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“I’D LIKE MY EGGS FROZEN”: NEGLIGENT EMOTIONAL DISTRESS COMPENSATION FOR LOST FROZEN HUMAN EGGS

Abstract: Assisted Reproductive Technology continues to advance and has already assisted thousands in childbearing. In 2012, the American Society for Reproductive Medicine announced that oocyte cryopreservation, or egg freezing, a form of Assisted Reproductive Technology, was no longer considered an experimental procedure. Egg freezing is growing significantly in popularity and, as a result, fertility clinics continue to prosper as more women seek their services. For many women, egg freezing gives them hope of motherhood beyond the typical childbearing age. For some, this procedure can preserve their fertility following invasive medical procedures that weaken their eggs’ viability. In March 2018, two tank failures occurred in San Francisco and Cleveland. As a result, thousands of eggs thawed and some women lost any chance they had at having biological children. In response, some women have sought legal recourse for their loss. This Note explores how reproductive material has been classified in property law and the overall limitations of emotional distress damages for property loss. The Note also discusses how eggs are most likely to be categorized as property and, as a result, how negligence damages for property loss are likely to be limited to the fair market value of the lost eggs. Finally, this Note argues that emotional distress damages for lost frozen eggs should be available to women for this property loss.

INTRODUCTION

Oocyte cryopreservation, better known as egg freezing, has only recently become routine medical practice.¹ Women pursue the procedure for a myriad of reasons.² For many female cancer patients, egg freezing has preserved their

¹ MARY ANN MASON & TOM EKMAN, BABIES OF TECHNOLOGY: ASSISTED REPRODUCTION AND THE RIGHTS OF THE CHILD 88 (2017). Oocyte is the biological term for egg cells. *Oogenesis*, in A DICTIONARY OF BIOLOGY (7th ed. 2015). Cryopreservation is the conservation of in vitro material by freezing. *Cryopreservation*, in A DICTIONARY OF ENVIRONMENT AND CONSERVATION (3d ed. 2017) (ebook).

² See Marcia C. Inhorn et al., *Medical Egg Freezing and Cancer Patients’ Hopes: Fertility Preservation at the Intersection of Life and Death*, 195 SOC. SCI. & MED. 25, 25 (2017) (discussing how egg freezing can help women who are facing infertility due to cancer); Zeynep Gurtin, *Women in Their 40s Freeze Their Eggs for a Reason (and It’s Not Stupidity)*, THE GUARDIAN (Sept. 14, 2018), <https://www.theguardian.com/commentisfree/2018/sep/14/women-40s-freeze-eggs-single-women-fertility-options> [<https://perma.cc/6FN8-FZZR>] (explaining that some young women are seeking to keep their fertility in case of future need). In this Note, the terms “woman,” “women,” or “female” describe those people biologically born with eggs, including cisgender women, transgender men, and gender nonconforming people. See generally *Glossary of Terms—Transgender*, GLAAD, <https://>

possibility of motherhood.³ For example, Julia, a young cancer patient, decided to freeze her eggs after undergoing a double mastectomy.⁴ The cancer continued to progress, however, and Julia was only able to preserve three eggs.⁵ She ultimately decided to donate her eggs and expressed her desire that they would eventually help another woman.⁶

Arghavan Salles dedicated most of her prime fertile years pursuing a medical degree and preparing to become a surgeon.⁷ Realizing she wanted someday to have children, she decided to spend the money to have her eggs extracted.⁸ To prepare for egg retrieval, Salles had to give herself shots, undergo ultrasounds, and have her blood drawn.⁹ In the end, the doctor was unable to retrieve any viable eggs for freezing.¹⁰ Despite the lack of success, Salles expressed her desire to try again with a different regimen to ensure she has a future option of having her own biological children.¹¹ She encourages younger women to freeze their eggs while they are at their most fertile.¹²

Jennifer Lannon began egg freezing procedures at only twenty-six, earlier than most women, who typically begin the process in their thirties.¹³ She decided to undergo the process early to make sure she has viable eggs when she is older.¹⁴ Similarly, at twenty-seven, Victoria Reitano chose to freeze her eggs early to invest in her life plan of having at least two children.¹⁵ For many women who have chosen to freeze their eggs, they are hoping to prolong their fertility until they meet a suitable partner.¹⁶ Such procedures, which are unre-

www.glaad.org/reference/transgender [https://perma.cc/P7EW-ECFV] (explaining the appropriate terms to use regarding transgender matters). The terms “men” or “males” describe those people born with the biological ability to produce sperm, including cisgender men, transgender women, and gender nonconforming people. *Id.*

³ Inhorn et al., *supra* note 2, at 25.

⁴ *Id.* at 30–31.

⁵ *Id.* at 31.

⁶ *Id.*

⁷ See Arghavan Salles, *I Spent My Fertile Years Training to Be a Surgeon. Now, It Might Be Too Late for Me to Have a Baby*, TIME (Jan. 3, 2019), <http://time.com/5484506/fertility-egg-freezing> [https://perma.cc/QAG6-8EJN].

⁸ *Id.* Most of the expenses were paid out of pocket. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Ruth La Ferla, *These Companies Really, Really, Really Want to Freeze Your Eggs*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/style/egg-freezing-fertility-millennials.html> [https://perma.cc/55YC-SMS9].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Heather Murphy, *Lots of Successful Women Are Freezing Their Eggs. But It May Not Be About Their Careers.*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/health/freezing-eggs-women.html> [https://perma.cc/TV4L-539Q].

lated to medical issues concerning infertility, are referred to as social egg freezing.¹⁷

These stories demonstrate that a number of factors motivate women in choosing to freeze their eggs.¹⁸ A 2018 study interviewed thirty-one women who underwent social egg freezing to better understand their motivations.¹⁹ Women expressed a variety of reasons for undergoing the procedure such as the desire to wait until they are financially stable, to take steps to plan ahead for later infertility, and to mitigate potential later regrets of failing to conceive when they were younger and more fertile.²⁰ Another recent study concluded that women are primarily motivated to pursue egg freezing because they are still searching for the right partner.²¹ For other women, the focus on their careers has forced their plans of motherhood on the back burner.²²

Although more employers are working to support their female employees who have family demands, many women still feel significant pressure in choosing between a career and a family, and many women have given up careers to pursue motherhood.²³ Egg freezing, therefore, has become an appealing option for young women to establish careers while still preserving their chances to be a mother at older ages.²⁴ Nonetheless, there are critics who argue egg freezing is just acting as a band-aid covering up deeper issues of salary gaps between men and women, societal pressures on mothers to be the primary caregivers, and unsupportive work environments for working mothers.²⁵ Despite these critiques, social egg freezing has rapidly grown in a very short time span.²⁶

¹⁷ Kylie Baldwin, *Conceptualising Women's Motivations for Social Egg Freezing and Experience of Reproductive Delay*, 40 SOC. HEALTH & ILLNESS 859, 859–60 (2018).

¹⁸ *Id.* at 870.

¹⁹ *Id.* at 861. The participants came from the United Kingdom, Norway, and the United States. *Id.*

²⁰ *Id.* at 863, 868.

²¹ Murphy, *supra* note 16.

²² See, e.g., Salles, *supra* note 7 (explaining that women studying to be physicians have very little time to focus on family planning).

²³ See MASON & EKMAN, *supra* note 1, at 90–93 (describing the many hours professional women are expected to put into their work but the slow changes companies are implementing to support working parents).

²⁴ *Id.* at 92.

²⁵ *Id.* at 95.

²⁶ See *id.* at 90 (stating egg freezing is one of the quickly expanding areas of fertility treatments); Jessica Glenza, *Fertility and Canapés: Why Egg Freezing Parties Are a Hot Item on Wall St*, THE GUARDIAN (Jan. 2, 2018), <https://www.theguardian.com/science/2018/jan/02/egg-freezing-parties-wall-st-fertility-women> [https://perma.cc/8WSW-VNCQ] (reporting that an investment banking firm stated the egg freezing industry is ready for a potential merger and acquisition). Kindbody, a new fertility startup, has received millions from investors. Sara Ashley O'Brien, *'Fertility Van' Hits Streets of New York City*, CNN (Aug. 3, 2018), <https://money.cnn.com/2018/08/03/technology/fertility-tests-kindbody/index.html> [https://perma.cc/SJV3-TK38].

Yet egg freezing can come at a hefty cost.²⁷ Although some egg freezing procedures are covered by health insurance, most women pay out of pocket.²⁸ Several high-tech Silicon Valley companies are increasingly adopting employee benefit packages for advanced reproductive operations.²⁹ Facebook and Apple now extend to their employees the benefits of oocyte cryopreservation.³⁰ Other large companies outside of the technology sector have also indicated interest in offering their female employees similar benefits.³¹ These employee perks help these companies stand out in the job market.³²

Egg freezing companies are now throwing parties to inform their guests of the benefits of the practice.³³ These parties are often at upscale locations with plenty of drinks and appetizers.³⁴ One startup, Kindbody, even has a van that tours different cities for women to visit in order to get information and have their blood drawn for a fertility test.³⁵ Celebrities have also publicly discussed their own experiences with egg freezing.³⁶ As the industry is rapidly

²⁷ Anna Louie Sussman, *The Women Who Empty Their Savings to Freeze Their Eggs*, BBC (June 28, 2018), <http://www.bbc.com/capital/story/20180627-the-women-who-empty-their-savings-to-freeze-their-eggs> [https://perma.cc/9UN7-YMF6]. One procedure can cost upwards of \$17,000. *Id.* This cost, however, does not include additional storage-related expenditures. Kaitlyn Tiffany, *The SoulCycle of Fertility Sells Egg-freezing and 'Empowerment' to 25-Year-Olds*, THE VERGE (Sept. 11, 2018), <https://www.theverge.com/2018/9/11/17823810/kindbody-startup-fertility-clinic-egg-freezing-millennials-location> [https://perma.cc/3ZBQ-MBT2].

²⁸ Sussman, *supra* note 27. Many insurance policies cover the costs of egg freezing when a woman undergoes life-altering treatments such as chemotherapy. Michelle Andrews, *Want to Freeze Your Eggs? Only a Few Firms, Such as Facebook and Apple, Help Pay for It*, WASH. POST (Dec. 23, 2014), <https://www.washingtonpost.com/national/health-science/want-to-freeze-your-eggs-only-a-few-firms-such-as-facebook-and-apple-help-pay-for-it/2014/12/19/a4a4aa78-8550-11e4-a702-fa31ff4ae98e> [https://perma.cc/HP76-4KSE]. Insurance coverage for infertility alone, however, has been more erratic and there is very little coverage for non-medical purposes. *Id.*

²⁹ Andrews, *supra* note 28.

³⁰ Murphy, *supra* note 16.

³¹ See MASON & EKMAN, *supra* note 1, at 89 (stating that Virgin Airlines' leader, Richard Branson, expressed interest in offering egg freezing benefits to the company's employees).

³² See Mark Tran, *Apple and Facebook Offer to Freeze Eggs for Female Employees*, THE GUARDIAN (Oct. 15, 2014), <https://www.theguardian.com/technology/2014/oct/15/apple-facebook-offer-freeze-eggs-female-employees> [https://perma.cc/AKS3-5D2M] (explaining that inclusion of fertility treatment in an employee benefits package can make a company more appealing).

³³ Glenza, *supra* note 26.

³⁴ See MASON & EKMAN, *supra* note 1, at 89–90 (describing egg freezing parties in San Francisco and Manhattan).

³⁵ O'Brien, *supra* note 26.

³⁶ See Korin Miller, *5 Celebrities Who've Decided to Freeze Their Eggs*, WOMEN'S HEALTH MAG. (Mar. 24, 2017), <https://www.womenshealthmag.com/health/g19966761/celebrity-egg-freezing/> [https://perma.cc/JYB2-BUK3] (surveying various celebrities who underwent egg freezing). For example, the singer Halsey has publicly discussed her decision to freeze her eggs. Kayleigh Roberts, *Halsey Discusses Her On-Stage Miscarriage and Why She's Freezing Her Eggs at 23*, MARIE CLAIRE (Apr. 27, 2018), <https://www.marieclaire.com/celebrity/a20085045/halsey-endometriosis-miscarriage-freezing-eggs/> [https://perma.cc/CU8A-9BKK]. In an episode of *The Real Housewives of New York City*, reality star Tinsley Mortimer became emotional when she saw a photo of her frozen eggs. *The*

growing, egg freezing clinics are also beginning to offer small mark downs in price, perhaps to attract more customers.³⁷

Although the egg freezing industry continues to give more women options to achieve biological motherhood, some women have lost their frozen eggs because of accidental thawing.³⁸ In March 2018, for instance, a fertility clinic in San Francisco had a malfunction that jeopardized thousands of eggs and pre-embryos.³⁹ That same month, a clinic in Cleveland experienced a similar incident when the freezing tank's temperature unexpectedly rose.⁴⁰ The Cleveland clinic did not discover the malfunction until the morning when staff arrived.⁴¹ These losses have ruined some women's chances of ever having biological children.⁴²

Yet these are not the only incidents of unintentional biological material losses.⁴³ The United States does little to regulate the fertility industry and some are now calling for greater oversight.⁴⁴ Lawsuits have been and continue to be

Real Housewives of New York City: Faux Weddings and a Funeral (Bravo television broadcast June 13, 2018).

³⁷ See Laura Regensdorf, *At 35, I Went to a Millennial Egg-Freezing Clinic—And Now I'm Re-thinking My Future*, VOGUE (Nov. 12, 2018), <https://www.vogue.com/article/what-to-know-about-egg-freezing-fertility-preservation-women-trellis-clinic-new-york-city> [<https://perma.cc/7JCT-4YV7>] (stating that some clinics are offering discounts).

³⁸ Kayla Webley Adler, *When Your Dreams of Motherhood Are Destroyed*, MARIE CLAIRE (Oct. 1, 2018), <https://www.marieclaire.com/health-fitness/a23327231/egg-freezing-embryos-lack-of-regulation> [<https://perma.cc/79GT-CMTJ>].

³⁹ Amy Goldstein, *Fertility Clinic Informs Hundreds of Patients Their Eggs May Have Been Damaged*, WASH. POST (Mar. 11, 2018), <https://www.washingtonpost.com/national/health-science/fertility-clinic-informs-hundreds-of-patients-their-eggs-may-be-damaged/2018/03/11/b605ea82-2536-11e8-b79d-f3d931db7f68> [<https://perma.cc/4F5X-7MW8>].

