

TORTS—WRONGFUL DEATH—ACTION FOR WRONGFUL DEATH NOT EXTINGUISHED BY DECEDENT'S PERSONAL INJURY RECOVERY—*Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857 (1981).

The Supreme Court of New Jersey recently departed from its established interpretation of the nature of the rights granted by the Wrongful Death Act.¹ In *Alfone v. Sarno*,² a nearly unanimous court found that a recovery by a decedent during her lifetime did not preclude a subsequent wrongful death action by her beneficiaries "if the recovery [was] tailored to avoid duplicating elements of damages which comprised or could have comprised the earlier judgment."³ By making the rights of the wrongful death plaintiff virtually independent of those of the decedent, however, the New Jersey Supreme Court has created a host of practical problems for all parties in tort litigation.

Alfone v. Sarno evolved out of a medical malpractice suit filed in September of 1968.⁴ The suit was originally filed by Concetta Alfone against Dr. Sarno for the negligent performance of two subtotal thyroidectomies.⁵ At the conclusion of the trial, the judge instructed the

¹ N.J. STAT. ANN. §§ 2A:31-1 to -6 (West 1952). The section creating the right of action for wrongful death provides:

When the death of a person caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

Id. § 2A:31-1.

² 87 N.J. 99, 432 A.2d 857 (1981), *aff'g as modified* 168 N.J. Super. 315, 403 A.2d 9 (App. Div. 1979).

³ *Id.* at 102, 432 A.2d at 859.

⁴ *Id.* Thirteen years after the initial filing of suit, this case was on remand for a hearing and final disposition. The case was settled within three months of this opinion.

⁵ *Id.* Dr. Sarno treated Ms. Alfone for a period of twelve years. The initial allegation of malpractice included a surgical procedure performed in the early 1960's. This allegation was later dropped. The alleged malpractice arose out of a surgical procedure performed on March 11, 1965 on Ms. Alfone's thyroid which resulted in damages to her parathyroids. The pathology report indicated that at least one of the parathyroids was surgically excised. *Alfone v. Sarno*, 139 N.J. Super. 518, 521, 534 A.2d 654, 656 (App. Div.), *certif. denied*, 71 N.J. 498, 366 A.2d 654 (1976). According to 2 CECIL, TEXTBOOK OF MEDICINE § 552.3, at 2220 (15th ed. 1975): "Hypoparathyroidism is the syndrome characterized by deficient secretion of parathyroid hormone with consequent hypocalcemia. . . . Hypoparathyroidism is the consequence of the mechanical injury to or removal of the parathyroid glands." *Id.* The physical consequences of hypoparathyroidism are calcification of the basal ganglia, cataracts, and abnormal density of the bones. The hypocalcemia leads to increased neuromuscular excitability and tetany. *Id.* Hypocalcemic tetany is manifested by numbness and tingling in the fingers, toes, and lips. Dyspnea and cyanosis are

jury that if they found for the plaintiff, the damage award should consist of compensation for temporary and permanent physical injury; past, present, and future pain and suffering; and, incurred and anticipated medical expenses.⁶ Significantly, future lost earnings were not included as an element of damages.⁷ The judge further instructed the jury that Ms. Alfone had a life expectancy of 44.1 years and that this life expectancy could be used in calculating any award of damages.⁸ The jury returned a verdict of \$100,000 for Ms. Alfone.⁹ Dr. Sarno appealed this verdict, arguing that the malpractice suit had been barred by the statute of limitations.¹⁰ The appellate court, in an unpublished opinion, reversed and remanded.¹¹ On remand, the trial judge entered judgment for the defendant¹² and a second appeal was instituted, this time by Ms. Alfone.¹³ During the pendency of the appeal, Ms. Alfone died intestate and was replaced as plaintiff by her father, Alphonse Alfone, general administrator of the estate.¹⁴ In the second appeal the court held that the action by Concetta Alfone should not have been barred by the statute of limitations¹⁵ and

sometimes apparent. In severe tetany, cramps of individual muscle groups in the hands and feet occur. There may also be convulsions or abdominal pain, nausea, and vomiting. *Id.* Epiligtiform attacks are a striking symptom of hypoparathyroidism. Usually seizures are of a grand mal type. Mental abnormalities including irritability, emotion liability, moroseness, impairment of memory, mental confusion, lethargy, depression, and mental deficiency may occur. *Id.*

This is the classic clinical picture of hypoparathyroidism. It is not a statement as to which of these symptoms Concetta Alfone exhibited. The prognosis of hypoparathyroidism as given by Cecil is important, as it may help explain the final result in this case: "[h]ypoparathyroidism that follows thyroid or parathyroid surgery may often be transient. . . . The prognosis is excellent with *full life expectancy* in established cases adequately treated." *Id.* at 221 (emphasis added). The prognosis, as stated in the definitive textbook on clinical medicine, may explain why the element of future lost earnings was not included within the award of damages. Based upon this prognosis, the plaintiff might not have been able to prove to a medical certainty that her life expectancy had been foreshortened. The supreme court remanded this case to determine whether the plaintiff could have or should have been able to establish a claim for future lost earnings based upon a foreshortening of her life. 87 N.J. at 123-24, 432 A.2d at 870.

