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The Infliction of Illegitimacy: A New Tort

THE INFLICTION OF ILLEGITIMACY: A NEW TORT?

A new tort allowing an action by an infant for damages for her negligently caused illegitimacy may have been created in the 1965 New York Court of Claims case of *Williams v State.*[1] In that case an action was brought by Frank Williams as guardian *ad Litem* for Christine Williams, an infant under the age of fourteen years, against the State of New York alleging neglectful care and supervision over the mother, Lorene Williams, while a mental patient in the custody of the defendant in Manhattan State Hospital, which neglectful care and supervision allowed the mother to be sexually assaulted, and that as a result of that negligence the infant, Christine Williams, was conceived and born out of wedlock to a mentally deficient mother The pleading of the plaintiff alleges damages resulting from deprivation of property rights, normal childhood and home life, proper parental care, support and rearing, and from having to bear the stigma of illegitimacy [2] Acting only on the question of the plaintiff's pleading, the Court of Claims, recognizing the breach of a foreseeable duty as the proximate cause of damages to the plaintiff,[3] determined that the cause of action was maintainable.[4]

On appeal by the state from the Court of Claims decision to the New York Supreme Court, Appellate Division, Third Department, that decision was reversed[5] for lack of a "reasonable basis, consistent with public policy"[6] for recognizing the tort, because, the

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1. 46 Misc. 2d 824, 260 N.Y.S.2d 953 (1965).
2. The mother, through Frank Williams, her guardian, also pleaded a seperate cause of action in this case, for carnal assault while a mental patient in the custody of the State, resulting in the pregnancy and birth allegedly due to the State's insufficient care and supervision, but the State did not here attack the legal sufficiency of the cause of action in favor of the mother, but only that in favor of the child. The plaintiff prays $50,000.00 for the mother's cause of action, and $100,000.00 for the infant Christine. *Id.*, 260 N.Y.S.2d at 954.
3. "[T]he act or acts of which the infant complains were reasonably foreseeable by the State which owed a duty to its patient and her issue. Where a pleading alleges that a breach of a foreseeable duty was a prorimate cause of damages, a claimant should be entitled to a trial." *Id.*, 260 N.Y.S.2d at 963.
4. "Being compelled to accept the pleaded facts as true, it is my determination that the cause of action sub judice is maintainable. Assuming that the defendant did not give a female mental patient adequate care and supervision at a hospital so that she was not prevented from being sexually attacked, the forseeable combination of persons and event is actionable negligence and a proximate cause of the pregnancy and birth." *Id.*, 260 N.Y.S.2d at 955.
5. Williams v. State, 269 N.Y.S.2d 786 (1966).
6. *Id.* at 787.

Appellate division felt, the damages are impossible to ascertain.[7]

Denials of recovery based upon a fear that the law cannot put a monetary value upon the interest in question have impeded the development of other areas of tort law, notably that of mental distress.[8] Refusal to recognize that tort for reason of difficulty of assessment of damages, proved merely a temporary deterrent to eventual recognition of the tort, once its elements had been defined and analyzed.[9]

In reaching its decision, the Court of Claims followed closely the reasoning in, and quoted extensively from, the 1963 Illinois case of *Zepeda v Zepeda*,[10] a somewhat similar case in which relief was denied.

Zepeda v Zepeda was an action of Joseph Dennis Zepeda, a minor, by Irma M. Flores, his next friend, against his father for damages because he had been born an adulterine bastard. The complaint averred that the defendant, plaintiff's father, induced the plaintiff's mother to have sexual relations by promising marriage, such promise being fraudulent because, unbeknown to the mother, defendant was already married. It was further charged that the defendant's acts were willful and injured the plaintiff's person, property, and reputation by causing him to be born an adulterine bastard. Damages were sought by plaintiff 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 father, to inherit from his paternal ancestors, and for being stigmatized as a bastard. The plaintiff raised constitutional questions under the due process and equal protection clauses and under Article II, section 19 of the Constitution of Illinois, which provides that "every person ought to find a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or reputation;" asked relief on the contract theory, plaintiff as third party beneficiary of the agreement made by his father and mother to marry; alleged defamation resulting

7. "We find no reasonable basis, consistent with public policy, for recognition of a cause of action predicated, first, upon a supposed obligation on the part of the state to a person to be conceived and, second, upon allegations of damage not susceptible of ascertainment." [T]he damages asserted rest upon the very fact of conception and would have to comprehend the infirmities inherent in claimant's situation as against the alternative of a void, if non-existence may be thus expressed, and could not, without incursion into the metaphysical, be measured against the hypothesis of a child or imagined entity in some way identifiable with claimant but of normal and lawful parentage and possessed of normal or average advantages." *Id.* at 787.

