributory negligence is the breach of the duty of the plaintiff to exercise due care for his or her own safety in respect of the occurrence about which he or she complains, and if the plaintiff's failure to exercise due care for his or her own safety is one of the proximate contributing causes of his or her injury, it will bar recovery.")

235. RESTATEMENT (SECOND) OF TORTS § 477 (1965).

than the defendant.²³⁶ As the donor will assert contributory or comparative negligence as an affirmative defense, she will have the burden of proving the child did not take reasonable steps to protect his own health.²³⁷ The egg donation child will have the burden to prove his condition would have been avoidable or treatable if he had known about his genetic predisposition at the time the egg donor learned of her disease.²³⁸

More practically, the child may not have access to information needed to prove causation, because the donor's medical confidentiality interest might be deemed weightier than the child's need for discovery.²³⁹ In adoption situations, children are generally granted access to their biological parents' medical information for good cause.²⁴⁰ This is a balancing test that weighs the relative interests of the parties.²⁴¹ Even life or death needs for medical information may not suffice to establish good cause if the likelihood or size of the benefit is less than the public policy interest in medical confidentiality.²⁴² Conversely, one court has held that a sperm donor is not a patient of a sperm bank, so medical confidentiality does not apply.²⁴³ However, because egg donation is so much more complicated than sperm donation, and requires considerable medical oversight,²⁴⁴ it is very unlikely a court would hold that an egg donor is not a patient of her fertility clinic. Therefore, the egg donor is

236. 57B AM. JUR. 2D *Negligence* § 954 (2007).

237. *See id.* § 940 (stating that a defendant raising the defense of contributory negligence must prove by a preponderance of the evidence that the plaintiff failed to exercise due care).

238. *See* RESTATEMENT (SECOND) OF TORTS § 433B (1965) ("The burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.").

239. *See, e.g., In re George*, 630 S.W.2d 614, 621–23 (Mo. Ct. App. 1982) (balancing privacy interests against the adoptee's need to obtain medical information about his biological parents in order to find a bone marrow donor, and deciding the unlikelihood of finding a match rendered the adoptee's interest less compelling than the parent's privacy interest).

240. *See, e.g., id.* (analyzing whether the adoptee has shown good cause to access his biological parents' records).

241. *See, e.g., id.* at 621 ("What is to be balanced then is the factual need and the policy against disclosure.").

242. *Id.*

243. *Johnson v. Cal. Cryobank, Inc.*, 95 Cal. Rptr. 2d 864, 872, 879 (App. Ct. 2000) (ordering disclosure by a sperm bank of a donor's records because the donor was not a patient of the sperm bank).

244. *See, e.g., Katers, supra* note 62, at 447–48 (describing some of the inconveniences and dangers present in egg donation that are not present in sperm donation); Wancata, *supra* note 22, at 221 (contrasting the time and effort commitments of egg donation and sperm donation to explain why sperm donors make as little as \$45 compared to the \$5,000 compensation paid to egg donors).

entitled to medical confidentiality, which may prevent the egg donation child from proving that the donor was negligent.

Given the difficulty of proving causation, it is more likely an egg donation child would bring suit against the egg donation agency and fertility clinic for failure to adequately screen egg donors.²⁴⁵ In other words, it may be an insurmountable hurdle for the child to prove causation in an action against the donor for negligent failure to warn. However, because the magnitude of the injury is great, and the egg donor is the only person who could possibly have warned the child, it is nonetheless possible a court would impose liability on the donor on public policy grounds.

d. Injury

As a logical outgrowth of the difficulty of proving causation, determining whether the egg donation child has suffered an injury presents metaphysical as well as legal complications.²⁴⁶ The recipient parents cannot bring a wrongful birth claim because the alleged failure to warn occurred after their choice to conceive, but the egg donation child may bring a wrongful life action,²⁴⁷ though proving injury will usually be impossible. Certainly, if the egg donor has caused nothing by failing to warn her offspring, she also cannot have caused any injury. More specifically, if the child's genetic disease was present at birth, even in latent form, it is not an injury at all.²⁴⁸ As the egg donation child is born with the defective gene, his claim is, in

245. This is because a failure to adequately screen a donor is more easily proven than a failure to warn, by virtue of the elevated duty of care the doctors are held to. See *supra* Part I.D.1 (discussing *Stiver v. Parker*, 975 F.2d 261, 265 (6th Cir. 1992); Part II.B.1.a (explaining the special doctor-patient relationship that creates an elevated duty of care).

