

April 2013

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Amanda Campo

Pace University School of Law, acampo@law.pace.edu

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Recommended Citation

Amanda Campo, *An Analysis of New York State's Flawed Recovery Scheme in Prenatal Malpractice Actions: Why a Claim of NIED Should Be Available to Plaintiffs*, 33 Pace L. Rev. 770 (2013)

Available at: <http://digitalcommons.pace.edu/plr/vol33/iss2/7>

An Analysis of New York State's Flawed Recovery Scheme in Prenatal Malpractice Actions: Why a Claim of NIED Should Be Available to Plaintiffs

Amanda Campo*

I. Introduction

Medical care presents many dangers to both physicians and patients. As medicine advances, the power to treat and diagnose patients increases, and so do the number of risks.¹ The number of medical malpractice suits is also on the rise.² This rise has resulted in an increased number of awards to victims and higher premiums for malpractice insurance carriers that cover physicians and institutions.³ In allowing recoveries, courts balance competing policy goals and societal costs to ensure that injured plaintiffs are justly compensated. However, there are gaps in recoveries. In New York State, prior to 2006, one such gap was a mother's inability to recover when medical malpractice resulted in miscarriage or stillbirth. Mothers could not bring a wrongful death action on behalf of their stillborn child, nor could they bring any personal cause of action, absent a physical injury independent from the unsuccessful birth itself. For nearly twenty years, this particular class of plaintiffs had no valid cause of action against prenatal care physicians.

In 2006, the New York Court of Appeals attempted to fill this gap in the case of *Broadnax v. Gonzalez*.⁴ In *Broadnax*, the court held that a woman may recover damages for emotional injuries resulting from

* J.D., Pace Law School, 2013; B.A., Siena College, 2010. The author wishes to thank her family and friends for their continued support throughout her law school journey. She also thanks the members of Pace Law Review for their hard work in editing and reviewing this Note.

1. BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 540 (6th ed. 2008).

2. *See id.* at 541.

3. *Id.*

4. 809 N.E.2d 645 (N.Y. 2004).

miscarriage or stillbirth, even if she did not suffer any physical injuries.⁵

This Note will analyze whether *Broadnax* successfully filled this recovery gap. Parts II, III, and IV will discuss the history of a mother's failed attempts to gain recovery for the death of her stillborn child. Part V will discuss *Broadnax*. I will argue that *Broadnax* is flawed, as evidenced by subsequent cases that follow it as precedent. Finally, in Part VI, I will offer a better solution: instead of receiving arbitrary awards in the form of emotional damages, mothers should be given an actual cause of action in the form of Negligent Infliction of Emotional Distress ("NIED").

II. A Brief Background on Medical Malpractice

Medical malpractice claims follow the tort theory of negligence.⁶ Essentially, the doctor must have been negligent in his care of the patient. The following elements must exist for victim to recover: (1) the doctor must owe a duty of care to the patient; (2) the doctor must have breached that duty of care; (3) there must be an injury; (4) the injury must have been caused by the malpractice; and (5) such an injury must have been reasonably foreseeable to the tortfeasor.⁷ The medical profession sets the appropriate standard of care.⁸ Defendants trying to prove the standard of care present expert testimony describing the pattern of medical practice regarding the issue or injury in the case.⁹ Defenses to a medical malpractice claim include arguments that the physician acted according to the standard of medical care, or that the physician made an error that does not rise to the level of malpractice.¹⁰ Obstetricians face the highest risk of being sued, and therefore, pay the highest insurance premiums.¹¹

5. *Id.* at 649.

6. FURROW ET AL., *supra* note 1, at 336.

7. *Id.*

8. *Id.* at 336-37.

9. *Id.*

10. *Id.* at 337.

11. *See id.* at 441-42.

III. The History of Failed Attempts to Obtain Recovery for Miscarriages or Stillbirths Caused by Medical Malpractice

A. *Inability to Bring a Wrongful Death Action on Behalf of the Stillborn Child Under New York Statute*

In 1847, New York became the first state in the country to enact its own wrongful death statute.¹² The law was modeled after a nineteenth century English statute entitled the “Fatal Accidents Act.”¹³ This law provided, for the first time, recovery for a family for the wrongful death of a family member.¹⁴ The New York statute, set forth in New York Estates, Powers, & Trusts Law (“EPTL”) section 5-4.1, provides the following:

The personal representative . . . of a decedent . . . may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent’s death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.¹⁵

The language of the statute sets forth three initial requirements: (1) there must be a decedent; (2) the death must have been caused by a wrongful act; and (3) the decedent would have been able to have maintained a suit for damages if his death had not occurred.¹⁶ Additionally, the only parties entitled to recover damages in a wrongful death action are the decedent’s beneficiaries, or persons entitled to take the decedent’s property after he dies, such as spouses, children, and parents.¹⁷

12. *New York’s Wrongful Death Statute: A Time for Change*, LAWYERTIME.COM, (Apr. 14, 2010), <http://www.lawyertime.com/2010/04/new-york%E2%80%99s-wrongful-death-statute-a-time-for-change/> [hereinafter *A Time for Change*].

13. *Id.*

14. *Id.*

15. N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney Supp. 2013).

16. *Id.*

17. *A Time for Change*, *supra* note 12.

