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CPLR 214-a, 208: Appellate Division, Third Department, Holds That the Statute of Limitations on an Infant's Malpractice Suit for Prenatal Injuries Begins to Run from the Time of Malpractice Even If the Malpractice Occurs Before the Child Is Born

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CIVIL PRACTICE LAW AND RULES

CPLR 214-a, 208: Appellate Division, Third Department, holds that the statute of limitations on an infant's malpractice suit for prenatal injuries begins to run from the time of malpractice even if the malpractice occurs before the child is born

The 1975 malpractice insurance crisis concerning medical doctors impelled the New York legislature to limit the number of malpractice judgments.¹ As a result, CPLR 214-a was enacted. CPLR 214-a provides that, to be timely, a medical malpractice suit must be commenced within two years and six months “from the act, omission or failure complained of”² with exceptions for foreign objects³ and continuous treatment.⁴

¹ See WK&M § 214-a.01, at 2-455 (1994) (finding “threat of doctors to curtail their services to the public” as reason for enactment of statute); CPLR 214-a commentary at 592 (McKinney 1990) (discussing “titanic battle among the medical and legal professions, the insurance industry, and the legislature” leading to passage of CPLR 214-a); Brian G. Friel, *CPLR 214-a: Appellate Division, Third Department holds that a surgical suture negligently placed in a patient's body in the course of an operation is a “foreign object” so as to toll the statute of limitations*, 67 ST. JOHN'S L. REV. 147, 147 n.1 (1993) (citing double and triple digit percentage increases in cost of medical malpractice insurance as cause of physician work stoppages and slow-downs in upstate New York).

During the crisis, insurance premiums skyrocketed, insurance carriers withdrew from the medical malpractice insurance market, the number of medical malpractice lawsuits rose, and medical malpractice awards increased. See Russell S. Schwartzman, Note, *Orderlies in the Court? A Proposal for the Proper Designation of Medical Malpractice Claims*, 8 CARDOZO L. REV. 287, 287-90 (1986). Many physicians threatened to refuse to provide health care services to the public if the trend continued. *Id.* at 287-88. This medical malpractice insurance crisis likewise existed throughout the rest of the country. 1 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* 1007 n.15 (1983) (quoting *Anderson v. Wagner*, 402 N.E.2d 560, 562 (Ill. 1979), *appeal dismissed sub. nom.*, *Woodward v. Burnham City Hosp.*, 449 U.S. 807 (1980)). Prior to the crisis, few states had statutes of limitation specifically applying to medical malpractice actions. *Id.* at 1015 n.31.

² CPLR 214-a (McKinney 1990); *cf.* CPLR 214(5)-(6) (McKinney 1990) (providing three year statutes of limitations “to recover damages for a personal injury” due to negligence or “to recover damages for malpractice, other than medical, dental or podiatric malpractice”); see Friel, *supra* note 1, at 148 nn.3-4 (indicating that CPLR 214-a merely codified New York common law regarding when cause of action accrues).

Some commentators believe that CPLR 214-a is a troublesome compromise. See, e.g., CPLR 214-a commentary at 592 (McKinney 1990) (describing statute as “politically expedient solution” reached with disregard to “many rational considerations”). New York's statute is an occurrence statute, which means that the “statutory period begins to run when the negligent act [omission, or failure complained of] occurs, regardless of when the negligence is discovered.”

Accordingly, aside from these two exceptions, in New York, a cause of action for medical malpractice accrues at the time the malpractice is committed.⁵ Recently, in *LaBello v. Albany Medical Center Hospital*,⁶ the Appellate Division, Third Department, held that the statute of limitations

Hutton Brown et al., Special Project, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 728 (1986). Occurrence statutes are easy to administer but may lead to harsh results. See SPEISER, *supra* note 1, at 1019 n.39 (explaining various methods for determining when cause of action accrues); Brown et al., *supra*, at 728 ("Recognizing the potential injustice caused by occurrence statutes, some courts have found ways to allow plaintiffs recovery in spite of these statutes."). But see Gerald D. McBeth, *Medical Malpractice: When Does the Statute of Limitations Begin to Run?*, 35 MO. L. REV. 528, 559-60 (1970) (discussing *Frohs v. Greene*, 452 P.2d 564 (Or. 1969), which extended discovery rule to apply in misdiagnosis cases). Alternatives to the occurrence rule include the "termination rule," by the cause of action would accrue on the date that the relationship between the patient and physician terminates, or the "discovery rule," by which accrual would occur on the date that the act or omission constituting the alleged malpractice is discovered, or in the exercise of reasonable diligence, should have been discovered. See, e.g., *Saultz v. Funk*, 410 N.E.2d 1275, 1277 (Ohio 1979). The termination rule and discovery rule are both elements of CPLR 214-a. See *infra* notes 3-4 (discussing exceptions to termination and discovery rules).

