==========
This opinion is uncorrected and subject to revision before publication in the New York Reports.
----

2 No. 30
Karen Broadnax et al.,
Appellants,
v.
Frederick A. Gonzalez, et al.,
Respondents.

---

3 No. 31
Debra Ann Fahey et al.,
Appellants,
v.
Anthony C. Canino et al.,
Respondents.

Case No. 30:
Margaret C. Jasper, for appellants.
Janet D. Callahan, for respondents.
Case No. 31:
Patricia A. Cummings, for appellants.
Janet D. Callahan, for respondents.

ROSENBLATT, J.:

These two cases call upon us to revisit a question we last addressed in Tebbutt v Virostek (65 NY2d 931 [1985]): whether, absent a showing of independent physical injury to her, a mother may recover damages for emotional harm when medical malpractice causes a miscarriage or stillbirth.

I.

A. Broadnax

While pregnant, plaintiff Karen Broadnax was under the care of defendants Frederick Gonzalez, an obstetrician, and Georgia Rose, a certified nurse-midwife. On September 24, 1994, at 1:45 AM, Karen telephoned Rose to say that her water had broken and that she had expelled a large amount of blood. Rose advised Karen and her husband, Jeffrey, to meet her at defendant Westchester Birth Center. When she arrived there, at approximately 3:00 AM, Karen again experienced vaginal bleeding. She and her husband asked Rose whether they should go across the street to St. John's Riverside Hospital for immediate treatment. Rose telephoned Dr. Gonzalez, who directed that Karen be transported to the Columbia Presbyterian Allen Pavilion in Manhattan.

Accompanied by Rose, the Broadnaxes reached the Allen Pavilion at about 3:45 AM. Dr. Gonzalez had not yet arrived. In his absence, however, Rose did not contact the on-call doctor. About 45 minutes later -- almost two hours after Karen arrived at the Westchester Birth Center -- Dr. Gonzalez examined Karen and detected fetal heart rate decelerations. Rather than performing an emergency cesarean section, Dr. Gonzalez conducted a vaginal and pelvic examination. He then performed a sonogram, but could no longer detect a fetal heartbeat. Approximately half an hour later, around 5:15 AM, Dr. Gonzalez undertook a cesarean section,

delivering a full-term stillborn girl. Autopsy reports indicated that a placental abruption caused the fetus to die before delivery.

The Broadnaxes sued defendants, alleging that their failure to recognize and properly treat Karen's placental abruption supported a cause of action for medical malpractice and related claims. At the close of plaintiffs' case, Supreme Court granted defendants' motion pursuant to CPLR 4401 for judgment as a matter of law. The Appellate Division affirmed, holding that Tebbutt v Virostek barred Karen from recovering damages for emotional or psychological harm stemming from the stillbirth because she adduced no evidence of having suffered a legally cognizable physical injury distinct from the fetus's.

B. Fahey

Plaintiff Debra Ann Fahey became an obstetrical patient of Dr. Anthony C. Canino, of defendant OBYGYN Health Care Associates, P.C. ("OBGYN"). In August 1999, Dr. Canino informed her that she was carrying twins. On October 28, 1999, on a follow-up visit with Dr. Canino's partner, defendant Dr. Patrick E. Ruggiero, Debra complained of lower abdominal pains and cramping. Based on an ultrasound, Dr. Ruggiero concluded that one of the twins was pressing against Debra's sciatic nerve. Two days later, during the eighteenth week of pregnancy, Debra called Dr. Canino and complained of increasingly intense pain along with

nausea. Relying on Dr. Ruggiero's examination, Dr. Canino advised Debra to lie down, explaining that the pain was likely related to her sciatic nerve and the nausea probably resulted from something she ate for lunch. Less than two hours later, while sitting on the toilet, Debra gave birth to one of the twins. Still linked to the fetus by the umbilical cord, she went by ambulance to the hospital, where she delivered the second twin. Neither twin survived.

Other doctors later diagnosed Debra as having an "incompetent cervix." In a subsequent pregnancy, she underwent a cerclage procedure to suture her cervix, and thereby prevent the premature expulsion of the fetus. Debra delivered a six-week premature daughter the following year.

The Faheys brought this action for medical malpractice asserting that defendants negligently failed to diagnose and treat her cervical condition. Supreme Court granted defendants' motion for summary judgment dismissing the complaint. With one Justice dissenting, the Appellate Division, also citing Tebbutt, affirmed on the ground that defendants' alleged malpractice did not cause the mother an independent physical injury.

We now reverse the Appellate Division orders in both cases.[1]

---

[1] We take no position on the ultimate merits of either case. We note only that, on the records before us, the cases were sufficient to withstand respectively a motion for a trial order of dismissal and a motion for summary judgment.

II.

