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Medical Malpractice Damages in Infant Death Cases

Under New York Law, limitations on damages associated with infant death cases attributable to medical negligence have long resulted in under compensation to the plaintiff (infant decedent's estate), while allowing the defendants and their insurers to pay out what is often a nominal amount in comparison to the horrific loss.

Prior to 2004

The law of New York prior to 2004 was that neither a mother nor a fetus had a cause of action in the situation where a physician through medical negligence caused the mother to miscarry or for the baby to be stillborn. *Tebbutt v. Virostek*, 65 NY2d 931 (1985).

Thus, prior to 2004, in order for a defendant to be held accountable for the death of a fetus due to medical negligence that fetus had to be born alive. If the infant was born alive and survived for any length of time then the damages compensable would be those in any traditional negligence action resulting in a wrongful death namely, conscious pain and suffering sustained by the decedent prior to the demise as well as any medical expenses incurred, but not compensated through collateral sources and a wrongful death action pursuant to the Estates Powers and Trust Law (EPTL) for pecuniary injuries to the next of kin.[1]

Due to the very nature of the action, these damages have been traditionally viewed as de minimus by the courts as well as insurance carriers since it is difficult for the plaintiff to prove damages. As far as the pain and

suffering is concerned, the burden is on the plaintiff to establish that the newborn experienced cognizant pain and suffering. Although pursuant to *McDougald v. Garber*,[2] plaintiff need only establish some level of awareness, it can be seen how difficult this is in a situation where an infant was born near death and survived for a short period of time. The plaintiff must provide some evidence, preferably medical evidence, that the infant sustained pain and that there had to have been some perception of that pain by the infant.

In these cases, it has routinely been the position of the defense that a newborn does not experience any pain and suffering giving rise to compensation under New York law. As far as the wrongful death cause of action is concerned establishing pecuniary loss to the surviving parents of the newborn is also extremely difficult since in an infant death case, the plaintiff has to establish that the infant would have gone on to grow up and provide services and/or support to the parents. The defense's argument in these situations is that such evidence is speculative and thus not compensable. Based on the foregoing, what has resulted in this area of litigation is that often these cases are settled for very small amounts which adds further insult, injury and damage to the infant's surviving parents and allows the defense to walk away from the most devastating of losses for a very small sum. There is little if no incentive for the defense to settle these cases since in the long run, the liability is basically limited to low damage amounts.

The reality of the allowable damages in infant death cases resulted in a situation where most experienced medical malpractice firms would not even pursue these cases because it was not financially feasible. These cases require plaintiff's counsel to prove the same medical negligence as in a brain-injured baby case, which are often the most complex and expensive of cases to prosecute, for little or no return. Then, the attorney is faced with the task of explaining to the parents why the death of their infant is worth so little. The firms that do prosecute these cases do so in order to provide parents with some redress for their loss which is undoubtedly the most life altering and deepest loss sustainable to a parent.

'Broadnax v. Gonzalez'

In 2004, the Court of Appeals overturned the *Tebbutt* decision by holding in *Broadnax v. Gonzalez*,[3] that in the situation where medical malpractice resulted in a miscarriage or a stillborn, the defendant is deemed to have violated a duty of care owed to the mother separate and apart from any independent injury to her. The Court held that since the infant could not bring suit since it was not born alive then there must have been an injury to the mother and as such, she was allowed to pursue an action for her own independent emotional distress. Obviously, the Court of Appeals was attempting to remedy a situation where there was no redress or accountability on the part of the defendant in the situation where the medical malpractice caused an in utero death.

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Logically, allowing an emotional distress claim for the mother in this situation certainly makes sense since it is obvious that to lose an infant due to medical negligence must in fact cause an emotional damage to the mother. What does not make sense is the fact that if the infant lived for 5, 10, 15 or 20 minutes or even a couple of days then the mother has no claim for her emotional distress. Such a delineation certainly is illogical. It has long been the basis of tort law that a tort feasor should be held responsible for the injuries and damages which were reasonably foreseeable as a result of a negligent act. *Palsgraf v. Long Island Railroad*.[4] Certainly, it is reasonably foreseeable that a mother will sustain emotional injuries when her infant is born dead or near dead.

In *Sheppard-Mobley v. King*,[5] the Court of Appeals found that if the infant is born alive then the mother does not have a claim for emotional distress. The Court declined to extend their decision in *Broadnax* stating that the *Broadnax* decision was only meant to create a remedy in a situation where there was a wrongdoing which would otherwise go without redress. Such a decision contravenes the very nature of tort law. Since the *Broadnax* decision recognizes a duty to the obstetrical mother, that duty exists whether the infant is born alive or not and whether or not the infant does or does not sustain conscious pain and suffering. Tort feasors should be responsible for the damages caused by their negligence and thus if they are accountable for the damages to the mother in the event that the infant is born dead then they should be accountable on the same theory of liability if the infant is born alive.

