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Torts – Survival of Actions – Illegitimate Child

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negligence must be submitted to the jury would merely have a tendency to shift the burden from the plaintiff to the defendant. This would not solve the problem. What is needed is legislation which would establish an equitable method of apportioning damages. This could be accomplished by statutes which would allow the jury to render special verdicts as to the amount of damages recoverable if they find no contributory negligence, and establish the amount by which such damages should be diminished if they find otherwise.²¹

JOEL H. DOWDY

TORTS — SURVIVAL OF ACTIONS — ILLEGITIMATE CHILD

Plaintiffs, the natural parents of an illegitimate son, brought suit for the wrongful death of their child under Article 2315 of the Louisiana Civil Code, which provides for the survival of actions for wrongful acts. *Held*, illegitimates are not included within the meaning of the act; thus action for the wrongful death of an illegitimate child does not survive in favor of natural parents. *Cheeks v. The Fidelity & Casualty Co. of New York*, 87 So.2d 377 (La. 1956).

A group of American courts¹ has held that death statutes modeled on Lord Campbell's Act,² and using the words "mother," "father," and "child," include only legitimates. This was the view expressed by Chief Baron Pollock soon after the original law.³ The rationale of the rule was that legislation must be presumed to be enacted in the light of the common law and does not give rights denied by the common law to a class separated from the common mass, without express intention.⁴ The reasoning rested upon the doctrine that a bastard is *nullius filius* and has no ancestor.⁵ On that basis, an illegitimate was not allowed to recover for the wrongful death of its father,⁶ nor was a mother allowed to recover

21. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 508 (1953).

1. Ga.: *Robinson v. R. & Banking Co.*, 117 Ga. 169, 43 S.E. 452 (1903); *Ind.*: *McDonald v. Pittsburg C. C. & St. L. Ry.*, 44 Ind. 159, 43 N.E. 447 (1896); *La.*: *Lynch v. Knoop*, 118 La. 611, 43 So. 252 (1907); *Md.*: *State v. Hagerstown & Frederick Ry.*, 139 Md. 78, 114 Atl. 729 (1921); *Miss.*: *Alabama & V. Ry. v. Williams*, 78 Miss. 209, 28 So. 853 (1900); *N.Y.*: *Hiser v. Davis*, 234 N.Y. 300, 137 N.E. 596 (1922); *Ohio*: *Bonewit v. Weber*, 95 Ohio App. 428, 120 N.E.2d 738 (1952); *Pa.*: *Molz v. Hansell*, 115 Pa. Super. 338, 175 Atl. 880 (1934); *S.C.*: *McDonald v. Southern Ry.*, 71 S.C. 352, 51 S.E. 138 (1905); *Vt.*: *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799 (1883).

2. Lord Campbell's Act, 1846, 9 & 10 Vict. 1, c. 93.

3. *Dickinson v. The North Eastern Ry.*, 2 Hurl. & C. 735, 159 Eng. Rep. 304 (Exch. 1863), "But beyond all doubt in the construction of this Act of Parliament the word 'child' means legitimate child only."

4. *Alabama & V. Ry. v. Williams*, 78 Miss. 209, 28 So. 853 (1900).

5. 1 BLACKSTONE, COMMENTARIES 458 (10th ed. 1787), "... for he [bastard] can inherit nothing, being looked upon as the son of nobody. . . ."

6. *Bonewit v. Weber*, 95 Ohio App. 428, 120 N.E.2d 738 (1952).

for the death of her illegitimate child.⁷ The same result was reached in a federal court⁸ under the Federal Torts Claims Act,⁹ the local law being controlling.

However, in recent times, a change has been brought about primarily through a combination of judicial interpretation and legislative action which might properly be called a modern trend. Where there have been statutes substantially legitimizing bastards as to the mothers,¹⁰ or conferring on them the right to inherit or transmit inheritances from or through the mothers,¹¹ courts have held that the mother could recover for the death of her illegitimate child¹² and such child for its mother's death.¹³ One such statute did not affect the relations between father and child.¹⁴ Where recovery has been allowed, approval was expressed,¹⁵ and where recovery has been denied, criticism and pointed comment censured the legislatures for unscientific drafting of the applicable statutes.¹⁶

In the instant case, the court cited leading Louisiana cases¹⁷ and upheld an historically firm interpretation¹⁸ of the Louisiana survival

7. *Citizen's St. R.R. v. Cooper*, 22 Ind. 459, 53 N.E. 1092 (1899).

8. *Evans v. United States*, 100 F. Supp. 5 (W.D. La. 1951). *Contra*, *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326 (2d Cir. 1934) (no local laws being controlling because death occurred on the high seas).

