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Virginia has established a judicial definition of "unambiguous and clear." West Virginia now has opinions stating what is clear and what is not.

TORTS—ACTION FOR WRONGFUL LIFE BY ADULTERINE
BASTARD AGAINST HIS FATHER—DAMNUM
ABSQUE INJURIA

In an unusual and novel case of first impression in Illinois, the plaintiff sued his father for damages for causing him to be born an adulterine bastard, raising constitutional questions and presenting two theories of recovery, one in tort and the other in contract.¹ The complaint averred, *inter alia*: that the plaintiff's father induced the plaintiff's mother to have sexual relations by promising to marry her; that this promise was not and could not be kept because the father was already married; that the promise was fraudulent; that the acts of the defendant were willful and injured the plaintiff in his person, property and reputation by causing him to be born an adulterine bastard. The plaintiff claimed 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 father, to inherit from his paternal ancestors² and for being stigmatized as a bastard. On the defendant's motion³ the trial court dismissed the suit for legal insufficiency of the complaint. The plaintiff appealed directly to the Supreme Court of Illinois which refused to hear the case and transferred it to the Illinois Appellate Court which, in a lengthy opinion containing much dicta, affirmed the dismissal. *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

The question presented on appeal was whether the complaint stated a cause of action in tort. This question, in turn, divided itself into other thought-provoking questions. The first, prompted by the unique averments of the complaint, was whether the act of the defendant was a legal wrong, a tortious act? The court found that the defendant's act was willful in that he was completely indifferent to the foreseeable consequences of his act; that he pursued a course of conduct which showed a conscious disregard

¹ The Constitutional questions were disposed of under the rule stated in *City of Chicago v. Campbell*, 27 Ill. App. 2d 456, 170 N.E.2d 19 (1960): "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 that they are not material to the disposition of the appeal." The contract theory was not available because the complaint sounded in tort.

² The trial court pointed out that a legitimate child had no absolute right of inheritance because he could be disinherited by will.

³ The motion to strike contained three grounds: (a) an illegitimate child has no rights against its father under the common law; (b) all rights of an illegitimate father and child are governed by statute; and (c) at the time of the alleged cause of action, plaintiff was not in being.

for the rights of others; that he knew he could not marry the woman nor legitimize a child born as a result of his act, and therefore the court held that the defendant's act was not only morally wrong but tortious in its nature.

The question of whether a tort had been committed upon the mother was not determined by the Illinois Appellate Court. It pointed out that the determinative question was whether a tort had been committed upon the child. This posed the second question: Could a tort be inflicted upon a being simultaneously with its conception? The court then proceeded to discuss the question of when life begins and the changes which had taken place in the law pertaining to prenatal physical injuries. The Massachusetts case of *Dietrich v. Inhabitants of Northampton*⁴ appears to have been the first case either in England or the United States to pass upon the right of an unborn child to recover damages for a tort. Mr. Justice Holmes, speaking for the court, said "that, as the unborn child was a part of the mother at the time of the injury, any damage" could be recoverable only by her.⁵ In *Allaire v. St. Luke's Hospital*⁶ the Illinois Supreme Court held that while regarding an unborn child as *in esse* for some purposes, this doctrine had not been extended to allow an action for injuries sustained before birth.⁷

This rule was changed in *Amann v. Faigy*⁸ where Mr. Justice Schaefer, after carefully reviewing the pertinent cases in Illinois and other jurisdictions, held that a viable child, who suffered prenatal injuries and was thereafter born alive, had a right of action against the defendant whose negligence caused the injuries. *Daley v. Meir*⁹ further enlarged the rule by

⁴ 138 Mass. 14 (1884).

⁵ *Id.* at 17.

⁶ 184 Ill. 359, 56 N.E. 638 (1900).