246. See, e.g., M. Gregg Bloche, *Obesity Policy Choices: Obesity and the Struggle Within Ourselves*, 3 GEO. L.J. 1335, 1357–58 (2005) (discussing the considerable obstacle presented by the element of causation in failure to warn actions brought against food manufacturers and providers about the danger of weight gain, cardiovascular disease and diabetes).

247. A wrongful life claim is brought by or on behalf of the child, while a wrongful birth claim is brought by the parent for the loss of the choice not to conceive or to terminate the pregnancy. E.g., *Greco v. United States*, 893 P.2d 345 (Nev. 1995) (distinguishing a wrongful birth action brought by the parent when medical negligence has deprived her of preventing or terminating the pregnancy from a wrongful life action brought by the child who argues that it would be better were he not alive and thus he should be compensated for having to be so).

248. See, e.g., *Suter*, *supra* note 18, at 1881 (discussing whether an injury can arise from a family member's disclosure of a genetic disorder to another family member, and noting "[t]heir relatives have no risk of becoming carriers; they only have the risk of find out that they are carriers").

effect, that he should recover the difference between a life without the defective gene and his actual life.²⁴⁹

Courts have handled “wrongful life” cases carefully for this reason.²⁵⁰ They usually decline to hold that life with a disability is worth less than life without one, and thus they deny recovery for

249. As a further complication, calculating damages would require a court’s brave metaphysical determination of the value of life with a genetic defect versus value of life without such a flaw. Even if the child can prove negligence, the fundamental philosophical question remains of how one calculates damages in such a situation; how can anyone measure the value of life unimpaired versus life with a genetic disease? See generally Roger Brownsword, *Genomic Torts: An Interest in Human Dignity as the Basis for Genomic Torts*, 42 WASHBURN L.J. 413, 428 (2003) (describing the impossibility of such a valuation). This task is somewhat simplified here because the child cannot bring a wrongful life or wrongful birth action because the disease only became known to the egg donor herself after the child had already been born to the recipient parents. See *supra* Part II.B.1.c–d; see also *Molloy v. Meier*, 679 N.W.2d 711 (Minn. 2004) (finding for the parents when a doctor negligently failed to warn them their next child might carry the same disorder as their first); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988) (en banc) (reversing summary judgment in favor of the doctor when he negligently misdiagnosed the patient child’s blindness as non-hereditary, and that diagnosis was relied upon by the parents in conceiving a second child who was also blind). But see *Canesi v. Wilson*, 730 A.2d 805 (N.J. 1999) (calculating compensatory damages for the wrongful birth of plaintiff as the emotional harm caused to the parents plus special medical expenses from raising an impaired child, but not the impairment itself).

Here, the breach of the duty to warn occurs after the egg donation child’s birth. Thus, though the similarity is limited to calculation of damages, this hypothetical case is thus more akin to a failure to warn of a contagious disease; a doctor’s failure to warn a patient of the transmission potential of her illness that results in the infection of foreseeable third parties. *E.g.*, *Safer v. Estate of Pack*, 667 A.2d 1188, 1192 (N.J. Super. Ct. App. Div. 1996) (extending a doctor’s duty to warn of a hereditary predisposition to his patient’s children when they were easily identifiable, because there is no “essential difference” between contagious and genetic disease when future harm “may be averted or minimized by a timely and effective warning”).

In cases where a doctor’s failure to warn results in crippling illness, the cause of action is more similar to standard medical malpractice than wrongful life. See *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978) (defining wrongful life, wrongful birth and wrongful conception actions as “sound[ing] essentially in negligence or malpractice”). Thus, because the breach in question occurs after the birth of the child in this hypothetical situation, damages would be measured according to standard negligence remedy principles. The remedy afforded a party alleging negligence on the part of someone who owed them a duty of care is compensation; a prevailing plaintiff in a negligence action recovers the amount needed to put him in the position that he would have occupied if not for the defendant’s negligence. RESTATEMENT (SECOND) OF TORTS § 903 (1965). Compensatory damages can be awarded for both physical injury and mental anguish. *Id.* § 905. If the injury suffered results in ongoing impairment that prevents the plaintiff from engaging in work, *inter alia*, he may also recover for any foreseeable future earnings lost. *Id.* § 910 cmt. b. So the egg donation child in this case could recover the amount needed for medical treatment of the genetic disease he would have been able to avert had he been warned. He would also be able to recover for his mental suffering, but the amount would vary depending on the harm actually suffered by a given egg donation child. See *infra* note 255. See generally Norton, *supra* note 58, at 818–43 (applying economic damages, noneconomic damages, offsets for benefits and mitigation, foreseeable damages, and speculative damages).