In Tebbutt v Virostek (65 NY2d 931 [1985]), we held that a mother could not recover for emotional injuries when medical malpractice caused a stillbirth or miscarriage, absent a showing that she suffered a physical injury that was both distinct from that suffered by the fetus and not a normal incident of childbirth. Plaintiffs assert that Tebbutt is arbitrary and unfair, and should be overturned.

Tebbutt reflected our longstanding reluctance to recognize causes of action for negligent infliction of emotional distress, especially in cases where the plaintiff suffered no independent physical or economic injury. Its holding was in keeping with our view that tort liability is not a panacea capable of redressing every substantial wrong. Although these concerns weigh heavily on us today, we are no longer able to defend Tebbutt's logic or reasoning.

As its dissenters recognized, the rule articulated in Tebbutt fits uncomfortably into our tort jurisprudence. Infants who are injured in the womb and survive the pregnancy may maintain causes of action against tortfeasors responsible for their injuries (see Woods v Lancet, 303 NY 340 [1951]). Further, a pregnant mother may sue for any injury she suffers independently. A parent, however, cannot bring a cause of action for wrongful death when a pregnancy terminates in miscarriage or

stillbirth (see Endresz v Friedberg, 24 NY2d 478 [1969]).

Injected into this common law framework, Tebbutt engendered a peculiar result: it 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. 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. The Endresz Court, for example, justified its holding -- barring parents from suing in wrongful death on behalf of an unborn child -- in part on the assumption that parents would have some legal recourse for a miscarriage or stillbirth resulting from negligent conduct (id. at 486).[2]

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" (65 NY2d at 933 [Jasen dissent]). 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" (65 NY2d at 940 [Kaye dissent]).

Defendants maintain that Tebbutt states a sensible

[2] In Endresz, an automobile accident both caused injuries to the mother and resulted in her miscarrying. The Court reasoned that no cause of action should lie in wrongful death because the damages recoverable by the mother for her independent physical injuries would "afford ample redress for the wrong done" (id. at 486).

rule, one worth preserving, because the defendant physician in that case did not violate a duty to the expectant mother. We are not persuaded. In Ferrara v Bernstein (81 NY2d 895 [1993]), we permitted a plaintiff to recover damages for emotional distress when she miscarried, following an unsuccessful abortion, on the ground that the treating physician violated a duty of care to his patient. Defendants would have us distinguish Ferrara, arguing that, in the cases before us, their alleged conduct injured only the fetuses, and, accordingly, they did not violate a duty to the expectant mothers. Defendants' reasoning is tortured. Although, in treating a pregnancy, medical professionals owe a duty of care to the developing fetus (as we impliedly recognized in Woods v Lancet, 303 NY 340 [1951]), they surely owe a duty of reasonable care to the expectant mother, who is, after all, the patient. Because the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes.[3]

We therefore hold 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

[3] The treating physician owes no duty of care to the expectant father. It of course remains true that, where the mother has a cause of action, her husband may recover for loss of services and consortium if the facts support such a claim.

emotional distress.[4]

Our dissenting colleague has expressed concern over the possible repercussions of what she concedes to be a "modest" advance in our tort jurisprudence. Significantly, on this appeal, no one from any quarter came forward to support any such concerns. While we are well aware of the importance of precedent, Tebbutt has failed to withstand the cold light of

---

[4] In rejecting Tebbutt, we recognize that a majority of jurisdictions permit some form of recovery for negligently caused stillbirths or miscarriages (see e.g. Eich v Gulf Shores, 293 Ala 95 [1974]; Summerfield v Superior Court, 144 Ariz 467 [1985]; Gorke v LeClerc, 23 Conn Supp 256 [Sup Ct, Hartford County 1962]; Worgan v Greggo & Ferrara, Inc, 50 Del 258 [Sup Ct, New Castle County 1956]; Simmons v Howard University, 323 F Supp 529 [DDC 1971]; Shirley v Bacon, 154 Ga App 203 [1980]; Seef v Sutkus, 205 Ill App 3d 312 [1st Dist 1990]; Bolin v Wingert, 764 NE2d 201 [Ind 2002]; Male v Manion, 189 Kan 143 [1962]; Mitchell v Couch, 285 SW2d 901 [Ky 1955]; State, Use of Odham v Sherman, 234 Md 179 [1964]; Wascom v American Indem Corp, 383 So2d 1037 [La App, 1 Cir 1980]; Mone v Greyhound Lines, Inc, 368 Mass 354 [1975]; O'Neill v Morse, 385 Mich 130 [1971]; Verkennes v Corniea, 229 Minn 365 [1949]; Rainey v Horn, 221 Miss 269 [1954]; Strzelczyk v Jett, 264 Mont 153 [Mo 1994]; White v Yup, 85 Nev 527 [1969]; Polinquin v MacDonald, 101 NH 104 [1957]; Giardina v Bennett, 111 NJ 412 [1988]; Salazar v St Vincent Hospital, 95 NM 150 [NM App 1980]; Hopkins v McBane, 427 NW2d 85 [ND 1988]; Werling v Sandy, 17 Ohio St 3d 45 [1985]; Evans v Olson, 1976 OK 64 [1976]; Libbee v Permanente Clinic, 268 Or 258 [1974]; Amadio v Levin, 509 Pa 199 [1985]; Presley v Newport Hospital, 117 RI 177 [1976]; Fowler v Woodward, 244 SC 608 [1964]; Parvin v Dean, 7 SW3d 264 [Tex Ct App 1999]; Vaillancourt v Medical Center Hospital of Vermont, Inc, 139 Vt 138 [1980]; Moen v Hanson, 85 Wash 2d 597 [1975]; Baldwin v Butcher, 155 W Va 431 [1971]; Kwaterski v State Farm Mut Auto Ins Co, 34 Wis 2d 14 [1967]). Unlike most of these jurisdictions, however, we limit a mother's recovery only to damages for the emotional distress attending a stillbirth or miscarriage caused by medical malpractice. We do not depart from our holding in Endresz v Friedberg (24 NY2d 478 [1969]) barring wrongful death actions under these circumstances.

