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BETTER LATE THAN NEVER: NEW YORK FINALLY CLOSES THE “GAP” IN RECOVERY PERMITTED FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN PRENATAL MEDICAL MALPRACTICE CASES

ALICIA A. ELLIS[†]

INTRODUCTION

New York courts, as well as courts in other states, have often been reluctant to allow recovery for negligent infliction of emotional distress (“NIED”). This reluctance stems primarily from public policy concerns. Courts have voiced three main concerns about allowing recovery for NIED:

(1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the “wrongful” act.¹

Despite these concerns, however, the ability of an injured party to “seek redress for every substantial wrong” has been fundamental to New York’s common law system,² as well as to

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¹ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 360–61 (5th ed. 1984); *see also* Tobin v. Grossman, 24 N.Y.2d 609, 615–19, 249 N.E.2d 419, 422–24, 301 N.Y.S.2d 554, 558–62 (1969) (outlining policy factors that must be considered when deciding whether to permit recovery for NIED); RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965); Carolyn A. Goodzeit, Note, *Rethinking Emotional Distress Law: Prenatal Malpractice and Feminist Theory*, 63 FORDHAM L. REV. 175, 180 (1994) (discussing public policy concerns surrounding decisions in NIED cases).

² Battalla v. State, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 36 (1961).

tort law in general.³ For this reason, the courts have allowed recovery in certain situations, regardless of the opportunities for fraud and extra litigation.⁴ Though New York courts have taken this position in some situations, they have often denied recovery for NIED in situations where they have felt compelled to do so by public policy.⁵ Competing policy interests always underlie decisions in this area, as courts struggle to strike a just balance between compensating those injured through the fault of others, and keeping liability reasonably limited and the potential for fictitious suits at a minimum.⁶ Therefore, courts have struggled for years to determine under what circumstances recovery will be permitted, keeping in mind notions of fundamental fairness as well as the public policy interests of keeping liability and litigation within manageable bounds.⁷

One historically problematic area within NIED has been prenatal medical malpractice.⁸ Until recently, New York law in this area was fraught with inconsistencies concerning under what circumstances recovery would be permitted.⁹ Furthermore,

³ See KEETON ET AL., *supra* note 1, § 1, at 5–6.

⁴ See *Battalla*, 10 N.Y.2d at 240–41, 176 N.E.2d at 731, 219 N.Y.S.2d at 37 (citing *Green v. T.A. Shoemaker & Co.*, 73 A. 688, 692 (Md. 1909)) (“The argument from mere expediency cannot commend itself to a [c]ourt of justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one.”).

⁵ See *Tobin*, 24 N.Y.2d at 617–19, 249 N.E.2d at 423–24, 301 N.Y.S.2d at 560–62 (1969).

While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.

Id. at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561; see also *Howard v. Lecher*, 42 N.Y.2d 109, 112, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 365 (1977) (explaining that the law cannot remedy every wrong because of the necessity of “circumscrib[ing] and limit[ing] the rules ascribing liability in a manner which accords with reason and practicality”).

⁶ “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.” Thomas A. Moore & Matthew Gaier, *Negligent Infliction of Emotional Distress*, N.Y. L.J., July 17, 2000, at 3.

⁷ See *id.*; see also KEETON ET AL., *supra* note 1, § 54, at 359–60 (noting the difficulty courts encounter when defining liability for NIED).

⁸ See Goodzeit, *supra* note 1, at 182.

⁹ See Thomas A. Moore & Matthew Gaier, *Negligent Infliction of Emotional Distress—Part II*, N.Y. L.J., Aug. 1, 2000, at 3; see also *infra* notes 67–92 and accompanying text.

the case law in New York left a “logical gap” in the recovery it permitted to mothers when prenatal medical malpractice injured their children.¹⁰

For decades, when medical malpractice resulted in the stillbirth or miscarriage of a child, the child’s mother was only able to recover for her emotional injuries if she could demonstrate that she had also suffered an independent physical injury—one that was not considered to be a normal incident of childbirth.¹¹ This rule was premised on the court’s finding that the doctor in such a situation owed a duty of care to the fetus, but not to the mother.¹² This was also the rule if a mother suffered emotional injuries due to her child being born alive but with severe birth defects due to her doctor’s negligence.¹³ Demonstrating the existence of an independent physical injury was difficult, making recovery for NIED in this area rare.¹⁴ This rule proved to “fit[] uncomfortably into [New York’s] tort jurisprudence.”¹⁵

At the same time that this rule was in effect, a pregnant woman had a cause of action for NIED if her doctor erroneously advised her to undergo an abortion,¹⁶ or if her doctor negligently performed an abortion.¹⁷ Further, a child born alive, but with birth defects due to another’s negligence, had his or her own cause of action against the tortfeasor.¹⁸ Finally, if an automobile operator, instead of a doctor, caused the stillbirth or miscarriage of a child, the child’s mother had a cause of action for NIED.¹⁹

¹⁰ See *infra* notes 108–09 and accompanying text.

¹¹ See *Tebbutt v. Virostek*, 65 N.Y.2d 931, 932, 483 N.E.2d 1142, 1143, 493 N.Y.S.2d 1010, 1011 (1985) (denying damages for emotional harm where a mother did not claim any physical injury separate from that of her fetus), *overruled by Broadnax v. Gonzalez*, 2 N.Y.3d 148, 809 N.E.2d 645, 777 N.Y.S.2d 416 (2004).

¹² See *id.* at 932–33, 483 N.E.2d at 1143–44, 493 N.Y.S.2d at 1011–12.

¹³ See *Vaccaro v. Squibb Corp.*, 52 N.Y.2d 809, 809–11, 418 N.E.2d 386, 386, 436 N.Y.S.2d 871, 871 (1980).

¹⁴ See *infra* note 83 and accompanying text.

¹⁵ *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 154, 809 N.E.2d 645, 648, 777 N.Y.S.2d 416, 419 (2004).

¹⁶ See *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 70 N.Y.2d 697, 699, 512 N.E.2d 538, 538–39, 518 N.Y.S.2d 955, 955–56 (1987) (allowing recovery for emotional harm because the Court considered a doctor’s erroneous abortion advice a breach of duty owed directly to the expectant mother as opposed to the unborn fetus); see also *infra* notes 86–88 and accompanying text.

¹⁷ See *Ferrara v. Bernstein*, 81 N.Y.2d 895, 897–98, 613 N.E.2d 542, 543–44, 597 N.Y.S.2d 636, 637–38 (1993); see also *infra* notes 89–91 and accompanying text.

¹⁸ See *Woods v. Lancet*, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951).

¹⁹ See *Endresz v. Friedberg*, 24 N.Y.2d 478, 487, 248 N.E.2d 901, 906, 301

The state of law at this time, therefore, "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."²⁰

This "gap" often resulted in unfair outcomes since it categorically denied recovery to certain deserving plaintiffs,²¹ even though allowing recovery would often be more aligned with fundamental notions of fairness. Finally, in April 2004, the New York Court of Appeals closed the "gap" that has plagued this area of the law for decades and permitted the interest in redressing substantial injury to outweigh the interests in limited liability and litigation.²² In *Broadnax v. Gonzalez*,²³ 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, entitling her to damages for emotional distress."²⁴

This Note asserts that the *Broadnax* decision was long overdue for New York. The decision fits comfortably with the rest of New York's jurisprudence in the NIED area because it creates a workable, bright-line rule that is sufficiently limited in scope so as not to create a significant risk of extra litigation and unlimited liability for medical practitioners. In addition, it seeks to compensate a relatively small but deserving class of plaintiffs who suffer a substantial loss due to their doctors' malpractice.

Part I of this Note will trace the history and development of NIED in New York, as well as the underlying public policy considerations that have driven its progression along the way. New York's approach to NIED in prenatal medical malpractice

N.Y.S.2d 65, 72 (1969) ("[The plaintiff mother] may recover for the injuries she sustained, both physical and mental, including the emotional upset attending the stillbirths.").

²⁰ *Broadnax*, 2 N.Y.3d at 154, 809 N.E.2d at 648, 777 N.Y.S.2d at 419.

²¹ See *Tebbutt v. Virostek*, 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985) (holding that a mother must show that she suffered a physical injury in order to recover for emotional injuries in an action for medical malpractice), *overruled by Broadnax v. Gonzalez*, 2 N.Y.3d 148, 809 N.E.2d 645, 777 N.Y.S.2d 416 (2004); see also *infra* note 82 and accompanying text.