250. See *supra* note 247 (explaining the difference between wrongful life and wrongful birth causes of action).

illness or disability with which the child is born.²⁵¹ In the words of the New York Court of Appeals:

Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.²⁵²

Consequently, the egg donation child bringing this action could only make a prima facie case for negligence if the egg donor's unforthcoming warning²⁵³ would have permitted prevention or mitigation of his illness.²⁵³ The child must be able to assert that the illness is an injury because it began *after* his birth, rather than claiming that his genes were defective.

It is more likely that the recipient parents could prove their own injury. Of course, the parents' action must overcome higher hurdles to prove the existence of a special relationship giving rise to a duty to warn between the egg donor and themselves because that relationship lacks the essential genetic link present between the egg donor and the egg donation child.²⁵⁴ If they are able to prove the duty element of negligence, however, the parents may be able to assert that the burden of paying for the sick child is a legally cognizable injury.²⁵⁵

251. *E.g.*, *Greco*, 893 P.2d at 347–48. *See generally* Robertson, *supra* note 58, at 14–19 (discussing why wrongful life actions will likely not prevail in cases in which children are conceived through ART and are also thereby injured, such that they are born with birth defects caused by the fertility clinic's medical negligence).

252. *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978) (explaining why New York's highest court refuses to allow a cause of action for wrongful life).

253. *See* Robertson, *supra* note 58, at 15 (describing the "paradox of non-wrongful life" implicated in preconception torts claims, and recognizing that no action can lie unless the injury is one that could have been prevented or lessened).

254. *See supra* Part II.B.1.a (detailing the types of relationships that have been sufficient to establish a duty of care, including a parent-child relationship and a doctor-patient relationship).

255. Only a few states have allowed recovery by parents for special damages incurred as a consequence of their child being born disabled. *See, e.g.*, *Smith v. Cote*, 513 A.2d 341 (N.H. 1986) (holding that damages are appropriate for actions for wrongful birth for tangible losses, but not intangible losses like emotional distress); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Becker*, 386 N.E.2d at 808–14 (permitting special damages for the cost of caring for the child during its minority because such damages arise from the negligence of the defendant). *See generally* Robertson, *supra* note 58, at 18–19 (explaining that the three states that recognize a special damages exception to the bar on wrongful life recovery do so only because the special damages for care of the child ends when the child reaches majority).

2. *Defenses available to the egg donor*

If the egg donation child succeeds in making a prima facie case for negligent failure to warn, the egg donor will be able to assert both affirmative and public policy defenses. These include contributory or comparative negligence, assumption of risk by the recipient parents, and the Learned Intermediary Doctrine. Additionally, the donor can argue that the importance of protecting medical confidentiality trumps competing interests, and that imposing liability on the grounds of even a quasi-parental relationship opens the door to egg donors asserting parental rights.

Whether the egg donor asserts contributory or comparative negligence depends upon which jurisdiction the egg donation child brings the action in.²⁵⁶ Contributory negligence is a doctrine under which the plaintiff is barred from recovery completely if he also acted negligently and thereby contributed to the cause of his own injury.²⁵⁷ Most states find this common law rule too strict, and have opted for a comparative fault determination that allows for recovery when the plaintiff's negligence was less than the defendant's.²⁵⁸ The defense of comparative negligence only succeeds when the plaintiff's own act or omission substantially contributes to his injury.²⁵⁹

In this case, the egg donor will have the burden of showing the egg donation child's acts or omissions are sufficiently responsible for the development of his disease that he should not be able to impose liability on her.²⁶⁰ Evidence may include anything suggesting the child did not take reasonable measures to look after his own health.²⁶¹

256. Only four states and the District of Columbia completely bar recovery if the plaintiff has contributed to the negligence causing his injury. 57B AM. JUR. 2D *Negligence* § 956 (2007) (Alabama, Maryland, North Carolina and Virginia).

257. *Id.* § 797.

258. *Id.* § 954.

259. For example, in *Walter v. Wal-Mart Stores*, a pharmacist negligently gave the plaintiff the wrong cancer medication. 2000 ME 63, 748 A.2d 961. The plaintiff was generally active and self-sufficient prior to taking the wrong medicine. *Id.* at ¶ 18, 748 A.2d at 968. She took the wrong drug for three weeks, without a check-up or blood test, and it was so strong it caused major deterioration in her condition. *Id.*, 748 A.2d at 968. Wal-Mart argued the plaintiff's failure to read the prescription bottle or to get a blood test during those three weeks contributed to the injury and broke the chain of causation. *Id.* ¶ 20, 748 A.2d at 969. The court found this argument unpersuasive because the plaintiff had no way to know the medication she was given was not the prescribed one, so her inaction was not a substantially contributing cause. *Id.* ¶ 22, 748 A.2d at 969.

