

Liability Widens for Fetal Death Caused by Doctors

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ALBANY — Overturning a 19-year-old precedent, the Court of Appeals held yesterday that a woman may recover damages for emotional distress for medical malpractice that causes a miscarriage or stillbirth, even if she personally suffers no physical injury.

In a 6-1 opinion, the Court abandoned the rule it adopted in *Tebbutt v. Virostek*, 65 NY2d 931 (1985).

It ruled in an opinion by Judge Albert M. Rosenblatt that "even in the absence of an independent injury, medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress."

The Court said its decision has no impact on a 1969 ruling that bars wrongful death actions under similar circumstances, *Endresz v. Friedberg*, 24 NY2d 478.

In footnotes, the Court made clear that it is permitting recovery just by the mother, not the father, and only for the emotional distress directly connected to a miscarriage or stillbirth caused by medical malpractice. A dissent said the decision represents only a modest expansion of tort liability.

Still, the ruling in *Broadnax v. Gonzalez*, 30, and *Fahey v. Canino*, 31, undeniably exposes physicians — already infuriated over what they characterize as an out-of-control tort system — to a new threat of litigation.

"This type of decision expands, and potentially very significantly, the exposure of physicians," said Gerard L. Conway, director of governmental affairs for the Medical Society of the State of New York.

Mr. Conway said he was unfamiliar with the facts of the cases and declined to comment on them.

But he said, "Clearly, the facts show there is a crisis, and this will have an impact on the specialty most in crisis, obstetrics. We are very concerned."

Lenore Kramer, past president of the New York State Trial Lawyers Association, said the ruling makes sense from a standpoint of fundamental fairness.

She disputed the contention that yesterday's decision will have any impact on a medical malpractice crisis — or even that there is one.

"This recognizes a reality of these terrible situations and brings the law into conformity with what people's understanding of what justice is," said Ms. Kramer, of Kramer & Dunleavy in Manhattan. "We sincerely believe that there is no malpractice crisis and that it is a trumped-up issue and fraud perpetrated by the insurers."

Broadnax, a Second Department case, involved a pregnant woman in Westchester County.

In 1994, Karen Broadnax called her nurse-midwife and reported that her water had broken and she was bleeding from the vagina. The nurse-midwife had her report immediately to the Westchester Birth Center.

At the center, Ms. Broadnax again began to bleed and the nurse-midwife called the patient's obstetrician, Dr. Frederick Gonzalez. He recommended that she be transported to Columbia Presbyterian Allen Pavilion in Manhattan rather than a hospital across the street.

Eventually, Dr. Gonzalez met his patient at the Manhattan hospital. By then two hours had passed since she arrived at the Westchester Birth Center.

Ultimately, Ms. Broadnax delivered a full-term stillborn girl through cesarean section. An autopsy showed the baby had died because of a placental abruption.

The Broadnaxes sued for medical malpractice. Their case was dismissed under Tebbutt on the ground that Ms. Broadnax suffered no distinct physical injury.

The second matter, Fahey v. Camino, came from the Third Department and grew out of a suit by Debra Ann Fahey, who lost twins in the 18th week of pregnancy and sued alleging failure to diagnose a cervical problem. She claimed emotional damages, and the case was dismissed on Tebbutt grounds.

A year later, Ms. Fahey underwent a relatively simple procedure to address the problem and successfully delivered a baby, the Court said.

Tebbutt set a precedent that a mother could recover for emotional injuries related to the stillbirth of her child only if she suffered an independent physical injury due to the negligence of the attending physician.

Two judges, including the present chief judge, Judith S. Kaye, dissented. Judge Kaye complained at the time that the rule was illogical.

"When the law declares that the stillborn child is not a person who can bring suit, then it must follow in the eyes of the law that an injury here was done to the mother," she wrote.

Yesterday, the chief judge and five of her colleagues put Tebbutt to rest, concluding that the 1985 decision "has failed to withstand the cold light of logic and experience."

Judge Rosenblatt wrote that Tebbutt "was in keeping with our view that tort liability is not a panacea capable of redressing every substantial wrong." He said the Court is "no longer able to defend Tebbutt's logic or reasoning."

Judge Rosenblatt observed that Tebbutt resulted in the legally untenable situation where doctors were potentially liable for in utero injuries when the fetus lived, yet completely shielded from liability if their malpractice was so severe that the fetus died. He agreed with retired Court of Appeals Judge Matthew J. Jasen, who also wrote a dissent in Tebbutt, that the 1985 rule relegated the fetus to a state of "juridical limbo."

"Although in treating a pregnancy, medical professionals owe a duty of care to the developing fetus, they surely owe a duty of care to the expectant mother, who is, after all, the patient," Judge Rosenblatt wrote. "Because the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes."

Impact Unknown

Judge Susan Phillips Read dissented.

Although she said the ruling neither alters the legal rights of a fetus nor creates new duties for physicians, she expressed concern that the decision's impact is largely a mystery.

"[T]here is no way for us to predict or assess the potential affect of this expansion of liability, however modest it may appear, on the cost and availability of gynecological and obstetrical services in New York State," Judge Read said. She found no good reason for toppling "a bright-line rule, which is easily applied."

Margaret C. Jasper of South Salem argued for the plaintiff, and Janet D. Callahan of Hancock & Estabrook in Syracuse appeared for the defendant in Broadnax. Patricia A. Cummings of O'Connor, Gagioch, Pope & Tait in Binghamton represented Ms. Fahey, and Ms. Callahan defended the doctor in Fahey.

Kathleen M. Gallagher of the New York State Catholic Conference applauded the ruling and noted the timing: It was handed down on the day that President George W. Bush signed the Unborn Victims of Violence Act, which establishes a crime of harming a fetus during an assault on a pregnant woman.

"This overturns many years of case law that did not recognize unborn children as having any worth at all," she said, referring to the Court's ruling. "The Court is saying they have worth, they have value to the families who lose them — and the families can recover."