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***BROADNAX V. GONZALEZ: QUESTIONING  
THE IMPACT OF EXPANDING FETAL  
RIGHTS ON LITIGATION AND  
HEALTHCARE IN NEW YORK***

*Elizabeth Lemanowicz\**

INTRODUCTION

It is difficult to imagine the anguish Marta Tebbutt faced on September 6, 1980, as she gave birth to a child she knew had died inside her.<sup>1</sup> Postmortem examination of the fetus revealed that a negligently-performed amniocentesis, a test in which Marta's doctor inserted a syringe into her lower abdomen in order to draw fluid from the amniotic fluid around the fetus, had possibly caused the fetus's subsequent death.<sup>2</sup> Marta turned to the courts for justice, suing her doctor and seeking to recover for her "pain, severe disappointment, anxiety, despondency, bitterness, and suffering."<sup>3</sup> However, for Marta Tebbutt, relief was never granted.<sup>4</sup> The trial court granted a motion by the defendant doctor for summary judgment, dismissing the complaint as insufficient as a matter of

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<sup>1</sup> *Tebbutt v. Virostek*, 477 N.Y.S.2d 776, 777 (N.Y. App. Div. 1984).

<sup>2</sup> *Id.* See also *Tebbutt v. Virostek*, 483 N.E.2d 1142, 1144 (N.Y. 1985) (describing the amniocentesis that Dr. Virostek administered to Marta Tebbutt) (Jasen, J., dissenting).

<sup>3</sup> *Tebbutt*, 477 N.Y.S.2d at 777.

<sup>4</sup> *Tebbutt*, 483 N.E.2d at 1143 (affirming the trial court's order granting defendants' motion for summary judgment dismissing the complaint).

law.<sup>5</sup> The appellate court affirmed the motion to dismiss,<sup>6</sup> and finally, the New York Court of Appeals affirmed the motion as well.<sup>7</sup> The courts reasoned that Marta had not suffered any physical injury that would give rise to a claim for emotional distress as a result of the stillborn birth.<sup>8</sup> Without an independent physical injury, Marta had no legal right to recovery for her emotional injuries, and this would be the case for similarly situated women for years to come.

The legal impediments faced by women such as Marta Tebbutt were lifted in 2004 when the New York Court of Appeals decided the landmark case of *Broadnax v. Gonzalez*, holding 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.”<sup>9</sup> *Broadnax* marked the end of nearly twenty years of precedent that denied mothers damages for emotional distress suffered from negligently caused miscarriages or stillbirths unless they had experienced independent injuries.<sup>10</sup>

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<sup>5</sup> *Tebbutt*, 477 N.Y.S.2d at 777.

<sup>6</sup> *Id.* at 779.

<sup>7</sup> *Tebbutt*, 483 N.E.2d at 1143.

<sup>8</sup> *Tebbutt*, 477 N.Y.S.2d at 777-78; *Tebbutt*, 483 N.E.2d at 1143-44. The court noted that Marta Tebbutt alleged no physical injury distinct from that suffered by the fetus. *Id.* Having suffered no physical injury, the court held that Marta Tebbutt’s claim was governed by *Vaccaro v. Squibb*, 418 N.E.2d 386 (N.Y. 1980), in which the mother sought to recover for emotional injuries resulting from the harm done to her child in the womb. *Tebbutt*, 483 N.E.2d at 1143. Because the mother in *Vaccaro* did not learn of the harm done to the fetus until the birth, which occurred some time after the harm occurred, the court rejected the contention that the defendants owed a duty to the mother. *Id.* Similarly, in *Tebbutt*, the court rejected the mother’s claim for damages for emotional distress. *Id.*

<sup>9</sup> *Broadnax v. Gonzalez*, 809 N.E.2d 645, 649 (N.Y. 2004).

<sup>10</sup> *Id.* at 648. *Accord* *Tebbutt v. Virostek*, 483 N.E.2d 1142 (N.Y. 1985). In general, when there is a duty owed to a plaintiff by a defendant, a breach of that duty that results in emotional injury is compensable even though no physical injury occurred, but only if the breach “unreasonably endangered plaintiff’s physical safety.” 1 N.Y. P.J.I.3d § 2:284, at 1476 (2005). However, in *Broadnax*, the Court of Appeals held that an expectant mother may recover damages for emotional distress resulting from a stillbirth or miscarriage that was

## FETAL RIGHTS UNDER NEW YORK LAW

809

This comment analyzes the impact of *Broadnax* in New York. The focus of the analysis is two-pronged. The first prong focuses on the potential impact of the *Broadnax* decision on the future of wrongful death suits for fetuses in New York.<sup>11</sup> The second prong focuses on the potential effect the decision will have on the availability and cost of gynecological services in New York and, consequently, on the rate of malpractice liability for obstetricians and gynecologists. This comment argues that *Broadnax* could open the door for a cause of action for wrongful fetal death, which is presently prohibited as a cause of action in New York courts. By reconsidering and expanding the rights of the mother and the fetus in cases of prenatal malpractice, it is conceivable that mothers and fetuses in the post-*Broadnax* era will be able to further push the boundaries of tort law and claim new causes of action grounded in wrongful death. This may be a substantial step in tort law, and perhaps it is theoretically just; however, it is yet unknown whether the liability that medical practitioners face will increase if a previously unrecognized class of plaintiffs—unborn fetuses and expectant mothers—are afforded significant legal rights.<sup>12</sup> Indeed, the *Broadnax* decision may prove detrimental to society if, as a result of increasing liability for physicians, the provision of healthcare becomes sufficiently expensive to compel the exit of physicians from the fields of obstetrics and gynecology due to high

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caused by medical malpractice, regardless of whether the mother suffered an independent physical injury or whether her physical safety was unreasonably endangered. *Id.* The *Broadnax* decision appears to have overruled decisions in which recovery was denied for emotional distress resulting from a stillbirth or miscarriage that was caused by medical malpractice in which the “independent physical injury” was limited to the physical pain and suffering that naturally accompanies the birthing process. 1 N.Y. P.J.I.3d § 2:150, at 802 (2005).

<sup>11</sup> An action for “wrongful death” is a “lawsuit brought on behalf of a decedent’s survivors for their damages resulting from a tortious injury that caused the decedent’s death.” BLACK’S LAW DICTIONARY 1607 (7th ed. 1999). New York’s wrongful death statute is set forth in N.Y. EST. POWERS & TRUSTS § 5-4.1 (2000). New York does not have a wrongful life statute.

<sup>12</sup> *Broadnax*, 809 N.E.2d at 650. “[T]here is no way for us to predict or assess the potential effect of this expansion of liability . . . on the cost and availability of gynecological and obstetrical services in New York State.” *Id.* (Read, J., dissenting).

insurance premiums and a fear of being sued.<sup>13</sup>

Part I.A of this comment provides an overview of case law regarding tort-based causes of action for emotional or psychological injuries. Part I.B chronicles the history in New York of causes of action for emotional distress related to prenatal care, including a discussion of *Tebbutt v. Virostek*, the precursor to the *Broadnax* decision. Part I.C provides an analysis of the court's holding and rationale in *Broadnax*. Part II.A focuses on the potential impact of *Broadnax* on wrongful death lawsuits in New York. Specifically, it contends that the reasons previously cited by the New York Court of Appeals for banning actions for the wrongful death of a fetus have been effectively undercut by the court's decision in *Broadnax*. Part II.B briefly addresses the impact of *Broadnax* on the malpractice jurisprudence of the past year. Part III discusses the potential ramifications of *Broadnax* for the provision of obstetrical and gynecological care in New York. Finally, this comment concludes that the state legislature, not the judiciary, will need to take the lead if clarity and consistency is ever to come to the area of tort jurisprudence that encompasses fetal rights.

#### I. *BROADNAX V. GONZALEZ*: PAST AND PRESENT

In *Broadnax v. Gonzalez*,<sup>14</sup> the New York Court of Appeals overruled *Tebbutt v. Virostek*,<sup>15</sup> which held that unless an expectant mother suffered an independent physical injury, she had no right to recover damages for emotional distress resulting from a miscarriage or stillbirth.<sup>16</sup> The *Broadnax* decision recognized that medical malpractice resulting in a miscarriage or stillbirth constituted a breach of duty to the expectant mother, and damages for emotional distress arising out of that breach should be

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<sup>13</sup> *Medical Liability: Hearing on H.R.5 and H.R.4280 Before the House Committee on Small Business*, 109th Cong. (2005) [hereinafter *Hearings*] (statement of Dr. Donald J. Palmisano, M.D., J.D., Immediate Past-President of the American Medical Association) available at 2005 WL 408414 (F.D.C.H.).

<sup>14</sup> *Broadnax v. Gonzalez*, 809 N.E.2d 645 (N.Y. 2004).

<sup>15</sup> *Tebbutt v. Virostek*, 483 N.E.2d 1142 (N.Y. 1985).

<sup>16</sup> *Id.* See also 1 N.Y. P.J.I.3d §2:280, at 1462-1463 (2005).

*FETAL RIGHTS UNDER NEW YORK LAW*

811

recoverable, even absent physical injury.<sup>17</sup> In overruling *Tebbutt*, a case governed by the court's earlier decision in *Vaccaro v. Squibb*,<sup>18</sup> the majority in *Broadnax* relied heavily on the language and logic of the dissent in *Tebbutt*.<sup>19</sup>

*A. A Brief History of Case Law Regarding Causes of Action for Psychological Injuries*

The issue of whether to permit causes of action for emotional or psychic injuries absent independent physical injuries has been treated differently by New York courts throughout history. For a greater part of the twentieth century, New York courts insisted that a plaintiff could not recover for emotional injuries absent a physical injury.<sup>20</sup> In 1961, the Court of Appeals fashioned a new rule that permitted recovery for emotional injuries absent immediate personal injury, but only if there was immediate fear or threat of bodily harm to the plaintiff directly.<sup>21</sup> In *Battalla v. State*, an infant-plaintiff was placed in a chair lift at a state-run ski resort by an employee who failed to properly secure the infant and lock

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<sup>17</sup> *Broadnax*, 809 N.E.2d at 649; 1 N.Y. P.J.I.3d § 2:280, at 1463 (2005).

<sup>18</sup> *Vaccaro v. Squibb*, 418 N.E.2d 286 (N.Y. 1980) (holding that a mother who was prescribed a toxic drug that rendered her child limbless at birth could not recover for emotional and psychic harm absent an independent injury).

<sup>19</sup> *Broadnax*, 809 N.E.2d at 648 (citing *Tebbutt*, 483 N.E.2d at 1144 (Jasen, J., dissenting)); *Tebbutt*, 483 N.E.2d at 1149 (Kaye, J., dissenting). "On its own terms, *Tebbutt* may make formal sense, but it created a logical gap in which the fetus is consigned to a state of 'juridical limbo.' It is time to fill the gap. If the fetus cannot bring suit, 'it must follow in the eyes of the law that any injury here was done to the mother.'" *Id.* (quoting language from the dissenting opinions in *Tebbutt*).

<sup>20</sup> *Mitchell v. Rochester Railway Co.*, 45 N.E. 354 (N.Y. 1896) (holding that a woman who miscarried as a result of being frightened by a team of horses owned by railroad company did not have a cause of action, there being no recovery available for mere fright absent immediate personal injury).

<sup>21</sup> *Battalla v. New York*, 176 N.E.2d 729 (N.Y. 1961) (holding that a cause of action exists when a claimant alleges that she was negligently caused to suffer emotional and psychological injuries with consequential physical injuries).

the equipment.<sup>22</sup> As a result, the infant became frightened and hysterical while riding on the chair lift and suffered “severe emotional and neurological disturbances with residual physical manifestations.”<sup>23</sup> Under the principle that “a wrong-doer is responsible for the natural and proximate consequences of his misconduct,”<sup>24</sup> the court held that the claimant should have the opportunity to prove that her emotional injuries, leading to her subsequent physical injuries, were the proximate result of the defendant’s negligence. Thus, after *Battalla*, contemporaneous or consequential physical harm, coupled with psychological injuries, was thought to provide an “index of reliability otherwise absent in a claim for psychological trauma with only psychological consequences.”<sup>25</sup>

From the *Battalla* decision developed the rule that “one may have a cause of action for injuries sustained although precipitated by a negligently induced mental trauma without physical impact.”<sup>26</sup> In 1969, the Court of Appeals refused to apply the *Battalla* rule to cases in which the tortfeasor’s duty not to cause physical injury did not apply to the claimant seeking damages for emotional and subsequent physical distress.<sup>27</sup> In *Tobin v. Grossman*, a mother was in a neighbor’s home when she heard brakes screeching outside.<sup>28</sup> She ran outside to find her injured child lying on the ground at the site of the accident.<sup>29</sup> The court held that the plaintiff-mother was barred from bringing a cause of action for her mental and consequential physical injuries caused by

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<sup>22</sup> *Id.* at 729.