²² See *Broadnax*, 2 N.Y.3d at 153–55, 809 N.E.2d at 647–49, 777 N.Y.S.2d at 418–20; see also *infra* notes 106–14 and accompanying text.

²³ 2 N.Y.3d 148, 809 N.E.2d 645, 777 N.Y.S.2d 416.

²⁴ *Id.* at 155, 809 N.E.2d at 649, 777 N.Y.S.2d at 420.

cases will also be examined, including the gap New York's case law left in plaintiff recovery. Part II will discuss the Court of Appeals' recent decision in *Broadnax*, its holding, rationale, and dissenting opinion, as well as how this case finally filled the gap in recovery allowed for NIED in prenatal malpractice cases. Part III will explain why the *Broadnax* decision was long overdue for New York and conclude with a discussion of its possible implications.

I. THE HISTORY AND DEVELOPMENT OF NIED IN NEW YORK

A. *The Beginnings of NIED: Direct Injury*

One of the first decisions in which the New York Court of Appeals recognized the right of a plaintiff to recover for NIED was *Ferrara v. Galluchio*.²⁵ In this action for medical malpractice, the plaintiff sued for the emotional injuries she suffered after being told by her dermatologist that burns on her shoulder caused by x-ray treatments administered by the defendant doctor may become cancerous.²⁶ In *Ferrara*, the plaintiff's emotional injuries followed from severe physical injuries caused by the defendant doctor's malpractice.²⁷ The Court declared, "Freedom from mental disturbance is now a protected interest in [New York]."²⁸

²⁵ 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

²⁶ See *id.* at 18–19, 152 N.E.2d at 250–51, 176 N.Y.S.2d at 997–98. The Court held that the defendant doctor would be liable for the plaintiff's emotional injuries even though it was her dermatologist who actually advised her that she was at risk for developing cancer. See *id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999.

²⁷ See *id.* at 20–21, 152 N.E.2d at 251–52, 176 N.Y.S.2d at 999.

²⁸ *Id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999. In so holding, the Court addressed the concerns that surround recovery for emotional injury:

The only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, which has loomed very large in the opinions as an obstacle. The danger is a real one, and must be met. Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may well be unwilling to open the door to an even more dubious field. But the difficulty is not insuperable. Not only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of clear medical proof. It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. The problem is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false.

Id. at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999–1000 (citation omitted). Three

When a physical injury accompanies the emotional distress, or more specifically, when the emotional distress flows from a physical injury caused by the defendant's negligent conduct, most courts will allow recovery for the emotional damages by characterizing them as "parasitic" damages flowing from the physical injury.²⁹ Courts seem to be less concerned with the risk of feigned emotional injuries when the emotional injuries result from easily verifiable physical injuries.³⁰

After *Ferrara*, emotional damages accompanying a physical injury were recoverable, but the longstanding rule remained that there was no recovery for emotional injuries absent a physical injury. That rule came from *Mitchell v. Rochester Railway Co.*,³¹ in which the Court of Appeals stated: "[N]o recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury."³²

This rule changed after the Court of Appeals recognized the right to recover for purely emotional injuries in *Battalla v. State*.³³ In *Battalla*, a state employee improperly and insecurely placed the infant plaintiff into a chair lift.³⁴ As a result, the infant plaintiff became "frightened and hysterical," and suffered consequential injuries.³⁵ This case demonstrated the Court's view that when a duty is owed to the plaintiff, the defendant is

judges joined in a dissent by Judge Froessel in which he cautioned that this "new field of damage[]" would create countless opportunities for plaintiffs to file fraudulent claims. *Id.* at 23-24, 152 N.E.2d at 254, 176 N.Y.S.2d at 1001-02 (Froessel, J., dissenting).

²⁹ See KEETON ET AL., *supra* note 1, § 54, at 362-63.

³⁰ See *id.* at 363.

³¹ 151 N.Y. 107, 45 N.E. 354 (1896), *overruled by* *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

³² *Id.* at 110, 45 N.E. at 355. The rationale for this rule was almost completely grounded in public policy concerns:

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.

Id. at 110, 45 N.E. at 354-55.

³³ 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

³⁴ *Id.* at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35.

³⁵ *Id.* at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35.

responsible for all damages proximately caused by his or her negligence, including those that are purely emotional in nature.³⁶ In recognizing a cause of action for purely emotional injuries, the Court explained that “[a]lthough fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction.”³⁷ Even after *Battalla*, however, the Court remained reluctant to permit recovery for purely emotional injuries in many situations.³⁸

When a plaintiff seeks to recover for purely emotional injuries suffered due to another’s negligence, the preliminary issue for the courts is whether the alleged tortfeasor owed the injured plaintiff a duty of care.³⁹ In deciding whether to permit recovery for NIED, the court’s analysis has typically been couched in terms of duty.⁴⁰ Even when the defendant is unquestionably negligent, and emotional distress is a foreseeable consequence of that negligence, courts will sometimes limit liability by finding that no duty was owed to the plaintiff.⁴¹ This

³⁶ See *id.* at 240–42, 176 N.E.2d at 730–32, 219 N.Y.S.2d at 36–38.

³⁷ *Id.* at 240–41, 176 N.E.2d at 731, 219 N.Y.S.2d at 37. Three judges joined in a dissent by Judge Van Voorhis in which he expressed concerns grounded in public policy that allowing recovery in this type of case would potentially open the floodgates to litigation and increase the occurrence of fraudulent claims. See *id.* at 242–43, 176 N.E.2d at 732, 219 N.Y.S.2d at 38–39 (Van Voorhis, J., dissenting).

³⁸ See *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 153, 809 N.E.2d 645, 648, 777 N.Y.S.2d 416, 419 (2004) (referring to the Court of Appeals’ “longstanding reluctance to recognize causes of action for [NIED], especially in cases where the plaintiff suffered no independent physical or economic injury”); KEETON ET AL., *supra* note 1, § 54, at 360 (discussing the reluctance courts have in recognizing “the interest in peace of mind”); Moore & Gaier, *supra* note 6 (“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.”).

³⁹ Moore & Gaier, *supra* note 9.

⁴⁰ See *Bovsun v. Sanperi*, 61 N.Y.2d 219, 233, 461 N.E.2d 843, 850, 473 N.Y.S.2d 357, 364 (1984) (“In conformity with traditional tort principles, the touchstone of liability in these cases is the breach by the defendant of a duty of due care owed the plaintiff.”); SUSAN FRIEDMAN, 1 NEW YORK PRACTICE GUIDE: NEGLIGENCE § 2.04[3][a] (Oscar G. Chase & Henry G. Miller eds., 2006) (“All of the cases awarding damages for emotional injuries hinge on the proposition that when there is a duty owed by the defendant to the plaintiff, breach of that duty which results directly in emotional harm is compensable.”); see also *Tobin v. Grossman*, 24 N.Y.2d 609, 613, 249 N.E.2d 419, 420–21, 301 N.Y.S.2d 554, 556 (1969) (describing the ultimate issue before the Court as being a question of duty); Moore & Gaier, *supra* note 6 (explaining that “[t]here will be no liability unless the [c]ourt finds that there exists a duty owed directly to the person seeking the damages”).

⁴¹ See DAN B. DOBBS, THE LAW OF TORTS § 308, at 836 (2000); see, e.g., *Bovsun*, 61 N.Y.2d at 227–28, 461 N.E.2d at 846–47, 473 N.Y.S.2d at 360–61 (explaining that foreseeability is not the sole means of deciding whether a legally cognizable duty is

type of situation often arises when the defendant's negligence results in a physical injury to one person and as a result of that physical injury, emotional distress is caused to another.⁴² Though rare, there have even been instances where the Court has refused to allow recovery for NIED, even after finding that a duty was owed directly to the person seeking damages for emotional harm.⁴³

B. Emotional Distress Suffered by Third Persons

Most courts, including those in New York, are willing to recognize the right of a plaintiff to sue for emotional damages resulting from the breach of a duty owed to him or her by the defendant.⁴⁴ However, when the plaintiff suffers emotional distress as a bystander to the death or serious injury of someone else, courts have approached this as an issue of limited duty and have permitted bystander recovery in very limited circumstances.⁴⁵

This problem came before the Court of Appeals in *Tobin v. Grossman*.⁴⁶ In *Tobin*, the plaintiff's two-year-old son was struck by an automobile driven by the defendant, causing the child severe injuries.⁴⁷ Though the plaintiff did not actually witness the accident, she heard the defendant's brakes screech and immediately went outside to observe her severely injured son lying in the road.⁴⁸ The Court held that "no cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries."⁴⁹ The decision

owed, but rather the decision is largely grounded in public policy considerations).