⁴⁰ Samantha Schmidt, *2,000 Frozen Eggs and Embryos Possibly 'Compromised' After Fertility Clinic Temperature Malfunction*, WASH. POST (Mar. 9, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/03/09/2000-frozen-eggs-and-embryos-possibly-compromised-after-fertility-clinic-temperature-malfunction> [<https://perma.cc/9GZ7-9T8G>]. Some of those samples in Cleveland dated as far back as the 1980s. *Id.*

⁴¹ *Id.*

⁴² See Adler, *supra* note 38 (reporting on Rachel Mehl who lost her frozen eggs in Cleveland and will never be able to have biological children); Randi Kaye & Michael Nedelman, *'Our Future Children': Families Speak After Loss of Frozen Embryos in Tank Failure*, CNN (May 12, 2018), <https://www.cnn.com/2018/05/12/health/ohio-fertility-clinic-embryos-families/index.html> [<https://perma.cc/H74T-Z8SG>] (explaining how Sierra Mathews lost her chance of having a child after her frozen eggs thawed).

⁴³ See, e.g., *Sentry Ins. v. Cont'l Cas. Co.*, 74 N.E.3d 1110, 1114 (Ill. App. Ct. 2017) (stating that the plaintiffs alleged their stored semen had been accidentally thawed and destroyed); *Frisina v. Women & Infants Hosp. of R.I.*, No. CIV.A. 95-4037, 2002 WL 1288784, at *2 (R.I. Super. Ct. May 30, 2002) (explaining that embryos were accidentally destroyed when they were moved from one location to another); Gilbert Ngabo, *Woman Sues Etobicoke Fertility Clinic Over Freezer Malfunction*, THE STAR (July 13, 2018), <https://www.thestar.com/news/gta/2018/07/11/woman-sues-etobicoke-fertility-clinic-over-freezer-malfunction.html> [<https://perma.cc/245E-ASKK>] (reporting on a woman's suit against a Toronto clinic over the loss of her frozen eggs).

⁴⁴ See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 217 (2d ed. 2011) (stating that U.S.

filed against these fertility clinics over the losses of pre-embryos, eggs, and sperm.⁴⁵ Now, with the emergence and growth of oocyte cryopreservation, more eggs will be placed in storage and, therefore, potentially compromised with consequential litigation likely to ensue.⁴⁶

This Note explores how traditional property and tort law affect the avenues of compensation for lost eggs.⁴⁷ This Note addresses the limited legal remedies for women who lose their eggs based upon the current legal landscape in property law and negligence.⁴⁸ Part I of this Note provides the necessary background material to understand property law regarding frozen gametes and pre-embryos.⁴⁹ Part I also presents the limits placed on negligence-caused emotional distress claims, and particularly, restrictions for negligent property loss.⁵⁰ Part II then discusses how the current law is likely to classify frozen eggs as property and how this classification will affect women's potential claims of mental distress damages for their destroyed eggs.⁵¹ Finally, Part III argues that courts should not completely bar women from emotional distress damages for negligence-caused losses of their lost frozen eggs.⁵²

I. REPRODUCTIVE BODILY TISSUE AS PROPERTY AND NEGLIGENT EMOTIONAL DISTRESS LIMITATIONS OF PROPERTY LOSS

Since the 1950s, sperm has been successfully preserved through freezing.⁵³ It was not until 1986, however, when oocyte cryopreservation was first

lawmakers have enacted very few laws regarding the assisted reproductive technology industry); Adler, *supra* note 38 (stating that Ohio state senator Joe Schiavoni plans to introduce a bill regulating fertility clinics). Senate Bill 344, sponsored by Schiavoni, was introduced in December 2018 but has not progressed any further. S.B. 344, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

⁴⁵ See *Sentry Ins.*, 74 N.E.3d at 1114 (explaining plaintiffs' allegation that their stored semen had been accidentally thawed and destroyed); *Frisina*, 2002 WL 1288784, at *5 (explaining that embryos were accidentally destroyed when they were moved); Adler, *supra* note 38 (stating that women have filed complaints against the Cleveland fertility clinic). An attorney in San Francisco has already represented over one hundred women who have lost embryos due to negligence. Adler, *supra* note 38.

⁴⁶ See, e.g., *KINDREGAN & MCBRIEN*, *supra* note 44, at 302 (explaining that litigation is inevitable as artificial reproductive technology grows and mistakes, including possible damage to cryopreserved gametes, occur); *MASON & EKMAN*, *supra* note 1, at 90 (stating that egg freezing is a quickly expanding area of fertility treatments); Browne Lewis, "You Belong to Me": *Unscrambling the Legal Ramifications of Recognizing a Property Right in Frozen Human Eggs*, 83 TENN. L. REV. 645, 672, 683 (2016) (explaining that egg freezing will most likely become more common, and absent more government regulation, fertility clinics may fail to safely store a woman's eggs).

⁴⁷ See *infra* notes 53–300 and accompanying text.

⁴⁸ See *infra* notes 158–168 and accompanying text.

⁴⁹ See *infra* notes 53–168 and accompanying text.

⁵⁰ See *infra* notes 132–168 and accompanying text.

⁵¹ See *infra* notes 169–256 and accompanying text.

⁵² See *infra* notes 257–300 and accompanying text.

⁵³ *Topé Adeniyi, Cryopreservation of Gametes and Embryos*, in CLINICAL REPRODUCTIVE SCIENCE 351, 351 (Michael Carroll ed., 2019). The first successful case of sperm donation for artificial

successfully accomplished.⁵⁴ Finally, in 2012, the American Society for Reproductive Medicine announced egg freezing to be a viable option for women wishing to prolong their fertility.⁵⁵ Some studies show that pregnancy rates from cryopreserved oocytes are akin to those achieved with fresh eggs; other studies, however, have been less optimistic, finding success rates only as high as 39% and as low as 14%.⁵⁶

Before oocyte cryopreservation became routine, in vitro fertilization, another form of assisted reproduction, was used successfully for decades.⁵⁷ In vitro fertilization involves the fertilization of a woman's egg outside of her body with sperm.⁵⁸ The fertilized egg, now called a pre-embryo, is placed in

insemination occurred in 1884. BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* 240 (2d ed. 2011).

⁵⁴ Adeniyi, *supra* note 53, at 356.

⁵⁵ MASON & EKMAN, *supra* note 1, at 88. Prior to 2012, the American Society for Reproductive Medicine considered egg freezing to be an "experimental" procedure only. *Id.* Women become less and less fertile as they age. See Jeffrey Klein & Mark V. Sauer, *Assessing Fertility in Women of Advanced Reproductive Age*, 185 AM. J. OBSTETRICS & GYNECOLOGY, 758, 758 (2001) (stating that women are much more likely to experience infertility around age forty); Dominic Stoop et al., *Fertility Preservation for Age-Related Fertility Decline*, 384 LANCET 1311, 1311 (2014) (referencing studies that have shown a decrease in female fertility beginning in the mid-thirties). There are a variety of reasons, however, why a woman may experience infertility issues that are unrelated to her age. See Hans-Rudolf Tinneberg & Antonio Gasbarrini, *Infertility Today: The Management of Female Medical Causes*, 123 INT'L J. GYNECOLOGY & OBSTETRICS S25, S25 (2013) (stating that infertility can be caused by a variety of factors). Men also experience infertility and can just as easily be the root of a couple's struggle with infertility. See Elise Hall & Vivien K. Burt, *Male Fertility: Psychiatric Considerations*, 97 FERTILITY & STERILITY 434, 435 (2012) (stating men's fertility issues affect about half of couples experiencing infertility). Women develop all the eggs they will possess before they are born, whereas men continue to produce new sperm. GEOFFREY SHER ET AL., *IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES* 34–35 (4th ed. 2013). Men also remain fertile for a longer period than women. See Mohamed A.M. Hassan & Stephen R. Killick, *Effect of Male Age on Fertility: Evidence for the Decline in Male Fertility with Increasing Age*, 79 FERTILITY & STERILITY 1520, 1256 (2003) (concluding that male fertility decreased significantly around age forty-five). Despite the time restraints to reproduce, the average age of motherhood has risen. Quoctrung Bui & Claire Cain Miller, *The Age That Woman Have Babies: How a Gap Divides America*, N.Y. TIMES (Aug. 4, 2018), <https://www.nytimes.com/interactive/2018/08/04/upshot/up-birth-age-gap.html> [<https://perma.cc/M9VG-FZWF>]. In 1972, the average age of new mothers was twenty-one; it is now closer to twenty-six. *Id.* This is due to more people attending college, marrying later, and using birth control. *Id.*

⁵⁶ Inhorn et al., *supra* note 2, at 25; see, e.g., Joseph O. Doyle et al., *Successful Elective and Medically Indicated Oocyte Vitrification and Warming for Autologous In Vitro Fertilization, with Predicted Birth Probabilities for Fertility Preservation According to Number of Cryopreserved Oocytes and Age at Retrieval*, 105 FERTILITY & STERILITY 459, 465 (2016) (finding that there was a 39% chance of live birth among all the thawed eggs within the study); Francesca Specter, *Hope or Hype? The Chilling Truth About Freezing Your Eggs*, THE GUARDIAN (Nov. 6, 2017), <https://www.theguardian.com/lifeandstyle/2017/nov/06/hope-or-hype-the-chilling-truth-about-freezing-your-eggs> [<https://perma.cc/3VGE-WMEC>] (mentioning a study that found only a 14% success rate). It is important to note that the more eggs retrieved, the more likely a viable pregnancy will result. See Salles, *supra* note 7.

⁵⁷ See SHER ET AL., *supra* note 55, at 18 (stating in vitro fertilization has progressed significantly since the first baby was born by in vitro fertilization in 1978).

⁵⁸ *Id.* In vitro means "in glass." *In vitro*, in A DICTIONARY OF BIOLOGY, *supra* note 1. In other words, in vitro fertilization refers to fertilization done outside the body. *Id.*

her uterus.⁵⁹ In 1983, less than a decade after the first successful birth conceived through in vitro fertilization, the first successful pregnancy from a three-day frozen pre-embryo occurred.⁶⁰ Over time, however, it became apparent that the established freezing method had a better success outcome for pre-embryos than for unfertilized female eggs.⁶¹ As a result, the medical community needed to find a different freezing approach for female eggs.⁶² Finally, in 1999, flash-freezing was established and opened the door for successful egg freezing practices.⁶³

This Part presents the necessary legal background of property law and how it has applied to reproductive material.⁶⁴ Section A covers how traditional property law has dealt with emerging medical practices involving the human body.⁶⁵ Section B explains how gametic material and pre-embryos are defined at law.⁶⁶ Section C concludes by discussing negligent emotional distress claims both generally and when brought with regard to property loss.⁶⁷

A. Property Law and the Human Body

U.S. property law originates in English common law, which operated to protect the land-owning class in maintaining wealth through real property.⁶⁸ Property is now defined based upon whether an owner possesses certain rights

⁵⁹ SHER ET AL., *supra* note 55, at 18. Many experts assert that an embryo remains a pre-embryo until it is implanted into the uterus. See STEINBOCK, *supra* note 53, at 232 (discussing that the term pre-embryo is more technical because it is at its earliest stage of development and cannot develop into an embryo without placement in the uterus). The term “embryo,” however, has been used by the courts when referring to a technical pre-embryo. See, e.g., *In re Marriage of Dahl & Angle*, 194 P.3d 834, 835–36 (Or. Ct. App. 2008) (referring to frozen pre-embryos not yet implanted into the uterus as embryos). Courts also sometimes use the terms “blastocyst” or “zygote” which are synonyms of pre-embryo. KINDREGAN & MCBRIEN, *supra* note 44, at 402, 409.

⁶⁰ Adeniyi, *supra* note 53, at 359.

⁶¹ *Id.* at 356. The differing success rate is due to female eggs’ composition, which is largely water, and due to their greater sensitivity to temperature compared to pre-embryos. *Id.*

⁶² See *id.* (stating that it was faulty to use the same freezing method for embryos on oocytes).

⁶³ MASON & EKMAN, *supra* note 1, at 88. The successful oocyte cryopreservation that occurred in 1986 was accomplished by the “slow method” of freezing used for pre-embryos. Adeniyi, *supra* note 53, at 356.

⁶⁴ See *infra* notes 68–168 and accompanying text.

⁶⁵ See *infra* notes 68–102 and accompanying text.

⁶⁶ See *infra* notes 103–131 and accompanying text.

⁶⁷ See *infra* notes 132–168 and accompanying text.

⁶⁸ See Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 387, 398 (2006) (describing how sources of wealth derive from families’ land rights). Real property includes land and anything attached to it. *Property*, BLACK’S LAW DICTIONARY (10th ed. 2014). American property law is largely rooted in John Locke’s theory that freedom is unattainable without property rights. Miranda Oshige McGowan, *Property’s Portrait of a Lady*, 120 MINN. L. REV. 1037, 1038 (2001).

in a thing regardless of whether that thing is tangible or intangible.⁶⁹ Courts enforce property rights through injunctions or damages depending upon the nature of the claim.⁷⁰ In cases of property loss because of wrongdoing, tort law usually governs the claim.⁷¹ Generally, damages for property loss are subject to the property's fair market value before the loss.⁷²

The American legal system has resolved that human beings are not a form of legal property.⁷³ Historically, before the advancement of medical technology, the law never had to consider property rights in human organs or body tissue.⁷⁴

⁶⁹ *Property*, BLACK'S LAW DICTIONARY, *supra* note 68 (defining property as an array of rights). Those rights include, for example, the ability to sell, transfer, or use the property that is protected by law. *See, e.g.*, *United States v. Craft*, 535 U.S. 274, 282 (2002) (stating the property owner's rights include the right to handle the property, the right to exclude others from the property, the right to generate wealth from the property, the right to sell the property, and the right to block another from selling the property).

⁷⁰ *See* *Brandreth v. Lance*, 8 Paige Ch. 24, 27 (N.Y. Ch. 1839) (stating that injunctions have been used to protect property rights); JOHN G. SPANKLING, *UNDERSTANDING PROPERTY LAW* 510, 520 (4th ed. 2017) (stating that injunctions are commonly enforced in private nuisance actions but less so in trespass actions, where damages are usually awarded); Oliva L. Weeks, *The Law Is What It Is, but Is It Equitable? The Law of Encroachments Where the Innocent, Negligent, and Willful Are Treated the Same*, 39 CAMPBELL L. REV. 287, 290–91, 293 (2017) (describing how courts have the option to choose between enforcing an injunction or demanding damages due to trespass). Equity, at English common law, was administered through Courts of Chancery; during their development, American courts followed this system. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 442–43, 449 (2003). Equity is rooted in justice and fairness and meant to be used when monetary damages are insufficient. *Id.* at 444, 476–78. Although distinct courts of equity have largely been eliminated, courts still use equitable power to order remedies including injunctions, specific performance, and restitution. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 538, 541–42 (2016).