8. "[M]ere mental pain and anguish are too vague for legal redress. " Southern Express Co. v. Byers, 240 US 612 (1916) at 615.

9. The objections that "mental disturbance cannot be measured in terms of money, and so cannot serve in itself as a basis for the action have been demolished many times, and it is threshing old straw to deal with them." PROSSER, TORTS, § 55, (3d ed. 1964).

10. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945, 85 Slp. Ct. 444 (1964).

in damage to reputation and good name; and endeavored to state a cause of action for mental suffering. The Circuit Court, Cook County, entered an order dismissing the suit and striking the complaint for failure to state a cause of action. The plaintiff appealed directly to the Supreme Court of Illinois, which refused to consider the case, and transferred it to the Illinois Appellate Court, which held that the complaint alleged the commission of a tort, but affirmed its dismissal. The constitutional issues were disposed of by the refusal of the Illinois Supreme Court to take the case.[11]

In dealing with the theory of a third party beneficiary to a contract, the court said: "This contention, even if it were tenable, is not available to the plaintiff because his complaint sounds in tort."[12]

The allegation of defamation, although the plaintiff's damage in reputation was similar to that of a defamed person, was also rejected, because the complaint failed to allege publication. The court also disposed of the claim made on the basis of intentional infliction of mental distress, ruling that such tort was not sufficiently alleged. The court observed that "if [the complaint] did outline such an action, it would be an interesting speculation whether a charge of mental distress and emotional suffering could be made and sustained on behalf of an infant."[13]

The Appellate Division was less hesitant with respect to the tortious nature of the defendant's activities. It found that the defendant's act was willful because of his indifference to the foreseeable consequences of his act and complete disregard of the rights of others, in that he knew that if a child were born as a result of his act he could not legitimize that child. The criminal aspects of the act were said to have accentuated its gravity Defendant's act "was not only a moral wrong but was, under the aggravated circumstances of this case, tortious in its nature."[14] The court, however, refused to recognize the cause of action because to do so would be judicial lawmaking, which, the justices felt, is improper "where the result would be as sweeping as here."[15] Recognition of a cause

11. "If a case in which constitutional issues are advanced is transferred to the Appellate Court, it must be concluded that the Supreme Court has determined no such issues are involved or they are not material to the disposition of the appeal. *City of Chicago v. Campbell*, 27 Ill. App. 2d 456, 170 N.E.2d 19." *Id.*, 190 N.E.2d at 852.

12. *Id.*, 190 N.E.2d at 852.

13. *Id.*, 190 N.E.2d at 855.

14. *Id.*, 190 N.E.2d at 852. It seems inconsistent for the court to recognize the existence of a tort and its resultant harm, but refuse an action for damages. It is a well recognized concept of tort law that for every tort there is a corresponding remedy in damages. "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. *Actions*, § 4 (1963). See also, PROSSER, TORTS § 1 (2d ed. 1955).

15. "[L]awmiking, while inherent in the judicial process should not be indulged in

of action for "wrongful life"[16] should come, said the court, "only after thorough study of the consequences. "[17] Moreover, the novelty of the action seems to have been a factor contributing to the *Zepeda* decision.[18] Professor Max Rheinstien, Professor of law at the University of Chicago, an internationally recognized authority on family law, was asked by the court in *Zepeda*, at the suggestion of plaintiff's attorney,[19] to participate in the case as amicus curiae. The court quoted from Professor Rheinstien's description of the complaint: "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 or any Common Law jurisdiction, or in any Civil Law country either "[20] In denying the cause of action, the decision reflects the hesitancy of the court due in part to the novelty of the complaint.

In recognizing the harm and characterizing the act of procreation of a bastard child as tortious,[21] however, the *Zepeda* court presented arguments in favor of redress for what they felt to be a real injury, which were convincing enough to guide the New York Court of Claims in recognizing a cause of action in favor of a bastard in *Williams v State*. The *Williams* Court of Claims decision could be narrowly construed as affording relief only to a child conceived and born out of wedlock as a result of an institutional defendant's failure to protect the child's incompetent mother from sexual assault. The opinion handed down in that case, however, strongly indicates that, given the fact situation in *Zepeda*, it would have recognized a cause of action in favor of the Zepeda child. The opinion in *Zepeda v Zepeda*, stated the Court of Claims, "deviated from its logical sequence when it concluded that the cause of action had

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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." *Supra* note 10, 190 N.E.2d at 859. Since the law looks with general disfavor upon sexual activity outside of marriage and since a large segment of society views such conduct as morally reprehensible, no statutory basis seems necessary to a finding of liability here.

16. "Wrongful life," a rather unfortunate term because its purview goes far beyond the concept of illegitimacy, is the label applied by the *Zepeda* court to the tort there in question. *Supra* note 10, 190 N.E.2d at 859.

