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Sperm Banks Can Be Sued Under Product Liability Laws, Federal Judge Rules

Shannon P. Duffy
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In the first decision of its kind, a federal judge has ruled that a sperm bank may be sued under product liability laws for failing to detect that a sperm donor had a genetic defect.

In his 23-page opinion in *Donovan v. Idant Laboratories*, Senior U.S. District Judge Thomas N. O'Neill Jr. cleared the way for a 13-year-old mentally retarded girl from Pennsylvania to sue a New York sperm bank under the theory that the sperm used to conceive her had a defect known as "Fragile X," a mutation known to cause a syndrome of maladies that include mental retardation and behavioral disorders.

"Under New York law, the sale of sperm is considered a product and is subject to strict liability," O'Neill wrote.

The ruling is a victory for plaintiffs attorney Daniel L. Thistle and clears the way for Brittany Donovan of Philadelphia to pursue both tort and contract claims against the New York sperm bank that sold sperm to her mother in 1995.

But O'Neill dismissed all claims brought by her mother, Donna Donovan, after finding that the statute of limitations had long expired because genetic tests showed in 1998 that the sperm donor was the source of the Fragile X genetic defect in her daughter.

Brittany Donovan's claims, however, are still viable, O'Neill found, because the Pennsylvania Minors Tolling Statute provides that the clock does not begin to run until two years after the minor reaches the age of 18.

According to the suit, Donna Donovan began research in 1994 to find a sperm bank and was promised by Idant Laboratories that its donors go through a rigorous screening process to ensure that they have a good genetic background and that it employed a screening program that far exceeds mandated standards.

Idant shipped semen from Donor G738 to Donovan's physician in April 1995, and she gave birth to Brittany in January 1996.

The suit says Donna Donovan soon noticed abnormalities in her daughter's development and that she was diagnosed

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as a Fragile X carrier in December 1997. Further genetic testing showed that Donna Donovan was not a Fragile X carrier and that Donor G738 was a carrier.

But Donna Donovan claims that doctors at Idant continued to assure her that Brittany's developmental problems were not related to Fragile X and couldn't possibly be the result of the sperm that was purchased through Idant.

Plaintiffs attorney Thistle argued in court papers that it was not until 2008, when Donovan saw a report in *The American Journal of Medical Genetics*, that she knew her daughter's problems were related to the sperm donor's genetic defect.

But Idant's lawyer, M. Douglas Eisler of Wilson Elser Moskowitz Edelman & Dicker, successfully argued that Donna Donovan had waited too long to sue.

Thistle urged the judge to apply the discovery rule and to toll the statute of limitations because of the fraudulent concealment by Idant. But O'Neill found that Donovan should never have relied on Idant's doctors.

"Common sense would cause a reasonable person to question statements in the letters from Idant's doctors regarding its liability especially in light of the facts that Brittany had been diagnosed by an independent hospital and that an independent laboratory had found a genetic link between the donor genes and Brittany's Fragile X carrier status," O'Neill wrote.

The fact that Idant's doctors proposed alternative explanations for Brittany's problems cannot be considered fraudulent concealment, O'Neill found.

"To hold otherwise would be to permit tolling for fraudulent concealment every time a defendant offered a different explanation of events which caused it to believe that it was not at fault. That is an untenable extension of the fraudulent concealment doctrine," O'Neill wrote.

But Thistle won the much more significant legal battle over which state's laws should apply -- Pennsylvania's or New York's.

For a case involving sperm, the differences between Pennsylvania and New York tort law are significant. Both states have enacted so-called "blood shield statutes" that prohibit products liability suits stemming from blood or blood products.

But while Pennsylvania's blood shield statute includes human tissues other than blood, New York's statute includes only blood and its derivatives.

O'Neill found that there was a "true conflict" between the laws of the two states because "semen is not a blood derivative," and Brittany Donovan would therefore have a valid cause of action under New York law, but not under Pennsylvania law.

Thistle argued that New York law should apply because New York's interest in regulating its corporations outweighed Pennsylvania's interest in providing redress for wrongs committed against one of its citizens.

Eisler argued that Pennsylvania law should apply because the semen was sold to be used by Donna Donovan in Pennsylvania and the injury she alleges took place in Pennsylvania.

O'Neill sided with Thistle, saying that since most of the significant conduct took place in New York -- including the screening of the sperm donor and the formation of the contract -- New York had a stronger interest in seeing its laws applied.

"New York has a strong policy incentive to regulate the sperm banks in its state," O'Neill wrote.

O'Neill found that Brittany Donovan may have valid contract claims for breach of implied and express warranties, but that Thistle must first cure a defect on the issue of standing by showing in an amended complaint that she is an "intended third-party beneficiary" of the contract between her mother and Idant.

Turning to the strict liability claim, O'Neill rejected the defense argument that New York would not allow a claim premised on allegedly defective sperm.

Although other states' blood shield laws and Section 19 of the Restatement (Third) of Torts all say that human tissue and organs are included in the list of products that are exempted from strict liability law, O'Neill found that "the relevant New York statute does not and no case law has extended the statute to also exempt human tissues like sperm."