

1963

## Torts - Illegitimacy - Illegitimate v. Father

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uation testimony premised on a reasonable probability of rezoning should be rejected.

The condemnee in an eminent domain proceeding has the right to just compensation, interpreted by the courts to mean fair market value. But fair market value does not include remote possibilities under the mistaken application of the rule of reasonable probability of rezoning. The rule requires evidence which refers to that area in the particular political subdivision in which the condemned property is located. The evidence introduced in *Snyder v. Commonwealth* does not appear to fit this standard.

**TORTS—Illegitimacy—Illegitimate v. Father—To cause one to be born into the world as an illegitimate constitutes a tortious act—no remedy for injuries resulting from this act will be granted.**

*Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963).

The defendant is the father of the infant plaintiff. The plaintiff's mother was induced by the defendant to have sexual relations with him by a promise of marriage. Because the defendant was already married, this promise could not be kept.<sup>1</sup> As a result, the plaintiff is an illegitimate child. This suit was brought by the plaintiff to recover damages for his illegitimacy.<sup>2</sup> The suit was dismissed by the Circuit Court of Cook County, Illinois, for failure to state a cause of action. The Supreme Court of Illinois refused to take the case, and transferred it to the Appellate Court which affirmed the lower court's decision.<sup>3</sup>

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1. The plaintiff's mother had no knowledge that the defendant was married at the time of the act of coition, and therefore, she was a victim of the defendant's fraud.

2. The plaintiff sought damages for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his paternal ancestors and for being stigmatized as a bastard.

3. According to Illinois Law not all cases can be appealed directly to the Supreme Court of Illinois.

ILL. REV. STAT. 1961, ch. 110, § 75.

(1) Appeals shall be taken directly to the Supreme Court  
(a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved,  
(b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinances

In rendering its decision, the court was confronted with several major problems. The first of these pertained to whether the act of the defendant was tortious.<sup>4</sup> This problem was resolved in the affirmative. The court felt that the act of the defendant was willful and perhaps criminal. It was found to be willful because the defendant was completely indifferent to the foreseeable consequences of his act. The court stated that the defendant displayed a total disregard for the rights of others by acting with full awareness that if a child was born as a result of this sexual relationship, it could not be legitimized by him because of his existing marriage.<sup>5</sup> It also was indicated that the act may have been criminal in that the married defendant and the unmarried mother were living together at the mother's apartment.<sup>6</sup> The court concluded that the defendant's act was not only a moral wrong but was clearly tortious in its nature.

After the court held that the defendant's act was tortious, it dealt with the problem of whether or not a tort could have been committed upon the plaintiff. The court indicated that because the concept of viability no longer seems to be a criterion upon which tort recovery rests, a tort could have been inflicted upon a being simultaneously

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or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires.

(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the constitution of the State to be allowed from the Appellate Court to the Supreme Court . . .

The plaintiff failed to come within this provision and therefore his case was transferred to the Appellate Court.

4. No precedent could be found on this type of case. The court quoted from the defense counsel's complaint in describing this claim:

Such a claim is novel. There is no statutory or judicial recognition of such a claim in Illinois or elsewhere in the United States. There is no adverse decision either. In fact, no such claim seems ever to have been raised in any court in Illinois, of any other Common Law jurisdiction, or in any Civil Law country either.

5. If the defendant were not married, he would have been able to subsequently marry the mother and make the plaintiff legitimate. ILL. REV. STAT. 1961, ch. 89, § 4.

6. ILL. REV. STAT. ch. 38, § 11-7.

(a) Any person who cohabits or has sexual intercourse with another not his spouse commits adultery, if the behavior is open and notorious, and

(1) the person is married and the other person involved in such intercourse is not his spouse; or

(2) the person is not married and knows that the other person involved in such intercourse is married.

with its conception.<sup>7</sup> Complaints are now sustained where the child was not, or might not have been viable at the time of the injury.<sup>8</sup> Thus, the court decided that if the plaintiff was conceived before the completion of the act of coition, he became a human organism concurrently with the wrongful act, and if life was proven by subsequent birth, this human life had the same rights at the time of conception as it has at any time thereafter.<sup>9</sup>

However, there is no certainty as to the exact moment conception occurs; it may take place during or after coition.<sup>10</sup> Therefore, the court was confronted with the problem of whether the defendant could be held accountable if his act was completed before the plaintiff was conceived. It was decided that even if the act was performed prior to conception, a right will arise if there is a causal relation between the wrongful act and the resulting injury.<sup>11</sup> The court found such a relationship and explained it by stating:

If . . . [the plaintiff's] . . . conception took place after the act, he was a potential being with essential reality at the time of the act. The seed was planted, the life process was started, life ensued and birth followed. The defendant's wrongful act simultaneously procreated the being whom it injured.

