Hastings Law Journal

Volume 17 | Issue 2 Article 16

1-1965

Wrongful Life--A New Tort--Williams v. State

Jeffrey L. Smith

Due to the limited nature of *Erlich*, it would not be irreconcilable with such a rule. Conditions were such that the court seemed to imply that damages could have been shown more explicitly.[43] The exercise of such discretion would clearly be within the recommended standard. It is to be hoped that such limiting factors will not be overlooked by future courts and that the strict requirement of special damages in trade libel cases will be modified in such a manner so as to be consistent with present business conditions and public policy.

*John R. Ball**

[43] 224 Cal. App. 2d at 74-75, 36 Cal. Rptr. at 259-60.

* Member, Second Year Class.

"WRONGFUL LIFE"—A NEW TORT?—*Williams v. State*

Williams v. State[1] is an action brought by Frank Williams as guardian *ad litem* for Christine Williams, an infant, and for Lorene Williams, an incompetent adult. While confined at Manhattan State Hospital, Lorene Williams was allegedly sexually assaulted as a result of defendant's negligent supervision, resulting in Christine Williams being conceived and born out of wedlock to a mentally deficient mother. Lorene Williams and Christine Williams each brought separate actions. At present the State does not contest the cause of action of its patient, Lorene Williams. However, when Christine Williams, alleging deprivation of property, normal childhood, normal life, proper parental care and support, and also alleging a burden of bearing the stigma of illegitimacy, sought 100,000 dollars in damages, the State moved to dismiss the plaintiff's cause of action as insufficient. Despite the fact that at the time of the State's alleged negligence plaintiff was not yet conceived, the court concluded that plaintiff's injury was reasonably foreseeable and that the State owed a duty to its patient and to her potential issue. The court therefore denied defendant's motion, holding that plaintiff had a cause of action and was entitled to a trial.

Negligence, the Prerequisites

Christine Williams seeks recovery of damages resulting from negligence. The courts have developed four prerequisites to a successful cause of action for negligence:[2] a legal duty not to subject plaintiff to unreasonable risk, a breach of that duty, a close causal connection between defendant's conduct and plaintiff's resulting injury, and actual loss or damage to plaintiff.

The final two requirements, close causal connection and damages, can be quickly disposed of since they are matters to be proved at trial, while the opinion

[1] 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), noted, 18 STAN. L. REV. 530 (1966).

[2] PROSSER, TORTS 146 (3d ed. 1964).

under discussion concerns only a motion to dismiss. It would seem that plaintiff's case is sufficient to allow her to present evidence of a close causal connection to the jury. The assault is not an independent intervening cause, for plaintiff is suing on the assumption that the State is responsible for the conditions which permitted the intentional tort to occur.[3] Whether the resulting injury to plaintiff was foreseeable or not is a question of fact for the trier of fact.[4]

The last requirement, damages, could be an obstacle to recovery. The court confined itself strictly to the pleaded matters and did not delve into this area of the problem which could be the most intricate. It has been argued that one in this plaintiff's position has not been damaged at all,[5] and actual damages are a necessary part of a cause of action for negligence.[6] Furthermore, many of plaintiff's alleged injuries, most notably deprivation of property, appear to involve pecuniary loss,[7] and "stigma of illegitimacy" has the appearance of mental disturbance without accompanying physical injury.[8] Plaintiff may find herself without a reasonable basis for an estimation of these damages.[9]

Duty, the First Prerequisite

The crux of the *Williams* decision is the prerequisite duty. The New York Court of Claims has, in effect, held that Christine Williams satisfied this requirement.[10] The term duty, as here discussed, is confined to its use in the area of negligence. There is a broader concept of duty present in any tort, *e.g.*, a duty toward the whole world not to commit assault and battery. But, as specifically applied to negligence, duty is a legal obligation to take care, owed by the defendant to a particular plaintiff. A statement of Lord Esher is most often quoted to explain this concept: "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to

[3] Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497 (1943).

[4] Milwaukee & St. P. Ry. v. Kellog, 94 U.S. 499 (1876).