The damages recoverable in a wrongful death action are set forth in EPTL section 5-4.3 and are limited to “fair and just compensation for the pecuniary injuries resulting from the decedent’s death”¹⁸ Essentially, “[a] wrongful death claim is meant to compensate [the family] for the future [economic] support and assistance they would have received” had the decedent not died, as well as for loss of society.¹⁹ In calculating damages, courts look at the decedent’s income and future earning potential, as well as the likelihood of future support and guidance to the family members.²⁰

In 1894, the New York Court of Appeals concluded that unborn children and their parents do not satisfy the above requirements necessary to sustain a wrongful death action.²¹ Since then, the New York Court of Appeals has consistently held that parents cannot bring a wrongful death action for the loss of an unborn child.²² This common law rule is followed today. The two main policy reasons against recognizing a wrongful death action for the death of an unborn child are: (1) the inability to comply with requirements of the wrongful death action because the courts cannot calculate a pecuniary injury for an unborn child, and the New York statute requires that there be a decedent, or living person who has died;²³ and, (2) the assumption that the mother can recover for her separate injuries sustained as a result of the tortious act.²⁴

As to the first policy consideration, a fetus cannot satisfy the requirements of a wrongful death cause of action. A fetus is not a decedent within the meaning of the New York statute. A stillborn or unborn child cannot be a decedent because it has not lived and died. Second, it is very difficult to compute damages for an unborn child—a necessary element of a wrongful death claim. In *Butler v. Manhattan Ry. Co.*, the New York Court of Appeals concluded that there were no factors upon which to base damages for the unborn.²⁵ Specifically, the court had no way of knowing whether the unborn child could have grown up to be a healthy, strong, successful adult, or whether it would have

18. *Id.* (citing N.Y. EST. POWERS & TRUSTS LAW § 5-4.3(a) (McKinney 1999)).

19. *Id.*

20. *Id.*

21. *See Butler v. Manhattan Ry. Co.*, 38 N.E. 454 (N.Y. 1894).

22. *See id.*

23. *See id.*; *see also Endresz v. Friedberg* 248 N.E.2d 901, 903 (N.Y. 1969).

24. *See generally Endresz*, 248 N.E.2d at 905 (discussing that recovery under tort provides an ample remedy for the distributees of a stillborn fetus).

25. *See Butler*, 38 N.E. at 454.

been stricken with infirmity and weakness.²⁶ Therefore, the court could not compute the expected earning power or success of an unborn child.²⁷ Furthermore, the family experienced no loss of society or loss of financial contribution because the child never became part of their family or formed a relationship with them (outside of the mother's womb) upon which the court could base pecuniary value.²⁸ As a result, any claim of wrongful death will inevitably fail.

In *Endresz v. Friedberg*,²⁹ the New York Court of Appeals affirmed the *Butler* holding that parents of stillborn fetuses, whose deaths allegedly had been caused by a third party's wrongful act, could not recover for the loss of the unborn child.³⁰ There, the plaintiff, Janice Endresz, was injured in a car accident and delivered stillborn twins two days later.³¹ Plaintiff brought two wrongful death actions against the driver, one for each child.³² Although the unborn are not explicitly discussed in section 5-4.1 of the EPTL, the court concluded that the New York Legislature did not intend to include an "unborn" fetus within the term "decendent."³³

The court justified its decision to limit recovery for loss of stillborn children by relying on Ms. Endresz's ability to recover for the injuries she "sustained in her own person" as a result of the car accident.³⁴ The court reasoned that including recovery for a mother's suffering as a result of the stillbirth *and* recovery for the wrongful death of the fetus would provide a windfall to the plaintiff and unduly punish the tortfeasor.³⁵ In a car accident caused by a negligent driver, it is easy to imagine that the passengers will suffer an injury. Such was the case in *Endresz*, in which the pregnant plaintiff requested \$500,000 in damages for her own personal injuries.³⁶ However, as will be discussed below, it is not easy to find such independent injuries suffered by a plaintiff during childbirth. Thus, the recovery in prenatal medical malpractice cases was severely limited following the *Endresz* decision.

26. *Id.* at 455.

27. *Id.*

28. *Id.*

29. 248 N.E.2d 901 (N.Y. 1969).

30. *See id.*

31. *Id.* at 902.

32. *Id.*

33. *Id.* at 903.

34. *Id.* at 904.

35. *Id.*

36. *Id.* at 901.

B. *The No-Duty Rule*

The case of *Vaccaro v. Squibb Corp (Vaccaro II)*³⁷ established the long-standing rule that prenatal care physicians do not owe a duty to pregnant mothers, but only to fetuses.³⁸ This holding prevented mothers from suing for their own injuries that resulted from prenatal medical malpractice.

In *Vaccaro I*, parents brought a cause of action against a doctor and a pharmaceutical company after their child was born alive, but without arms or legs, in addition to other severe birth defects.³⁹ The parents alleged that the birth defects were caused by the drug Delalutin, a hormone commonly administered to pregnant women to prevent miscarriages.⁴⁰ Ms. Vaccaro's doctor dispensed the drug each month up until the birth.⁴¹ The mother claimed "emotional damage" and "mental anguish . . . allegedly sustained by reason of the birth of their deformed child."⁴²

On appeal from the First Department, the New York Court of Appeals held that where harm is inflicted upon the fetus in utero, a mother cannot recover, because prenatal physicians do not owe pregnant mothers a duty of care.⁴³ As a result, the mother could not recover for any injuries sustained by her in a medical malpractice action alleging prenatal injuries (either stillbirth or birth defects), because her prenatal care physician did not owe her duty of care.⁴⁴ This logic was certainly flawed, because both the mother and the unborn fetus are obviously patients of the prenatal care physician. However, *Vaccaro II*'s no-duty holding remained the rule for all prenatal malpractice actions for nearly twenty-five years.

37. 418 N.E.2d 386 (N.Y. 1980).

38. *See generally id.*

39. *Vaccaro v. Squibb Corp. (Vaccaro I)*, 422 N.Y.S.2d 679, 680 (1st Dep't 1979), *rev'd*, 418 N.E.2d 386 (N.Y. 1980).

40. *Id.*

41. *Id.*

42. *Id.* (internal quotation marks omitted).

43. *See Vaccaro II*, 418 N.E.2d at 387 (Fuchsberg, J., dissenting) (majority reversing the decision of the Appellate Division, which had denied the defendant's motion to dismiss the first through the ninth causes of action).