⁷¹ *See, e.g.*, *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 634 A.2d 1330, 1334 (Md. 1994) (affirming that a party may be compensated for property loss in tort law); *Rabideau v. City of Racine*, 627 N.W.2d 795, 801–02 (Wis. 2001) (turning to tort law on whether the plaintiff can recover emotional distress damages due to property loss).

⁷² *See, e.g.*, *Hand Elecs., Inc. v. Snowline Joint Unified Sch. Dist.*, 26 Cal. Rptr. 2d 446, 450 (Ct. App. 1994) (citing *Lane v. Spurgeon*, 223 P.2d 889, 891 (Cal. Ct. App. 1950)) (reiterating that the general rule is to compensate property loss with the fair market value of the property at the time of the loss); *MCI Commc'ns Servs., Inc. v. CMES, Inc.*, 728 S.E.2d 649, 652 (Ga. 2012) (explaining that generally damages for lost property against a tortfeasor are limited to the fair market value of the property); *J & D Towing, LLC v. Am. Alt. Ins. Corp.*, 478 S.W.3d 649, 657 (Tex. 2016) (stating that damages for property loss are typically the fair market value at the time before the destruction). Courts, however, have recognized when the fair market value is an inadequate remedy and, as a result, have awarded other damages. *See, e.g.*, *Kimes v. Grosser*, 126 Cal. Rptr. 3d 581, 585–86 (Ct. App. 2011) (holding the plaintiff should be able to also seek damages for the costs incurred in saving his pet's life after it was shot).

⁷³ *See* U.S. CONST. amend. XIII, § 1 (abolishing slavery). For much of U.S. history, many human beings were considered property. *See* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857) (declaring that the Constitution gives the right to keep slaves as property); *Bell v. Bell's Adm'r*, 36 Ala. 466, 474 (1860) (summarizing that a wife's being becomes that of her husband).

⁷⁴ *See* Michael M.J. Lin, Note, *Conferring a Federal Property Right in Genetic Material: Stepping into the Future with the Genetic Privacy Act*, 22 AM. J. L. & MED. 109, 112 (1996) (discussing how courts have only recently been asked to resolve issues involving genetic material).

Instead, early case law primarily addressed the issue of property rights in cadavers, which were considered quasi-property, whereby the body does not constitute a legal property, but relatives possess an interest in the corpse up until burial or disposal.⁷⁵ Nonetheless, over the last century, blood transfusions and organ donations became routine.⁷⁶ With this advancement in medical technology, courts were forced to confront the legal status of particular parts of the human body.⁷⁷

1. *Moore v. Regents of University of California* and Property Interest of the Spleen

In 1990, the Supreme Court of California in *Moore v. Regents of University of California* decided a key case regarding property law of human bodily tissue by holding that a plaintiff did not possess a property interest in his spleen.⁷⁸ In October 1976, plaintiff John Moore visited the University of California, Los Angeles Medical Center regarding his hairy-cell leukemia.⁷⁹ A few days later, Moore's physician, David W. Golde, recommended that Moore's spleen be removed.⁸⁰ Prior to the operation, Golde and a researcher arranged to give parts of Moore's spleen to a research facility; Moore was not informed of these plans.⁸¹ Following the operation, Moore visited the medical center several additional times between 1976 and 1983.⁸² By 1979, Golde had established a cell culture which he derived from Moore's spleen and a patent was issued in

⁷⁵ *Bauer v. N. Fulton Med. Ctr.*, 527 S.E.2d 240, 243 (Ga. Ct. App. 1999); Kristine D. Kuenzli, Note, *Is Your Kidney for Sale? An Economic and Policy Perspective on the Legalization of a Living Kidney Vendor Program in the United States*, 36 J.L. & COM. 131, 137 (2018); see *Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891) (stating that the notion that a cadaver is not property is rooted in Lord Coke's writing); Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is . . ."*, 20 IOWA J. CORP. L. 5, 9–10 (1996) (discussing the development of English common law regarding cadavers).

⁷⁶ See DOUGLAS B. KENDRICK, *BLOOD PROGRAM IN WORLD WAR II*, at ix (1964) (stating that the blood donation program was established during World War II); Peter K. Linden, *History of Solid Organ Transplantation and Organ Donation*, 25 CRITICAL CARE CLINICS 165, 165 (2009) (stating that organ donation became a common practice beginning around 1950).

⁷⁷ See Jeffrey A. Potts, Note, *Moore v. Regents of the University of California: Expanded Disclosure, Limited Property Rights*, 86 NW. U.L. REV. 453, 453 (1992) (stating that established law cannot always answer the issues that arise with technological progress).

⁷⁸ 793 P.2d 479, 488–89 (Cal. 1990); see *Wash. Univ. v. Catalona*, 437 F. Supp. 2d 985, 995 (E.D. Mo. 2006), *aff'd*, 490 F.3d 667 (8th Cir. 2007) (stating that although there is little case law, *Moore* gives maximum direction regarding property ownership of biological materials used in medical research).

⁷⁹ *Moore*, 793 P.2d at 480–81. Hairy cell leukemia is an uncommon type of chronic lymphocytic leukemia where the cancerous white blood cells first develop in the lymph nodes and then spread. THE MERCK MANUAL OF MEDICAL INFORMATION: HOME EDITION 768 (Robert Berkow et al. eds., 1997).

⁸⁰ *Moore*, 793 P.2d at 481.

⁸¹ *Id.*

⁸² *Id.*

1984.⁸³ The patent was estimated to have a possible market value of approximately \$3 billion.⁸⁴ Upon learning of the patent, Moore sued for property conversion, among other claims.⁸⁵ As a result, the California Supreme Court was forced to address the issue of whether Moore ever had a property interest in his extracted spleen.⁸⁶

Ultimately, the court was not convinced that Moore possessed a property interest in his separated spleen.⁸⁷ The court was swayed by the lack of case law supporting Moore's claim, and refused to expand property conversion claims to Moore's case.⁸⁸ In particular, the court was wary of imposing such liability due to the societal importance of medical research and concern that a contrary holding would result in a constant threat of litigation.⁸⁹ Although the court refused to extend property conversion liability in *Moore*, it noted that its holding did not mean bodily tissue can never be considered property.⁹⁰ As a result, the court left an open question in the property law of excised bodily material.⁹¹

2. Current Property Law Regarding Bodily Tissue

Since *Moore*, other courts have followed the California court's lead.⁹² In the late 1980s, parents of children diagnosed with Canavan disease began providing bodily tissue in order to develop testing to identify disease carriers.⁹³

⁸³ *Id.* at 481–82. Moore's spleen cells were valuable because they could produce a continuous culture while keeping the T-lymphoblasts. U.S. Patent No. 4,438,032, at [57] (filed Jan. 6, 1983).

⁸⁴ *Moore*, 793 P.2d at 482.

⁸⁵ *Id.* at 482, 487. Property conversion is an intentional tort where a tortfeasor exercises so much control over another person's personal property that the owner loses ability to exercise dominion over his or her property. RESTATEMENT (SECOND) OF TORTS § 222A (AM. LAW INST. 1965). Damages will generally be the fair market value of the property. *Id.* § 222A cmt. c.

⁸⁶ *See Moore*, 793 P.2d at 488–89 (pointing out that to establish a case of conversion, Moore must have had some ownership in his cells).

⁸⁷ *Id.* at 489. The court used the term "cells" to encompass all the excised parts of the plaintiff's body, including his spleen. *Id.* at 483 n.6.

⁸⁸ *Id.* at 489, 492–93. The court also concluded that Moore did not hold a property interest in the patented cell line based upon patent law. *See id.* at 493 ("Moore's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention.")

⁸⁹ *See id.* at 493 (stating that honest researchers should not be prevented from doing socially beneficial activities in fear that the donor never intended to have their biological materials used).

⁹⁰ *Id.*

⁹¹ *See* Michelle Bourianoff Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 238–39 (1990) (stating the *Moore* holding was inconclusive with regard to the bodily property rights individuals hold).

⁹² *See* David A. Mapow, Note, *Do People Have Ownership Over Their Body Parts and if So, Can the State Control Their Ultimate Disposition in the Interest of Public Health and Safety?*, 16 RUTGERS J.L. & RELIGION 114, 123 (2014) (stating that the holding in *Moore* has been upheld in other cases).

⁹³ *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064, 1066–67 (S.D. Fla. 2003). Canavan disease is a deadly brain disorder and many sufferers die before reaching age ten. Megan Scudellari, *Gene Therapy Might Be the Best, and Perhaps Only, Chance at Curing*

The plaintiffs argued that they provided genetic material with the understanding that it would be used for researching the disease.⁹⁴ In 1997, however, a patent was granted without the plaintiffs' awareness, and the plaintiffs sued for property conversion.⁹⁵ Basing its review upon case law and statutory law, the court held that the plaintiffs had no property interest in their donated bodily tissue.⁹⁶ Similarly, in 2007, the U.S. Court of Appeals for the Eighth Circuit ruled that, based upon the facts in that particular case, the donors of body tissue and blood did not have a property interest in their donated samples.⁹⁷

Yet the law in the United States is inconsistent in its approach to bodily tissue and organs.⁹⁸ For example, it is against the law to sell organs or bodily tissue on the market.⁹⁹ Blood, on the other hand, is a taxable commodity and considered marketable bodily tissue.¹⁰⁰ In contrast with case law that finds no property interest in bodily tissue, some courts have gone so far as to define blood as property.¹⁰¹ Blood, therefore, is largely considered marketable bodily tissue and remains an outlier to the precedent established in *Moore*.¹⁰²

Brain Diseases, NEWSWEEK (Apr. 28, 2016), <https://www.newsweek.com/2016/05/06/gene-therapy-brain-disease-453217.html> [<https://perma.cc/52XS-K2H6>].

⁹⁴ *Greenberg*, 264 F. Supp. 2d at 1067.

⁹⁵ *Id.* at 1067–68. The patent provided methods of diagnosis, treatment, and therapy. U.S. Patent No. 5,679,635, at [57] (filed Sept. 9, 1994).

⁹⁶ *Greenberg*, 264 F. Supp. 2d at 1074–75; see FLA. STAT. § 760.40(2)(a) (2001) (stating that, with limited exceptions, the results of DNA tests are the sole property of the person analyzed and such tests may only be performed with the person's consent); *State v. Powell*, 497 So. 2d 1188, 1192 (Fla. 1986) (holding that relatives of the deceased have no property interest in the deceased's cadaver). The *Greenberg* court explained that the holding in *Powell* clearly limits property rights to bodily tissue and the state statute was inapplicable to property conversion claims as it was only related to penalties for failure to obtain a person's informed consent. *Greenberg*, 264 F. Supp. 2d at 1074–75. The court also specifically pointed out that extending liability could have a deleterious effect on future research. *Id.* at 1076.

⁹⁷ *Wash. Univ. v. Catalona*, 490 F.3d 667, 670, 673 (8th Cir. 2007). Interestingly, the court did not rest its conclusion on public policy concerns but instead used traditional property law and found that there was a proper gift to Washington University. *See id.* at 676 (stating that the lower court accurately found the donors made a valid gift to the educational institution). As a result, although the donors consented to transfer their bodily tissue to a different research facility, they lost the right to approve transfers upon making their gift. *Id.* at 676–77.

⁹⁸ *See Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 281 (Ct. App. 1993) (pointing out that property law regarding the body is inconsistent).

⁹⁹ 42 U.S.C. § 274e(a) (2018).

¹⁰⁰ *See Green v. Comm'r*, 74 T.C. 1229, 1235 (1980) (holding that petitioner was in the industry of selling her blood for profit); Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 219 (1986) (stating that the selling of blood is a frequent occurrence).

¹⁰¹ *See United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (stating that blood plasma is property); *Perez v. Comm'r*, 144 T.C. 51, 57 (2015) (explaining that in *Garber*, the court hinted that the taxpayer was selling property because her income was directly related to the sale of her blood).

¹⁰² *See Kimberly Self, Note, Self-Interested: Protecting the Cultural and Religious Privacy of Native Americans Through the Promotion of Property Rights in Biological Materials*, 35 AM. INDIAN

B. Property Law Regarding Gametic Material and Pre-embryos

Following *Moore*, California courts were again asked whether biological material deserved property rights, this time with respect to gametic material.¹⁰³ In 1993, in *Hecht v. Superior Court*, the California Court of Appeal ruled that a deceased sperm donor maintained a property interest in his sperm.¹⁰⁴ In October 1991, William Kane left fifteen vials of his sperm at a sperm bank; later that month, he committed suicide.¹⁰⁵ Prior to the deposits, Kane signed an agreement with the sperm bank authorizing release of his sperm to his girlfriend, Deborah Hecht.¹⁰⁶ His will stated his intent to give his sperm to Hecht and, in a letter to his surviving children, he also wrote that he hoped Hecht would choose to have a child with his sperm.¹⁰⁷ Kane's children and ex-wife requested the sperm be destroyed, although Hecht argued it was her property outside of control of the estate.¹⁰⁸ The California Superior Court ordered that the sperm be disposed and Hecht appealed.¹⁰⁹

The California Court of Appeal differentiated sperm from other bodily tissue because, with the help of artificial insemination, it has the very real potential to create life.¹¹⁰ As a result, the court held that the sperm is property and Kane held a property interest in the sperm.¹¹¹ Kane, in accordance with general property rights, was therefore free to dictate the use of his sperm through his will.¹¹² After *Hecht*, other courts have also held that sperm is property.¹¹³

Pre-embryos, on the other hand, are usually considered to be neither property nor life.¹¹⁴ In *Davis v. Davis*, Mary Sue Davis sought possession of

L. REV. 729, 740 (2011) (affirming that the blood seller in *Garber* had a property interest in her plasma).

¹⁰³ *Hecht*, 20 Cal. Rptr. 2d at 281.

