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DOES THE BASTARD HAVE A LEGITIMATE COMPLAINT?

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I. INTRODUCTION

Wholly without action on his part, "the bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured."[1] Society's endurance of the bastard has not been accompanied by magnanimity. Though tolerating his existence, it granted him but a paucity of inheritance and support rights under the common law,[2] and it even made truth a defense to the otherwise slanderous epithet "bastard."[3]

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1. Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOCIOLOGY 215 (1939).

2. At common law the bastard was *filius nullius*, son of no one. He could not inherit from either of his natural parents. *See* Brewer v. Blougher, 39 U.S. (14 Pet.) 78 (1840); Note, *The Status of Illegitimates in New England*, 38 B.U.L. REV. 299 (1958); Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45 (1959). For various reasons, the general rule is that the mother has the superior right to the custody of her illegitimate child. Marshall v. Reams, 32 Fla. 499, 14 So. 95 (1893); Annot., 51 A.L.R. 1507 (1927). In Florida, the mother of an illegitimate child is the natural guardian of her child. FLA. STAT. § 744.13(1) (1967). Also by statute, the child is only the heir of the mother. FLA. STAT. § 731.29 (1967). *See generally* Adams, *Nullius Filius*, 6 U. TORONTO L.J. 361 (1946); Ayer, *Legitimacy and Marriage*, 16 HARV. L. REV. 22 (1902).

Recently, the equal protection clause has been held to apply to social and economic legislation which discriminates on the basis of legitimacy of birth. In Levy v. Louisiana, 36 U.S.L.W. 4458 (U.S. May 20, 1968), the Supreme Court stated that: "[I]llegitimate children are not 'nonpersons.' They are humans, live and have their being. They are clearly 'persons' within the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 4459. Though *Levy* dealt only with a wrongful death statute, its import may be broader and may be extended to inheritance rights as well.

3. An imputation of illegitimacy generally is libelous or slanderous. Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584 (1914) (libelous per se); Walker v. Tucker, 220 Ky.

The bastard retaliated. By dabbling in juvenile delinquency[4] or succumbing to neuroticisms,[5] he ensured that many of his increasing[6] number would be provided for at society's expense.[7] Though occasional statutes ameliorated society's harsh treatment,[8] he sought further recom-

363, 295 S.W. 138 (1927) (slanderous); Jerald v. Huston, 120 Kan. 3, 242 P. 472 (1926) (slanderous per se); *cf.* Teare v. Plumbers Local 295, 98 So.2d 79 (Fla. 1957); Miami Herald Publishing Co. v. Brautigam, 127 So.2d 718 (Fla. 3d Dist. 1961). *Contra*, Bolton v. Strawbridge, 156 N.Y.S.2d 722 (Sup. Ct. 1956) (not slanderous per se). If it appears that the matter charged as libelous is true and published with good motives, truth constitutes a defense. FLA. CONST. Declaration of Rights, § 13; 33 AM. JUR. *Libel and Slander* § 320 (1941).

4. The risks of juvenile delinquency among illegitimate children are greater than those among legitimate children. GILLEN, SOCIAL PATHOLOGY 298 (3d ed. 1946), cited in Comment, 49 IOWA L. REV. 1005, 1006, n.3 (1964).

5. An illegitimate child is more likely to be neurotic. *Id.* at 311.

6. The number of live illegitimate births increased from 89,500 in 1940 to 291,200 in 1965. The rate per 1000 live births increased from 7.1 to 23.4 in the same period, the greatest increase occurring in the nonwhite population and in the 15 to 19 year old bracket of mothers. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 51 (1967).

7. Public agencies often are required to care for illegitimate children. Pinchbeck, *Social Attitudes to the Problem of Illegitimacy*, 5 BRIT. J. SOCIOLOGY 309, 310 (1954).

8. An illegitimate child is the heir of his mother and also of the person who acknowledges himself to be the father in writing, and he inherits in the same manner as if legitimate. However, unless the parents intermarry, in which case the child is legitimate for all purposes, the child does not inherit from his parents' lineal or collateral kindred. FLA. STAT. § 731.29. The child's estate passes to his mother or heirs at law. *Id.* Any informal writing is sufficient for acknowledgement by the father. *In re* Horne's Estate, 149 Fla. 710, 7 So.2d 13 (1942) (letter to registrar of college); Wall v. Altobello, 49 So.2d 532 (Fla. 1950) (hotel registration card). Although the statute allowing a bastard to inherit from his mother is in derogation of the common law, the Supreme Court of Florida has indicated that its construction will not be so strict as to defeat its laudable remedial purpose. Hadley v. City of Tallahassee, 67 Fla. 436, 65 So. 545 (1914).

It is impossible to assess the full import of the application of the equal protection clause to statutes discriminating on the basis of legitimacy of birth. Perhaps because there is a legitimate legislative purpose in attempting to assess the propensity of an intestate to leave his estate toward certain persons, the effect of this application of the equal protection clause may not be felt in the area of descent and distribution. *See* Levy v. Louisiana, 36 U.S.L.W. 4458 (U.S. May 20, 1968) and Glona v. American Guar. & Liab. Ins. Co., 36 U.S.L.W. 4459 (U.S. May 20, 1968).

"Any unmarried woman" may institute bastardly proceedings to determine the paternity of a bastard and to compel the father to contribute to its support. FLA. STAT. §§ 742.011-742.10 (1967). These proceedings are primarily for the relief of the public's welfare support and not for punishment. Flores v. State, 72 Fla. 302, 73 So. 234 (1916).

Florida has not been as progressive as some states in providing for the rights of illegitimate children. Some states provide that a bastard has all the rights of a legitimate child. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-206 (1956); ORE. REV. STAT. §§ 109.060 (1967), 111.231 (1957). Some states equate the rights of legitimate and illegitimate children, at least for support purposes. *See, e.g.*, CAL. CIV. CODE § 196a (West 1961). Some federal legislation affects the rights of illegitimates. *See* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962). It has been suggested that further legislation is necessary. *See* Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Illegitimacy*, 44 TEXAS L. REV. 829 (1966). For an extensive analysis of existing legislation, see Comment, *Illegitimacy in Kansas*, 14 KAN. L. REV. 473 (1966); Comment, 18 WASH. & LEE L. REV. 343 (1961). For an analysis of the rights of the father of an illegitimate child, see Comment, 50 MINN. L. REV. 1071 (1966); 27 OHIO ST. L.J. 738 (1966).

It would appear that in the area of support, the *Levy* and *Glona* decisions might have an impact. It might be argued, however, that support, unlike wrongful death, has a reason-

pense for his plight by suing his putative father in tort for the stigma of his bastardy.[9] As courts are wont to do, the action was dismissed.[10]

The dismissal of the bastard's action, an inventive mutation of the common law aptly termed an action for "wrongful life,"[11] was unusual. Recognizing that the elements of a willful tort were presented by the claim, the first court to consider the action reluctantly dismissed it on the basis of public policy.[12]

This Comment will examine the propriety of judicial non-recognition of an action for wrongful life, concluding that the injurious conduct of the parents of an illegitimate child is the omission to marry, rather than the act of giving birth to the bastard. An action for wrongful life will be examined from this analysis of the tortious conduct.

A. *The Cases*

The first case dealing with a wrongful life action was *Zepeda v. Zepeda*.[13] In that case an adulterine bastard sued his father seeking damages "for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his paternal ancestors and for being stigmatized as a bastard."[14] The court held that neither a claim for damages for mental distress[15] nor for defamation[16] was charged in the complaint. It further held that the illegitimate child

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able relationship to legitimacy. Probably the effect of the decisions may be to equate the rights of legitimate and illegitimate children for support rights, as has been accomplished in the California statutes.