³ CPLR 214-a (McKinney 1990). See DAVID D. SIEGEL, NEW YORK PRACTICE § 42, at 52 (2d ed. 1991). When a foreign object is left inside the plaintiff, he or she has one year from the date it is discovered, or reasonably should have been discovered, to bring a claim. *Id.* The New York Court of Appeals first applied the discovery rule to a foreign object case in *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). Prior to this case, the New York legislature refused to adopt a foreign object exception to the general tort rule that measures accrual from the time of injury. SIEGEL, *supra*, at 52. The *Flanagan* rule was later codified in CPLR 214-a. *Id.* With the enactment of CPLR 214-a, however, the plaintiff's time to commence the medical malpractice suit was reduced from three years to one year from discovery. Compare *Flanagan*, 24 N.Y.2d at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27 with CPLR 214-a (McKinney 1990).

⁴ CPLR 214-a (McKinney 1990); see SIEGEL, *supra* note 3, at 51-52. Accrual of the claim is postponed until treatment of the particular ailment creating the cause of action is concluded. *Id.* In *Borgia v. City of New York*, 12 N.Y.2d 151, 157, 187 N.E.2d 777, 779, 237 N.Y.S.2d 319, 322 (1962), the Court of Appeals defined "continuous treatment": "The 'continuous treatment' we mean is treatment for the same or related illnesses or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship." *Borgia*, 12 N.Y.2d at 157, 187 N.E.2d at 779, 237 N.Y.S.2d at 322 (emphasis added).

⁵ SIEGEL, *supra* note 3, at 51; see 76 N.Y. JUR.2D *Malpractice* § 202 (1989) (stating general rule that action accrues from time of alleged malpractice); see also *Rockefeller v. Moront*, 81 N.Y.2d 560, 563, 618 N.E.2d 119, 121, 601 N.Y.S.2d 86, 88 (1993) (stating that limitation period runs from last act constituting basis of claim); *Goldsmith v. Howmedica, Inc.*, 67 N.Y.2d 120, 122, 491 N.E.2d 1097, 1098, 500 N.Y.S.2d 640, 641 (1986) (holding that cause of action for medical malpractice regarding malfunctioning of prosthetic device accrues upon implementation rather than at time of malfunction); *Wancewicz v. Hickey*, 148 A.D.2d 773, 774, 538 N.Y.S.2d 354, 355 (3d Dep't 1989) (stating that malpractice cause of action commences from time of act).

Even before the adoption of CPLR 214-a, the cause of action accrued "at the time of the acts of the physician which constitute[d] malpractice." Richard B. Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 340 (1962).

⁶ 200 A.D.2d 299, 614 N.Y.S.2d 459 (3d Dep't 1994).

for an infant's medical malpractice suit for prenatal injuries begins to run from the time the negligent act was committed, even though the child may not have been born.⁷ Yet, the court held that such an action may not be pursued unless the child is born alive.⁸

In *LaBello*, the plaintiff asserted medical malpractice claims on behalf of her infant son for prenatal injuries sustained by him between November 9 and November 11, 1982.⁹ As a result of the malpractice, the child was born on November 30, 1982 with severe and permanent injuries.¹⁰ The plaintiff, however, did not commence the action until November 23, 1992, just short of ten years from the child's date of birth.¹¹ The defendant alleged, as an affirmative defense, that the statute of limitations had run and, thus, the plaintiff was barred from recovery.¹² The Supreme Court, Albany County, dismissed the defense, holding that the cause of action accrued at birth, and the action, therefore, fell within the infancy toll.¹³

The Third Department reversed in a 3-2 decision.¹⁴ Writing for the majority, Justice White adopted a literal reading of the general rule mandating that a cause of action for medical malpractice accrues, and the

⁷ *Id.* at 301, 614 N.Y.S.2d at 461.

⁸ *Id.*

⁹ *Id.* at 300, 614 N.Y.S.2d at 460. The specific allegations of medical malpractice arose from the defendant's failure to properly assess the significance of an ultrasound report and an amniocentesis test which indicated insufficient placenta and amniotic fluid in addition to fetal distress. Brief for Plaintiff at 1-2. Consequently, the defendant did not arrange for an immediate delivery needed to prevent injury. *Id.*

¹⁰ *LaBello*, 200 A.D.2d at 300, 614 N.Y.S.2d at 460.

¹¹ *Id.*

¹² *Id.* The defendant alleged that the action was not commenced within two years and six months after the cause of action arose and was therefore barred by CPLR 214-a. The defendant further contended that the action was not properly commenced within the 10 year time limit set by the infant tolling period of CPLR 208. Brief for Defendant at 4-5; see CPLR 208 (providing that infancy tolls statute of limitations in medical malpractice suit for maximum of 10 years); *Daniel J. v. New York City Health & Hosps. Corp.*, 77 N.Y.2d 630, 634, 571 N.E.2d 704, 706, 569 N.Y.S.2d 396, 398 (1991) (measuring 10 year toll of CPLR 208 from negligent act complained of, not from last continuous treatment).

