

PERSONALITY AND STATUS IN THE WOMB

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1. Introduction

In March 1962, a mentally deficient woman confined as a patient in the Manhattan State Hospital, New York, was raped by a fellow patient. As a result of the rape, the woman became pregnant and gave birth to an illegitimate female child who was to be the plaintiff in the somewhat bizarre case of Williams v. State (1).

The plaintiff alleged that the State of New York had been negligent in its supervision of the rapist and in its protection of the plaintiff's mother. As a result of such negligence, it was alleged, the plaintiff had been born illegitimate and in addition to the stigma of illegitimacy, she would be deprived of a normal childhood, home life, parental care, and familial property rights.

The plaintiff's action having been brought in the New York Court of Claims, the defendant moved to have the claim dismissed on the grounds that no cause of action was disclosed. The court rejected the defendant's motion, holding that the defendant owed the infant plaintiff a duty of care, and that the defendant's negligence might prove to be the proximate cause of the plaintiff's injury.

For the Commonwealth lawyer, Williams v. State presents two novel aspects. Firstly, the alleged tortious act (in this case negligence) occurred before the birth of the plaintiff. Secondly, included amongst the heads of damage allegedly suffered by the plaintiff was to be found the status of illegitimacy. In this article, it is proposed to examine both these aspects more closely in order to ascertain :-

(a) the likely attitude of a Commonwealth court to claims based on pre-natal torts; i. e. torts which were committed before the plaintiff's birth.

(b) whether a court would and/or should regard the status of illegitimacy as being a compensable form of damage.

2. Pre-Natal Torts

There is little English authority on the question of whether an action for damages can be founded on a tort committed before the birth of the plaintiff. Ultimate one must turn to the jurisdictions of the United States for guidance. Indeed, for one prominent English authority, the question raises no doubt at all. In a footnote of the latest edition of Halsbury's Laws of England appears the assertion :

"An infant cannot sue for a tort suffered while en ventre sa mere"(2)

The legal position in tort of unborn children has, in the main, been examined by the courts in cases involving claims for alleged pre-natal injuries.

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(1) 260 N. Y. S. 2d 953

(2) Halsbury. Laws of England (3rd ed. 1963) Vol. 37 p. 121

A quarter of a century ago, Professor Winfield examined the then existing English law in an article entitled The Unborn Child (3). In the field of property law, Winfield notes that for the purposes of acquiring property, and for the purposes of the rule against perpetuities, a child en ventre sa mere is regarded a life in being. Winfield also notes that the criminal law protects the child en ventre sa mere by a series of statutory offences. Furthermore, death resulting from injury inflicted before birth can be classed as homicide, provided that the child was born alive (4).

In the field of the law of tort, Winfield observes that a posthumous child can, at birth, claim damages or compensation in respect of its deceased father under the Fatal Accidents Act or the Workers Compensation Acts. (5). However, it should be noted that such claims do not involve a tort committed against the unborn child itself.

In the Irish case of Walker v. Great Northern Railway Co. of Ireland (6) the plaintiff's pregnant mother was involved in an accident whilst travelling on one of the defendant's trains. The plaintiff was later born crippled and deformed, and alleged that his condition was attributable to injuries inflicted as a result of the defendant's negligence whilst the plaintiff was en ventre sa mere. All four judges of the Irish Queens Bench Division were of the opinion that no cause of action was disclosed. They held that the defendant was not liable to the unborn child in tort on the grounds that the defendant did not know of the child's existence at the time of the accident (7). Two judges further held that an unborn child had no legal rights. One judge further observed that there was no conclusive proof of any connection between the accident and the child's deformity.

Despite the fact that Halsbury's Laws of England cites it as authority for a categorical proposition (8) Walker v. Great Northern Railway Co. of Ireland must remain of limited value in determining whether an action can be maintained in respect of a pre-natal tort. For only two of the four Irish judges addressed themselves to this problem.