[5] Comment, 49 IOWA L. REV. 1005 (1964) (better a live bastard than never to have existed).

[6] Commercial Bank of Albany v. Ten Eyck, 48 N.Y. 305 (1872).

[7] In negligence cases courts are reluctant to grant damages for purely pecuniary loss without an accompanying tangible damage to the person or property. PROSSER, *op. cit. supra* note 2, at 663, 721-724, 962-967, 976-977.

[8] To date, with several exceptions not here important, courts will not award damages for purely mental distress, negligently caused, without accompanying physical injury. Annot., 64 A.L.R. 2d 100, 117 (1959).

[9] A reasonable basis for an estimate of damages with some exactness is essential. MCCORMICK, DAMAGES 99 (1935).

[10] Judge Squire, in writing the opinion of the court, spoke in terms of a "foreseeable duty." Although an unusual way of expressing it, it would seem that he is concluding that plaintiff is not in the position of Mrs. Palsgraf. In Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), unknown to defendant's servants, a passenger was carrying a package of fireworks which slipped out of his hands while defendant's servants negligently assisted him in boarding the train. The fireworks exploded, the concussion causing scales on the platform to fall on Mrs. Palsgraf. Chief Judge Cardozo, writing for the majority, concluded that Mrs. Palsgraf was an unforeseeable plaintiff and therefore there was no actionable negligence toward her. Unless it can be said that children are not the foreseeable consequence of rape, Judge Squire's conclusion would seem to be justified.

make him liable for his negligence. . . . A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."[11]

The requirement of duty is of comparatively recent origin.[12] At that period in common law when contract and tort were slowly being disentangled and negligence was developing as a separate tort, the concept of duty innocuously began to appear in decisions. Commencing with opinions holding that the obligation of contract could give no right of action to one not privy to the contract, this concept was gradually extended to the whole field of negligence.[13] By 1883, duty had solidified into an essential requirement of the law of negligence.[14]

Duty Between Conception and Birth

The idea that a tort could be committed against a child between conception and birth and thus that a duty could exist toward that child, was first put forward in *Dietrich v. Inhabitants of Northampton.*[15] While four to five months pregnant with deceased, deceased's mother fell as a result of defendant's negligence, causing an abortion of the pregnancy. The premature child died within ten or fifteen minutes. Justice Holmes refused to concede that the deceased child could be the victim of a tort. The jurist reasoned that until birth the child was not a person recognized by law so that defendant owed him no duty prior to birth. Until 1946, Holmes' opinion represented the overwhelming weight of authority as to prenatal injuries.[16]

In 1946, *Bonbrest v. Kotz*[17] held that a child *en ventre sa mere*[18] was a human being capable of suffering tortious physical injury. Plaintiff was injured during birth, and the case was distinguished from *Dietrich* on the ground that plaintiff was a viable being at the time of injury. In an effort to escape the scope of *Dietrich* many courts have adopted the *Bonbrest* test of viability.[19] Since the point at which

[11] Le Lievre v. Gould, [1893] 1 Q.B. 491, 497.

[12] Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934).

[13] A series of three cases is generally considered as the origin of the requirement of duty in negligence actions. Vaughan v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1837); Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (1837) and Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

[14] Heaven v. Pender, 11 Q.B.D. 503 (1883).

[15] 138 Mass. 14 (1884).

[16] Attack in earnest on the flat denial of recovery was begun by Justice Boggs in a dissenting opinion in Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900). He distinguished *Allaire* from *Dietrich* on the grounds that the child in *Dietrich* was not viable. Prior to 1946 California and Louisiana granted recovery on the basis of statutory language. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923). Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924), granted recovery to the victim of a prenatal injury but was in effect overruled by Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940). Despite the lack of precedent, Canada in 1933 granted recovery for an injury which occurred while plaintiff's mother was seven months pregnant. Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, [1933] 4 D.L.R. 337.

[17] 65 F. Supp. 138 (D.D.C. 1946).

[18] In its mother's womb.