¹³ *LaBello v. Albany Medical Ctr.*, No. 0193-033183, slip op. at 5 (Sup. Ct. Albany County Feb. 26, 1993), *rev'd*, 200 A.D.2d 299, 614 N.Y.S.2d 459 (3d Dep't 1994); see *Daniel J.*, 77 N.Y.2d at 635, 571 N.E.2d at 706, 569 N.Y.S.2d at 398 ("[W]here medical malpractice actions accrue during infancy, the extension is limited to 10 years from the time of accrual."); see also *Ramirez v. St. Luke's Hosp. Ctr.*, 188 A.D.2d 419, 419, 591 N.Y.S.2d 836, 837 (1st Dep't 1992) (holding that statute of limitations "applicable to causes of action for medical malpractice . . . may be tolled during a plaintiff's infancy for a maximum of ten years from the date of accrual"); *Janvier v. New York City Health & Hosps. Corp.*, 162 A.D.2d 342, 343, 556 N.Y.S.2d 907, 908 (1st Dep't 1990), *appeal denied*, 76 N.Y.2d 711, 564 N.E.2d 672, 563 N.Y.S.2d 62 (1990) (holding that tolling period in CPLR 208 provides 10 year "outside limit" regarding when infant may bring cause of action).

¹⁴ *LaBello*, 200 A.D.2d at 301, 614 N.Y.S.2d at 461.

statute of limitations begins to run, at the time the malpractice occurs.¹⁵ The majority also indicated that, even if the statute of limitations on the medical malpractice action was tolled under the continuous treatment doctrine, the action would still be barred since the ten-year infancy toll runs from the date the negligent act was committed and not from the end of the continuous treatment.¹⁶ Since the legislature has created only two exceptions to CPLR 214-a which historically have been narrowly applied, the court was reluctant to read a third exception into the statute applicable to infants,¹⁷ reasoning that the general infancy toll provides ample time for an infant to seek redress.¹⁸

Justice Yesawich, joined by Justice Mikoll, dissented. Their dissent adopted a broader reading of the general rule, arguing that the "specific 'rule' must yield to the general principle that no action can accrue until the plaintiff has [both] a legal right to relief" and a tribunal in which a suit may be maintained.¹⁹ Since there is no right to relief until an infant is born alive, the claim could not have been brought, and the cause of action, therefore, should not have accrued prior to the date of birth.²⁰

¹⁵ *Id.*; see *supra* note 5 and accompanying text (stating that action accrues from act or omission constituting malpractice). The *La Bello* court went on to state that because of the generous tolling period which was available to the plaintiff, there was no policy reason to create an exception on the facts of this case. *La Bello*, 200 A.D.2d at 301, 614 N.Y.S.2d at 461. Therefore, the court held that the plaintiff filed her suit 12 days too late. *Id.*

¹⁶ *LaBello*, 200 A.D.2d at 301, 614 N.Y.S.2d at 461; see *supra* note 3 (stating infancy toll runs from date of accrual and not from end of continuous treatment).

¹⁷ *LaBello*, 200 A.D.2d at 301, 614 N.Y.S.2d at 461. Courts have consistently read the exceptions narrowly. See *Rockefeller v. Moront*, 81 N.Y.2d 560, 566, 618 N.E.2d 119, 125, 601 N.Y.S.2d 86, 90 (1993) (finding holding consistent with court's cautionary directive that foreign object exception not be broadened); *Goldsmith v. Howmedica, Inc.*, 67 N.Y.2d 120, 123, 491 N.E.2d 1097, 1098, 500 N.Y.S.2d 640, 641-42 (1986) (indicating clear intent of legislature that exceptions to general rule governing accrual not be broadened); *Beary v. City of Rye*, 44 N.Y.2d 398, 415, 377 N.E.2d 453, 459, 406 N.Y.S.2d 9, 15 (1978) (determining that any extension of foreign object exceptions has been "clearly interdicted" by enactment of CPLR 214-a); *Neumann v. Nassau County Med. Ctr.*, No. 93-07781, 1994 N.Y. App. Div. LEXIS 12592, at *5 (Dec. 12, 1994) (Miller, J., concurring) ("[T]he court lacks jurisdiction to even grant leave to serve a late notice of claim after the expiration of the . . . period of limitations . . . I . . . call upon the legislature to consider amending the law to end this intolerable situation whereby innocent injured malpractice victims are left without judicial recourse.").

¹⁸ *LaBello*, 200 A.D.2d at 301, 614 N.Y.S.2d at 461.

¹⁹ *Id.* at 302, 614 N.Y.S.2d at 462 (Yesawich, J., dissenting).

²⁰ *Id.* The majority countered this argument by claiming that there is a difference between a cause of action and a right to maintain an action, and that birth is an element of the latter rather than the former. *Id.* at 302, 614 N.Y.S.2d at 461. The right to even maintain an action for prenatal injuries is a relatively recent development. See generally Horace B. Robertson, Jr., *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401 (discussing development of cause of action for prenatal injury). Currently, every jurisdiction allows prenatal injury claims

It is well established that a cause of action for medical malpractice accrues from the time the negligent act was committed.²¹ Medical malpractice cases involving prenatal injuries, however, differ from other medical malpractice cases in several significant ways. First, unborn children have never legally been recognized as "persons."²² Second, unlike claimants in other medical malpractice cases,²³ an unborn child

if the child is born alive. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984); cf. *Endresz v. Friedberg*, 24 N.Y.2d 478, 486, 248 N.E.2d 901, 905, 301 N.Y.S.2d 65, 71 (1969) (stating that for wrongful death action there is "conditional prospective liability" which is created when unborn child is injured through wrongful act of defendant and attaches only when child is born alive); *Shack v. Holland*, 89 Misc. 2d 78, 79, 389 N.Y.S.2d 988, 989 (Sup. Ct. Kings County 1976) (holding that doctor will be conditionally liable to unborn child even if cause of injury was lack of informed consent regarding risks, hazards, and alternatives of delivery procedure). The unborn has no legal personality or identity. See *infra* note 23 and accompanying text (discussing reluctance to recognize fetus as person).

