RECOVERY FOR EMOTIONAL DISTRESS FROM LOSS OF FETUS

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This month we discuss the Court of Appeals' reversal of its own precedent to find that a mother has a cause of action for emotional distress when medical malpractice results in loss of her fetus, regardless of whether the mother experienced physical injury.

We also discuss: an insurance coverage case in which the Court held that an employer was entitled to coverage for an assault committed by one of its employees because, from the employer's point of view, the conduct was an "accident" not "expected or intended;" a decision declining to reach the merits of a challenge to Department of Health guidelines because the plaintiff lacked standing; and a ruling that may require cash-strapped Nassau County to refund certain taxes, depending upon the outcome of a hearing to be conducted on remand into the impact such a refund would have upon the County.

Fetal Loss Recovery

Overruling its 19-year precedent, the Court sustained a cause of action for emotional harm on behalf of a mother when medical malpractice causes a miscarriage or stillbirth without a showing of physical injury to the mother. In an opinion by Judge Albert M. Rosenblatt for a six-judge majority, the Court reversed the dismissal of such claims in *Broadnax v. Gonazalez* and *Fahey v. Canino,* and sent both cases back to the trial courts for further proceedings. Not unlike several other cases in which the Court over the years has been confronted with the thorny issues involved in a claim for the negligent infliction of emotional harm, the majority's decision provoked a dissent, in this instance by Judge Susan Phillips Read. (*See* Moore and Gaier, *Negligent Infliction of Emotional Distress,* N.Y.L.J. July 17, 2000, Aug. 1, 2000 and Sept. 5, 2000 (a three-part series).)

Both cases involved mothers who lost unborn fetuses (*Fahey* involved twins) as the result of alleged medical malpractice. In the face of the Court's 1985 decision in *Tebbutt v. Virostek*, 65 N.Y.2d 931, the Appellate Divisions had dismissed both cases as a matter of law. In reversing the determinations in *Broadnax* and *Fahey*, the Court made it clear that it was neither reaching the merits of either case nor acknowledging that a similar claim existed on behalf of the fathers, other than the derivative claim for loss of services a father might assert in any case in which injury is inflicted on his wife.

The Court took the opportunity to "revisit" the issue and concluded that it was no longer able to defend the "logic or reasoning" of *Tebbutt*. There, the Court had acknowledged a cause of action for a surviving infant injured by malpractice while in utero, but immunized medical caregivers from *any* liability when the malpractice caused a miscarriage or stillbirth and there was no physical injury to the mother. Finding that *Tebbutt* had created a "logical gap," the Court adopted the reasoning of the dissenters in that case, that the fetus had been consigned to "juridical limbo" (65 N.Y.2d at 933 [Jasen dissent]) and that if the fetus had no cause of action "it must follow in the eyes of the law that any injury here was done to the mother." (*Id.* at 940 [Kaye dissent].) In reaching its determination, the Court observed that its holding was consistent with the law in a majority of jurisdictions to have considered the issue.

Judge Read in her dissent concluded that the holding in *Tebbutt* presented a "bright line" workable rule – that exposure to liability for emotional distress should be limited to instances in which the woman sustained physical injury distinct from that of the fetus – and that *stare decisis* dictated adherence to the rule. While acknowledging the emotional impact a woman suffers as the result of a miscarriage or the delivery of an unborn fetus, the dissent expressed concern about expanding liability to medical caregivers and the practical problem juries will have in fairly assessing damages.

Employee Assault Covered

Four years ago the Court held that a landlord's insurance policy covered a claim against it arising out of the murder of a tenant because the murder, while intended by the assailant, was an "accident" from the point of view of the landlord. *Agoado Realty Corp. v. United Int'l Ins. Co.,* 95 N.Y.2d 141 (2000). Last month the Court extended this holding to an intentional assault committed by an employee of the insured. *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*

The policyholder in *RJC Realty* was a spa that had been sued for negligent hiring and supervision of a masseur by a customer who claimed to have been sexually assaulted. The insurance company denied coverage on the basis that the claim fell outside the definition of an "occurrence" -- a definition that included an "accident" -- and that two bodily injury exclusions applied, one for injuries "expected or intended from the standpoint of the insured" and the other for those "arising out of . . . [a] body massage."

The key issue was whether the expectation and intent of the employee was attributable to the insured. To resolve this issue the Court, in a unanimous opinion by Judge Robert S. Smith, turned to the law of *respondeat superior.* It found that the employee's alleged conduct could not be attributable to the employer because, if the allegations were true, the masseur had "departed from his duties for solely personal motives unrelated to the furtherance of [the employer's] business."[1] Thus, from the employer's point of view, the claim arose out of an accident that was not expected or intended.

The Court considered a closer question the applicability of the remaining exclusion. Applying the principle that an exclusion can only negate coverage if stated in "clear and unmistakable" language, the Court determined that a reasonable reading of the exclusion's language (bodily injury "arising out of" a massage) limited it to injury inflicted upon a customer by a massage itself, as opposed to an assault committed during a massage. The employer therefore was entitled to insurance coverage for the claim.