260. 57B AM. JUR. 2D *Negligence* § 851 (2007).

261. Analogously, in a famously derided case against McDonald's, customers argued deceptive marketing practices caused them to eat the restaurant's food, become obese, and develop diabetes. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 538-39 (S.D.N.Y. 2003), *amended complaint dismissed*, No. 02 Civ. 7821, 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. Sept. 4, 2003), *vacated in part and remanded*, 396 F.3d 508 (2d Cir. 2005) (finding the plaintiffs were entitled to a greater finding of fact by the

For example, if the disease in question is adult-onset diabetes, the egg donor could offer evidence showing the child was obese, maintained a poor diet, rarely had medical check-ups, and rarely exercised, all of which are environmental factors in the development of the disease.²⁶²

Here, the hypothetical egg donation child had a genetic predisposition toward the disease, but no certainty it would ever develop.²⁶³ Therefore, joint causation is at issue. If the child engaged in habits comparable to eating McDonald's twice a day, his diabetes might have been sufficiently caused by his own behavior that the egg donor's failure to warn did not constitute a substantial factor in the cause of his illness.

The defendant egg donor may also invoke an assumption of risk defense. Assumption of risk is an affirmative defense when the plaintiff, explicitly or implicitly, knowingly and voluntarily assumed the danger posed by a risky activity.²⁶⁴ All reproduction creates the risk of birth defects,²⁶⁵ but genetic disease does not fall in that category. Without a doubt, the recipient couple relied upon the fertility clinic's screening measures, so it cannot plausibly be asserted

district court). The plaintiffs admitted to eating McDonald's twice a day as many as five times a week during school. *Pelman*, 2003 U.S. Dist. LEXIS 15202, at *31-33. Because they failed to address genetic and environmental factors, the plaintiffs failed to "isolate the particular effect of McDonald's foods on their obesity and other injuries," and could not prove causation, so the complaint was dismissed. *Id.* (dismissing the complaint because "[p]laintiffs have failed . . . to draw an adequate causal connection between their consumption of McDonald's food and their alleged injuries"). Quoting its previous dismissal the district court explained:

[T]o allege that McDonald's products were a significant factor in the plaintiffs' obesity and health problems, the Complaint must address these other variables and, if possible, eliminate them or show that a McDiet is a substantial factor despite these other variables. Similarly, with regard to plaintiffs' health problems that they claim resulted from their obesity . . . it would be necessary to allege that such diseases were not merely hereditary or caused by environmental or other factors.

Pelman, 237 F. Supp. 2d at 539.

262. The American Diabetes Association estimates that "[j]ust 30 minutes a day of moderate physical activity, coupled with a 5-10% reduction in body weight, produced a 58% reduction in diabetes." Am. Diabetes Ass'n, How To Prevent Diabetes, <http://www.diabetes.org/diabetes-prevention/how-to-prevent-diabetes.jsp> (last visited Mar. 11, 2007).

263. As discussed in Part II.B.1.d, if the disease was definitely going to develop, the egg donation child could not prove causation or injury from the donor's failure to warn.

264. See RESTATEMENT (SECOND) OF TORTS § 496A (1965).

265. See McIntyre, *supra* note 20, at 543 (noting the risk of passing on genetic disease is present in sexual reproduction, but that situation provides the parties the opportunity to investigate the parents' genetic make-up in advance).

that they knowingly assumed the risk of the egg donor passing on a genetic disease to their child.²⁶⁶

Discussed in Part III.A.3, the Learned Intermediary Doctrine limits a medical manufacturer's duty to warn customers to informing experts upon whom the consumer reasonably relies.²⁶⁷ In this case, both the egg donation agency and the fertility clinic are such experts, because they possess the medical expertise and they serve both the recipient couple and the donor in a fiduciary capacity. Thus, if the donor informs either of the learned intermediaries, the agency or clinic, she has probably satisfied her duty to warn the egg donation child.

The egg donor also has at least two strong public policy arguments in her defense. First, the issue of medical confidentiality is very much implicated in the negligence case prospectively analyzed here. The duty to maintain a patient's confidence dates back as far as 400 B.C., when the Hippocratic Oath was first recorded.²⁶⁸ Most states have statutes protecting medical confidentiality.²⁶⁹ The duty of doctors to maintain the doctor-patient privilege is necessary to ensure a patient's ability to speak freely and disclose all information needed for treatment.²⁷⁰ However, doctors may disclose patient information with impunity when it is necessary to protect the public from the spread of disease or to protect a patient's family.²⁷¹

In sperm donation situations, the sperm donor has been held not to be a patient within the meaning of the doctor-patient privilege.²⁷² Thus, the sperm donor is not entitled to medical confidentiality.²⁷³ In contaminated blood donation cases, donors' privacy interests are usually considered less important than the tremendous public

266. *Cf. id.* at 541–43 (analyzing the defense of assumption of risk when a genetic disease is passed from an anonymous sperm donor to a child conceived with his sperm, and concluding that it would be unsuccessful in that situation).

