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Torts--Negligence--Freedom From Illegitimate Birth

Robert K. Wood

University of Kentucky

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husband's place of business lies south of and midway between his home and the restaurant where he and his wife drank and dined prior to the accident. At the time of the accident, the plaintiff and her husband were travelling away from the interchange where they normally turned toward the place of employment, and thus were actually travelling away from their purported destination and toward their home. The plaintiff explains this by stating that her husband had missed the turn and was driving to the next interchange. The accident occurred near midnight which was four or five hours after they had left home, and during this period, the plaintiff and her husband were drinking. These events would not normally be beneficial to nor planned in accordance with, a trip made in the "scope of employment." Clearly, if a wife is to recover from her husband's employer, she must establish in some way that her husband was acting for his employer. On facts such as these, the wife and her husband needed only to agree that they had missed the turnoff, rather than to admit that they were actually on their way home.

In holding as it did, the Delaware court flaunted reality in two ways. First, the court overlooked the availability of indemnity actions, thereby ignoring defendant's argument of indirection and failing to foresee the real possibility of an indemnity action against the husband, which would negate the wife's recovery. Second, cases of this type must be carefully analyzed for the possibility of collusion and fraud. The court must be extremely cautious in applying this rule, which now is a moot question in Kentucky, because a husband and his wife are so related that they may easily collude to establish that the husband was acting within the scope of his employment.

John D. McCann

TORTS—NEGLIGENCE—FREEDOM FROM ILLEGITIMATE BIRTH.—A mentally deficient woman in a state mental hospital was raped by a male patient. An illegitimate infant was born, on whose behalf a suit was brought against the state. Predicated upon allegedly negligent care of the mother, damages were sought for the stigma of illegitimacy, deprivation of property rights, and loss of normal childhood and home life. Denying the motion to dismiss for failure to state a cause of action,
the New York Court of Claims held that an infant born out of wedlock to a mother confined in a state mental hospital had a cause of action against the state, whose allegedly negligent supervision allowed a carnal assault.\(^1\) The Appellate Division reversed, holding there was no public policy basis for recognizing a cause of action grounded, first, upon a state's obligation to a person yet to be conceived and, second, upon allegations of damages so requiring an incursion into the metaphysical for measurement as not to be susceptible of ascertainment.\(^2\)


Prior to reversal, *Williams* was the first recognition of a cause of action for harm inherent in the status of illegitimacy. An earlier case, *Zepeda v. Zepeda*,\(^3\) also sought a cause of action for the stigma of illegitimacy. In *Zepeda*, however, an adulterine bastard sued her natural father for damages. The *Zepeda* court believed the elements of a new tort were presented and ventured the name, "wrongful life." Yet the court denied a cause of action, believing that recognition of the tort would result in such a flood of litigation that a study of the consequences should first be made by the legislature. While disliking the name, "wrongful life,"\(^4\) the lower court in *Williams* believed the creation of a bastard due to alleged negligence of a state hospital was an actionable wrong.

The *Williams* holding in the lower Court was only conceptually radical for "new and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression in which the court has struck out boldly to create a new cause of action, where none had existed before."\(^5\) The law is increasingly providing remedies for once unrecognized intangible injuries such as infliction of mental suffering, invasion of privacy, and alienation of parental affection.

The appellate division found the state could not owe a duty to an

\(^1\) *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965).


\(^4\) *Id.* at 959.

\(^5\) *Prosser, Torts* § 1, at 3 (3d ed. 1964).
unconceived person. Yet such a duty, while unusual, is not foreign to existing law. From the initial recognition of a cause of action for injuries to an infant *en ventre sa mere*, to the recent cases eliminating the absolute requirement of viability of the foetus, American law is apparently permitting a cause of action closer and closer to the instant of conception. The logical extension would be a cause of action prior to conception. That extension has been made in Germany. An infant was born with congenital syphilis caused by a hospital's negligently administering a transfusion of syphilitic blood to his mother. It was held immaterial that the wrongful act occurred months prior to the plaintiff's conception. The injury to the *Williams* infant, however, was not physical. But a cause of action for injuries prior to conception need not be physical. *Piper v. Hoard* held that a plaintiff may maintain an action for a wrong inflicted before conception. The plaintiff's mother was induced by the defendant to marry a third party on the fraudulent promise that any offspring would inherit land. The plaintiff issue was allowed an action for recovery of land based on fraud prior to conception. It is thus easy to see that the state in *Williams* could owe a duty to the unconceived plaintiff to prevent her illegitimate birth.