¹⁰⁴ *Id.*; see Harvey L. Fiser & Paula K. Garrett, *Life Begins at Ejaculation: Legislating Sperm as the Potential to Create Life and the Effects on Contracts for Artificial Insemination*, 21 AM. U. J. GENDER SOC. POL'Y & L. 39, 47 (2012) (stating *Hecht* is regularly acknowledged as a preeminent case on property rights in sperm). Gametic material is the technical term for sperm and eggs. JAY PHELAN, *WHAT IS LIFE: A GUIDE TO BIOLOGY* 236 (1st ed. 2010).

¹⁰⁵ *Hecht*, 20 Cal. Rptr. 2d at 276.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 276–77.

¹⁰⁸ *Id.* at 279.

¹⁰⁹ *Id.* at 279–80.

¹¹⁰ *Id.* at 283.

¹¹¹ *Id.* Because sperm is property, the court ruled that a probate statute applied. *Id.* at 281, 283.

¹¹² See *id.* (ruling that Kane had the authority to choose how his sperm was utilized).

¹¹³ See, e.g., *Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 316 (Ct. App. 2008) (agreeing with *Hecht*'s holding that gametes are to be considered property); *Kurchner v. State Farm Fire & Cas. Co.*, 858 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 2003) (holding the lower court was correct in finding the excised sperm to be property); *Hall v. Fertility Inst.*, 647 So. 2d 1348, 1351 (La. Ct. App. 1994) (holding that the only issue that needs addressing in the case is whether the sperm was properly donated under property law).

¹¹⁴ KINDREGAN & MCBRIEN, *supra* note 44, at 130.

the frozen pre-embryos made during her marriage.¹¹⁵ She intended to implant them in her uterus.¹¹⁶ Junior Davis, Mary's ex-husband, sought to prevent her from implanting the pre-embryos until he determined whether he wanted to become a father.¹¹⁷ After the trial court decided that the pre-embryos were persons,¹¹⁸ the appellate court reversed and was affirmed by the Tennessee Supreme Court, holding that unwanted procreation on Junior Davis's part would violate his constitutional rights.¹¹⁹ The court concluded that the pre-embryos were neither property nor human beings but rather fit within an alternative category that focuses on the appreciation of the potential for human life.¹²⁰

Less than a decade later, the New York Court of Appeals faced a similar issue on the disposition of frozen pre-embryos following divorce.¹²¹ In this case, however, the couple previously agreed that any release of the pre-embryos from storage required consent from both parties.¹²² The parties, Maureen and Steven Kass, further agreed that in the event they chose to no longer pursue pregnancy, the pre-embryos would be donated for medical research.¹²³ Facing divorce, Maureen Kass sought sole custody of the pre-embryos.¹²⁴ Steven Kass, in opposition, sought instead to enforce the previous agreement to donate the pre-embryos.¹²⁵ Unlike in *Davis*, the *Kass v. Kass* court evaded the question of the legal status of pre-embryos and instead based its ruling on the valid contract between the parties.¹²⁶

Following *Kass*, other courts have largely deferred to the intentions of the parties in resolving disputes over biological material.¹²⁷ In other cases, courts

¹¹⁵ *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* The Supreme Court has held that people have a fundamental right to procreation and, in the reverse, a fundamental right to not procreate. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (ruling that substantive due process gives a right to not procreate); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that procreation is a basic right). Nonetheless, there are limitations to these fundamental rights. See, e.g., *Roe*, 410 U.S. at 163–64 (stating that state law may be able to regulate and even completely restrict a woman's ability to terminate her pregnancy past the first trimester).

¹²⁰ *Davis*, 842 S.W.2d at 597. Because pre-embryos have a potential to create life, the court explained that they are afforded "special respect." *Id.* As a result, the court held that property law must not be the sole guiding force in these cases. *Id.*

¹²¹ *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998).

¹²² *Id.* at 176.

¹²³ *Id.* at 176–77.

¹²⁴ *Id.* at 177.

¹²⁵ *Id.*

¹²⁶ See *id.* at 179 (stating that it is unnecessary to decide whether embryos deserve their own unique legal status). The court held that because the contract was valid, the embryos should be donated for research as agreed upon in the contract. *Id.* at 181.

¹²⁷ See *In re Marriage of Rooks*, 429 P.3d 579, 592 (Colo. 2018), *cert. denied*, 139 S. Ct. 1447 (2019) (stating that the court should first look to any binding agreements regarding the disposition of a couple's embryos); *Roman v. Roman*, 193 S.W.3d 40, 54 (Tex. Ct. App. 2006) (concluding that em-

have sought instead to balance the competing interests of the parties.¹²⁸ The Oregon Court of Appeals, however, went a step further than the New York Court of Appeals by defining embryos as personal property subject to division under a state divorce statute as opposed to contract law.¹²⁹ Louisiana, meanwhile, has a state statute defining frozen embryos as persons but is an outlier among the states.¹³⁰ Indeed, most courts follow *Davis* in categorizing frozen pre-embryos as something between property and personhood.¹³¹

C. Negligent Emotional Distress Claims for Property Loss

To impart a better understanding of the legal landscape negligence lawsuits over frozen egg loss will travel, this Section provides background on negligence claims of emotional distress.¹³² The first Subsection provides the historical development of negligent emotional distress claims.¹³³ The next Subsection examines the current law regarding negligent emotional distress.¹³⁴ Finally, the Section concludes by exploring negligent emotional distress claims involving property loss.¹³⁵

bryos should be destroyed based on an agreement). Courts refer to this method of reasoning as the “contractual approach.” See *Szafranski v. Dunston*, 34 N.E.3d 1132, 1166 (Ill. App. Ct. 2015) (explaining how the contractual approach looks to the agreement between the parties regarding disposition of their embryos). The petitioner in *In re Marriage of Rooks* asked the U.S. Supreme Court to decide whether frozen embryos are property or persons. Petition for Writ of Certiorari at i, *In re Marriage of Rooks*, 429 P.3d 579 (No. 18-959).

¹²⁸ See *J.B. v. M.B.*, 783 A.2d 707, 716–17 (N.J. 2001) (balancing the procreation rights of the parties and concluding that J.B.’s desire not to procreate outweighed M.B.’s desire to procreate); *Reber v. Reiss*, 42 A.3d 1131, 1136–37 (Pa. Super. Ct. 2012) (concluding that the lower court did not err in applying the balancing approach); *Davis*, 842 S.W.2d at 603 (stating that the court will consider the two parties’ circumstances and how the court ruling would affect each of them).

¹²⁹ See *In re Marriage of Dahl & Angle*, 194 P.3d at 839 (stating that the frozen embryos are personal property subject to the state statute). The court used the term “embryo” as opposed to “pre-embryo” even though the embryos were not yet implanted. See *id.* at 835 (stating that the case involved frozen embryos).

¹³⁰ See LA. STAT. ANN. § 9:129 (1986) (stating that an embryo has the legal status of personhood); KINDREGAN & MCBRIEN, *supra* note 44, at 135 (describing the Louisiana state statute as distinctive). Louisiana law uses the term “embryo.” LA. STAT. ANN. § 9:129.

¹³¹ See KINDREGAN & MCBRIEN, *supra* note 44, at 130 (stating that most courts acknowledge that embryos fall somewhere between persons and property).

¹³² See *infra* notes 136–168 and accompanying text.

¹³³ See *infra* notes 136–150 and accompanying text.

¹³⁴ See *infra* notes 151–157 and accompanying text.

¹³⁵ See *infra* notes 158–168 and accompanying text.

1. The History of Negligent Emotional Distress Claims

Early American law did not allow recovery for emotional distress.¹³⁶ This eventually changed and mental distress damages were awarded in cases of physical injuries or, absent physical injury, exceptional cases like the mishandling of a loved one's corpse.¹³⁷ These early common law exceptions in negligent emotional distress claims are still recognized today.¹³⁸

Claims that one has suffered from intentional infliction of emotional distress have long had more favorable treatment in the courts than claims of emotional distress due to negligence.¹³⁹ Because intentional infliction of emotional distress requires both intent and outrageous conduct, courts have been more willing to find liability.¹⁴⁰ In contrast, courts have been hesitant to recognize negligent emotional distress claims without corresponding bodily injury.¹⁴¹

Until the last century, a plaintiff could rarely recover for negligent stand-alone emotional distress damages unrelated to bodily harm.¹⁴² There were pub-

¹³⁶ See Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 813–14 (2004) (explaining that physical injury claims were more widely recognized than emotional harm claims).

¹³⁷ See *id.* at 814 (discussing exceptions, including the mishandling of a loved one's body or misinforming someone of a beloved's death); see, e.g., *Cashion v. W. Union Tel. Co.*, 32 S.E. 746, 746–48 (N.C. 1899) (holding that plaintiff can recover for mental damages if defendant was negligent in its failure to deliver a telegram that would have allowed plaintiff's brother-in-law to be present during her husband's death).

¹³⁸ See Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605, 2612–13 (2015) (stating that claims involving the mishandling of a loved one's corpse or mistakenly informing someone about the death of a loved one are still recognized by courts). There have also been recent cases allowing claims of negligent emotional distress for a doctor misdiagnosing a patient, hospital staff mistakenly placing a newborn in the wrong place, and food consumption involving a revolting external object. *Id.* at 2613–14.

¹³⁹ *Id.* at 2610–11 (discussing the history of intentional infliction of emotional distress claims and how they have been acknowledged at common law). Intentional infliction of emotional harm requires the actor, through his or her egregious behavior, to purposefully cause someone to experience intense emotional harm. RESTATEMENT (THIRD) OF TORTS § 46 (AM. LAW INST. 2012). Negligent infliction of emotional harm, in contrast, does not require intent but instead occurs when an actor's negligence results in extreme emotional harm. *Id.* § 47.

¹⁴⁰ See Rhee, *supra* note 136, at 870 (stating that the blame in tort law is in proportion to the tortfeasor's behavior).

¹⁴¹ Narbeh Bagdasarian, *A Prescription for Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestation Requirement in N.I.E.D. Cases*, 26 AM. J.L. & MED. 401, 401–02 (2000); see, e.g., *Migliori v. Airborne Freight Corp.*, 690 N.E.2d 413, 414 (Mass. 1998) (stating that proving emotional injury is a challenge in cases involving claims for emotional distress); *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 437 (Wis. 1994) (affirming that courts have been concerned about awarding damages related to mental anguish due to the potential consequences of frivolous lawsuits); RESTATEMENT (THIRD) OF TORTS § Scope Note (listing the reasons why negligent claims of emotional distress have been limited).

¹⁴² See Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814, 814 (1990) (explaining that in the nineteenth century, damages for fright required corresponding bodily contact); RESTATEMENT (SECOND) OF TORTS § 436A (AM. LAW INST. 1965) (stating a defendant is not liable for stand-alone emotional distress).

lic policy concerns that stand-alone emotional distress damages would open the door to fraudulent claims and make a court's task of determining the extent of a defendant's liability impractical.¹⁴³ These concerns grew to be less vital over time when compared to the pain such plaintiffs had suffered.¹⁴⁴ Furthermore, in the latter half of the last century, tort law began to broaden with more paths of recovery available to plaintiffs.¹⁴⁵

Dillon v. Legg, a 1968 California Supreme Court case, paved the way for emotional distress damages absent bodily injury.¹⁴⁶ In *Dillon*, the court held that a mother could recover emotional distress damages after witnessing her daughter die from the defendant's car hitting the child.¹⁴⁷ Following *Dillon*, other courts were willing to allow stand-alone emotional distress recoveries in negligence cases.¹⁴⁸ These other courts also found the old rules that once barred stand-alone emotional distress recovery to be overly dogmatic and harsh.¹⁴⁹ Now almost every state has allowed negligence actions for mental distress.¹⁵⁰

2. Current Law Regarding Negligent Emotional Distress Claims

To limit negligent emotional distress not involving physical impact, courts often confine emotional distress claims to cases that meet certain criteria.¹⁵¹ One common category, the zone of danger, emerges when a person, ab-

¹⁴³ *Dillon v. Legg*, 441 P.2d 912, 914 (Cal. 1968).

¹⁴⁴ *Id.*

¹⁴⁵ See Chamallas & Kerber, *supra* note 142, at 822 (stating that tort law slowly became more plaintiff-centered to address more and more tort injustices); Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1515–17 (1997) (describing California court decisions in the 1960s and 1970s that broadened tort law and became the majority view).

¹⁴⁶ Chamallas & Kerber, *supra* note 142, at 821.

¹⁴⁷ *Dillon*, 441 P.2d at 914, 925.

¹⁴⁸ See *D'Amra v. United States*, 354 F. Supp. 810, 813, 822 (D.R.I. 1973) (finding a cause of action for emotional distress damages after a mother witnessed her child being run over); *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1283, 1285–86 (Me. 1987) (reasoning a jury could allow plaintiff recovery for emotional distress damages after receiving what was labeled as his late father's personal effects but ended up being a severed leg); *Whitehair v. Highland Memory Gardens*, 327 S.E.2d 438, 439–40, 443 (W. Va. 1985) (holding that mental distress damages for mishandling of a loved one's corpse do not require corresponding bodily injury).

¹⁴⁹ See *Pieters v. B-Right Trucking, Inc.*, 669 F. Supp. 1463, 1473 (N.D. Ind. 1987) (holding that the plaintiff can still recover emotional distress damages despite not having any physical harm because such a barrier to recovery is unreasonable); *Paugh v. Hanks*, 451 N.E.2d 759, 767 (Ohio 1983) (explaining that the court should consider each negligent emotional distress case based upon its individual facts and not upon established rules).

¹⁵⁰ See *Mower v. Baird*, 422 P.3d 837, 853 (Utah 2018) (citing *Johnson v. Rogers*, 763 P.2d 771, 779 (Utah 1988)) (explaining that, because no jurisdiction in the United States completely bars negligent emotional distress claims, *Johnson* held that, in certain circumstances, public policy now supports negligent emotional distress claims).

¹⁵¹ See J. Mark Appleberry, *Negligent Infliction of Emotional Distress: A Focus on Relationship*, 21 AM. J.L. & MED. 301, 305–06, 309–10 (1995) (describing the usual scenarios in which emotional

sent bodily contact, was within such close proximity of death or injury to cause duress.¹⁵² For instance, in *Falzone v. Busch*, the New Jersey Supreme Court ruled that the plaintiff may recover emotional distress damages when the defendant's car came so close to hitting her that the plaintiff became sick.¹⁵³ *Dillon* is illustrative of a second common category, this one involving mental distress damages for a bystander forced to witness the death or injury of a loved one.¹⁵⁴

Foreseeability, as in other areas of tort law, has also become an important factor in allowing claims of negligent mental distress.¹⁵⁵ The *Restatement (Third) of Torts* recommends limiting negligent emotional distress claims to zone of danger cases or when an individual's negligent conduct will foreseeably cause mental duress.¹⁵⁶ Many recent negligent emotional distress cases have rested upon the foreseeability of a plaintiff's mental suffering caused by the defendant.¹⁵⁷

distress liability has been found, including when the plaintiff is within the zone of danger, when the plaintiff is put at risk of harm, or when the plaintiff is a bystander to a loved one's injury or death).