In Montreal Tramways v. Leveille (9), the Supreme Court of Canada allowed a right of action in respect of harm inflicted whilst the plaintiff was a foetus in utero. An action was brought on behalf of a child whose seven-month pregnant mother was negligently injured whilst alighting from a tram. The child was born with club feet. The defendant was sued under an article of the Quebec Code which provided :

"Every person . . . is responsible for the damage caused by his fault to another."

The issue for determination was whether an unborn child fell within the

(3) (1942) 4 Univ. of Toronto L. J. 278. Reprinted (1944) 8 Camb. L. J. 76

(4) R. v. Senior (1832) 1 Moody C. C. 346

(5) The George & Richard (1871) L. R. 3 Ad. & E. 466

(6) (1890) 38 L. R. Ir. 69

(7) This reasoning is fallacious. The tortfeasor's knowledge of his victim is not a prerequisite of the tort. Rather, the court shall have examined whether the defendant owed the plaintiff (in this case unborn) a duty of care. If there is such a duty, knowledge of the plaintiff's presence is irrelevant.

(8) Note 2 supra.

(9) [1933] 4 D. L. R. 337

meaning of "another" as provided by the code. A Quebec jury had awarded \$5,500 damages, and this judgment was affirmed by a majority decision of the Canadian Supreme Court, which held that the unborn child was an existing person in the eyes of the law.

Being a case on appeal from Quebec, a considerable portion of the judgments is devoted to examinations of Roman and civil law. However, the ultimate ground for the decision seems applicable to common law jurisdictions. At page 345 of the report, Lamont J. states :-

"If a right of action be denied to the child, it will be compelled without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother".

The Montreal Tramways case has been subject to criticism, but such criticism has, in the main, been levelled at the inadequacy of the medical evidence which was adduced to establish a connection between the accident and the child's deformity.

"The expert evidence on the child's behalf reads much more like pure conjecture than reasonable inference". (10)

In a more recent South African decision, the Witwatersrand Local Division Court was prepared to recognise a claim for pre-natal injuries. The plaintiff in Pinchin & anor. v. Santam Insurance Co. (11) suffered from cerebral palsy. When six months pregnant, the plaintiff's mother was involved in a motor accident, as a result of which she lost a large quantity of amniotic fluid by uterine discharge. Hiemstra J. reviewed the few available authorities and commentaries, and reached the conclusion that the plaintiff's action should be allowed.

"I hold that a child does have an action to recover damages for pre-natal injuries. This view is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage". (11a)

In the circumstances of the case, however, the court held that the medical evidence was inconclusive, and that no casual link had been established between the defendant's negligence act and the plaintiff's disability.

"In the result, the likelihood that the loss of fluid led to the cerebral palsy is no stronger than the opposite contention . . . (the) plaintiff's case has not been proved on the balance of probabilities". (12)

Various United States jurisdictions have made considerable progress over

(10) Winfield, The Unborn Child, p. 289

(11) [1963] 2 S. A. L. R. 254

(11a) *ibid.* at p. 260

(12) per Hiemstra J. at p. 263

the last twenty years in the law relating to pre-natal torts. (13) It appears that four jurisdictions, Alabama, Michigan, Rhode Island, and Texas, have refused to recognise a cause of action for pre-natal injuries (14). Twenty further United States jurisdictions appear never to have considered the problem. Amongst the remaining jurisdictions, however, there is considerable conflict over the particular circumstances in which an action for pre-natal injuries will be successful.

The difficulties in the main appear to be conceptual. For, as D. A. Gordon succinctly states :-

"To Religion and Medicine, life begins at conception; but to Law, legal personality begins only at birth. This jurisprudential concept is the origin of much of the difficulty". (15)

In most legal systems, legal personality appears to begin at live birth. At first, the American courts were not prepared to recognise legal personality in an unborn foetus (16). Subsequent development of the law in the United States jurisdictions has shown a diversity of approaches to the problem of legal personality.