17. *Id.*, 190 N.E.2d at 859.

18. The New York Court of Claims recognized this factor and derided the Zepeda court for allowing it to affect their decision, saying, "the novelty and lack of precedent for declaring that the baby bastard has a cause of action should not be a deterrent to such ruling." *Supra* note 1, 260 N.Y.S.2d at 955.

19. Defendant did not contest the appeal, and during the oral argument, the plaintiff's attorney suggested to the court that the defendent's viewpoint should be represented, and that Professor Rhienstein be asked to participate.

20. *Supra* note 10, 190 N.E.2d at 851-52.

21. "Recognition of the plaintiff's claim means creation of a new tort: a cause of action for wrongful life." *Id.*, 190 N.E.2d at 858.

to be dismissed rather than establish a new cause of action. . ."[22]

The combination of arguments and precedent laid out in *Zepeda* and in the Court of Claims decision of *Williams v State* set forth strong arguments, both legal and social, against allowing the illegitimate's plight to exist without legal remedy These arguments are not properly answered by the Court of Appeals decision. If the new tort recognized in the *Williams* case can be committed not only in the extraordinary circumstances there present, but also by an illegitimate's father, these arguments must be met and that tort examined in its relation to other somewhat similar areas of tort law

The first conceptual problem dealt with by the *Williams* and *Zepeda* courts was whether a tort may be inflicted upon a human being simultaneously with its conception. The New York Court of Appeals' dismissal of the problem by referring to the cause of action as one predicated "upon a supposed obligation on the part of the State to a person to be conceived,"[23] thus not entitled to legal remedy, in light of the detailed analyses by the other two courts, is not an adequate answer to the question. In dealing with the problem the Court of Claims and the Illinois court found analogies in the pre-natal injury cases.

The case of first impression on the question of recovery by a child for injuries inflicted upon him prior to his birth was *Dietrich V Inhabitants of Northampton,*[24] where the Massachusetts Supreme Judicial Court, in an opinion written by Oliver Wendell Holmes, held, "if a woman between four and five months advanced in pregnancy, by reason of falling upon a defective highway, is delivered of a child, who survives his premature birth only a few minutes, such a child is not a 'person', within the meaning of the Pub. Sts. c. 52,§17, for the loss of whose life an action may be maintained against the town by his administrator."[25] The opinion further stated, "as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her [the mother]. . . ."[26]

The next jurisdiction in the United States to handle the problem was Illinois, in the 1900 case of *Allaire v St. Luke's Hospital.*[27] In that case the court, following the reasoning in *Dietrich,* held that an infant cannot maintain an action for injuries received

22. *Supra* note 1, 260 N.Y.S.2d at 958.
23. *Supra* note 7.
24. 138 Mass. 14, 52 Am. St. Rep. 242 (1884).
25. *Id.* at 14.
26. *Id.* at 17.
27. 184 Ill. 359, 56 N.E. 638, 45 L.R.A. 225 (1900).

before birth.[28] Justice Boggs, however, dissenting, expressed a viewpoint which was to find acceptance later He stated that:

> the law should, it seems to me, be that whenever a child *in utero* is so far advanced in pre-natal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterward born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother [29]

The precedent set in *Dietrich* and *Allaire* ruled the decisions for nearly fifty years.[30] The courts, in denying recovery, grounded their decisions on lack of precedents for recovery,[31] stare decisis,[32] the conjectural and speculative nature of the injury,[33] lack of duty owed to the child,[34] and fear of fictitious claims.[35] There was, however, growing opposition to the doctrine.[36] As well as the dissent in *Allaire,* the rationale was questioned by Justice Cardozo in a dissenting opinion in *Drobner v Peters,*[37] and by Brogan, C. J et al in a strong dissent in *Stemmer v Kline.*[38] But only one decision in this country rejected the rule prior to 1946. A Pennsylvania trial court, in a 1924 case, decided not to be bound by the weight of authority and granted relief for injuries wrongfully inflicted upon a child prior to its birth.[39] This case must be considered overruled,

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28. "That a child before birth is in fact, a part of the mother, and is only severed from her at birth, cannot, we think be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty court, therefore, that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere legal fiction, which so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother while pregnant with it. We are of the opinion that the action will not lie." *Id.,* 56 N.E. a t 640.

29. *Id.,* 56 N.E. at 642.

30. Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926), See Buel v. United Rys. Co. of St. Louis, 248 Mo. 126, 154 S.W 71 (1913), Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), Mays v. Weingarten, 82 N.E.2d 421 (Ct. App. Ohio, 1943), Magnolia Coca Cola Bottling Co. v. Jordon, 124 Tex. 347, 78 S.W.2d 944 (1935), Lipps v. Milwaukee Electric R. and Light Co., 164 Wis. 272, 159 N.W 916 (1916).