<sup>23</sup> *Id.* The “residual physical manifestations” were not explained or clarified in either the trial or appellate level decisions. *See Battalla v. State*, 184 N.Y.S.2d 1016 (N.Y. Ct. Cl. 1959); *Battalla v. State*, 200 N.Y.S.2d 852 (N.Y. App. Div. 1960).

<sup>24</sup> *Battalla*, 176 N.E.2d. at 730 (quoting *Ehrgott v. Mayor of City of N.Y.*, 96 N.Y. 264, 281 (1884)).

<sup>25</sup> *Johnson v. New York*, 334 N.E.2d 590, 592 (N.Y. 1975).

<sup>26</sup> *Tobin v. Grossman*, 249 N.E.2d 419, 420-21 (N.Y. 1969) (addressing the issue of the possibility of recovery for physical injuries resulting from a purely mental or psychological impact).

<sup>27</sup> *Id.* at 419-20.

<sup>28</sup> *Id.* at 419.

<sup>29</sup> *Id.*

## FETAL RIGHTS UNDER NEW YORK LAW

813

shock and fear for her child.<sup>30</sup> The principles espoused in *Battalla* made clear that an individual could bring a cause of action for injuries that caused psychological trauma and consequential physical injuries, even absent contemporaneous physical impact.<sup>31</sup> Yet in *Tobin*, the court held that a cause of action did not exist for psychological harm sustained by a person as a result of *someone else's* injuries, regardless of whether a special relationship existed between the two individuals or whether the emotionally injured person was an eyewitness to the incident that resulted in harm to the other.<sup>32</sup>

However, in 1975, New York extended the rule in *Battalla* to a situation in which the defendant's negligence caused neither contemporaneous nor consequential physical harm to the plaintiff.<sup>33</sup> In *Johnson v. State*, the plaintiff suffered emotional harm as a direct result of the negligence of a state hospital, which falsely notified the plaintiff that her mother, a patient at the hospital, had died.<sup>34</sup> The plaintiff's emotional injuries were unaccompanied by any physical injury.<sup>35</sup> The Court of Appeals held that it was the hospital's duty to responsibly advise the proper next of kin of a patient's death and that recovery for emotional harm would be permitted by an individual subjected directly to a tortious act, such as the negligent mishandling of a corpse or the negligent false notification of death.<sup>36</sup> *Johnson* clarified that individuals may recover for emotional harm, even in the absence of fear of physical injury, when they are subjected directly to the negligence of a tortfeasor.<sup>37</sup> For such recovery, however, individuals must prove that any suffered psychological injuries are genuine and substantial, and that these injuries were proximately caused by the defendant's conduct.<sup>38</sup>

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<sup>30</sup> *Id.* at 420, 424.

<sup>31</sup> *Id.* at 420-21.

<sup>32</sup> *Id.* at 423-24.

<sup>33</sup> *Johnson v. New York*, 334 N.E.2d 590 (N.Y. 1975).

<sup>34</sup> *Id.* at 591.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 593.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



*B. Causes of Action for Psychological Injuries Caused by Negligent Prenatal Care*

The status of recovery for emotional suffering can be broken down into four main rules: (1) where a tortfeasor causes physical injury to another, the injured party can recover for the actual physical injury and concurrent mental and emotional suffering resulting from the wrongful act;<sup>39</sup> (2) where a tortfeasor directly causes the injured party to experience fear of physical injury as a direct result of the tortious conduct, the party can recover for psychic injuries absent physical impact;<sup>40</sup> (3) where a tortfeasor physically injures one party, recovery is denied for mental and emotional injuries experienced by a third party as a result of the physical injuries sustained by the first party;<sup>41</sup> but (4) where a tortfeasor genuinely, substantially, and proximately causes psychological injuries to the injured party, the injured party can recover for the emotional harm, even in the absence of fear of potential physical injury.<sup>42</sup> These rules can be applied to cases of medical malpractice in which a doctor's negligence causes physical injuries to a fetus, resulting in the miscarriage, stillbirth, or permanent impairment of the child. Courts previously have addressed such cases from the vantage point of the mother and have examined whether a mother's right to collect damages for emotional distress resulting from the physical injuries sustained to the fetus inside her is a situation consistent with any of the four main rules.

In 1977, the New York Court of Appeals decided the case of *Howard v. Lecher*, based on the third rule above, holding that a parent who suffers psychological injuries as a result of a doctor's medical malpractice in treating a fetus cannot recover for such damages.<sup>43</sup> In *Howard*, the plaintiffs were the parents of a child who died from Tay-Sachs disease, a progressive degenerative

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<sup>39</sup> *Mitchell v. Rochester Railway Co.*, 45 N.E. 354 (N.Y. 1896).

<sup>40</sup> *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961).

<sup>41</sup> *Tobin v. Grossman*, 249 N.E.2d 419 (N.Y. 1969).

<sup>42</sup> *Johnson v. New York*, 334 N.E.2d 590 (N.Y. 1975).

<sup>43</sup> *Howard v. Lecher*, 366 N.E.2d 64 (N.Y. 1977).

## FETAL RIGHTS UNDER NEW YORK LAW

815

disease that affects the nervous system and tends to appear more often in children with parents of Eastern European Jewish descent.<sup>44</sup> The parents alleged that the doctor-defendant was negligent in failing to properly perform or evaluate a genealogical history of the parents, given his knowledge that the Howards were both Eastern European Jews and that there was a high risk that the fetus would be born with Tay-Sachs.<sup>45</sup> The Howards claimed that, had the doctor informed them of this risk, they would have chosen to abort the fetus.<sup>46</sup> The parents brought a cause of action to recover from the defendant-doctor for the emotional and mental distress they experienced from witnessing their child suffer and die from such a devastating disease.<sup>47</sup> In this case, the court held that the parents were not made to suffer any physical or mental injury, except for the pain in watching their child suffer from Tay-Sachs, and that the doctor's negligence was not the direct cause of the child's suffering from the disease.<sup>48</sup> The court suggested that, even in a case in which the negligent conduct of a doctor directly injured a fetus but in no manner physically injured the parents, there could be no recovery for the mental and emotional pain and suffering of the parents.<sup>49</sup> Thus, there could be no recovery for the mental and emotional injuries experienced by the parents in *Howard*.<sup>50</sup>

In 1978, the court decided the case of *Becker v. Schwartz* based on the principles espoused in *Howard*.<sup>51</sup> In *Becker*, two cases were combined in which the plaintiffs sought damages for emotional distress alleged to have occurred as a consequence of the birth of their infants in an impaired state, the birth of those infants having occurred through the negligence of the defendant-doctors.<sup>52</sup> In *Becker*, the plaintiffs had received prenatal care from the

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<sup>44</sup> *Howard*, 366 N.E.2d at 64-65, 67.

<sup>45</sup> *Id.* at 65.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 64-65, 66.

<sup>48</sup> *Id.* at 66.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978).

<sup>52</sup> *Id.* at 809.

defendant-doctors.<sup>53</sup> Plaintiff-mother Delores Becker was thirty-seven years old at the time of her pregnancy and at no point during the prenatal care provided by the defendant-doctors was Delores informed that, based on her age, she was at an increased risk of bearing a child with Down's Syndrome.<sup>54</sup> Becker subsequently gave birth to an infant with Down's Syndrome.<sup>55</sup> Becker and her husband claimed damages for the pecuniary expenses they bore and would continue to bear for the care and treatment of their infant, and for the emotional and physical injuries suffered by Delores as a result of her child's having been born with Down's Syndrome.<sup>56</sup>

In a companion case, *Park v. Chessin*, Hetty Park and her husband consulted the defendant-doctors to determine the likelihood that they would bear a child afflicted with a genetic kidney disease.<sup>57</sup> Having already experienced the birth of a child who had died from a genetic kidney disease five hours after being born, the plaintiffs were concerned with the possibility that they might bear another child so afflicted.<sup>58</sup> In response to the plaintiffs' inquiry, the defendant-doctors told the Parks that the chances of having another baby afflicted with the kidney disease were "practically nil."<sup>59</sup> As a result of this information, the Parks renewed their efforts to conceive a child and Hetty subsequently gave birth to a baby born with a genetic kidney disease.<sup>60</sup> The infant survived for only two and a half years before dying from the disease.<sup>61</sup> Plaintiffs brought a claim seeking damages for the pecuniary expenses they bore for the care and treatment of their

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<sup>53</sup> *Id.* at 808.

<sup>54</sup> *Id.* at 808-09.

<sup>55</sup> *Id.* at 808.

<sup>56</sup> *Id.* at 809.

<sup>57</sup> *Id.* Hetty Park had already given birth to a baby who died five hours after birth from a polycystic kidney disease. *Id.* Based on their history, Hetty Park and her husband were questioning whether the kidney disease was a genetically-caused disease. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

## FETAL RIGHTS UNDER NEW YORK LAW

817

infant prior to his death, and for the psychological and physical injuries suffered by Hetty Park as the result of her child's having been born with a genetic kidney disease.<sup>62</sup>

The *Becker* court held that, while the parents might have a valid claim for the pecuniary expenses they endured or would continue to endure in providing care and treatment for their infants, there could be no recovery by the plaintiff-mothers for the psychological injuries they endured from having given birth to impaired infants, based on the court's decision in *Howard*.<sup>63</sup> Furthermore, the court held that permitting the plaintiffs to recover for pecuniary loss but precluding recovery for the emotional injuries was consistent with the court's decision in *Johnson v. State*, in which the court sustained a cause of action for emotional harm based on the plaintiff's having been falsely informed by a hospital that her mother had died.<sup>64</sup> In *Johnson*, the court recognized the existence of a duty by the hospital not to issue death notices in a negligent manner; the breach of this duty entitled the plaintiff to recover for harmful consequences proximately caused by the breach, including pecuniary loss and emotional harm caused by the tortious act.<sup>65</sup> In distinguishing *Johnson* from *Becker*, the court restated the *Johnson* rule, which limited the plaintiff's recovery to damages for the "proven harmful consequences proximately caused by the breach."<sup>66</sup> The court explained that, in *Johnson*, the causal nexus between the daughter's emotional injuries and the hospital's breach was clear, but that the "same cannot be confidently said with respect to the birth of a child, the conception of which was planned and fully desired by the parents."<sup>67</sup> While parents may suffer from psychological injuries due to the birth of their child in an impaired state, the parents may also "experience a love that even an abnormality cannot fully dampen."<sup>68</sup> Thus, to assess an amount for emotional damages

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 813.

<sup>64</sup> *Id.* (citing *Johnson v. New York*, 334 N.E.2d 590 (N.Y. 1975)).

<sup>65</sup> *Id.* at 814 (citing *Johnson*, 334 N.E.2d at 593).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

would require consideration of the “love” factor in mitigation of the parents’ emotional injuries.<sup>69</sup> The court noted that, unlike *Johnson*, *Becker* required consideration of mitigating factors that would complicate the calculation of damages for the plaintiffs’ emotional injuries—injuries that would ultimately prove too speculative and uncertain to be deemed a “proven harmful consequence proximately caused by the breach” of the defendant-doctors’ duties to the plaintiffs.<sup>70</sup>

Following *Becker*, in 1980, the Court of Appeals decided *Vaccaro v. Squibb*.<sup>71</sup> In that case, the plaintiff-mother, Inez Vaccaro, was prescribed a hormone by her physician to prevent the miscarriage of her baby, given that she had previously suffered a stillbirth and a miscarriage.<sup>72</sup> The drug caused Vaccaro’s infant to be born with neither arms nor legs and with other serious injuries.<sup>73</sup> Relevant to damages for emotional distress, the plaintiffs brought a cause of action against the defendants, the physician and drug manufacturer, for “damages for the injuries to their nervous systems and emotional damage, personality changes and extreme mental anguish occasioned by the birth of their daughter without limbs and with other serious and permanent injuries and congenital defects” due to the plaintiff-mother’s having ingested the dangerous hormone during pregnancy.<sup>74</sup> The trial court held that the facts of *Vaccaro* were more like the facts in *Johnson* than *Howard* because the plaintiffs in *Vaccaro* alleged that the infant’s deformities were the direct result of exposure to a drug administered to the mother by the mother’s physician during pregnancy.<sup>75</sup> The court noted that this was a direct harm to the

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* Interestingly, the court here said that the legislature would be a better body than the judiciary to determine whether emotional damages should be permitted in cases in which the plaintiffs’ emotional injuries stemming from the prenatal medical malpractice that led to the birth of their infants in an impaired state might be mitigated by their love for the child. *Id.*

<sup>71</sup> *Vaccaro v. Squibb*, 418 N.E.2d 386 (N.Y. 1980).