¹⁵² *Id.* at 305–06. The zone of danger has been limited in some jurisdictions where recovery is allowed only if the emotional reaction results in physical symptoms. *Id.* at 308. Other jurisdictions rely on the test of foreseeability and permit liability only where the emotional reaction to the negligence is foreseeable. *See Caputal v. Lindsay Co.*, 222 A.2d 513, 514, 516 (N.J. 1966) (ruling that it was not foreseeable to a water softener manufacturer that its product defect would cause such mental distress that plaintiff would suffer a heart attack).

¹⁵³ *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965).

¹⁵⁴ *Appleberry*, *supra* note 151, at 309; *see, e.g.*, *Portee v. Jaffee*, 417 A.2d 521, 522–23, 528 (N.J. 1980) (concluding that plaintiff's emotional harm after witnessing the death of her son due to defendant's negligence constituted a valid legal claim). Courts also limit the bystander theory by requiring a close relationship between the bystander and the victim. *See, e.g.*, *Trombetta v. Conkling*, 626 N.E.2d 653, 653–54, 656 (N.Y. 1993) (holding that plaintiff could not recover for witnessing the death of her aunt because her aunt was not a close family member). Other courts have denied recovery when a bystander witnesses the aftermath of an accident. *See, e.g.*, *Fineran v. Pickett*, 465 N.W.2d 662, 663–64 (Iowa 1991) (refusing to broaden the rule that a bystander must witness the accident as it occurs, and therefore prohibiting plaintiffs from recovering damages due to the mental distress they experienced after witnessing the aftermath of an accident).

¹⁵⁵ *See* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 868, 885, 894 (2007) (surveying state laws and finding several states look to foreseeability in emotional distress claims). Foreseeability was also an important consideration in *Dillon*. *See* 441 P.2d at 920–21 (stating that foreseeability will be a vital factor for courts to consider in negligent emotional distress claims and that the *Dillon* defendant should have foreseen the mother's emotional distress). Many courts also use foreseeability in determining whether there was a duty of care owed by a potentially liable party to a plaintiff. Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1263 (2009).

¹⁵⁶ RESTATEMENT (THIRD) OF TORTS § 47.

¹⁵⁷ *See, e.g.*, *Tanasi v. CitiMortgage, Inc.*, 257 F. Supp. 3d 232, 273 (D. Conn. 2017) (asserting that one of the elements a plaintiff must prove in a negligent emotional distress case includes the foreseeability of the duress); *Schmidt v. Coogan*, 335 P.3d 424, 431 (Wash. 2014) (stating that to determine negligent emotional distress the court needs to examine the foreseeability of the plaintiff's mental anguish).

3. Negligent Emotional Distress Claims for Property Loss

Unlike cases involving recovery for emotional distress associated with bodily injury, there is little likelihood of recovery for claims of emotional distress resulting in property loss.¹⁵⁸ It is widely accepted that courts should not consider an owner's emotional relationship to his or her property when assessing damages in negligent property loss.¹⁵⁹ There have been limited exceptions, however, where courts have awarded emotional distress damages where one loses a pet from negligence.¹⁶⁰ This is largely because pets, although personal property, still hold great sentimental value to their owners.¹⁶¹ Nevertheless, most courts have been unwilling to legitimize claims of emotional distress damages for negligent pet loss.¹⁶²

Although less common, there have also been some successful claims for emotional distress damages in negligent property loss of other forms of property that naturally have sentimental value.¹⁶³ Emotional distress claims have also

¹⁵⁸ McGowan, *supra* note 68, at 1094; *see, e.g.*, *Robinson v. United States*, 175 F. Supp. 2d 1215, 1230 (E.D. Cal. 2001) (stating that damages awards involving property loss are typically based on the property's fair market value); *Ketchmark v. N. Ind. Pub. Serv. Co.*, 818 N.E.2d 522, 525 (Ind. Ct. App. 2004) (holding that emotional distress liability cannot extend to pure property loss); *Carbasha v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005) (affirming that emotional distress damages are inappropriate for personal property loss). Unlike claims for negligent infliction of emotional distress, claims involving intentional infliction of emotional distress involving property loss have been treated more favorably by the courts. W.E. Shipley, Annotation, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 29 A.L.R.2d 1070 § 2.5 (1953); *see, e.g.*, *Ragland v. U.S. Bank Nat'l Ass'n*, 147 Cal. Rptr. 3d 41, 59 (Ct. App. 2012) (explaining that one may recover emotional distress damages when there is an intentional tort injuring property).

¹⁵⁹ *See* Shipley, *supra* note 158, § 12 (stating that courts generally do not consider the affection owners have for their property in assessing damages).

¹⁶⁰ *See* *Knowles Animal Hosp. v. Wills*, 360 So. 2d 37, 38–39 (Fla. Dist. Ct. App. 1978) (reasoning that the lower court did not err in allowing the jury to consider emotional distress damages for the negligent handling of plaintiff's dog causing severe burns); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067, 1071 (Haw. 1981) (holding that the lower court was correct in allowing a claim for emotional distress damages for the negligent loss of plaintiff's dog). Pets are considered personal property. *See, e.g.*, *Anzalone v. Kragness*, 826 N.E.2d 472, 476 (Ill. App. Ct. 2005) (affirming that pets are personal property at common law); *Carbasha*, 618 S.E.2d at 371 (stating that pets are personal property).

¹⁶¹ *See* *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964) (pointing out that owners are devoted to their dogs); *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001) (acknowledging that the loss of a pet is equivalent to losing a member of the family or friend).

¹⁶² *See, e.g.*, *Kennedy v. Byas*, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004) (agreeing with other courts that expanding negligent emotional distress claims for pet loss would overburden the judiciary); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211–12 (Mich. Ct. App. 2000) (empathizing with the plaintiff but stating that it is the legislature's prerogative to create a cause of action for negligent emotional distress damages from pet loss); *Hendrickson v. Tender Care Animal Hosp. Corp.*, 312 P.3d 52, 54–55, 57 (Wash. Ct. App. 2013) (affirming that Washington law does not allow negligent emotional distress recovery for death or injury to a pet).

¹⁶³ *See* *McClellan v. Highland Sales & Inv. Co.*, 484 S.W.2d 239, 242 (Mo. 1972) (permitting damages for emotional distress when another person was buried in plaintiff's plot and next to her dead husband); *Edwards v. Talent Irrigation Dist.*, 570 P.2d 1169, 1169–70 (Or. 1977) (allowing emotional

been successful for irreplaceable property loss.¹⁶⁴ For example, there have been successful claims of negligent emotional distress due to losses of unique or special trees.¹⁶⁵ Courts, however, usually limit recovery for damages of sentimental items such as family heirlooms or jewelry to their fair market value.¹⁶⁶ Therefore, to its owner, a family heirloom may be invaluable while its fair market value may be minimal.¹⁶⁷ This varied treatment of negligent emotional distress damages for various types of property loss is likely rooted in judicial concern for wildly speculative claims.¹⁶⁸

II. THE CONSTRAINTS ON EMOTIONAL DISTRESS CLAIMS FOR LOST FROZEN HUMAN EGGS

As egg freezing has only recently become common practice, there have been fewer negligence lawsuits involving frozen eggs than those regarding sperm or pre-embryos.¹⁶⁹ As a result, there is little law to fully predict how courts will treat lawsuits involving negligently lost frozen eggs.¹⁷⁰ Based on precedent regarding pre-embryos and sperm, courts may take different positions in categorizing the legal status of frozen eggs.¹⁷¹ Section A of this Part

distress damages for negligence after water damage from defendant's irrigation system interfered with the plaintiffs' lives because they were forced to spend hours draining water from their home and could not use the bathrooms).

¹⁶⁴ See McGowan, *supra* note 68, at 1100–01.

¹⁶⁵ See *Dawsey v. Newton*, 15 So. 2d 271, 272–73 (Ala. 1943) (concluding that the lower court did not err in allowing the jury to consider the emotional distress when two oak trees were cut down); *Adams v. State*, 357 So. 2d 1239, 1241–42 (La. Ct. App. 1978) (holding that the lower court reasonably found mental distress resulted from the negligent destruction of the plaintiffs' pecan tree).

¹⁶⁶ See *Champlin v. Corr. Corp. of Am., Inc.*, No. 5:08cv76-RS-AK, 2008 WL 2686189, at *8 (N.D. Fla. June 26, 2008) (concluding that even if the plaintiff had an emotional attachment to her lost jewelry, the jewelry's fair market value was an adequate remedy); *Costello v. Yale New Haven Health Servs. Corp.*, No. CV136032324S, 2013 WL 6978818, at *5 (Conn. Super. Ct. Dec. 13, 2013) (holding that state law does not allow claims for negligent emotional distress of property even if there is sentimental value).

¹⁶⁷ See *Robinson*, 175 F. Supp. 2d at 1219, 1233 (ruling that the compensation for personal property loss, such as a wedding dress owned by the plaintiff's grandmother, cannot be measured based on the emotional value attached to the items).

¹⁶⁸ See McGowan, *supra* note 68, at 1102–03 (explaining that emotional distress damages make greater sense for property loss of things that are widely understood to carry sentimental value, as opposed to the personal items that only have emotional and speculative value to their owner).

¹⁶⁹ See Lewis, *supra* note 46, at 687 (concluding her article by explaining that because oocyte cryopreservation is now widely available, courts will need to face the pertinent legal issues of egg freezing).

¹⁷⁰ See *Kazmeirczak v. Reprod. Genetics Inst., Inc.*, No. 10 C 05253, 2012 WL 4482753, at *1 (N.D. Ill. Sept. 26, 2012) (explaining that the state has yet to decide how to compensate plaintiffs for lost pre-embryos or gametes).

¹⁷¹ See *Davis v. Davis*, 842 S.W.2d 588, 596 (Tenn. 1992) (stating that there are three possible categories that pre-embryos can fit into: personhood, bodily material as property, or somewhere in between).

first discusses how frozen eggs will likely be defined as property.¹⁷² Section B then explores how the legal status of frozen eggs as property affects women's avenues of compensation for their lost eggs due to negligence.¹⁷³

A. Possible Legal Classifications of Frozen Eggs

Plaintiffs in past cases have pursued wrongful death lawsuits over lost pre-embryos, arguing that they qualify for personhood.¹⁷⁴ Some state legislatures are passing laws which expand the definition of personhood that would include embryos.¹⁷⁵ In one high profile custody battle over pre-embryos, actor Nick Loeb attempted to move his case to Louisiana, a state with strong protections for pre-embryos, to preserve the pre-embryos developed with his former fiancé, actress Sofia Vergara.¹⁷⁶ Outside of those in a handful of states, however, few courts have been willing to define pre-embryos as persons.¹⁷⁷

Viability is typically defined as the point where a fetus could survive outside of the womb.¹⁷⁸ Most states refuse to define non-viable fetuses as persons, a position that is consistent with U.S. Supreme Court precedent.¹⁷⁹ Because

¹⁷² See *infra* notes 174–205 and accompanying text.

¹⁷³ See *infra* notes 206–256 and accompanying text.

¹⁷⁴ See *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1261 (Ariz. Ct. App. 2005) (holding that the lower court was correct in dismissing plaintiffs' wrongful death claim for their destroyed pre-embryo); *Miller v. Am. Infertility Grp. of Ill.*, 897 N.E.2d 837, 839 (Ill. App. Ct. 2008) (stating that the plaintiffs brought a wrongful death suit against the fertility clinic for failing to properly preserve their pre-embryo).

¹⁷⁵ See, e.g., LA. STAT. ANN. § 9:129 (1986) (stating that an embryo has the legal status of personhood); S.C. CODE ANN. § 44-41-430 (2016) (defining an unborn child as a human organism from the point of fertilization to birth).

¹⁷⁶ See Sam Reed, *Sofia Vergara's Complicated Legal Battle, Explained*, INSTYLE (June 29, 2018), <https://www.instyle.com/news/sofia-vergaras-ex-suing-her-right-implant-their-embryos-another-woman> [<https://perma.cc/EJ9Z-DYAS>] (explaining the various tactics Loeb has used to move his lawsuit to Louisiana, where there are greater legal protections for pre-embryos). Loeb's case was dismissed by a judge in 2019. Ian Mohr, *Nick Loeb's Embryo Case Against Sofia Vergara Dismissed in Louisiana*, PAGE SIX (Oct. 22, 2019), <https://pagesix.com/2019/10/22/nick-loebs-louisiana-case-against-sofia-vergara-dismissed/> [<https://perma.cc/R2JM-34A8>].

¹⁷⁷ See, e.g., *Jeter*, 121 P.3d at 1261 (stating that it is up to the legislature and not the judicial system to consider whether a pre-embryo is a person); *Frisina v. Women & Infants Hosp. of R.I.*, No. CIV.A. 95-4037, 2002 WL 1288784, at *8 (R.I. Super. Ct. May 30, 2002) (dismissing plaintiffs' lawsuit because of their failure to prove that pre-embryos are persons); *Davis*, 842 S.W.2d at 594–95 (holding that the trial court's decision to define pre-embryos as constituting life is unsupported by state and federal law).

¹⁷⁸ See Lauren Russo, Comment, "*Microscopic Americans?*" *A New Conception of the Right to Recover for the Loss of a Pre-embryo in Tort Law*, 2009 MICH. ST. L. REV. 789, 799 (discussing how courts have used nonviability as a barrier to wrongful death suits involving fetuses). *But see Mack v. Carmack*, 79 So. 3d 597, 610–11 (Ala. 2011) (holding that because the state homicide statute includes criminal liability for the death of a fetus, regardless of the viability of that fetus at the time of death, it is logical for the wrongful death statute to also cover the death of nonviable fetuses).