31. See Allaire v. St. Luke's Hospital, *supra* note 27.

32. See Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939).

33. See Stanford v. St. Louis-San Francisco Ry. Co., *Supra* note 30.

34. See Allaire, *Supra* note 27.

35. See Magnolia Coca Cola Bottling Co. v. Jordan, *Supra* note 30.

36. Morris, *Injuries to Infants "En Ventre Sa Mere",* 59 CENT. L.J. 143 (1904) Kerr, *Actions by Unborn Infant,* 61 CENT. L.J. 364 (1905) Albertsworth, *Recognition of New Interests in the Law of Torts,* 10 CALIF. L. REV. 461 (1922), Frey, *Injuries to Infants "En Ventre Sa Mere",* 12 ST. LOUIS L. REV. 85 (1927) Notes, 76 CENT, L.J. 351 (1913) 34 HARV. L. REV. 549 (1921) 6 CORNELL L. Q. 341 (1921) 44 YALE L.J. 1468 (1935) 20 MINN. L. REV. 321 (1936), and 36 MICH. L. REV. 512 (1938).

37. *Supra* note 30.

38. 128 N.J.L. 455, 26 A.2d 489 (1942).

39. See discussion of Kine v. Zuckerman, 4 Pa. D. & C. 227, *supra* note 10, 190 N.E.2d at 853.

however, by the Pennsylvania Supreme Court in *Berlin v J. C. Penney Co.*[40]

The breakthrough in the United States finally came in the District Court of the U.S. for the District of Columbia, where in *Bonbrest v Kotz*[41] it was held that a child who was injured in the process of removal from its mother's womb by defendant's alleged professional malpractice, and which demonstrated its capacity at the time of the injury to survive, by surviving, was a "viable child,"[42] and a person having standing in court to maintain an action for its injury, and could not be denied recovery on the ground that it was merely a part of the mother. The court distinguished *Dietrich v Inhabitants of Northampton* on the basis of viability existing in the case of the *Bonbrest* child at the time of the injury

The ruling in *Bonbrest* led the courts in many jurisdictions in overruling prior decisions and granting relief to infants for injuries prior to birth.[43]

The Court of Appeals of Georgia, in 1955, in *Porter v Lassiter*[44] dispensed with the viability test. The court there held that it was sufficient if the foetus was "quick," and that it was not essential for the foetus to have reached the viable stage. Many courts have since gone further and declared that a recovery may be had for pre-natal injuries inflicted upon infants at points of time ever nearer the moment of conception, irrespective of the stage of development of the foetus.[45] There are some jurisdictions in which decisions denying recovery for pre-natal injuries do not appear to have been overruled,[46] but the trend toward recognizing the injury and allowing compensation in the courts seems clear In *Zepeda* the Illinois Court, after referring to the history and development of the cause of action for pre-natal injury, concluded, "if recovery is 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

40. 339 Pa. 547, 16 A.2d 28 (1940).

41. 65 F. Supp. 138 (D.C. Cir. 1946).

42. There is a medical distinction between the "embryo" and the "viable" foetus. The "embryo refers to the foetus in the early stages of the development, and the foetus is referred to as "viable" when it is sufficiently developed to live outside of the womb. STEDMAN'S MEDICAL DICTIONARY, ILLUSTRATED 1640 (20th ed. 1961).

43. Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953) overruling Allaire v. St. Lukes Hospital, note 27 *supra*, Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), overruling Drobner v. Peters, note 37 *supra*, Smith v. Brennen, 31 N.J. 353, 157 A.2d 497 (1960), overruling Stemmer v. Kline, note 38 *supra*, Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960), overruling Berlin v. J. C. Penney Co., note 40 *supra*.

44. 91 Ga. App. 712, 87 S.E.2d 100 (1955).

45. *E.g.*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), second month Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961), first month Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953), third month of pregnancy· Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960), first month of pregnancy.

46. See Stanford v. St. Louis-San Francisco Ry. Co., *supra* note 30, Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901), Turnknett v. Keaton, 266 F.2d 572 (5th cir. 1959).

is inevitable that the date will be further retrogressed."[47] The law of property has long recognized the legal existence of a child from the moment of conception, and it would seem that tort law has at last come to that position.