In *Mendez v. Bhattacharya*,[6] the lower court held that the obstetrical mother had a viable cause of action for emotional distress in a case where an infant although born with a heartbeat was unable to be resuscitated and died soon after birth. The court reasoned that technically even though the infant exhibited signs of life, there was no demonstrable consciousness and thus allowing the mother to proceed with an emotional distress claim would "fill the gap" pursuant to the Court of Appeals decisions in both *Broadnax* and *Sheppard-Mobley*.

Whether or not this case will be appealed is unknown at the present time.

The Appellate Division, Third Department in a similar situation did in fact dismiss the mother's claim for emotional distress in a case where the infant died two hours after birth based on the *Sheppard-Mobley* decision.[7]

A 'Gap' in Case Law

Thus, the Court's decisions in *Broadnax* and *Sheppard-Mobley* have resulted in a "gap" which is being interpreted differently by different judges in different courts. In a case of obstetrical malpractice, a physician has two patients and obviously has a duty to both the mother and the unborn infant to act with reasonable care so as to protect these patients from foreseeable harm. When a breach of that duty causes injury, such injury should be compensated in a fair and reasonable amount. Allowing the parent to be compensated for their devastating loss through their own individual cause of action for emotional distress should extend to all such cases. Certainly, no amount will ameliorate the loss, but as in any tort system will act as a deterrent to any future negligent behavior.

'Sheppard-Mobley' said that if a infant is born alive then the mother has no claim for emotional distress. The Court declined to extend 'Broadnax,' saying that 'Broadnax' created a remedy where a wrongdoing would otherwise go without redress. [But] such a decision contravenes tort law. Since 'Broadnax' recognizes a duty to the mother, that duty exists whether the infant is born alive or not and whether it sustains c onscious pain.

The rationale of only allowing the cause of action in the situation where there is no conscious pain and suffering on the part of the deceased infant is really no rationale at all. To say that a physician or other health care provider has a duty in one situation, but does not have that very same duty where the infant lives for a short period of time is not based on law, but rather economics. If the Court recognizes a duty in one situation, it should not deprive other parents from being compensated for their loss on an economic basis. Depriving the parents of a cause of action keeps the damages low on these cases.

Court of Appeals' Finding

What the Court of Appeals has determined by *Broadnax* and *Sheppard-Mobley*, is that the tortfeasors should not get away without paying anything, but they should not pay too much.

Sustainable damages for conscious pain and suffering concerning the death of a newborn are difficult to find since most of these cases are either not pursued or settled for small amounts. Of the reported cases, those involving death of newborns are not cases involving infant's surviving for a few hours. One of the highest reported damage amounts involves the death of a 12-day-old who was subjected to "constant invasive procedures" including intubation, catheterization, placement on an ECMO (heart-lung machine), severe infection, slow respiratory decomposition and death. The case resulted in a jury verdict of $12 million dollars which was for pain and suffering which was reduced by the trial court to $175,000 and then increased to $750,000 by the Appellate Division, First Department.[8] Whereas, emotional distress claims bring higher sustainable amounts as is evidenced in a recent case wherein the emotional distress award of $1 million was upheld by the trial court and later settled for an undisclosed amount.[9]

Conclusion

It is illogical to deny adequate compensation to a plaintiff on the basis of whether or not the infant survived for a short period of time after birth. Parents should be compensated for their loss and defendants should be responsible for the damages they caused.

1. EPTL 5-4.1-5-4.5.
2. 73 NY2d 246 (1989).
3. 2 NY3d 148 (2004).
4. 248 NY 339 (1928).
5. 4 NY3d 627 (2005).
6. 15 Misc3d 974, 838 N.Y.S.2d 378 (Sup. Ct., Bronx Cty., 2007).
7. *Warnock v. Duello*, 30 AD3d 818 (3rd Dept., 2006).
8. *Cepeda v. NYCHHC*, 303 AD2d 173 (1st Dept., 2003).
9. 12 Misc3d 1180 (N.Y.C. Civil Ct., Kings Cty., 2006). Also see *Lubecki v. City of New York*, 304 AD2d 224 (1st Dept., 2003) award of $951,000 for emotional distress to decedent's brother who witnessed the shooting death of decedent was sustained.