

Torts—First Recognition of "Wrongful Life" as Valid Cause of Action (Williams v. State, 46 Misc. 2d 824 (Ct. Cl. 1965))

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more than thirty years old. The proponents of the act, while anticipating serious objections, nevertheless, felt certain that its constitutionality would be ultimately upheld.²⁶ As early as 1958, one commentator predicted that although the retroactive aspect of the statute would be attacked as a taking without due process, the opportunity to avoid the taking by the simple act of recording would be sufficient to assure the statute's validity.²⁷

It is to be noted that the Court has ruled only on that portion of the law which refers to deeds creating possibilities of reverter executed prior to 1931. The entire statute has not yet been invalidated, but in view of the reasoning in the instant case it is doubtful whether the Court will uphold the statute as it applies to those interests created between 1931 and 1961 (the effective cut-off date of the statute). The prospective provisions of the statute appear to be safe, however, and thus, possibilities of reverter created after 1961 will fail unless recorded.

That restrictions can have valid and worthwhile objectives is not denied, and to condemn all restrictions upon land would be rather short-sighted. On the other hand, there are many restrictions which serve no beneficial purposes and which have been forgotten by the owners of the land and by the holders of the reversionary interests. It is apparent that we should distinguish between antiquated restrictions and those which retain a useful purpose. A recording act is a valid solution since it allows destruction of the former upon the failure to record and allows the retention of the latter by the recordation of an intention to preserve.



TORTS — FIRST RECOGNITION OF "WRONGFUL LIFE" AS VALID CAUSE OF ACTION. — Due to the state's alleged negligence, a female incompetent was sexually assaulted while confined in a mental institution. The plaintiff, conceived as a result of the attack, claimed tort damages primarily for suffering "the stigma of illegitimacy." Ruling solely on the sufficiency of the pleading, the New York Court of Claims *held* that the infant had a valid cause of action against the state. *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965).

At common law, life began, from a legal point of view, when the infant stirred in its mother's womb.¹ Gradually, a child *en ventre*

²⁶ 1951 N.Y. LEG. DOC. NO. 65, N.Y. LAW REVISION COMM'N REP. (B) 32.

²⁷ *Supra* note 18, at 1196.

¹ 1 BLACKSTONE, COMMENTARIES * 129.

sa merè gained recognition as a human being for purposes of inheritance² and in criminal cases.³ However, in 1884, Judge Holmes refused to allow a tort recovery to a child who had suffered pre-natal injuries, reasoning that the child at the time of the injury was a part of the mother, and, therefore, that she alone should recover for any damage that was done to her child.⁴

After 1900, various dissenting opinions indicated a trend towards allowing a remedy to a child who had suffered tortious injury while in the womb of its mother.⁵ In 1933, the issue was squarely presented in a Canadian case.⁶ The court not only recognized that both parents might be entitled to damages as a result of pre-natal injuries suffered by their child, but it also approved the *child's independent* right of action, stating, "there is a residuum of injury for which compensation cannot be had save at the suit of the child."⁷

The major breakthrough in the United States occurred thirteen years later, in *Bonbrest v. Kotz*.⁸ The plaintiff there claimed damages for injuries sustained at the time of her birth by reason of alleged professional malpractice. Denying the defendant's motion for summary judgment, the court held that since the child was *viable* at the time of the injury, it had standing to maintain the action.⁹

In a subsequent New York case,¹⁰ the court traced the development of the concept of legal separability. It announced that "separ-

² *Marsellis v. Thalhimer*, 2 Paige 35 (N.Y. 1830).

³ 3 COKE, THIRD INSTITUTE 50 (1797).

⁴ *Dietrich v. Northhampton*, 138 Mass. 14, 17 (1884). The denial of the cause of action in tort to the child was predominantly founded on three reasons: (a) no duty was owed to the child as he was not in "existence" at the time of the injury; (b) the difficulty of proving a causal connection between the negligence and the damage thereby resulting to the child; and, (c) fear of fictitious claims. PROSSER, TORTS § 56 (3d ed. 1964). See generally Comment, 3 DE PAUL L. REV. 257 (1954).

⁵ *E.g.*, *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 369, 56 N.E. 638, 640 (1900) (Boggs, J., dissenting); *Stemmer v. Kline*, 128 N.J.L. 455, 26 A.2d 489 (Ct. Err. & App. 1942) (Brogen, C.J., dissenting); *Drobner v. Peters*, 232 N.Y. 220, 224, 133 N.E. 567, 568 (1921) (Cardozo, J., dissenting without opinion).

⁶ *Montreal Tramways v. Leveille*, [1933] Can. Sup. Ct. 456, [1933] 4 D.L.R. 337.