But see John E.B. Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 16 (1984) (proposing that unborn children have long received limited recognition as persons and that trends point toward greater acknowledgement).

²¹ See *supra* note 5 and accompanying text (discussing general rule that medical malpractice accrues at time malpractice is committed).

²² *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 200, 286 N.E.2d 887, 888, 335 N.Y.S.2d 390, 392 (1972), *appeal dismissed*, 410 U.S. 949 (1973); see *Endresz*, 24 N.Y.2d at 485, 248 N.E.2d at 904, 301 N.Y.S.2d at 70 (holding that unborn fetus does not have juridical existence, legal personality, or identity); *Tebbutt v. Virostek*, 102 A.D.2d 231, 234, 477 N.Y.S.2d 776, 778 (3d Dep't 1984) (finding that injury to unborn fetus is not considered injury to third person), *aff'd*, 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985); *Wilner v. Prowda*, 158 Misc. 2d 579, 601 N.Y.S.2d 518 (Sup. Ct. N.Y. County 1993) (noting there are no New York cases that consider fetus to be person for purposes of habeas corpus proceeding); *Johnson v. Verrilli*, 134 Misc. 2d 582, 584, 511 N.Y.S.2d 1008, 1010 (Sup. Ct. Dutchess County 1987) (holding that New York does not recognize unborn as person), *modified*, 139 A.D.2d 497, 526 N.Y.S.2d 600 (2d Dep't 1988); *In re Thomas*, 118 Misc. 2d 456, 457, 460 N.Y.S.2d 716, 717 (Sur. Ct. Nassau County 1983) (stating that it is "generally concluded" that unborn fetus has no legal personality or identity); *In re Scanelli*, 208 Misc. 804, 805, 142 N.Y.S.2d 411, 412 (Sur. Ct. Nassau County 1955) (stating stillborn child never had legal personality); cf. *People v. Vercelletto*, 135 Misc. 2d 40, 44, 514 N.Y.S.2d 177, 179 (Ulster County Ct. 1987) ("At common law it was clear that an unborn fetus, viable or otherwise, could not be the subject of a homicide.").

The court in *Thomas* noted that "the law has [historically] indulged in the fiction that for the purpose of inheritance or other devolution of property, a child *en ventre sa mere*, while not a 'person' has certain legal rights, contingent upon being born alive . . . which are entitled to protection." *Thomas*, 118 Misc. 2d at 475, 460 N.Y.S.2d at 717. Furthermore, the court in *In re Jamaica Hosp.*, 128 Misc. 2d 1006, 1007, 491 N.Y.S.2d 898, 899 (Sup. Ct. Spec. T. 1985), held that a fetus is a human being to whom the court stands *parens patriae*. *Id.* Finally, in *Gloria C. v. William C.*, 124 Misc. 2d 313, 324, 476 N.Y.S.2d 991, 997 (Fam. Ct. Richmond County 1984), the court held that a fetus is a "person" for the purpose of a child protective proceeding. *Id.*

²³ In some medical malpractice cases not involving prenatal injuries, a plaintiff may be barred from recovery before the plaintiff knows of the injury, or even before the actual injury occurred.

cannot bring a claim when the act occurs, but must wait until birth.²⁴ Third, the tortious act in a prenatal injury case creates conditional prospective liability which only attaches if the child is born alive.²⁵

Contrary to what the majority opinion suggests,²⁶ there is no decision preceding *LaBello* in New York, or in the nation, directly addressing when a cause of action for prenatal injury accrues.²⁷ Furthermore, dicta exists supporting the argument that liability for prenatal injuries only ripens into a cause of action if a child is born alive.²⁸ It is submitted, therefore, that a court should treat medical malpractice claims for prenatal injuries differently from other medical malpractice claims by relying on previous New York Court of Appeals decisions concerning the general rule governing when a cause of action accrues.