267. *See Kane, supra* note 176 (concluding that a medical manufacturer reasonably delegated its duty to warn to a third party who had purchased the drug).

268. *See Suter, supra* note 18, at 1871 (explaining that the Oath expresses a physician's moral obligation "to maintain confidentiality in the physician-patient relationship").

269. *See Ralph Ruebner & Leslie Ann Reis, Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 507 (2004) (finding forty states and the District of Columbia recognize the doctor-patient privilege).

270. *See, e.g., Denbo, supra* note 201, at 572 (discussing the history and purpose of medical confidentiality rules).

271. *See id.* at 574 (noting that a majority of states mandate disclosure in the case of child abuse or neglect, gunshot wounds or contagious diseases).

272. *See, e.g., Johnson v. Super. Ct.*, 95 Cal. Rptr. 2d 864 (Ct. App. 2000) (ordering disclosure by a sperm bank of a sperm donor's medical records, but protecting his identity).

273. *See id.* at 872 (concluding that the physician-patient privilege has no application in the case of this sperm donor).

interest in maintaining a safe and adequate national blood supply.²⁷⁴ Also, communicable diseases fall within the permissible exceptions to doctor-patient medical confidentiality.²⁷⁵ Confidentiality is most fully recognized in the adoption setting, where medical data of biological parents can usually be accessed only upon a showing of good cause.²⁷⁶

In this case, unlike a sperm donation situation, the egg donor is likely a patient of the fertility clinic and egg donation agency because of the extensive medical oversight the egg donation process requires.²⁷⁷ Therefore, she is entitled to the protection of medical confidentiality. Further, as the child is born with the predisposition, it is likely a court would conclude that the potential benefit to be gained by disclosing the donor's medical information is outweighed by the donor's interest in medical confidentiality.²⁷⁸

A second public policy defense, and perhaps the more persuasive, is that the egg donor can argue that imposing liability on her for a negligent failure to warn would be contrary to the law's preference for reinforcing traditional family structures.²⁷⁹ The argument is that any recognition of a duty the egg donor owes the child implicitly opens the door to claims for rights and parental privileges, and courts have consistently favored legal fictions that protect traditional notions of family.²⁸⁰ This preference was clearly illustrated in *Gerald H. v. Michael D.*,²⁸¹ in which the Supreme Court upheld a California statute mandating, as an irrebuttable presumption, that a child born into

274. See Hopkins, *supra* note 110, at 145–46 (arguing for donor's privacy interests in blood donation contamination litigation).

275. See, e.g., Denbo, *supra* note 201, at 572 (explaining the rationale for the doctrine of physician-patient confidentiality, but noting that a physician can reveal confidential communications when required by law).

276. See *supra* Part I.D.2 (discussing state regulation and case law regarding adoption, including the circumstances in which various states allow the opening of sealed adoption records). See generally Lori B. Andrews & Nanette Elster, *Adoption, Reproductive Technologies, and Genetic Information*, 8 HEALTH MATRIX 125, 126 (1998) (assessing whether genetic history should be available to children born through ART, and being unable to "think of any legal reason why such information should be disclosed," but easily thinking "of any number of social reasons why it should not be revealed").

277. See *supra* Section II.B.1.c (reasoning that a physician assumes the duty to warn his patient).

278. Cf. *In re George*, 630 S.W.2d 614, 621–23 (Mo. Ct. App. 1982) (finding the benefit outweighed by the biological father's privacy interest when disclosure was unlikely to produce a bone marrow donor match for the adoptee).

279. See, e.g., Richards & Wolf, *supra* note 8, at 527–34 (discussing the law's preference for preserving the traditional family, even though changing social and reproductive trends render the preference a legal fiction frequently at odds with reality).

280. See, e.g., Dolgin, *supra* note 3, at 528–34 (analyzing cases where paternity conflicted with presumptions of paternity).