44. *Id.* at 386-87.

C. *No Recovery for the Mother Absent an Independent Physical Injury*

In *Tebbutt v. Virostek*,⁴⁵ the Court of Appeals relied on the aforementioned cases and further limited recovery in prenatal medical malpractice. First, the court reiterated *Vaccarro II*'s holding that no duty was owed to a mother by the physician whose malpractice allegedly caused the death of her fetus.⁴⁶ Second, the court confirmed that the parents could not bring a wrongful death action on behalf of an unborn child.⁴⁷ Finally, the court's holding implied that a mother could not recover any damages absent an independent injury separate and apart from the birth.⁴⁸

Plaintiff Marta Tebbutt sued defendant Robert Virostek, a physician who was caring for her throughout her pregnancy.⁴⁹ Defendant performed an amniocentesis and the sample returned a significant amount of blood.⁵⁰ Plaintiff saw another doctor, who concluded that the fetus was dead, and suggested that the amniocentesis could be the cause of death.⁵¹ Plaintiff sued Virostek for malpractice.⁵²

Plaintiff suffered no physical injuries, but sought to recover damages for emotional distress resulting from the stillbirth of her child.⁵³ The court first stated that, in light of *Vaccarro II*, it was clear that Ms. Tebbutt could not recover for any emotional injuries because her physician did not owe her a duty of care.⁵⁴ The *Tebbutt* court noted that in *Endresz*, the plaintiff's injuries were the "direct result of defendants' breach of a clearly recognized duty to drive with a reasonable degree of care."⁵⁵ Thus, the majority distinguished the circumstances of *Tebbutt* from *Endresz* because, although both mothers suffered emotional injuries, the defendant driver in *Endresz* owed a duty to the plaintiff, but

45. 483 N.E.2d 1142 (N.Y. 1985).

46. *Id.* at 1143.

47. *Id.*

48. *See id.*

49. *Id.*

50. *Id.* at 1144 (Jasen, J., dissenting).

51. *Id.* at 1145.

52. *Id.*

53. *Id.* at 1143 (majority opinion).

54. *Id.* The Court of Appeals reached this conclusion despite the lower court's following statement: "[d]efendant, a licensed physician, was caring for plaintiff who, at 35 years of age, was pregnant." *Tebbutt v. Virostek*, 477 N.Y.S.2d 776, 777 (3d Dep't 1984) (emphasis added).

55. *Tebbutt*, 483 N.E.2d at 1144.

the defendant doctor in *Tebbutt* owed no duty to the pregnant mother.⁵⁶

The court also applied *Endresz*'s wrongful death analysis to *Tebbutt*'s medical malpractice set of facts. The court reaffirmed the long-standing rule that "no action for wrongful death could be maintained by the personal representative of a stillborn fetus."⁵⁷ However, the court in *Endresz* based its ruling on the fact that Ms. Endresz could collect damages for her separate injuries sustained as a result of the car accident.⁵⁸ Conversely, in *Tebbutt*, the only separate injuries experienced by the plaintiff were emotional injuries, not physical injuries.⁵⁹

Ultimately, the *Tebbutt* court held the following: a mother could not recover for emotional injuries resulting from injury to her fetus absent a showing that she suffered a physical injury, distinct from that suffered by the fetus, and not a normal incident of childbirth.⁶⁰

D. *The Zone-of-Danger Fails*

Several decisions in the Appellate Division have also rejected the notion that the zone-of-danger rule applies in prenatal malpractice cases.⁶¹ In *Guialdo v. Allen*, the Appellate Division, First Department, held that the mother could not recover for the harm done to her fetus unless the defendant created an "unreasonable risk of . . . harm" to the mother.⁶² In that case, the court held that this threshold had not been met; in other words, following the *Tebbutt* standard, the *Guialdo* court determined that the mother must suffer a separate injury, distinct from the childbirth, in order to recover damages.⁶³

56. *Id.*

57. *Id.*

58. *See* *Endresz v. Friedberg*, 248 N.E.2d 901, 904 (N.Y. 1969).

59. *Tebbutt*, 483 N.E.2d at 1143.

60. *See id.* at 1143-44.

61. *See, e.g.,* *Guialdo v. Allen*, 567 N.Y.S.2d 255 (1st Dep't 1991); *see also* Alicia A. Ellis, Note, *Better Late Than Never: New York Finally Closes the "Gap" in Recovery Permitted for Negligent Infliction of Emotional Distress in Prenatal Medical Malpractice Cases*, 80 ST. JOHN'S L. REV. 725, 735-39 (2006).

62. *Guialdo*, 567 N.Y.S.2d at 256.

63. *Id.* (citing *Prado v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 536 N.Y.S.2d 474 (2d Dep't 1988)).

IV. The Problem: No Recourse for a Narrow Class of Plaintiffs

A. *No Recovery*

The gap in New York's recovery scheme was clear. A mother could recover for her own physical injuries resulting from a car crash, but not for mental injuries resulting from the stillbirth of her child—although both “injuries” were allegedly caused by another's negligence.⁶⁴ As discussed above, the *Endresz* court justified its holding by asserting that a mother would recover for the independent physical injuries caused by the negligent actor.⁶⁵ In a car accident, resulting stillbirths are commonly accompanied by a mother's actionable physical injuries. In a stillbirth, quite often, the only injury experienced by mothers who deliver a stillborn child is emotional distress—which is not to be minimized, and should be compensated. Thus, the requirement that mothers experience a separate physical injury, distinct and apart from the childbirth itself, is unreasonable because this is a very high burden to satisfy.⁶⁶ Childbirth is a rigorous experience, with many injuries suffered by the mother throughout the process. Many New York courts have concluded that such injuries are merely incidental to pregnancy and birth, and are therefore not actionable. Likewise, the *Guialdo* court held that mother's physical injuries could not be normal incidents of childbirth.⁶⁷ As a result, many women could not recover for the loss of their child because they did not suffer any physical injuries themselves.