<sup>72</sup> *Vaccaro v. Squibb*, 412 N.Y.S.2d 722, 723 (N.Y. Sup. Ct. 1978).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 724.

<sup>75</sup> *Id.* at 730.

## FETAL RIGHTS UNDER NEW YORK LAW

819

mother and father caused by the breach of a duty owed by the defendants to the parents.<sup>76</sup> Furthermore, the plaintiff-mother actually ingested the hormone, and thus, there was a triable issue of fact as to whether the psychological damages were the natural consequences of the wrongful act.<sup>77</sup> Thus, the trial court denied the defendants' motions to dismiss the claims for emotional damages.<sup>78</sup>

The appellate court affirmed the trial court's holding in *Vaccaro*,<sup>79</sup> in part holding that *Vaccaro* was more like *Johnson* than *Tobin* or *Howard*.<sup>80</sup> The court explained that, in *Vaccaro*, a duty of care was owed by the doctor-defendant to the mother who ingested the hormone, as it was owed to the daughter falsely informed of her mother's death in *Johnson*.<sup>81</sup> This duty derived from the fact that the defendant-doctor was the mother's physician, knew of her prior stillbirth and miscarriage, and selected and administered the hormone said to be responsible for the infant's deformities.<sup>82</sup> Unlike *Tobin*, the plaintiff-mother in *Vaccaro* was not a bystander; rather, the mother herself ingested the drug.<sup>83</sup> Additionally, in contrast to *Howard*, in *Vaccaro* there was "something more" than the failure to discuss with the parents the risk of bearing a child with Tay-Sachs syndrome.<sup>84</sup> While the doctor in *Howard* had committed no affirmative acts or errors, the doctor in *Vaccaro* had affirmatively administered to the plaintiff-mother a drug that subsequently caused her infant to be born impaired.<sup>85</sup> Thus, the appellate level court held that the mother could maintain a cause of action for emotional distress, premised on the theory that she suffered from emotional harm directly

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Vaccaro v. Squibb*, 422 N.Y.S.2d 679, 684 (N.Y. App. Div. 1979).

<sup>80</sup> *Id.* at 681.

<sup>81</sup> *Id.* at 681-82.

<sup>82</sup> *Id.* at 682.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

caused by the breach of defendant-doctor's duty to her.<sup>86</sup> The father's cause of action for emotional distress was dismissed, as he was not a patient of the doctor, did not ingest the drug, and thus, was owed no duty, the breach of which would give rise to a recovery.<sup>87</sup>

Despite the holdings of both the trial and appellate level courts, the Court of Appeals held that the plaintiff-mother's cause of action for emotional distress could not stand in *Vaccaro*.<sup>88</sup> Citing *Howard* and *Becker*, the majority dismissed the cause of action for the plaintiff-mother's emotional injuries because she did not set forth evidence of any independent injuries.<sup>89</sup> This brief but steadfast application of *Howard* and *Becker* would set the stage for the court's decision in *Tebbutt v. Virostek*, the precedent case that would not be overturned until *Broadnax v. Gonzalez*, almost twenty years later.

In 1985, the Court of Appeals decided *Tebbutt v. Virostek*,<sup>90</sup> in which the alleged negligence of medical care providers directly resulted in a fetus's death *in utero*, although the mother suffered no physical injuries distinct from the injuries to the fetus.<sup>91</sup> In *Tebbutt*, the plaintiff's obstetrician attempted to perform an amniocentesis three times with no success.<sup>92</sup> Prior to the first attempted amniocentesis, the fetal heart monitor showed the fetus to be viable

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<sup>86</sup> *Id.* at 683-84. The court held that "[t]here is a vital interest to be protected, there is proximate cause, there is demonstrable injury and there is foreseeability. 'Thus, the rationale underlying the *Tobin* case, namely, the real dangers of extending recovery for harm to others than those directly involved, is inapplicable to the instant case.'" *Id.* (citing *Johnson v. New York*, 334 N.E.2d 590, 593 (N.Y. 1975)).

<sup>87</sup> *Id.* at 684.

<sup>88</sup> *Vaccaro*, 418 N.E.2d at 386.

<sup>89</sup> *Id.*

<sup>90</sup> *Tebbutt v. Virostek*, 483 N.E.2d 1142 (N.Y. 1985).

<sup>91</sup> *Id.* at 1143. *See also* *Broadnax v. Gonzalez*, 809 N.E.2d 645, 647-48 (N.Y. 2004).

<sup>92</sup> *Tebbutt v. Virostek*, 477 N.Y.S.2d 776, 777 (N.Y. App. Div. 1984); *Tebbutt*, 483 N.E.2d at 1144 (describing the amniocentesis that Dr. Virostek administered to Marta Tebbutt) (Jasen, J., dissenting). An amniocentesis is a procedure in which a syringe punctures the womb in order to draw fluid for testing. *Id.*

## FETAL RIGHTS UNDER NEW YORK LAW

821

and of normal size for a sixteen-week gestation.<sup>93</sup> More than a month later, despite reassurances that the fetus was normal, the plaintiff-mother delivered a stillborn baby, bearing three hemorrhagic blisters, whose size was consistent with sixteen-week gestation.<sup>94</sup> Doctors concluded that it was possible that the failed amniocentesis attempts caused the fetal death.<sup>95</sup> In her claim to recover for “pain, severe disappointment, anxiety, despondency, bitterness, and suffering,”<sup>96</sup> the plaintiff alleged no physical injuries apart from those suffered by the fetus.<sup>97</sup>

The majority in *Tebbutt* rejected the plaintiff’s claim for damages for emotional distress.<sup>98</sup> The court succinctly explained that the plaintiff’s claims for emotional damages must be denied based on *Vaccaro v. Squibb*, which held that damages for emotional distress may not be recovered by the parents of children who are injured *in utero* but born alive.<sup>99</sup> In *Vaccaro*, the court “rejected the contention that the defendants owed any duty to the mother” where the harm done to the child *in utero* was not discovered until the birth of the child, some time after the damage was done.<sup>100</sup> Based on the logic of *Vaccaro*, the *Tebbutt* majority rejected the mother’s claim for emotional distress damages.<sup>101</sup>

While the majority declared that the plaintiff-mother was not owed a duty by her doctors, the dissent in *Tebbutt* expressed considerable concern about the consequences of precluding emotional distress claims by mothers of fetuses negligently killed

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<sup>93</sup> *Tebbutt*, 483 N.E.2d at 1144.

<sup>94</sup> *Id.* at 1145.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1143, 1145.

<sup>97</sup> *Id.* at 1143, 1145.

<sup>98</sup> *Id.* at 1143.

<sup>99</sup> *Id.* at 1144 (citing *Vaccaro v. Squibb*, 418 N.E.2d 386 (N.Y. 1980)).

<sup>100</sup> *Id.* at 1143 (citing *Vaccaro v. Squibb*, 418 N.E.2d 386 (N.Y. 1980)).

<sup>101</sup> *Id.* at 1143-44. Interestingly, in *Vaccaro v. Squibb*, 418 N.E.2d 386, 387 n.\* (N.Y. 1980), the dissenting judge reflected on the “stultifying effect of what may be too indiscriminating an application of *stare decisis*.” In his dissent, the judge stated that the defendants owed a duty directly to the mother as the patient of the doctor and the consumer of the implicated drug (the patient had ingested a prescription drug that caused deformities in her baby). *Vaccaro*, 418 N.E.2d at 387.



*in utero*.<sup>102</sup> The dissent explained that the majority had created a “juridical limbo,” in which a physician’s negligent acts resulting in the death of an unborn child would be “neither compensated nor deterred.”<sup>103</sup> The dissent concluded that a child killed *in utero* has no rights under the law for two reasons: (1) for purposes of the wrongful death statute, the stillborn child is not considered a “person” who is owed a duty of care;<sup>104</sup> and (2) under the *Tebbutt* majority’s rationale, for the purposes of a personal injury action, the stillborn child is not owed a duty of care.<sup>105</sup> Under the majority’s analysis, if the child in the case were born alive, a remedy would exist;<sup>106</sup> however, if the child were more seriously injured, resulting in the child’s death, the loss would go unredressed.<sup>107</sup> The dissent thus concluded that “[w]here 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 any injury here was done to the mother.”<sup>108</sup> According to the dissent’s logic, the mother should have been able to bring a claim of emotional distress resulting from the stillbirth of her child.

### C. *Broadnax v. Gonzalez*

*Tebbutt* provided the New York courts with a precedent that was strictly adhered to for nearly twenty years until two cases—*Broadnax v. Gonzalez*<sup>109</sup> and *Fahey v. Canino*<sup>110</sup>—percolated up through the courts. At the trial level, the plaintiff-mothers sought damages for emotional distress from their prenatal medical

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<sup>102</sup> *Tebbutt*, 483 N.E.2d at 1145 (Jasen, J., dissenting).

<sup>103</sup> *Id.* at 1144.

<sup>104</sup> *Id.* at 1148 (Jasen, J., dissenting).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1149 (citing *Woods v. Lancet*, 102 N.E.2d 691 (N.Y. 1951) (Kaye, J., dissenting)).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Broadnax v. Gonzalez*, 759 N.Y.S.2d 499 (N.Y. App. Div. 2003), *rev’d*, 809 N.E.2d 645 (N.Y. 2004).

<sup>110</sup> *Fahey v. Canino*, 758 N.Y.S.2d 708 (N.Y. App. Div. 2003) *rev’d sub nom.* *Broadnax v. Gonzalez*, 809 N.E.2d 645 (N.Y. 2004).

## FETAL RIGHTS UNDER NEW YORK LAW

823

caregivers based on malpractice that resulted in the deaths of the fetuses carried by the mothers.<sup>111</sup> In both cases, the courts granted the defendants' motions for summary judgment, holding that the plaintiff-mothers could not recover for emotional or psychological injuries stemming from malpractice resulting in the death of an unborn child.<sup>112</sup> Subsequently, the plaintiffs in both cases appealed; however, in both cases, the appellate court affirmed the judgments of the trial court.<sup>113</sup>

In the early hours of September 24, 1994, Karen Broadnax, pregnant and almost due to give birth, called her midwife to say that her water had broken and that she was expelling blood.<sup>114</sup> The midwife told Karen and her husband to come to the birthing center, but when Karen arrived just over an hour later, she was still experiencing vaginal bleeding.<sup>115</sup> The midwife consulted Karen's obstetrician, Dr. Gonzalez, who requested that Karen be transferred to a hospital.<sup>116</sup> Approximately forty-five minutes later, Karen, her husband, and the midwife arrived at the hospital.<sup>117</sup> Although Karen's obstetrician still had not arrived, the midwife failed to call or consult the on-call doctor at the hospital.<sup>118</sup> When Dr. Gonzalez arrived two hours later, the fetal heart rate had already decelerated.<sup>119</sup> However, instead of performing an emergency cesarean section, Dr. Gonzalez conducted a number of tests, including a vaginal and pelvic examination and a sonogram.<sup>120</sup> Half an hour later, Karen delivered a full-term stillborn baby by cesarean section who, according to the autopsy, had died from a placental abruption.<sup>121</sup>

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<sup>111</sup> *Broadnax*, 759 N.Y.S.2d at 500; *Fahey v. Canino*, No. 40038(U), slip op. at 2 (N.Y. Sup. Ct. Mar. 5, 2002).

<sup>112</sup> *Broadnax*, 759 N.Y.S.2d at 500; *Fahey*, slip op. at 5.

<sup>113</sup> *Broadnax*, 759 N.Y.S.2d at 500; *Fahey*, 758 N.Y.S.2d at 710.

<sup>114</sup> *Broadnax v. Gonzalez*, 809 N.E.2d 645, 646 (N.Y. 2004).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 647.