281. 491 U.S. 110 (1989).

marriage is the child of both members of the marriage, even when a paternity test would definitively prove otherwise.²⁸² This presumption also exists at common law.²⁸³ In fact, courts are usually so eager to reinforce traditional family structures that a double standard exists regarding paternity;²⁸⁴ even when a father is demonstrably not the biological father of a child, courts may sometimes force him to pay child support,²⁸⁵ yet a biological father may be denied parental rights if those rights impede upon the sanctity of a traditional family.²⁸⁶ The purpose of such paternity presumptions is to ensure that children are provided for and to escape traditional notions of illegitimacy.²⁸⁷

Here, the hypothetical egg donation child is fully provided for by his actual, intending parents, so that impetus for holding the egg donor to a duty of care is absent. Thus, egg donation is most like adoption, because responsibility for the child is fully assumed by new parents. However, even more than in an adoption case, the recipient parents are the *only* parents the egg donation child has ever had, because all the donor provided were unfertilized eggs. In fact, one would presume that intending parents often choose ART instead of adoption in order to have children who are more fully their own. Therefore, the imperative in adoption, that the full legal transfer of

282. *Id.*

283. *E.g.*, RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmt. c (1998) (“A child born to a married woman is presumptively the genetic child of the woman’s husband.”). This common law presumption was intended to protect children from being declared illegitimate. WILLIAM BLACKSTONE, 1 COMMENTARIES *457.

284. *See Dolgin, supra* note 3, at 563 (discussing the conflict between traditional constructs of family and the realities of modern families, including those created by multiple marriages, divorces, gay and lesbian relationships, and assisted reproductive technologies, and noting the contradictory results this conflict creates in paternity suit outcomes).

285. *E.g.*, *Miscovich v. Miscovich*, 688 A.2d 726 (Pa. Super. Ct. 1997) (applying estoppel principles in refusing to admit DNA evidence, proving the mother’s ex-husband was not the biological father of the child born during their marriage, in order to require the ex-husband to continue paying child support, even though the wife had instituted a child support suit against a third party). *See generally* Richards & Wolf, *supra* note 8, at 427–34 (discussing putative and legal fathers’ rights regarding marital children).

286. *E.g.*, *Michael H.*, 491 U.S. 110 (upholding a statute barring introduction of DNA paternity tests into a custody suit when the evidence would disturb the married couple and its traditional family structure); *Lehr v. Robertson*, 463 U.S. 248 (1983) (rejecting a biological father’s effort to block the adoption of his child by the mother’s husband, even though she married the adopting father after the child’s birth).

287. *See Dolgin, supra* note 3, at 527–28 (explaining the presumption as a way to help children avoid hardship).

the child creates stability and normality, is intrinsic in the egg donation process itself.²⁸⁸

Imposing a duty on the egg donor allows for the possibility that the donor could assert rights over the egg donation child. Not only would such a possibility directly impede the imperative of stability and normality, but it would also buck the trend in the law favoring intention as the ultimate determination of parentage.²⁸⁹ The court in *Johnson* refused to conclude the child had two mothers, one biological and one genetic:

The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home. To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina [Calvert]'s role as mother.²⁹⁰

This logic should control an egg donation child's suit against the egg donor for failing to warn him of his genetic predisposition. Here, the recipient parents are half the genetic parents of the child, the intending mother is also the biological (birth) mother, and they are also the intending parents.²⁹¹ The egg donor does not even have the biological link created by birth upon which Anna Johnson's claim of maternity was founded.²⁹² Certainly, recognizing parental rights in an egg donor rather than a gestational surrogate, an even more distant third party, would diminish the recipient and intending parents' parental status.²⁹³

III. LEGISLATIVE AND POLICY RECOMMENDATIONS

Notwithstanding the conclusion reached in the analysis in Part II, above, the possibility remains that a court might hold an egg donor liable for latent genetic diseases passed to an egg donation child after finding either that eggs are commodities, and thus the donor is a seller, or that there is a special relationship between the donor and

288. Cf. Anderson, *supra* note 83, at 610–11 (“Adoption statutes are very clear regarding the termination of birth parents’ legal rights and responsibilities.”); Manning, *supra* note 14, at 711–16 (discussing an adoptee’s entitlement to stability through clear legal parentage determination).

289. See Dolgin, *supra* note 3, at 542 (describing the courts’ justification for protecting traditional family structures because families are “moral units” in need of protection).

290. 851 P.2d 776, 781 n.8 (Cal. 1993).

291. This genetic ratio assumes the intending father’s sperm was used to fertilize the donor’s egg, though the sperm may well be from an anonymous donor as well.

292. *Johnson*, 851 P.2d at 779 (stating that Anna Johnson gave birth to the child).

293. *Id.* at 781 n.8 (arguing that there is no reason to accept that a child has two mothers in this situation).

the child creating a duty to warn. It is critical that the type of litigation analyzed in this Comment be preempted by proper legislation, and that the free-for-all that defines the egg donation industry be reined in.²⁹⁴ Thus, following a discussion of the various interests in need of protection, this section proposes comprehensive regulation.