B. *Doctors Are Immunized from Liability*

Disturbingly, New York's case law effectively insulated negligent physicians from liability. Whether the child was injured and born alive or whether it was stillborn, the actions of the physician in such cases usually caused injury to the child only—not the mother. As established in Part III, in cases where the child did not survive the birth, the stillborn child could not bring a cause of action of his own, and his parents had no claim either. As established, the mother could not sue for her emotional

64. Ellis, *supra* note 61, at 739.

65. *Endresz v. Friedberg*, 248 N.E.2d 901, 904 (N.Y. 1969).

66. Ellis, *supra* note 61, at 737-38.

67. *Guialdo*, 567 N.Y.S.2d at 256 (citing *Prado v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 536 N.Y.S.2d 474 (2d Dep't 1988)).

distress caused by the doctor's malpractice if she did not suffer a separate physical injury. As a result, the physician escaped unscathed despite the unborn life he destroyed. Both the unborn child and its parents were left without a voice and without reparation. As a result, the physician could continue to practice and do harm to others in the future—because he had not been held accountable for his wrongdoing. As expressed in the *Tebutt* dissent, unborn children were left in “juridical limbo, where negligent acts, with fatal effect, performed upon the child are neither compensated nor deterred.”⁶⁸

V. New York's Solution: *Broadnax v. Gonzalez*

In *Broadnax v. Gonzalez*, the New York Court of Appeals overruled *Tebbutt* and established grounds for recovery for would-be mothers who have lost fetuses as a result of malpractice.⁶⁹ First, the court held that a prenatal care physician owes a duty of care to expectant mothers.⁷⁰ Second, the court held that a mother may sue for her emotional anguish despite the absence of a separate physical injury.⁷¹ As a result, *Broadnax* gave the unborn and their mothers some sort of voice, but at what cost? This section discusses *Broadnax*, its implications, and the flaws in its application.

A. *Broadnax* Generally

The *Broadnax* decision consolidated two similar cases: *Broadnax v. Gonzalez* and *Fahey v. Canino*.⁷² The chilling facts of the two cases are as follows:

1. *Broadnax v. Gonzalez*

During her pregnancy, Karen Broadnax was under the care of Frederick Gonzalez, an obstetrician, and Georgia Rose, a midwife.⁷³ On September 25, 1994, at 1:45 A.M., plaintiff telephoned her midwife to

68. *Tebbutt v. Virostek*, 483 N.E.2d 1142, 1144 (N.Y. 1985) (Jasen, J., dissenting).

69. *Broadnax v. Gonzalez*, 809 N.E.2d 645, 648-49 (N.Y. 2004).

70. *Id.* at 648.

71. *Id.* at 649.

72. *See id.* at 646-47.

73. *Id.* at 646.

inform the midwife “that her water had broken and that she had expelled a large amount of blood.”⁷⁴ The midwife advised plaintiff and her husband to meet the midwife at the Westchester Birth Center.⁷⁵ When plaintiff arrived at 3:00 A.M., she experienced vaginal bleeding again.⁷⁶ The midwife telephoned the obstetrician, Gonzalez, and the obstetrician directed that the plaintiff be transferred to the Columbian Presbyterian Allen Pavilion in Manhattan.⁷⁷ Plaintiff, her husband, and the midwife arrived at the Allen Pavilion at 3:45 A.M., but the obstetrician had not yet arrived.⁷⁸ About forty-five minutes later, and two hours after the plaintiff first arrived at the Westchester Birth Center, the obstetrician examined the plaintiff.⁷⁹ He “detected fetal heart rate decelerations [and] rather than performing an emergency cesarean section, [he] conducted a vaginal and pelvic examination.”⁸⁰ He then performed a sonogram and did not detect a fetal heartbeat.⁸¹ A half-hour later, at 5:15 A.M., the obstetrician delivered a stillborn baby girl via cesarean section.⁸² Autopsy reports concluded that “a placental abruption caused the fetus to die before delivery.”⁸³ The Broadnaxes sued the obstetrician, Gonzalez, alleging that his failure to recognize and treat the placental abruption was medical malpractice, which had caused the death of the fetus.⁸⁴ However, plaintiff only suffered emotional and psychological injuries.⁸⁵

2. *Fahey v. Canino*

The second issue in *Broadnax* concerned plaintiff Debra Ann Fahey, who was a patient of Dr. Anthony Canino during her pregnancy.⁸⁶ In August 1999, Dr. Canino informed plaintiff that she was pregnant with twins.⁸⁷ In October 1999, during a visit with Dr. Canino’s partner,

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 646-47.

82. *Id.* at 647.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

Dr. Patrick Ruggiero, plaintiff “complained of lower abdominal pains and cramping.”⁸⁸ Dr. Ruggiero subsequently performed an ultrasound on plaintiff, and concluded that one of the twins was pressing against plaintiff’s sciatic nerve.⁸⁹ Two days later, plaintiff called Dr. Canino and complained of increasing pain and nausea.⁹⁰ Dr. Canino, relying on Ruggiero’s examination, advised plaintiff to lie down, told her that the pain and nausea were probably related to her sciatic nerve or to something that she had eaten.⁹¹ Two hours later, plaintiff delivered one of her twins while sitting on the toilet.⁹² She was rushed to the hospital, where she delivered the second twin.⁹³ Neither baby survived.⁹⁴

Other doctors subsequently diagnosed plaintiff with an “incompetent cervix.”⁹⁵ During her second pregnancy, plaintiff underwent a procedure to remedy this condition and successfully gave birth to a premature, but live, child.⁹⁶ The plaintiff sued her first doctor for medical malpractice for failing to diagnose and treat her cervical condition, which had caused the stillbirth of her twins.⁹⁷

3. The Decision

On April 1, 2004, the New York Court of Appeals 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” thereby “entitling her to damages for emotional distress.”⁹⁸ In their opinion, the majority criticized the flaws of New York’s case law in this area, particularly referring to the fact that doctors were protected from suit if their negligence caused a stillbirth.⁹⁹

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 649.