In fields other than tort, especially property law, rights have been held to vest in an unborn child immediately, if such a course is beneficial to the foetus (17). Such an approach is essentially fictional in that an unborn child is regarded for some purposes as having been born. However, the American courts have failed to adopt this fiction for the law of torts.

Although the Canadian decision of Montreal Tramways v. Leveille (18) has considerably influenced development in the United States, the problem of legal personality does not appear to have been discussed extensively in that case. Subsequently some United States courts were prepared to recognise a legal personality in an unborn child from the time the child became "viable". The concept of viability appears to be a somewhat unsatisfactory attempt to solve the problem of legal personality on scientific grounds. For in medical terminology, a foetus becomes viable when it reaches such a stage of development as to be able to survive outside its mother's womb (19). And, in contradistinction to the view that a foetus was only a part of its mother's body and could have no legal personality until its live birth, some judges were prepared to grant a legal personality to a foetus from the time of its viability.

The concept of viability has, however, been attacked in a number of decisions (20). Medical science suggests that an entirely separate organism comes into existence within a week of conception. It is also known that the foetus is most susceptible to environmental influences during the first three months of pregnancy,

(13) An excellent survey is to be found in an article by D. A. Gordon, The Unborn Plaintiff (1965) 63 Mich. L.R. 579

(14) Gordon; op. cit. p. 585

(15) *ibid.* p. 581

(16) Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884)

(17) See Gordon; op. cit. p. 587, and Winfield; op. cit. *passim*.

(18) 1933 4 D.L.R. 337

(19) Usually around the fifth month of pregnancy

(20) See (1965) 10 St Louis Univ. L.J. 291

long before viability. This being the case, it would seem both illogical and unjust to allow a tortfeasor to escape liability for damage caused to a foetus before viability and at a time when the effects of any such damage will be most pronounced. As a result of such considerations, although some American jurisdictions still adhere to the concept of viability, others are prepared to grant legal personality to the zygote (21).

The comments of the Illinois Appellate Court in the case of Zepeda v. Zepeda (22) (a case which will be examined more closely on the question of illegitimacy) are particularly instructive. The following passage reveals the line of reasoning adopted by some American jurisdictions in their abandonment of the viability concept in favour of endowing the zygote with legal personality;

" 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. If there is human life proved by subsequent birth, then that human life has the same rights at the time of conception as it has at any time thereafter." (23)

It is thus apparent, that by granting the foetus (whether viable or not) a legal personality, certain United States jurisdictions have enabled infants suffering from the disabilities of pre-natal injuries to found a claim for damages in tort. The plaintiff would share in common with all plaintiffs in a tort action, the requirement of establishing a causal nexus to the requisite degree of proof.

But the granting of legal personality to the foetus has led to a further divergence amongst United States jurisdictions. The division is to be found in the differing attitudes adopted to claims brought on behalf of still-born children (24). In a number of American jurisdictions, actions have been brought for wrongful deaths under the United States equivalents of Lord Campbell's Act by the administrators of still-born children. In all such cases, the administrator of the still-born child has alleged that the death of the child was caused by a pre-natal tort, and in all cases the action had been brought for the benefit of the still-born child's parents. Faced with such situations, some jurisdictions have allowed actions for wrongful death, despite the fact that there has been no live birth, whilst other courts have refused to allow the administrators to recover, holding that live birth is a prerequisite to a claim for wrongful death.

Decisions awarding damages for the wrongful death of a still-born child can be justified on three grounds. Firstly, the success of the action is but a logical extension of granting a legal personality to the foetus. For, once a legal personality has been obtained, subsequent life or death should make no logical difference to the legal status of the holder. Thus, if a foetus has a legal personality and is subsequently killed as a result of a pre-natal tort, then an action for wrongful death should lie at the door of the tortfeasor.

(21) The earliest cellular organism.

(22) 41 Ill. App. 2d. 240

(23) *ibid.* pp.249-50.

(24) Gordon; *op. cit.* pp.591-5

Secondly, an action for wrongful death provides compensation or solatium for the grief of the parents of the still-born child, who will benefit as the administrators of the deceased's estate, (and presumably as the deceased's "dependants").