The possibility of non-existence of the injured person at the time of the commission of the act which is deemed to have caused the injury, as is the case where the illegitimate's conception takes place some time after completion of the act of intercourse, was recognized by the *Williams* and *Zepeda* courts. They alluded to *Piper v Hoard*[48], in which a child was awarded the fruits of a contract made for her benefit prior to her birth,[49] but dismissed the entire argument by describing a child not yet conceived at the time of completion of the act as a potential being having such an essential reality as to be considered in being at the time of the act which created its existence.[50]

Both the New York Court of Claims and the *Zepeda* court unqualifiedly recognized the existence of a real harm inherent in the status of the illegitimate. "[I]t would be a pure fiction to say that the plaintiff suffers no injury."[51]

> Children born illegitimate have suffered an injury If legitimation does not take place, the injury is continuous. If legitimation cannot take place, the injury is irrepairable. The injury is not as tangible as a physical defect but it is as real. This is acknowledged by the State itself. The statutory provision that a child's illegitimacy must be suppressed in certain public records is an admission of the hardships that can be caused by its disclosure. How often during his life does an illegitimate try to conceal his parentage and how often does he wince in shame when it is revealed? Public opinion may bring about more laws amelioratng further his legal status, but laws cannot temper the cruelty of those who hurl the epithet "bastard" nor ease the bitter-

47. *Supra* note 10, 190 N.E.2d at 853.

48. 107 N.Y. 73, 13 N.E. 626 (Ct. App. 1887).

49. In that case, the defendant, John L. Hoard, had promised to the mother of the plaintiff that if she married Frederick Piper, the issue of that marriage would receive a substantial portion of land, which had been conveyed to the defendant by Frederick Piper. The marriage was consumated, and plaintiff, the only issue of said marriage, brought the action against Hoard for deliverance of the property. The court held that the facts alleged in the complaint constituted a fraud upon plaintiff's mother, upon which plaintiff had a right of action, and that defendant could be held to the character of trusted *ex maleficio* in plaintiff's favor, and as such was bound to make good to her/his representations. *Ibid.*

50. "[I]f the plaintiff was conceived before the completion of the act he became a living, human organism concurrently with the wrongful act. If his 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." *Supra* note 10, 190 N.E.2d at 855.

51. 46 Misc. 2d 824, 260 N.Y.S.2d 953 at 958 (1965) *supra* note 10, 190 N.E.2d at 857. at 857.

> ness of him who hears it, knowing it to be true. This, however, is but one phase, one manifestation of the basic injury, which is being born and remaining illegitimate. An illegitimate's very birth places him under a disability [52]

As a portion of that harm, the plaintiff in *Zepeda* complained that defendant's negligent act deprived him of the normal home that might have been his and of equality with the legitimate child he might have been. The court rejected this element of the alleged harm, however, because they felt to do so would be to give an illegitimate child rights superior to those of a legitimate, in that a legitimate child cannot maintain an action against his parents for lack of affection, for failure to provide a pleasant home, for disrupting the family life or for being responsible for a divorce which has broken up the home.[53]

A legitimate child, however, has been recognized by the courts as having certain of these rights to love and affection and an undisturbed family life.[54] Some jurisdictions allow a legitimate child a cause of action analogous to that of a wife for alienation of affections.[55] In *Johnson v Luhman*,[56] an action by five minor children against Lydia Luhman for alienation of the affections of their father and depriving them of his support and society when she enticed the father to desert his wife and family, the court granted the children a cause of action against Luhman for destroying their family unit, to enforce their "right to protect their relationships with their parents. "[57] The opinion defined as rights to which children are entitled as incidental to their family life not only such things as food and shelter, but such intangibles as affection, moral support and guidance, as well.[58]

Also, impressive arguments which have been put to the court advocating recognition of a cause of action in favor of an infant for loss of consortium of his parents, although accepted in only one case, led one writer to conclude: "We shall wait patiently, perhaps a good while, but we shall see that court in our day which will exercise its judicial empiricism and allow recovery in an area

52. *Id.*, 260 N.Y.S.2d at 958, 190 N.E.2d at 857.
53. *Supra* note 10, 190 N.E.2d at 856.
54. "[A] legitimate child has the natural right to be wanted, loved, and cared for. He also has an interest in preserving his family life and he may protect this interest against outside disturbances." From Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947), *Id.*, 190 N.E.2d at 856.
55. See Daily v. Parker, 152 F.2d 174 (7th Cir. 1945), Johnson v. Luhman, *supra* note 47 Heck v. Schupp, 394 Ill. 296, 68 N.E.2d (1946) Miller v. Monson, 228 Minn. 400, 37 N.W.2d 543 (1949).
56. 330 Ill. App. 598, 71 N.E.2d 810 (1947).
57. *Id.*, 71 N.E.2d at 814.
58. "Children are entitled to both the tangible incidents of family life such as food, clothing and shelter and to the intangible elements of affection, moral support and guidance from both parents. All members of a family have a right to protect the family relationships. " *Ibid.*

where the reasons for its denial have ceased to exist."[59] Thus, the rationale of refusing to redress this harm inherent in illegitimacy because to do so would give the illegitimate rights superior to those of a legitimate child, is not completely convincing. The situation of the illegitimate must be distinguished from that of the legitimate child in an unhappy home. The legitimate may have, at least in some cases, the right to parental affection, happy family life, and a whole family unit. Even though the legitimate child does not have an absolute right to a happy home life, he is not in the same position as is the illegitimate, as the illegitimate has been deprived of even the chance to have such a home with his natural parents because of his illegitimacy