Karen and her husband brought an action against Karen's obstetrician, the midwife, and the hospital to recover damages for emotional distress resulting from the stillbirth of the baby.<sup>122</sup> The appellate level court held that *Tebbutt v. Virostek* precluded mothers from "recovering damages for emotional or psychological harm stemming from the stillbirth . . . [unless they had] suffered a legally cognizable physical injury distinct from the fetus's."<sup>123</sup> Given that Karen Broadnax failed to produce evidence of an independent injury apart from those normally incident to childbirth, the trial court granted the defendants' motion for summary judgment.<sup>124</sup> The appellate court affirmed the judgment.<sup>125</sup> Applying *Vaccaro* and *Tebbutt*, the court rejected the possibility of recovering emotional damages for a negligently caused stillbirth, noting:

There is an absence of evidence that the plaintiff mother suffered a physical injury distinct from the injury to her unborn child and separate and apart from that which occurs in any normal childbirth. Thus, she may not recover damages for the psychological and emotional harm she allegedly suffered as a result of the stillbirth of her child.<sup>126</sup>

Debra Ann Fahey and her husband experienced a loss similar to that of the Broadnaxes. In August 1999, Debra Ann was told by her obstetrician, Dr. Canino, that she was carrying twins.<sup>127</sup> Two months later at a regular checkup, Debra Ann informed Dr. Canino's partner, Dr. Ruggiero, that she was experiencing lower back pain and cramping.<sup>128</sup> Dr. Ruggiero performed an ultrasound and concluded that one of the twins was pressed against Debra Ann's sciatic nerve, and that this was the source of her pain.<sup>129</sup> Two days later, Debra Ann experienced increasingly intense pain

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Broadnax*, 759 N.Y.S.2d at 500.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Broadnax*, 809 N.E.2d at 647.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

## FETAL RIGHTS UNDER NEW YORK LAW

825

and nausea.<sup>130</sup> She called Dr. Canino who, relying on Dr. Ruggiero's examination, suggested to Debra Ann the pain was related to the sciatic nerve and that the nausea was probably related to something she ate for lunch.<sup>131</sup> Dr. Canino simply told Debra Ann to lie down.<sup>132</sup> While sitting on the toilet two hours later, Debra Ann tragically gave birth to one of the twins.<sup>133</sup> With the umbilical cord from the first fetus still attached to her body, Debra Ann was transported by ambulance to the hospital, where she delivered the second twin.<sup>134</sup> Neither twin lived.<sup>135</sup> Debra Ann was later diagnosed with an "incompetent cervix,"<sup>136</sup> a problem that is detectable by ultrasound and can be remedied with a surgical procedure.<sup>137</sup>

The plaintiffs, Debra Ann and her husband, commenced a medical malpractice action against the defendant-doctors for the emotional distress caused by Debra Ann's loss of the twins,

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Broadnax*, 809 N.E.2d at 647.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* An incompetent cervix is a weakened cervix that predisposes a woman to mid-term miscarriage or early (premature) delivery. Special Care Pregnancies: Incompetent Cervix, University of Pennsylvania Health System, at [http://www.pennhealth.com/health\\_info/pregnancy/specialcare/articles/cervix/%20html](http://www.pennhealth.com/health_info/pregnancy/specialcare/articles/cervix/%20html) (last visited Apr. 20, 2005) [hereinafter Special Care Pregnancies].

<sup>137</sup> If a doctor suspects that a woman might have an incompetent cervix, she can perform an ultrasound early in the pregnancy to examine the thickness of the cervical tissue. Special Care Pregnancies, *supra* note 136. A surgical procedure can successfully treat an incompetent cervix eighty-five percent to ninety percent of the time. *Id.* This procedure, called cerclage, is usually performed when the patient is under spinal or epidural anesthesia and involves closing the cervix with strong stitches for the full term of the pregnancy. *Id.* After having cerclage, a woman is usually prescribed medication to help prevent miscarriage. *Id.* The stitches are removed around the ninth month of pregnancy or sooner if labor commences, to prepare for delivery. *Id.* In a later pregnancy, Debra Ann Fahey was able to undergo a cerclage procedure to prevent her from delivering the fetus prematurely, and she was able to carry her pregnancy until the baby was healthy enough to survive (although the baby was born six weeks premature). *Broadnax*, 809 N.E.2d at 647.

arguing that the extra operations she had endured as a result of the negligently monitored labor and delivery constituted a “physical injury.”<sup>138</sup> The court granted the defendants’ motion for summary judgment,<sup>139</sup> finding the plaintiff-mother’s “physical injury” argument without merit<sup>140</sup> and her claim for emotional damages based on personal injury unsupported by her testimony.<sup>141</sup> Moreover, the trial court held that so long as *Tebbutt* provided the legal framework for prenatal cases, a mother could not recover for emotional damages resulting from a negligently caused stillbirth absent proof of her suffering an independent injury.<sup>142</sup> Indeed, the court found “the more reasonable rule to be that which precludes recovery, not only for the emotional suffering resulting indirectly from the loss or impairment of the fetus or baby, but also for ‘the more immediate emotional harm attendant to the mother’s enduring a negligently caused stillbirth.’” The appellate court affirmed the trial court’s decision.<sup>143</sup>

In April 2004, the New York Court of Appeals reversed the lower courts’ orders granting the defendants’ motions for summary

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<sup>138</sup> *Fahey*, slip op. at 2. Plaintiff’s arguments were in response to defendants’ motion to dismiss on the grounds that a plaintiff may not recover for emotional distress resulting from a negligently caused stillbirth in the “absence of any independent, causative physical injury to her own person.” *Id.*

<sup>139</sup> *Id.* at 5.

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 3. The court held:

[P]laintiff’s testimony demonstrates that her primary concern was over the plight of the babies, [sic] and their condition . . . there is simply nothing in the record to support a finding that plaintiff suffered any . . . psychological trauma as a result of her own condition or experiences, separable from the distress she felt because of the condition or death of the fetuses.”

*Id.* (citations omitted).

<sup>142</sup> *Id.* at 5.

<sup>143</sup> *Fahey*, 758 N.Y.S.2d at 710 (holding that the plaintiffs failed to present evidence that the mother was independently injured beyond those injuries naturally caused during childbirth, and as such, the cause of action for emotional distress was properly dismissed because recovery for psychological damages resulting from the stillbirth was precluded “in view of the present status of the law”).

## FETAL RIGHTS UNDER NEW YORK LAW

827

judgment in both *Broadnax* and *Fahey*.<sup>144</sup> The court addressed the issue of when, if ever, a mother could recover damages for emotional distress resulting from a miscarriage or stillbirth caused by medical malpractice absent a showing of independent physical injury to the mother.<sup>145</sup> The court recognized that precedent strongly disfavored claims for emotional distress in cases in which the plaintiffs had suffered no independent physical injuries.<sup>146</sup> However, the court noted that applying a strict interpretation of this rule in cases of negligently caused stillbirths creates a “logical gap in which the fetus is consigned to a state of ‘juridical limbo.’”<sup>147</sup> Essentially, infants who were injured *in utero* but survived could maintain a cause of action for medical malpractice against tortfeasors after they were born.<sup>148</sup> Furthermore, a pregnant mother could bring a cause of action for her independent injuries.<sup>149</sup> However, neither party had a cause of action if medical malpractice had caused the pregnancy to terminate in miscarriage or stillbirth and the mother was not physically injured beyond the pain and suffering naturally attendant to childbirth.<sup>150</sup> The gap created by precedent resulted in an uncomfortable dichotomy: medical caregivers faced liability for injuries to fetuses that survived, but faced no liability for injuries to fetuses that died *in utero*.<sup>151</sup>

In *Broadnax*, the defendants argued against the permissibility of claims for emotional damages resulting from the wrongful death of a fetus, grounding their challenge in the fact that the defendants’

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<sup>144</sup> *Broadnax*, 809 N.E.2d at 647.

<sup>145</sup> *Id.* at 646.

<sup>146</sup> *Id.* at 648.

<sup>147</sup> *Id.* (citing *Tebbutt v. Virostek*, 483 N.E.2d 1142, 1144 (Jasen, J., dissenting)).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* In both Appellate Division decisions, the courts held that the procedures incident to childbirth, miscarriage, or stillbirth are not considered independent physical injuries to the mother, and thus, do not allow for a cause of action for emotional distress. See *Broadnax*, N.Y.S.2d at 500; *Fahey*, 758 N.Y.S.2d at 710.

<sup>151</sup> *Broadnax*, 809 N.E.2d at 648.

actions, negligent or otherwise, did not violate a duty to the expectant mothers; rather, the alleged conduct injured only the fetuses.<sup>152</sup> The court dismissed this argument as “tortured” reasoning.<sup>153</sup> The court explained that, given that prenatal medical providers owe a duty of care to the developing fetus, the providers would naturally owe a corresponding duty of care to the mother, who is the primary patient during the entire pregnancy.<sup>154</sup> The court determined the health of the mother and the fetus to be linked in the unique situation of pregnancy, but in the same breath, clarified that the fetus and the mother are *each* owed a duty of care.<sup>155</sup> Thus, in overturning nearly twenty years of precedent, the court held 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.”<sup>156</sup>

*Broadnax* was decided 6-1 in favor of the plaintiff-mothers.<sup>157</sup> In the only dissenting opinion, Judge Reed posed the possibility

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* The “[d]efendants [argue that] their alleged conduct injured only the fetuses, and, accordingly, they did not violate a duty to the expectant mothers. Defendants’ reasoning is tortured.” *Id.*

<sup>154</sup> *Id.* (citing *Woods v. Lancet*, 102 N.E.2d 691 (1951)). In *Woods v. Lancet*, the plaintiff-infant sustained serious injuries through the negligent actions of his mother’s physician, such that he was born permanently impaired and disabled. *Woods*, 102 N.E.2d at 691-92. The court held that the infant, injured *in utero* and later born alive, had the right to maintain an action for the alleged negligence causing such injury. *Woods*, 102 N.E.2d at 695.

<sup>155</sup> *Broadnax*, 809 N.E.2d at 648-49. *Cf.* *Tebbutt v. Virostek*, 483 N.E.2d 1142, 1146 (N.Y. 1985) (Jasen, J., dissenting). In his dissent, Judge Jensen noted:

The interests of the mother and the unborn child are intertwined by nature during the mother’s pregnancy. Due to these relationships, a tortious act, which results in the death of an unborn child, represents a breach of a direct duty to the mother. Defendant’s infringement upon the mother’s freedom from mental distress was occasioned by the breach of a distinct and independent duty flowing to the mother.

*Id.*

<sup>156</sup> *Broadnax*, 809 N.E.2d at 649.

<sup>157</sup> *Id.*

## FETAL RIGHTS UNDER NEW YORK LAW

829

that the decision might expose medical caregivers to additional liability.<sup>158</sup> Of great concern to her was that there was no way, at the time of the decision, to assess or predict the potential effect of increased liability on the availability and cost of gynecological and obstetrical care in New York.<sup>159</sup>

II. BEYOND *BROADNAX*

In its indication that a fetus enjoys a legal status independent of the mother, *Broadnax v. Gonzalez* stands in stark contrast to New York's past jurisprudence regarding actions for the wrongful death of a fetus. In 1969, the New York Court of Appeals affirmatively stated in *Endresz v. Friedberg* that actions for the wrongful death of a fetus are barred in New York.<sup>160</sup> In *Endresz*, the court discussed at length the reasons for denying the survivors to fetuses negligently killed by medical malpractice *in utero* the right to sue the physician tortfeasors.<sup>161</sup> *Broadnax*, however—in holding that the fetus is a separate being, that the fetus need not be born to have rights, and that the difficulty of calculating damages is not a justification for barring wrongful death suits—may render the logic of *Endresz* invalid. In so doing, *Broadnax* possesses the potential to work a significant change in the law regarding fetal rights. The precise impact of *Broadnax* is as yet unclear; however, in testing the boundaries of this new precedent, plaintiffs and the lower courts may compel the reevaluation of the recovery bar for actions

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<sup>158</sup> *Broadnax*, 809 N.E.2d at 650; *See supra* note 12.

<sup>159</sup> *Broadnax*, 809 N.E.2d at 650.

<sup>160</sup> *Endresz v. Friedberg*, 248 N.E.2d 901, 902, 907 (N.Y. 1969). The *Endresz* court upheld the lower court's dismissal of the plaintiff's wrongful death suits and claims for loss of services of the infants, holding that

the fairest and most practical solution . . . the one most in accord with the dictates of justice, public policy and common sense . . . [is] to leave the parents of a stillborn fetus, whose death has been caused by a third party's wrongful act, to the damages recoverable by them in their own right and to deny to the distributees any redress by way of a wrongful death action.

*Id.* at 907.

<sup>161</sup> *Endresz*, 248 N.E.2d at 903-05.



grounded in the wrongful death of a fetus. Indeed, only through clarification by the New York Court of Appeals or the New York State legislature will stability and predictability come to the law of torts related to fetal rights.

*A. The Unraveling of Endresz: Broadnax's Implications for Wrongful Death Law*

An action for wrongful death is a lawsuit brought by the survivors of a decedent whose death resulted from a defendant's negligent or wrongful act.<sup>162</sup> A majority of jurisdictions today, with the exception of New York, recognize that a cause of action lies for the negligently caused death of an unborn child.<sup>163</sup> The old rule,<sup>164</sup> which barred actions for the wrongful death of an unborn child, held that the fetus was not a person for whom recovery could be made under wrongful death, as the fetus was part of the mother at the time of the injury.<sup>165</sup> This rule was abandoned by most states

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<sup>162</sup> See *supra* note 11 and accompanying text. See also 12 AM. JUR. *Trials* § 317 (2004).