Standing

In *New York State Assoc. of Nurse Anesthetists v. Novello,* the Court divided over the issue of standing, with its newest member, Judge Robert S. Smith, in dissent.

The declaratory judgment action challenged guidelines issued by the New York State Department of Health concerning office-based surgery on the basis that the guidelines constituted regulations and thus were beyond the authority of the Department, which is authorized to regulate hospitals, but not services provided in physicians' offices. The Appellate Division, Third Department, found that the plaintiff Association of Nurse Anesthetists had standing to bring the action and affirmed the summary judgment order that had invalidated the guidelines.

The Court of Appeals did not reach the merits of the action, finding in a 6-1 decision that plaintiff lacked standing. The majority and dissent agreed that standing is governed by a two-part test. A plaintiff must show both "injury in fact" and that it falls within the "zone of interests" sought to be protected by the statutory provisions plaintiff is trying to enforce. The majority, in an opinion by Chief Judge Judith S. Kaye, did not reach the zone of interest aspect of the test, finding the Association had not demonstrated injury in fact.

The guidelines at issue provided for in-office administration of anesthesia by nurses trained in the specialty, but also provided that "[s]upervision . . . should be provided by a physician, dentist or podiatrist who is physically present, [and] who is qualified by law, regulation or hospital appointment to perform and supervise the administration of the anesthesia." Further, the supervising physician should, *inter alia,* "perform a preanesthetic examination . . . [and] remain physically present during the entire perioperative period . . ."

According to affidavit evidence submitted by the Association, most physicians are not qualified to administer anesthesia. Such physicians therefore would not qualify to supervise the administration of anesthesia by nurses, and thus would choose to hire anesthesiologists over nurses. In addition, because utilizing a nurse would, under the guidelines, require physicians to perform many tasks that they usually do not perform, such as remaining present during the entire perioperative period, the Association argued, the guidelines provided incentives for physicians to hire anesthesiologists instead.

Defendants' response to these argument was that the guidelines only called for supervision by a physician "qualified by law" to administer anesthesia and the law does not require any credential other than a license to practice medicine, so the physicians, dentists or podiatrists performing office procedures could themselves provide the supervision and perform the additional tasks necessitated by use of a nurse.

To the majority, the claim that nurse anesthetists were likely to suffer injury was "founded on two layers of speculation -- that the Guidelines will be rigorously enforced as regulations and that, as such, they will effectively harm CRNAs [Certified Registered Nurse Anesthetists]. At this juncture, it is not at all 'obvious' that, even if enforced as regulations, the Guidelines would in fact injure any of the plaintiff's members."

The dissent addressed both "layers of speculation." As to whether the guidelines would be enforced as regulations, Judge Smith pointed out that was the very issue in the action, which the Association would not be able to establish under the majority's holding on standing. As to injury, Judge Smith described as "powerful, detailed and virtually unrebutted" plaintiff's evidence that the guidelines would injure at least some CRNA's opportunities for employment. The dissent would have found the Association established both injury in fact and that its members were within the protected zone of interests.

As a practice point, it is noteworthy that the dissent did not consider the affidavits submitted by plaintiff to be the only record support for its conclusions. The dissent cited as evidence of the guidelines' effect the fact that the answer's response to many of the verified complaint's allegations was either a reference to the language of the guidelines themselves, or a denial of information or knowledge sufficient to form a response.

Nassau County Tax Refunds

Nassau County may have to refund improperly levied taxes as a result of the Court's decision in *New York Tel. Co. v. Nassau County*. The matter was a consolidation of several suits filed by New York Telephone Company (NYNEX), New York Water Service Corporation and Long Island Water Corporation.

The Supreme Court, Nassau County, granted summary judgment in favor of petitioner utilities on their claim that the County's method of assessing real property for ad valorem levies in non-countywide districts violated the Real Property Tax Law for the tax years in question. It declined to hear evidence of the hardship that retroactive relief would impose upon the County, and directed a damages trial. The Appellate Division, Second Department, upheld the trial court's determination that the challenged tax assessments were invalid, but nonetheless held that petitioners were not entitled to retroactive relief because granting refunds would have a "significant financial impact" in the special districts. The County did not seek review of the holding invalidating the assessments. The Court of Appeals granted petitioners'

motions for leave to appeal.

In an opinion by Judge George Bundy Smith, the Court reversed the Appellate Division on the basis that no proof had been submitted demonstrating the impact on the County of making refunds (estimated by petitioners at $12 million). The Court directed that a hearing be held to determine both the amount of the refunds and the impact of requiring the County to pay them. Remanding the action, the Court cited two cases in which it had invalidated taxes yet denied retroactive relief because of the "undue burden"[2] or "financial chaos"[3] that would ensue. The Court also quoted from a prior decision in which relief was denied because it would have "cause[d] disorder and confusion in public affairs."[4]

[1] *Quoting Judith M. v. Sisters of Charity Hosp.,* 93 N.Y.2d 932 (1999).

[2] *Foss v. City of Rochester,* 65 N.Y.2d 247 (1985).

[3] *Hellerstein v. Assessor of Town of Islip,* 37 N.Y.2d 1 (1995).

[4] *Citing Matter of Andresen v. Rice,* 277 N.Y.2d 271 (1938).