Therefore, the court concluded the tort to exist and viewed as immaterial whether the plaintiff was conceived during or after the act of procreation. It explained this decision by the following:

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7. Daley v. Meier, 33 Ill. App. 2d. 218, 178 N.E. 2d. 691 (1961), mother approximately one month pregnant; Smith v. Brennan, 31 N.J. 353, 157 A.2d. 497 (1960); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d. 93 (1960), first month of pregnancy; Bennett v. Hymers, 101 N.H. 483, 147 A.2d. 108 (1958); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E. 2d. 727 (1956), six weeks after conception; Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S. 2d. 696 (1953), third month of pregnancy; Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d. 550 (1951).

8. *Ibid.*

9. The court explained this statement in relation to the cases cited in note 7 which eliminated the criterion of viability for tort recovery. The court added: The case at bar seems to be the natural result of the present course of the law permitting actions for physical injury ever closer to the moment of conception. In point of time it goes just a little further. The significance of this course to us is this: if recovery is to be permitted an infant injured one month after conception, why not if injured one week after, one minute after, or at the moment of conception? It is inevitable that the date will be further retrogressed.

10. Goodrich, NATURAL CHILDBIRTH, 52 (1950); MALOY, LEGAL ANATOMY AND SURGERY, 668 (2nd. ed. 1955); 1 MARSHALL'S PHYSIOLOGY OF REPRODUCTION, 315 (3rd. ed. 1960); Parker, THE SEVEN AGES OF WOMAN, 198 (1960).

11. Piper v. Hoard, 107 N.Y. 73, 13 N.E. 626 (1887).

The plaintiff is a person now and he was a potential person with full capacity for independent existence at the time of the original wrong. As he developed biologically from potentiality to reality, the wrong developed too. It progressed as did he, from essence to existence. When he became a person, the nature of the wrong became fixed. From a moral wrong and a criminal act against the public, it became a legal wrong and a tortious act against the individual.

The third problem considered was the character of the plaintiff's injury. The court believed that although the injury of being born into the world as an illegitimate is not tangible, it is real, and if legitimation does not take place, the injury is continuous and irreparable. The court cited the Illinois statutory provisions which are aimed at suppressing a child's illegitimacy as evidence of this injury.<sup>12</sup> However, the court felt that as praiseworthy as these laws are, no law can make these children whole unless legitimation takes place. It was resolved that the plaintiff has been placed under a permanent disability by his birth, and therefore, the quintessence of the injury is that the plaintiff was born and that he is.

The final problem considered was whether a remedy should be granted for this injury. While the court admitted that an action for damages is implicit in any wrong that is called a tort,<sup>13</sup> in the instant case it deliberately refused to grant a remedy. This was done despite

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12. The court supported this statement by the following:

This liberalization is reflected in the statutes of Illinois: an illegitimate child has the right to his father's surname; either or both of his parents may be compelled to support and educate him until he becomes 18 years of age; his parents have custodial rights; he may be legitimized by the marriage of his parents; if a birth certificate has been issued a new one is issued in the same form as for a legitimate child and the old certificate is impounded; if he is born following an attempted marriage, where some form of a lawful marriage ceremony has been performed, he is considered legitimate; if he is born of an adulterous relation he may be legitimized if his parents intermarry and his father acknowledges him to be his child; in order to facilitate his legitimation, the certificate of negative finding as to venereal disease in his parents, a prerequisite to marriage is waived; he is not considered as illegitimate if, after his conception or birth, the marriage of his parents is declared void; the consent of his father is not necessary for his adoption; the word 'illegitimate' and the phrase 'born out of wedlock' cannot be used in his adoption petition or decree; he may inherit from his mother and his maternal ancestors; if his mother has died he may inherit from those from whom she might have inherited; his issue may take what he would have taken if he were living; not only his wife and descendants inherit from him, but his mother and her descendants can also.