⁷ Many of our courts were disturbed by the inconsistency and unfairness of holding that a child *en ventre sa mere* was a human being for inheritance and property rights purposes but not one if it suffered tortious physical injury. In 1946 a major breakthrough occurred. In *Bonbrest v. Klotz*, 65 F. Supp. (D.C.) 138 (1946), the plaintiff sued to recover for injuries sustained when she was allegedly taken from her mother's womb through professional malpractice. The defendant sought to dispose of the case by a motion for summary judgment. The court denied the motion and held that because the child was viable it had *locus standi* in that court to maintain the action.

⁸ 415 Ill. 422, 114 N.E.2d 412 (1953).

⁹ 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961). See also, *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960). Action for injuries sustained by the infant plaintiff while in the womb of his mother when injured in an automobile collision caused by the defendant's negligence. The age of the foetus at the time of injury was 6 months. The court found for the plaintiff stating that an averment as to the viability of the child at the time of the injury was not necessary to state a cause of action. *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960). Action on behalf of a child born a Mongoloid, as a result of injuries received in an automobile collision when a foetus of 1 month. The court held that the child had a right of action. *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504,

holding that a child whether viable or not at the time of the injury could maintain an action for injuries provided it was born alive and survived.¹⁰ This was the law in Illinois up until the present case.¹¹

The court, after commenting on the present trend of the law toward permitting actions for physical injuries occurring closer to the moment of conception, reflected that if there was human life, proved by subsequent birth, then that human life had the same rights *at the time of conception* as it had at any time thereafter.

By way of bringing the real issue into finer focus, the court posited these questions: "what if the wrongful conduct takes place before conception? Can [a person] be held accountable if his act was completed before the plaintiff was conceived?"¹² By the employment of hypothetical cases, accompanied by self-answering queries, and fortified by *Piper v. Hoard*,¹³ the court answered these questions in the affirmative. In the *Piper Case*, a girl, over 20 years of age, was permitted to maintain an action for pecuniary damage suffered by her as a result of a fraud perpetrated on her mother before the mother's marriage and her own conception.¹⁴ The court then said:

Returning to the present case, . . . it is not too important whether the plaintiff's life began during or subsequent to the act of procreation. There is no certainty as to the exact moment conception takes place. . . . 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.¹⁵

93 S.E. 2d 727 (1956). Action brought by a child for alleged tortious injuries sustained while the child was in the mother's womb. The court held that a child born after receiving tortious injury at any period after conception has a cause of action for such injuries.

¹⁰ It is interesting to note that the Restatement of Torts inclusive of its most recent supplement (1954) still states that "A person who negligently causes harm to an unborn child is not liable to such child for the harm." The Restatement takes no view if the act is intentional or reckless and without excuse.

¹¹ For a detailed analysis of the development of the prenatal injury doctrine, see Comment, 3 DEPAUL L. REV. 257 (1954). See also, Note, 11 DEPAUL L. REV. 361 (1962).

¹² 41 Ill. App. 2d 240, 250, 190 N.E.2d 849, 853 (1963).

¹³ 107 N.Y. 73, 13 N.E. 626 (1887).

¹⁴ Note here the similarity between the instant case and the cited one in that in both, the mother was fraudulently deceived from which injury resulted to the child thereafter conceived. But in the *Piper Case* the court bottomed its decision on the theory that the plaintiff was the one injured by the fraud perpetrated on the mother. On the other hand in the instant case the court proceeded on the theory that the plaintiff was injured by the act of intercourse and ignored the fraud perpetrated on the plaintiff's mother as being the basis for the tort action. One wonders whether if the court had accepted the contract, third party beneficiary theory (the father's breach of promise to marry the mother which caused the injury complained of), its decision would have been the same as that rendered in the *Piper Case* which was based on a tort theory.

¹⁵ 41 Ill. App. 2d 240, 252, 190 N.E.2d 849, 855 (1963).