⁴² See *infra* notes 45-52 and accompanying text (elaborating on bystander recovery for NIED).

⁴³ See, e.g., *Becker v. Schwartz*, 46 N.Y.2d 401, 415, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 902 (1978) (explaining that the "calculation of damages for plaintiffs' emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants to themselves").

⁴⁴ See DOBBS, *supra* note 41, § 308, at 836.

⁴⁵ See *Bousun*, 61 N.Y.2d at 227, 461 N.E.2d at 846, 473 N.Y.S.2d at 360 ("Traditionally, courts have been reluctant to recognize any liability for the mental distress which may result from the observation of a third person's peril or harm.").

⁴⁶ 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

⁴⁷ *Id.* at 611, 249 N.E.2d at 420, 301 N.Y.S.2d at 556.

⁴⁸ *Id.* at 611, 249 N.E.2d at 419, 301 N.Y.S.2d at 556.

⁴⁹ *Id.* at 611, 249 N.E.2d at 419-20, 301 N.Y.S.2d at 555. The Court saw the

seemed to be primarily based on the Court's concern that if it was to recognize a cause of action in this situation, there would be no way to limit the scope of the liability.⁵⁰ Therefore, the Court found: "It [was] enough that the law establishe[d] liability in favor of those directly or intentionally harmed."⁵¹ Though the Court recognized the reality that the loss of or injury to loved ones, particularly children, gives rise to the risk of indirect emotional harm to others, it deemed it part of "[t]he risk of living and bearing children."⁵²

Almost twenty years after *Tobin*, the Court adopted a new approach to bystander liability in its landmark decision *Bovsun v. Sanperi*.⁵³ In *Bovsun*, the Court adopted a narrow zone-of-danger rule that precisely circumscribed the limits of the duty owed to some bystanders who suffer emotional distress resulting from injury to another:

Where a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the

main issue as "whether the concept of duty in tort should be extended to third persons, who do not sustain any physical impact in the accident or fear for their own safety." *Id.* at 613, 249 N.E.2d at 421, 301 N.Y.S.2d at 556. To create this new duty would be to create a new cause of action. For reasons based on policy and precedent, the Court declined to do so. Though the Court recognized that the severe injury of a child would undoubtedly have an emotional impact on the child's mother, it did not consider this to be a sufficient enough justification for the creation of a new tort concept. *See id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. "[T]here are no new technological, economic, or social developments which have changed social and economic relationships and therefore no impetus for a corresponding legal recognition of such changes. Hence, a radical change in policy is required before one may recognize a cause of action in this case." *Id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

⁵⁰ *See id.* at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561. Since the Court was unable to define a sufficiently limited duty owed to bystanders, it opted to hold that no duty was owed to bystanders at all. *See id.* at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561. The Court did not want to create a cause of action that would permit any witness of an accident to bring a claim for NIED. *See Moore & Gaier, supra* note 6.

⁵¹ *Tobin*, 24 N.Y.2d at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 562.

⁵² *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 562.

⁵³ 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

plaintiff's immediate family in his or her presence, the plaintiff may recover damages for such injuries.⁵⁴

The Court explained that its adoption of this rule was in no way creating a new duty; rather, it simply involved a "broadening of the duty concept" by allowing an immediate family member in the zone-of-danger, to whom a duty is already owed, to recover an element of damages not previously allowed.⁵⁵ In adopting this narrow rule, the Court expressly rejected the use of foreseeability alone as the test of whether a duty is owed to a plaintiff.⁵⁶ The Court's rationale for rejecting this approach was grounded in public policy—more specifically, the fear that such an approach could lead to unlimited liability.⁵⁷ In order to recover for emotional distress, the *Bovsun* Court also required that the plaintiff show not only that his or her emotional injuries were proximately caused by the defendant's negligence, but also that such injuries are serious and verifiable.⁵⁸ Other than this narrow zone-of-danger rule, New York courts have rarely recognized liability for emotional injuries based on injuries to loved ones.⁵⁹

In sum, New York will allow recovery for emotional injuries flowing from physical injuries caused by the defendant's negligent conduct.⁶⁰ Though New York is willing to allow recovery for purely emotional injuries, the number of circumstances in which such recovery will be permitted is certainly limited.⁶¹ In order for a plaintiff to recover for emotional injuries stemming from a physical injury negligently

⁵⁴ *Id.* at 223–24, 461 N.E.2d at 844, 473 N.Y.S.2d at 358. In Judge Kaye's dissent, she insisted that the majority had just created a new duty and cause of action, thus seriously departing from precedent. *See id.* at 234, 461 N.E.2d at 850, 473 N.Y.S.2d at 364 (Kaye, J., dissenting).

The Court of Appeals later made clear that this rule applied only to the plaintiff's immediate family, and did not extend to other familial relationships, such as that between an aunt and a niece. *See Trombetta v. Conkling*, 82 N.Y.2d 549, 551, 626 N.E.2d 653, 654, 605 N.Y.S.2d 678, 679 (1993).

⁵⁵ *Bovsun*, 61 N.Y.2d at 229, 461 N.E.2d at 847, 473 N.Y.S.2d at 361.

⁵⁶ *See id.* at 227, 461 N.E.2d at 846, 473 N.Y.S.2d at 360.

⁵⁷ *See id.* at 227, 461 N.E.2d at 846, 473 N.Y.S.2d at 360. While recognizing that the zone-of danger rule represented a bright-line circumscription of duty, the Court explained that "arbitrary distinctions are an inevitable result of the drawing of lines which circumscribe legal duties, and that delineation of limits of liability in tort actions is usually determined on the basis of considerations of public policy." *Id.* at 228, 461 N.E.2d at 847, 473 N.Y.S.2d at 361 (citations omitted).

⁵⁸ *Id.* at 231, 461 N.E.2d at 849, 473 N.Y.S.2d at 363.

⁵⁹ *See Moore & Gaier, supra* note 9.

⁶⁰ *See supra* note 29 and accompanying text.

⁶¹ *See supra* notes 33–38 and accompanying text.

inflicted upon another, the plaintiff needs to fit within the narrow zone-of-danger rule.⁶² When the Court of Appeals denies recovery, it is most often because it finds that the defendant did not owe a duty to the plaintiff.⁶³ The determination of whether or not a duty was owed to a particular plaintiff is almost entirely dependent on public policy considerations.⁶⁴

C. New York's Approach to NIED in Prenatal Claims

It is difficult to imagine damages more foreseeable than the severe emotional distress, mental anguish, and disappointment suffered by a woman who has a miscarriage or stillbirth due to her doctor's malpractice. However, *Bovsun* made clear that foreseeability is not enough in New York.⁶⁵ Instead, foreseeability has often given way to public policy concerns and the court's fear of opening the floodgates of litigation. These ideas seem to underlie most of the Court's decisions in this area and have led to unfair or even illogical outcomes.⁶⁶

In deciding whether to permit recovery for NIED to parents and would-be parents for injuries to their children inflicted during pregnancy, the main issue for courts is whether a duty was owed to the parents to protect them from such injury.⁶⁷ In *Endresz v. Friedberg*,⁶⁸ while disallowing a wrongful death cause of action on behalf of stillborn fetuses, the Court of Appeals stated that "[the plaintiff mother] may recover for the injuries she sustained, both physical and mental, including the emotional upset attending the stillbirths."⁶⁹

This seemingly broad dicta was severely limited by the Court of Appeals' decisions in *Vaccaro v. Squibb Corp.*⁷⁰ and *Tebbutt v. Virostek*,⁷¹ in which the Court made clear that no recovery was

⁶² See *supra* text accompanying note 54.

⁶³ See *supra* notes 40–41 and accompanying text.

⁶⁴ See *supra* note 41.

⁶⁵ See *supra* notes 56–57 and accompanying text.

⁶⁶ See, e.g., *infra* text accompanying notes 93–97.

⁶⁷ See *Moore & Gaier, supra* note 9.

⁶⁸ 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969). In *Endresz*, the plaintiff, while seven months pregnant, was injured in an automobile accident, resulting in the stillbirth of her twins. See *id.* at 481, 248 N.E.2d at 902, 301 N.Y.S.2d at 67.

⁶⁹ *Id.* at 487, 248 N.E.2d at 906, 301 N.Y.S.2d at 72.