¹⁷⁹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (affirming the holding of *Roe v. Wade*, 410 U.S. 113 (1973) by finding that a woman may have an abortion before her fetus has reached viability); *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998) (concluding that to remain con-

pre-embryos have yet to be implanted into the mother's womb, most courts are unwilling to define pre-embryos as persons, especially considering that non-viable fetuses are also not afforded that status.¹⁸⁰ Nevertheless, a recent lawsuit that has emerged from the Cleveland tank failure alleges wrongful death based on pre-embryo losses.¹⁸¹ This suit will have a difficult legal mountain to overcome.¹⁸² As long as the courts remain hesitant to expand the legal definition of personhood to include pre-embryos, frozen eggs will most certainly remain outside the legal category of personhood, as they have no ability to procreate autonomously.¹⁸³

1. Frozen Eggs: Neither Person Nor Property?

The Tennessee Supreme Court stated in *Davis v. Davis* that pre-embryos fit within a middle category between property and life, a category entailing life potential.¹⁸⁴ Courts in other jurisdictions have agreed and have recognized pre-embryos' potential for life.¹⁸⁵ As a result, these courts are hesitant to define pre-embryos as mere personal property.¹⁸⁶ Pre-embryos, if they somehow did not have the power to give life, would likely not be given such deference by the courts.¹⁸⁷

sistent with constitutional law, pre-embryos do not have personhood status); Russo, *supra* note 178, at 798–99 (stating that most states do not recognize wrongful death claims for non-viable fetuses).

¹⁸⁰ See Russo, *supra* note 178, at 798–99 (explaining that defining pre-embryos as life would go against legal precedent involving non-viable fetuses).

¹⁸¹ Plaintiffs' Complaint for Declaratory Judgment with Memorandum in Support at 4, Penniman v. Univ. Hosps. Health Sys., Inc., 130 N.E.3d 333 (Ohio Ct. App. 2019) (No. 107406).

¹⁸² See Greer Gaddie, Note, *The Personhood Movement's Effect on Assisted Reproductive Technology: Balancing Interests Under a Presumption of Embryonic Personhood*, 96 TEX. L. REV. 1293, 1297 (2018) (stating that pre-embryo personhood legislation has not been very successful); see also *Jeter*, 121 P.3d at 1265 n.7 (explaining that, if pre-embryos are treated as persons, gametic material would also need to be classified as persons in wrongful death claims because they too will be viable after fertilization).

¹⁸³ See Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. LAW. 55, 67 (2018) (stating that eggs and sperm cannot reproduce independently from one another); Russo, *supra* note 178, at 798–99 (explaining that defining a pre-embryo as a person for purposes of a wrongful death case would defy current law).

¹⁸⁴ 842 S.W.2d at 597.

¹⁸⁵ See *Jeter*, 121 P.3d at 1270–71 (emphasizing that because the pre-embryos are not defined as persons does not necessarily mean they are only defined as property); *In re Marriage of Rooks*, 429 P.3d 579, 591 (Colo. 2018), *cert. denied*, 139 S. Ct. 1447 (2019) (recognizing that pre-embryos, because they have the potential for life, should be considered a special kind of property).

¹⁸⁶ See *Jeter*, 121 P.3d at 1270–71 (explaining that pre-embryos are owed greater appreciation than property). Courts may also be wary to label any aspect of life as property due to the history of human beings defined as property in the United States. See Lewis, *supra* note 46, at 647 (explaining how slavery within the United States has affected legal decisions regarding sperm and property).

¹⁸⁷ See *McQueen v. Gadberrry*, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016) (stating that pre-embryos are unique due to their capacity for life).

Sperm, like eggs, cannot breed life autonomously, and have consequently been defined as personal property.¹⁸⁸ The Arizona Court of Appeals, however, has pointed out that gametic material is only one step away from viability.¹⁸⁹ The California Court of Appeal also expressed appreciation for gametic material's vital role in procreation.¹⁹⁰ Within this case, the court distanced the issues surrounding sperm from those surrounding pre-embryos.¹⁹¹ Therefore, there is a remote possibility that eggs may fall into the pre-embryo interim category of property and personhood.¹⁹²

2. Frozen Eggs as Personal Property

Frozen eggs, like sperm, are most likely to be classified as personal property.¹⁹³ The American Fertility Society, for instance, has recognized gametic material as the sole property of its donor.¹⁹⁴ As frozen eggs have no potential for life without fertilization, courts are not limited by the more complicated issues surrounding pre-embryos.¹⁹⁵ Indeed, cases after *Hecht v. Superior Court* have held that sperm is undoubtedly property.¹⁹⁶ Furthermore, women are born with all their eggs whereas men continue to produce new sperm.¹⁹⁷ As a result, one scholar has argued that women should possess stronger property control over their eggs than men possess over their sperm.¹⁹⁸

¹⁸⁸ *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993); see Kristi Ayala, Note, *The Application of Traditional Criminal Law to Misappropriation of Gametic Materials*, 24 AM. J. CRIM. L. 503, 509 (1997).

¹⁸⁹ See *Jeter*, 121 P.3d at 1265 n.7 (explaining that gametic material, if pre-embryos are treated as persons, would also need to be classified as persons in wrongful death claims because it will also be viable after fertilization). It is important to note, however, that one ejaculation has an extremely low probability of creating a viable embryo. See STEINBOCK, *supra* note 53, at 60 (explaining that one ejaculation will contain about 200 million spermatozoa and only one of those spermatozoa will likely fertilize). Embryos, in contrast, have an estimated 70% chance of growing into a fetus. *Id.*

¹⁹⁰ See *Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 316 (Ct. App. 2008) (acknowledging how gametic material is special compared to other forms of property).

¹⁹¹ See *id.* at 316 n.1 (calling attention to the fact that gametic material concerns are different than those involving pre-embryos, as gametic material is incapable of reproducing autonomously).

¹⁹² SHER ET AL., *supra* note 55, at 300; see *Jeter*, 121 P.3d at 1270–71 (stating that pre-embryos transcend mere property).

¹⁹³ Lewis, *supra* note 46, at 671.

¹⁹⁴ *Estate of Kievernagel*, 83 Cal. Rptr. 3d at 314.

¹⁹⁵ See *In re Marriage of Rooks*, 429 P.3d at 591 (recognizing that pre-embryos, because they have the potential for life, should be considered a special kind of property).

¹⁹⁶ See *Se. Fertility Ctr. v. Aetna Cas. & Sur. Co.*, No. 99-1736, 2000 WL 223339, at *1, *4 (4th Cir. Feb. 28, 2000) (affirming the lower court's finding that the frozen sperm was property); *Kurchner v. State Farm Fire & Cas. Co.*, 858 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 2003) (stating that it is understood that sperm is property); *Hall v. Fertility Inst.* 647 So. 2d 1348, 1351 (La. Ct. App. 1994) (reasoning that the cryopreserved sperm is property).

¹⁹⁷ SHER ET AL., *supra* note 55, at 33–35.

¹⁹⁸ Lewis, *supra* note 46, at 672.

The Fourteenth Amendment of the U.S. Constitution, which requires equal protection of all individuals, may also be relevant to the discussion of gametic material.¹⁹⁹ The Fourteenth Amendment requires all people to be equally protected by the law.²⁰⁰ In the last century, the Court has heard many cases involving the equal protection of men and women.²⁰¹ In 1973, the Court held that different legal treatment based upon a person's sex requires strict judicial scrutiny.²⁰² Strict scrutiny means the burden will be on the state to prove that it has a vital interest that legitimizes and requires the law.²⁰³ The Court has since moved away from utilizing strict scrutiny in reviewing laws that distinguish on the basis of sex and has started to recognize legitimate differences between the sexes.²⁰⁴ Therefore, unless there is a compelling reason to treat women's property rights regarding their frozen eggs differently from men's regarding their sperm, the courts may be further bound by the Fourteenth Amendment to treat property rights in frozen eggs equal to those rights found in sperm.²⁰⁵

B. Limited Emotional Distress Damages for Property Loss of Human Eggs

The limitations that courts impose on recovery for negligent emotional distress are not without their critics.²⁰⁶ In comparison to physical injuries, the debilitating conditions which can result from mental duress have often been less recognized.²⁰⁷ Scholars now argue that the distinction between mental and physical injuries is unnecessary as science is now able to prove emotional du-

¹⁹⁹ See Ayala, *supra* note 188, at 529 (stating that the Equal Protection Clause could necessitate equal legal treatment of sperm and eggs). The Equal Protection Clause of the Fourteenth Amendment provides that the state must not treat persons or classes of people differently from other persons or other classes of people without a reasonable basis for doing so. *Equal Protection*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁰⁰ U.S. CONST. amend. XIV, § 1.

²⁰¹ See generally Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1200–02 (2016) (summarizing the cases that went to the Supreme Court in the last century regarding equal protection between men and women).

²⁰² *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

²⁰³ *Strict Scrutiny*, BLACK'S LAW DICTIONARY, *supra* note 68.

²⁰⁴ See Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-suspect Classification*, 59 MO. L. REV. 569, 583 (1994) (discussing the recent development of intermediate scrutiny regarding sex-based classifications).

²⁰⁵ See Ayala, *supra* note 188, at 529 (noting that sperms and eggs may require equal legal treatment under the Equal Protection Clause).

²⁰⁶ See Appleberry, *supra* note 151, at 308–09 (stating that some scholars have recommended that courts abandon the zone of danger category of negligent emotional distress claims and instead look to the foreseeability of a plaintiff's mental distress); Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 812–13 (2015) (discussing the various criticisms of the practice of valuing damages for physical injury over those for emotional distress).

²⁰⁷ See Goldberg, *supra* note 206, at 811 (stating that there is an established legal hierarchy that favors bodily injury claims over mental distress claims).

ress.²⁰⁸ In other words, a plaintiff is now less likely to be able to successfully fake an emotional distress claim.²⁰⁹ Nonetheless, with this technology, there is still concern that erasing the longstanding constraints on negligent emotional distress claims can cause adverse consequences.²¹⁰

In 2018, a woman who lost her eggs due to the San Francisco tank failure sued the fertility clinic.²¹¹ She claimed negligence, contract breach, and property conversion.²¹² She also claimed emotional distress for her lost property.²¹³ The suit remains ongoing and she faces the possibility of receiving limited compensation for her lost eggs due to negligence.²¹⁴ As this Section illustrates, there has been little success in negligent emotional distress claims for misused sperm.²¹⁵ As a result, because frozen human eggs are far more similar to sperm than pre-embryos, women face an uphill battle for negligent emotional distress damages.²¹⁶

²⁰⁸ See *id.* at 826–29 (discussing the use of brain scan technology in measuring emotional distress); Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 619 (2011) (arguing that the limitations on stand-alone emotional distress claims should be reduced as more technology is available to prove such claims); Shaun Cassin, Comment, *Eggshell Minds and Invisible Injuries: Can Neuroscience Challenge Longstanding Treatment of Tort Injuries?*, 50 HOUS. L. REV. 929, 941 (2013) (explaining how neuroscience imagery can show the levels at which someone is experiencing distress). Expert testimony is also used to prove claims of mental duress. Kolber, *supra*, at 617. Expert testimony may even be required in negligent emotional distress actions. See, e.g., *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (holding that expert testimony or assessment is required to prove emotional distress in the negligence suit).

²⁰⁹ See Kolber, *supra* note 208, at 618 (arguing that even when a plaintiff has the motive to lie, technology will be more able to weed out fraudulent claims).

²¹⁰ See David Crump, *Negligent Infliction of Emotional Distress: An Unlimited Claim, but Does It Really Exist?*, 49 TEX. TECH L. REV. 685, 686 (2017) (pointing out that claims of negligent infliction of emotional distress should not be permitted because they encourage unlimited legal claims); Goldberg, *supra* note 206, at 860–61 (arguing that corrective justice will break down in allowing broader claims of negligent emotional distress).

²¹¹ Complaint for Damages at 1–2, *R.M. v. Prelude Fertility, Inc.*, No. CGC-18-565458 (Cal. App. Dep’t Super. Ct. Apr. 3, 2018) [hereinafter *R.M. Complaint*]. Other plaintiffs have filed lawsuits against the San Francisco fertility clinic due to the destruction of their frozen eggs. See, e.g., *Complaint for Damages at 6, 9, K.G. v. Pac. Fertility Ctr.*, No. CGC-19-574336 (Cal. App. Dep’t Super. Ct. Mar. 6, 2019).

²¹² *R.M. Complaint*, *supra* note 211, at 1.

²¹³ *Id.* at 8–9. Throughout her complaint, the plaintiff refers to the lost eggs as property. See *id.* (alleging that due to defendants’ wrongful conduct, she has been deprived of her property).

²¹⁴ See Lewis, *supra* note 46, at 651 (stating that compensation for lost sperm and embryos will depend on how these reproductive materials are classified).

²¹⁵ See *infra* notes 236–250 and accompanying text.

²¹⁶ See *Hardin v. Obstetrical & Gynecological Assocs. P.A.*, 527 S.W.3d 424, 427, 446 (Tex. Ct. App. 2017) (determining that no recovery for negligent infliction of emotional distress is permitted under Texas law against the facility that released gametes to a thief).

1. Negligent Emotional Distress for Lost Pre-embryos and Frozen Eggs

Negligent emotional distress claims for lost pre-embryos have received mixed treatment by the courts.²¹⁷ In *Jeter v. Mayo Clinic Arizona*, the plaintiffs sued a clinic for the loss of their pre-embryos, bringing claims for wrongful death and negligent infliction of emotional distress for the loss of irreplaceable property.²¹⁸ Recognizing the *Davis* holding, the Court of Appeals of Arizona stated that the pre-embryos seem to fall within an intermediate category of neither persons nor property.²¹⁹ Although the court dismissed the wrongful death claim, it allowed the plaintiffs to maintain their claim of negligent loss based upon the *Restatement (Second) of Torts* § 323.²²⁰

The Superior Court of Rhode Island has also granted negligent emotional distress claims for irreplaceable destroyed pre-embryos.²²¹ In *Frisina v. Women & Infants Hospital of Rhode Island*, the plaintiffs brought action against a hospital for the loss of their pre-embryos claiming negligent infliction of emotional distress due to loss of their irreplaceable property.²²² The court relied on an earlier state case that allowed for claims of emotional distress damages for irreplaceable lost property of a house and, as a result, allowed plaintiffs' claim to progress.²²³

In contrast, a case that came before the U.S. District Court for the Eastern District of Virginia for negligent infliction of emotional distress was less successful for the plaintiffs who lost their pre-embryos.²²⁴ Defendant's product

²¹⁷ Compare *Frisina*, 2002 WL 1288784, at *13 (dismissing defendant's summary judgment motion which sought to bar emotional distress damages for lost pre-embryos), with *Doe v. Irvine Sci. Sales Co.*, 7 F. Supp. 2d 737, 741 (E.D. Va. 1998) (finding loss of pre-embryos is not enough to sustain claim for emotional distress damages without accompanying bodily injury).