⁶ 87 N.J. at 103, 432 A.2d at 859.

⁷ *Id.* It is not clear from the opinion whether the issue was never litigated, stricken due to insufficient proofs, or not submitted to the jury for some other reason. *See also* note 5 *supra*.

⁸ *Alfone v. Sarno*, 168 N.J. Super. 315, 319, 403 A.2d 9, 10 (App. Div. 1979), *aff'd as modified*, 87 N.J. 99, 432 A.2d 857 (1981). This estimation was based upon the mortality tables appended to the New Jersey Court Rules.

⁹ *Alfone v. Sarno*, 139 N.J. Super. 518, 521, 354 A.2d 654, 656 (App. Div.), *certif. denied*, 71 N.J. 498, 366 A.2d 654 (1976).

¹⁰ *Id.*

¹¹ *Alfone v. Sarno*, 168 N.J. Super. 315, 318-19, 403 A.2d 9, 10 (App. Div. 1979), *aff'd as modified*, 87 N.J. 99, 432 A.2d 857 (1981).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* N.J. STAT. ANN. § 2A:15-3 provides for the survival of an action after the victim's death.

¹⁵ *Alfone v. Sarno*, 168 N.J. Super. 315, 318, 403 A.2d 9, 10 (App. Div. 1979), *aff'd as modified*, 87 N.J. 99, 432 A.2d 857 (1981). Both appeals taken in the personal injury action were

accordingly reinstated the \$100,000 judgment in favor of her estate.¹⁶ In September of 1976, the defendant paid the judgment and a warrant of satisfaction was entered.¹⁷

In March of 1976, just one week short of the limitations period for bringing a wrongful death action,¹⁸ Alphonse Alfone filed a second action as administrator *ad prosequendum*¹⁹ for the wrongful death of his daughter, Concetta Alfone.²⁰ Defendant responded with a motion for summary judgment, contending that the successful prosecution of the personal injury action barred a subsequent wrongful death action.²¹ The trial judge granted this motion for summary judgment, but the appellate division later reversed.²²

based upon contentions that the trial judge erroneously interpreted the *Lopez* discovery standard for the statute of limitations. See *Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973); note 116 *supra*. In *Alfone v. Sarno*, 139 N.J. Super. 518, 354 A.2d 654 (App. Div.), *certif. denied*, 71 N.J. 498, 366 A.2d 654 (1976), the appellate division considered

whether under *Lopez* . . . a cause of action for medical malpractice accrues only when a patient/victim of the malpractice knows or by the exercise of reasonable diligence and intelligence should know that the injury . . . was related to fault on the part of the physician as distinguished from mere knowledge of a causal relationship (without negligence) between the doctor's acts and the injury.

Id. at 520, 354 A.2d at 656. The issue squarely addressed was what level of awareness the supreme court deemed necessary to trigger the accrual of a cause of action in a medical malpractice case.

After assessing the equities, the court held that the plaintiff had "sustained the burden of proving that she [was] entitled to the indulgence of the equitable rule relieving her of the bar of the statute of limitations." *Id.* at 525, 354 A.2d at 658. The court closely examined the testimony relating to discussions between Ms. Alfone and Dr. Sarno. The court determined that these discussions caused her to be ignorant of her cause of action, since they diverted her attention away from consideration of fault on the part of the defendant. *Id.* For the most recent decision on the *Lopez* discovery rule, see *Lynch v. Rubacky*, 85 N.J. 65, 424 A.2d 1169 (1981), wherein *Alfone v. Sarno*, 139 N.J. Super. 518, 354 A.2d 654 (App. Div.), *certif. denied*, 71 N.J. 498, 366 A.2d 654 (1976), is cited with approval.

¹⁶ *Alfone v. Sarno*, 139 N.J. Super. 518, 525, 354 A.2d 654, 658 (App. Div.), *certif. denied*, 71 N.J. 498, 366 A.2d 654 (1976).

¹⁷ *Alfone v. Sarno*, 168 N.J. Super. 315, 319, 403 A.2d 9, 10-11 (App. Div. 1979), *aff'd as modified*, 87 N.J. 99, 432 A.2d 857 (1981).

¹⁸ N.J. STAT. ANN. § 2A:31-3 (West 1952) states: "Every action brought under this chapter shall be commenced within two years after the death of the decedent, and not thereafter."

¹⁹ The Act requires that "Every action commenced under this chapter shall be brought in the name of an administrator *ad prosequendum* of the decedent for whose death damages are sought, except where the decedent dies testate." *Id.* § 2A:31-2.

²⁰ *Alfone v. Sarno*, 168 N.J. Super. 315, 318, 403 A.2d 9, 10-11 (App. Div. 1979), *aff'd as modified*, 87 N.J. 99, 432 A.2d 857 (1981). Concetta Alfone was survived by her father, mother, and teenage daughter. See N.J. STAT. ANN. § 2A:31-4 (West 1952) for limitations on statutory beneficiaries.