Before discussing the difficulty of assessing damages, it is important to see if damages are legally justified. Does an illegitimate birth produce harm, and if so, is it a type of harm the law has ever redressed? Compensable liability is usually based on an unreasonable interference with interests of others. Does an infant have a legal interest in a legitimate birth? Yes, for a legal right which children have always possessed is the right to be considered legitimate if at all possible. "Pursuant to one of the strongest presumptions in the law, a child has a right to be legitimate if such a status can be inferred in any way from conditions surrounding the birth of the child." The reason the law guards a child's legitimacy is to prevent the social harm inherent in an illegitimate status. "The bastard, like the prostitute, thief, and beggar belongs to that motley crowd of disreputable social types which society has generally resented. . . . He is a symbol of social irregularity, an undeniable evidence of contra-moral forces, in short, a problem."

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9 107 N.Y. 73, 13 N.E. 626 (1887).
10 Drinan, *The Rights of Children in Modern American Family Law*, 2 J. Family L. 101, 103 (1962); Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527 (1908); Dudley's Adm'r v. Fidelity & Deposit Co., 240 S.W. 2d 76 (Ky. 1951).
Legislatures have recognized the problems illegitimacy can cause and have improved the economic and legal status of bastards. The disparity in the rights of intestate succession of legiti mates and illegitimates has been corrected in Arizona and Oregon. In Kentucky, fathers of illegitimates are financially liable for support just as if the children were legitimate.

The essence of the wrong, however, is not economic inequality. The Zepeda court said that illegitimates suffer a real injury—they have been placed "under a permanent disability." That disability is a social stigma which legislatures have recognized. Various records and procedures once required in bastardy hearings are being eliminated to reduce publicity and resultant stigmatization. But no law can effectively remove a stigma created by society. A stigma, a mark of infamy or disgrace, has been defined as conferring shame or discredit. A stigma is thus an intangible injury akin to mental distress, social embarrassment, and harm to reputation, all of which the law redresses. Only a change in societal concepts of morality can remove the stigma. As long as a stigma accompanies bastardy, should not an innocent child recover damages for an injury corresponding to injuries the law has previously recognized as redressable.

Seeing that damages can be justified, it is next necessary to consider assessment. In any new problem encountered by the courts, damages are indeed difficult to assess due to a lack of precedent. Fears of fraudulent claims and problems of measurement have characteristically been excuses of expediency in new developments of the law. The mental suffering and right of privacy actions were shackled by similar reasoning for years. Yet those intangible injuries the law now recom penses. Damages for the intangible injury inherent in the stigma of illegitimacy could similarly be assessed.

An estimate of damage should be limited to the "social stigma" category of harm. Rights of property and support are commonly regulated by statute. Deprivation of normal childhood and home life cannot be assessed during infancy. Illegitimate children may be adopted. They may experience a happier childhood than many legitimate children. Only after reaching adulthood could such a harm then be measured in retrospect. The harm to be recompensed—a social stigma—

12 Comment, 18 STAN. L. REV. 530, 532 (1966). But see KY. REV. STAT. § 391.090 1942 [hereinafter cited as KRS].
15 In 1964, the following statutes were repealed in Kentucky: KRS §§ 406.010, 406.020, 406.030, 406.140, 406.160 (1942).
16 WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY 2243 (1966).
must therefore be a type which every illegitimate can know, whether later legitimized or not. The injury is an insidious form of mental distress peculiar to his status.

Construed broadly, *Williams* in the Court of Claims would have allowed a cause of action for damages against *parents* of illegitimates. The Court of Appeals of New York stated that being born to one set of parents rather than another is not an actionable wrong. Both courts exceeded the scope of the problem, for parents were not involved. Admittedly, the character of the question changes when the rights and liabilities of private individuals are brought to bear on a theory of conception resulting from the negligence of parents. *Williams* should have been narrowly confined to the concept of non-parental third party defendants, such as public or private organizations having an affirmative duty of care to ensure that persons in its charge are not sexually molested. Such a limitation of the class of defendants would effectively eliminate so-called "flood of litigation" fears and greatly simplify the measurement of damages.

*Robert K. Wood*