⁷⁰ 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

⁷¹ 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985), *overruled by* *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 809 N.E.2d 645, 777 N.Y.S.2d 416 (2004).

permitted for a mother's emotional injuries resulting from the prenatal injuries to her child absent a showing of an independent physical injury to her.⁷² In *Vaccaro*, the plaintiff parents brought several causes of action, including one for NIED, against the defendant doctor and defendant pharmaceutical company after their child was born without arms or legs and with other serious birth defects.⁷³ The child's injuries were caused by a progestational hormone manufactured by the pharmaceutical company and administered by the doctor to the mother during her pregnancy.⁷⁴ In *Tebbutt*, the plaintiff sued the defendant doctor to recover damages for her "pain, severe disappointment, anxiety, despondency, bitterness and suffering," all of which resulted from the stillbirth of her child. The fetus' death was allegedly caused by the defendant doctor's negligently performed amniocentesis.⁷⁵

In both of these cases, the Court rejected the plaintiff mothers' contention that the defendant doctor owed them a duty of care that would support a cause of action for NIED.⁷⁶ This position in particular was strongly opposed by the dissenters in both cases,⁷⁷ who asserted that the defendants' actions constituted a breach of a duty owed directly to the mothers.⁷⁸

⁷² See *Tebbutt*, 65 N.Y.2d at 932-33, 483 N.E.2d at 1143-44, 493 N.Y.S.2d at 1011-12; *Vaccaro*, 52 N.Y.2d at 810, 418 N.E.2d at 386, 436 N.Y.S.2d at 871. The Court in *Tebbutt* distinguished the case before it from its dicta in *Endresz* by explaining that the plaintiff mother in *Endresz* could recover mental injuries attendant to the stillbirth of her children because the defendant driver breached a duty to drive with reasonable care that was owed directly to the plaintiff mother. *Tebbutt*, 65 N.Y.2d at 933, 483 N.E.2d at 1144, 493 N.Y.S.2d at 1012. On the facts of *Tebbutt*, however, the Court found no comparable duty owed to the mother that would justify the imposition of liability for NIED on the defendant doctor. See *id.* at 933, 483 N.E.2d at 1144, 493 N.Y.S.2d at 1012.

⁷³ *Vaccaro v. Squibb Corp.*, 71 A.D.2d 270, 272, 422 N.Y.S.2d 679, 680 (1st Dep't 1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

⁷⁴ *Id.* at 272, 422 N.Y.S.2d at 680.

⁷⁵ See *Tebbutt*, 65 N.Y.2d at 932, 483 N.E.2d at 1143, 493 N.Y.S.2d at 1011.

⁷⁶ See *id.* at 932, 483 N.E.2d at 1143, 493 N.Y.S.2d at 1011. ("[In *Vaccaro*], we rejected the contention that the defendants owed any duty to the mother. Similarly, in the case before us, we must reject the mother's claim for damages for emotional distress.")

⁷⁷ See *id.* at 935-36, 483 N.E.2d at 1145-46, 493 N.Y.S.2d at 1013-14 (Jasen, J., dissenting). Judge Jasen, who authored one of the dissenting opinions in *Tebbutt*, insisted that the doctor owed the mother an independent duty of care arising out of their professional relationship, as well as the "physiological and biological bond existing between the mother and her unborn child." *Id.* at 935-36, 483 N.E.2d at 1145-46, 493 N.Y.S.2d at 1013-14.

⁷⁸ See *id.* at 936, 483 N.E.2d at 1146, 493 N.Y.S.2d at 1014 ("Defendant's

Judge Kaye, who authored one of the dissenting opinions in *Tebbutt* stated: "Where 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."⁷⁹ Similarly, another dissent in *Tebbutt* expressed concern that the majority left unborn children in a "juridical limbo, where negligent acts, with fatal effect, performed upon the child are neither compensated nor deterred."⁸⁰

Regardless of the strongly worded dissents in both of these cases, the majority opinions represented binding authority in New York and were faithfully followed for nearly twenty years.⁸¹ After *Tebbutt*, New York courts strictly adhered to the following rule: "[A] mother [can] not recover for emotional injuries when medical malpractice cause[s] 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."⁸² This physical injury threshold was extremely difficult to meet, making recovery for NIED in these types of

infringement upon the mother's freedom from mental distress was occasioned by the breach of a distinct and independent duty flowing to the mother.")

⁷⁹ *Id.* at 940, 483 N.E.2d at 1149, 493 N.Y.S.2d at 1017 (Kaye, J., dissenting). Judge Fuchsberg's dissent in *Vaccaro* made a similar argument:

It would seem impossible to deny that defendants owed a duty directly to her. She was a patient of the doctor. She was the consumer of the implicated drug, it having actually been injected into her body. And she suffered the physical effect it had on the fetus and herself while the baby was still unborn.

Vaccaro, 52 N.Y.2d at 811-12, 418 N.E.2d at 387, 436 N.Y.S.2d at 872 (Fuchsberg, J., dissenting).

⁸⁰ *Tebbutt*, 65 N.Y.2d at 933, 483 N.E.2d at 1144, 493 N.Y.S.2d at 1012 (Jasen, J., dissenting).

⁸¹ *See, e.g.*, *Miller v. Chalom*, 269 A.D.2d 37, 710 N.Y.S.2d 154 (3d Dep't 2000); *Scott v. Capital Area Cmty. Health Plan, Inc.*, 191 A.D.2d 772, 594 N.Y.S.2d 370 (3d Dep't 1993); *Guialdo v. Allen*, 171 A.D.2d 535, 567 N.Y.S.2d 255 (1st Dep't 1991); *Buzniak v. County of Westchester*, 156 A.D.2d 631, 549 N.Y.S.2d 130 (2d Dep't 1989); *Prado v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 145 A.D.2d 614, 536 N.Y.S.2d 474 (2d Dep't 1988); *Sceusa v. Mastor*, 135 A.D.2d 117, 525 N.Y.S.2d 101 (4th Dep't 1988); *Burgess v. Miller*, 124 A.D.2d 692, 508 N.Y.S.2d 204 (2d Dep't 1986); *Kaniecki v. Yost*, 166 Misc. 2d 408, 631 N.Y.S.2d 500 (Sup. Ct. Erie County 1995); *Khan v. Hip Hosp., Inc.*, 127 Misc. 2d 1063, 487 N.Y.S.2d 700 (Sup. Ct. Queens County 1985).

⁸² *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 153, 809 N.E.2d 645, 647, 777 N.Y.S.2d 416, 418 (2004) (citing, discussing, and ultimately overruling the Court's holding in *Tebbutt*); *see also* 76 N.Y. JUR.2D *Malpractice* § 348 (2003) (explaining the rule regarding recovery for NIED in prenatal malpractice cases).

cases rare.⁸³

Some mothers, taking a slightly different approach, have attempted to recover under the zone-of-danger rule. After finding it clear from *Tebbutt* that mothers must assert an independent physical injury in order to recover for NIED, the departments of the Appellate Division have generally found the zone-of-danger rule inapplicable to fetal injuries.⁸⁴ Courts have also rejected the claim of a father for NIED resulting from his child's in utero injuries under the zone-of-danger rule.⁸⁵

The Court of Appeals, however, has allowed recovery for NIED stemming from medical malpractice in the abortion context. *Martinez v. Long Island Jewish Hillside Medical Center*⁸⁶ represents one such case where the Court allowed the plaintiff to recover for NIED. In *Martinez*, the plaintiff underwent an abortion after the defendant doctors erroneously advised her that her child would be born with severe birth defects.⁸⁷ Because the Court found that defendants owed a duty directly to the plaintiff, she was permitted to recover any damages, including those emotional in nature, that were caused by the breach of that duty.⁸⁸

⁸³ See *Scott*, 191 A.D.2d at 773, 594 N.Y.S.2d at 370-71 (denying recovery for NIED based on mother's "rapid heartbeat, nausea, shortness of breath and chest pains" because those symptoms were not distinct from the cardiac distress suffered by the fetus); *Guinaldo*, 171 A.D.2d at 536, 567 N.Y.S.2d at 256 (denying mother's claim for NIED based on lower abdominal cramping, holding it to be a normal incident of childbirth, and therefore not actionable); *Buzniak*, 156 A.D.2d at 632, 549 N.Y.S.2d at 131 (allowing recovery for NIED by holding a staphylococcus infection caused by a negligently performed amniocentesis, which ultimately resulted in a miscarriage, to be an independent physical injury); *Prado*, 145 A.D.2d at 615, 536 N.Y.S.2d at 475-76 (allowing mother's cause of action for NIED based on her fear for her own physical safety, but not for the stillbirth of her child); *Sceusa*, 135 A.D.2d at 121, 525 N.Y.S.2d at 103 (holding a Cesarean procedure was not a physical injury, but rather a surgical procedure that was an acceptable mode of delivery); *Khan*, 127 Misc. 2d at 1067-68, 487 N.Y.S.2d at 704 (permitting recovery for NIED after a finding that the excruciating pain and injury suffered by the plaintiff mother was not typical of childbirth).