The court of appeals has held that a cause of action accrues when enforcement becomes possible, when a plaintiff has a legal right to relief, or when a plaintiff becomes entitled to maintain the particular action.²⁹

See supra note 5 (discussing general rule that cause of action runs from act, which may bar plaintiff's suit before any injury is suffered or discovered). Compare *Marine Midland Bank, N.A. v. State*, 195 A.D.2d 871, 600 N.Y.S.2d 797 (3d Dep't) (stating general rule that cause of action accrues when all elements of tort can be truthfully alleged), *appeal denied*, 82 N.Y.2d 661, 627 N.E.2d 518, 606 N.Y.S.2d 596 (1993) and *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 26, 544 N.Y.S.2d 359, 363 (2d Dep't 1989) ("[A] cause of action does not accrue until its enforcement becomes possible." quoting *Jacobus v. Colgate*, 217 N.Y. 235, 245, 111 N.E. 837 (1916)) with *Fern v. IBM*, 204 A.D.2d 907, 907, 612 N.Y.S.2d 492, 493 (3d Dep't 1994) (holding that employment discrimination action accrues when act complained of occurs) and *Bassile v. Covenant House*, 152 Misc. 2d 88, 90, 575 N.Y.S.2d 233, 235 (Sup. Ct. N.Y. County 1991) (noting that cause of action accrues when injury occurs, even if victim does not become aware of injury until later), *aff'd*, 191 A.D.2d 188, 594 N.Y.S.2d 192 (1st Dep't), *appeal denied*, 82 N.Y.2d 656, 624 N.E.2d 177, 604 N.Y.S.2d 47 (1993).

²⁴ *See infra* note 36 and accompanying text (arguing child cannot bring cause of action until birth).

²⁵ *Endresz*, 24 N.Y.2d at 486, 248 N.E.2d at 905, 301 N.Y.S.2d at 70 (1969); *see Department of Social Servs. v. Felicia B.*, 144 Misc. 2d 169, 170, 543 N.Y.S.2d 637, 638 (Fam. Ct. Nassau County 1989) (stating that defendant has conditional prospective liability to unborn child he harmed); *Shack v. Holland*, 89 Misc. 2d 78, 86, 389 N.Y.S.2d 988, 993 (Sup. Ct. Kings County 1976) (holding that lack of mother's informed consent creates conditional prospective liability to fetus which attaches at birth).

²⁶ *LaBello*, 200 A.D.2d at 301, 614 N.Y.S.2d at 461 (citations omitted) (asserting that in other prenatal injury cases cause of action accrued on date of malpractice).

²⁷ *See Gary Spencer, Injury Claim Accrued Pre Birth*, N.Y. L.J., July 11, 1994, at 1. "Significantly, in none of the cases cited by the majority has it been held that an infant plaintiff's cause of action was barred because it accrued prior to . . . birth." *LaBello*, 200 A.D.2d at 302 n.1, 614 N.Y.S.2d at 462 n.1 (Yesawich, J., dissenting).

²⁸ *Felicia B.*, 144 Misc. 2d at 170, 543 N.Y.S.2d at 638; *see also infra* note 33 (discussing necessity of birth for cause of action for prenatal injuries).

²⁹ 75 N.Y. JUR.2D *Limitations and Laches* § 143 (1989); *see Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 612 N.E.2d 289, 292, 595 N.Y.S.2d 931, 934 (1993) (explaining that statute

In other words, a cause of action accrues when all the factual elements of the tort are present.³⁰ Although birth is clearly not an element of an ordinary medical malpractice claim,³¹ the importance common law places

of limitations in patent royalties action does not run until there is legal right to relief); *Aetna Life and Casualty Co. v. Nelson*, 67 N.Y.2d 169, 175, 492 N.E.2d 386, 389, 501 N.Y.S.2d 313, 316 (1986) (stating in action to recoup benefits paid to insured on fire insurance policy that cause of action accrues when party is entitled to obtain relief in court); *Jacobus v. Colgate*, 217 N.Y. 235, 245, 111 N.E. 837, 840 (1916) (arguing that cause of action does not accrue until its enforcement becomes possible and statute of limitations does not begin to run until plaintiff is supplied with tribunal where suit can be maintained); *Ryan Ready Mixed Concrete Corp. v. Coons*, 25 A.D.2d 530, 530, 267 N.Y.S.2d 627, 630 (2d Dep't 1966) (concluding that statute of limitations commences in breach of contract action from time plaintiff is first enabled to bring action).