The competing interests are varied. Regulation should protect egg donors, recipient parents, and the children born from donated eggs. In opposition to a donor's privacy interest, the children born with donated eggs must be assisted in the treatment and prevention of disease through access to the medical records of their donor parent.²⁹⁵ Egg donation children must also be guaranteed protection against genetic diseases they cannot avoid through stringent screening measures that filter out donors who carry genetic diseases.²⁹⁶ Donors must be sure anonymity will be preserved and must be confident they will never be found to be the lawful parents of any children their eggs may ultimately create.²⁹⁷ On the flip side, intending parents and their families need protection from the possible intrusion of an egg donor asserting parental rights.²⁹⁸

First, to protect egg donation children, the possibility of birth with a genetic disease should be minimized by adoption of strict screening

294. Calls for regulation are not new. See Anderson, *supra* note 83, at 620–26, (proposing comprehensive legislation to govern ART); Horstmeyer, *supra* note 63, at 693 (proposing a rule requiring a birth mother to state before the procedure that she does not wish gamete donors to have parental rights over the child); Katers, *supra* note 62, at 466 (arguing for “nuclear-family traditionalism” for ART legislation); Squillace, *supra* note 220, at 146–50 (applying contract and property law principles to egg donation regulation). But see Baum, *supra* note 13, at 162–66 (arguing free market principles should govern egg donation instead of restrictive regulation to maximize procreative liberty and recognition of freedom of contract). Students at the University of Iowa drafted a model ART Act in 2005. Sara Cotton et al., *Model Assisted Reproductive Technology Act*, 9 GENDER RACE & JUST. 55, 55 (2005). The American Bar Association has also published model ART guidelines. MODEL ACT GOVERNING ASSISTED REPRODUCTION I (Proposed Draft 2006) (revised 2007).

295. For calls for full access to sperm and egg donors' medical information, see Baines, *supra* note 17, at 118–20 (balancing the child's right to know his own genetic background with the donor's right to anonymity and the recipient parent's right to have the fact of assisted reproduction kept secret, and arguing for the same access extended to adoptees to be extended to children born of donated eggs or sperm); D'Orazio, *supra* note 17, at 253 (arguing for access to medical records given the importance of such information for making health decisions).

296. See Robertson, *supra* note 58, at 10–11 (describing the risk of transmission of genetic disease without proper screening).

297. For a discussion of the danger of being found to be a lawful parent faced by egg donors, see Crews, *supra* note 44, at 154 (critiquing *K.M. v. E.G.*, 117 P.2d 673 (Cal. 2005)).

298. Cf. *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (permitting the biological father of a child conceived with his donated sperm to seek parental rights when he and the mother might have agreed not to extinguish his parental rights).

standards for egg donors. Currently, the Food and Drug Administration requires that donors undergo a basic blood test for communicable diseases.²⁹⁹ A limited number of states also have screening requirements that are limited to communicable diseases.³⁰⁰ Furthermore, to best protect egg donation children, they should have the same access to the genetic information of their egg donors that adoptees have to their biological parents' information for good cause.³⁰¹

Second, egg donors must be protected against product liability actions by classification of human eggs as non-products. Just as blood shield statutes have blocked such actions in the context of blood donation, egg donors should not be held to the high standards of product liability.³⁰² Blood shield statutes permit actions for negligence and misrepresentation, and egg donation law should as well.³⁰³ Furthermore, donors must also be confident they will never be found responsible for parental duties.

Most importantly, the duty of care should be placed squarely onto the egg donation agencies and fertility clinics. These companies profit tremendously from ART.³⁰⁴ They possess the medical expertise, they solicit infertile couples who want their own children, and they serve as brokers between and agents for the parties.³⁰⁵ Therefore, the burden of screening donors for hereditary genetic disease and selecting embryos free from genetic defects properly belongs to the egg donation agencies and fertility clinics. Though critics of extensive pre-donation genetic screening might argue the cost would

299. See *supra* note 26 and accompanying text (noting the minimal regulation of donor screening in most jurisdictions).

300. See, e.g., N.H. REV. STAT. ANN. § 168-B:14 (2007) ("No gamete shall be used in an in vitro fertilization or preembryo transfer procedure, unless the gamete donor has been medically evaluated and the results, documented in accordance with rules adopted by the division of public health services, demonstrate the medical acceptability of the person as a gamete donor."); VA. CODE ANN. § 32.1-45.3 (2007) ("Any person using donor gametes . . . [for] artificial insemination, in vitro fertilization, . . . or other intervening medical technology using sperm or ova, shall, prior to using any donor gametes for such procedures, ascertain the HIV status of the donor through testing as provided in Board of Health regulations.").