13. Prosser, *LAW OF TORTS*, 1-4 (2nd. 1955).

the court's realization that it was acting inconsistently by recognizing the tort and refusing the remedy. The court felt that recognition of this claim would mean the creation of a new tort—an *action for wrongful life*. It did not fear that this new tort would open the floodgates of litigation concerning illegitimates, but it did fear that the nature of this action was such that others born into the world under conditions which they might regard as adverse would be encouraged to seek relief.<sup>14</sup> The court concluded its reasoning for the denial of a remedy by saying:

. . . despite our designation of the wrong committed herein as a tort, because of our belief that lawmaking, while inherent in the judicial process, should not be indulged in where the result could be as sweeping as here. The interest of society is so involved, the action needed to redress the tort could be so far-reaching, that the policy of the State should be declared by the representatives of the people.

This decision raises difficulties in two areas—one concerning the court's untroubled recognition of this tort and the other involving the jurisprudential problem relating to the connection between rights and remedies. It appears that the tort in this case is not as plain on its face as was decided by this court. The argument can be raised that although the defendant's conduct was reckless, this same conduct gave the plaintiff life. Therefore, it could be argued that it would be better to have been born an illegitimate than not to be born at all. Applying this point of view to the instant case, it could logically be concluded that *to cause one to be born an illegitimate* is more of a benefit than a disability. Thus, it may be that the recognition of this tort will not be as readily made by others as it was by this court.

As to the right-remedy union violated in this case, it appears that the court made a compromise decision balancing the potentiality of an onslaught of radical claims against the granting of, by their own admission, a justified remedy. It seems that the court by its recogni-

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14. The court stated in respect to radical claims:

What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.

The court also felt that the present case could be just a forerunner of those which may confront the court in the future because of birth caused because of artificial insemination or even life created in a test tube.

tion of the existence of a tort and refusal of a remedy has ignored that principle of rational jurisprudence which provides a remedy for every wrong which is recognized as such by law.<sup>15</sup>

It is apparent from this decision that the court justified the denial of this remedy because they feared that the granting of damages would open the floodgates of radical claims.<sup>16</sup> However, it has been propounded by both courts and legal scholars that neither the possibility of a multiplicity of radical claims,<sup>17</sup> nor the fear that a legal principle will be pushed to an absurdity,<sup>18</sup> are sufficient grounds to justify the denial of a legal remedy.

This court created a dilemma when it recognized the defendant's act as unlawful, but instead of providing a relief to correct the harms done by this act, it has by refusing a remedy created a privilege or immunity in all such defendants to commit this wrong.

15. It is well settled that for every right or wrong there is a legal remedy, except in the case of the rights of an individual against a state, or of one nation against another. 1 C.J.S. *Correlation of Right, Wrong, and Remedy*, § 4. (1936).

Right and remedy, within the meaning of this rule, are reciprocal; there can be no right without a remedy, and to deny the remedy is, in substance, to deny the right. 1 C.J.S. *supra*.

An action or defense, although one of first impression, may be maintained if, under any recognized principles of law, the facts involved constitute a violation of a legal right. 1 C.J.S. *Actions of First Impression*, § 16. (1936).

Hinish v. Meier & Frank Co., Inc., 166 Ore. 482, 113 P.2d. 438 (1941); 1 Am. Jur. 2d. *Novelty of Action*, § 49 (1962).

16. *Supra.*, note 8.

17. . . . it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense. Ashby v. White, 2 Ld. Raym. 938, 92 Eng. Rep. 129 (1703).

18. As to the fear of the court concerning the radicalness of the claims which will appear, Mr. Justice Holmes stated: "all decisions [are] . . . a series of points tending to fix a point in a line. 2 HOLMES-POLLOCK LETTERS 28 (1961). The Supreme Court of Oregon stated:

When a legal principle is pushed to an absurdity, the principle is not abandoned, but the absurdity is avoided. The courts are competent, we think, to deal with difficulties of the sort suggested, and case by case, through the traditional process of inclusion and exclusion, gradually to develop the fullness of the principle and its limitations. Hinish v. Meir & Frank Co., Inc., *Supra.* note 15;

1 Am. Jur. 2d. *Supra.* note 15.