³⁰ See *Kronos*, 81 N.Y.2d at 94, 612 N.E.2d at 292, 595 N.Y.S.2d at 934 (asserting that without occurrence of injury, which is element of tort claim, no cause of action may accrue); *Marine Midland Bank, N.A. v. State*, 195 A.D.2d 871, 873, 600 N.Y.S.2d 797, 799 (3d Dep't 1993) (stating that for negligence action to accrue there must be actionable injury); *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 26, 544 N.Y.S.2d 359, 363 (2d Dep't 1989) (stating that cause of action accrues when "claimant is able to state the elements of that cause of action"); *Kelly v. City of Rochester*, 98 Misc. 2d 435, 442, 413 N.Y.S.2d 1006, 1011 (Sup. Ct. Monroe County 1979) (holding that firefighter's cause of action against state for negligent filing accrued either when late filing date was discovered or when benefits were denied); see also *Nelson*, 67 N.Y.2d at 175, 492 N.E.2d at 389, 501 N.Y.S.2d at 316 (reasoning that cause of action accrues only when plaintiff's right to sue for breach of duty arises); WK&M § 201.02, at 2-10 to 2-11 (stating that accrual date concept is borrowed from substantive law and signifies that all factual elements necessary to maintain lawsuit are present); 2 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 25.80 (1993) (indicating that in jurisdictions applying discovery rule there can be no accrual until party has right to maintain action, which requires injury or damage); cf. *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399, 402, 615 N.E.2d 985, 986, 599 N.Y.S.2d 501, 502 (1993) (holding that breach of contract action accrues at time of breach even though damages accrue later); *Fern v. IBM*, 204 A.D.2d 907, 908, 612 N.Y.S.2d 492, 494 (3d Dep't 1994) (holding that employment discrimination action accrues when act complained of occurs); *Bassile v. Covenant House*, 152 Misc. 2d 88, 91, 575 N.Y.S.2d 233, 235 (Sup. Ct. N.Y. County 1991) (noting that cause of action accrues when there is injury, whether or not victim is ignorant of injury until later), *aff'd*, 191 A.D.2d 188, 594 N.Y.S.2d 192 (1st Dep't), *leave to appeal denied*, 82 N.Y.2d 656, 624 N.E.2d 177, 604 N.Y.S.2d 47 (1993).

³¹ 5 CARMODY-WAIT 2D § 29:874 (1966).

For an ordinary malpractice action the factual elements are that (1) the defendant is a physician or surgeon, (2) the defendant professionally treated and cared for the plaintiff or rendered other professional services, (3) the defendant either did not possess the requisite learning, skill and experience, or did not use reasonable care in the exercise of his or her skill and the application of his learning, and (4) the plaintiff was injured or damaged thereby.

Id. In New York, however, an action can be "foreclose[d] . . . against the doctor before any injury has been suffered." *Goldsmith v. Howmedica*, 67 N.Y.2d 120, 124, 491 N.E.2d 1097, 1099, 500 N.Y.S.2d 640, 642 (1986); see also *Rockefeller v. Moront*, 81 N.Y.2d 560, 563, 618 N.E.2d 119, 121, 601 N.Y.S.2d 86, 88 (1993) (stating limitation period for medical malpractice actions generally do not run from date injury is discovered); *Wancewicz v. Hickey*, 148 A.D.2d 773, 774, 538 N.Y.S.2d 354, 355 (3d Dep't 1989) (rejecting argument that medical malpractice cause of action accrues when alleged injury is discovered). When an occurrence statute is applied, the accrual date is the date of the act of misconduct or negligence, not that of the consequential

on a live birth for the bringing of a prenatal injury action suggests that birth may be an additional element of a medical malpractice claim for prenatal injuries.³² The majority relies purely on semantics in concluding that birth is not an element of the claim.³³ It is thus submitted that a medical malpractice action for prenatal injuries does not exist until the injured child is born.

The New York Court of Appeals has also maintained that a cause of action cannot accrue unless there exists a tribunal in which the victim may

or actual damages. *See supra* note 2 (explaining occurrence statutes); *Bernath v. Le Fever*, 189 A. 342, 343 (Pa. 1937) (holding that breach of duty and not consequential damage marks accrual of cause of action); *Albert v. Sherman*, 67 S.W.2d 140, 141 (Tenn. 1934) (explaining action accrues immediately upon happening of wrongful act or breach, even though actual resulting damage has not yet occurred). *But see* LEE & LINDAHL, *supra* note 31, § 25.81 (stating that in some cases there is no injury at time of malpractice).

³² *See* *Woods v. Lancet*, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951) (allowing cause of action for prenatal injuries when child is born alive); *Howard v. Lecher*, 53 A.D.2d 420, 428, 386 N.Y.S.2d 460, 465 (2d Dep't 1976) (Marssett, J., dissenting) (stating that prenatal injury cause of action is allowed if child is born alive), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977); *People v. Vercelletto*, 135 Misc. 2d 40, 44, 514 N.Y.S.2d 177, 179 (Ulster County Ct. 1987) (determining that child born alive may sue for prenatal injuries); *Gloria C. v. William C.*, 124 Misc. 2d 313, 324, 476 N.Y.S.2d 991, 997, (Fam. Ct. Richmond County 1984) (emphasizing that child must be born alive to bring cause of action for prenatal injuries). Birth is not only a necessary element of a prenatal injury action but is also an element in other tort, criminal, and property actions. *See* *Endresz v. Friedberg*, 24 N.Y.2d 478, 482-85, 248 N.E.2d 901, 902-04, 301 N.Y.S.2d 65, 67-69 (1969) (explaining that birth is necessary element of wrongful death action and for attachment of property rights); *Vercelletto*, 135 Misc. 2d at 44, 514 N.Y.S.2d at 179 ("At common law it was clear that an unborn fetus, viable or otherwise, could not be the subject of a homicide."); *Ryan v. Beth Israel Hosp.*, 96 Misc. 2d 816, 817, 409 N.Y.S.2d 681, 683 (Sup. Ct. N.Y. County 1978) (deciding that guardian *ad litem* appointed to protect interest of unborn fetus stillborn before commencement of action had no standing to bring declaratory judgment); *Shack v. Holland*, 89 Misc. 2d 78, 85, 389 N.Y.S.2d 988, 989-91 (Sup. Ct. Kings County 1976) (holding that conditional prospective liability to fetus is created when unborn child's mother is not sufficiently informed of alternative delivery procedures). *But see* *Gloria C.*, 124 Misc. 2d at 325, 476 N.Y.S.2d at 998 (holding that birth is not condition precedent to enforcement of order of protection on behalf of fetus).