99. *Id.* at 648-49.

In its decision, the court overruled *Vaccarro II* and *Tebbutt*'s no-duty holdings, by establishing a new rule that physicians owe "a duty of reasonable care" to expectant mothers.¹⁰⁰ "[I]n treating a pregnancy, medical professionals owe a duty of care to the developing fetus . . . [thus] they surely owe a duty of reasonable care to the expectant mother, who is, after all, the patient."¹⁰¹ The court further reasoned that a physician owes a pregnant mother a duty of care because "the health of the mother and fetus are linked."¹⁰²

The *Broadnax* court also addressed the long-standing rule that wrongful death actions cannot be brought on behalf of the unborn: "[i]t is time to fill the gap. If the fetus cannot bring the suit, 'it must follow in the eyes of the law that any injury here was done to the mother.'"¹⁰³ However, the court declined to overrule *Endresz*, stating that "a mother's recovery [is limited] only to damages for the emotional distress attending a stillbirth or miscarriage caused by medical malpractice."¹⁰⁴ Further, *Broadnax* did "not depart from [the] holding in *Endresz v. Friedberg*, . . . barring wrongful death actions under these circumstances."¹⁰⁵ Yet, by providing some sort of recovery for the mother for the mental anguish suffered, the court nonetheless attempted to "level the playing field" for plaintiffs who were previously unable to bring wrongful death actions.¹⁰⁶

B. *The Flaws*

Broadnax was seen as finally "closing the gap"¹⁰⁷ and providing justice for those families who had suffered a stillbirth as a result of medical malpractice. However, *Broadnax* is not a perfect decision, and some of its flaws are discussed below.

100. *Id.* at 649.

101. *Id.* at 648 (citing *Woods v. Lancet*, 102 N.E.2d 691 (N.Y. 1951)) (recognizing an implied duty of care owed to a developing fetus).

102. *Id.* at 648-49.

103. *Id.* at 648 (quoting *Tebbutt v. Virostek*, 483 N.E.2d 1142, 1149 (N.Y. 1985) (Kaye, J., dissenting)).

104. *Id.* at 649 n.4.

105. *Id.* (citation omitted).

106. *See id.*

107. Ellis, *supra* note 61.

1. *Broadnax* Does Not Explicitly Recognize a Cause of Action for This Class of Plaintiffs

The *Broadnax v. Gonzalez* decision is ambiguous, because the court did not explicitly state that women whose stillbirths or miscarriages were caused by medical malpractice had a recognized cause of action.¹⁰⁸ This limits the decision's applicability. The court did not suggest that that negligence or negligent infliction of emotional distress claims were available to these mothers. Rather, it simply permitted recovery for emotional damages with no other analysis.¹⁰⁹ Thus, women still did not possess an explicitly described claim, explaining the elements needed to allow recovery. They were simply entitled to an arbitrary award of emotional damages if the fact-finder weighed the evidence in their favor.

2. The Dissent's Concerns: What Will Emotional Damages Cost?

In her dissenting opinion in *Broadnax*, Judge Read raised several concerns regarding the soundness of the decision. First, the judge expressed concern as to the increased liability of medical caregivers, particularly in the specialty of obstetrics. Judge Read stated that:

Today's ruling exposes medical caregivers to additional liability for the treatment they provide to pregnant women. . . . [T]here is no way for us to predict or assess the potential effect on this expansion of liability, however modest it may appear, on the cost and availability of gynecological and obstetrical services in New York State.¹¹⁰

Although the impact of this risk is unknown, studies show that "when choosing a residency, the medical liability issue influenced the choice of state for [thirty-nine percent] of medical students, and it affected the choice of specialty for [fifty percent] of them."¹¹¹ In an area

108. See *id.* at 740-44, 745-50 (discussing the holding and rationale in *Broadnax* and the reactions and limitations in its holding).

109. See *id.* at 742-43 (stating that emotional damages could be recovered under *Broadnax*).

110. *Broadnax v. Gonzalez*, 809 N.E.2d 645, 650 (N.Y. 2004) (Read, J., dissenting).

111. Pamela Robinson, et al., *The Impact of Medical Legal Risk on Obstetrician-*

of medical practice where doctors are now subject to suit for pure emotional injuries, unlike in many other malpractice claims, doctors may be less willing to risk specializing in an area for fear of high insurance premiums and a higher risk of being sued. Recent studies show that insurance is rising, especially for high-risk specialties like obstetrics.¹¹²

The judge also felt uncomfortable asking a jury to “quantify the emotional distress that a woman feels upon suffering a miscarriage or stillbirth.”¹¹³ While the mothers definitely suffered extreme emotional disturbance as a result of the death of their unborn child, it is possible for damages awards to get out of control. Thus, arbitrary estimations are suspect. The jury should have orderly guidelines upon which to base emotional damages.

In tort claims, emotional damages are often met with criticism, and are usually seen as dangerous. They can be very high, arbitrary, and easily “feigned.”¹¹⁴ Physical or quantifiable injuries are often required.¹¹⁵ As Thomas Moore and Matthew Gaier state in *Negligent Infliction of Emotional Distress: Medical Malpractice*,¹¹⁶

One of the most nebulous and problematic areas of tort law is that involving recovery for negligently inflicted damages which are purely emotional, psychological, or mental in nature On the one hand, the courts seek to assure that there is a remedy for a significant injury. On the other hand, there is the fear of opening the floodgates of litigation based upon injuries which are often amorphous.¹¹⁷

Thus, there is the fear that *Broadnax* will open the floodgates for pure emotional damages in cases where the child has not died, but has survived with permanent congenital injuries. There, a mother may experience emotional distress as a result of having a brain-damaged

Gynecologist Supply, 105 OBSTETRICS & GYNECOLOGY 1296, 1300 (2005).

112. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 225 (8th ed. 2004).

113. *Broadnax*, 809 N.E.2d at 650 (Read, J., dissenting).

114. Thomas A. Moore & Matthew Gaier, *Negligent Infliction of Emotional Distress: Medical Malpractice*, N.Y. L.J., July 17, 2000, at 3.

115. Ellis, *supra* note 61, at 730; Eugene Kontorovich, Comment, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 493-94 (2001).

116. Moore & Gaier, *supra* note 114, at 3.

117. *Id.*

child.¹¹⁸ Additionally, emotional damages could possibly extend to prenatal malpractice claims in other negligence cases in which injuries led to a miscarriage, like car accidents.¹¹⁹ Surely, in car accident cases, the driver has no reason to foresee that his actions will cause emotional harm to a pregnant woman. Critics fear that there is the potential for pure emotional damages to spiral out of control.¹²⁰

3. *Broadnax* as Precedent: *Ferreira v. Wyckoff Heights Medical Center*¹²¹

Ferreira v. Wyckoff Heights Medical Center was the first case decided on similar facts since *Broadnax*'s monumental holding. *Ferreira* may represent the fears that the dissenting views in *Broadnax* had about cost and increased liability. There, Ms. Ferreira was awarded one million dollars for her emotional suffering as a result of a stillbirth.¹²²

In April 1997, plaintiff Lucia Ferreira, who was pregnant, was first treated at Wyckoff Heights Medical Center.¹²³ She had a fever, headache, and lower abdominal pain, and was hospitalized for six days.¹²⁴ On June 18, 1997, plaintiff returned to Wyckoff with similar complaints, as well as some vaginal spotting.¹²⁵ During that visit, she was given "a drug that relaxes the uterine muscles and [that] is used to stop premature labor."¹²⁶ She was also placed on a fetal monitor.¹²⁷ A strep culture was taken and an antibiotic was administered.¹²⁸ Plaintiff was diagnosed with a vaginal infection and discharged on June 23, 1997.¹²⁹

118. Marian E. Silber & Maria Elyse Rabar, *Damages for Stillbirth: Will the Floodgates Be Opened?*, N.Y. L.J., Apr. 30, 2004, at 27.

119. *Id.*

120. *See generally id.*

121. 885 N.Y.S.2d 143 (App. Term 2009).

122. *Id.* at 148.

123. *Id.* at 147.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

On June 25, 1997, plaintiff was again admitted to Wyckoff with similar medical complaints.¹³⁰ After she received another drug to prevent premature labor, plaintiff was discharged on June 27, 1997.¹³¹ Two days later, plaintiff once again returned to Wyckoff where she was determined not to be in labor and was given antibiotics for a possible urinary tract infection.¹³² On June 30, at 12:25 A.M., plaintiff again returned to Wyckoff, was determined not to be in labor, and left.¹³³ She returned the same morning between 8:00 A.M. and 9:00 A.M., was given a prescription for Tylenol with codeine, and was sent home.¹³⁴ Plaintiff was thirty-two to thirty-three weeks pregnant at this time.¹³⁵

On July 1, around 9:00 A.M., plaintiff began experiencing the “urge to urinate, but was unable to empty her bladder.”¹³⁶ She also experienced increased abdominal discomfort.¹³⁷ Around 12:00 P.M., plaintiff went into labor and before the ambulance arrived, delivered the baby foot-first at home.¹³⁸ The child did not survive the birth.¹³⁹ The baby was later determined to have died of asphyxia because its head had been wedged in the birth canal.¹⁴⁰

Ms. Ferreira subsequently sued Wyckoff Heights Medical Center.¹⁴¹ She claimed “that she suffered great emotional pain as a result of this event.”¹⁴² The jury concluded that “Wyckoff had deviated from good and accepted medical practice [when it sent] plaintiff home on June 30, 1997 with a prescription for Tylenol with codeine without properly evaluating, admitting, and treating her, and that this was a substantial factor in causing the death of the plaintiff’s baby.”¹⁴³ The jury also found that Ferreira was negligent in not seeking further medical attention after being sent home on June 30, 1997, but that her negligence was not a

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 145.

142. *Id.*

143. *Id.* at 147-48.

substantial factor in causing the death of the baby.¹⁴⁴ The plaintiff was awarded one million dollars for her emotional distress suffered from July 1, 1997 up to the date of the verdict.¹⁴⁵

Ferreira may be what Judge Read's dissent in *Broadnax* and other legal writers feared: an opening of the floodgates and exposure to high awards.¹⁴⁶ There is no doubt that the physicians at Wyckoff Heights Medical Center should have been more diligent in examining a pregnant plaintiff who was close to term and complaining of abdominal pain and other ailments. An arbitrary award is what the critics of *Broadnax* feared. *Ferreira* confirmed these fears.

VI. The Better Solution: Bringing Suit for Negligent Infliction of Emotional Distress

Stillbirths and miscarriages caused by medical malpractice fit cleanly into a NIED claim. The Restatement (Second) of Torts defines NIED as follows:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.¹⁴⁷

Broadnax v. Gonzalez was not decided on NIED grounds—it did not give women a clear cause of action.¹⁴⁸ The court did not explicitly state that an NIED claim applied to these mothers.¹⁴⁹ Rather, it simply

144. *Id.* at 148.

145. *Id.*

146. See *Broadnax v. Gonzalez*, 809 N.E.2d 645, 649-50 (N.Y. 2004) (Read, J., dissenting); Silber & Rabar, *supra* note 118.