²¹ *Alfone v. Sarno*, 168 N.J. Super. 315, 319, 403 A.2d 9, 11 (App. Div. 1979), *aff'd as modified*, 87 N.J. 99, 432 A.2d 857 (1981).

²² *Id.* at 333, 403 A.2d at 18.

The appellate court's opinion examined eighty years of New Jersey precedent in the wrongful death area.²³ The court acknowledged that the availability of a cause of action under the Wrongful Death Act had been dependent upon the availability of a cause of action in the decedent.²⁴ After evaluating the dicta in *Lawlor v. Cloverleaf Memorial Park, Inc.*,²⁵ however, the appellate judge concluded that if presented with the issue, the Supreme Court of New Jersey would substantially alter its present position.²⁶ Consequently, the action was reinstated based on two findings of the appellate division. The first finding was that the New Jersey Supreme Court was predisposed to find that a cause of action for wrongful death was not barred by a prior action for personal injury.²⁷ The second was that the damages awarded to Ms. Alfone in the personal injury action would not be duplicated in a wrongful death action,²⁸ Ms. Alfone having never recovered future lost earnings,²⁹ the primary basis of the damages award for wrongful death.³⁰

The question upon certification was one of statutory interpretation.³¹ The supreme court had to decide whether consecutive actions for personal injury and wrongful death arising out of the same tortious

²³ See *id.* at 324-25, 403 A.2d at 12-14.

²⁴ *Id.* at 325, 403 A.2d at 13.

²⁵ 56 N.J. 326, 343-45, 266 A.2d 569, 577-79 (1970). In *Lawlor*, Justice Jacobs wrote: These cases take the persuasive position that the statutory terminology 'relates to the character of the injury, without regard to the question of time of suit or death.' *Hoover's Admx. v. Chesapeake & O. Ry. Co.*, 46 W.Va. 268, 33 S.E. 224 (1899). Much the same approach might be gathered from this Court's statement in *Graf v. Taggart*, 43 N.J. 303, 305-06 (1964), that the italicized language in [the Wrongful Death Act] was 'intended to preclude recovery where the injured person could not have recovered because the defendant did not commit a wrongful act or the deceased's own conduct would have barred his right to recover.'

56 N.J. at 344-45, 266 A.2d at 579.

²⁶ *Alfone v. Sarno*, 168 N.J. Super. 315, 327-28, 403 A.2d 9, 15-16 (App. Div.), *aff'd as modified*, 87 N.J. 99, 432 A.2d 857 (1981).

²⁷ *Id.* While agreeing with the appellate judge's conclusions regarding the viability of the wrongful death action, Justice Pashman suggested that he may have exceeded his authority in reaching those conclusions. 87 N.J. at 105 n.5, 432 A.2d at 851 n.5.

²⁸ *Alfone v. Sarno*, 168 N.J. Super. 315, 332, 403 A.2d 9, 18 (App. Div. 1979), *aff'd as modified*, 87 N.J. 99, 432 A.2d 857 (1981). The supreme court was not convinced that the facts developed below warranted that conclusion and therefore remanded the case for clarification of the damage question. 87 N.J. at 123, 432 A.2d at 870.

²⁹ 87 N.J. at 123, 432 A.2d at 870. See note 7 *supra* and accompanying text.

³⁰ N.J. STAT. ANN. § 2A:31-5 (West 1952) states: "In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death to the persons entitled to any intestate personal property of the decedent."

³¹ 87 N.J. at 103, 432 A.2d at 860.

occurrence were consistent with the terms and intent of the rights granted by the Wrongful Death Act.³² The essential issue was whether the prosecution to judgment of the personal injury claim by the tort victim barred the beneficiary from the remedy of a wrongful death action.³³ The issue was narrowly focused on the Act, as it was the sole source of remedy for the family of a deceased tort victim.³⁴

Recovery for wrongful death was a remedy which did not exist in the common law.³⁵ At common law "the death of a human being could not be complained of as an injury."³⁶ The prototypic legislative response was the passage, in England, of the first wrongful death act in 1846, popularly known as Lord Campbell's Act.³⁷ In 1848,

³² *Id.*

³³ *Id.* at 105, 432 A.2d at 860.

³⁴ *Meyers v. Holborn*, 58 N.J.L. 193, 195-96, 33 A. 389, 390 (1895). Justice Grummere wrote:

[S]ince the decision of the Supreme Court in the case of *Grosso v. Delaware, Lackawanna and Western Railroad Co.*, 21 Vroom 317, it has been considered as settled law in this state that no action will lie for an injury caused by the death of a human being, with the exception of that provided by the [Wrongful Death Act] which permits a recovery by the personal representatives of the decedent, for the benefit of the widow and the next of kin, of the pecuniary loss resulting to them from such death.

Id.