<sup>163</sup> James M. Simpson, *Growing Recognition of Wrongful Death for Unborn Children*, ADVOCACY, PRACTICE AND PROCEDURES (Int'l Ass'n of Def. Counsel, Aug. 2001), reprinted in DEFENSE COUNSEL JOURNAL, Oct. 1, 2001, at 487. The following U.S. jurisdictions either explicitly or implicitly recognize a wrongful death action for the death of an unborn child by statute, state case law, or federal case law: Alabama, Arkansas, Arizona, Colorado, Connecticut, District of Columbia, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, Wisconsin, and West Virginia. *Id.*

<sup>164</sup> Simpson, *supra* note 163 (citing *Dietrich v. Northampton*, 52 Am. Rep. 242, 138 Mass. 14 (1884)). The rule barring actions for the wrongful death of an unborn child was promulgated by Oliver Wendell Holmes in *Dietrich v. Inhabitants of Northampton* in 1884. *Id.*

<sup>165</sup> Simpson, *supra* note 163 (citing *Dietrich v. Northampton*, 52 Am. Rep. 242, 138 Mass. 14 (1884)). This rule is no longer applicable in jurisdictions that have concluded that unborn children are "persons" within the meaning of the wrongful death statutes. Simpson, *supra* note 163. For example, in 2001, the Supreme Court of Arkansas was asked to reconsider its position in *Chatelain v.*

## FETAL RIGHTS UNDER NEW YORK LAW

831

in part because advances in medicine “fundamentally changed the way the modern mind conceptualizes ‘separateness’ between mother and child.”<sup>166</sup> Nonetheless, New York courts maintain a bar against actions based on the wrongful death of a fetus dating from the New York Court of Appeals’s decision in *Endresz*, which foreclosed this avenue of relief.<sup>167</sup>

In *Endresz*, a pregnant woman was injured in a car accident negligently caused by another driver.<sup>168</sup> The injuries caused to her and her twin fetuses resulted in the stillbirth of both babies.<sup>169</sup> The plaintiff-parents sued on behalf of the unborn twins for wrongful death.<sup>170</sup> In dismissing the plaintiffs’ claims for wrongful death, the court held that when an unborn child is injured through the wrongful act of a defendant, “liability attaches only upon fulfillment of the condition that the child be born alive.”<sup>171</sup> The court thus concluded that there was no right of recovery under New York law by the personal representative of a stillborn fetus that had died as a result of injuries received while *in utero*.<sup>172</sup>

Importantly, although *Broadnax* expressly declared that there was no right of recovery for the wrongful death of a fetus,<sup>173</sup> the

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*Kelley*, 910 S.W.2d 215, 219 (Ark. 1995), that a viable fetus was not a “person” within the meaning of the wrongful death statute. *Id.* In *Arkansas v. Jefferson Hospital Ass’n*, 42 S.W.3d 508, 518 (Ark. 2001), the Court noted that their holding that a fetus was not a person was based on the Arkansas legislature’s former characterization of the word “person,” which had changed in the context of criminal law since *Chatelain* to include unborn children. Simpson, *supra* note 163. The court noted that the holding in *Chatelain* that a fetus was not a person was seriously undermined by legislative change. *Id.* After *Jefferson Hospital*, the Arkansas legislature amended its wrongful death statute to include unborn children. *Id.*

<sup>166</sup> Simpson, *supra* note 163.

<sup>167</sup> *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969).

<sup>168</sup> *Id.* at 902.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 905.

<sup>172</sup> *Id.* at 907 (denying the distributees of the fetus a cause of action for the fetus’s wrongful death).

<sup>173</sup> *Broadnax*, 809 N.E.2d at 649 n.4. In footnote 4 of the majority opinion, the court noted that in rejecting *Tebbutt*, it also recognized that a majority of jurisdictions permit some form of recovery for negligently caused stillbirths or

case nonetheless challenges the logic of the arguments asserted in *Endresz* in support of a prohibition on such actions.

The first reason advanced in *Endresz* for barring a cause of action for the wrongful death of a fetus is that an unborn child is not a decedent under the wrongful death statute.<sup>174</sup> The majority opinion observed that the law in New York has declined to attribute the unborn fetus a “legal personality or identity ‘until it sees the light of day,’”<sup>175</sup> and thus, a fetus killed as a result of medical malpractice could not be legally termed “deceased.”<sup>176</sup> However, the Court of Appeals acknowledged in *Broadnax* that a mother has a right to sue for emotional damages caused when medical malpractice results in a miscarriage or stillbirth precisely because the infant has no such right.<sup>177</sup> Additionally, the court deemed the fetus to be owed a duty of care independent of the mother.<sup>178</sup> By acknowledging that a fetus is owed an independent duty of care, the *Broadnax* decision suggests that an unborn fetus has a legal personality or identity.<sup>179</sup> If this is true, then an unborn

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miscarriages. The court then proceeded to specifically limit a mother’s recovery to damages for the emotional distress attending the stillbirth or miscarriage caused by medical malpractice, and affirmed the holding in *Endresz v. Friedberg* barring wrongful death actions under the circumstances of medical malpractice resulting in stillbirth or miscarriage. *Id.* The court gives no reasoning for this statement, other than the implied reasoning of *stare decisis* in saying, “[w]e do not depart from our holding in *Endresz*.” *Id.*

<sup>174</sup> *Endresz*, 248 N.E.2d at 903. However, the majority does admit that the statute is silent on this matter. *Id.* The majority interpreted the legislative intent to *not* have included unborn children within the meaning of the wrongful death statute based on the case law at the time the Decedent Estate law was written in 1847. *Id.* The Decedent Estate Law became, without major changes, Section 5-4.1 of the EPTL. *Id.*; see also N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (2004).

<sup>175</sup> *Endresz*, 485 N.E.2d at 904.

<sup>176</sup> *Endresz*, 485 N.E.2d at 905 (holding that a “conditional prospective liability” is created when a fetus is injured through the wrongful acts of the defendant, and as such, liability for those wrongful acts attaches only if the child is later born alive).

<sup>177</sup> *Broadnax*, 809 N.E.2d at 648.

<sup>178</sup> *Id.*

<sup>179</sup> In *Endresz*, the court noted that the law had never considered an unborn fetus as having a separate “juridical existence” or a legal personality or identity unless it was later born, as part of its reasoning that a fetus did not fall within the

## FETAL RIGHTS UNDER NEW YORK LAW

833

child would fall within New York's statutory definition of "deceased."<sup>180</sup> Thus, in light of the court's holding in *Broadnax*, the first reason advanced in *Endresz* for denying a cause of action in wrongful death for an unborn fetus is no longer viable.

The second reason articulated for barring causes of action in wrongful death for infants killed *in utero* is that a deprivation of life should not be actionable unless there has first been a birth.<sup>181</sup> Yet, the wrongful death statute is designed to compensate the decedent's estate for the loss caused by the decedent's death.<sup>182</sup> Given that the *Broadnax* court found it illogical to permit doctors to evade liability when their negligence results in the stillbirth or miscarriage of a fetus,<sup>183</sup> it makes little sense to preclude recovery for wrongful death when a fetus dies *in utero*. In both cases, the fetus dies as a result of the negligence of a third party before it is born, and in both cases, a loss is occasioned by the death of the decedent.<sup>184</sup> If the logic flowing from *Broadnax* is extended,<sup>185</sup> the parents, as representatives of the decedent (the unborn fetus), must be permitted a cause of action for wrongful death simply because the fetus was deprived of life in the first place.

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meaning of "person" for the purposes of the wrongful death statute. *Endresz*, 248 N.E.2d at 904 (citations omitted). However, now the court in *Broadnax* has acknowledged that the fetus is owed a duty of care separate from the expectant mother, in addition to the duty of care owed to the mother. *Broadnax*, 809 N.E.2d at 648. Thus, through the decision in *Broadnax*, the law may now consider an unborn fetus as having a separate "juridical existence" even when the fetus does not survive through birth.

<sup>180</sup> N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (2004).

<sup>181</sup> *Endresz*, 248 N.E.2d at 903.

<sup>182</sup> *Weisberg v. Layne-New York Co.*, 517 N.Y.S.2d 304 (N.Y. App. Div. 1987) "The policy underlying [New York's wrongful death statute] is . . . to compensate the decedent's estate for loss suffered by his death." *Id.* at 306.

<sup>183</sup> *Broadnax*, 809 N.E.2d at 648.

<sup>184</sup> The commentary to New York's Pattern Jury Instructions for wrongful death actions states that "[i]n order to establish a right to a wrongful death recovery, the plaintiff need only show that he has a reasonable expectation of support from the decedent and therefore a pecuniary loss." 1 N.Y. P.J.I.3d § 2:320, at 1565 (2005).

<sup>185</sup> The logic flowing from *Broadnax* is that the mother must be permitted to bring a cause of action for injury because the fetus itself cannot bring suit. *Broadnax*, 809 N.E.2d at 648.

The *Broadnax* court noted that had the fetus been born, as an infant it could have sued for its injuries.<sup>186</sup> The court also held that since the fetus was not born, it must be the mother who was injured; thus, the court conferred upon the mother the right to bring suit simply because the fetus could not.<sup>187</sup> The court's argument essentially eliminates the birth requirement for the wrongful death statute. The wrongful death statute states as a condition of suit that the cause of action must be one that could have been sued upon had death not ensued.<sup>188</sup> Had the fetus been born but injured in the womb and survived until at least birth, it could have sued for the negligent injuries it sustained in the womb.<sup>189</sup> However, as the second prong of *Broadnax* explains, since those injuries killed the fetus, the survivors of the fetus must have the right to bring suit simply because the fetus was could not.<sup>190</sup> The very fact that the fetus was not born, but could have been born, mandates the existence of a cause of action for wrongful death on behalf of the fetus's survivors. Thus, to fulfill the policy reasons behind the wrongful death statute, the representatives of the unborn fetus must have a cause of action for wrongful death.

The *Endresz* court supported its second reason for precluding a cause of action in wrongful death by stating that "considerations of justice which mandate the recovery of damages by an infant, injured in his mother's womb and born deformed through the wrong of the third party, are absent where the foetus, deprived of life while yet unborn, is never faced with the prospect of impaired mental or physical health."<sup>191</sup> However, as noted, *Broadnax* expressly acknowledged that the child *in utero* is owed a duty of care by the medical professional treating the expectant mother's pregnancy.<sup>192</sup> The *Broadnax* court impliedly held that consigning the unborn fetus to a state in which it has no rights is an injustice in

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Endresz*, 248 N.E.2d at 908 (Burke, J., dissenting).

<sup>189</sup> *Broadnax*, 809 N.E.2d at 648.

<sup>190</sup> *Id.*

<sup>191</sup> *Endresz*, 248 N.E.2d at 903.

<sup>192</sup> *Broadnax*, 809 N.E.2d at 648.

## FETAL RIGHTS UNDER NEW YORK LAW

835

itself<sup>193</sup> that should be resolved by allowing the mother a cause of action for injuries if the fetus cannot bring suit.<sup>194</sup> Thus, considerations of justice necessitate the recovery of damages by representatives of the fetus injured and killed *in utero* simply because that fetus never had the chance to bring suit in the first place.

In his dissenting opinion in *Endresz*, Judge Burke dismissed the majority's reliance on birth as a prerequisite for an action in wrongful death as illogical.<sup>195</sup> First, citing language from *Woods v. Lancet*, Judge Burke declared that the majority's reasoning was an "outmoded, timeworn fiction."<sup>196</sup> He proposed that life, not birth, should be the criteria by which the court reviews causes of action in wrongful death.<sup>197</sup> Second, Judge Burke relied on an analogous Wisconsin case, from which he quoted:

If no right of action is allowed, there is a wrong inflicted for which there is no remedy. Denying a right of action for negligent acts which produce a stillbirth leads to very incongruous results. For example, a doctor or midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However, if they badly injured the child they would be exposed to liability. Such a rule would produce the absurd result that an unborn child who was badly injured by the tortious acts of another, but who was born alive, could recover while an unborn child, who was more severely injured and died as the result of the tortious act of another, could recover nothing.<sup>198</sup>

Judge Burke's criticism of this inconsistency is similar to that raised by the dissent in *Tebbutt*—that the practitioner who caused a more serious injury resulting in death would face less liability than

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<sup>193</sup> Akin to the aforementioned "juridical limbo," mentioned *supra* note 19 and accompanying text.

<sup>194</sup> *Broadnax*, 809 N.E.2d at 648.

<sup>195</sup> *Endresz*, 248 N.E.2d at 908 (Burke, J., dissenting).

<sup>196</sup> *Id.* (citing *Woods v. Lancet*, 102 N.E.2d 691 (1951)).

<sup>197</sup> *Id.* at 908.