Thirdly, as a matter of judicial policy, it would seem inconsistent to attach liability to a defendant who injures a foetus, but to allow a defendant who succeeds in killing a foetus to escape all liability.

Against the success of such wrongful death actions, it can be argued that unlike the living child affected by a pre-natal injury, the still-born child has no requirement for compensation. Furthermore, Lord Campbell's Act and similar statutes were designed to provide a means for compensating the defendants of a wrongfully killed bread-winner. It is difficult to see how claims in respect of still-born children fall within the general scope and intent of Lord Campbell's Act. Finally, bearing in mind that the fundamental principle underlying an award of damages is to provide compensation for a wronged plaintiff, it seems that an award of damages to the estate of a deceased foetus, far from compensating a wrong, provides instead a windfall to the parents and punishment for the defendant.

There would accordingly seem to be a variety of approaches amongst the United States jurisdictions to the problem of actions in respect of pre-natal torts and injuries. Of these jurisdictions prepared to allow such actions, some will afford protection to the foetus from the time of viability and others from the time of conception. Some will allow claims by the administrators of still-born infants and others will not (25). The explanation of these United States variations is to be found in differing approaches to the problem of legal personality.

The preferable approach would appear to be one which endows the unborn child with a legal personality from the time of its conception, yet makes that personality conditional upon subsequent live birth. Such an approach would give the plaintiff a remedy for any disability resulting from a pre-natal tort, regardless of whether the foetus was viable at the time the tort was committed. Furthermore, a legal personality conditional upon live birth would prohibit actions for the wrongful deaths of still-born children. For unlike actions brought by plaintiffs suffering from the effects of pre-natal injuries, wrongful death actions do not fulfil the fundamental requirement of an action in tort, which is to provide compensation for damage resulting from another's wrong.

It is to be hoped that the above approach will be adopted by future Commonwealth courts. For the concept of viability and wrongful death actions concerning still-born children, are both capable of producing injustices. In the Canadian and South African cases discussed previously (26) the concept of viability was not discussed (27). However, in the Canadian case, the plaintiff's mother was seven

- (25) See generally. D. M. J. Bennett, The Liability of the Manufacturers of Thalidomide to the affected children (1965) 39 A.L.J. 256 at 263.
- (26) Montreal Tramways v. Leveille [1933] 4 D.L.R. 337. Pinchin v. anor v. Santan Insurance Co. Ltd. [1963] 2 S.A.L.R. 254.
- (27) Lamont J. [1933] 4 D.L.R. 337 at 345 uses the word "viable" in what appears to be a different context from the normal medical usage.

months pregnant and in the South African case, the mother's pregnancy had reached its sixth month. In both those cases therefore, the foetus would have been viable. Furthermore, both cases make passing reference to the child's live birth as being an essential ingredient of the action (28). However, the possibility of an action in the event of a still-birth was not discussed.

The opportunity would therefore seem open for Commonwealth courts to adopt a more consistent and uniform approach to pre-natal torts than has been possible in the United States.

3. Illegitimacy as a Form of Damage

It will be recalled that the plaintiff in Williams v. State (29) brought an action in tort which sought compensation for the status of illegitimacy with its attendant disadvantages. Although the plaintiff founded her claim on the well-known tort of negligence, it is obvious that the fact situation of Williams v. State (29) is so bizarre as to be unlikely to recur often. It is more appropriate to ascertain whether the status of illegitimacy, an alleged form of damage to a plaintiff, will give rise to an action in tort.

It is not proposed to examine the difficulties involved in formulating a definition of a tort. Suffice to state that damage appears to be an essential ingredient of a tort. Whether such damage takes the form of actual loss or harm to the plaintiff, or whether the damage is limited to the infringement of some absolute right (30) of the plaintiff is beside the point. No act of a defendant can be classed as a tort unless damage results to a plaintiff, for without such damage, a plaintiff has no grounds on which to found an action.