³⁵ *Id.*

³⁶ *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (Nisi Prius 1808). *Compare Hyatt v. Adams*, 16 Mich. 180, 185 (1867) ("to the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting") and *Grosso v. Delaware Lackawanna & W.R.R. Co.*, 50 N.J.L. 317, 320, 13 A. 233, 235 (1888) ("it is inconsistent with the policy of the law to permit the value of human life to become the subject of judicial computation") with *Sullivan v. Union Pac. R.R.*, 23 Fed. Cas. 368 (No. 13,599, 1874) (later discredited by *Insurance Co. v. Broome*, 95 U.S. 754 (1877)). See *Cross v. Guthery*, 2 Root 90 (Conn. 1794) (early American judges unaware of common law rule dispensed more rudimentary form of justice which allowed them to place financial value on life). See generally 1 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* (2d ed. 1975); Duffy, *The Maldistribution of Damages in Wrongful Death*, 19 OHIO ST. L.J. 264 (1958); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960).

³⁷ An Act for Compensating the Families of Persons Killed by Accidents (Lord Campbell's Act), 1846, 9 & 10 Vict., c.93. Lord Campbell's Act read in part:

Whereas no action at law is now maintainable against a person who by his wrongful Act, Neglect or Default may have caused the Death of another person. . . . Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by a wrongful Act, Neglect or Default, and the Act, Neglect or Default is such as would [if Death had not ensued] have entitled the Party injured to maintain an Action . . . in respect thereof, then, and in every such Case, the Person who would have been liable if Death had not ensued, shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as to amount in Law to a Felony.

II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent and Child of the Person whose Death shall have been so

New Jersey adopted most of the essential language of Lord Campbell's Act.³⁸ At present, all but one of the fifty states have adopted the Wrongful Death Act in some form.³⁹

Passage of the Wrongful Death Act did not transfer the decedent's personal right of action for his lifetime injuries to his beneficiaries, but created a wholly new remedy for the losses incurred by them as a result of his death.⁴⁰ The remedy granted by the Act was limited to pecuniary losses such as loss of support, loss of advice and guidance, and funeral expenses.⁴¹ Unlike the survival action, the wrongful death action did not remedy the common law rule that a right of action died with the person.⁴² If the original tort victim died before

³⁸ New Jersey's first Wrongful Death Act stated in pertinent part:

Be it enacted by the Senate and General Assembly of the State of New Jersey, that whenever the death of a person shall be caused by wrongful Act, Neglect or Default, and the Act, Neglect or Default is such as would if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have amounted in law to felony.

caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought

III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of the Complaint. . . .

Id. Point III has never been enacted in New Jersey. Had Point III been enacted the decision in *Alfone* might never have been reached. It is interesting to note that the majority opinion never argued that the failure of the New Jersey legislature to adopt Point III indicated a desire not to bar successive suits. Justice Clifford does mention that Point III was never adopted but does not attach any significance to it. 87 N.J. at 127 n.2, 432 A.2d at 875 n.2 (Clifford, J., dissenting). Act of March 3, 1848 Pub. L. No. 1848, at 151.

The act was amended regarding persons entitled to bring suit and those entitled to the amount recovered. The language quoted changed in the codification of the Revised Statutes in 1937 when the present wording of the statute was adopted. See N.J. STAT. ANN. § 2A: 31-1 to -6 (West 1952).

³⁹ 87 N.J. at 127 n.3, 432 A.2d at 872 n.3 (Clifford, J., dissenting).

⁴⁰ *Cooper v. Shore Elec.*, 63 N.J.L. 558, 44 A. 633 (1899); Schumaker, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924).

⁴¹ See N.J. STAT. ANN. § 2A:31-5 (West 1952); note 30 *supra*. See also notes 104 & 140 *infra*.

⁴² The common law maxim was "*actio personalis moritur cum persona*"—a personal action dies with the person. Malone, *supra* note 36, at 1045. The reason given historically for this maxim was best elucidated in Winfield, *Death as Affecting Liability in Tort*. 29 COLUM. L. REV. 239 (1929):

Perhaps it was the criminal hue that coloured trespass for such a long time. Crime is a very personal matter. Death pays all when the criminal has gone. 'The party cannot be punished when he is dead.' And even if he survives, and it is the injured party who has died, surely it is the king and not the representatives who should take up redress.

the adjudication of his claim, the right of redress in the form of a survival action was granted to the estate.⁴³ By definition, a survival action provides that personal actions shall not abate at death, but shall be carried on by the estate. The estate recovers all losses that accrued to the original victim between injury and death, including, but not limited to the medical expenses, and pain and suffering of the victim.⁴⁴ A major difference between the wrongful death action and the survival action, besides the basis on which damages are calculated, is that the amount recovered under the survival action is subject to the claims of the decedent's creditors and to estate taxes, whereas the wrongful death recovery, belonging exclusively to the statutory beneficiaries, is beyond the reach of such claims.⁴⁵ New Jersey has recognized both the wrongful death action and the survival action.⁴⁶

Potential for conflict between the two statutory schemes exists as each involves separately held claims arising from the same tortious occurrence.⁴⁷ There is no conflict if the survival action and the wrongful death action are brought concurrently, as all claims are addressed in one adjudication.⁴⁸ Conflict only materializes when a substantial time elapses between the original tort and the subsequent fatality, and the tort victim lives long enough to determine conclusively the outcome of his claim.⁴⁹ In New Jersey, as in most states, the course of action taken by the original victim for his personal injuries could foreclose the possible long-term rights of his dependents for their pecuniary losses.⁵⁰ It is doubtful that this problem was ever contemplated when the Wrongful Death Act was passed in 1848.⁵¹

Id. at 249. For a complete discussion of the origins of the common law bar to recovery for wrongful death, see 1 S. SPEISER, *supra* note 36, § 1:1 to 1:9; Malone, *supra* note 36, at 1045; Smedley, *supra* note 36, at 606-24.