301. See Manning, *supra* note 14, at 716 ("Even those states that do not allow complete access to adoption records recognize the importance of access to genetic medical history . . .").

302. See Part I.D.4 (discussing blood shield statutes, and noting their possible applicability to other human tissue, including gametes).

303. *Id.*

304. Cf. MUNDY, *supra* note 5, at 4 (noting that pharmaceutical companies make approximately \$3,000,000,000 per year from sales of fertility drugs and medical devices used in ART procedures).

305. Cf. *Stiver v. Parker*, 975 F.2d 261, 270 (6th Cir. 1992) (holding a surrogacy agency to a fiduciary duty of care).

be prohibitive, an intending couple that is already paying over \$20,000 to have a child of their own would likely consider ensuring that child's future health warrants this precautionary step. Regardless, egg donors, who are arguably the least informed party in an egg donation transaction, should not be forced to bear burdens of care they are ill equipped to meet.³⁰⁶

Given all these competing interests, states should adopt the revised 2002 Uniform Parentage Act provision that specifically bars recognition of gamete donors as legal parents,³⁰⁷ and should add additional provisions to protect the other interests at play. First, the UPA provision that should be adopted states that “[a] donor is not a parent of a child conceived by means of assisted reproduction.”³⁰⁸ Adoption of this provision would protect the donor, the intending parents, and the egg donation child by preserving the family structure from multiple and conflicting parental claims.

Second, the additional regulation should include a statute modeled on the adoption statutes that grant access to parents' medical information, without revealing the parents' identities, upon a showing of good cause.³⁰⁹ Consequently, states should also adopt regulation that requires adequate record keeping of egg donors' medical information by the egg donation agencies and fertility clinics so that egg donation children can access their genetic histories if and when they show good cause.

Third, states should adopt regulation that specifically classifies egg donation as a service, thereby preventing invocation of the UCC or product liability law by plaintiff egg donation children.

Fourth, and perhaps most importantly, high minimum screening standards should be also mandated, with the duty and burden of care placed on the skilled shoulders of the egg donation agencies and fertility clinics so all parties are protected.³¹⁰ With this genetic information available before the egg donation process commences, intending parents should also be able to—and required to—give truly informed consent, waiving the liability of the donor for any future

306. See *supra* Part II.A.1 (critiquing the idea of applying principles of product liability as a means of imposing a duty to warn on egg donors).

307. UNIF. PARENTAGE ACT § 702 (2000) (amended 2002), 9B U.L.A. 355 (2001). See *supra* Part I.C. (providing further information about the history and current state of the UPA).

308. UNIF. PARENTAGE ACT § 702.

309. See *supra* Part I.D.2 (noting the circumstances in which sealed adoption records may be opened).

310. This could, perhaps, take the form of amendments to the Fertility Clinic Success Rate and Certification Act of 1992. 42 U.S.C. § 201 (2006). See *supra* note 12 and accompanying text (discussing the frequency and success rates of IVF).

medical issues faced by the egg donation child.³¹¹ Critically, this regulation should prohibit egg donation procedures and transactions unless licensed medical professionals—the fertility clinics—have conducted threshold screening for latent genetic disorders.

CONCLUSION

Infertility is a tragedy that affects a considerable percentage of the population.³¹² ARTs offer a solution for an increasing number of people, but the legal, ethical and practical consequences have not yet been worked out. Currently, the near absolute lack of regulation necessarily turns every case in which egg donation is at issue into an ad hoc determination of parentage.³¹³ Thus far, the question of whether the anonymous egg donors, whose eggs permit so many parents to have children, retain an ongoing duty of care to protect their offspring has not been answered. As this Comment has argued, legislation must be passed to protect egg donors from being held to a continuing duty to warn. Statutes that balance the competing interests in play should preempt suits similar to the hypothetical action analyzed here. Most importantly, the egg donation industry, and the fertility industry in general, desperately needs regulating so that a situation in which an egg donation child is born with disease or defective gene does not ever arise.

311. For a discussion of informed consent in egg donation situations, see Barbara L. Atwell, *The Modern Age of Informed Consent*, 40 U. RICH. L. REV. 591 (2006) (addressing the parameters of informed consent in the new situations alternative reproductive medical procedures present).

312. CDC, SUCCESS RATES, *supra* note 33, at 1 (reporting that fifteen percent of American women will seek infertility treatment in their lives).

313. *E.g.*, *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (using parental intent as a tiebreaker between a birth and genes to determine parentage).