9. Pinkney v. Pinkney, 198 So.2d 52 (Fla. 1st Dist. 1967); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

10. *Id.*

11. This was the term applied by the first court to consider the asserted cause of action, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 259, 190 N.E.2d 849, 858 (1963), *cert. denied*, 379 U.S. 945 (1964). Primarily due to the broadness of the term, it has been criticized. Williams v. State, 46 Misc. 2d 824, 830, 260 N.Y.S.2d 953, 959 (Ct. Cl. 1965); Note, *The Infliction of Illegitimacy A New Tort?*, 43 N.D.L. REV. 99, 102 n.16 (1966).

12. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964). The same result obtained for essentially the same reason in the only other case in which this precise cause of action was considered, Pinkney v. Pinkney, 198 So.2d 52 (Fla. 1st Dist. 1967).

13. *Id.*

14. 41 Ill. App. 2d at 246, 190 N.E.2d at 851.

15. *Id.* at 254, 190 N.E.2d at 855:

> The present complaint . . . does not charge mental distress. The nearest approach to this is the allegation that 'His father has wilfully injured and wronged him . . . in stigmatizing him as an adulterine bastard.' 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 on behalf of an infant.

16. The court held that absent an allegation of publication to a third person and because truth might constitute a defense, no cause of action was charged. *Id.* at 254-55, 190 N.E.2d at 855-56; *see also* note 3 *supra*.

could not maintain an action against his parents for lack of affection, for failure to provide a pleasant home, for disrupting the family life, nor for being responsible for a divorce which has broken up the home, as to do so would be to give to illegitimate children rights superior to those of legitimate children.[17] Dismissing the claim for inheritance rights by reference to the common law doctrine of *filius nullius* and statutory provisions,[18] the court characterized the claim as one for damages for the stigma attached to an illegitimate status; an action for wrongful life.[19]

It was the wrongful life claim which caused the *Zepeda* court the most difficulty. The court characterized the conduct of the defendant as "willful and, perhaps, criminal . . . [and] tortious in its nature."[20] It found no difficulty in concluding that the plaintiff suffered damages as a result of the defendant's conduct,[21] and its characterization of the conduct as "tortious" indicated a willingness to impose a legal duty with respect to the conduct. Yet the court concluded that the merits of the claim were outweighed by the encouragement its recognition would give to related but undesirable suits.[22] The court's inability to distinguish the claim from such related claims led it to the conclusion that the action could be maintained only upon legislative authority.

In *Pinkney v. Pinkney*,[23] a recent Florida case, a claim for damages for wrongful life again was presented. The claim met with the same fate as that in *Zepeda*. Citing *Zepeda*, the court refused to allow the action to be maintained in the absence of express legislative authority.[24]

In *Williams v. State*[25] an analogous claim was presented. While confined to a state mental hospital, the plaintiff's mother was raped by a fellow inmate. The plaintiff sued the state of New York for its negligence in failing to safeguard her mother, resulting in the stigma of plaintiff's bastardy. Refusing to follow the example of *Zepeda*, the trial court held that a cause of action against the state was presented in the complaint.[26] The trial court was undeterred by lack of precedent and unimpressed by the examples of analogous undesirable suits cited in *Zepeda*.[27]

17. *Id.* at 255, 195 N.E.2d at 856.
18. *Id.* at 255-58, 190 N.E.2d at 856-57; *see also* note 2 *supra*.
19. *Id.* at 259, 190 N.E.2d at 858.
20. *Id.* at 247, 190 N.E.2d at 852.
21. *Id.* at 258, 190 N.E.2d at 857; *see also* the discussion in the text at II, A, *infra*.
22. *Id.* at 259-62, 190 N.E.2d at 858-59.
23. 198 So.2d 52 (Fla. 1st Dist. 1967).
24. *Id.* at 54.
25. 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), *rev'd*, 25 App. Div. 2d 906, 269 N.Y.S.2d 786 (1966), *reversal aff'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).
26. *Id.*
27. *Id.* at 830, 833, 260 N.Y.S.2d at 959, 962. *See also* Note, 4 DUQUESNE L. REV. 315 (1965-1966); Comment, 50 MINN. L. REV. 593 (1966).

Its intrepidity was rewarded by reversal.[28] The New York Court of Appeals noted that the impossibility of maintaining the action came not so much from the difficulty in measuring damages but from the absence in legal concepts of a "wrong" in terms of responsibility for the stigma of illegitimacy.[29]

B. *The Claim*

Existing legal concepts do not bespeak a total absence of culpability in the infliction of the stigma of bastardy. To be sure, the pedigree of a wrongful life suit is doubtful. However, in view of the interests it would protect, a kinship to existing causes of action does appear.[30] A wrongful life action would protect the recognized interest of the individual in freedom from social embarrassment, as well as the interest in a normal home. Suits for defamation and invasion of privacy protect the former interest,[31] while suits for alienation of affections protect the latter.[32] A suit for mental distress conceivably could protect both interests.[33]

28. Williams v. State, 25 App. Div. 2d 906, 269 N.Y.S.2d 786 (1966), *aff'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

29. Williams v. State, 18 N.Y.2d 481, 484, 223 N.E.2d 343, 344, 276 N.Y.S.2d 885, 887-88 (1966).

30. *See* Note, 77 HARV. L. REV. 1349, 1359 (1964).

31. *See* Comment, 50 MINN. L. REV. 593, 598-99 (1966); Note, 41 N.Y.U.L. REV. 212, 215 (1966).

32. *See* Note, 77 HARV. L. REV. 1349, 1350 (1964); Comment, 50 MINN. L. REV. 593, 598-99 (1966). *See generally* W. PROSSER, TORTS § 118 (3d ed. 1964); 42 CORNELL L.Q. 115 (1956). *See also* Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949); Johnson v. Luhman, 330 Ill. App. 598, 7 N.E.2d 810 (1947); Miller v. Monson, 228 Minn. 400, 37 N.W.2d 543 (1949). Negligent interference with parental affection may be compensable. *See* Foster, *Relational Interests of the Family*, 1962 U. ILL. L.F. 493, 509 (1962); Green, *Protection of the Family Under Tort Law*, 10 HASTINGS L.J. 237, 238 (1959). However, statutory provisions may preclude such recovery. *See* note 33 *infra*.

33. *See* 55 KY. L.J. 719, 722 (1966); Note, 50 MINN. L. REV. 593, 599 (1966). There is a problem engendered by the statutory abolition of analogous relational interests. Causes of action for alienation of affections, criminal conversation, seduction and breach of contract to marry have been abolished in many states. *See, e.g.*, FLA. STAT. § 771.01 (1967); Kolkey v. Grossinger, 195 F.2d 525 (5th Cir. 1952); Liappas v. Augoustis, 47 So.2d 582 (Fla. 1950); Rotwein v. Gersten, 160 Fla. 736, 36 So.2d 419 (1948). *See also* Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935); 21 FLA. L.J. 245 (1947); Comment, 3 U. FLA. L. REV. 377 (1950).

The primary reason for the abolition of these remedies was that fraud and blackmail often accompanied them. *See* Rotwein v. Gersten, *supra*. The remedies

> . . . have been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies . . . furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, exploitation and blackmail . . . . Preamble, Act of 1945, FLORIDA LAWS § 23138 (1945), presently FLA. STAT. § 771.01 (1967).

A similar legislative interest in preventing blackmail and extortion might be found in the prohibition against publishing the names of those persons involved in bastardy proceedings. *See, e.g.*, FLA. STAT. § 742.09 (1967). However, such statutes appear designed as much, if not more, for the protection of the reputation of the child involved in such proceedings, something akin to the prevention of a defamation. *Cf.* FLA STAT. § 742.091 (1967) ("in the interests of the child"). In this manner there would appear to be legislative recognition that bastards suffer the damage sought in a wrongful life action.