⁴³ N.J. STAT. ANN. § 2A:15-3 (West 1938) provides that "Executors and administrators may have an action for any trespass done to the person to property, real or personal, of their testator or intestate against the trespasser, and recover these damages as their testator or intestate would have had if he was living." For a complete discussion of the different interests and claims involved in both survival and wrongful death actions, see 1 S. SPEISER, *supra* note 36, §§ 1:2 to 1:3, at 5-13; Schumaker, *supra* note 40, at 114.

⁴⁴ See N.J. STAT. ANN. § 2A:15-3 (West 1938); note 43 *supra*.

⁴⁵ See N.J. STAT. ANN. § 2A:15-3 (West 1938).

⁴⁶ *Soden v. Trenton & Mercer County Traction Corp.*, 101 N.J.L. 393, 127 A. 558 (1925).

⁴⁷ See Schumaker, *supra* note 40, at 130-31.

⁴⁸ See *Soden v. Trenton & Mercer County Traction Corp.*, 101 N.J.L. 393, 127 A. 558 (1925).

⁴⁹ See Schumaker, *supra* note 40, at 130-31.

⁵⁰ 1 S. SPEISER, *supra* note 36, § 1:1 to 1:9. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 127, at 911 (4th ed. 1971); Malone, *supra* note 36, at 1067.

⁵¹ See Fleming, *The Lost Years: A Problem in the Computation and Distribution of Damages*, 50 CAL. L. REV. 598, 607 (1962). "It is highly doubtful whether the problem was ever

Current advances in medical care have exacerbated a deficiency in the law, since the severely injured frequently live many years beyond the original tort. An injured person faced with the pressures of mounting medical bills and loss of income frequently cannot consider the long-term needs of his beneficiaries or may not anticipate that his injury will be the proximate cause of his death. When such incompatible interests arose, the courts were forced to determine whether the recovery by the original victim foreclosed the rights of the next of kin.⁵² The underlying issue was whether the rights of the beneficiaries were derivative or independent of the rights of the original victim.⁵³

This controversy arose from the very language of the Wrongful Death Act.⁵⁴ The language, "when the death of a person is caused by a wrongful act, neglect or default, *such as would if death had not ensued have entitled the person injured to maintain an action for damages,*"⁵⁵ was susceptible of two interpretations. The "great weight of authority"⁵⁶ took the language to mean that any procedural or jurisdictional bars available against the victim also barred the wrongful death plaintiff.⁵⁷ For example, in a jurisdiction which followed this "derivative" interpretation, if the decedent allowed the statute of limitations to run on his personal injury claim, the wrongful death claim would also be barred regardless of when it was commenced.⁵⁸

within the contemplation of the framers of the statute who more probably envisaged a standard-type of accident proving fatal, if not instantaneously, at least within a brief interval thereafter." *Id.*

⁵² See Schumaker, *supra* note 40, at 123.

⁵³ See generally Annot., 39 A.L.R. 579-92 (1925).

⁵⁴ See 1 S. SPEISER, *supra* note 36, § 1:12 to 1:13; Schumaker, *supra* note 40, at 115.

⁵⁵ N.J. STAT. ANN. § 2A:31-1 (West 1952) (emphasis added).

⁵⁶ RESTATEMENT OF JUDGMENTS § 92.1 (Tent. Draft No. 2, 1975).

⁵⁷ This interpretation was first articulated in *Read v. Great Eastern R. Co.*, 3 Q.B. 555 (1868), in which the court held:

The question turns upon the construction of [Lord Campbell's Act]. . . . Before that statute the person who received a personal injury and survived its consequences, could bring an action, and recover damages for the injury; but if he died from its effects, then no action could be brought. To meet this state of the law the [statute] was passed, and "whenever the death of a person is caused by a wrongful act, and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then . . . the person who would have been liable if death had not ensued shall be liable for an action for damages notwithstanding the death of the party injured." Here, taking the plea to be true, the party injured could not "maintain an action in respect thereof," because he had already received satisfaction.

Id. at 558 (citations omitted).