There are no reported decisions of British Commonwealth jurisdictions which have allowed claims founded on illegitimate status. It should be noted, however, that almost invariably, Commonwealth legislatures have provided an illegitimate child with various statutory rights of maintenance against its natural father (31).

Apart from Williams v. State there appears to be only one other United States authority dealing with an action founded on the status of illegitimacy; the case of Zepeda v. Zepeda (32). The defendant in that case had induced the plaintiff's mother to have sexual relations with him, by fraudulently promising to marry her. Being a married man, however, he was unable to keep his promise. The plaintiff was the illegitimate result of the liaison. The plaintiff alleged that his father's conduct was tortious, and claimed damages for deprivation of a normal home and for the stigma of illegitimacy. The trial court dismissed the action for failure to state a

(28) [1933] 4 D. L. R. 337 at 345 per Lamont J. and [1963] 2 S. A. L. R. 254 at 260

(29) 260 N. Y. S. 2d 953.

(30) Such is the case with actions for trespass where the plaintiff can bring an action on the grounds that his rights have been infringed, without the necessity of proving actual harm or loss.

(31) In New Zealand, see Destitute Persons Act 1910.

(32) 41 Ill. App. 240 (1963)

cause of action. On appeal, the Illinois Court of Appeal Act held that although the defendant's conduct was tortious and had caused harm, relief to the plaintiff must be denied. A cause of action for illegitimate status was unprecedented. To allow such an action would bring a flood of claims from children in socially disadvantageous circumstances, especially from the rising numbers of illegitimates (33). Finally, the court noted that modern social legislation had done much to ameliorate the position of illegitimate children.

It is interesting to note that the Illinois court had no hesitation in labelling the conduct of the defendant as being tortious. The tort was supposedly the fraudulent inducement of the plaintiff's mother to enter into sexual relations with the defendant who was completely indifferent to the consequences of his act. The court had been criticised for failing "to develop a coherent theory" regarding this new tort (34). There can certainly be no valid objection to a court recognising and allowing an action which is based on a situation from which previous actions in tort were unknown. However, it is difficult to see how a court can class a certain type of behaviour as tortious and yet deny recovery, for, as suggested above, damage is an essential part of any tort. If the Illinois court was not prepared to grant compensation for the "damage" of the plaintiff's illegitimacy and deprivation of a normal home, then to class the defendant's conduct as tortious is not only nugatory but inaccurate.

In Williams v. State (35) on the other hand, the New York Court of Claims was prepared to hold that the defendant's negligence might well prove to be the proximate cause of the plaintiff's damage. Implicit in this decision is the assumption that the "damage" of illegitimate status gives rise to a cause of action. The New York court discussed Zepeda v. Zepeda at some length, but reached the conclusion that :

"The novelty and lack of precedent for declaring that the baby bastard has a cause of action should not be a deterrent to such a ruling". (36)

One can only assume, that had Zepeda v. Zepeda been called before the New York Court of Claims, the plaintiff's action would have been upheld.

In both the Zepeda and Williams decisions, the courts found it necessary to review extensively the law relating to pre-natal injuries. For in both cases, the initial difficulty was that the alleged tort had occurred before the birth of the plaintiff. In both cases, an analogy with the pre-natal injury cases was valid in so far as the alleged damage occurred simultaneously with the conception of the plaintiff. However, it is obvious that the pre-natal injury cases can have no possible bearing on whether the alleged harms of illegitimacy and social deprivation were compensable. For an action to recover damages for illegitimate status is of an entirely different nature from an action to recover damages for personal injuries inflicted pre-natally.

(33) The court noted with alarm that of the 87, 989 children born in Chicago in 1961, 11, 021 were illegitimate.

(34) Comment (1964) 77 Harvard L.R. 1349 at 1350

(35) 260 N. Y. S. 2d 953

(36) ibid. at 955

If other courts were to follow Williams v. State (37) in deciding that illegitimacy was a compensable form of damage, the resulting social consequences would be widespread and even alarming. Moreover, numerous legal difficulties would remain unresolved.