[19] *Bonbrest* marked the beginning of a revolution. Only three states, Alabama, Rhode Island and Texas, have yet to overrule decisions following *Dietrich*. PROSSER, *op. cit. supra* note 2, at 356. New York followed *Dietrich* in Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921). This was overruled in 1951 by Woods v. Lancet, 303 N.Y. 349,

viability occurs varies with the individual circumstances,[20] it is doubtful that in the future the courts can continue to draw this distinction. A number of decisions have granted recovery in cases involving only a short length of time between conception and injury, thus expressly or impliedly dispensing with any requirement of viability.[21]

Duty at or Prior to Conception

The State argued that its alleged negligence was not a continuing tort and therefore the negligent act was completed before the assault. If this is accepted, then it follows that plaintiff's cause of action can be successful only if the State owed a duty to plaintiff prior to her conception. Even if there were a continuing tort the only difference would be that the State must have owed a duty to plaintiff at, as opposed to prior to, conception.

Plaintiff lacks authority for the argument that a duty can exist toward a nonexistent person. Two cases, *Zepeda v. Zepeda*[22] and *Piper v. Hoard*,[23] at first glance appear to be pertinent. In *Zepeda*, the defendant, who was already married, seduced plaintiff's mother with promises of marriage. Plaintiff was consequently born an adulterine bastard and brought an action which, for purposes of argument, was called an action for wrongful life. The court had little difficulty in recognizing that plaintiff suffered damages as a proximate result of defendant's tortious acts. However, fearing a flood of litigation, it balked at granting relief, reasoning that this was more properly a legislative than a judicial matter.[24] In *Piper*, prior to plaintiff's conception, defendant made certain fraudulent representations to plaintiff's mother concerning plaintiff's interest in real property held by defendant. Plaintiff sought to have defendant declared trustee *ex maleficio* of the property, which plaintiff would own had the representations been true. Recovery was granted, despite the fact that plaintiff was not in existence at the time of the tort.

The significance of these two cases is obvious. *Zepeda* involved a tort at or immediately prior to conception; *Piper* involved a tort a considerable time before conception. However, neither is precedent for Christine Williams' cause of action, for unlike these two cases, *Williams* was based upon negligence. In *Piper* the tort was fraudulent misrepresentation, an intentional tort. Intentional torts do not involve the same problem of duty as does negligence. Because intentional torts involve the broader concept of duty which is owed to the whole world rather than to a spe-

102 N.E.2d 691 (1951), the court placing considerable reliance upon the viability of plaintiff at the time of the injury.

[20] GREENHILL, OBSTETRICS (13th ed. 1965).

[21] At least the following have dispensed with any requirement of viability: Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956) (6 weeks); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961) (1 month); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953) (3 months); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (1 month); Puhl v. Milwaukee Automobile Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959) (dictum).

[22] 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

[23] 107 N.Y. 73, 13 N.E. 626 (1887).

[24] In *Williams* the defendant argued that to recognize that the State, which at most was indirectly responsible for the alleged damages, is liable when an action for wrongful life against the father is denied is contradictory. Since Judge Squire criticized *Zepeda* for denying relief, this argument carried little weight.

cific individual the intent can be transferred.[25] Negligence requires a duty toward a particular plaintiff which cannot be transferred. In *Zepeda* the court called the defendant's acts "wilful in that defendant was completely indifferent to the foreseeable consequences . . . ."[26] Wilful conduct falls somewhere between negligence, which is unreasonable risk of harm to another, and intent, which is knowledge that the harm is substantially certain to follow.[27] One writer has described it as *"quasi-*intentional conduct."[28] While transferred intent cannot be applied to such a case, neither need the narrow concept of duty, necessary in negligence cases, be applied. Thus like *Piper*, *Zepeda* is not authority for Christine Williams' cause of action.[29]

Not only does plaintiff lack authority for the proposition that the State could have owed a duty to a nonexistent plaintiff, but it is difficult to see how such a duty could exist. Holmes had the same difficulty. He called the child *en ventre sa mere* a nonexistent plaintiff and concluded that no duty could exist. Yet, as seen, his reasoning has been discarded. It would thus seem to be inviting criticism to end this discussion with the conclusion that it is impossible for a duty to be owed to a nonexistent plaintiff.