⁵⁸ "[T]he statute gives an action only if the decedent has one, and since the decedent had lost his right of action by lapse of time, his representative had none." *Coulter v. New Jersey*

This majority view focused on the original claim and regarded the availability of a viable right of action in the decedent as a condition precedent to the wrongful death action.⁵⁹

Under the "independent" interpretation, the statutory language was deemed to refer only to the tortious nature of the conduct.⁶⁰ In the statute of limitations problem given above, the running of the statute of limitations on the personal injury claim would not bar the wrongful death plaintiff⁶¹ because the limitation in the statutory language related only to the initial tort. Subsequent conduct by the victim did not affect the cause of action accruing to the beneficiary.⁶² The leading case supporting the independent interpretation was *Rowe v. Richards*,⁶³ where the court ruled that acts of the decedent had no effect upon a cause of action that did not accrue until his death, at which time it accrued in favor of another.⁶⁴

The United States Supreme Court put its imprimatur on the minority position in the case of *Sea-Land Services v. Gaudet*.⁶⁵ In *Gaudet*, the Court held that the lifetime recovery by an injured longshoreman did not bar a subsequent wrongful death action by his widow.⁶⁶ The case was decided, however, under admiralty law,⁶⁷ and it only established that the Supreme Court did not find successive actions for personal injury and wrongful death violative of the principle of *res judicata*.⁶⁸ The Court, however, laid down protective

Pulverizing Co., 11 N.J. Misc. 5, 6-7, 163 A. 661, 661 (1932). "We agree that where any right of action by the living party injured was barred by limitations before his death, the Death Act does not create a right of action in the personal representative." *Knabe v. Hudson Bus Transp. Co.*, 111 N.J.L. 333, 335, 168 A. 418, 418 (1933).

⁵⁹ See note 57 *infra*.

⁶⁰ See Schumaker, *supra* note 40, at 124.

⁶¹ Duffy, *supra* note 36, at 273; Schumaker, *supra* note 40, at 121.

⁶² See note 64 *infra* and accompanying text.

⁶³ 35 S.D. 201, 151 N.W. 1001 (1915).

⁶⁴ *Id.* at 206, 151 N.W. at 1006.

We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon a violation of a right vested solely in the wife.

Id.

⁶⁵ 414 U.S. 573 (1974).

⁶⁶ *Id.* at 591.

⁶⁷ *Id.* at 576-77.

⁶⁸ *Id.* at 573-74. The *res judicata* argument was not generally advanced to bar a wrongful death claim; the majority's argument was that the limitation was inherent in the statute itself.

limitations on successive actions. These limitations, composed of principles of collateral estoppel and fiduciary duty, were aimed at avoiding duplication of damages.⁶⁹ The adoption by the Supreme Court of the "independent" position may have been a substantial factor in influencing the *Alfone* court's interpretation of the wrongful death statute.

The New Jersey courts, adhering to the derivative interpretation, repeatedly held that the Act was decedent-oriented and utilized common law and statutory defenses to defeat theoretically meritless claims.⁷⁰ For example, wrongful death claims were barred where the tort victim had failed to bring his claim for personal injury within the statute of limitations.⁷¹ Also, settlement of the personal injury claim was held to bar the subsequent prosecution of a wrongful death action.⁷² New Jersey precedent was so well established that the Third Circuit ruled that under New Jersey law prosecution to judgment of a personal injury action unequivocally barred the bringing of a wrongful death claim.⁷³

The first intimation in New Jersey that a wrongful death action was not dependent upon derivative rights was found in *Lawlor v. Cloverleaf Memorial Park, Inc.*⁷⁴ There the issue presented was

⁶⁹ Justice Brennan held that:

[W]hen a decedent brings his own personal injury action during his lifetime and recovers damages for his lost wages he acts in a fiduciary capacity to the extent that he represents his dependents' interest in that portion of his prospective earnings which, but for his wrongful death, they had a reasonable expectation of his providing for their support. Since the decedent's recovery of any future wages will normally be dependent upon his fully litigating that issue, we need not fear that applying principles of collateral estoppel to preclude the decedent's dependents claim for a portion of those future wages will deprive the dependents of their day in court.

Id. at 594-95.

⁷⁰ See, e.g., notes 71-73 *infra*.

⁷¹ *E.g.*, *Knabe v. Hudson Bus Transp. Co.*, 111 N.J.L. 332, 168 A. 418 (1933); *Coulter v. New Jersey Pulverizing Co.*, 11 N.J. Misc. 5, 163 A. 661 (1932).

⁷² *Liberia v. Whittaker, Clark & Daniels*, 20 N.J. Super. 292, 89 A.2d 734 (Law Div. 1952).

At the time of his death [the deceased] had done all he could do to release the defendant from liability and at that time there existed a binding and enforceable obligation against the defendant to pay the promised sum. Under [the] circumstances it appears clear that the release . . . constitutes a bar to the present [wrongful death] action.

Id. at 295, 89 A.2d at 736.

⁷³ *Roberts v. Union Carbide Corp.*, 415 F.2d 474, 475 (3d Cir. 1969). The court noted: "[A]t least two New Jersey cases support the proposition that plaintiff's cause of action is barred and extinguished by the decedent's having obtained a recovery during his lifetime. [T]his view is consistent with that of nearly all states having similar statutes." *Id.* (citing *Lawlor*, and *Liberia v. Whittaker, Clark & Daniels*, 20 N.J. Super. 292, 89 A.2d 734 (Law. Div. 1952)).