The plaintiffs in *Williams* and *Zepeda* further sought damages for the deprivation of the right to inherit from their fathers and from their paternal ancestors. The *Zepeda* court notes that legislation has taken steps toward alleviating that disability of the illegitimate,[60] but that, "praiseworthy as this legislation is it does not, and no law can, make these children whole."[61] Here is where the reluctance to put the illegitimate child in a better position than the legitimate child could, in most cases, be appropriately applied. There is no "right" inherent in any status of a child to inherit from anyone.[62] There are, of course, statutes in some jurisdictions which provide for children of the deceased born after the execution of the deceased's will in the event that they are not mentioned in the will. Generally, however, a child may be disinherited. Even if this were not so, it must be remembered that the majority of the populace do not accumulate any wealth during their lifetimes, and thus have nothing to pass on to their children. To allow damages to the illegitimate because of loss of inheritance as an absolute right would truly be discrimination against legitimates. Here again, the legitimate may not have an absolute right, but he does have a chance to inherit from his father and paternal ancesotrs, and the illegitimate, by virtue of his status, has been deprived of that chance. It is inconsistent for the courts to recognize the harm in the instance of loss of inheritance and not recognize it in the case of deprivation of a happy home life. If the loss of that chance in either is a real

59. Comment, *Loss of Consortium-A Child's Action For*, 2 J. FAM. LAW 51 (1962).

60. "Under the common law an illegitimate child could not inherit. [I]n recent years a more compassionate sense of social justice has brought about the enactment of beneficient legislation which has alleviated some of the oppression long visited up these unfortunates." 41 Ill. App.2d 240, 190 N.E.2d 849 at 851, 856 (1963).

61. *Id.*, 190 N.E.2d at 857.

62. 49 American jurisdictions treat legitimate and illegitimate children in the same manner with respect to inheritance rights from the mother. Nineteen states allow the illegitimate a right of inheritance from the father, at least where there is acknowledgment of paternity. See Note, 26 BROOKLYN L. REV. 45 (1959-1960).

harm, the loss of that chance in both should be, notwithstanding the difficulty in assessing damages in both cases.

The remaining aspect of harm alleged was that of being "stigmatized a bastard." Both courts showed convincingly that the law has recognized and sought to alleviate some of the disability under which illegitimates suffer [63] The *Zepeda* court referred to the statutory provisions in Illinois which are directed at lessening the burden of the illegitimate: The child is allowed his father's surname, may compel payment for support and education from either or both parents, may be legitimized by subsequent marriage of the parents, is considered legitimate if born of a void marriage; and the child's attainment of the status of legitimacy is facilitated by the waiving of various procedures, lack of which could prevent the marriage of the parents.[64]

Since illegitimates have been the beneficiaries of remedial humanitarian statutes designed to remove some of the burdens of their status, it seemed clear to both courts that the law had recognized the harm which attaches to that status. From that, it followed in the Court of Claims that the illegitimate could recover from the agency which had harmed him by producing that status, to compensate him for that harm. In *Zepeda*, however, the court refrained from doing so, and referred the plaintiff to the legislature for his remedy

Since statutes have at least in part taken care of most of the economic burden of the illegitimate, the major element compensated by the New York Court of Claims must have been the psychological harm. That harm can be most closely analogized to that suffered by the victim of intentional infliction of mental or emotional distress.[65] It must be noted that mental disturbance is compensated in many jurisdictions only when "parasitic" to some other injury [66] Many cases may be cited as at least recognizing the rule that there is no right of recovery for mental or emotional distress alone, unconnected with any independently actionable tort or with a contemporaneous or consequential physical injury [67] Even where the

63. "Under the common law an illegitimate child was called 'filius nullius' son of no one, or 'filius populus' son of the people. [Citation omitted] His position in the community was one of ignominy and he had no rights in law. Since he was the child of no one he was without a name his parents had no right to his custody and no subsequent act of theirs could make his legitimate, only a special act of parliament could do so. [Citation omitted] In most American jurisdictions illegitimate children were also treated harshly, but in recent years the whole climate has changed nationally, with variations in degree from state to state. [Citation omitted] More euphonious terms are also being used in the statutes. 'Bastard' is giving way to illegitimate child' 'Bastardy Acts' have yielded to 'Family Acts' and 'Paternity Acts'" *Supra* note 10, 190 N.E.2d at 856.

64. *Id.*, 190 N.E.2d at 856.

65. See PROSSER, TORTS, § 55 (3d ed. 1964).

66. 64 A.L.R.2d 115.