The relative novelty of an action for wrongful life prompts inquiry not only into its ancestry but also into such aspects as the conduct and duty of the alleged tortfeasor, damages, immunity and socio-legal policy. Particularly interrelated are the areas of conduct, duty and damages. It is the conduct of the defendant that causes damage to the plaintiff. Liability for the resulting damage depends upon whether the law imposes a duty on the defendant and reposes a right in the plaintiff with respect to the conduct.

In discussing these aspects it is important to remember that an action for wrongful life is concerned with a *status* and its social implications. A status of illegitimacy attaches to an individual according to the compliance or non-compliance of his parents with laws governing marriage. The law defines the status of an individual, but it is the conduct of his parents that decides it. Essentially, the bastard's complaint is that a willful omission of his parents decided his status as illegitimate, and to his status are attached social consequences which constitute an injury to him.[34]

II. The Nature of the Claim

A. *Damages*

The law compensates persons for injuries of a legally compensable nature which are sustained in a legally disapproved manner. The type of damages suffered by the wrongful life plaintiff, which are inherent in the stigma of his status, are of a legally compensable nature.

> The concept of "stigma" embodies two principal components which are widely accepted as representing sufficient injuries to sustain a cause of action in the law of torts. The "intrinsic" component goes to the mental and emotional distress experienced by an individual, and it is this element which is compensable in actions for the invasion of privacy and the intentional infliction of mental or emotional distress. The injuries compensable in these causes of action are probably more transitory than those an illegitimate might be expected to suffer because of the nature of his birth. The "extrinsic" component goes primarily to the deleterious effect upon one's reputation. It is this injury to an individual's reputation that has long been recognized as a basis for compensation in defamation actions. There would seem to be little doubt that an illegitimate could show this type of injury since the fact of his illegitimacy is always present, and despite attempts to conceal it, his reputation would likely be severely damaged if his status were to become public. . . .[35]

34. *See* notes 3-5 *supra*.

35. Comment, 49 Iowa L. Rev. 1005, 1007-08 (1964). For a general discussion of illegitimacy and its social implications, see L. Young, Out of Wedlock (1954).

It has been found that illegitimate children actually do suffer from severe emotional distress, resulting in antisocial behavior,[36] suggesting the existence of "intrinsic" injuries. The similarity of "extrinsic" damages to those in a defamation action is particularly striking. If it is an actionable slander to call a person a bastard,[37] it seems even more culpable to cause him to be one. The infliction of illegitimacy is at least as injurious as its imputation. In *Pinkney* the plaintiff likened her wrongful life action to slander, posing this question:

> If it be actionable to speak of one as a bastard, how much more so is it to cause one to be a bastard? The latter "wrong" is certainly more lasting than the calumny of mere words which hopefully may soon be lost from the memory of one's contemporaries. Illegitimacy, however, is indelibly imprinted on the appellant and those in like circumstance. Unlike slander, the sting continues long after others have forgotten. It is painful enough if the child alone knows.[38]

As the court noted in *Zepeda*, "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. . . . The injury is not as tangible as a physical defect but it is as real."[39] Certain of the injuries sustained by a bastard, however, are not of a type historically compensable under the common law. Only by statute has a right to support from parents been recognized.[40] With few exceptions the bastard cannot inherit from his father.[41] Many of the deprivations suffered by an illegitimate child would not be compensable even if he were legitimate.[42]

B. *The Tortious Conduct*

The conduct of the bastard's parents which causes injury is dual. There is the affirmative act of sexual intercourse which results in the

36. Fodor, *Emotional Trauma Resulting from Illegitimate Birth*, 54 ARCHIVES OF NEUROLOGY & PSYCHIATRY, 381, 382 (1945). *See also* Comment, *Illegitimacy, Society and the Law: A Private Tort Remedy for a Public Problem*, 39 So. CAL. L. REV. 438, 445-47 (1966); Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOCIOLOGY 215 (1939); Podolsky, *The Emotional Problem of the Illegitimate Child*, 70 ARCHIVES OF PEDIATRICS 401 (1953); E. CHESSER, UNWANTED CHILD (1947); L. YOUNG, OUT OF WEDLOCK 158-60 (1954).

37. *See* note 3 *supra*. It is probable that a bastard could prove actual damages as in an action for defamation not actionable per se. Where proof of illegitimacy is in a written communication to a third person, there appears to be a type of libel actionable per se. *Cf.* Hendricks v. Citizens & So. Nat'l Bank, 43 Ga. App. 408, 158 S.E. 915 (1931), *rev'd on other grounds*, 176 Ga. 692, 168 S.E. 313 (1933); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584 (1914).

38. 198 So.2d 52, 53 (Fla. 1st Dist. 1967).

39. 41 Ill. App. 2d at 258, 190 N.E.2d at 857.

40. *See* note 8 *supra*.

41. *Id.*

42. *See* text accompanying note 17 *supra*. Similarly, he could not complain of a deprivation of rights he never enjoyed, as his deprivation could only be that of an opportunity of enjoying them. *See* Comment, 49 IOWA L. REV. 1005, 1007 (1964); Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 138 (1966); *cf.* Daily v. Parker, 152 F.2d 174 (7th Cir. 1945).

birth of the child. There is also an omission or inability to perform acts which would make the child legitimate. The *Zepeda* court treated the affirmative act of sexual intercourse, followed by a child being born alive, as the tortious conduct.[43] Although the court eventually concluded that the plaintiff was capable of having legal rights regarding this particular conduct,[44] it also concluded that no legal duty could be imposed upon such conduct absent legislative authority.[45]

1. EXISTENCE OF THE PLAINTIFF

The *Zepeda* court faced difficulty in establishing the capability of the plaintiff to have legal rights regarding the affirmative act with which the court concerned itself. The difficulty stemmed from the argument that the plaintiff did not exist at the time of the "tortious" affirmative act of sexual intercourse.[46] Beginning with *Dietrich v. Inhabitants of Northhampton*,[47] the rule was established that the nonexistence of the plaintiff at the time of the defendant's act precluded an action for prenatal injuries. It was supposed that a person has no legal existence prior to birth, in that he has no existence separate from his mother until then. Because no duty of care is owed to a person whose existence the law does not recognize, a prenatal injury action could not be maintained. In 1946, *Bonbrest v. Kotz*[48] held that a viable fetus could maintain an action for injuries received while viable, thus extending legal recognition of existence to a time prior to birth. Prenatal injury cases since *Bonbrest* have nearly abolished the viability distinction.[49]

Willing to recognize legal existence at conception, the *Zepeda* court eliminated the nonexistent plaintiff argument and concluded that a tort can be inflicted simultaneously with conception.[50] Fearful of a biological flaw in this reasoning, the court stated that the defendant could be liable

43. 41 Ill. App. 2d at 247-48, 190 N.E.2d at 852; see also Comment, *Liability to Bastard for Negligence Resulting in His Conception*, 18 STAN. L. REV. 530, 535 (1966).

44. *Id.* at 247-53, 190 N.E.2d at 852-55.

45. *Id.* at 259-62, 190 N.E.2d at 857-59.

46. *Id.* at 248-53, 190 N.E.2d at 852-55.

47. 138 Mass. 14 (1884) (Holmes, J.).

48. 65 F. Supp. 138 (D.D.C. 1946).

49. *See, e.g.*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Keyes v. Construction Serv. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953). *See also* Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61 (1960); Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965); Note, *The Case of the Prenatal Injury*, 15 U. FLA. L. REV. 527 (1963); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962).

50. 41 Ill. App. 2d at 248-53, 190 N.E.2d at 852-55. Viewing conception as a sequential act, the wrongful life plaintiff could exist at its culmination. Although fertilization does not take place until after the act of intercourse, there is an analogy to the firing and impact of a bullet. Just as the sequential act of firing a bullet can include its detonation, flight and impact, the act of conception could be considered to begin with ejaculation and end with union of the gametes. So considered, the plaintiff would achieve first existence during the culmination of the defendant's act.

even were the act to have been completed before the plaintiff's conception. The court stated that "it makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal connection between them."[51] The court suggested that a person injured by an article negligently manufactured prior to his birth, or a person born malformed because of negligent injuries to his parent's genes occuring prior to his conception, should not be denied recovery.[52] The court also noted the case of *Piper v. Hoard*[53] in which a plaintiff was allowed to recover for injuries suffered from a fraudulent misrepresentation to her mother before the mother's marriage and the plaintiff's conception. Thus the court concluded that it was of no particular importance that the plaintiff might not have existed at the time of the defendant's act of procreating him,[54] this act being considered that of which the wrongful life plaintiff complains.