⁷⁴ 56 N.J. 326, 266 A.2d 569 (1970). Mrs. Lawlor was injured on September 6, 1974, while visiting the Park Memorial Cemetery. She filed a complaint against the Cloverleaf defendants on

whether the amendment of a complaint to include survival and wrongful death claims against a third-party defendant was timely. The Supreme Court of New Jersey ruled that the amendment of the complaint adding the survival claim related back to the filing of the third-party complaint and was therefore timely.⁷⁵ The issue of the timeliness of the wrongful death claim was never reached. The court reasoned that if the survival claim was timely, the wrongful death claim was *a fortiori* timely.⁷⁶ Nevertheless, Justice Jacobs, writing for the majority, questioned whether the issue, if reached, would be decided in line with previous New Jersey cases. In dictum, he referred to the "persuasive position" of out-of-state cases which held that the "statutory terminology 'relates to the character of the injury, without regard to the question of time of suit or death.'" ⁷⁷

The questions raised in *Lawlor*⁷⁸ inspired the supreme court to reappraise the previous construction given to the Wrongful Death Act when the issue was raised in *Alfone*.⁷⁹ In evaluating the essential elements of the wrongful death claim⁸⁰ and the underlying interests addressed by the Act,⁸¹ the *Alfone* court took the independent viewpoint, specifying that recovery in a subsequent wrongful death action must be tailored to avoid duplication of damages between the personal injury action and the wrongful death action.⁸²

February 16, 1965. The Cloverleaf defendants raised a defense of charitable immunity and additionally filed a third-party complaint against the hospital and doctor responsible for Mrs. Lawlor's medical care. Mrs. Lawlor died on December 23, 1966, and one month later, the trial court allowed substitution of her executor as plaintiff and amendment of the claim to include a direct claim, both survival and wrongful death, against the doctor and hospital. *Id.* at 329, 266 A.2d at 570.

⁷⁵ *Id.* at 343, 266 A.2d at 578. The *Lawlor* court ruled that: "there is no dispute that where, as here, the survival action was not barred by limitation, the later death action, instituted well within two years after the death . . . was not also barred." *Id.* at 345, 266 A.2d at 579.

⁷⁶ *Id.* at 345, 266 A.2d at 579.

⁷⁷ *Id.*, 266 A.2d at 579 (quoting Hoover's Adm'rx v. Chesapeake & Ohio Ry. Co., 46 W. Va. 268, 33 S.E. 224 (1899)). The court stated in *Graf v. Taggart*, 43 N.J. 303, 305-06, 204 A.2d 140, 142 (1964), "that the italicized language in [the Wrongful Death Act] was intended to preclude recovery where the injured person could not have recovered because the defendant did not commit a wrongful act or the deceased's own conduct would have barred his right to recover."

⁷⁸ See note 75 *supra* and accompanying text.

⁷⁹ 87 N.J. at 106-07, 432 A.2d at 861.

⁸⁰ *Id.* at 108, 432 A.2d at 862. The wrongful death action contains two important elements not present in any suit brought by the decedent for his personal injuries: death caused by the defendant's tortious act and the resulting damages flowing to the next of kin.

⁸¹ *Id.* at 107, 432 A.2d at 862. "By requiring 'a fair and equitable apportionment' of damages in accord with financial need, see N.J.S.A. 2A:31-4, the wrongful death statute addresses specific interests of dependents that receive only incidental protection in any surviving personal injury suit. See N.J.S.A. 2A:15-3." *Id.*

⁸² *Id.* at 102, 432 A.2d at 859.

To construe the Wrongful Death Act as granting independent rights to the beneficiaries, a showing of legislative intent was required.⁸³ Seeking to extrapolate this intent, the court turned to an analysis of three principles of statutory construction.⁸⁴ While the defense strenuously argued that there was evidence of legislative "acquiescence [to] a long-standing judicial interpretation [which was] indicative of legislative intent,"⁸⁵ this contention was given little weight since the court found that neither unequivocal judicial interpretation nor legislative acquiescence were "present with clarity."⁸⁶ Two other guiding principles analyzed by the court were in direct conflict. On one hand, the statute was in derogation of the common law and as such should have been strictly construed.⁸⁷ In contrast, the statute was remedial in nature and was entitled to liberal interpretation to effectuate its purpose.⁸⁸ The court resolved this conflict in accordance with its earlier decision in *Tenore v. Nu Car Carriers*,⁸⁹ which stated that the primary aim of the Wrongful Death Act was found in its remedial purpose. Further support for the court's adoption of the independent interpretation was the existence of a separate statute of limitations for each action. This was interpreted as legislative recognition "of the differing personal interests underlying the action,"⁹⁰ and proof that the rights of the wrongful death plaintiff are independent of those of the decedent.⁹¹

Although the court held that prior adjudication of the personal injury claim did not bar a claim for wrongful death, the court did not go so far as to say that a wrongful death action was "independent for all purposes."⁹² The inherent limitation in the wrongful death action

⁸³ *Id.* at 108, 432 A.2d at 862.

⁸⁴ *Id.* at 109-10, 432 A.2d at 863. See generally 2 A. SUTHERLAND, STATUTORY CONSTRUCTION § 49.10 (4th ed. 1973).