<sup>198</sup> *Id.* (citing *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 20).

the practitioner who caused a more minor injury that the infant survived.<sup>199</sup> The persuasiveness of Judge Burke's dissent is given even more support by the *Broadnax* court's express approval of the judge's reasoning in its discussion of the rationale for permitting a cause of action by the mother for emotional damages on behalf of the fetus.<sup>200</sup> Given this logic, it is likely that the second reason cited in *Endresz* against permitting a cause of action for wrongful death, specifically that there has been no birth, also has been impliedly overruled by *Broadnax*.

The third reason advanced for prohibiting recovery for the wrongful death of fetuses negligently killed *in utero* is that damages for such injuries are difficult to calculate.<sup>201</sup> In addressing this concern, Judge Burke, in his dissent in *Endresz*, argued that the difficulty of calculating damages should not preclude substantive recovery.<sup>202</sup> Specifically, Judge Burke noted that the majority's reliance on the argument that causation and damages are too difficult to calculate had been effectively dismissed by the court in *Woods v. Lancet*.<sup>203</sup> Indeed, the majority in *Woods* asserted that "it is an inadmissible concept that uncertainty of proof can ever destroy a legal right."<sup>204</sup> Judge Burke noted that this portion of the *Woods* holding was cited approvingly by a Kentucky state court in its refusal to dismiss a cause of action for the wrongful death of a stillborn fetus based solely on the difficulty of estimating damages.<sup>205</sup> Judge Burke thus concluded that the

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<sup>199</sup> *Tebbutt*, 483 N.E.2d at 1147-49.

<sup>200</sup> *Broadnax*, 809 N.E.2d at 648 (holding that *Tebbutt* wrongly "exposed medical caregivers to malpractice liability for in utero injuries when the fetus survived, but immunized them against any liability when their malpractice caused a miscarriage or stillbirth").

<sup>201</sup> *Endresz*, 248 N.E.2d at 904 (holding that there are "no elements whatever upon which a jury could base any conclusion that a pecuniary injury has been suffered by the plaintiff from the loss of the unborn child").

<sup>202</sup> *Id.* at 909. Compare *Broadnax*, 809 N.E.2d at 649, in which the court dismisses the dissenting judge's concerns about juries being asked to quantify the emotional distress that a woman feels upon suffering a miscarriage or stillbirth.

<sup>203</sup> *Endresz*, 248 N.E.2d at 909 (citing *Woods*, 303 N.Y. at 356).

<sup>204</sup> *Endresz*, 248 N.E.2d at 909.

<sup>205</sup> *Id.* at 909 (citing *Mitchell v. Couch*, 285 S.W.2d 901, 906 (Ky. 1955)).

## FETAL RIGHTS UNDER NEW YORK LAW

837

supposed difficulty of calculating damages should not be used to justify the denial of causes of action for the wrongful death of a fetus.<sup>206</sup> Furthermore, the *Broadnax* majority was unconcerned that damages might be difficult to quantify.<sup>207</sup> In addressing the dissent's concern that juries would be asked to quantify the emotional distress experienced by a woman who has suffered a miscarriage or stillbirth, the majority responded that "no one from any quarter [had come] forward [during the appellate process] to support any such concerns."<sup>208</sup> It can be inferred from this statement that unless interested parties voiced concerns regarding any difficulties in affixing damages, the *Broadnax* majority would not consider such concerns *sua sponte*. Given the court's sentiment that the difficulty of affixing damages does not justify adherence to *Tebbutt*, it is possible that the court may also find that the difficulty of affixing damages does not justify adherence to the principle in *Endresz* that wrongful death damages are barred in part because it would be difficult to calculate damages and causation in a claim for the wrongful death of a fetus.

The fourth reason cited to preclude recovery for wrongful death by the personal representative of a stillborn fetus is that the parents would receive an undeserved windfall.<sup>209</sup> The *Endresz* court noted that, in a given case, a mother could sue for any independent physical injuries she suffered and the father could sue for the loss of services, making any award for wrongful death an "unmerited bounty . . . [as the award] would constitute not compensation to the injured but punishment to the wrongdoer."<sup>210</sup> However, this argument is undercut by the existence of cases in which a mother does not suffer any physical injuries from the

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The *Mitchell* court, citing to *Woods v. Lancet*, 102 N.E.2d 691 (1951), held that uncertainty of proof, by itself, can never destroy a legal right. *Mitchell*, 285 S.W.2d at 906. "The questions of causation and reasonable certainty which arise in these cases are no different in kind from the ones which have arisen in thousands of other negligence cases decided in this state in the past." *Id.*

<sup>206</sup> *Endresz*, 248 N.E.2d at 909.

<sup>207</sup> *Broadnax*, 809 N.E.2d at 649.

<sup>208</sup> *Id.*

<sup>209</sup> *Endresz*, 248 N.E.2d at 904.

<sup>210</sup> *Id.*



stillbirth apart from those normally incident to childbirth.<sup>211</sup> In such cases, prior to the *Broadnax* decision, if the plaintiff-mothers did not allege any independent physical injuries, they were barred from asserting causes of action for emotional damages.<sup>212</sup> Notably, *Broadnax* has removed this bar to recovery.<sup>213</sup> Thus, the *Broadnax* decision could influence the fourth *Endresz* factor in one of two ways: (1) either the court may look to *Broadnax* as representative of a current trend to permit greater recovery on behalf of plaintiff-parents, thereby rendering the “unmerited bounty” argument outdated, or (2) the court could decide that because a mother can now recover for emotional distress, she should not be permitted to also recover as the representative of the fetus in a cause of action for wrongful death, given that the combination of the two damage awards would constitute an “unmerited bounty.”<sup>214</sup>

If the reasoning in *Endresz* is outdated and a majority of other states recognize a cause of action for wrongful death of a fetus, why then do the New York courts consistently bar wrongful death actions on behalf of survivors of fetuses negligently killed *in utero*? The fundamental reasoning for barring wrongful death actions may parallel the reasoning cited by the New York state courts in barring actions for wrongful life—that the issue is one best addressed by the legislature, not the court.<sup>215</sup>

An action for wrongful life is “[a] lawsuit brought by or on behalf of a child with birth defects, alleging that but for the defendant doctor’s negligent advice, the parents would have not conceived the child, or if they had, they would have aborted the fetus to avoid the pain and suffering resulting from the child’s congenital defects.”<sup>216</sup> New York currently does not permit causes of action for wrongful life.<sup>217</sup> While a parent may recover damages

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<sup>211</sup> See *Tebbutt*, 483 N.E.2d at 1143; see also *Broadnax*, 809 N.E.2d at 646.

<sup>212</sup> *Broadnax*, 809 N.E.2d at 648.

<sup>213</sup> *Id.*

<sup>214</sup> *Endresz*, 248 N.E.2d at 904.

<sup>215</sup> See *supra* note 70 and accompanying text.

<sup>216</sup> BLACK’S LAW DICTIONARY 1607 (7th ed. 1999).

<sup>217</sup> *Sheppard-Mobley v. King*, 778 N.Y.S.2d 98, 101 (N.Y. App. Div. 2003) (holding that “[n]o cause of action may be maintained on behalf of an infant plaintiff for ‘wrongful life,’ i.e., that he or she would never have been born but

## FETAL RIGHTS UNDER NEW YORK LAW

839

for the increased cost of caring for the child until the age of majority,<sup>218</sup> a child is barred from recovering damages for the extraordinary expenses that the child will incur upon reaching majority.<sup>219</sup> In the landmark case *Becker v. Schwartz*, the court cited two reasons for barring claims for wrongful life.<sup>220</sup> First, the court noted that children who bring wrongful life actions have not suffered any legally cognizable injuries, there being no “fundamental right . . . to be born as a whole, functional human being.”<sup>221</sup> Second, the court found that damages would be impossible to compute, there being no way to provide a remedy that would place the infants in the place they would have occupied but for the negligence of the defendants because that place would have been nonexistence.<sup>222</sup> These concerns echo those of the *Endresz* court regarding claims for wrongful death, specifically that an unborn child is not a legally cognizable person in the eyes of the wrongful death statute and that damages for the wrongful death of a fetus would be too difficult for a jury to calculate.

In *Becker*, the majority voiced its discomfort with having to recognize claims for wrongful life, holding that the court was ill-equipped to calculate damages based on a comparison between life in an impaired state and non-existence.<sup>223</sup> Indeed, the court noted that “[r]ecognition of so novel a cause of action . . . is best reserved

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for the negligence of the defendants”); *see also* *Sample v. Levada*, 779 N.Y.S.2d 96, 99 (N.Y. App. Div. 2004); *Becker v. Schwartz*, 386 N.E.2d 807, 813 (N.Y. 1978).

<sup>218</sup> 1 N.Y. P.J.I.3d 2:280, at 1464. “[P]arents may recover the cost of care and treatment of a disabled child born because of a negligent failure to test for or advise the parents of the potential for the birth of such a child . . . [t]his recovery is limited to the extraordinary expenses incurred . . . prior to the child’s 21st birthday.” *Id.* (citations omitted).

<sup>219</sup> *Alquijay by Alquijay v. St. Luke’s-Roosevelt Hosp. Center*, 473 N.E.2d 244, 245 (N.Y. 1984) (holding that an infant does not have a cause of action in wrongful life because he cannot allege any cognizable injury, there being no right not to be born over being born impaired).

<sup>220</sup> *Becker*, 386 N.E.2d at 812.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Becker*, 46 N.Y.2d at 412.

for legislative, rather than judicial, attention.”<sup>224</sup> Although wrongful death is not a novel cause of action and is recognized in a majority of states,<sup>225</sup> New York continues to reject causes of action for wrongful death-of-fetus, primarily for reasons that echo its reasons for rejecting causes of action for wrongful life. Thus, perhaps as in the case of wrongful life, the cause of action for wrongful death is also best left to the legislature for a formal decision. If there is confusion regarding *Broadnax*’s implications for wrongful life actions, the legislature could affirmatively address this issue through an amendment to the wrongful death statute. State legislatures in South Dakota and Arkansas have drafted their wrongful death statutes to expressly permit actions on behalf of survivors of unborn children.<sup>226</sup> These codes of these states could serve as a helpful model if the legislature decides to properly address the issue of wrongful death actions in New York. However, just as it has not yet addressed the issue of whether a cause of action lies for wrongful life, the New York legislature has stalled in enacting a statute providing that fetuses are persons for the purpose of the wrongful death statute. In 2003, the New York State legislature put forward bills in both the State Assembly and the Senate that, if enacted, would amend the Estates, Powers and Trusts Law to allow recovery for the wrongful death of a fetus which dies in the womb through a wrongful act or negligence by a third party.<sup>227</sup> However, these bills have not yet been passed and remain in the committee stage.<sup>228</sup>

### *B. The Application of Broadnax by New York Courts*

*Broadnax* is a fairly recent decision, and thus, New York courts have not been presented with many occasions in which to apply the principles articulated in the case. However, three significant lower

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<sup>224</sup> *Id.*

<sup>225</sup> Simpson, *supra* note 163.

<sup>226</sup> See S.D. CODIFIED LAWS § 21-5-1 (2004); ARK. CODE ANN. § 16-62-102 (2004).

<sup>227</sup> S.B. 135, 226th Ann. Leg. Sess., Reg. Sess. (N.Y. 2003); S.A. 5753, 226th Ann. Leg. Sess., Reg. Sess. (N.Y. 2003).

<sup>228</sup> *Id.*

## FETAL RIGHTS UNDER NEW YORK LAW

841

court decisions, *Sheppard-Mobley v. King*, *Shaw v. QC-Medi New York, Inc.*, and *Stuart v. New York City Health & Hospitals Corp.*, and the very recent Court of Appeals decision to overturn *Sheppard-Mobley v. King*, address the *Broadnax* ruling directly.<sup>229</sup> The outcomes of these cases suggest that the courts are struggling to deal with the expansion of fetal and maternal rights that resulted from *Broadnax*. If nothing else, the four decisions indicate some disagreement among the courts with regard to how best to apply *Broadnax*.

In June 2004, in *Sheppard-Mobley*, the Appellate Division, Second Department, extended the principles of *Broadnax* to the plaintiff-mother's claim of emotional distress resulting from the successful birth of a child negligently injured *in utero*.<sup>230</sup> Finding no reason to limit the *Broadnax* holding to cases of stillbirth and miscarriage, the Appellate Division relied on an analysis of previous Court of Appeals decisions, including *Broadnax*, *Tebbutt*, and *Vaccaro*, to demonstrate that the court had "repealed the independent physical injury requirement for all three categories of birth trauma."<sup>231</sup> First, the court in *Sheppard-Mobley* noted the holding in *Broadnax* that if there is a duty of care owed to the infant *in utero*, then surely there is a duty of care owed to the expectant mother.<sup>232</sup> Second, the court held that, in prohibiting a mother's recovery for emotional distress damages in the absence of an independent injury, it had consistently treated the miscarriage, stillbirth, or live birth of a fetus in an impaired state alike.<sup>233</sup> Thus, miscarriage, stillbirth, and live birth of a fetus in an impaired state should be treated alike in allowing a mother's recovery for emotional distress damages in the absence of an independent

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<sup>229</sup> *Sheppard-Mobley v. King*, 778 N.Y.S.2d 98 (N.Y. App. Div. 2004); *Shaw v. QC-Medi New York*, 778 N.Y.S.2d 791 (N.Y. App. Div. 2004); *Stuart v. New York City Health & Hospitals Corp.*, No. 9767/03, slip. op. at 1 (N.Y. Sup. Ct. Jan. 10, 2005); *Sheppard-Mobley v. King*, No. 49, 2005 N.Y. LEXIS 1135, (N.Y. App. Div. May 10, 2005).