⁸⁴ See, e.g., *Miller*, 269 A.D.2d at 40, 710 N.Y.S.2d at 156-57; *Sceusa*, 135 A.D.2d at 119-20, 525 N.Y.S.2d at 102-03; see also Moore & Gaier, *supra* note 9.

⁸⁵ See, e.g., *Reed v. Cioffi, Seftel & Soni, P.C.*, 155 A.D.2d 796, 797, 548 N.Y.S.2d 73, 74 (3d Dep't 1989).

⁸⁶ 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987).

⁸⁷ See *id.* at 698-99, 512 N.E.2d at 538, 518 N.Y.S.2d at 955.

⁸⁸ See *id.* at 699, 512 N.E.2d at 539, 518 N.Y.S.2d at 956. The Court distinguished the case before it from *Tebbutt* by finding that the plaintiff's emotional injuries did not result from what happened to the fetus, but rather from her undergoing an unnecessary abortion, an act contrary to her beliefs. See *id.* at 699,

Similarly, in *Ferrara v. Bernstein*,⁸⁹ the Court allowed the plaintiff to recover for NIED after she miscarried following an unsuccessful abortion.⁹⁰ The Court likewise reasoned that recovery was permitted because the defendant doctor owed a duty directly to the plaintiff.⁹¹

The inconsistencies in this area of the law are apparent:

There may be recovery for emotional distress for stillbirths caused by automobile accidents but not for those caused by malpractice; however, there may be such recovery for abortions undertaken as a result of malpractice. There is no recovery for the emotional distress of parents whose child is born with severe injuries as a result of either negligence or malpractice.⁹²

To this point, the state of the law was that automobile operators, but not doctors, owed pregnant women a duty not to cause them emotional distress by negligently causing the stillbirth of their children.⁹³ A child born alive, but with birth defects caused by a doctor, could maintain a cause of action for NIED,⁹⁴ but when presumably more egregious negligence actually resulted in the death of the child, the doctor was insulated from liability.⁹⁵ Finally, a doctor had a duty not to expose a woman to emotional injuries when advising her whether to undergo an abortion,⁹⁶ and when performing an abortion.⁹⁷ Despite these inconsistencies, it took the Court of Appeals nearly twenty years to fill this gap left by *Tebbutt* and its progeny.

512 N.E.2d at 539, 518 N.Y.S.2d at 956.

⁸⁹ 81 N.Y.2d 895, 613 N.E.2d 542, 597 N.Y.S.2d 636 (1993).

⁹⁰ *See id.* at 897, 613 N.E.2d at 543, 597 N.Y.S.2d at 637.

⁹¹ *Id.* at 898, 613 N.E.2d at 544, 597 N.Y.S.2d at 638 ("Indeed, the breach of duty owed directly to plaintiff leading to her emotional distress is plainly compensable under *Martinez*").

⁹² Moore & Gaier, *supra* note 9. At this point, it had become clear to some that overruling *Tebbutt* would significantly improve this area of the law:

It is our view that the time is ripe for at least the rule of *Tebbutt* to be overruled, such that there may be recovery for medical malpractice which results in miscarriages or stillbirths. Such a rule would add a measure of consistency to this area of law in that stillbirths, miscarriages and abortions would be treated the same regardless of whether they are due to motor vehicle accidents or malpractice.

Id.

⁹³ *See supra* notes 68–69, 72, 76 and accompanying text.

⁹⁴ *See, e.g.,* Woods v. Lancet, 303 N.Y. 349, 351, 102 N.E.2d 691, 691–92 (1951).

⁹⁵ *See supra* note 80 and accompanying text.

⁹⁶ *See supra* notes 86–88 and accompanying text.

⁹⁷ *See supra* notes 89–91 and accompanying text.

II. *BROADNAX V. GONZALEZ AND FAHEY V. CANINO:* THE GAP IS FILLED

A. *Facts, Holding, and Rationale*

On April 1, 2004, the Court of Appeals overruled a nineteen-year-old precedent when it answered in the affirmative the question of "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."⁹⁸ Two separate cases came together before the Court of Appeals so this issue could be settled.⁹⁹

One of the plaintiffs, Karen Broadnax, was under the care of the defendants Frederick Gonzalez, an obstetrician, and Georgia Rose, a certified nurse-midwife, during her 1994 pregnancy.¹⁰⁰ On September 25, 1994, a series of traumatic events unfolded, tragically ending with Karen Broadnax's delivery of a full-term stillborn girl.¹⁰¹ As a result of these events, Karen Broadnax and

⁹⁸ See *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 151, 809 N.E.2d 645, 646, 777 N.Y.S.2d 416, 417 (2004) (overruling *Tebbutt*). The 6-1 opinion was authored by Judge Rosenblatt, with only Judge Read dissenting. *Id.* at 157, 809 N.E.2d at 650, 777 N.Y.S.2d at 421.

⁹⁹ *Cf. Id.* at 151-53, 809 N.E.2d at 646-47, 777 N.Y.S.2d at 417-18.

¹⁰⁰ See *id.* at 151-52, 809 N.E.2d at 646, 777 N.Y.S.2d at 417.

¹⁰¹ See *id.* at 151-52, 809 N.E.2d at 646-47, 777 N.Y.S.2d at 417-18. Karen contacted defendant Rose because her water had broken and she had lost a large amount of blood. *Id.* at 151-52, 809 N.E.2d at 646, 777 N.Y.S.2d at 417. Karen and her husband were told to meet defendant Rose at Westchester Birth Center, also a defendant in the case. *Id.* at 152, 809 N.E.2d at 646, 777 N.Y.S.2d at 417. After again experiencing vaginal bleeding, Karen was transported to the Columbia Presbyterian Allen Pavilion in Manhattan at the behest of Dr. Gonzalez. *Id.* at 152, 809 N.E.2d at 646, 777 N.Y.S.2d at 417. This was done despite Karen's suggestion that she be brought to St. John's Riverside Hospital, which was located across the street from her location at the Westchester Birth Center. *Id.* at 152, 809 N.E.2d at 646, 777 N.Y.S.2d at 417. When the Broadnaxes arrived at Columbia Presbyterian, nearly two hours had passed since their original phone call to defendant Rose. *Id.* at 151-52, 809 N.E.2d at 646, 777 N.Y.S.2d at 417. Though Dr. Gonzalez had not yet arrived to meet the Broadnaxes, defendant Rose did not contact the on-call physician. *Id.* at 152, 809 N.E.2d at 646, 777 N.Y.S.2d at 417. The Broadnaxes waited forty-five minutes at Columbia Presbyterian before Dr. Gonzalez arrived and decelerations in the fetal heartbeat were detected. *Id.* at 152, 809 N.E.2d at 646, 777 N.Y.S.2d at 417. At this point, Dr. Gonzalez decided to conduct a pelvic and vaginal examination, rather than perform an emergency cesarean section. *Id.* at 152, 809 N.E.2d at 646, 777 N.Y.S.2d at 417. Thereafter, Dr. Gonzalez performed a sonogram, which detected no fetal heartbeat. *Id.* at 152, 809 N.E.2d at 646-47, 777 N.Y.S.2d at 417-18. Dr. Gonzalez performed a cesarean section about a half an hour later, at which time Karen delivered a full-term stillborn girl. *Id.* at 152, 809 N.E.2d at 647,

her husband filed suit against the 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."¹⁰²

In 1999, the other plaintiff, Debra Ann Fahey, while pregnant with twins, was under the care of defendant Dr. Anthony C. Canino and defendant OBGYN Health Care Associates, P.C.¹⁰³ Debra Ann Fahey and her husband brought an action against the defendants after their alleged failure to diagnose a cervical condition led to the miscarriage and stillbirth of both twins.¹⁰⁴

The Broadnaxes and Faheys petitioned the Court of Appeals after adverse lower court rulings, both of which relied on *Tebbutt* in dismissing the plaintiffs' claims for NIED.¹⁰⁵ Due to its

777 N.Y.S.2d at 418.

¹⁰² *Id.* at 152, 809 N.E.2d at 647, 777 N.Y.S.2d at 418.