²¹⁸ *Jeter*, 121 P.3d at 1258–59, 1273. These two claims seem to be contradictory as one relies on the notion that pre-embryos are persons and the other is based on property loss. *Id.* The plaintiffs likely brought both claims for the sake of strategy. See Colleen M. Quinn, *Tort Liability for Lost or Destroyed Embryos*, 39 FAM. ADVOC. 6, 7 (2016) (stating that innovative litigation methods involve bringing multiple claims in complaints for lost pre-embryos).

²¹⁹ *Jeter*, 121 P.3d at 1271; see *Davis*, 842 S.W.2d at 597 (holding that pre-embryos fit within a middle category between property and life).

²²⁰ *Jeter*, 121 P.3d at 1273. The Restatement of Torts allows for negligent recovery for the loss of a person's stuff. RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).

²²¹ *Frisina*, 2002 WL 1288784, at *10.

²²² *Id.* at *1, *2, *10. The court noted that other courts have found the owners of pre-embryos to possess property rights in them. See *id.* (explaining that some courts have considered pre-embryos property in the sense that there is ownership involved).

²²³ *Id.* at *8–9 (citing *Hawkins v. Scituate Oil*, 723 A.2d 771 (R.I. 1999)). In *Hawkins*, the defendant's employee accidentally pumped gallons of heating oil into plaintiff's basement. 723 A.2d at 771. As a result, plaintiffs needed to relocate for approximately a year and a half. *Id.* Based on the facts, the court allowed negligent emotional distress claims to proceed. See *id.* at 773–74 (stating that the trial court will allow evidence to be introduced showing the suffering the plaintiffs suffered regardless of whether the plaintiffs had accompanying physical symptoms).

²²⁴ *Doe*, 7 F. Supp. 2d at 739, 741. This case was in the federal district court due to diversity of citizenship. *Id.* at 738.

was possibly exposed to Cruetzfeldt-Jakob Disease and, as a result, the pre-embryos were unsafe to be implanted.²²⁵ Plaintiffs alleged negligent infliction of emotional distress that was rejected by the court.²²⁶ Applying Virginia law, the court concluded that a successful claim for negligent infliction of emotional distress requires mental anguish subsequent to bodily injury.²²⁷ The court held that plaintiffs did not suffer any property loss or bodily injury and, therefore, dismissed their complaint.²²⁸

As these cases demonstrate, should a court compare frozen eggs to pre-embryos, there is some precedent to support a woman's claim for emotional distress damages for her lost eggs.²²⁹ Interestingly, the plaintiffs in these successful cases sought negligent distress damages for lost property and, therefore, likened their pre-embryos to property.²³⁰ Furthermore, both the Court of Appeals of Arizona and the Superior Court of Rhode Island based their rulings on precedent involving negligent distress damages for *property* loss.²³¹ Nonetheless, the Arizona court was still unwilling to explicitly define pre-embryos as property.²³² Indeed, both courts appeared to be more persuaded by the unique qualities of pre-embryos and the predictable emotional bonds people form with their pre-embryos.²³³ Nonetheless, because frozen human eggs do not hold the potential for human life, courts are not bound to give frozen eggs the same special treatment as pre-embryos.²³⁴ Therefore, past cases involving negligent emotional distress regarding sperm are likely more representative of the legal landscape for frozen eggs.²³⁵

²²⁵ *Id.* at 739. Cruetzfeldt-Jakob Disease is a potentially fatal neurological disorder. *Id.*

²²⁶ *Id.* at 741.

²²⁷ *Id.* at 740–41.

²²⁸ *Id.* at 741, 743.

²²⁹ See *Jeter*, 121 P.3d at 1273 (holding plaintiffs can pursue claims of emotional distress damages for loss of their pre-embryos); *Frisina*, 2002 WL 1288784, at *10 (permitting emotional distress damages claims to proceed).

²³⁰ See *Jeter*, 121 P.3d at 1260 (stating that plaintiffs were appealing the lower court's decision to not permit a negligence action for destroyed irreplaceable property); *Frisina*, 2002 WL 1288784, at *2 (summarizing plaintiffs' claims including damages for lost irreplaceable property).

²³¹ See *Jeter*, 121 P.3d at 1273 (stating that Arizona courts have previously allowed emotional distress damages from negligent property loss); *Frisina*, 2002 WL 1288784, at *9–10 (finding past case law permits claims for negligent emotional distress due to lost property).

²³² See *Jeter*, 121 P.3d at 1273 (stating that pre-embryos fall into an interim category between personhood and property).

²³³ See *id.* (stating that pre-embryos should be recognized as unique and afforded such respect); *Frisina*, 2002 WL 1288784, at *9–10 (explaining how this case that involves the loss of pre-embryos is different than many property loss cases and describing the magnitude of people's emotional bonds with their pre-embryos).

²³⁴ See *Jeter*, 121 P.3d at 1270–71 (explaining that pre-embryos are owed greater appreciation than property).

²³⁵ See *infra* notes 236–256 and accompanying text.

2. Negligent Emotional Distress for Misused Sperm and Frozen Eggs

Although there have been numerous negligent infliction of emotional distress claims for lost pre-embryos, there have been few negligent emotional distress claims for destroyed sperm.²³⁶ There are, however, cases that have addressed negligent emotional distress claims regarding cryopreserved sperm more generally.²³⁷ The plaintiffs in these cases have seen very limited success in seeking emotional distress damages for negligence.²³⁸

In 2007, a New York trial court decided a case on whether plaintiffs could obtain emotional distress damages for a doctor's negligence in fertilizing a woman's egg with the incorrect sperm.²³⁹ Plaintiffs sued and sought emotional distress damages for the lost opportunity to raise a biological child of both parties.²⁴⁰ The court, however, rejected this argument on public policy grounds.²⁴¹

Ten years later, the Texas Court of Appeals considered a case involving a successful pregnancy that resulted from stolen cryopreserved sperm.²⁴² Based on the plaintiff's contract with the lab, he had discretion to do with his sperm as he pleased.²⁴³ Years later, his ex-girlfriend took his sperm from the lab without his consent and became pregnant.²⁴⁴ Plaintiff sued the lab for breach of contract and was awarded emotional distress damages by the jury.²⁴⁵ On appeal, the court held these damages were improper because emotional distress

²³⁶ See Debele & Crockin, *supra* note 183, at 99 (explaining that many cases of negligently destroyed reproductive material often settle and are subject to confidentiality agreements). It is also common for fertility clinics to have dispute resolution clauses in their contracts requiring arbitration. See, e.g., Order re: Motion to Compel Arbitration at 3, 6, R.E. v. Pac. Fertility Ctr., No. 18-cv-01586-JSC (N.D. Cal. Mar. 25, 2019) (finding that plaintiffs' claims are bound to arbitration proceedings because the fertility clinic had a dispute resolution provision requiring arbitration).

²³⁷ See, e.g., *Andrews v. Keltz*, 838 N.Y.S.2d 363, 365–66 (Sup. Ct. 2007) (explaining that the plaintiffs were seeking mental anguish damages for the alleged negligence of the doctor for fertilizing the egg with the wrong sperm); *Hardin*, 527 S.W.3d at 427 (explaining that the issue in the case was whether the plaintiff can claim negligent infliction of emotional distress due to his sperm being stolen and used to have a baby).

²³⁸ See *Andrews*, 838 N.Y.S.2d at 368 (stating that New York law bars recovery for negligent emotional distress damages for having a healthy child that is not the biological child of the father); *Hardin*, 527 S.W.3d at 446 (ruling that there is no recovery for negligent emotional distress for stolen gametes).

²³⁹ *Andrews*, 838 N.Y.S.2d at 365–66. After the plaintiffs' baby was born, they suspected the child was not conceived with both parents' genetic material through the in vitro fertilization process. *Id.* at 365. A genetic test confirmed that the father was not biologically related to his child. *Id.*

²⁴⁰ *Id.* at 369.

²⁴¹ See *id.* at 368–69 (pointing to prior state law that recognizes the issues with awarding damages for the birth of a healthy child as it devalues life).

²⁴² *Hardin*, 527 S.W.3d at 427.

²⁴³ *Id.*

²⁴⁴ *Id.* A healthy child was born. See *id.* at 444–45 (holding that the plaintiff cannot receive emotional distress damages for the birth of a healthy baby).

²⁴⁵ *Id.* at 428. The plaintiff also sued his ex-girlfriend for intentional infliction of emotional distress. *Id.* at 431–32.

damages are very rarely rewarded in breach of contract claims.²⁴⁶ The plaintiff argued that his contract fit within the legal exception of emotional distress damages for contracts involving a special relationship.²⁴⁷ Although the court acknowledged such an exception, it held for public policy purposes that the award of damages was inappropriate.²⁴⁸ Most importantly, the court stated that this holding did not apply across the board to all contracts between donors and cryopreservation labs.²⁴⁹ In particular, the court alluded to the possibility that some contracts could exist involving special relationships that may give rise to emotional distress damages so long as the birth of a child is uninvolved.²⁵⁰

These past unsuccessful cases involving emotional distress damages for misused sperm indicate courts are less willing to stray from established legal doctrine.²⁵¹ This tendency differs from those cases involving pre-embryos where those courts were more inclined to award emotional distress damages.²⁵² The most difficult hurdle women will face is overcoming the established legal rule that emotional distress damages are generally unavailable for negligent property loss.²⁵³ A woman's damages may then be reduced to the fair market value of her eggs.²⁵⁴ Moreover, courts may be wary due to the speculative nature of damages, especially because there is no guarantee a lost frozen egg

²⁴⁶ See *id.* at 444 (pointing out that there are few contracts that rise to the level where mental anguish damages are appropriate).

²⁴⁷ *Id.*

²⁴⁸ *Id.* The court provided examples of contracts involving special relationships from other cases, including those that involved breaching a contract to properly bury a loved one or failing to deliver an important message about a relative's imminent death. *Id.* This court also found that it would be unwise to give damages in connection with a new life. See *id.* at 444–45 (stating that the court cannot award mental distress damages for the birth of an able-bodied baby).

²⁴⁹ See *id.* at 445 (clarifying that this holding means a special relationship could arise between gamete donors and the labs that store the gametes under different circumstances).

²⁵⁰ See *id.* (explaining that other situations could create a special relationship between gamete donors and the labs that do not involve child birth). The court provided the example of a contract between a funeral home for the burial of a mother's deceased child as one involving a special relationship. *Id.* at 444. Special relationships are found primarily based upon the sensitive facts surrounding a contract. See *id.* (explaining the emotional circumstances involved in cases where courts have found special relationships).

²⁵¹ See *Andrews*, 838 N.Y.S.2d at 369 (refusing to award plaintiffs emotional distress damages for their lost opportunity to have a genetically related child because the damages would not be based on a reasonable degree of certainty); *Hardin*, 527 S.W.3d at 444–45 (declining to permit negligent emotional distress damages for breach of contract, but stating that this decision does not affect the established law that recognizes mental distress claims for negligent mishandling of a corpse or misinforming someone of an illness).

²⁵² See *Jeter*, 121 P.3d at 1273 (holding plaintiffs can pursue damages for claims of emotional distress for loss of their pre-embryos); *Frisina*, 2002 WL 1288784, at *13 (ruling emotional distress damages claims may proceed).

²⁵³ See *Shiple*, *supra* note 158, § 12 (stating that courts generally do not consider the affection owners have for their property in assessing damages).

²⁵⁴ See *Robinson v. United States*, 175 F. Supp. 2d 1215, 1230 (E.D. Cal. 2001) (stating that the value of property loss is generally based on the property's fair market value).

would have fertilized.²⁵⁵ Despite these difficulties, however, at least one court has suggested the possibility that contracts between gamete donors and the storage labs could amount to a special relationship and thus could open the door for emotional distress damages.²⁵⁶

III. EMOTIONAL DISTRESS CLAIMS SHOULD BE AVAILABLE TO WOMEN WHO HAVE LOST THEIR FROZEN EGGS

Although frozen eggs are most akin to property, this concept should not act as a complete bar to emotional distress claims.²⁵⁷ This Part of the Note argues that courts should recognize emotional distress claims for lost frozen human eggs when a plaintiff can reasonably show the requisite suffering.²⁵⁸ Failure to recognize such claims would result in an unjust and inadequate remedy because damages would be reduced to the fair market value of the lost eggs, likely an unsubstantial sum.²⁵⁹ The first Section of this Part argues that public policy necessitates these damages.²⁶⁰ The second Section then contends that there is room in existing law for emotional distress claims for lost frozen eggs to go forward.²⁶¹

A. Public Policy Demands Emotional Distress Compensation for Women Who Have Lost Their Frozen Eggs

The law does not remain stagnant but grows as society changes.²⁶² Oocyte cryopreservation is a very recent medical development but a practice that is quickly growing.²⁶³ As a result, the law must evolve to adequately address the complex legal issues regarding egg freezing.²⁶⁴ To restrict a woman's damages for her lost eggs to the property's fair market value would limit her to inadequate compensation.²⁶⁵ These women have considerably invested in egg freez-

²⁵⁵ See Doyle et al., *supra* note 56, at 465 (concluding there is a 39% chance of live birth from the thawed eggs within the study).

²⁵⁶ See *Hardin*, 527 S.W.3d at 445 (emphasizing that other scenarios could create a special relationship between gamete donors and the labs).

²⁵⁷ See *infra* notes 262–300 and accompanying text.

²⁵⁸ See *infra* notes 262–300 and accompanying text.

²⁵⁹ See Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 175–76 (2017) (discussing how damages limited to the fair market value of lost gametic material and embryos would be minimal).

²⁶⁰ See *infra* notes 262–282 and accompanying text.

²⁶¹ See *infra* notes 283–300 and accompanying text.

²⁶² See Self, *supra* note 102, at 731 (stating that property law has changed as technology has developed).

²⁶³ MASON & EKMAN, *supra* note 1, at 90 (stating that egg freezing is rapidly growing).

²⁶⁴ See Self, *supra* note 102, at 731 (stating that property law changes to address modern issues).