2. THE OMISSION TO ACT

By its emphasis on the affirmative act of sexual intercourse and its failure to discuss the omission or inability of the defendant to perform acts legitimating the plaintiff, the *Zepeda* court ignored the gravamen of the claim and was unable to formulate a coherent theory of liability.[55] The plaintiff claims injury not solely as a result of his birth, but because of the consequences of the status attaching to his birth. The affirmative act of sexual intercourse causes the plaintiff's birth, but it is the omission or inability to perform acts of marriage which causes his status of illegitimacy.[56] It is legal and social disapprobation of his status

51. 41 Ill. App. 2d at 250, 190 N.E.2d at 853.

52. *Id.* at 250-51, 190 N.E.2d at 853-54.

53. 107 N.Y. 73, 13 N.E. 626 (1887).

54. 41 Ill. App. 2d at 252-53, 190 N.E.2d at 855.

55. In considering this the tortious act, the court was in good company. *See* Comment, 49 IOWA L. REV. 1005 (1964); Comment, 50 MINN. L. REV. 593 (1966); Note, 41 N.Y.U.L. REV. 212 (1966); Ploscowe, *An Action for Wrongful Life*, 38 N.Y.U.L. REV. 1078 (1963); *cf.* W. PROSSER, TORTS § 1 (3d ed. 1964).

56. "The plaintiff's action should not, however, be seen as based upon any wrongfulness in his being conceived but upon the legally disapproved circumstances under which his parents' intercourse took place and the failure of his parents to marry subsequent to his conception." Note, 77 HARV. L. REV. 1349, 1351 (1964).

> An alternative to the "wrongful life" theory advanced [in *Zepeda*] . . . which would avoid most of the problems in that approach, would be to adopt a tort limited to the narrower concept of illegitimacy. The basis of this tort would be recognition of a legal duty on the part of the father to legitimatize his children, a duty which could be discharged by marrying the mother or adopting the child. The wrongful act would be the breach of this legally imposed duty rather than illicit intercourse. The imposition of such a duty on the father of an illegitimate child has support in the traditional duties of parents toward their children. . . . In [*Zepeda*] there would be a concurrence of the parent-child relationship with the defendant's act being responsible for the plaintiff's predicament, the result being to avoid the harm to the plaintiff which could be discharged by legitimating him. In a situation such as [*Zepeda,*] . . . where the father was married to someone other than the illegitimate child's mother, it would be undesirable, if not impossible, for the father to accomplish legitimation by marrying the mother. However, the fact that a defendant cannot specifically perform a legal obligation should not give

that causes the bastard to lose inheritance and support rights or to suffer social degradation and mental anguish. He seeks redress for a continuing injury:[57] a stigma resulting from the omission of his parents to avail themselves of the services of the clergy.

That the cases did not consider the claim of the plaintiff with regard to the omission is apparent from the discussion in *Zepeda* of the "non-existence of the plaintiff" argument. The continuing inaction of the parents confers upon the wrongful life plaintiff the status of illegitimacy, a status of which he complains. Presumably the law does not operate upon that which it does not recognize to exist. Illegitimacy being a legal status, it could not attach to the plaintiff until legal existence, and hence the plaintiff could not be injured by the status until after his legally recognized existence.

The moment at which the plaintiff's legal existence is recognized could assume some importance regarding the time at which damages would first begin to affect the plaintiff and the time at which a cause of action might be considered to accrue. The nature of the plaintiff's injuries and the omission causing them are such that a continuous injury would be inflicted after birth when the plaintiff appreciates the harm.[58] The cause of action should not accrue nor the statute of limitations begin to run until the damages are suffered.[59]

3. THE "BENEFIT OF LIFE"

Because the courts considered procreation the act and birth itself the injury, they were perplexed in assessing damages by the presumed benefit of life conferred concurrently with the supposedly injurious birth.[60] By considering the omission as the injurious act, the question of whether a benefit of life should preclude or be set off against recovery is eliminated. The law does not assign the causation of tortious acts to the fertility of Adam.[61] No more does it search back to procreation to find an "original" cause of injuries sustained by a child from his parents,

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him immunity to a suit for damages. Note, 9 UTAH L. REV. 187, 190 (1964) (footnotes omitted).

57. "In a suit for being born illegitimate the damages do not really occur 'simultaneously with conception,' but begin with birth and continue throughout life." Note, 38 U. COLO. L. REV. 285, 287 (1966).

58. *Id.*

59. Presumably the statute of limitations period would be four years in Florida. *See* FLA. STAT. § 95.11 (1967). Assuming the cause of action were to be allowed, the damages compensable in view of the limitations period may be only those which occurred within four years of the time of suit in addition to those for prospective future injury.

60. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 258, 190 N.E.2d 849, 857 (1963); Williams v. State, 18 N.Y.2d 481, 484-85, 223 N.E.2d 343, 344-45, 276 N.Y.S.2d 885, 888 (1966) (concurring opinion). *See also* Comment, 50 MINN. L. REV. 593, 598-99 (1966); Note, 31 ALBANY L. REV. 381, 386 (1967); Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 138 (1966); Note, 9 UTAH L. REV. 808 (1965).

61. *Genesis* 4.

with an incidental concurrent benefit. To do so would under all circumstances preclude or limit recovery by a child for a wrongful act or omission of his parent occurring after his birth because a benefit of life is always conferred by a parent.

4. THE PARENTAL CONDUCT

The conduct of the parents is dual, involving volition both as to the decision to engage in intercourse and as to the decision not to marry. The decision to engage in intercourse may be voluntary or involuntary, with states of mind induced by intent, recklessness, negligence, coercion or mistake. The decision not to marry may be voluntary or involuntary with similar possible states of mind and additionally a possible inability to marry due perhaps to death or a previous marriage. Considering the natural parents in combination, a wide variety of circumstances may result in the illegitimacy of a child because both parents need not necessarily decide to engage in intercourse or not to marry for the same reason.

That an illegitimate child should seek to sue his father for conduct resulting in a type of slanderous damage after birth is not without precedent in the law. In *Garcia v. Fantauzzi*[62] the plaintiff was a "natural child"[63] under Puerto Rican statutory law but would have been an illegitimate child under the common law. The child sued his father for breach of the statutory duty upon the father of a natural child to recognize him, which recognition would have conferred certain benefits on the child. Because the father's avoidance of this duty was effected by fraudulently inducing the mother and another to execute a recognition of the plaintiff, he sued the father also for "his wrongful acts in causing the plaintiff to be reputed as the son of an uneducated negro barber of no means or standing, and of immoral life and habits, under whose care and influence plaintiff was forced to live . . . ."[64]

The court stated that:

> [T]he real father, upon whom rested the primary duty of support and education, may be held for damages resulting from his failure of duty, effected and aggravated by the harmful means (the fraudulent ascription of negro parentage) used to escape that duty. . . .[65]
>
> The gravamen of the case is that plaintiff is entitled to damages because of defendant's fraud in preventing him from asserting the truth as to his paternity, and as a means of effect-

62. 20 F.2d 524 (1st Cir. 1927), *cert. denied*, 275 U.S. 571 (1927).

63. A natural child is one who is born of unmarried parents who could have married at the time of the child's birth. *Id.* at 525.

64. *Id.*

65. *Id.* at 527-58.