¹⁰³ *Id.* at 152, 809 N.E.2d at 647, 777 N.Y.S.2d at 418.

¹⁰⁴ *See id.* at 152–53, 809 N.E.2d at 647, 777 N.Y.S.2d at 418. During a visit with Dr. Canino's partner, defendant Dr. Patrick E. Ruggiero, Debra, while in her eighteenth week of pregnancy, "complained of lower abdominal pains and cramping." *Id.* at 152, 809 N.E.2d at 647, 777 N.Y.S.2d at 418. Dr. Ruggiero concluded that the pain was being caused by one of the twins pressing against Debra's sciatic nerve. *Id.* Two days after her visit with Dr. Ruggiero, Debra telephoned Dr. Canino to complain of increasing pain and nausea. *Id.* at 152–53, 809 N.E.2d at 647, 777 N.Y.S.2d at 418. Dr. Canino told Debra to lie down, explaining to her that "the pain was likely related to her sciatic nerve and the nausea probably resulted from something she ate for lunch." *Id.* at 153, 809 N.E.2d at 647, 777 N.Y.S.2d at 418. Less than two hours later, Debra gave birth to one of the twins at home, and the other at the hospital after being transported there by ambulance. *Id.* at 153, 809 N.E.2d at 647, 777 N.Y.S.2d at 418. Tragically, neither of the twins survived. *Id.* at 153, 809 N.E.2d at 647, 777 N.Y.S.2d at 418. Debra was later diagnosed with having an "incompetent cervix," a condition that was later remedied, allowing her to give birth to a healthy, albeit premature, daughter the following year. *Id.* at 153, 809 N.E.2d at 647, 777 N.Y.S.2d at 418.

¹⁰⁵ *See Broadnax v. Gonzalez*, 304 A.D.2d 781, 781, 759 N.Y.S.2d 499, 500 (2d Dep't 2003), *rev'd* 2 N.Y.3d 148, 809 N.E.2d 645, 777 N.Y.S.2d 416 (2004).

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.

Id. at 781, 759 N.Y.S.2d at 500; *see also Fahey v. Canino*, 304 A.D.2d 1069, 1072, 758 N.Y.S.2d 708, 710 (3d Dep't 2003), *rev'd sub nom. Broadnax v. Gonzalez*, 2 N.Y.3d 148, 809 N.E.2d 645, 777 N.Y.S.2d 416 (2004).

[W]e conclude that the emotional distress for which plaintiff seeks recovery derives from her concern over what happened to the fetuses and not for a breach of any duty that defendants owed to her. Therefore, in order for plaintiff to recover damages under the circumstances presented herein, she

inability to "defend *Tebbutt's* logic or reasoning,"¹⁰⁶ the Court of Appeals reversed the lower courts' decisions in *Broadnax* and *Fahey* and overruled its own prior decision in *Tebbutt*.¹⁰⁷ The Court of Appeals' majority opinion pointed to the "logical gap" *Tebbutt* left in the law: "[I]t 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."¹⁰⁸ Finally, after several decades, the Court decided: "It [was] time to fill the gap."¹⁰⁹ Since the fetus is unable to bring suit in a situation that causes its stillbirth or miscarriage, "it must follow in the eyes of the law that any injury here was done to the mother."¹¹⁰ The Court noted that its decision was in accordance with the majority of other jurisdictions in the country.¹¹¹

In holding that a mother may recover for emotional distress when medical malpractice results in a stillbirth or miscarriage, the Court finally recognized that the treating physician owes a duty not only to the fetus, but also to the mother:

Although, in treating a pregnancy, medical professionals owe a duty of care to the developing fetus . . . , 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.

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 emotional

must demonstrate that she suffered an independent physical injury Because plaintiffs have failed to tender any evidence that plaintiff sustained a medically cognizable physical injury beyond that naturally attendant to childbirth, this cause of action falls within those cases which preclude the mother's recovery of damages for emotional distress resulting from the death of a child in utero or postpartum.

Fahey, 304 A.D.2d at 1072, 758 N.Y.S.2d at 710 (citation omitted).

¹⁰⁶ *Broadnax*, 2 N.Y.3d at 153, 809 N.E.2d at 648, 777 N.Y.S.2d at 419.

¹⁰⁷ See *id.* at 153, 809 N.E.2d at 647, 777 N.Y.S.2d at 418.

¹⁰⁸ *Id.* at 154, 809 N.E.2d at 648, 777 N.Y.S.2d at 419. Thus, this "logical gap" left the fetus in a "juridical limbo." *Id.* at 154, 809 N.E.2d at 648, 777 N.Y.S.2d at 419.

¹⁰⁹ *Id.* at 154, 809 N.E.2d at 648, 777 N.Y.S.2d at 419.

¹¹⁰ *Id.* at 154, 809 N.E.2d at 648, 777 N.Y.S.2d at 419 (quoting *Tebbutt v. Virostek*, 65 N.Y.2d 931, 940, 483 N.E.2d 1142, 1149, 493 N.Y.S.2d 1010, 1017 (1985) (Kaye, J., dissenting)).

¹¹¹ See *id.* at 155 n.4, 809 N.E.2d at 649 n.4, 777 N.Y.S.2d at 420 n.4.

distress.¹¹²

The majority understood that its holding was a departure from precedent, but found *stare decisis* alone insufficient to support the continuation of a rule that it found to be both unfair and illogical.¹¹³ The *Tebbutt* rule represented the Court of Appeals' effort to limit liability by means of a bright-line circumscription of duty. "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 . . . clinging to a line that has proved indefensible."¹¹⁴

B. Judge Read's Dissent

Judge Read dissented from the majority opinion in *Broadnax* for several reasons—one being respect for the doctrine of *stare decisis*.¹¹⁵ Judge Read did not think the majority's reasons for redefining a physician's duty of care to a pregnant woman justified overruling *Tebbutt*.¹¹⁶ In her view, nothing in the previous twenty years had made the *Tebbutt* rule outdated or unworkable. In other words, because the gap referred to by the majority¹¹⁷ existed in 1985 when *Tebbutt* was decided, Judge Read considered the majority's decision to fill it now, in contravention of precedent, to be unjustified.¹¹⁸

While Judge Read's concerns about the doctrine of *stare decisis* are generally well-founded, *stare decisis* is not enough by itself to justify adherence to a rule that has consistently produced unfair and illogical results. Further, the fact that the gap existed

¹¹² *Id.* at 154–55, 809 N.E.2d at 648–49, 777 N.Y.S.2d at 419–20 (citation and footnote omitted). The Court was sure to clarify that its decision was not to be interpreted as recognizing a similar duty owed by a doctor to the father of a fetus. *Id.* at 155 n.3, 809 N.E.2d at 649 n.3, 777 N.Y.S.2d at 420 n.3. Where applicable, the father's recovery is limited to loss of services and consortium. *Id.* at 155 n.3, 809 N.E.2d at 649 n.3, 777 N.Y.S.2d at 420 n.3.

¹¹³ *See id.* at 156, 809 N.E.2d at 649, 777 N.Y.S.2d at 420.

¹¹⁴ *Id.* at 156, 809 N.E.2d at 649, 777 N.Y.S.2d at 420.

¹¹⁵ "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." *Id.* at 156, 809 N.E.2d at 650, 777 N.Y.S.2d at 421 (Read, J., dissenting) (quoting *People v. Damiano*, 87 N.Y.2d 477, 488, 663 N.E.2d 607, 613–14, 640 N.Y.S.2d 451, 457–58 (1996) (Simons, J., concurring)).

¹¹⁶ *Id.* at 156, 809 N.E.2d at 650, 777 N.Y.S.2d at 421.

¹¹⁷ *See supra* note 108 and accompanying text.