<sup>230</sup> *Sheppard-Mobley*, 778 N.Y.S.2d at 103-04.

<sup>231</sup> *Id.* at 103.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

injury.<sup>234</sup> Finally, the court noted that if *Broadnax* overruled *Tebbutt*, it should also overrule *Vaccaro*, which denied damages for emotional distress to the parents of children injured *in utero* but born alive.<sup>235</sup> Consequently, the court held that recovery for emotional damages should be permitted when the defendant-doctor's negligence results in the live birth of a severely impaired child.<sup>236</sup>

In addition to the Second Department's holding that a mother's right to recover for emotional distress under *Broadnax* extends to cases involving the live birth of a child in an impaired state,<sup>237</sup> in early 2005, the Queens County Supreme Court held that the retroactive application of both *Broadnax* and *Sheppard-Mobley* was appropriate.<sup>238</sup> The decision in *Stuart v. New York City Health and Hospitals Corp.* reflected a turning point in New York jurisprudence marked by *Broadnax* and *Sheppard-Mobley*. The judge noted that *Broadnax* and *Sheppard-Mobley* created a "new rule" that recognized actions for emotional distress absent physical injury.<sup>239</sup> This rule fulfilled the "commendable purpose" of expanding the duty of care owed to expectant mothers.<sup>240</sup> The court held that this "commendable purpose" was achieved by retroactive application, since there was no lawful justification for the old policy, which did not address a mother's emotional wellbeing as dependent on the health of her child.<sup>241</sup> Thus, the *Stuart* decision reinforced *Broadnax* and *Sheppard-Mobley*, comporting with the "spirit and direction" of the Court of

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*; see also *supra* notes 68-87 and accompanying text for a summary of *Vaccaro v. Squibb*, 418 N.E.2d 386 (N.Y. 1980)).

<sup>236</sup> *Sheppard-Mobley*, 778 N.Y.S.2d at 103.

<sup>237</sup> 1 N.Y. P.J.I.3d 2:280, at 1463 (2005); *Sheppard-Mobley*, 778 N.Y.S.2d at 103.

<sup>238</sup> *Stuart*, No. 9767/03, slip op. at 3. Retroactive application means that a change in law will be applied to injured parties that filed lawsuits prior to the change in law, in that they will be allowed to amend their complaint to include a cause of action for recovery that the new law permits them. *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

## FETAL RIGHTS UNDER NEW YORK LAW

843

Appeals's decisional law in this area.<sup>242</sup>

From holdings such as the Second Department's in *Sheppard-Mobley* and the Queens County Supreme Court's in *Stuart*, it appeared that the New York courts would progressively expand upon the holding in *Broadnax* and go to great lengths to permit recovery for emotional damages when a defendant-doctor's negligence resulted in the live birth of a severely impaired child. However, in May 2005, the Court of Appeals reexamined *Sheppard-Mobley* and overturned the Second Department's decision, holding that an expectant mother may not recover damages for emotional injuries when a defendant-doctor's negligence causes injury to a fetus that later survives.<sup>243</sup> The court explained that the holding in *Broadnax* was intended to "fill a gap" in tort jurisprudence that had exposed doctors to liability for their negligence when a fetus was born alive, but immunized them when the fetus died in the womb.<sup>244</sup> Further, the court held that the *Broadnax* holding had been crafted to eliminate the injustice created by ignoring a small, but undoubtedly aggrieved, class of plaintiffs, and that it was this unique injustice that the court sought to rectify by permitting mothers, even absent an independent injury, to recover for emotional distress when medical malpractice resulted in the stillbirth or miscarriage of the fetuses they were carrying.<sup>245</sup> Thus, the Court of Appeals held that the Second Department had wrongly applied the principles of *Broadnax* to the facts in *Sheppard-Mobley* because, as the court had held many years earlier in *Woods v. Lancet*, a child born alive has a cause of action for the physical injuries it sustained as a fetus through medical malpractice.<sup>246</sup>

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<sup>242</sup> *Broadnax v. Gonzalez*, 809 N.E.2d 645, 648 (N.Y. 2004). "In categorically denying recovery to a narrow, but indisputably aggrieved, class of plaintiffs, *Tebbutt* is at odds with the spirit and direction of our decisional law in this area." *Id.*

<sup>243</sup> *Sheppard-Mobley v. King*, No. 49, 2005 N.Y. LEXIS 1135, at \*1-2 (N.Y. App. Div. May 10, 2005).

<sup>244</sup> *Id.* at \*7.

<sup>245</sup> *Id.* at \*7.

<sup>246</sup> *Id.* at \*7-8 (citing *Woods v. Lancet*, 102 N.E.2d 691). It is unclear whether the recent Court of Appeals' decision in *Sheppard-Mobley* will impact the Queens County Supreme Court's decision in *Stuart*. Andrew Harris,

The decision by the Court of Appeals to narrow the scope of *Broadnax* provides support for an earlier decision by the Appellate Division, Fourth Department, to narrowly interpret the *Broadnax* precedent. Only ten days after *Sheppard-Mobley* was decided by the Second Department in June 2004, the Appellate Division, Fourth Department, in *Shaw v. QC-Medi New York*, refused to extend *Broadnax* to the parents' claims of emotional distress absent physical injury to the nonpatient plaintiff mother.<sup>247</sup> In that case, the plaintiffs' baby was born with severe defects requiring her to be on a ventilator and to receive twenty-four-hour nursing care.<sup>248</sup> The infant's mother was diabetic and her condition was aggravated by stress.<sup>249</sup> The nursing staff hired by the plaintiffs was apprised of the mother's poor health.<sup>250</sup> When one of the nurses failed to adequately respond to an alarm on the infant's ventilator, the plaintiff returned home to find her two-year-old daughter "sweating profusely, very blue, and barely conscious."<sup>251</sup> The child later recovered, but the mother sued for negligent infliction of emotional distress, arguing that an independent duty was owed to her by the defendant nurses because they were "on notice of her condition and the effect that stress had upon it."<sup>252</sup> The court held that, despite the decision in *Broadnax* to permit

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*Expanding 'Broadnax': Court of Appeals Soon to Rule On Case Used By Suffolk Judge to Add Emotional Distress Claim to Neo-Natal Malpractice Suit*, N.Y. L.J., May 10, 2005, at 16 (noting, prior to the publication of the Court of Appeals decision on *Sheppard-Mobley*, that if the Court of Appeals overturned the Second Department's decision in *Sheppard-Mobley*, the new holding could "sweep away" the decision in *Stuart* as well).

<sup>247</sup> *Shaw v. QC-Medi New York*, 778 N.Y.S.2d 791 (N.Y. App. Div. 2004).

<sup>248</sup> *Id.* The child's severe defects were not caused by medical malpractice and are important to the case only in that the defects caused the child to need twenty-four-hour nursing care and attention.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* Before the incident in question, the parents in *Shaw* were frustrated when their nurses sometimes failed to show up for work. The father wrote a letter informing the nursing service that his wife's severe diabetes was being exacerbated by the stress of the nursing staff's "lack of professional commitment," and that the stress his wife was under was "literally killing her." *Id.*

<sup>251</sup> *Id.* at 792-93.

<sup>252</sup> *Id.* at 793.

## FETAL RIGHTS UNDER NEW YORK LAW

845

recovery for a mother's emotional distress resulting from negligence to her fetus, the duty of care owed to a patient-mother in pregnancy was unique, and thus, the principles of *Broadnax* were not applicable to cases in which the mother was a nonpatient.<sup>253</sup> Thus, it appears for now that the principles of *Broadnax* may not extend to instances involving a nonpatient parent.<sup>254</sup>

It is clear that the New York courts are in a state of transition regarding their willingness, or unwillingness, to extend the principles announced in *Broadnax* to other situations. The Court of Appeals's decision in *Sheppard-Mobley* strongly suggests that the holding of *Broadnax* will be applied very narrowly in the future. However, *Sheppard-Mobley* only addresses the potential for a mother to recover emotional damages for prenatal negligence that resulted in the birth of an impaired baby. Importantly, the holding of *Broadnax* remains valid as applied to other cases affecting the rights of a fetus and the rights of the mother of a fetus negligently killed. Thus, the precise repercussions of *Broadnax* for wrongful death-of-fetus cases still remain to be seen. As additional cases percolate up through the New York courts on the issue of maternal and fetal rights as related to medical malpractice suits, the true scope of *Broadnax* hopefully will become clearer.

## III. EXPANDING MALPRACTICE LIABILITY IN NEW YORK

The recent New York Court of Appeals decision in *Broadnax v. Gonzalez* has the potential to either change or altogether eliminate the current bars to suits for wrongful death in New York.<sup>255</sup> Regardless of whether the *Broadnax* decision opens the door to wrongful death litigation, it almost certainly will impact the field of obstetrical and gynecological care in New York by expanding medical malpractice liability.<sup>256</sup> This concern was

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<sup>253</sup> *Id.* at 795.

<sup>254</sup> In other words, only by reason of pregnancy does a mother, absent independent injury, have a cause of action for emotional damages for negligence resulting in harm to her child. *Shaw*, 778 N.Y.S.2d at 795.

<sup>255</sup> *See supra* Part II.

<sup>256</sup> *Broadnax*, 809 N.E.2d at 650. *See supra* note 12 and accompanying



highlighted in Judge Reed's dissent in *Broadnax*.<sup>257</sup> While she stated that "there is no way . . . to predict . . . the potential effect of this expansion of liability . . . on the cost and availability of gynecological and obstetrical services in New York State,"<sup>258</sup> it is a general concern among medical practitioners in New York that "stifling liability insurance rates could come even closer to suffocating them" after the *Broadnax* decision.<sup>259</sup> Doctors and insurance carriers are especially concerned that *Broadnax* will result in the filing of an increasing number of lawsuits and, with "escalating jury awards" and the high costs of defending a lawsuit, additional lawsuits mean higher liability insurance premiums.<sup>260</sup>

According to the American Medical Association (AMA), New York faces a "medical liability insurance crisis that has physicians retiring early, moving to states where insurance rates are lower and cutting back on high-risk procedures in an effort to lower insurance premiums."<sup>261</sup> The AMA reports that New York physicians pay some of the highest rates of liability insurance in the country, in the range of up to \$200,000 annually.<sup>262</sup> Doctors are struggling to obtain \$1 million in malpractice coverage, but jury awards greater than \$1 million are frequent in New York, and the average award increased from \$1.7 million in 1994 to \$6 million in 1999.<sup>263</sup> Indeed, fear of staggering liability compels many young doctors not to specialize in obstetrics.<sup>264</sup> Further, forty-five percent of the obstetrical residents who graduated in New York in 2002 have

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<sup>257</sup> *Broadnax*, 809 N.E.2d at 650.

<sup>258</sup> *Id.*

<sup>259</sup> Tanya Albert, *New York Court Expands Liability in Miscarriage and Stillborn Cases* AMEDNEWS.COM, para. 1 (2004), available at <http://www.ama-assn.org/amednews/2004/04/26/prsb0426.htm>.

<sup>260</sup> Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care*, 37 AKRON L. REV. 417, 417-18 (2004).

<sup>261</sup> Albert, *supra* note 259, at para. 7.

<sup>262</sup> *Hearings*, *supra* note 13.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* (citing New York Daily News, Feb. 12, 2004).

## FETAL RIGHTS UNDER NEW YORK LAW

847

since left the state to practice elsewhere.<sup>265</sup> In response to these and other statistics, however, it must be noted that the legislative director of the New York Public Interest Research Group has asserted that nowhere is there any independent data proving that doctors and obstetricians are leaving New York.<sup>266</sup>

It is possible that the fear of liability has led to a decrease in the number of obstetricians and an increase in the cost of medical services available in New York State.<sup>267</sup> When there are physician shortages, fewer obstetricians and gynecologists are available for routine screenings and checkups.<sup>268</sup> Consequently, “women lose care that helps protect fertility, end pelvic pain, or treat cancer early . . . [women have to] travel longer distances to find a doctor, have longer waiting periods for appointments, and have shorter visits once they get there.”<sup>269</sup> Increasing medical liability disproportionately harms pregnant women because they are unable to get the prenatal and delivery care they need.<sup>270</sup> Furthermore, obstetric shortages disproportionately impact poor and disadvantaged women.<sup>271</sup> These women frequently rely on community care clinics, which often have to limit the number of patients they accept because they cannot shift the costs of their rising insurance premiums to their uninsured patients.<sup>272</sup> Medical care expenses may also increase when doctors, out of fear of getting sued, practice what is termed “defensive medicine,” where they order too many, and sometimes needless, medical tests to

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<sup>265</sup> *Id.* (citing Long Island Business News, Mar. 28, 2003).

