Emotional distress from a miscarriage or stillbirth – N.Y.

By Lori Rosen Semlies

A recent New York Court of Appeals decision may mean an increasing number of malpractice cases against obstetricians, gynecologists and hospitals in relation to miscarriage or stillbirth. In Broadnax v. Gonzalez (2004), the court reasoned that a physician owes a duty of care not only to a mother, but also to her fetus. The mother may recover for emotional injuries, even when she has not suffered an independent physical injury. The court stated that the duty a physician owes to the mother is the same duty regardless of the outcome of the delivery: a normal healthy child, a child with defects, or a stillborn child.

Damages for emotional distress claims are difficult to assess. Damage awards may be the result of a jury’s determination of the value of the pregnancy and "potential" baby to a woman.

Background

Until recently, the highest court in New York prohibited a mother from recovering damages for the emotional distress she suffered from a miscarriage or delivering a stillborn fetus as a result of medical malpractice, absent her own physical injury from the malpractice. This ruling was often questioned as unjust, since the law allowed a mother to recover such damages if her baby was born alive, but injured as a result of malpractice.

In Broadnax v. Gonzalez, 2 N.Y.3rd 148 (2004), and its companion case, Fahey v. Canino, the Court of Appeals reversed itself and allowed for compensation of emotional injuries under these circumstances, even where the mother has not suffered an independent physical injury. The court reasoned that a physician owes a duty of care not only to the mother, but also to the fetus. The duty is the same regardless of the outcome of the delivery, that is, whether the child is born healthy, with defects, or is stillborn.

The court did not however extend the holding to the father of the fetus, reasoning that the physician does not owe a duty of care to the father.

Issue

Two concerns are raised as a result of this decision: attempted expansion of this holding by the lower courts; and, the calculation of damages.

The Appellate Division, Second Department, which includes Brooklyn, Long Island and Westchester County, already tried to expand Broadnax and allowed a mother to recover for emotional injuries that she suffered before delivering an infant with serious defects that resulted from doctors’ failure to properly perform a chemically induced abortion: Sheppard-Mobley v. King, 778 N.Y.S.2d 98 (2d Dep’t 2004). The mother underwent chemical injections to induce an abortion based upon misinformation, and suffered from facing an “emotionally wrenching decision” of having a late term abortion versus delivering a deformed child.

The Court of Appeals reversed this decision and reiterated that Broadnax is limited to cases where the fetus is miscarried or stillborn. Recently, an Albany County Supreme Court judge applied the court’s reasoning in Sheppard-Mobley and refused to extend Broadnax to a case where the infant was born alive but died within two hours: Warnock v. Dello.

The court has yet to confront a set of facts like in Warnock post-Broadnax. Presently, the law only permits a mother to recover emotional damages if her fetus did not have its own cause of action for pain and suffering.
It will be interesting to see the jury awards for mother’s emotional damages and how the appellate divisions will determine what is an excessive, or perhaps too low of a verdict. Such a calculation forces the assignment of a monetary value on the loss of a “potential” life. Clearly, issues of morality, ethics and religion are implicated.

Impact of the Decision

The number of medical malpractice claims against physicians, hospitals and midwives is likely to increase as a result of Broadnax.

Comment

Some would say that Broadnax is consistent with a trend by the court to expand the recovery of money damages in personal injury and medical malpractice cases. However, the court was careful to write its decision and the decision in Sheppard-Mobley to the unique set of facts where no redress was previously available when medical malpractice caused the loss of a fetus.