³³ *LaBello*, 200 A.D. at 302, 614 N.Y.S.2d at 461 (stating that birth is limitation on plaintiff's right to sue and not necessary element for prenatal injury malpractice claim). *But see id.* at 303, 614 N.Y.S.2d at 462 (Yesawich, J., dissenting) (implying that distinction is wholly illusory). It is extremely difficult to determine whether a condition is an element of a cause of action or a limitation on the right of action. *See id.* at 302. This is because the two are closely related. *See* BLACK'S LAW DICTIONARY 221, 1325 (6th ed. 1990) (defining cause of action and right of action). "[I]t is not possible for one at the same time to have a cause of action and not to have a right to sue." *Jacobus*, 217 N.Y. at 241, 111 N.E. at 839 (citing *Walters v. City of Ottawa*, 88 N.E. 651, 653 (Ill. 1909)). The majority in *LaBello*, however, does not explain its conclusion that birth is not an element of a prenatal malpractice cause of action, but a limitation upon the infant's right of action. *LaBello*, 200 A.D.2d at 302, 614 N.Y.S.2d at 461.

bring a claim for relief.³⁴ Such a tribunal does not exist for the unborn infant in a prenatal injury case since courts have specifically held that a claim may not be brought on behalf of a child until he or she is born.³⁵ No prenatal injury case allows for the commencement of a medical malpractice suit for prenatal injuries before birth. A cause of action, therefore, should not accrue until New York provides the unborn infant with a "tribunal in which his suit may be maintained."³⁶

According to the majority, the statute of limitations runs in favor of a defendant who is not yet liable,³⁷ and against a person who does not yet

³⁴ See *Jacobus*, 217 N.Y. at 245, 111 N.E. at 840. In order for a cause of action to accrue there must exist "a tribunal of competent jurisdiction to enforce the right." 75 N.Y. JUR.2D *Limitations and Laches* § 143 (1989); see *Homer Eng'g Co. v. State*, 12 N.Y.2d 508, 511, 191 N.E.2d 455, 457, 240 N.Y.S.2d 973, 975 (1963) (concluding that existence of tribunal where plaintiff could enforce claim for payment of duplicate check permitted claim to accrue); *Oswego S. R.R. v. State*, 226 N.Y. 351, 361, 24 N.E. 8, 11 (1919) (stating that cause of action is not barred by lapse of time unless tribunal of competent jurisdiction has been available to plaintiff throughout period when statute of limitations was running); *Paramount Film Distrib. Corp. v. State*, 27 A.D.2d 420, 425, 279 N.Y.S.2d 781, 786 (3d Dep't 1967) (Herlihy, J., dissenting) (arguing that statute of limitations should run despite claimant's inability to sue respondent since respondent might have sought declaratory judgment).

³⁵ See *Department of Social Servs. v. Felicia B.*, 144 Misc.2d 169, 170, 543 N.Y.S.2d 637, 638 (Family Ct. Nassau County 1989) (stating that cause of action only ripens if child is born alive); see also *Endresz*, 24 N.Y.2d at 483, 248 N.E.2d at 903, 301 N.Y.S.2d at 68 ("[A] child viable but *in utero*, if injured by tort, should when born, be allowed to sue.") (citation omitted); *Gloria C.*, 124 Misc. 2d at 324, 476 N.Y.S.2d at 997 (suggesting that action for prenatal injuries cannot be brought until birth); *Shack*, 89 Misc. 2d at 82, 389 N.Y.S.2d at 990 (stating that prenatal injuries are compensable when brought by child after birth); GEORGE C. CHRISTIE & JAMES E. MEEKS, *CASES & MATERIALS ON THE LAW OF TORTS* 779 n.2 (1990) (noting that majority of states permit child to bring action for prenatal injuries if born alive). *But cf. Ryan*, 96 Misc. 2d at 817, 409 N.Y.S.2d at 683 (implying that plaintiff might have had standing had fetus been born alive, but deciding that plaintiff lacked standing to represent fetus once it was stillborn).

³⁶ *LaBello*, 200 A.D.2d at 303, 614 N.Y.S.2d at 462 (Yesawich, J., dissenting) (citation omitted).

