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## Torts - Illegitimacy - Negligence - To Cause One to Be Born into the World as a Bastard Is a Wrongful Act

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TORTS—Illegitimacy—Negligence—To cause one to be born into the world as a bastard is a wrongful act—Where breach of a foreseeable duty is the proximate cause of damages a claimant is entitled to a trial.

*Williams v. State of New York*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (1965).

A bastard child is entitled to an equal start in life, although it has not yet been determined how much this will cost. The New York Court of Claims sustained an infant's cause of action for negligence, where the only damages alleged were the consequences of bastardy. The child was conceived as a result of a sexual assault upon her mother, a patient in a state mental institution. The State allegedly failed to provide adequate care and supervision for the mother while she was in their custody.

In entertaining the State's motion to dismiss the action as insufficient, the court was faced with several significant questions, not the least of which was the absence of precedent.<sup>1</sup> The court held that neither the novelty of an action nor the lack of precedent will bar recovery where a legal wrong results in lawful damages.<sup>2</sup> The motion to dismiss did not require a finding of negligence and causation. Thus, the court had only to decide whether relief could be granted if the facts as alleged were true.<sup>3</sup>

A child's action for injuries arising from an act concurrent with conception had never before been sustained. The right to recover for prenatal injuries had heretofore depended solely upon the viability concept. But a review of cases during the past fifteen years indicates a gradual abandonment of that standard.<sup>4</sup> The court extended the trend in the present case and found that viability was not a controlling factor. It then stated:

... where a pleading alleges that a breach of a foreseeable duty was a proximate cause of damages, a claimant should be entitled to a trial.<sup>5</sup>

Recently, an Illinois court decided that an adulterine bastard should not be permitted to sue its putative father for illegitimate birth arising from a tortious assault upon its mother.<sup>6</sup> While recognizing both a wrongful act and the resulting harm, the Illinois court envisioned a cause of action that would enable anyone born into adverse conditions to maintain

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1. *Williams v. State*, 260 N.Y.S.2d 953, 954 (1965). See also the comments of Professor Max Rheinstein of the University of Chicago Law School quoted in *Zepeda v. Zepeda*, 190 N.E.2d 849, 851 (1963).

2. *Williams v. State*, *supra* at 955.

3. *First National Bank of Morrisville v. International Radiant Corporation*, 5 App. Div. 2d 1043, 173 N.Y.S.2d 383, 384 (1958).

4. *Williams v. State*, *supra* note 1, at 961-962; *Zepeda v. Zepeda*, 190 N.E.2d 849, 852 (1963).

5. *Williams v. State*, *supra* note 1, at 963.

6. *Zepeda v. Zepeda*, *supra* note 4.

an action and recover damages.<sup>7</sup> The New York Court of Claims, commenting upon the decision, said:

. . . I do not comprehend judicially how the maintenance of the action at bar can be equated with the quoted anticipation. To me, [the anticipations of the Illinois court] are unrealistic, illogical and unsupportable. Tangential reasoning should not be utilized as a sledge hammer or chisel to destroy a fundamental right which cries out for justice . . . .<sup>8</sup>

The court in the present case is to be commended for rejecting the Illinois rationale. In the present case, as in the Illinois case there was a wrongful act resulting in harm. Thus, in either case it would be inconsistent to deny relief because of the judge-made viability standard.

It may be argued, of course, that an illegitimate child should not be afforded the relief requested in the present case, regardless of the tortious or criminal nature of the conduct resulting in his birth.<sup>9</sup> Admittedly, in almost every instance, life as a bastard would be preferable to nonexistence. But recovery should not be denied merely because a collateral benefit has been conferred by the same act that causes injury.<sup>10</sup> The injury suffered by a bastard is a direct consequence of his illegitimacy.<sup>11</sup> His very existence should not serve as a bar to recovery.

When it is conceded, as in the present case, that recovery must be allowed, it is essential that the nature and extent of damages be defined. While the specific issue of damages was not before the New York Court of Claims in this case, it is suggested that it would have nevertheless been proper for it to define the extent of damages since this action is recognized as a novel claim. Although the action was sustained upon the alleged deprivation of property rights, a normal childhood and homelife, and support and rearing, as well as the harm that arises from being stigmatized a bastard, the court did not discuss the measure or extent of damages that may be awarded for such harm.<sup>12</sup>

It is impossible for any court or counsel to formulate damages that will provide a bastard with a normal childhood. But this should not deter them from designing damages to give the bastard an equal start in life with normal children. The mental suffering and need for support and

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7. *Id.* at 858.

8. *Williams v. State*, *supra* note 1, at 959.

9. 2 DUQUESNE U.L. REV. 125, 129 (1963).

10. 65 C.J.S. *Negligence* §§ 57, 58 (1950). A volunteer who rescues another person from perilous circumstances will incur liability for injuries inflicted on that person as a result of the volunteer's failure to exercise due care.

11. *Zepeda v. Zepeda*, *supra* note 4, at 857.

12. These items were set forth as injuries in paragraph 15 of the infant's pleadings and damages of \$100,000 were alleged. See *Williams v. State*, *supra* note 1, at 954.

rearing that accompany illegitimacy invite a comparison to defamation and support actions. Similar comparisons can be made with other tort actions that should provide additional bases for compensation in illegitimacy cases.

Negligence that causes a person to be born a bastard is actionable. The bastard child should be awarded sufficient damages to compensate him for a disability arising from that wrong. It is incumbent upon our courts and skilled counsel to create a standard to determine the scope and extent of damages that will constitute substantial redress. Their efforts may well result in damages that are "bastards" among traditional tort damages.

It is fundamental to our common-law system that one may ask redress for every substantial wrong. . . . Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction.<sup>13</sup>

*Charles J. Weyandt*

CONSTITUTIONAL LAW—Right to Counsel—Accused's right to counsel attaches at the accusatory stage of the proceedings even though no request for counsel is made.

*United States ex rel. Russo v. New Jersey*, 351 F.2d 429 (3d Cir. 1965).

Petitioners Russo and Bisignano, and a fellow defendant, LaPierre, were arrested after an attempted robbery of a Newark, New Jersey tavern in which an off-duty policeman was killed and one of the robbers wounded. Russo, who was suffering from a gunshot wound, was taken to a hospital where the bullet was removed. Having implicated himself in the crimes, Russo signed a confession shortly after his release from the hospital. Bisignano had already admitted his role in the crimes, and, after several hours of questioning, he signed a confession. Neither Russo nor Bisignano was advised of his right to counsel before signing a confession.

The trio was indicted and convicted of murder. Having exhausted their state remedies and rights of appeal,<sup>1</sup> defendants Russo and Bisignano applied to the federal district court in New Jersey for writs of habeas corpus. The writs were sought by the defendants on the ground, *inter*

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13. *Battella v. State of New York*, 291 N.Y.S.2d 34, 36, 176 N.E.2d 729, 730 (1961), where the court overruled a case that was followed for sixty-five years.

1. *State v. LaPierre*, 39 N.J. 156, 188 A.2d 10 (1963). Certiorari was denied Bisignano. *Bisignano v. New Jersey*, 374 U.S. 852 (1963). See 28 U.S.C.A. § 2254.