¹¹⁸ *See Broadnax*, 2 N.Y.3d at 156–57, 809 N.E.2d at 650, 777 N.Y.S.2d at 421 (Read, J., dissenting).

when *Tebbutt* was decided does not necessarily mean that the Court should not fill it now. In fact, the Court of Appeals itself said: "Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it."¹¹⁹ Judge Read also thought that the rule from *Tebbutt* was easy to apply and proved to be workable over the previous twenty years.¹²⁰ Though this is an arguably accurate observation, it does not appear that courts will have any more difficulty applying the rule from *Broadnax* than they did applying the rule from *Tebbutt*. In fact, now that the physical injury threshold¹²¹ from *Tebbutt* no longer needs to be surmounted, the rule from *Broadnax* is arguably easier to apply and more workable than that from *Tebbutt*. Under *Tebbutt*, the lower courts needed to determine whether a plaintiff suffered an independent physical injury or whether the plaintiff's injury was a normal incident to childbirth—a task that historically has not been easy to undertake.¹²² Now, under *Broadnax*, no such determination is necessary.¹²³

Though, according to Judge Read, the majority's rule "expand[ed] existing law sparingly," she expressed concern over the effect that this expansion of medical caregivers' liability will have on the cost and availability of gynecological and obstetrical services.¹²⁴ Judge Read was also apparently uncomfortable with asking juries to quantify the emotional distress suffered by a mother who has experienced a stillbirth or miscarriage.¹²⁵

Emotional damages flowing from a stillbirth caused by medical malpractice seem no more speculative than in any other case where recovery for emotional distress is permitted, such as when a pregnant woman loses her child due to the negligence of an automobile operator.¹²⁶ These damages certainly are no more

¹¹⁹ *Woods v. Lancet*, 303 N.Y. 349, 354, 102 N.E.2d 691, 694 (1951).

¹²⁰ *Broadnax*, 2 N.Y.3d at 156, 809 N.E.2d at 650, 777 N.Y.S.2d at 421 (Read, J., dissenting).

¹²¹ See *supra* text accompanying note 72.

¹²² See *supra* note 83 and accompanying text.

¹²³ See *supra* text accompanying note 112.

¹²⁴ *Broadnax*, 2 N.Y.3d at 156-57, 809 N.E.2d at 650, 777 N.Y.S.2d at 421 (Read, J., dissenting).

¹²⁵ See *id.* at 157, 809 N.E.2d at 650, 777 N.Y.S.2d at 421.

¹²⁶ See, e.g., *Endresz v. Friedberg*, 24 N.Y.2d 478, 487, 248 N.E.2d 901, 906, 301

speculative because they resulted from the negligence of a doctor rather than an automobile operator. Further, if the level of damages awarded to these mothers becomes truly overburdensome to the medical industry and public policy so dictates, a cap on the amount of recovery can always be imposed by New York's legislature.¹²⁷

III. THE AFTERMATH OF A DECISION LONG OVERDUE FOR NEW YORK

A. *Some Initial (Mixed) Reactions*

Almost immediately after the Court of Appeals decided *Broadnax*, there was much speculation as to the likely implications of the decision.¹²⁸ Some expressed concern over what effect this increased exposure to liability would have on the medical community, particularly on the specialty of obstetrics.¹²⁹ Others felt the decision was fair and posed no real threat to the medical community.¹³⁰

There was also speculation as to the amount of damages that juries could be expected to award for NIED in prenatal medical malpractice cases.¹³¹ Some predicted that a flood of litigation

N.Y.S.2d 65, 72 (1969) (explaining that emotional damages may be awarded when a plaintiff's negligent driving causes a woman to deliver a stillborn).

¹²⁷ Some states have already enacted legislation limiting the amount of recovery possible for non-economic losses in medical malpractice lawsuits. *See, e.g.*, ALA. CODE § 6-5-544 (2005); CAL. CIV. CODE § 3333.2 (West 2005); COLO. REV. STAT. § 13-21-102.5 (2004); FLA. STAT. § 766.118(2) (2005); KAN. STAT. ANN. § 60-19a02 (2005); MICH. COMP. LAWS § 600.1483 (2004); MISS. CODE ANN. § 11-1-60 (2005); MO. REV. STAT. § 538.210 (2004); MONT. CODE ANN. § 25-9-411 (2005); OHIO REV. CODE ANN. § 2323.43 (West 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2005); W. VA. CODE § 55-7B-8 (2004).

¹²⁸ *See, e.g.*, John Caher, *Liability Widens for Fetal Death by Doctors*, N.Y. L.J., Apr. 2, 2004, at 1; Marian E. Silber & Maria Elyse Rabar, *Damages for Stillbirth: Will the Floodgates Be Opened?*, N.Y. L.J., Apr. 30, 2004, at 3.

¹²⁹ *See Caher, supra* note 128 ("This type of decision expands, and potentially very significantly, the exposure of physicians Clearly, the facts show there is a crisis, and this will have an impact on the specialty most in crisis, obstetrics. We are very concerned.") (quoting Gerard L. Conway, Director of Governmental Affairs for the Medical Society of the State of New York).

¹³⁰ *See id.* ("This recognizes a reality of these terrible situations and brings the law into conformity with what people's understanding of what justice is We sincerely believe that there is no malpractice crisis and that it is a trumped-up issue and fraud perpetrated by the insurers.") (quoting Lenore Kramer, past President of the New York State Trial Lawyers Association).

¹³¹ *See id.*

would follow the decision: “[T]he floodgates have clearly been opened. The only question is how far.”¹³² Though *Broadnax*'s full impact remains to be seen, it did not take long for some of its implications to surface.

B. *Is Vaccaro Still Valid After Broadnax?*

Shortly after *Broadnax*, several members of the legal community predicted that a likely result of the decision was the implicit overruling of *Vaccaro*.¹³³ In fact, it was urged that reading *Broadnax* otherwise would lead to an unfair and illogical result:

Infants that survive but are injured as a result of malpractice possess their own causes of action, such that there is no gap or immunity in providing a remedy for wrongful conduct. However, that does not change the fact that the mother of an injured child—to whom a duty is owed—may sustain her own serious emotional injury from the injury to her child. . . . Denying that mother the right to recover for her emotional harm would leave a logical gap both in the degree and the nature of the recovery.

It would likewise be illogical to permit recovery by the mother whose child is stillborn, but to deny it where the baby dies as a result of the injuries caused by the same type of malpractice within minutes, hours, days, or weeks after delivery.¹³⁴

It has been asserted that the only logical rule to be derived from *Broadnax*'s recognition of a duty owed to the mother is that the mother is permitted to recover for emotional injuries resulting from any injury to her child sustained prior to and during birth.¹³⁵ “[N]othing in the opinion expressly limit[ed] the mother's recovery for emotional injury to miscarriages or stillbirths.”¹³⁶

This was precisely the position taken by the Second Department in *Sheppard-Mobley v. King*.¹³⁷ In that case, the

¹³² See Silber & Rabar, *supra* note 128.

¹³³ Thomas A. Moore & Matthew Gaier, 'Broadnax' Allows Recovery for Emotional Distress in Miscarriages, N.Y. L.J., June 1, 2004, at 3 (“[T]he logical conclusion is that *Vaccaro* is no longer valid law.”).

¹³⁴ *Id.*

¹³⁵ See *id.*

¹³⁶ *Id.*

¹³⁷ 10 A.D.3d 70, 778 N.Y.S.2d 98 (2d Dep't 2004), *rev'd*, 4 N.Y.3d 627, 830 N.E.2d 301, 797 N.Y.S.2d 403 (2005).

plaintiff mother gave birth to a child with severe defects due to the alleged negligence of the defendant doctors.¹³⁸ As a result, the plaintiff brought multiple claims against the defendants, including one for the emotional distress she suffered as a result of her child being born in an impaired state.¹³⁹ The court found *Broadnax* controlling:

[W]e discern no reasonable basis to limit the *Broadnax* holding to cases of stillbirth and miscarriage. The duty owed to the mother remains the same whether the fetus is stillborn or is born in an impaired state. The duty is not vitiated by virtue of the live birth of a child in a severely impaired state. In addition, the cases prior to *Broadnax* drew no distinction between miscarriage and stillbirth on the one hand, and the live birth of a fetus in an impaired state on the other hand, when they prohibited a mother's recovery for damages for emotional distress in the absence of independent physical injury to the mother.¹⁴⁰

At first, it seemed that the Second Department's holding would be a good indicator of how the rest of the courts would decide this issue. Its decision not only made logical sense in light of *Broadnax's* holding, but it also seemed to be in accord with the fair and equitable outcome that the *Broadnax* Court clearly sought.