logic and experience. To be sure, line drawing is often an inevitable element of the common law process, but the imperative to define the scope of a duty -- the need to draw difficult distinctions -- does not justify our clinging to a line that has proved indefensible.

Accordingly, the orders of the Appellate Division should be reversed, with costs, and the cases remitted to Supreme Court for further proceedings consistent with this Opinion.

Broadnax v Gonzalez

Fahey v Canino

Nos. 30 & 31

READ, J. (DISSENTING):

In 1985, we were asked whether a woman may recover damages for emotional distress where medical malpractice causes her to suffer a stillbirth. We concluded in Tebbutt v Virostek (65 NY2d 931 [1985]) that no recovery could be had in the absence

of an independent physical injury, thus clearly and reasonably circumscribing a medical caregiver's duty to a pregnant patient. Appellants now invite us to reconsider and revise our holding in Tebbutt. Unlike the majority, I would decline the invitation.

True, the new rule articulated by the majority expands existing law sparingly. The new rule does not alter the legal rights or status of a fetus; it does not create any new duties on the part of a physician. Nonetheless, the majority's justification for redefining the duty of care owed to a pregnant woman by her medical caregivers is insufficient for me to vote to overrule a 20-year old precedent.

Stare decisis teaches that "common-law decisions should stand as precedents for guidance in cases arising in the future" for substantial reasons of stability and legitimacy (People v Damiano, 87 NY2d 477, 488 [1996] [Simons, J. concurring]). As Judge Simons also observed, however, stare decisis is not "inflexible," and our holdings are "always open to reexamination if there is some evidence that the policy concerns underlying them are outdated or if they have proved unworkable" (id. at 489). Here, there is no suggestion that the Tebbutt rule is unworkable. To the contrary, Tebbutt established a bright-line rule, which is easily applied. The majority considers Tebbutt outdated, however, because a "narrow, but indisputably aggrieved, class of plaintiffs" (majority opn at 6) is denied recovery, creating a gap in the law. But this same gap was manifest in

1985 when we decided to limit a physician's exposure to damages for emotional distress to those cases in which the woman sustains a physical injury distinct from that suffered by the fetus. Nor does the majority's new rule do away with all seeming gaps. As we acknowledged in Bovsun v Sanperi (61 NY2d 219, 228 [1984]), "arbitrary distinctions are an inevitable result of the drawing of lines which circumscribe legal duties."

Today's ruling exposes medical caregivers to additional liability for the treatment they provide to pregnant women. Juries will be asked to quantify the emotional distress that a woman feels upon suffering a miscarriage or stillbirth. Importantly, there is no way for us to predict or assess the potential effect of this expansion of liability, however modest it may appear, on the cost and availability of gynecological and obstetrical services in New York State.

No one disputes the heartache experienced by a woman who miscarries or delivers a stillborn fetus. Nonetheless, Tebbutt established a rational and workable rule to limit the scope of duty in obstetrical malpractice. I see insufficient reason to overrule Tebbutt and create a different rule. Accordingly, I would affirm the orders of the Appellate Division.

* * * * * * * * * * * * * * * *

Case No. 30: Order reversed, with costs, and case remitted to Supreme Court, Westchester County, for further proceedings in accordance with the opinion herein. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges Smith, Ciparick, Graffeo and Smith concur. Judge Read dissents and votes to affirm in an opinion.

Case No. 31: Order reversed, with costs, and the motion of defendants Canino and Ruggiero for summary judgment denied. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges Smith, Ciparick, Graffeo and Smith concur. Judge Read dissents and votes to affirm in an opinion.

Decided April 1, 2004