³⁷ Liability does not attach until birth. See *supra* note 26 (discussing conditional prospective liability which only attaches if child is born). If the infant is stillborn, the defendant is not liable. See *Tebbutt v. Virostek*, 65 N.Y.2d 931, 932, 483 N.E.2d 1142, 1143, 493 N.Y.S.2d 1010, 1011 (1985) (holding that no cause of action for mother's emotional distress resulted from stillborn child); *Endresz*, 24 N.Y.2d at 488, 248 N.E.2d at 906, 301 N.Y.S.2d at 73 (holding that parents not entitled to damages for loss of stillborn infant); *La Page v. Di Costanzo*, 194 A.D.2d 977, 977, 599 N.Y.S.2d 190, 191 (3d Dep't) (recognizing wrongful death cause of action does not exist on behalf of stillborn fetus), *appeal dismissed*, 82 N.Y.2d 748, 622 N.E.2d 307, 602 N.Y.S.2d 806, *appeal denied*, 82 N.Y.2d 662, 632 N.E.2d 459, 610 N.Y.S.2d 149 (1993), *cert. denied*, 114 S. Ct. 1220 (1994); *Raymond v. Bartsch*, 84 A.D.2d 60, 61-62, 447 N.Y.S.2d 32, 33 (3d Dep't 1981) (dismissing causes of action for loss of services of infant, wrongful death of infant, infant's pain and suffering, wrongful interference with infant's equitable right to life, and constitutional right to life), *appeal denied*, 56 N.Y.2d 508, 439 N.E.2d 401, 453 N.Y.S.2d 1027 (1982); *In re Irizarry*, 21 Misc. 2d 1099, 1100, 198 N.Y.S.2d 673, 675 (Sur. Ct. N.Y. County

exist.³⁸ The majority opinion further determines that the accrual date occurs before the law recognizes the existence of the action.³⁹ Such a counter-intuitive result cannot be justified by the assumption that the ten-year toll provides the plaintiff a sufficient opportunity to bring the cause of action, regardless of when the cause of action accrues and the statute of limitations begins to run.⁴⁰

Consequently, New York should make the date of a child's birth the accrual date for medical malpractice cases involving prenatal injuries. To do so would not inappropriately expand CPLR 214-a to reach a sympathetic result but, rather, would create a logical result which is consistent with generally established principles regarding when a cause of action accrues.

Jennifer M. Chow

1960) (denying petition for letters of administration on estate of stillborn child).

³⁸ "To hold . . . an infant is not a 'person' is only to announce a legal conclusion that there can be no right of action." William I. Muse & Nicholas A. Spinella, *Right of Infant to Recover for Prenatal Injury*, 36 VA. L. REV. 611, 622 (1950); see *supra* note 23 and accompanying text (discussing unborn's lack of recognition as person).

³⁹ *LaBello*, 200 A.D. at 300-02, 614 N.Y.S.2d at 462. A cause of action cannot accrue until the plaintiff has a legal right to relief and a tribunal in which his suit may be maintained. *Id.* at 303 (Yesawich, J., dissenting); see *supra* note 33 and accompanying text (suggesting that birth is element of medical malpractice claim involving prenatal injury so that cause of action cannot accrue until birth); *supra* note 35 and accompanying text (arguing that cause of action cannot accrue because New York does not supply tribunal in which unborn can bring claim for relief).

⁴⁰ See *LaBello*, 200 A.D.2d at 302, 614 N.Y.S.2d at 462 (Yesawich, J., dissenting). The "specific" rule that a cause of action for medical malpractice accrues when the malpractice occurs must yield to the established principle that no cause of action can accrue until the plaintiff has a legal right to relief and a tribunal in which to state a claim. *Id.* at 302-03, 614 N.Y.S.2d at 462. New York adheres to the principle that "liability for damages caused by wrong ceases at a point dictated by public policy." *Endresz*, 24 N.Y.2d at 486, 248 N.E.2d at 905, 301 N.Y.S.2d at 71 (citation omitted). Consequently, courts weigh the hardships which occur when a just claim is barred against the effect of potentially open-ended claims upon the repose of defendants and society. See *Connell v. Hayden*, 83 A.D.2d 30, 41, 443 N.Y.S.2d 383, 391 (2d Dep't 1981) (stating that purpose of statute of limitations is to prevent evidentiary problems). Adopting the dissent's position would delay commencement of the statute of limitations by nine months at most, and therefore would not lead to claims which are any more open-ended than those commenced within ten years of the act of malpractice. *But see* CPLR 201 (McKinney 1990) ("No court shall extend the time limited by law for the commencement of an action"); *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 302, 200 N.E. 824, 835 (1936) (stating that hardship caused by statute of limitations causes is outweighed by advantage of outlawing stale claims); *Munoz v. Goldstein*, 31 Misc. 2d 749, 753, 222 N.Y.S.2d 922 (Sup. Ct. Spec. T. Bronx County) (stating that statute of limitations should not be extended by construction), *rev'd on other grounds*, 16 A.D.2d 142, 226 N.Y.S.2d 1 (1st Dep't 1962); *Bassile v. Covenant House*, 152 Misc. 2d 88, 90, 575 N.Y.S.2d 233, 235 (Sup. Ct. N.Y. County 1991) (stating court cannot extend statutory periods out of sympathy), *aff'd*, 191 A.D.2d 188, 594 N.Y.S.2d 192 (1st Dep't), *leave to appeal denied*, 82 N.Y.2d 656, 624 N.E.2d 177, 604 N.Y.S.2d 47 (1993).