9. Federal Torts Claims Act, 60 Stat. 842 (1946), 28 U.S.C. § 2671—80 (1952).

10. ALA. CODE ANN. tit. 16, § 7 (1940); CAL. PROB. CODE ANN. § 255 (Deering 1944); IND. ANN. STAT. § 6-207 (1954).

11. FLA. STAT. § 731.29 (1955); MO. ANN. STAT. § 468.060 (1952); TENN. CODE ANN. § 31-107 (1955); TEX. PROB. CODE § 42 (1956), WASH. REV. CODE § 11.04.080 (1954).

12. Ala.: *Southern Ry. v. Carlton*, 218 Ala. 265, 118 So. 458 (1928); Cal.: *Stoneburner v. Theodoratos*, 137 Cal. App. 462, 30 P.2d 1001 (1934); Fla.: *Hadley v. Tallahassee*, 67 Fla. 436, 65 So. 545 (1914); Ind.: *L. T. Dickason Coal Co. v. Liddil*, 49 Ind. App. 40, 94 N.E. 411 (1911); Miss.: *Wheeler v. Southern Ry.*, 111 Miss. 528, 71 So. 812 (1916) (under Tenn. Stat.); Mo.: *Marshall v. Wabash R.R.*, 120 Mo. 275, 255 S.W. 179 (1894); Wash.: *Goldmeyer v. Van Bibber*, 130 Wash. 8, 225 Pac. 821 (1924); Wis.: *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170, 148 N.W. 37 (1914).

13. *Galveston R. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S.W. 705 (1908).

14. *Seaboard Airline R.R. v. Kenney*, 240 U.S. 489 (1915). *Contra*; *Withrow v. Edwards*, 181 Va. 344, 25 S.E.2d 343 (1943).

15. 8 So. CALIF. L. REV. 249 (1935), 22 CALIF. L. REV. 578 (1934), 21 VA. L. REV. 120 (1935).

16. 27 MICH. L. REV. 315 (1942), 16 OHIO ST. L. J. 128 (1955).

17. *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1945); *Lynch v. Knoop*, 118 La. 611, 43 So. 252 (1907).

18. *Jackson v. Lindlom*, 84 So.2d 101 (La. 1955); Board of Comm'rs. of Port of New Orleans v. Public Belt R.R. Commission of New Orleans, 223 La. 199, 65 So.2d 313 (1952); *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1945); *Navarette v. Joseph Laughlin, Inc.*, 209 La. 417, 24 So.2d 594 (1944); *Brown v. Texas & Pac. Ry.*, 18 La. App. 656, 138 So. 221 (1931); *Youchican v. Texas & Pac. Ry.*, 147 La. 1080, 86 So. 551 (1920); *Green v. New Orleans, S & G I. R.R.*, 141 La. 120, 74 So. 717 (1917); *Mount v. Tremont Lumber Co.*, 121 La. 64, 46 So. 103 (1908); *Landry v. American Creosote Works*, 119 La. 231, 43 So. 1016 (1907); *Lynch v. Knoop*, 118 La. 611, 43 So. 252 (1907).

statute.¹⁹ It noted that the civil law doctrines of descent and distribution²⁰ and the express codal definition of "child"²¹ required exclusion of illegitimates. The court also pointed out that whereas the legislature had broadened the scope of the act by amendment to include adopted children,²² it has not so expressly provided for illegitimates. This indicates a plain but regrettable ratification on the part of the Louisiana legislature of the old attitude toward illegitimates. From these considerations, it would seem the court reached its decision by necessity in the wake of legislative apathy.

Traditional doctrines upon which reliance may be placed for future conduct are not to be brushed aside lightly by judicial interpretation. Sympathy may be commanded for the unfortunate in cases of extreme hardship (such as the death of a mother leaving a destitute illegitimate child); nevertheless, it is primarily the responsibility of the legislature to express social policy in the law. It is hoped the Louisiana legislature will enlarge the scope of the survival of actions provision of Article 2315 to include illegitimates. In so doing, it would place a logical liability on presently exempt wrongdoers; avoid, in many cases, the burden being shifted from the wrongdoer to the State for the welfare of illegitimate minors; and fulfill the purpose of such a statute—to give compensation to the immediate family and relatives of the deceased.

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19. LA. CIV. CODE ANN. art. 2315 (West 1952).

Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of the action shall survive in case of death of the children, including adopted children and children given in adoption. . . . and in default of any of these, in favor of the surviving father and mother and either of them. . . .

20. LA. CIV. CODE ANN. art. 917-20 (West 1952).

21. LA. CIV. CODE ANN. art. 178-212, 3556 (West 1952).

22. Acts 1908, No. 120.