67. See, *e.g.*, Samms v. Eccles, 11 Utah2d 289, 358 P.2d 344 (1961), State Rubbish Collector's Assn. v. Siilenoff, 38 Cal.2d 330, 240 P.2d 282 (1952).

infliction of mental distress is intentional or reckless, or where any reasonable man would have known that such would result, the growing trend toward recognition of an independent right of recovery has not been universally accepted.[68] Furthermore, the courts recognizing liability where the mental distress is not parasitic to other injuries, have done so only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with a tortious or even criminal intent, or that he has intended to inflict emotional distress, or even that his conduct has been malicious.[69] It is submitted that, unless the harm being compensated in the *Williams* decision can be properly distinguished from that in mental distress cases, or the elements of loss of chance to have a happy home and to inherit are included as accompanying injuries, this, rather than an unwillingness to assess a dollar value to damages, could be a rather convincing argument against recognition of the tort.

The next area with which the *Zepeda* court dealt was that of the possible flood of litigation likely to result from the recognition of a cause of action for "wrongful birth." The opinion refers to the great number of illegitimate births in the United States and their ever increasing incidence.[70] Although the opinion expressly denies that the possibility of great numbers of actions arising from a decision for the plaintiff in this case is the reason for its denying recovery,[71] their concern in this area may have been a factor in the decision.[72] It is of interest to note that here again the development of tort law has historically been impeded by the same fear,[73] but has continued to develop in spite of temporary setbacks because of it. The fear of the *Zepeda* Court of a flood of litigation from

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68. Annot., 64 A.L.R.2d 115 PROSSER, TORTS § 11 at 51 (3d ed. 1964).

69. RESTATEMENT (SECOND), TORTS § 46, Comment d (1965).

70. "If the new litigation were confined just to illegitimates it would be formidable. In 1960 there were 224,330 illegitimate births in the United State, 14,262 in Illinois and 10,182 in Chicago. Vital Statistics of the United States, 1960, Vol. 1 Sec. 1, 2 (1962). Not only are there more such births year after year (In Illinois and in Chicago the number in 1960 was twice that of 1950) but the ratio between illegitimate and legitimate births is increasing. This increase is attested by a report of the Illinois Department of Public Health, released in July, 1962. This report revealed that in Chicago in 1961, of the 87,989 live births 11,021 were illegitimate, a ratio of eight to one. In 1951 out of 81,801 births, 5,212 were illegitimate, a ratio of fifteen to one." 41 Ill. App. 2d 240, 190 N.E.2d 849 at 858 (1963).

71. "That the doors of litigation would be opened wider might make us proceed cautiously in approving a new action, but it would not deter us. The plaintiff's claim cannot be rejected because there may be others of equal merit. It is not the suits of illegitimates which give us concern, great in numbers as these may be." *Id.*, 190 N.E.2d at 858.

72. The *Williams* court felt that the *Uepeda* decision had wrongfully dismissed the action "rather than establish a new cause of action whereby the 'doors of litigation would be opened wider " 46 Misc.2d 824, 260 N.Y.S.2d 953 at 958 (1965).

73. See Spade v. Lynn and B.R. Co., 168 Mass. 285, 47 N.E. 88 (1897) Sullivan v. H. P Hood and Sons, 341 Mass. 216, 168 N.E.2d 80 (1960) Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) GREEN, JUDGE AND JURY 85-87 (1930).

children born of artificial insemination,[74] depends for its relevance as a threat to the courts on the future dealings of the legislatures concerning the legitimacy of a child so conceived. As already noted, the law has a tender regard for legitimacy, and several cases acting on the question, have held that husband and wife, having once consented to artificial insemination, are estopped from later denying that a child conceived from the heterological artificial insemination is not the child of their marriage, if it is in the best interests of the child.[75]

> Children born of heterologous insemination should not be stigmatized with illegitimacy when the husbands of their mothers had freely consented to the practice which resulted in their birth and had permitted their names to be registered as fathers. . . . The solution to the problem . is simple, and requires only legislative recognition that such children are legitimate.[76]

The possibility of complications in one area of law due to lack of proper treatment in the future by the legislative and judicial systems in a second area of the law, should not be a deterrent for judicial advancement in the first.

Next the court in *Zepeda v Zepeda* speculated on the "nature of the new action and the related suits which would be encouraged."[77] It was feared that a decision granting relief for injuries suffered by an illegitimate for the stigma attached to his bastardy would lead to actions by everyone born into the world under conditions less than ideal. "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."[78] These fears could be easily dispelled by recognizing that there is no social or moral wrong inherent in marital sex. Procreation is not tortious unless it is extra-marital or adulterous. The tort of "wrongful birth"

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74. "The present case could be just a forerunner of those which may confront the courts in the future. Without stimulating them, we may have suits for wrongful life just as we now have for wrongful death. Cases are appearing in the domestic relations field concerning children born as a result of artificial insemination. [Citation ommitted] How long will it be before a child so produced sues in tort those responsible for its being?" 41 Ill. App.2d 240, 190 N.E.2d 849 at 858 (1963).