<sup>266</sup> Kathleen Kerr, *Docs Don't See a Future in Babies*, NEWSDAY, Oct. 19, 2004, at A06.

<sup>267</sup> *Hearings*, *supra* note 13.

<sup>268</sup> News Release, American College of Obstetricians and Gynecologists, Medical Liability Survey Reaffirms More Ob-Gyns Are Quitting Obstetrics (2004), available at [http://www.acog.org/from\\_home/publications/press\\_releases/nr07-16-04.cfm](http://www.acog.org/from_home/publications/press_releases/nr07-16-04.cfm) [hereinafter Medical Liability Survey].

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Sarah Domin, *Where Have All the Baby-Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics and the Medical Malpractice Insurance Crisis*, 53 CATH. U. L. REV. 499, 537 (2004).

<sup>272</sup> *Id.*

insulate themselves from future lawsuits.<sup>273</sup> It is not difficult to conclude that with fewer physicians, limited community clinic services, and defensive medical practices, women in a lower socio-economic bracket would face significant difficulties in accessing vital gynecological or obstetrical services.

Some doctors fear that the *Broadnax* decision could expand liability, such that they will end up in court for cases that involved no medical negligence and face jurors who will award damages for psychological suffering based not on the degree of harm or fault, but on the emotionally-charged nature of fetal malpractice cases.<sup>274</sup> The vice-chair of the American College of Obstetricians and Gynecologists expressed concern about the potential expansion of liability following *Broadnax*, noting that “if it were a fair fight, it would not be a problem. But the problem is that science doesn’t protect us [obstetricians and gynecologists] in court” when dealing with such emotional issues.<sup>275</sup> Similarly, insurers voice concerns that echo doctors’ concerns. Edward Amsler, vice president of Medical Liability Mutual Insurance Company, which insures most of New York’s physicians, noted to *Newsday* that children who have been injured through negligence *in utero* are very sympathetic plaintiffs and “hence they get huge jury verdicts.”<sup>276</sup>

In contrast to doctors’ fears of increased medical malpractice liability resulting from *Broadnax* and similar decisions, trial lawyers doubt whether *Broadnax* will have any impact on the crisis of medical malpractice liability facing New York and the rest of the country; others debate whether there is even a “crisis” at all.<sup>277</sup> In one published reaction to *Broadnax*, Lenore Kramer, past president of the New York State Trial Lawyers Association, refuted contentions that *Broadnax* would increase malpractice

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<sup>273</sup> Kerr, *supra* note 266.

<sup>274</sup> Albert, *supra* note 259, at para. 4.

<sup>275</sup> *Id.* at para. 5.

<sup>276</sup> Kerr, *supra* note 266.

<sup>277</sup> John Caher, *Liability Widens for Fetal Death Caused by Doctors; Distress Damages Do Not Require Bodily Harm to Women*, N.Y.L.J., Apr. 2, 2004, at 1.

## FETAL RIGHTS UNDER NEW YORK LAW

849

litigation so as to affect liability rates.<sup>278</sup> She declared that the ruling in *Broadnax*

recognizes a reality of these terrible situations [of medical malpractice to fetuses] and brings the law into conformity with what people's understanding of what justice is . . . [trial lawyers] sincerely believe that there is no medical malpractice crisis and that it is a trumped up issue perpetrated by the insurers.<sup>279</sup>

In another published reaction, Margaret C. Jasper, one of the attorneys representing the appellants in *Broadnax*, stated that if doctors are concerned about unjustified lawsuits, they will need to do a better job of "policing their own."<sup>280</sup> Jasper further explained that even in clear cases of medical malpractice, it is difficult to bring a malpractice case in New York due to statutes of limitations and expert testimony requirements.<sup>281</sup> Regardless of its impact on the medical liability insurance crisis, it is clear that the *Broadnax* decision was "heralded by plaintiff's attorneys as having brought New York out of the dark ages by expanding the amount of damages potentially recoverable,"<sup>282</sup> with some opining that *Broadnax* merely comports with a growing national sentiment that the unborn child is worthy in the eyes of the law.<sup>283</sup> Whether an increase in the amount of available damages will actually have an impact on the cost of malpractice liability insurance in New York is yet to be seen.

There are two specific ways in which the New York State

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Albert, *supra* note 259, at para. 15.

<sup>281</sup> *Id.* at para. 16.

<sup>282</sup> Marian E. Silber and Maria Elyse Rabar, *Medical Malpractice Litigation; Damages for Stillbirth: Will The Floodgates Be Opened?*, N.Y. L. J., April 30, 2004, at 3.

<sup>283</sup> Albert, *supra* note 259. In addition to civil remedies, the nation is also seeking criminal remedies for those who injure a child *in utero*. For example, the decision in *Broadnax* was coincidentally handed down on the same day that President George W. Bush signed into law the Unborn Victims of Violence Act, making it a crime to harm the fetus of a pregnant woman during an assault. Caher, *supra* note 277.

legislature could address concerns related to the *Broadnax* decision. First, the legislature could directly address the cause of action for wrongful death by statute, either by affirmatively denying recovery for these causes of action or by expressly allowing for these causes of action.<sup>284</sup> This method goes directly to the heart of the matter and in fact would determine the impact that *Broadnax* will have on fetal rights litigation related to prenatal negligence.

Alternatively, the legislature could also address the concerns resulting from *Broadnax* by regulating medical malpractice liability itself. Damages caps and insurance reform are often suggested as two means of stabilizing premium rates for doctors.

Physicians and the insurance industry generally favor the imposition of caps on non-economic damages in medical malpractice liability cases as a solution to rising insurance premiums.<sup>285</sup> This method has been supported primarily by Republican legislators at both the state and federal level.<sup>286</sup> California's Medical Injury Compensation Reform Act (MICRA) is one such model of damage cap legislation.<sup>287</sup> MICRA places a \$250,000 cap on the amount of compensation awarded to malpractice victims for their non-economic injuries.<sup>288</sup> The New

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<sup>284</sup> S.D. CODIFIED LAWS § 21-5-1 (2004); ARK. CODE ANN. §16-62-102 (2004). South Dakota and Arkansas have statutes that expressly allow for causes of wrongful death for the fetus negligently killed *in utero*. *Id.*

<sup>285</sup> Glassman, *supra* note 260, at 419 (noting that physicians and the insurance industry place the blame for escalating malpractice liability insurance rates on an excess of litigation and high jury awards). Non-economic damages are defined generally as damages awarded for a litigant's past and/or future pain and suffering. *Id.* at 423 n.27.

<sup>286</sup> *Id.* at 419. The GOP's objective is to impose federal caps on non-economic damages in medical malpractice cases and to take the decision out of the hands of the states. *Id.*

<sup>287</sup> CAL. CIVIL CODE § 3333.2 (Deering 2005); *see also Hearings, supra* note 13 (statement to Congress in which the American Medical Association advocates federal legislation based on California's medical liability reform act, known as MICRA).

<sup>288</sup> CAL. CIVIL CODE § 3333.2 (Deering 2005). Non-economic damages, as defined in the California statute, include pain, suffering, inconvenience, physical impairment, disfigurement and other non-pecuniary injury. *Id.*

*FETAL RIGHTS UNDER NEW YORK LAW*

851

York legislature could enact a similar cap on non-economic damages.<sup>289</sup> A cap might propel more obstetricians and gynecologists back into high-risk practices, thus helping to alleviate the women's healthcare crisis that might result from the *Broadnax* decision. However, opponents to a similar proposal in the U.S. House of Representatives have stated that

[a cap on non-economic damages in healthcare lawsuits] offers a "solution" prior to having discovered the root of the problem. Instead of reducing the occurrence of frivolous lawsuits, providing direct assistance to health care providers and communities, and examining every aspect of this problem [i.e., doctors facing soaring medical malpractice insurance premiums], this legislation restricts the legal rights of those who have been truly wronged.<sup>290</sup>

Insurance reform has been suggested as an alternative means of reducing or stabilizing doctors' insurance premium costs.<sup>291</sup> Insurance reform is supported primarily by Democratic state and federal legislators, the Association of Trial Lawyers of America, state trial lawyer associations, and consumer watchdog groups.<sup>292</sup> These groups are critical of federal caps and maintain that caps have not proven successful in either lowering or stabilizing premiums.<sup>293</sup> Indeed, as noted in a 2003 study released by the Foundation for Taxpayer and Consumer Rights on the relative success of California's MICRA statute, malpractice caps, and other restrictions on patients' rights did not actually lower or stabilize premiums, as insurers and doctors claimed; rather, it was the implementation of California's insurance reform initiative in 1988 that reduced California doctors' premiums by twenty percent over three years.<sup>294</sup> This law resulted in a rate freeze, a rate rollback,

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<sup>289</sup> Medical Liability Survey, *supra* note 268.

<sup>290</sup> Glassman, *supra* note 260, at 424 n.39.

<sup>291</sup> FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, HOW INSURANCE REFORM LOWERED DOCTORS' MEDICAL MALPRACTICE RATES IN CALIFORNIA (Mar. 7, 2003), *available at* <http://www.consumerwatchdog.org/healthcare/rp/rp003103.pdf> [hereinafter INSURANCE REFORM].

<sup>292</sup> Glassman, *supra* note 260, at 420.

<sup>293</sup> *Id.*

<sup>294</sup> INSURANCE REFORM, *supra* note 291.

and stringent regulation that reduced premiums in all lines of insurance, including medical malpractice.<sup>295</sup> Thus, the New York State legislature might be well advised to adopt insurance reforms similar to those implemented in California and to require that insurance companies roll back premium rates to offset any concerns about the rising costs of medical malpractice insurance in the aftermath of the *Broadnax* decision.

Clearly, divergent views exist as to whether *Broadnax* will affect the medical liability crisis faced by obstetricians and gynecologists in New York. Some even question whether a crisis exists at all. However, even if the crisis is “trumped up,” as some opine, it is almost certain that the legislature will address the crisis, or potential crisis, through initiatives that either eliminate possible causes of action for the wrongful death of fetuses, impose caps on malpractice verdicts, or enact insurance premium reforms. Thus, while *Broadnax*’s impact may be a drop in the bucket in terms of affecting the availability or cost of obstetrical or gynecological care in New York, it has almost assuredly contributed to fear that the availability or cost of obstetrical or gynecological care could be compromised by expanding liability in the area of wrongful death. Indeed, this fear may be what spurs the legislators to take action.

#### CONCLUSION

The New York Court of Appeals’ recent decision in *Broadnax v. Gonzalez* overturned nearly twenty years of precedent in which New York courts refused to permit mothers to recover emotional damages for negligently caused stillbirths or miscarriages absent independent injuries of their own. In declaring that both the fetus and the mother are owed a duty of care, and by expanding the rights of the fetus by assigning a cause of action to the mother, *Broadnax* may have far-reaching implications for other causes of action involving fetal rights, namely, suits for wrongful death. While the victims of negligence clearly deserve to have their

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<sup>295</sup> Foundation for Taxpayer and Consumer Rights, Five Dangerous Myths About California’s Medical Malpractice Restrictions, at <http://www.consumerwatchdog.org/healthcare/fs/fs003009.php3> (last visited Apr. 20, 2005).

*FETAL RIGHTS UNDER NEW YORK LAW*

853

injuries redressed, doctors are justifiably concerned that expanding liability will result in higher insurance premiums, forcing obstetricians to abandon high-risk patients or even the practice of obstetrics and gynecology in New York altogether, thereby lowering the quality of obstetrical and gynecological care provided in this state. This result would undermine one of the principal purposes of medical malpractice liability—to encourage accountability in medicine and to ensure the availability of high-quality healthcare. If an increase in the number of malpractice lawsuits results in an exodus of obstetrical and gynecological physicians from the medical field, it must be asked whether this expansion of liability is beneficial for New York in the long run. In addressing this question, the courts have faced difficult decisions and have demonstrated a desire to leave the expansion of tort liability to the legislature. Given the court's reluctance to address this area of the law, the legislature must seriously examine the trend of expanding fetal rights in New York and the United States generally and take affirmative steps to either expressly accept or reject the extension of these rights to wrongful death causes of action. Only with definitive and clear statutes will this murky area of fetal rights ever be resolved in New York.