> ing it, conspiring with others to cause the boy's paternity to be ascribed to the negro barber . . . .[66]

In the *Garcia* case an omission, coupled with an affirmative act, by the father after the birth of his illegitimate child caused what was considered an essentially slanderous imputation of the child's parentage. In a wrongful life action the father of an illegitimate child causes by omission what otherwise would be a slanderous imputation of parentage.

Though generally not accompanied by affirmative acts of harm, the conduct of the parents resulting in the stigma of illegitimacy should be examined focusing on volition. The omission to marry may at times result from circumstances where no duty would be imposed, and the decision to engage in intercourse might also affect recovery.[67]

C. *Duty*

1. ANALOGOUS CIRCUMSTANCES

In one typical circumstance both parents voluntarily engage in intercourse which impregnates the mother, followed by the refusal of one parent, for example the father, to marry the other.[68] The father's intentional refusal to exercise his power to legitimize the child deprives the mother of *her* power to legitimize him, and the consequent injury to the child results.

A number of legal principles, applicable in analogous circumstances in which the law imposes tort liability, would support recovery against the father in this situation. Although the general rule is that there is no liability for nonfeasance, intentional or not,[69] a special relationship may result in a duty of affirmative action. Thus "if the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect."[70]

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66. *Id.* at 527.

67. *See* W. PROSSER, TORTS § 9 (3d ed. 1964); *see also* People v. Minkowski, 204 Cal. App. 2d 832, 23 Cal. Rptr. 92 (1962).

68. The refusal would not necessarily be limited to the father, as either parent could refuse to marry the other. The result is somewhat worse, however, where the father does not marry the mother nor recognize the child.

69. RESTATEMENT (SECOND) OF TORTS § 314 (1965):

> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

See also Toadvine v. Cincinnatti, New Orleans & Tex. Pac. Ry., 20 F. Supp. 226 (E.D. Ky. 1937); Gilbert v. Gwin-McCollom Funeral Home, Inc., 268 Ala. 372, 106 So.2d 646 (1958); Allen v. Hixon, 111 Ga. 460, 36 S.E. 810 (1900); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928); Schichowski v. Hoffmann, 261 N.Y. 389, 185 N.E. 676 (1933); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959); Riley v. Gulf, Colo. & Santa Fe Ry., 160 S.W. 595 (Tex. Civ. App. 1913).

70. RESTATEMENT (SECOND) OF TORTS § 321(1) (1965). *See also* Trombley v. Kolts, 29 Cal. App. 2d 699, 85 P.2d 541 (1938); Northern Cent. Ry. v. State *ex rel.* Price, 29 Md.

It is true that the risk of injury jeopardizing the wrongful life plaintiff is not one of impending physical harm, but rather of mental harm and injury to reputation. However, because recovery has been allowed before for the intentional infliction of emotional distress,[71] the type of injury suffered should not be a reason for denial of recovery.[72] "The injury is not as tangible as a physical defect but it is as real,"[73] and it is no less intentional because it results from omission. The principle supporting the rule would mitigate toward the imposition of a duty of affirmative action upon the parent of a bastard due to the relationship in which the parent causes the risk of injury to the child, has the power to prevent the risk from taking effect, but intentionally refuses to take affirmative action.

The relationship between parent and child is a particularly close one and strongly impels imposition of a duty of affirmative action.[74] A duty of affirmative action has been imposed upon parents in other situations because of this relationship,[75] and its breach has at times resulted in criminal liability.[76] The relationship exists between parents and illegitimate,[77] as well as legitimate children.[78]

Another principle would appear to apply in view of the father's prevention of the mother's exercise of her power to legitimate the bastard. It is a common rule of tort liability that "one who intentionally prevents a third person from giving to another aid necessary to prevent physical harm is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person

420, 96 Am. Dec. 545 (1868); *cf.* Ward v. Morehead City Sea Food Co., 128 N.C. 229, 38 S.E. 878 (1901). The rule applies even where the original act is innocent. RESTATEMENT (SECOND) OF TORTS § 321(2) (1965); *In re* Pennsylvania R.R., 48 F.2d 559 (3d Cir. 1931), *cert. denied,* 284 U.S. 640 (1931); Hardy v. Brooks, 103 Ga. App. 124, 118 S.E.2d 492 (1961); Hollinbeck v. Downey, 26 Minn. 481, 113 N.W.2d 9 (1962).

71. *See e.g.,* State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (Traynor, J.); Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932); Scheman v. Schlein, 35 Misc. 2d 581, 231 N.Y.S.2d 548 (Sup. Ct. 1962); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961).

72. A libel action based on printed matter could be analyzed as to a failure to remove the offensive matter before printing or sale.

73. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 258, 190 N.E.2d 849, 857 (1963), *cert. denied,* 379 U.S. 945 (1964).

74. *See* W. PROSSER, TORTS § 54 (3d ed. 1964).

75. Particularly regarding support and custody. Additionally, the duty can arise in criminal law. *See* note 76 *infra.*

76. Rex v. Russell [1933] Vict. L.R. 59. The defendant was found guilty of manslaughter for watching his wife drown herself and their two infant children without taking action to prevent it. *See also* Palmer v. State, 223 Md. 341, 164 A.2d 467 (1960); Note, 47 HARV. L. REV. 531 (1934).

77. *See* Commonwealth v. Hall, 322 Mass. 523, 78 N.E.2d 644 (1948). *See also* Note, 9 UTAH L. REV. 187, 190 (1964).

78. *See generally,* Bohlen, *The Moral Duty to Aid Others as the Basis of Tort Liability,* 56 U. PA. L. REV. 217, 316 (1908); McNiece & Thornton, *Affirmative Duties in Tort,* 58 YALE L.J. 1272 (1949); W. PROSSER, TORTS § 54 (3d ed. 1964); Seavey, *I Am Not My Guest's Keeper,* 13 VAND. L REV. 699 (1960); Comment, *Liability for Negative Conduct,* 35 VA. L. REV. 446 (1949).

from giving."[79] Again, though the harm is not physical it is nonetheless injurious. Another rule of tort liability is that an actor "who knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, . . . is under a duty to exercise reasonable care to prevent such further harm."[80]

> If his act, or an instrumentality within his control, has inflicted upon another such harm that the other is helpless and in danger, and a reasonable man would recognize the necessity of aiding or protecting him to avert further harm, the actor is under a duty to take such action even though he may not have been originally at fault.[81]

To a degree the principles inherent in this rule suggest liability, particularly for the protracted injuries suffered by a continuous refusal to marry, since after birth it is still possible to marry and legitimize a bastard.[82] To do so would prevent at least some damage.

One can arguably analogize the father of the wrongful life plaintiff to a manufacturer of chattels. "The manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be, dangerous for use is subject to the liability of a supplier of chattels with such knowledge."[83] A manufacturer who places in the stream of commerce a deleterious product endangering others is under a duty to take such action as will protect others from injury.[84] This rule suggests liability in a wrongful life action, where the wound which begins upon the mattress is as harmful as that which has its start within it.[85]

The case of the adulterine bastard is somewhat different. The parent's refusal would be less an intentional omission than an inability to perform the omitted act. However, there is an analogy to the driver who knowingly operates a vehicle without brakes. A person injured by

79. RESTATEMENT (SECOND) OF TORTS § 326 (1965). *See also* Eclipse Lumber Co. v. Davis, 196 Iowa 1349, 195 N.W. 337 (1923); Metallic Compression Casting Co. v. Fitchburg Ry., 109 Mass. 277, 12 Am. Rep. 689 (1872); Phenix Ins. Co. v. New York Cent. & Hudson River R.R., 122 App. Div. 113, 106 N.Y.S. 696 (1907), *aff'd*, 196 N.Y. 554, 90 N.E. 1164 (1909); Concordia Fire Ins. Co. v. Simmons Co., 167 Wis. 541, 168 N.W. 199 (1918).