147. RESTATEMENT (SECOND) OF TORTS § 313 (1965).

148. See generally *Broadnax*, 809 N.E.2d at 645.

149. See generally *id.*

permitted recovery for emotional damages with no other analysis.¹⁵⁰ Allowing mothers to sue doctors for NIED gives victims a voice and holds doctors accountable, but limits arbitrary emotional damages so that they do not spiral out of control.

A. *The Foundation for NIED in New York*

1. “Freedom From Mental Disturbance”

The earliest case to recognize the right to recover damages for negligently inflicted emotional injuries in New York was *Ferrara v. Galluchio*,¹⁵¹ decided by the Court of Appeals in 1958. There, the plaintiff brought a medical malpractice action for burns suffered as a result of an X-ray administered by the Defendant.¹⁵² In addition to seeking damages for the burns, she also sued for emotional injuries suffered after learning from her dermatologist that the burns might become cancerous.¹⁵³ The plaintiff introduced testimony of a neuropsychiatrist who indicated that the plaintiff suffered from “severe cancerophobia.”¹⁵⁴ The lower court awarded the plaintiff \$25,000, \$15,000 of which was for the emotional distress caused by the cancerophobia.¹⁵⁵ The New York Court of Appeals upheld the award, declaring that “such recovery was justified” and that “freedom from mental disturbance is now a protected interest” in New York.¹⁵⁶

2. Emotional Injuries Suffered by Third Parties

New York State has been reluctant to permit recovery for emotional injuries sustained as a result of another’s harm. Thus, third parties, such as witnesses of a tort committed upon someone else, usually cannot recover for the emotional disturbances they suffer as a result of witnessing the accident. This also includes parents who are distraught over a child’s injury. In *Tobin v. Grossman*,¹⁵⁷ the court held that a

150. *See generally id.*

151. 152 N.E.2d 249, 252-53 (N.Y. 1958).

152. *See id.* at 250-51; *see also* Moore & Gaier, *supra* note 114, at 3.

153. *Ferrara*, 152 N.E.2d at 251.

154. *Id.*

155. *Id.*

156. *Id.* at 252.

157. 249 N.E.2d 419 (N.Y. 1969).

mother could not recover for mental injuries of shock and fear sustained after her child was hit by a car.¹⁵⁸ There, the plaintiff did not actually witness the accident, but had observed her injured child lying in the road immediately after he was struck by the vehicle.¹⁵⁹ The court opined that the problem with allowing recovery in these instances was that the plaintiff was “not directly the victim” of the accident.¹⁶⁰ The court feared that permitting a cause of action under these circumstances would impose a new duty on a negligent actor to unforeseeable victims (such as distraught bystanders or family members of victims) and create unlimited liability.¹⁶¹

It would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders. Moreover, in any one accident, there might well be more than one person indirectly but seriously affected by the shock of injury or death to the child.¹⁶²

Arguably, it would be unreasonable for all affected third persons to sue the negligent actor for mental injuries. It would certainly open the floodgates to increased litigation for attenuated claims. However, allowing recovery for some while excluding others would prevent creation of a uniform rule.¹⁶³ The *Tobin* court therefore denied recovery, reasoning that “[i]t is enough that the law establishes liability in favor of those directly or intentionally harmed.”¹⁶⁴ The court also pointed out the harsh reality that suffering mental anguish from the loss or injury of a child “is the risk of living and bearing children.”¹⁶⁵

This logic is flawed, however, when applied to prenatal malpractice claims. Pregnant mothers should not be seen as mere bystanders or third parties, such as those parents or family members who have witnessed their child get hit by a car. As the court in *Broadnax* held, a physician directly owes pregnant mothers a duty of care because “the health of the

158. *Id.* at 419-20; *see also* Moore & Gaier, *supra* note 114, at 5.

159. *Tobin*, 249 N.E.2d at 419.

160. *Id.* at 420.

161. *Id.* at 423.

162. *Id.*

163. *See id.*

164. *Id.* at 424.

165. *Id.*

mother and fetus are linked.”¹⁶⁶ Therefore, the mother has standing to bring a cause of action for NIED, not as a third party, but as a direct victim to whom a duty is owed.

3. Exception: The Zone-of-Danger Rule

The zone-of-danger rule is an exception to the general proposition that third parties cannot recover for a tort committed upon another. In *Bovsun v. Sanperi*,¹⁶⁷ the New York Court of Appeals permitted recovery for damages where the plaintiff was in the zone of danger. In such cases,

where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family.¹⁶⁸

Bovsun consisted of two cases in which the plaintiffs and their family members were involved in a car accident and the plaintiffs immediately witnessed the injury to their family member.¹⁶⁹ The court found that the “instantaneous awareness” of severe injury to a family member was sufficient to entitle recovery for emotional damages.¹⁷⁰

However, as discussed above, zone-of-danger claims have failed in prenatal malpractice claims.¹⁷¹ Nevertheless, mothers should not bring causes of action for emotional distress under a zone-of-danger theory. A mother’s recovery should not be based upon merely viewing her stillborn child; rather, she should be able to recover as a direct victim of the tort.

166. *Broadnax v. Gonzalez*, 809 N.E.2d 645, 648-49 (N.Y. 2004).

167. 461 N.E.2d 843 (N.Y. 1984).

168. *Id.* at 848.

169. *See id.*

170. *Id.* at 850.

171. *See, e.g., Tebbutt v. Virostek*, 483 N.E.2d 1142 (N.Y. 1985).

B. *Why NIED Works for Prenatal Malpractice Claims Resulting from Miscarriages or Stillbirths*

Permitting mothers of children who are stillborn as a result of malpractice to bring NIED claims is logical for several reasons:

1. The Victims Fit the Elements of a NIED Claim

Mothers of children who are stillborn as a result of malpractice fit a NIED claim. Again, the elements of NIED are:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.¹⁷²

In a stillbirth case, the doctor has often been negligent in his care of both the mother and the fetus. It is possible that the mother may bring a successful NIED claim if she can prove that the doctor's conduct involved an unreasonable risk of causing emotional distress. Usually, the negligent conduct (such as failing to perform an ultrasound or emergency cesarean section) creates an unreasonable risk of causing distress to the mother, because her baby could die. Furthermore, it is foreseeable to the doctor that a pregnant patient will suffer severe emotional harm if a stillbirth results from the negligence. Thus, while unintentional, the doctors have negligently inflicted emotional distress upon the mother as a result of his unreasonable conduct.

