

December 1968

Constitutional Law--Torts--Equal Protection of Illegitimate Children

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Recommended Citation

David L. Core, *Constitutional Law--Torts--Equal Protection of Illegitimate Children*, 71 W. Va. L. Rev. (1968).

Available at: <https://researchrepository.wvu.edu/wvlr/vol71/iss1/6>

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CASE COMMENTS

**Constitutional Law—Torts—Equal Protection
of Illegitimate Children**

An action was brought on behalf of minor illegitimate children for the wrongful death of their mother. The trial court dismissed the suit. On appeal the dismissal was affirmed on the grounds that the denial of the cause of action bore substantial relation to the general health, morals and welfare of people and discouraged bringing children into the world out of wedlock; and, that the dismissal was not a denial of equal protection of the laws, in that there was no discrimination based on race, color or creed. The Supreme Court of Louisiana denied certiorari and the case was appealed to the United States Supreme Court. *Held*, reversed. The denial to illegitimate children of the right to recover for the wrongful death of their mother on whom they were dependent constitutes invidious discrimination against them in violation of the equal protection clause of the fourteenth amendment. *Levy v. Louisiana*, 88 S. Ct. 1509 (1968). In the companion case, *Glonn v. American Guarantee and Liability Insurance Co.*, 88 S. Ct. 1515 (1968), the Supreme Court applied its holding in *Levy* by reversing lower court decisions denying a mother a cause of action for the wrongful death of her minor illegitimate son.

The Louisiana wrongful death statute¹ specifies the surviving spouse and child or children of the deceased as the primary class of beneficiaries. The surviving father and mother, or either of them, comprise the secondary class of beneficiaries. The courts of Louisiana have construed "child" or "children" as used in the wrongful death statute to mean legitimate children. This interpretation is in accord with that of most jurisdictions. The general rule was well stated in a recent Pennsylvania case:²

When the words 'child' or 'children' appear in a statute, in the absence of qualifying expression, such words are to be interpreted . . . as referring to a child or children begotten in lawful wedlock . . . or begotten out of wedlock but legitimized

¹ LA. CIV. CODE ANN. art. 2315 (1952).

² *Frazier v. Oil Chemical Co.*, 407 Pa. 78, 85, 179 A.2d 202, 206-07 (1962).

There have been exceptions to the general rule,³ and four states now have statutes which provide specifically that an illegitimate child may recover for the wrongful death of its mother.⁴ In addition, illegitimate children have been constructed to be "children" within the meaning of the Federal Employers' Liability Act (unless to do so would offend state policy),⁵ under the Federal Death on the High Seas Act,⁶ and under the Jones Act.⁷

Despite the exceptions noted, in not only Louisiana, but in the vast majority of the states, classes of proper plaintiffs and beneficiaries under the wrongful death statutes have been determined in terms of legal relationships. In the *Levy* and *Glon* cases, however, the Supreme Court held that this basis of classification results in invidious discrimination in violation of the equal protection clause of the fourteenth amendment.⁸ The Court declared that such classifications must now be made not on the basis of legal relationships, but on the basis of biological relationships.

The dissenting opinion in the *Levy* case contends that it is not clear how the biological classification for determining proper parties under wrongful death statutes is more rational than the legal relation criterion.⁹ The seeming insistence in the dissenting opinion that the biological relation criterion must be rationally superior to be acceptable is questionable. It disregards the explanation in the majority opinion that it is not the classification itself which is required to be rational, *but the line drawn by*, or the purpose of, the classification which must meet this test.¹⁰ The Court observed that there is a lack of proper purpose in legislation which subjects an illegitimate child to all the responsibilities of citizenship, yet permits a tortfeasor to go free simply because the person who suffers injuries at his hands is illegitimate. The majority concluded that there is no propriety in a statute which places under a disability one whose action, conduct or demeanor bears no relation to the harm suffered.

³ *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S.W. 179 (1894); *Galveston, Harrisburg & San Antonio R. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S.W. 705 (1907); Annot., 72 A.L.R.2d 1235, 1237 (1960).

⁴ S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 10:4, at 589-90 (1966). The states are Georgia, Maryland, Mississippi and South Carolina.

⁵ *Hammond v. Pennsylvania R.*, 31 N.J. 244, 156 A.2d 689 (1959).

⁶ *Civil v. Waterman S. S. Corp.*, 217 F.2d 94 (2d Cir. 1954).

⁷ *In re Wenkhous' Estate*, 158 Misc. 663, 286 N.Y.S. 518 (1936).