80. RESTATEMENT (SECOND) OF TORTS § 322 (1965). *See also* Trombley v. Kolts, 29 Cal. App. 2d 699, 85 P.2d 541 (1938); Northern Cent. Ry. v. State *ex rel.* Price, 29 Md. 420, 96 Am. Dec. 545 (1868).

81. RESTATEMENT (SECOND) OF TORTS § 322, comment *a* (1965). *See also* L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942); Holland v. St. Paul Mercury Ins. Co., 135 So.2d 145 (La. App. 1961); *cf.* Whitesides v. Southern Ry., 128 N.C. 229, 38 S.E. 878 (1901).

82. FLA. STAT. § 731.29 (1967).

83. RESTATEMENT (SECOND) OF TORTS § 394 (1965).

84. *See, e.g.*, Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (1916).

85. RESTATEMENT (SECOND) OF TORTS § 395, comment *d*, illustration 1 (1965):

> *A* manufactures a mattress. Through the carelessness of one of *A*'s employees a spring inside of the mattress is not properly tied down. *A* sells the mattress to *B*, a dealer, who resells it to *C*. *C* sleeps on the mattress, and is wounded in the back by the sharp point of the spring. The wound becomes infected, and *C* suffers serious illness. *A* is subject to liability to *C*.

See also Maecherlein v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (1956).

the driver's inability to stop his vehicle might establish liability for the foreseeable inability to stop where, had the driver had brakes, he would have been able to do so.[86] The statutes requiring brakes on vehicles,[87] upon which liability could also be predicated, would be analogous to adultery statutes.[88] To say that the class of people intended to be protected by adultery statutes does not include illegitimate children would be like saying that the statutes requiring brakes are for the protection of the occupants of vehicles and not innocent persons likely to be injured by unimpeded vehicles. The unborn illegitimate child could be considered to be among the class of people likely to be injured by adultery. Both the brake and adultery statutes are for the protection of the public generally.

Where, as in *Zepeda*, the act of fornication by the adulterous father was preceded by a fraudulent promise of marriage, the wrongful life plaintiff could also proffer the argument that he constitutes a third party beneficiary of a promise, the breach of which involves tort liability. Liability would be akin to that imposed upon those who negligently perform an undertaking to render services.[89] There would be an actual reliance by the mother and a type of compulsory reliance by the plaintiff beneficiary because he would be unable to take steps to better his position.

In both of the above situations the mother, because she is unable to legitimize the plaintiff due to the refusal or previous marriage of the father, might argue that her failure to marry the father should not result in liability. However, her inability is not any less an actual cause of the illegitimacy of the plaintiff, and it would appear to be a foreseeable cause.[90] It might be her burden either to prove that her conduct did not cause the harm,[91] or to suffer the consequences of her dilemma.

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86. Violation of a statute requiring brakes is prima facie evidence of negligence. Anchor Hocking Glass Corp. v. Allen, 161 So.2d 853 (Fla. 1st Dist. 1964).

87. *See, e.g.*, FLA. STAT. § 317.611 (1967).

88. *See, e.g.*, FLA. STAT. § 798.01 (1967).

89. RESTATEMENT (SECOND) OF TORTS § 323 (1965):

> One who undertakes, gratuitously or for a consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

See also Mallett v. Southern Ry., 20 Cal. App. 2d 500, 68 P.2d 281 (1937); Maddock v. Riggs, 106 Kan. 808, 190 P. 12 (1920); Abresch v. Northwestern Bell Tel. Co., 246 Minn. 408, 75 N.W.2d 206 (1956); Siegal v. Spear & Co., 195 App. Div. 845, 187 N.Y.S. 284 (1921), *aff'd*, 234 N.Y. 479, 138 N.E. 414 (1923).

There is some difficulty in this approach because of the similarity the argument has to causes of action for breach of promise to marry which have been abolished by statute. *See* note 33 *supra*.

90. *See* RESTATEMENT (SECOND) OF TORTS § 433 (1965). *See also* McNello v. John B. Kelly, Inc., 283 F.2d 96 (3d Cir. 1960); New York Eskimo Pie Corp. v. Rataj, 73 F.2d 184 (3d Cir. 1934); Troietto v. G.H. Hammond Co., 110 F.2d 135 (6th Cir. 1940); West v. Molders Foundry Co., 342 Mass. 8, 171 N.E.2d 860 (1961); Miller v. Board of Educ., 291 N.Y. 25, 50 N.E.2d 529 (1943).

91. *See* RESTATEMENT (SECOND) OF TORTS § 433B (1965). *See also* O'Conner v. Boulder

Where the mother has been raped and fails to marry her rapist, resulting in the illegitimacy of the child, it is clear that she should not be liable. In such a situation, due to the lack of volition, the conduct placing the plaintiff in a position of peril would not be her action, and the special relationship upon which liability for nonfeasance historically has been based would not exist. The law has not required a person to affirmatively perform a dangerous or distasteful act necessary to extract another from a peril resulting from an unwanted, and in fact resisted, act of a third person.[92]

2. POLICY CONSIDERATIONS

Although it is apparent that the law compensates injuries similar to the type suffered by the bastard and has imposed liability in analogous circumstances, the plaintiff seeks to impose liability predicated upon nonfeasance and involving a duty of affirmative action. It is true that as a general rule the law does not impose upon persons an affirmative duty to marry.[93] The law does, however, impose a duty upon persons to refrain

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Colorado Sanitarium Ass'n, 107 Colo. 290, 111 P.2d 633 (1941); Rutherford v. Modern Bakery, 310 S.W.2d 274 (Ky. 1958); Kramer Serv., Inc. v. Wilkins, 184 Miss. 483, 186 So. 625 (1939).

92. RESTATEMENT (SECOND) OF TORTS § 314 (1965). This would be an appropriate situation for application of the general rule. This situation is similar to the factual circumstances presented in Williams v. State, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), *rev'd*, 25 App. Div. 2d 906, 269 N.Y.S.2d 786 (1966), *reversal aff'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966), discussed in the text at note 25 *supra*. In this regard the New York Court of Appeals was correct in stating that the law does not recognize a concept of legal "wrong" in causing a person to be born a bastard. The *Williams* situation is analogous to that of a bystander who, though perhaps under a duty of affirmative action to aid a third person, has not the means of aiding him.

93. *See* Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 146-49; 9 UTAH L. REV. 187, 190-91 (1964). It has been noted that:

> [I]t is, at best, a doubtful social policy to try to compel a marriage, considering the potential enmity and rancor between the "shotgunned" parents, and the resulting adverse emotional influences on the child. The social blunder of forcing unwilling parties to marry has been acknowledged before. Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 138 n.88 (1966).

It is difficult to understand how much greater the compulsion of a wrongful life action would be than that of support statutes. Though there would be some, perhaps additional, compulsion, the fact remains that an illegitimate child does suffer damage; a damage of a kind compensable by the law. The above criticism is prompted by the existence of "heart balm" statutes. *See* note 33 *supra*. Those statutes were a result of fraudulent and coercive claims and a lack of confidence in courts as reasoning institutions capable of separating fact from fancy and merit from abuse.

Though legislatures are quick to act to correct an abuse, if and when it may occur, they are less prone to act to remedy an existing wrong, particularly in the field of tort law. *See* Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963); Green, *The Thrust of Tort Law—Part I: The Influence of Environment*, 64 W. VA. L. REV. 115 (1962); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936). It is desirable to deter illegitimacy, and a wrongful life action would have a deterrent effect. *See* Comment, *Illegitimacy, Society and the Law: A Private Tort Remedy for a Public Problem*, 39 SO. CAL. L. REV. 438, 449-61 (1966). "Because the existing remedies, such as paternity suits and legitimation, provide illegitimate children with inadequate compensation, the courts should respond to the need for a superior remedy by recognizing an action for wrongful life." *Id.* at 461. The deterrent effect and the

from causing certain of the damages suffered by a bastard.[94] Additionally, despite requiring mutual consent to marry, the law does encourage marriage to an extent by the very existence of support statutes.[95]

A wrongful life action is directed more toward compensating for the failure to marry than toward encouraging marriage. It would remain within the power of the parents to exercise a choice as to marriage. The bastard has no such power, but a wrongful life action would provide him with compensation for an injurious choice made by his parents.