In *Ferreira*, the plaintiff was very close to term and experiencing spotting and abdominal pain.¹⁷³ Perhaps instead of repeatedly discharging the plaintiff, the doctors should have admitted her and

172. RESTATEMENT (SECOND) OF TORTS § 313 (1965).

173. *Ferreira v. Wyckoff Heights Med. Ctr.*, 885 N.Y.S.2d 143, 147 (App. Term 2009).

performed an ultrasound or cesarean section. After all, the baby was in a breech position when it was ultimately born in plaintiff's home, and this position could have been determined by further examination. In *Ferreira*, the plaintiff could have sustained a NIED cause of action by claiming that the doctor's decision-making created an unreasonable risk of emotional harm, because the conduct could result in a stillbirth. Again, a doctor should foresee that his negligent conduct may cause a stillbirth, and severe emotional damage will obviously result on the part of the mother.

2. NIED Continues to "Bridge the Gap"

Allowing mothers to bring a NIED claim will continue to bridge the gap in New York's recovery scheme. First, a NIED claim preserves *Broadnax's* holding that prenatal care physicians owe pregnant women a duty of care in the event of stillbirths resulting from malpractice. Both the child and mother are patients of the prenatal care physician. If the child dies as the result of the doctor's negligence, the doctor must be held liable for any injuries caused to the mother, regardless of whether the injuries are mental or physical. Essentially, in NIED, a doctor owes the pregnant patient a duty of care. Thus, if the doctor breaches that duty by negligently caring for her, this breach results in the death of the baby, and it was foreseeable that the doctor's actions could cause the mother severe mental anguish, then the doctor is liable to the mother for emotional damages. Accordingly, because the mother now has a clear cause of action on her own behalf, the bridge across the recovery gap established in *Broadnax* is preserved, and the "narrow class of plaintiffs" who were previously denied recovery may obtain redress.

Allowing a cause of action for NIED for mothers upholds the principles of justice. As expressed by the dissenters in *Tebbutt v. Virostek* (decided before *Broadnax*), unborn children and their mothers were left in "juridical limbo, where negligent acts, with fatal effect, performed upon the child are neither compensated nor deterred."¹⁷⁴ These unborn children need a voice, not to mention that their mothers are undoubtedly left with uncompensated emotional damages. Furthermore, the doctors must be held responsible for their wrongdoings. As such, it defies logic to hold that mothers are not owed a duty by prenatal care

174. *Tebbutt v. Virostek*, 483 N.E.2d 1142, 1144 (N.Y. 1985) (Jasen, J., dissenting).

physicians, or that they are not entitled to any damages. Such was the case before *Broadnax*.

3. A NIED Claim Eliminates Flaws in *Broadnax*

It is important to note that *Broadnax* is limited in its holding. Specifically, *Broadnax* does not create an explicit cause of action for these victims. Although the *Broadnax* court recognized that it was “time to fill the gap” as if “the fetus cannot bring suit, it must follow in the eyes of the law that any injury here was done to the mother,”¹⁷⁵ the court did so cautiously by stipulating that the mother was entitled “to damages for emotional distress,” and no more.¹⁷⁶ Seemingly, the court did not explicitly recognize a cause of action nor suggest that a cause of action existed.¹⁷⁷ A claim of NIED will remedy this flaw in *Broadnax*.

Additionally, the availability of a NIED claim will provide a more orderly and controlled method for these mothers to obtain damages—a notion not discussed by the court in *Broadnax*. The *Broadnax* decision merely provided a starting point from which a mother could seek to recover damages, but the court did not go far enough. NIED claims, however, permit the fact-finder to quantify the plaintiff’s damages based on satisfaction of the elements as well as consideration of all the evidence. Arbitrary damages and “free-for-all” estimates of the value of injuries sustained by the mother will no longer be realistic fears, as they were for critics of *Broadnax*. At the same time, however, doctors will still be held accountable for their wrongdoing.

VII. Conclusion

In 2004, the New York Court of Appeals attempted to fill a formidable and unjust gap in the recovery scheme for prenatal malpractice actions. *Broadnax v. Gonzalez* overruled twenty years of precedent, in which a mother’s miscarriage or stillborn resulting from malpractice was denied any form of recovery for the mental anguish they suffered. The New York Court of Appeals finally acknowledged that prenatal care physicians owe a duty to the mother, who is, after all, the

175. *Broadnax v. Gonzalez*, 809 N.E.2d 645, 648 (N.Y. 2004) (internal quotation marks omitted).

176. *Id.* at 649.

177. *See generally id.*

patient. Furthermore, it allowed mothers to recover for their emotional injuries, even if they did not suffer any physical injuries as a result of the malpractice.

However, *Broadnax* is not a perfect decision and is flawed in many respects. Critics feared of an opening of the floodgates for arbitrary emotional damages in cases involving prenatal torts. Furthermore, *Broadnax* failed to completely provide mothers with a voice; they still are unable to maintain a clear cause of action. Rather, mothers are merely allowed to receive emotional damages for malpractice.

Mothers should be permitted to bring NIED claims against negligent prenatal care physicians. These victims satisfy the elements of the claim. Furthermore, the availability of a NIED claim will destroy any earlier arguments that limit a mother's recovery. Claims for NIED will clear up ambiguities encompassed in *Broadnax*, thus truly filling the gap by providing the mothers of deceased unborn children with a clear voice once and for all.