²⁶⁵ See Fox, *supra* note 259, at 155 (explaining how emotionally painful it is to lose your ability to procreate and its significant disruption in people's lives).

ing clinics both monetarily and emotionally.²⁶⁶ To award a woman the fair market value of her eggs alone would not only inadequately compensate her loss but allow the egg freezing industry to escape any real liability.²⁶⁷ Permitting juries to award emotional distress damages, however, could increase the plaintiffs compensation to a more appropriate level.²⁶⁸

Courts are nevertheless correct to require that damages be based upon a reasonable degree of certitude.²⁶⁹ For this reason, courts have traditionally been skeptical of mental distress damages.²⁷⁰ This traditional skepticism, however, should be reexamined in light of technological tools that are now available to scientifically demonstrate emotional distress.²⁷¹ Furthermore, the scientific and medical communities' understanding of psychological duress and its physical effects on the brain continues to progress.²⁷² As a result, the ability to concretely prove emotional distress damages is progressing beyond mere speculation and courts should therefore recognize legitimate claims of emotional distress following destruction of frozen human eggs.²⁷³

Public policy also supports emotional distress claims for lost frozen eggs due to the biased practices in tort law that are increasingly becoming a prevalent concern in the legal community.²⁷⁴ Female plaintiffs have historically faced sig-

²⁶⁶ See *id.* at 160–61, 170 (emphasizing the degree of trust people place in the fertility industry); Adler, *supra* note 38 (reporting on the trust one woman placed with her egg freezing clinic); Sussman, *supra* note 27 (stating the costs of egg retrieval procedures).

²⁶⁷ See *Gilbert v. Kennedy*, 22 Mich. 117, 130 (1871) (stating that denying a person compensation for a wrong against them would allow an industry to benefit from its blunders). Monetary damages can never replace what has been lost in such situations. Fox, *supra* note 259, at 224. Nonetheless, our legal system has long recognized that although true justice may be impossible in certain circumstances, monetary remedies are as close as possible to compensate a victim. See, e.g., N.Y. CT. CL. ACT § 8-b(1) (LexisNexis 1984) (allowing damages for wrongful imprisonment); *Williams v. Placid Oil Co.*, 224 So. 3d 1101, 1114 (La. Ct. App. 2017) (holding that damages of \$750,000 for wrongful death are not unreasonable).

²⁶⁸ See, e.g., *Hardin*, 527 S.W.3d at 433 (providing mental distress damages of \$250,000). In many cases that have permitted mental distress damages for lost property, the damages have been modest. McGowan, *supra* note 68, at 1105.

²⁶⁹ Bagdasarian, *supra* note 141, at 431.

²⁷⁰ *Id.* at 410.

²⁷¹ See Grey, *supra* note 138, at 2649 n.305 (discussing the various ways neuroimaging technology has been used in the courts as evidence of psychological conditions such as dementia, schizophrenia, and post-traumatic stress disorder).

²⁷² See *id.* at 2607 (explaining how neuroscience may provide greater wisdom into negligent emotional distress claims).

²⁷³ See *id.* at 2633–34 (explaining that this medical technology helps to determine emotional effects in a more reliable manner).

²⁷⁴ See, e.g., Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 578 (1993) (explaining that traditional tort law displaced women's emotional suffering completely); Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325, 336 (2018) (arguing that race-based tables not only lessen damage awards to plaintiffs of color but also reduce them to their race alone).

nificant hurdles in tort law because the injuries that commonly have women plaintiffs predominantly cause emotional harm.²⁷⁵ In the 1990s and early 2000s, there was growing pressure for tort reform legislation and, since then, most states have set a maximum limit to noneconomic damages.²⁷⁶ These reforms, however, have negatively affected women.²⁷⁷ Since noneconomic damages, which include emotional distress damages, have been capped, female plaintiffs have much more at stake to lose.²⁷⁸ As a result, women are not only more likely to face a significant legal battle to get a stand-alone emotional distress claim recognized by the law but greater monetary restraints in their compensation overall.²⁷⁹ Furthermore, these damage caps already limit women's compensation for harm related to fertility and pregnancy.²⁸⁰ To help alleviate these long-standing biased practices, courts should recognize women's claims of emotional distress from their lost reproductive material.²⁸¹ Failure to do otherwise not only trivializes women's emotional distress from losing their frozen eggs but also exacerbates the existing gender-biased practices regarding damages.²⁸²

²⁷⁵ See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 510 (1998) (arguing that the injuries women suffered, often emotional ones, have been belittled by the courts). Women are more likely to claim emotional distress damages for several reasons. *Id.* at 512. One reason is that the traditional role of women as caretakers meant they were more exposed to the debilitating consequences of the loss or severe injury of their child. *Id.* Another reason is women are more likely to be the victims of sexual harassment. *Id.* at 515–16.

²⁷⁶ Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1263–64 (2004). There was growing pressure for reform due to frustration within the insurance market of high damages in tort litigation. Scott DeVito & Andrew W. Jurs, “Doubling-Down” for Defendants: *The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 545 (2014).

²⁷⁷ Finley, *supra* note 276, at 1297. It is important to note that women are not the only group adversely affected; the elderly and minorities have also felt the effects of such legislation. *Id.* at 1265, 1281. Studies show that in cases that predominantly involve female plaintiffs, noneconomic damages comprised the largest percentage of compensation. See *id.* at 1295–96, 1301 (finding that in twenty-eight gynecological malpractice cases, an average of 83% of the total award was for noneconomic damages, and that for female sexual assault victims, noneconomic damages averaged 91.6% of the total award).

²⁷⁸ See *id.* at 1281 (pointing out that the reforms have a larger impact on women). Empirical studies have shown the adverse effects these reforms have on women because there has been an overall reduction in noneconomic damages. See NICHOLAS M. PACE ET AL., RAND INST. FOR CIVIL JUSTICE, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA, at xvii, xxi (2004) (finding, based on studies following California's 1975 Medical Injury Compensation Reform Act, that the claim that had the largest cap in total compensation was for noneconomic damages, which constituted 97% of the total damages awarded); David A. Hyman et al., *Estimating the Effect of Damages Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. LEGAL ANALYSIS 355, 405 (2009) (concluding that Texas's cap on noneconomic damages will result in an overall reduction of about 73% in noneconomic damage awards).

²⁷⁹ Chamallas, *supra* note 275, at 510; Finley, *supra* note 276, at 1281.

²⁸⁰ Finley, *supra* note 276, at 1313.

²⁸¹ See Fox, *supra* note 259, at 171–72 (arguing that traditional limits of emotional distress damages should not apply in reproductive negligence).

²⁸² See Finley, *supra* note 276, at 1314 (advocating for more careful attention in the law to how tort reforms adversely affect women); Fox, *supra* note 259, at 154 (stating that reproductive harm is

B. Existing Law That Recognizes Claims for Mental Distress Damages Is Applicable to the Loss of Frozen Eggs

As a general matter, damages for property loss are generally reduced to the fair market value of the property.²⁸³ There are exceptions to this rule in cases when it is particularly foreseeable that the property loss is the type that would be expected to cause emotional distress.²⁸⁴ For example, courts have awarded mental distress damages in destruction of real property such as homes and trees.²⁸⁵ In these cases, the courts recognized the natural emotional attachment owners have to their property and, therefore, found mental distress damages to be reasonable compensation for their loss.²⁸⁶ Although trees and homes are real property as opposed to personal property, it is not unexpected that a woman would form an emotional attachment to her frozen eggs as people typically form to their real property.²⁸⁷

Some courts have also recognized mental distress damages for negligent destruction or harm of personal property.²⁸⁸ Hawaii most notably has recog-

often undervalued). It is also very important to note that lawyers may be less willing or unable to take some cases with damages caps because many lawyers work on contingency. Finley, *supra* note 276, at 1295.

²⁸³ J & D Towing, LLC v. Am. Alt. Ins. Corp., 478 S.W.3d 649, 657 (Tex. 2016).

²⁸⁴ See McGowan, *supra* note 68, at 1096 (explaining that emotional distress damages are usually awarded for property that most people own and with which people typically have sentimental bonds).

²⁸⁵ See Adams v. State, 357 So. 2d 1239, 1241–42 (La. Ct. App. 1978) (awarding emotional distress damages because the plaintiffs were distressed upon the negligent loss of their uniquely shaped and important pecan tree on their property); Edwards v. Talent Irrigation Dist., 570 P.2d 1169, 1169–70 (Or. 1977) (holding mental distress damages were proper because the plaintiffs spent significant time draining their land due to the defendant’s flooded irrigation ditch and were under stress by not being able to use their home to bathe or do laundry).

²⁸⁶ See Adams, 357 So. 2d at 1242 (summarizing plaintiff’s emotional distress after her beloved tree was negligently destroyed); Edwards, 570 P.2d at 1170 (stating that the record clearly showed the plaintiffs suffered anguish from worrying about the extreme damage to their home and concluding that defendants should compensate them for that anguish).

²⁸⁷ See Frisina v. Women & Infants Hosp. of R.I., No. CIV.A. 95-4037, 2002 WL 1288784, at *10 (R.I. Super. Ct. May 30, 2002) (citing Hawkins v. Scituate Oil, 723 A.2d 771 (R.I. 1999)) (finding emotional distress damages appropriate for plaintiffs’ destroyed pre-embryo after considering a prior state case that allowed emotional distress damages from the negligent destruction of a home).

²⁸⁸ See Huber v. Bakewell, No. DBDCV146015023S, 2016 Conn. Super. LEXIS 85, at *16 (Super. Ct. Jan. 13, 2016) (holding that negligent emotional distress claims are appropriate for a decedent’s personal property loss because it was a defendant’s fiduciary duty to ensure the property would be secured); Knowles Animal Hosp. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (holding that the lower court did not err in awarding emotional distress damages for defendant’s negligent harm to plaintiffs’ dog); Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1067, 1071 (Haw. 1981) (stating that damages for emotional distress from the negligent loss of the plaintiffs’ dog were permissible). Admittedly, these damages are more rare than mental distress damages for intentional conduct resulting in personal property loss. See Shipley, *supra* note 158, § 8 (explaining that there are some cases that hint that emotional distress damages may be permissible if the defendant’s actions were intentional).

nized such claims for decades.²⁸⁹ Courts are especially sympathetic to pet owners' losses as it is reasonable that the loss of a loved one, albeit an animal, would cause emotional heartache.²⁹⁰ The most defining influence in all these cases, involving both real and personal property, is whether it is reasonably expected the owner would suffer emotional pain from their property loss.²⁹¹ It is hardly speculative to predict that a woman will experience strong emotional duress following the loss of her frozen eggs.²⁹² After all, for some women, their only chance to have their own biological children lies with their frozen eggs.²⁹³

Each of these cases allowing claims of emotional distress damages for property loss also involve unique or irreplaceable forms of property.²⁹⁴ Although a person can always plant a new tree or get a new dog, that replacement can never fully restore what was wrongfully lost because the emotional bond has been severed.²⁹⁵ Few things are as unique as one's own genetic makeup.²⁹⁶ Frozen eggs, therefore, are extremely special because they hold the donor's DNA.²⁹⁷ Furthermore, for many women, their lost eggs may be irreplaceable based upon age or infertility or a combination of the two.²⁹⁸ Considering that existing law already permits negligent emotional distress claims for certain forms of property loss, women should also be allowed to claim emotional dis-

²⁸⁹ See Denise E. Antolini, *Punitive Damages in Rhetoric and Reality: An Integrated Empirical Analysis of Punitive Damages Judgments in Hawaii, 1985–2001*, 20 J.L. & POL. 143, 172–73 (2004) (explaining how Hawaii is unique in recognizing emotional distress damages for certain negligent property loss).

²⁹⁰ See *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286–87 (Civ. Ct. 1980) (holding that it is fair to recognize the plaintiff's emotional pain following the death of her dog and that it is just for the defendant to pay for such pain); McGowan, *supra* note 68, at 1104 (explaining how some courts allow emotional distress claims for pet loss because of the emotional ties people have with their pets).

²⁹¹ See McGowan, *supra* note 68, at 1108 (explaining how some courts, acknowledging the emotional bonds people have to certain forms of property, allow emotional distress claims for property loss).

²⁹² See Adler, *supra* note 38 (discussing how one of the women who lost her eggs in the Cleveland clinic tank failure explained to the reporter, in tears, how she must now come to terms with a childless life).

²⁹³ See Inhorn et al., *supra* note 2, at 25 (discussing how egg freezing can help women who are facing infertility due to cancer).

²⁹⁴ See, e.g., *Adams*, 357 So. 2d at 1241 (describing the special features of the pecan tree); *Brousseau*, 443 N.Y.S.2d at 286 (stating how plaintiff lost her eight-year-old German Shepherd).

²⁹⁵ See McGowan, *supra* note 68, at 1109 (describing how courts try to award remedies that compensate a person's actual loss and, in cases of emotional bonds to lost property, compensation is for the emotional loss and not the property itself).

²⁹⁶ Sean Charles Vinck, Note, *Does the Thirteenth Amendment Provide a Jurisdictional Basis for a Federal Ban on Cloning?*, 30 J. LEGIS. 183, 189 (2003).

²⁹⁷ PHELAN, *supra* note 104, at 258.

²⁹⁸ See Klein & Sauer, *supra* note 55, at 758 (stating that women's fertility significantly declines around age forty); Tinneberg & Gasbarrini, *supra* note 55, at S25 (stating that infertility occurs for many reasons). Eggs, unlike sperm, are also a more limited resource because women are born with all their eggs whereas men continue to produce sperm. SHER ET AL., *supra* note 55, at 34–35.

stress for their lost frozen eggs.²⁹⁹ It is entirely expected that a woman will experience mental duress over her lost frozen eggs as it is a unique form of sentimental property.³⁰⁰

CONCLUSION

Egg freezing is rapidly growing in popularity within the United States. This medical procedure gives hope of motherhood to the women who will lose their fertility from devastating illness. It also lets women plan for futures that can include successful careers and a family. With the continual growth of the egg freezing industry, however, comes increased litigation with little precedent to answer complex questions. As the tank failures in San Francisco and Cleveland demonstrate, machine and human error are inevitable. Traditional compensation for property loss is an insufficient remedy for women who lose such irreplaceable property. The law, therefore, must recognize emotional distress damages to compensate these women and to incentivize the egg freezing industry to more carefully regulate itself through precautionary measures.

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²⁹⁹ Cf. *Edwards*, 570 P.2d at 1170 (holding defendants should compensate plaintiffs for mental distress damages from extreme damage to their home); McGowan, *supra* note 68, at 1104 (explaining how some courts allow emotional distress claims for pet loss because of the emotional ties people have with their pets).

³⁰⁰ Cf. McGowan, *supra* note 68, at 1108 (explaining how certain forms of property, including homes and pets, will foreseeably cause emotional distress).