The court then considered the character of the plaintiff's injury. In that connection it was recognized that injuries other than physical or to property were compensable and that the complaint set forth averments which endeavored to come within the scope of mental suffering and defamation. *Eick v. Perk Dog Food Co.*,¹⁶ a case of first impression in Illinois involving the right of privacy, held that actions were permissible for intentionally caused mental suffering.¹⁷ The only averment in the complaint in *Zepeda v. Zepeda*¹⁸ savoring of mental distress stated: "His father has wilfully injured and wronged him . . . in stigmatizing him as an adulterine bastard." The court said,

To some persons the shame of being an adulterine bastard might cause as genuine and severe emotional distress as that resulting from other serious provocation. However, in the absence of proper and adequate averments, we must hold that the complaint states no cause of action for this tort. If it 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 in behalf of an infant.¹⁹

The complaint alleged, in addition, that the plaintiff was deprived of equality with the legitimate child he might have been but the court pointed out that an illegitimate child cannot be given rights superior to those of a legitimate child.

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 disturbance.²⁰ However, a legitimate child cannot maintain an action against his own 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.²¹

Therefore, the court concluded, the plaintiff had not stated a cause of action in this count.

After recognizing that the plaintiff suffered an injury, the court traced the evolution of the law's treatment of bastards from the common law until that day pointing out that many of the hardships imposed by law had been liberalized so that in Illinois an illegitimate child had the right

¹⁶ 347 Ill. App. 293, 106 N.E.2d 742 (1952).

¹⁷ Accord, *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

¹⁸ 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

¹⁹ 41 Ill. App. 2d 240, 254, 190 N.E.2d 849, 855 (1963). The infant was born April 12, 1959; the complaint was filed January 2, 1960. Could a child of such tender age comprehend the vast implications of being born an adulterine bastard so that he could experience mental distress and emotional suffering traceable to this knowledge?

The court also concluded that the complaint did not state a cause of action for defamation because the necessary averment of publication was lacking.

²⁰ *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E.2d 810 (1947).

²¹ 41 Ill. App. 2d 240, 255, 190 N.E.2d 849, 856 (1963).

to his father's surname, either or both of his parents could be compelled to support and educate him until he became eighteen years of age, his parents had custodial rights, he could be legitimized by the marriage of his parents, and so on.²²

The court further reflected that while these statutes were praiseworthy: they do not, and no law can make these children whole. 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 irreparable. . . . An illegitimate's very birth places him under a disability. It is of this that the plaintiff complains. . . . Be that as it may, the quintessence of his complaint is that he was born and that he is. Herein lies the intrinsic difficulty of this case, a difficulty which gives rise to this question: Are there overriding legal, social, judicial or other considerations which should preclude recognition of a cause of action?²³

In the course of its opinion the court then proceeded to run the gamut of possibilities that might arise if this action were to be recognized (e.g., an infant could bring an action for being born of a certain color, of a certain race, with a hereditary disease, in a poor family, etc.), and presented these possibilities as cogent reasons for denying the right to recover in the instant case.

From the court's opinion there emerged the following assertions: (a) the act of the defendant was tortious, (b) a tort could be inflicted upon a being simultaneously with its conception just as it could be inflicted prior thereto, but (c) the complaint was deficient in that it lacked proper and adequate averments as to an actionable tort. However, with refreshing frankness the court recognized its inconsistency in calling the injury a tort and then questioning the plaintiff's right to maintain an action to recover for it. Nonetheless seriously concerned about (a) the creation of a new tort, a cause of action for wrongful life, (b) the vast implications and the staggering social impact thereof, (c) the statistical data on illegitimate births and the tremendous increase thereof, (d) opening the flood gates of litigation wide to related actions, and (e) the fear of "judicial" legislation and the sweeping result if indulged in here, and deterred thereby, the court decided to affirm the dismissal of the complaint.²⁴

²² See generally, 26 BROOKLYN L. REV. 45 (1959); 38 B.U.L. REV. 299 (1953), 15 FORDHAM L. REV. 282 (1946). See also, Illinois Paternity Act, ILL. REV. STAT. ch. 106½ (1961).

²³ 41 Ill. App. 2d 240, 258, 190 N.E.2d 849, 857 (1963).

²⁴ This case is now pending in the Supreme Court of Illinois, this time on a petition for leave to appeal "as a matter of right" where it has already been orally argued and taken for decision.