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## Strict Liability for Sperm?

Posted by [Adam Doerr](#) on August 4, 2009



The *ABA Journal* notes an interesting case from a federal district court Pennsylvania, [Donovan v. Idant Laboratories](#) (pdf). In 1995, Donna Donovan, the plaintiff, was artificially inseminated with sperm provided by Idant Laboratories, the defendant. Ms. Donovan signed a consent form in which Idant represented that "(1) semen stored at Idant is exceptionally safe; (2) Idant has a screening program that far exceeds mandated standards and (3) Idant's donors go through a rigorous screening process to ensure that they have a good genetic background and history."

Donovan gave birth to a daughter, Brittany, in January 1996 using sperm from Idant Donor G738. Brittany was diagnosed with developmental difficulties related to her status as a carrier of the Fragile X gene (FMR1). Testing revealed that Donor G378, not Donna Donovan, carried the Fragile X gene. Donna Donovan sued Idant under a multitude of theories,\* both as Brittany's guardian and on her own.

Although the court dismissed Donovan's personal claims as outdated, it allowed Brittany's claims to proceed. As a minor, Brittany's claims would not expire until two years after her eighteenth birthday. Brittany had two main claims, one based on the theory that Idant was negligent in failing to properly

screen the sperm, and the second based on the theory that she was injured by a defective "product," Donor G378's sperm.

Brittany claimed that Idant was negligent in failing to adequately screen sperm from Donor G378. Had Idant tested Donor G378's sperm, however, Donovan would not have been given access to this particular sperm, and Brittany would never have been born. Following New York law, the court viewed this paradoxical result as fatal to Brittany's claim. The court noted that "no cause of action may be maintained on behalf of an infant plaintiff for 'wrongful life,' i.e., that he or she would never have been born but for the negligence of the defendant."

More significantly, the court allowed Brittany to proceed on the theory that her injuries resulted from a defect in Donor G738's sperm. Strict product liability is generally based on the idea that manufacturers are best positioned to make their products safer. Instead of having to prove that the manufacturer was negligent, a consumer bringing a strict product liability claim just has to show that he or she was injured by a defect in the product.

Does treating the claim as one for strict product liability really resolve the logical paradox underlying New York's refusal to recognize wrongful birth claims? Sperm (or eggs) may be unique as "products" with a central role in conception, but I fail to see a clear distinction between a negligence claim for wrongful birth and a strict product liability claim for defective sperm brought by the product of that sperm. In either case, the logical flaw persists — the plaintiff would not exist but for the defect/negligence.

The ultimate resolution to the issues raised by this case may be for states to pass laws placing sperm beyond the reach of product liability claims. Many states already apply such shield laws to blood, and some have extended their shield laws to cover organs and other human tissues. Indeed, this question played a major role in the outcome of this case. As the court noted, Brittany would not have been able to bring her claim under Pennsylvania law, which shields human tissue. Because New York's equivalent statute shields only blood and blood derivatives, however, the court allowed Brittany's claims to proceed.

\*The full list of claims includes negligence, breach of contract, third-party beneficiary breach of contract, breach of the express warranty of merchantability, breach of implied warranty of merchantability, third-party beneficiary breach of express and implied warranties of merchantability, negligent misrepresentation, strict products liability and negligent infliction of emotional distress.

Filed under: [Genetic Testing/Screening](#), [Genomics & Society](#), [Pending Litigation](#)

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### One Response to "Strict Liability for Sperm?"

ryan says:

[August 4, 2009 at 3:55 pm](#)

In this instance, it holds that Idant laboratory was negligent. It's fair to assume that this is settled at this point. it's merely of whether or not such negligence should be held accountable.

Would anyone agree that they SHOULDN'T be held accountable in some way?

Perhaps the judges in New York know this. And that merely because of a flurry of legal barriers, Donovan isn't in a position to hold them liable. Maybe, just maybe, the system is allowing such a stretch (strict product liability on sperm) to facilitate some justice where some is due. Would you agree?

IMHO, a rare instance where the logic of justice is holding its ground despite legal obfuscations.

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August 7, 2009 at 1:07 am

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