75. Anonymous v. Anonymous, 208 Misc. 633, 143 N.Y.S.2d 221 (1955), People v. Dennett, 15 Misc.2d 260, 184 N.Y.S.2d 178 (1958).

76. Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAM. LAW 39 (1965).

77. 41 Ill. App.2d 249, 190 N.E.2d 849 at 858 (1963).

78. *Id.*, 190 N.E.2d at 858.

cannot exist in the conception by a husband and a wife of a child thus born legitimate.

The *Williams* court, in recognizing the cause of action, merely followed the *Zepeda* reasoning to the point at which that court denied recovery, denounced the reluctance of the Illinois court, and granted relief. Although it is true that a court's decision should properly be restricted to the issues presented in the particular case before it, the creation of a novel right of action, in this case a new tort, requires thoughtful consideration of the ramifications of the decision, and careful definition and explanation of the elements of the act for which the court is granting relief. A number of problems likely to arise were not adequately provided for by the decisions.

How, for instance, is the amount of damage to be ascertained? The defendant has, by the same act which resulted in the child's illegitimate status, given the child life, although not under the most satisfactory circumstances. Here, then, is a tort which, at the same time it is inflicting an injury on the plaintiff, confers upon him a notable benefit. Is the benefit of life to be weighed by the jury against the harm of illegitimacy? Would a court, instructing otherwise, be in effect saying that non-existence is preferable to existence as an illegitimate? It is possible that there are some people, due to situations of great pain or constant suffering, who would prefer death to life. This is indicated by the incidence of suicide in this country and throughout the world. In all probability, however, most illegitimates value their existence even as a "bastard" highly enough to prefer it over non-existence. It would be a most difficult task to persuade a jury that a plaintiff-illegitimate preferred non-existence to existence, even under his circumstances. The court could, as a matter of policy, declare that the value intrinsic in life is not to be considered in determining the compensation of the illegitimate, and thus provide for an award of greater than nominal damages. To dismiss the damage as impossible of ascertainment as did the Appellate division, is not an adequate answer if indeed harm exists, and the opinions of the Court of Claims and the Illinois court do not provide a sufficient guide for the triers of fact.

It should also be noted that the requirement set down in *Zepeda* of defendant's being "completely indifferent to the foreseeable consequences of his act,"[79] seems to imply the requirement of a negligent or reckless state of mind. The *Zepeda* court seems to say that the defendant may be charged as a matter of law with knowledge that conception would result, and that as he knew as an

79. *Id.*, 190 N.E.2d at 852.

adulterer that he could not legitimize the child, he could foresee the stigma that the child would suffer Recovery for merely negligent infliction of emotional distress is rare.[80] Does this excuse a defendant who, exercising due care, practiced birth control, or who, intending to marry his partner, did not foresee the illegitimacy of his offspring? Could the child sue his mother also, if she was negligent, willful, and disregarded foreseeable consequences, as would be the case of a careless prostitute or willing lover? What of the mother who refuses all of the father's honest attempts to marry? A suit against the mother might fall within the doctrine of parental immunity, if the child was in the custody of the mother, but probably would not if he were in someone else's care.

It could be inferred that the defendant is excused if the damage, the "stigma" is removed by subsequent marriage. If so, is there a duty to marry? Before such a duty is created, the court should consider the social consequences of judicially sanctioned marriages without love, and, in the case of an adulterous relationship, the breakdown of an already existing marriage necessitated by the avoidance of suit. And, if the cause of action is removed by subsequent marriage, it is easily arguable that legitimation be written recognition of the father, or by subsequent adoption of the child, also deprives the child of his right to sue in tort. What of the child who finds that the date of his birth is prior to the wedding date of his parents. Can he too recover for the distress he suffers as a result of that knowledge?

Thus, many questions and possibilities have been left open by the decisions on the tort of infliction of illegitimacy It is submitted that most of these could be settled by a more careful definition of the tort, narrowing it in scope to the concept of illegitimacy, or by a decision which disallows the tort by more decisively refuting the arguments in its favor than did the opinion of the Appellate division. Judicial reasoning has shown that an illegitimate suffers from a very real harm which absent this cause of action would go in part unredressed, and since there is a strong social policy against extra-marital sex, especially when it results in the birth of an illegitimate child, the courts should hold the person responsible for inflicting that harm liable in damages to the injured child, or refuse to do so with reasoning at least as convincing as that which created the tort.

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80. See text accompanying note 70 *infra.*