⁷ *Id.* at 464, 4 D.L.R. at 345.

⁸ 65 F. Supp. 138 (D.D.C. 1946).

⁹ The concept of attributing a separate legal existence to a fetus only if it was viable at the time of the injury presented obvious problems. For example, there was no medical way of determining the amount of time necessary for a fetus to attain viability. In addition, the non-viable fetus possessed the potential of being born in a normal condition if left undisturbed during its process of maturation. See *Magnolia Coca-Cola Bottling Co. v. Jordan*, 124 Tex. 347, 358, 78 S.W.2d 944, 949 (1935). See also Comment, 3 DE PAUL L. REV. 257, 267 (1954).

¹⁰ *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953).

ability begins at conception,"¹¹ and thus, for the first time, recognized an infant's legal existence at the moment of its conception. Other jurisdictions quickly adopted this theory.¹²

Prior to the instant case, *Zepeda v. Zepeda*¹³ was the only decision on record in which a child had sought to recover damages from her *natural father* solely on the ground that she was illegitimate. Although the court there conceded that the elements of a wilful tort were set forth in the complaint, it was disturbed by the fact that recognition of the claim would mean "the creation of a new tort: a cause of action for wrongful life. . . ."¹⁴ Therefore, the court dismissed the complaint for failing to set forth a sufficient and recognized cause of action.¹⁵

Acknowledging the existence of a wrong, the instant Court, on a motion to dismiss the complaint for failure to state a cause of action, ruled *only* that the action for "wrongful life" was maintainable. The proposition that novelty should deter recognition of a new cause of action was rejected,¹⁶ and it was stated that the plaintiff could maintain an action based on the stigma of illegitimacy, which was itself a substantial wrong.¹⁷ The similarity between *Zepeda* and the instant case is apparent. In both, the cause of action is in tort for what may be called "wrongful life." In *Zepeda*, however, plaintiff was suing her natural father, while here, the suit is against the state for its negligence in the care and protection of plaintiff's mother.

Recognition of this new "wrong" comes at a time when illegitimates are more favorably viewed than ever before. At common law, an illegitimate child was called *filius nullius*, son of no man, and was denied many legal rights.¹⁸ More recently, a compassionate

¹¹ *Id.* at 544, 125 N.Y.S.2d at 697.

¹² *E.g.*, *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956) (action was permitted where embryo was injured in sixth week of development); *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961) (mother pregnant for one month at time of injury).

¹³ 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

¹⁴ *Id.* at 259, 190 N.E.2d at 858.

¹⁵ The court listed several reasons for refusing to allow the cause of action based on "wrongful life": (1) numerous suits by persons born with hereditary defects, or racial disadvantages; (2) the difficulty of placing this alleged tort in traditional categories; and, (3) allowance of the suit would be "judicial lawmaking."

¹⁶ *Williams v. State*, 46 Misc. 2d 824, 826, 260 N.Y.S.2d 953, 955 (Ct. Cl. 1965).

¹⁷ *Id.* at 829, 260 N.Y.S.2d at 958.

¹⁸ *People v. Moczek*, 407 Ill. 373, 380, 95 N.E.2d 428, 432 (1950). In 1576, the first legislation pertaining to illegitimates was enacted, relieving local parishes of the burden of supporting them. See Note, 23 BROOKLYN L. REV. 80, 82 (1957). As late as 1917, New York declared that illegitimates were not favored by the law. See *Bell v. Terry & Tench Co.*, 177 App. Div. 123, 125, 163 N.Y. Supp. 733, 735 (3d Dep't 1917).

sense of social justice has brought about beneficial legislation, easing many of the illegitimate's former handicaps.¹⁹ However, while reforms are progressing, the stigma of illegitimacy remains a very real source of personal injury. In *Zepeda*, the court said, "laws cannot temper the cruelty of those who hurl the epithet 'bastard' nor ease the bitterness in him who hears it, knowing it to be true."²⁰

Narrowly construing the holding of *Williams*, it would appear that a cause of action in favor of the child would exist only where the state's negligence is the proximate cause of the "wrongful life." However, the Court stated, by way of dicta, that the decision reached in *Zepeda* "deviated from its logical sequence when it concluded that the cause of action had to be dismissed,"²¹ after concluding that a wrong had been committed. The inference seems irrefutable that if the *Zepeda* case were to be decided by the Court in *Williams*, the decision, by a parity of reasoning, would give an illegitimate child a cause of action for "wrongful life" against its natural father, and possibly against its unwed mother, assuming she had consented to the illicit act.²²

¹⁹ *E.g.*, N.Y. DECED. EST. LAW § 83(14) provides for the right of an illegitimate child to inherit from its mother under certain circumstances; N.Y. DOM. REL. LAW § 145(3) permits bastards to become legitimized by the subsequent marriage of the natural parents; N.Y. PUB. HEALTH LAW § 4135(1) permits the illegitimate to receive a birth certificate that will not indicate that he was born out of wedlock; N.Y. FAM. CT. ACT § 512(a) states that the phrase "child born out of wedlock" shall apply to a child who is begotten and born outside lawful matrimony.