⁸ "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

⁹ *Levy v. Louisiana*, 88 S. Ct. 1509 (1968) (dissenting opinion).

¹⁰ *Levy v. Louisiana*, 88 S. Ct. 1509 (1968); *Morey v. Doud*, 354 U.S. 457 (1957); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

The Court's reference to "dependency" in the *Levy* case presents another plausible question. Was it the intent of the Court to make "dependency" an element essential to the right to maintain a cause of action? It would seem unlikely that this is so, because the question of dependency could be no more logically or relevantly attached to the biological relationship basis of classification announced in this case than to the legal relationship basis rejected. It is also improbable that the Court's intention was to complicate the process of recovery granted by the cases by requiring a showing of "dependency". On the contrary, the more likely reason for the mention of "dependency" in the *Levy* case is to be found in the principle that the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."¹¹

The holdings in the instant cases, unless extended, are not applicable to West Virginia law. The West Virginia wrongful death statute provides that a wrongful death action may be initiated only by the personal representative of the deceased,¹² and that the amount recovered shall be distributed in accordance with the laws of descent and distribution.¹³ The descent and distribution statutes¹⁴ place illegitimate children on the same footing as legitimate children with respect to inheritance from and transmission of inheritance on the part of the mother. In view of the fact that these statutes have not been construed by the West Virginia Supreme Court of Appeals in an action for damages by an illegitimate child for the wrongful death of its mother or the reverse situation, it can only be surmised that the language of the statutes would be interpreted to allow a cause of action, and thereby be in accord with the principal cases. In any event, the *Levy* and *Glona* cases dictate that such a judicial interpretation of the statutes be rendered if such a case is presented for determination.

The decisions in *Levy* and *Glona* must on their facts be limited to the mother-child relationship. However, an obvious possible extension of the holdings would be to permit a recovery in a father-child relationship in which the identity of the father has been legally determined but the child had not been legitimized. One

¹¹ *Liverpool, New York & Philadelphia S. S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885).

¹² W. VA. CODE ch. 42, art. 1, § 6 (Michie 1966).

¹³ *Id.*

¹⁴ W. VA. CODE ch. 42, art. 1, § 5 (Michie 1966); *Simpson v. State Compensation Commissioner*, 114 W. Va. 814, 816-17, 174 S.E. 329, 330 (1934).

hypothetical situation in this context might serve to bring some of the plausible problems into clearer focus.

Suppose that M delivered an illegitimate child, S, and that F was legally determined to be the father of S as the result of a paternity suit initiated by M. Assume further that F was later killed in an automobile accident in which the fault of the second driver involved in the accident had been clearly established. Would S be able to recover for F's wrongful death, or conversely, had S been the accident victim, would F be able to recover?

The hypothetical situation contemplates a case in which the legal, and hence, the biological relationship of father-child has been established, and an accident has resulted in the death of either father or child in a fashion that would create a cause of action for wrongful death but for the illegitimacy of the child.

West Virginia and two other states¹⁵ have wrongful death statutes which specify that the beneficiaries of a wrongful death action are those named in the intestacy statutes. Connecticut has a similar statute, which provides that the beneficiaries are those named in the decedent's will, and in the absence of a will, recovery shall be according to the intestacy laws.¹⁶ In all four of these states, intestate succession between the mother and the illegitimate child is permitted; but of these four states, only Iowa permits intestate succession between the father and the illegitimate child, even when paternity has been legally established.¹⁷ The holdings in the instant cases are that illegitimacy is not a valid basis for denying a cause of action for wrongful death in the instance of a mother-child relationship. Therefore, the wrongful death statutes of West Virginia, Connecticut and Wyoming when read together with the intestacy statutes would seem to deny a recovery in the case of the father-child relationship hypothesized. This possible denial might well be found to promote the invidious discrimination prohibited by these decisions. Indeed, any statute which purports to deny a cause of action to an illegitimate child or its father for wrongful death, where the relationship has been established, would seem to be contrary to these decisions.

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¹⁵ IOWA CODE ANN. § 633.336 (1964); WYO. STAT. § 1-1066 (1957); S. SPEISER, *supra* note 4, § 10:1 at 584.

¹⁶ CONN. GEN. STAT. ANN. ch. 795, § 45-280 (1960); S. SPEISER, *supra* note 4, § 10:1 at 584.

¹⁷ 6 R. POWELL, REAL PROPERTY § 1003, at 660-61 (1958).