3. RELATED CLAIMS

The myriad circumstances which might result in a bastard child, as revealed by emphasis on the omission as well as the affirmative act, serve to distinguish undesirable related suits such as those which persuaded the *Zepeda* court to deny the bastard's claim for relief. The court feared that "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 . . . ."[96] Such malformations or characteristics occurring as the result of natural genetic processes would not result in liability of the parents because no omission to act would exist where no action could be taken. The same would be true even of artificially caused malformations. Whether a child malformed by artificial genetic processes could state a cause of action based on foreseeability would not be of concern in examining a wrongful life claim.

As the court noted, neither a legitimate child nor an illegitimate child could maintain an action against a parent for causing a divorce which has broken up the home.[97] Not only is divorce a legally sanctioned process, but the damages sustained by the issue of divorced parents is not of a compensable type. Certainly a divorce action would not concern a bastard; in order to be a divorce there must first be a marriage.

There seems to be some analogy of a wrongful life suit to another claim the encouragement of which was feared by the *Zepeda* court. The court feared that one might be encouraged to sue for being born into a large and destitute family.[98] However, a judgment against a destitute parent, whatever it would be worth,[99] would not come about because

need for compensation by additional remedies warrant judicial recognition of the action. *Id.* at 449-61; *see also* 28 ALBANY L. REV. 174 (1964).

94. See the discussion in text at I, B and II, A, *supra*. *See also* Comment, 49 IOWA L. REV. 1005, 1010-11 (1964); Comment, *Illegitimacy, Society, and the Law: A Private Tort Remedy for a Public Problem*, 39 So. CAL. L. REV. 438, 460-61 (1966).

95. *See* note 8 *supra*.

96. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 260, 190 N.E.2d 849, 858 (1963), *cert. denied*, 379 U.S. 945 (1964).

97. *Id.* at 255, 190 N.E.2d at 856.

98. *Id.* at 260, 190 N.E.2d at 858.

99. The prospective illegitimacy suit could be invoked, as a practical matter, only by

this financial interest of a child has not been recognized beyond the duty of a parent to support his children. The law already protects and requires support of children.

An interesting question was posed by the *Zepeda* court as to artificially inseminated children.[100] It has been held that heterologously artificially inseminated children are not illegitimate where the insemination apparently was by sperm of the husband of the mother.[101] However, the same jurisdiction has held that a child resulting from artificial insemination by a third party donor is illegitimate.[102] Depending on the strength of the presumption of legitimacy of children born in wedlock, the results of artificially inseminated child cases probably will vary. At this point the status of children produced by artificial insemination is in doubt.[103] However, where and when such children are considered illegitimate, it would seem that their case for a cause of action for wrongful life would be as strong as that of more mundane bastards.

One quite speculative question posed by the *Zepeda* court concerned the status of "children" resulting from synthesization of life.[104] Conceivably such beings might be classed as illegitimates, if and when they exist, though to do so would be to add a strained new dimension to the phrase "born out of wedlock." Assuming a wrongful life action should be available to all who suffer damages from illegitimacy, such beings might be entitled to it. Whether they would be able to prove damages would be speculative. They might be quite respected, for their creation would be a monumental human achievement.

D. *Parental Immunity*

An important consideration in a suit for wrongful life is the doctrine of parental tort immunity. According to this doctrine a suit by a child

claimants whose parents are affluent enough to satisfy a judgment above the ordinary support liability. The large number of fathers presently unable to satisfy judgments obtained against them in statutory support proceedings suggests that the proposed cause of action would have very limited utility. Furthermore, viewing the bastard child's action as a deterrent designed to diminish the number of illegitimate births does little to alter this conclusion. Attaching financial consequences to sexual irresponsibility through bastardy proceedings has apparently failed to alter the incidence of illegitimacy. Procreation of a bastard child is more likely to result from passion or ignorance—essentially non-deterable conduct—than from specific intent . . . . Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 147-48 (1966) (footnotes omitted).

100. 41 Ill. App. 2d at 260-63, 190 N.E.2d at 858-59.

101. Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948). Apparently the sperm was not that of a third party donor because the court stated that there was no difference between the child whose status was in question and a child born out of wedlock and later made legitimate by the inter-marriage of the interested parties. Although the court referred to the child as "adopted or semi-adopted," it apparently did so for lack of any other description.

102. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

103. *See* Biskind, *Legitimacy of Children Born of Artificial Insemination*, 5 J. FAM. LAW 39 (1965). *See also* Comment, *Human Artificial Insemination: An Analysis and Proposal for Florida*, 22 U. MIAMI L. REV. 000 (1968).

104. 41 Ill. App. 2d at 261-62, 190 N.E.2d at 859.

against his parent cannot be maintained. However, because of the limitations and exceptions to this doctrine it probably would have limited application to a wrongful life action.

The history of the doctrine is relatively recent and rather unusual. Citing neither precedent nor authority and relying only on the vagaries of public policy, the 1891 case of *Hewlett v. George*[105] quite literally created the doctrine.[106] Although the case was soon followed in cases involving even very atrocious acts,[107] courts have not agreed upon the reasons for the application of the doctrine and have created exceptions to it or limitations upon it.

1. APPLICATION OF THE DOCTRINE

Certain aspects of a family relationship have been influential as reasons for applying parental immunity.[108] Courts have hesitated to unnecessarily and perhaps irreparably disrupt family unity and tranquility by allowing family disputes to be aired in public litigation.[109] The necessity of discretionary parental discipline of children[110] and the fear of collusion in suits involving insurance have been offered as reasons for invoking the doctrine.[111] It has also been stated that depletion of the

105. 68 Miss. 703, 9 So. 885 (1891). For general discussion of parental immunity see Comment, 12 S.D.L. REV. 364 (1967); Cooperrider, *Child v. Parent in Tort: A Case for the Jury*, 43 MINN. L. REV. 73 (1958); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960); Note, 38 CORNELL L.Q. 462 (1953); Comment, 48 IOWA L. REV. 748 (1963); Comment, 26 MO. L. REV. 152 (1961); W. PROSSER, TORTS § 116 (3d ed. 1964); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956).

106. The textwriters of the nineteenth century were in disagreement over the ability of a child to sue its parents prior to the case. *See* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059-60 (1930). Some cases prior to *Hewlett* did analyze the authority of persons *in loco parentis*. *See* Gould v. Christianson, 10 F. Cas. 857 (No. 5636) (D.C.N.Y. 1836); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885); Lander v. Seaver, 32 Vt. 114 (1859).

107. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (cruel and inhumane treatment); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (incestuous rape), overruled in Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). Parental immunity was asserted in Foley v. Foley, 61 Ill. App. 577 (1895), and was allowed on public policy grounds without citing *Hewlett*. The *Hewlett* decision soon became the general rule and evidently remains so today. Annot., 19 A.L.R.2d 423 (1951); 39 AM. JUR. *Parent and Child* § 90 (1942).

108. A common analogy cited by courts has been to the immunity between husband and wife. *See* Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Luster v. Luster, 229 Mass. 480, 13 N.E.2d 438 (1938). The analogy has been criticized as paradoxical and inapplicable. *See* McCurdy, *supra* note 101 at 1074; PROSSER, *supra* note 100 at 886.

109. This reason is generally asserted. *See, e.g.*, Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928). *See also* McCurdy, *supra* note 101, at 1074-76.