Dean Prosser argues that the statement that there is or is not a duty is a shorthand statement of a conclusion rather than an aid to analysis in itself.[30] " '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[31] He continues: "No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree it exists."[32]

Factors Underlying a Determination of Duty

Since the courts' finding of duty conforms to that of the reasonable man, it is helpful to look to the reasoning applied in related fields where the question of duty is important and determine what standards are applied. The development of recovery for mental distress, the turntable doctrine,[33] and recovery for prenatal injuries are representative.

Recovery for mental distress began as recovery for the mental anguish which accompanies physical injury.[34] The leading case of *Mitchell v. Rochester Ry.*[35]

[25] Morrow v. Flores, 225 S.W.2d 621 (Tex. Civ. App. 1949).

[26] 41 Ill. App. 2d at 247, 190 N.E.2d at 852.

[27] PROSSER, *op. cit. supra* note 2, at 187.

[28] Elliott, *Degrees of Negligence*, 6 So. CAL. L. REV. 91, 143 (1933).

[29] In common law jurisdictions only one case, Morgan v. United States, 143 F. Supp. 580 (D.N.J. 1956) has raised the possibility of pre-conceptive conduct being negligent with respect to a later child, but recovery was denied because the statute of limitations had run. By way of dictum, the court observed that no recovery would be granted because applicable Pennsylvania law at that time did not recognize actions by the child for prenatal injuries.

[30] PROSSER, *op. cit. supra* note 2, at 332.

[31] *Id.* at 333.

[32] *Id.* at 334.

[33] This doctrine concerns the liability of a landowner to a trespassing child. The early cases involved railroad turntables and hence the name "turntable doctrine."

[34] Canning v. Inhabitants of Williamstown, 55 Mass. (1 Cush.) 451 (1848).

[35] 151 N.Y. 107, 45 N.E. 354 (1896).

denied recovery even for physical damage brought on by mental distress, in the absence of any physical impact. The court expressed a fear of a flood of litigation, for injury could easily be feigned and damages might be based upon mere conjecture. It was concluded that to grant recovery would be against public policy. In 1961 this case was overruled by *Battalla v. State*,[36] where the court held that rigorous application of *Mitchell* would be both unjust and contrary to experience and logic. Although fraud, extra litigation and a degree of speculation were conceded to be possible, it was concluded that this was no reason to deny redress for a substantial wrong. It must be noted that even in *Battalla* the mental distress resulted in at least some physical damage, although there was no physical impact. Using the same reasoning as *Mitchell*, courts presently deny recovery, as a general rule, unless the mental disturbance results in at least some physical damage.[37]

McPheters v. Loomis[38] held that the landowner owed no duty to the trespasser whose presence was unknown. The court based its reasoning on the conclusion that the landowner has dominion over the land and a greater right to its use than does the trespasser and therefore the trespasser is to be taken to have assumed the risk of the condition of the property. This attitude, that property rights are superior to individual rights, is on the wane, and many restrictions are being placed upon the landowner.[39] Because of this de-emphasis of the importance of property rights and because of the favored position children hold, *Sioux City and Pacific R.R. v. Stout*[40] held that a railroad owed a duty of reasonable care to a child trespasser. *Ryan v. Towar*[41] leads the opposition, holding that no such duty can exist because of the undue burden it would place upon the traditionally favored property owner. The *Restatement of Torts*,[42] which has been described as presently representing the great weight of authority,[43] adopts the turntable doctrine but sets out stringent prerequisites to the presence of a duty to the trespassing child.[44]

In the prenatal injury cases most courts denied recovery on the basis of the *Dietrich* reasoning, namely, that no duty could exist prior to birth. This appears to have been a convenient way to say that proving a causal connection between the negligence and the injury was too difficult and hence fictitious claims were feared.[45]

The common denominator in all of the above appears to be what Professor

---

[36] 10 N.Y.2d 237, 176 N.E.2d 229, 219 N.Y.S.2d 34 (1961).

