



# Courts Expand Rights of Mothers to Recover for Emotional Distress Caused by Prenatal Malpractice

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In 2004, New York's highest court, the Court of Appeals, held for the first time that a mother may recover for her own emotional

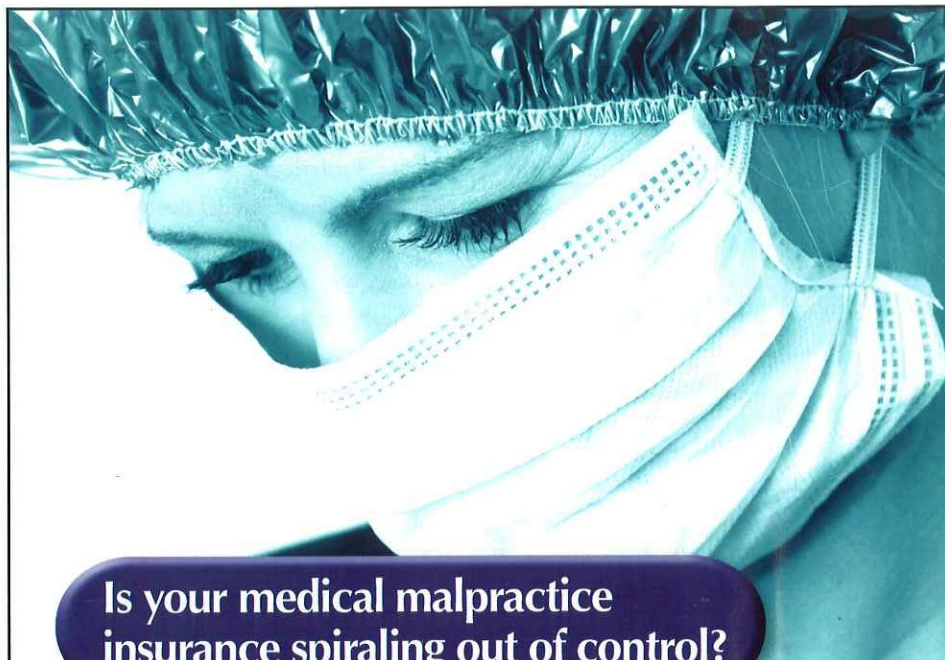
distress if she miscarries or delivers a baby who is stillborn. In *Broadnax v. Gonzalez*, the Court of Appeals overturned 19 years of

precedent holding that a woman could not recover for malpractice leading to a miscarriage or stillbirth unless she herself suffered an independent physical injury.

The Court of Appeals further defined the narrow bounds of the recovery permitted by *Broadnax* in May of 2005 in *Sheppard-Mobley v. King*, rejecting a claim by a mother seeking to recover for her emotional injuries after she delivered a baby born with severe deformities as a result of *in utero* malpractice. The facts in *Sheppard-Mobley* appeared somewhat egregious. According to the plaintiff's complaint, she was told she was pregnant but that large fibroids in her uterus made it highly unlikely that she would carry to term. A chemical abortion with methotrexate was recommended and performed and the plaintiff was advised by her doctor that the abortion had been successful. Four months later, in her 28th week of pregnancy, she learned that the fetus was alive. She delivered a daughter with severe physical and mental defects caused by fetal methotrexate syndrome.

In both cases, the Court of Appeals considered whether there was a remedy available to the infant before determining whether to permit the mother to recover. Because the infant in *Broadnax* was stillborn and, hence, had no claim, the court reasoned that a negligent medical provider would be immunized from liability unless a claim by the mother for emotional distress was recognized. In contrast, since the infant in *Sheppard-Mobley* was born alive and could bring her own malpractice action for the injuries inflicted on her in the womb, the court declined to recognize a separate claim by the mother.

Two additional lower court decisions



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have been handed down recently that wrestle with these issues. In November 2005, Justice David Demarest, a judge in St. Lawrence County, reluctantly applied the holding in *Sheppard-Mobley* to dismiss the malpractice claim of a woman who delivered a son who had been injured *in utero* and who died two hours after birth. Judge Demarest held that because the baby had been born alive, he was constrained by *Sheppard-Mobley* to dismiss the mother's cause of action. He noted, however, that the case presented a "troublesome anomaly," and asked for additional guidance from the appellate courts on this issue.

Most recently, Justice Dianne Renwick of Bronx County held in *Mendez v. Bhattacharya* that the mother of an infant born with a heartbeat but pronounced dead following 45 minutes of unsuccessful resuscitation attempts should be allowed to recover for her emotional distress resulting from prenatal malpractice.

The issue presented to Justice Renwick in *Mendez* was whether the mother should be allowed to recover for her emotional distress where her baby was born with a heartbeat, but was neither conscious nor viable, and died within minutes of birth. Quoting language from *Broadnax* that if "the fetus cannot bring suit, it must follow in the eyes of the law that any injury here was done to the mother" Justice Renwick held that the mother's claim stated a viable cause of action.

According to Justice Renwick, "To hold otherwise would permit a defendant doctor to obtain a dismissal of the mother's cause of action for emotional distress because the baby was born 'alive' based solely on a momentary heartbeat, then also argue before a judge or jury that the baby has no cause of action either, because the baby had no consciousness. As a matter of public policy the law should not countenance such a scenario." The decision was based on the court's finding that the infant had no consciousness after birth and, hence, no cause of action.

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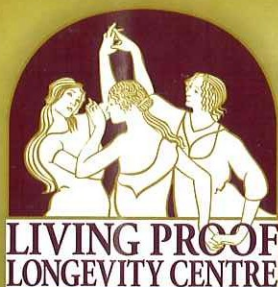


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