110. Cowgill v. Boock, 189 Ore. 282, 305, 218 P.2d 445, 455 (1950); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); Borst v. Borst, 41 Wash. 642, 251 P.2d 149 (1952); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); *cf.* Meehan v. Meehan, 133 So.2d 776 (Fla. 2d Dist. 1961). *See also* McCurdy, *supra* note 101, at 1076-77.

111. Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957). *But cf.* Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966).

family estate to the advantage of one child over another is a reason for the rule.[112] Another reason cited is the apparent anomaly that would result were the father, as heir, to succeed to damages which the law wrested from him.[113] Families thus have been treated somewhat as small self-governing units with an immunity of parents analogous to that of a sovereign,[114] and in some states the immunity has been extended to persons *in loco parentis*.[115]

Certain exceptions to the doctrine have evolved where a nonfamily status or relationship is presented. The existence of a master-servant,[116] carrier-passenger[117] or vocational status[118] has been held to create an exception to the immunity concomitant to a parental status. Some courts have considered that the existence of insurance is reason for an exception,[119] though this has been criticized by other courts. Some courts also have limited the doctrine, as by refusing to extend its application to persons *in loco parentis*[120] or by holding that emancipation[121] or death[122] terminates the family relationship which is the basis for the rule.

2. TRENDS IN EMPHASIS

Two different emphases are possible in applying the doctrine. The immunity could be based on the family relationship existing at the time of the tortious parental act or upon the family relationship existing at the time of litigation. Questions regarding collusion and insurance, depletion of the family estate, succession to damages by a parent, and death

112. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). *See also* McCurdy, *supra* note 101, at 1073-74.

113. *Id. Cf.* Russell v. Meehan, 141 So.2d 332 (Fla. 2d Dist. 1962); Rehe v. Airport U-Drive, Inc., 63 So.2d 66 (Fla. 1953).

114. Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925). This has been criticized as an obsolete concept. *See* McCurdy, *supra* note 101, at 1076.

115. Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939). *See also* 67 C.J.S. *Parent and Child* § 61 (1950). *See generally* Annot., 19 A.L.R.2d 423 (1951).

116. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); *cf.* Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913).

117. Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); *cf.* Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965); Henderson v. Henderson, 11 Misc. 2d 449, 169 N.Y.S.2d 106 (Sup. Ct. 1957); Lusk v. Lusk, 133 W. Va. 17, 166 S.E. 538 (1932).

118. Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

119. Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Lusk v. Lusk, 133 W. Va. 17, 166 S.E. 538 (1932). *See also* Wick v. Wick, 192 Wis. 260, 262, 212 N.W. 787, 788 (1927) (dissenting opinion).

120. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Cwik v. Zylstra, 58 N.J. Super. 29, 155 A.2d 277 (1959).

121. Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 789 (1962). The question is one of fact. *Compare* Thompson v. Thompson, 264 S.W.2d 667 (Ky. 1954) *with* Crosby v. Crosby, 230 App. Div. 651, 246 N.Y.S. 384 (1930). The child is presumed unemancipated. Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932).

122. Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957). *But see* Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940).

or emancipation generally emphasize the family relationship, unity and tranquility existing at the time of suit. Questions of dual status or discretionary parental discipline generally require emphasis upon the family relationship existing at the time of the tort. The modern emphasis has been upon the family relationship existing at the time of the tort, and where the original act was willful[123] or malicious[124] or did not involve the exercise of parental duty or discretion,[125] the immunity rule has been abrogated.

3. THE FLORIDA POSITION

Florida appears to follow the majority rule of parental immunity. In *Meehan v. Meehan*[126] it was held that a child was immune from a suit instituted by a parent. Although one trial court allowed a child to recover from a parent in a wrongful death action involving a willful and wanton tort,[127] in *Rickard v. Rickard*[128] parental immunity was applied in a child's suit for negligence despite the existence of insurance.

4. SUITS BY ILLEGITIMATE CHILDREN

The very few cases which have considered the immunity of parents from suits by their illegitimate children have done so with regard to the exceptions, limitations and purposes of the rule. A child formerly illegitimate but legitimated by a subsequent marriage was treated as a legitimate child.[129] Where a relationship of *in loco parentis* existed, a jurisdiction recognizing the *in loco parentis* extension applied the immunity.[130] Conversely, where the act fell within the willful and malicious tort exception, the doctrine was not applied.[131] *Garcia v. Fantauzzi*[132] is authority for the proposition that where no family unit or *in loco parentis* relationship exists, there is no justification for applying the rule.

Because of the frequent criticism of the immunity rule and the

123. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959); Treschmann v. Treschmann, 28 Ind. App. 206, 61 N.E. 961 (1901).

124. Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

125. Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1954); Ertl v. Ertl, Wis. 2d 372, 141 N.W.2d 208 (1966); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Because of the numerous exceptions, the immunity rule often has little force. Siembab v. Siembab, 202 Misc. 1053, 112 N.Y.S.2d 82 (Sup. Ct. 1952); Comment, 12 S.D.L. REV. 364, 365 (1967).

126. 133 So.2d 776 (Fla. 2d Dist. 1961).

127. Henderson v. Henderson, 14 Fla. Supp. 181 (Ct. Rec. Escambia County 1958).

128. 203 So.2d 7 (Fla. 2d Dist. 1967).

129. Borzik v. Miller, 22 Fay. L.J. 5 (C.P. Fayette County 1958), *aff'd on other grounds*, 399 Pa. 293, 159 A.2d 741 (1960).

130. Caringe v. Rubin, 13 App. Div. 2d 593, 212 N.Y.S.2d 455 (1961).

131. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). The court expressly refused to decide whether the doctrine of parental immunity could be applied in a suit by an illegitimate child.

132. 20 F.2d 524 (1st Cir. 1927), *cert. denied*, 275 U.S. 571 (1927).

modern trend to limit or make exceptions to its application, it appears that any immunity of a parent from suit by an illegitimate child should be limited to those cases where an actual family unit exists and the act is committed within the scope of parental duty and authority.

In such cases as *Zepeda v. Zepeda* the father certainly should not be allowed to avail himself of the parental immunity doctrine, as no reason for applying it would exist in the absence of a family relationship.[133] Even where the illegitimate child lives with the parents, a wrongful life action should not be precluded by parental immunity because the omission to marry which causes the child damage is clearly not within the scope of parental duty and authority.[134]

III. CONCLUSION

Despite its apparent uniqueness, the bastard's complaint has great merit. The damages sustained as a result of illegitimacy are of a nature akin to those compensable in existing causes of action, and the interests protected bear a resemblance to those protected by the common law. The cause of action is reasonably analogous to circumstances in which the law imposes a duty of care. Additionally, the cause of action easily can be distinguished from those undesirable claims to which courts have objected.

The most incisive objections to recognition of the cause of action are based upon public policy and the historical judicial reluctance to impose a duty where nonfeasance is concerned. These objections, however, do not necessarily compel the conclusion that legislative action[135] alone would permit courts to recognize the claim. Without great deviation from precedent, courts could let the bastard recover.

133. Even where the father does provide support voluntarily or through statutory proceedings there does not seem to be a family relationship sufficient to justify parental immunity. In such circumstances only a portion of the relationship of a normal family exists. The relationship should at least include the custody and control of the child, and the right of parental discipline which requires a discretion which courts might choose to respect.

134. Were the tortious act to be the act of intercourse, it could be argued that the benefit bestowed constitutes the willful tort exception to the immunity rule in reverse, and that therefore the immunity rule should be applied.

135. A natural place for amendment of the Florida statutes in order to allow this cause of action would be in the bastardy chapter. *See* FLA. STAT. § 742.011 (1967). At the same time, if desired, a limit on recoverable damages could be set. One major problem is that presently a paternity suit can be instituted only by "unmarried mothers." *See* FLA. ATT'Y GEN. OP. 717 (1952). At least to the extent of allowing recovery for damages, the statute would have to be amended to allow the child or someone on his behalf to institute the proceedings to the extent of recovery for wrongful life damages.