Because the Court of Appeals explicitly recognized that a doctor owes an expectant mother a duty of care, there was no reason to suppose that this duty would only be recognized for certain results of negligence but not for others. It seemed logical to say that this duty exists regardless of whether the subsequent breach of that duty results in the stillbirth of a child or in birth defects to a child. On the other hand, it would seem quite

¹³⁸ See *id.* at 72–73, 778 N.Y.S.2d at 99–100. In *Sheppard-Mobley*, the pregnant plaintiff was advised by the defendant doctors to terminate her pregnancy because she suffered from a condition that rendered successful completion of the pregnancy unlikely. *Id.* at 72, 778 N.Y.S.2d at 99. The plaintiff agreed to undergo an abortion by receiving an injection of the drug methotrexate. *Id.* at 72, 778 N.Y.S.2d at 99. One of the defendants allegedly administered an ineffective dose of methotrexate to the plaintiff. *Id.* at 72, 778 N.Y.S.2d at 99. By the time the defendants discovered that the plaintiff was still pregnant, her options were either to undergo a late-term abortion or give birth to the child. *Id.* at 72, 778 N.Y.S.2d at 99–100. The plaintiff eventually gave birth to a child with serious birth defects. *Id.* at 72, 778 N.Y.S.2d at 100.

¹³⁹ See *id.* at 73, 778 N.Y.S.2d at 100.

¹⁴⁰ *Id.* at 77, 778 N.Y.S.2d at 103.

illogical to say that the nature of the duty depends on the results of its subsequent breach. Unfortunately, the Court of Appeals disagreed.

In May 2005, the *Sheppard-Mobley* case reached the Court of Appeals, which unanimously reversed the Second Department.¹⁴¹ The Court explained: "Our decision in [*Broadnax*] was intended to fill a gap created by our previous decision in *Tebbutt* which concerned the medical malpractice performed upon the body of an expectant mother resulting in a miscarriage or stillbirth. . . . [O]ur holding in [*Broadnax*] [wa]s a narrow one . . ." ¹⁴² Since a child born with birth defects due to medical malpractice has his or her own cause of action against the doctor, the Court saw no reason to also allow the child's mother to collect for her emotional injuries unless she suffered an independent injury. Instead, *Broadnax* was "intended to permit a cause of action where otherwise none would be available to redress the wrongdoing that resulted in a miscarriage or stillbirth."¹⁴³

Regardless of whether one agrees with the Court's decision in *Sheppard-Mobley* from a policy standpoint, it can hardly be argued that it is entirely inconsistent with New York's jurisprudence in this area. Since New York has a history of expanding the law in the NIED area sparingly and limiting liability whenever possible, it is not at all surprising that this rigid formulation of the *Broadnax* holding was adopted, and the Second Department's more expansive reading was rejected.

C. *The Limits of Broadnax*

Another case that came before the Appellate Division after the *Broadnax* decision was *Shaw v. QC-Medi New York, Inc.*¹⁴⁴ In *Shaw*, the plaintiff mother sued the defendant medical providers for NIED after witnessing her daughter nearly suffocate due to a blockage in her ventilator tube.¹⁴⁵

The court distinguished the case from the situation in *Broadnax* and denied recovery to the mother.¹⁴⁶ The court found

¹⁴¹ See *Sheppard-Mobley v. King*, 4 N.Y.3d 627, 637, 830 N.E.2d 301, 304, 797 N.Y.S.2d 403, 406 (2005).

¹⁴² *Id.* at 636–37, 830 N.E.2d at 304, 797 N.Y.S.2d at 406.

¹⁴³ *Id.* at 637, 830 N.E.2d at 304, 797 N.Y.S.2d at 406.

¹⁴⁴ 10 A.D.3d 120, 778 N.Y.S.2d 791 (4th Dep't 2004).

¹⁴⁵ See *id.* at 121–22, 778 N.Y.S.2d at 792–93.

¹⁴⁶ See *id.* at 123–24, 778 N.Y.S.2d at 794–95.

controlling the fact that the plaintiff mother in *Broadnax* was actually the patient of the doctor, making the duty owed to her a logical result of the doctor-patient relationship.¹⁴⁷ The court saw the plaintiff mother in *Shaw* more analogous to the father in *Broadnax*, where, because the father was not the doctor's patient, the court expressly refused to recognize a duty flowing from the doctor to the father.¹⁴⁸ Likewise, since the mother in *Shaw* was not the patient of the defendants, the court held they did not owe her a duty of care.¹⁴⁹ In so holding, the court made a familiar public policy argument, expressing its fears of unlimited liability and opening the floodgates of litigation:

To permit liability under these circumstances would create untold numbers of claims by third parties. Familial concerns are present in most instances involving relationships between health care providers and patients. Quite commonly, close family members are concerned with a patient's care and treatment. Were we to permit such liability as is sought by plaintiffs herein, medical providers would necessarily be concerned with matters unrelated to their treatment of patients.¹⁵⁰

According to the court in *Shaw*, the holding in *Broadnax* is limited to pregnant mothers, and does not extend to other family members who may suffer emotional distress as a result of a family member receiving negligent medical care. Though only the Fourth Department has spoken on the issue thus far, it is likely that the rest of the Appellate Division will take the same position. The Fourth Department's reading of *Broadnax* seems accurate, particularly in light of New York's longstanding tradition of making only minor expansions at a time in recovery allowed for NIED.¹⁵¹

D. *Better Late Than Never—A Change Long Overdue*

The *Broadnax* case itself, coupled with the few cases that have already followed and interpreted it, make clear that a new bright-line rule has been created—one that is sufficiently limited in scope as to remain consistent with the theme of limited

¹⁴⁷ See *id.* at 123, 778 N.Y.S.2d at 794.

¹⁴⁸ See *id.* at 123, 778 N.Y.S.2d at 794.

¹⁴⁹ *Id.* at 124, 778 N.Y.S.2d at 795.

¹⁵⁰ *Id.* at 125, 778 N.Y.S.2d at 795.

¹⁵¹ See *supra* Part I.

liability underlying New York's common law in NIED. The new bright-line rule seems to allow a mother recovery for emotional distress resulting from a negligently inflicted injury to her child before or during birth, but only where the negligence results in a miscarriage or stillbirth.

The *Broadnax* decision was long overdue in New York. It is clear, however, that the *Broadnax* decision, albeit important, really does "expand [the] law sparingly."¹⁵² The *Broadnax* decision seems to rest largely, if not entirely, on the inseparable and completely intertwined relationship between the mother and the fetus. There seems to be no familial relationship sufficiently comparable to this unique relationship that would justify genuine concerns of unlimited liability for medical practitioners and opening the floodgates of litigation. It seems unlikely that *Broadnax* will be expanded to situations outside of the prenatal context, or that it will be interpreted as allowing recovery to anyone other than a pregnant woman.¹⁵³

Unfortunately, this change in the law does not have the power to eliminate all prenatal injuries suffered at the hands of medical professionals, but it nonetheless accomplishes something important. When an expectant mother goes to an obstetrician or other medical practitioner for prenatal care, she expects, whether or not consciously, that she is owed a duty from this professional to protect her and her child from harm. The law is now willing to validate that expectation and allow for compensation when that expectation, which the mother is undeniably justified in holding, goes unsatisfied and results in emotional distress.

CONCLUSION

In April 2004, the New York Court of Appeals filled a gap in recovery permitted for NIED in the prenatal malpractice area. Now, a mother is permitted to recover for emotional distress when medical malpractice results in the stillbirth of her child, regardless of whether the mother suffers an independent

¹⁵² *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 156, 809 N.E.2d 645, 650, 777 N.Y.S.2d 416, 421 (2004) (Read, J., dissenting).

¹⁵³ The Court of Appeals was careful in expressly eliminating the possibility of its holding in *Broadnax* being misunderstood to allow recovery to fathers of injured fetuses. See *supra* note 112. Also, in *Shaw*, the Fourth Department refused to recognize *Broadnax's* applicability outside of the prenatal context. See *supra* text accompanying notes 144-49.

physical injury. Because the mother is actually the patient when she undergoes prenatal care from a medical professional, it makes logical sense to recognize that a duty is owed to the mother, as well as to the fetus. The unique relationship between a pregnant woman and her fetus ensures that this rule will not open the floodgates to endless litigation, and also will not result in unlimited liability for medical professionals. Since this rule is sufficiently limited in scope and possible application, these typical public policy concerns do not justify denying recovery. Though this rule will undoubtedly expose medical professionals to increased liability for their negligence, it is consistent with New York's interest in allowing an injured party to seek redress for a substantial injury. When the Court of Appeals decided to permit recovery for emotional distress to mothers who lose their children due to prenatal medical malpractice, it created a new, workable bright-line rule that has been long overdue for New York.