²⁰ *Zepeda v. Zepeda*, *supra* note 13, at 258, 190 N.E.2d at 857.

²¹ *Williams v. State*, *supra* note 16, at 830, 260 N.Y.S.2d at 958.

²² Such a decision would not be contrary to present New York public policy. In *Zepeda v. Zepeda*, *supra* note 13, the illegitimate's action was based partially on the father's promise to marry the mother, which induced the intercourse. However, the illegitimate's action in the instant case, sounding entirely in tort, could be maintained without alleging any pre-marital agreement and, therefore, would not run afoul of the prohibition of such suits. N.Y. CIV. RIGHTS LAW §§ 80-84, as amended, N.Y. Sess. Laws 1965, ch. 333. The corollary problem of damages is significant in this context. "When injuries . . . leave the realm of the tangible world . . . courts understandably have difficulty in establishing principles of law calculated to assure substantial justice." McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1 (1949).

In *Williams*, the plaintiff's action was directed against the state because of the latter's negligence. Thus, proof of damages formed an essential part of the plaintiff's cause of action. Generally, such compensatory damages are determined by comparing the plaintiff's present condition with his position prior to the tort. Here, since plaintiff's previous "state" was one of non-existence, this standard is inapplicable. The jury must therefore determine the extent to which this particular child will be damaged by the stigma of illegitimacy during its natural life. In this respect, the computation of damages will be speculative, based on an illusionary norm, comparable with the damages in wrongful death actions.

While in *Williams* the Court recognized the existence of a tort, it did not dispose of the multifarious problems inherent in, but left unanswered by, its decision. While these difficulties were not proper areas for judicial consideration, the true effect of the Court's decision cannot be evaluated without discussing them. For example, there were 20,223 illegitimate births in New York in 1964.²³ Theoretically, an equal number of "wrongful birth" actions are possible. Increasing litigation in this area would cause considerably more confusion than already exists in our congested court system. Secondly, the difficulty of determining damages is apparent where the plaintiff alleges injury arising as a result of the "stigma of illegitimacy." Query how the increasing proportion of illegitimacy might abrogate the so-called "stigma" and thereby reduce the injury. Furthermore, in New York, a child conceived through the aid of an artificial insemination device (A.I.D.) is illegitimate. Is it not then possible to hypothesize a suit by the representative of such an illegitimate against the parents, even though both parents had consented to conception through such a device?²⁴ Would such a child be entitled to maintain an action for "wrongful life," the basis of the action being the "stigma of illegitimacy?"

In striving for an effective solution to these problems, and others of an analogous nature, it would seem that our present judicial system is not geared to handle a task of such magnitude. Rather than attempting to "revamp" our court system to meet this challenge, it seems that a more desirable remedy would lie in the creation of a specialized body to handle the matter. During the past thirty years, administrative agencies have emerged as successful legislative creations working in areas of specialization originally

In cases analogous to *Zepeda*, the plaintiff has alternative remedies: the action may be in negligence, in which situation the defendant's state of mind would not be a factor; plaintiff may also allege a prima facie tort, i.e., the intentional performance of an act producing injury, but not of such a categorical nature as to fit a recognized cause of action. Proceeding under the prima facie tort, plaintiff would also be allowed to recover exemplary or punitive damages if the defendant's wrongdoing, in addition to being deliberate, were shown to have been committed with a malicious or fraudulent motive.

²³ These figures were obtained by the author from the New York City Dept't of Health, Bureau of Records & Statistics.

²⁴ *Gursky v. Gursky*, 39 Misc. 2d 1083, 1088, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963). See generally Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAM. L. 39 (1965). Artificial insemination achieved through the use of the husband's semen is commonly referred to as homologous insemination or A.I.H. In *Gursky*, a third party's semen was introduced, thereby causing heterological insemination or A.I.D. It is the latter process alone that causes the child to be illegitimate. Biskind, *supra* note 24.

within the purview of the judicial process.²⁵ The adoption of a specialized agency in this area would therefore seem appropriate. If endowed with liberal powers of discretion, such an agency could evaluate each "wrongful life" claim on a sociological as well as a legal basis, thus assuring substantial justice to all interested parties.

²⁵ See generally DAVIS, ADMINISTRATIVE LAW §§ 1.01-09 (1959).