[37] Annot., 64 A.L.R.2d 100, 117 (1959). This is of slight consequence since in most cases of serious mental disturbance there are accompanying physical consequences which the courts are quick to find.

[38] 125 Conn. 526, 7 A.2d 437 (1939).

[39] See generally PROSSER, *op. cit. supra* note 2, ch. 11.

[40] 84 U.S. (17 Wall.) 657 (1874).

[41] 128 Mich. 463, 87 N.W. 644 (1901).

[42] RESTATEMENT (SECOND), TORTS § 339 (1964).

[43] PROSSER, *op. cit. supra* note 2, at 375.

[44] The property owner must know, or have reason to know, children are likely to trespass; an unreasonable risk of death or serious bodily harm must be involved; the child, because of its youth, must not understand the danger; the utility of the dangerous condition must be slight as compared to the risk involved; and the property owner must fail to exercise reasonable care to eliminate the danger or otherwise protect the children. RESTATEMENT (SECOND), TORTS § 339 (1965).

[45] Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); PROSSER, *op. cit. supra* note 2, at 355.

Green refers to as "the administrative factor."[46] "[T]here is nothing so weighty with court-room government as the workability of a rule or a process."[47] This is the final hurdle that must be overcome before a duty will be recognized. It can be argued that it is unjust and illogical to deny recovery for mental distress unless there has been physical impact, but until the court is assured of protection against fraudulent claims and unlimited liability, recovery will be refused. In liability to a trespassing child the current social mores may demand that the child be protected, but until the courts are convinced that the landowner's liability will not be unlimited, recovery will be denied. Similarly, until the courts are convinced that claims can be accurately assessed, they will refuse to recognize a duty toward a child *en ventre sa mere.*

Conclusion

In light of these considerations, it is doubtful that social mores demand that the court find that Christine Williams was owed a duty of reasonable care. Plaintiff's circumstances are not singular. Each day children are born with a multitude of handicaps ranging from physical or mental to economic. However unfortunate these burdens may be, courts as yet have not seen fit to compensate them. Is the plight of the bastard any different?

Even if it be assumed that our ethics demand recovery, this writer submits that plaintiff cannot overcome the administrative factor: the courts' fear of unreasonable burdens being placed on prospective defendants and courts. The merits of a case cannot, and are not, determined without looking beyond the given facts to the problems that will be raised if it becomes precedent. The law must remain workable.

It is doubtful that in Christine Williams' case reasonable men would recognize a duty on the part of the State toward plaintiff. The State pointed out that the parents who permit a promiscuous daughter to consort with males might similarly be liable to a child born to their daughter out of wedlock. The effects of a negligent radiologist might not appear until generations later, yet liability would ensue. Any act of negligence toward a woman, the effects of which are manifested in a subsequently-conceived infant would result in liability on the basis of *Williams.* Suppose defendant's negligence renders plaintiff's father unable to fulfill such paternal duties as support. Perhaps the child could recover on the basis of *Williams.*

These are but a few of the problems raised by the *Williams* decision. If the standards of the related cases are any indication, it would appear that Christine Williams has not satisfied the administrative factor. There is no indication that fears such as those expressed above are not well founded. As seen, courts generally are slow to recognize a duty until they are satisfied that it has reasonable limits. The New York Court of Claims was not justified in deviating from this established norm.

*Jeffrey L. Smith**

---

[46] GREEN, JUDGE AND JURY, ch. 3, 4 (1930), first published, 28 COLUM. L. REV. 1014 (1928) and 29 COLUM. L. REV. 255 (1929). Professor Green lists five factors which primarily influence the courts: the administrative factor, the ethical or moral factor, the economic factor, the prophylactic or preventive factor, and the justice factor.

[47] GREEN, *op. cit. supra* note 46, at 77.

* Member, Third Year Class.