Would the illegitimate child's right of action be limited to one against its natural father (as in the Zepeda Case) or would the child be permitted recovery from either or both of its parents? If fornication resulting in an illegitimate birth gives rise to liability in tort, what are the respective degrees of fault vis a vis the fornicating parties? Although in the Zepeda case there was the complicating factor of a fraudulent inducement, in most cases, fornication is consensual.

If both parents are to be held liable, what is the position of a party who unsuccessfully practised a method of birth control? Is he as guilty as a party who never gave birth control (and impliedly the consequences of his fornication) a thought? Might it not be desirable for an onus to use contraceptive devices to be placed on the parties? If so, on which party? Is liability to attach to a party who relies on the other party's false assertion that a contraceptive device is being employed?

From a legal viewpoint, it is unclear at what stage the new tort is completed. Both the Zepeda and Williams decisions suggest that the tort is complete at the moment of conception. But obviously, no stigma or disadvantage is attached to a child who is conceived out of wedlock, but whose parents marry before its birth. However, if the child is born illegitimate, what is the effect of the parents' subsequent marriage (and thereby the child's subsequent legitimation)? (38). Is the child's right of action extinguished, or is the subsequent legitimation merely a mitigating factor going towards a reduction of damages? The further social question is immediately raised of whether it is desirable to induce reluctant parties to marry or form "loveless marriages" so as to avoid actions at the suit of their illegitimate off-spring (39).

There is a further conceptual difficulty arising out of the Zepeda and Williams decisions which both courts seem to have ignored. The difficulty is to discover a measure of damages to compensate illegitimacy. For, as some commentators have observed, the Williams decision seems to imply that "no life" is to be preferred to a "disadvantaged life". (40). The act for which the plaintiff seeks compensation is the self-same act to which he owes his very existence. Taken to its logical conclusion, such reasoning seems to justify the abortion of illegitimate children. How is one to assess damages for an act without which the plaintiff would never have existed?

Yet, it is submitted that if a court were to recognise illegitimacy as being compensable, then the measure of damages would not be impossible to assess. The

(37) For excellent critique of the Williams decision in a social context see Comment by M. H. Linde; (1966) 18 Stanford L. R. 530

(38) Marriage would never have been possible in the Williams case.

(39) See (1964) 18 Harvard L. R. at p. 1351 and (1966) 18 Stanford L. R. at p. 536.

(40) See (1966) 18 Stanford L. R. at p. 533 and (1966) 50 Minnesota L. R. at p. 598

Williams decision seems to assume, not that "no life" is preferable to an illegitimate life, but that a legitimate life is preferable to an illegitimate one. An award of damages would therefore compensate, as far as money is able, for the disadvantages of illegitimacy.

It is true that illegitimacy entails more disadvantages than can be remedied by a statutory right of the child to claim maintenance from its natural father. On the other hand, in most Western countries in recent years there has been a tendency to minimise the disadvantages of illegitimacy by legislative action. (41). It is submitted that the problem of the illegitimate child is more the concern of the legislature than of the law of tort. Recognition of illegitimacy as a compensable form of damage would deluge the courts with inter-familial litigation, encourage unsuitable marriages, and as the court in Zepeda v. Zepeda feared, might open the door to all manner of actions by children (not necessarily illegitimate) claiming that they were socially disadvantaged.

It is not denied that illegitimacy is a vast social problem which the law cannot ignore. But the introduction of a new tort action to compensate illegitimate status would spread further social disruption without curing the original social ill. Piecemeal legislation to remove the existing disadvantages of illegitimacy would be preferable.

Only the New York Court of Claims has allowed an action founded on illegitimate status. It is to be hoped that no Commonwealth courts will follow Williams v. State.

(41) For example, in New Zealand, S. 58 Administration Act 1952; S. 3 Family Protection Act 1955. In Arizona, all children are by statute regarded as the legitimate products of their natural parents.