⁸⁵ See Brief *Amicus Curiae* on behalf of Medical Inter-Insurance Exchange at 1, *Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857 (1981).

⁸⁶ 87 N.J. at 109, 432 A.2d at 862. See *Lemke v. Bailey*, 41 N.J. 295, 301, 196 A.2d 523, 526 (1963); *Egan v. Erie R.R. Co.*, 29 N.J. 243, 250, 148 A.2d 830, 834 (1950).

⁸⁷ 87 N.J. at 109, 432 A.2d at 863. See *Dacunzo v. Edgye*, 19 N.J. 443, 451, 117 A.2d 508, 513 (1955); *Carlo v. Okonite Callender Cable Co.*, 3 N.J. 253, 265, 69 A.2d 734, 741 (1949). See generally 3 A. SUTHERLAND, *supra* note 84, § 60.01-6.

⁸⁸ 87 N.J. at 109, 432 A.2d at 863. See *Turon v. J&L Construction Co.*, 8 N.J. 543, 558, 86 A.2d 192, 199 (1952); *Soden v. Trenton & Mercer County Traction Corp.*, 101 N.J.L. 393, 396-97, 127 A. 558, 560 (1925). See generally 3 A. SUTHERLAND, *supra* note 84.

⁸⁹ 67 N.J. 466, 473, 341 A.2d 613, 617 (1975).

⁹⁰ 87 N.J. at 108, 432 A.2d at 862.

⁹¹ *Id.*

⁹² *Id.* at 110, 432 A.2d at 863.

was that although it redresses a wrong unique to the beneficiaries, the recovery right nonetheless derives directly from the original tort.⁹³ Consequently, the wrongful death action was derivative of the prior action for purposes of "issue preclusion," in that issues resolved in the personal injury action were not open to litigation in the wrongful death action.⁹⁴ The court reasoned that both the principle of res judicata⁹⁵ and the privity doctrine⁹⁶ required that the defendant litigate only once the substantive issues of liability.⁹⁷ If the personal injury action was fully litigated, the issues in the wrongful death action would be limited to causation⁹⁸ and damages.⁹⁹ The wrongful death plaintiff could not raise new theories of liability, nor could the

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 111, 432 A.2d at 864. BLACK'S LAW DICTIONARY 1470 (4th ed. 1955) defines res judicata as a "[r]ule that a final judgment or decree on the merits by courts of competent jurisdiction is conclusive of rights of parties and their privies in all later suits on points and matters determined in former suit." See Note, *Developments in the Law of Res Judicata*, 65 HARV. L. REV. 818 (1952). The principle of res judicata is applied in two specific ways in this case. The first is issue preclusion for substantive liability. "Once the liability of the defendant has been determined on the merits in a judicial decision, all interested parties should be able to rely on that determination in ordering their affairs with respect to the accident causing the original injury." *Id.* The issue of substantive liability is precluded from subsequent litigation. *Id.* See note 96 *infra*, for a discussion of privity.

⁹⁶ 87 N.J. at 111-12, 432 A.2d at 864. The wrongful death beneficiaries are "in privity" with decedents or successors in interest to the degree that their interests overlap. This is an adaptation of the principle of res judicata to nonparties which happens "[o]ccasionally . . . [when] justice and fair play demand that a nonparty to the first suit be bound by the adjudication on the claim." *Id.* (citing Vestal, *Claim Preclusion and Parties in Privity: Sea-Land Services v. Gaudet in Perspective*, 60 IOWA L. REV. 973, 975 (1975)). Vestal uses a two-tiered analysis for a determination of privity. First,

[t]he court should decide whether the recovery in the first suit makes recovery in the second unnecessary, unfair and undesirable. In other words, the court should determine whether the parties can be viewed as 'in privity.' Second, the measure of duplicative interest must be established; the parties may be 'in privity' only as to certain legal relationships and specific matters.

Vestal, *supra*, at 986. In the case of the wrongful death litigant, although not a party to the prior personal injury suit, his interests, "at least insofar as the defendant's liability is concerned were represented in that action by the decedent." 87 N.J. at 111, 432 A.2d at 864.

⁹⁷ 87 N.J. at 110-11, 432 A.2d at 863. "[I]ssues determined in the personal injury action may include negligence or percentages of negligences under our comparative negligence statute, N.J.S.A. 2A:15-5.1 to 5.3, proximate causes of the injury, duty of the defendant to the decedent, immunity of the defendant from suit, and strict or vicarious liability." *Id.* at 112, 432 A.2d at 864.

⁹⁸ *Id.* at 113, 432 A.2d at 865. The causation issue in the wrongful death action must be distinguished from the proximate cause issue in the personal injury action. In the personal injury action, the plaintiff seeks to show that the tortious conduct of the defendant was the proximate cause of his injury. In a subsequent wrongful death action, the causation issue is limited to the question whether the original injury caused the death of the victim. *Id.*

⁹⁹ *Id.* at 114, 432 A.2d at 865.

defendant interpose new defenses.¹⁰⁰ The court also held that where the original victim released or settled his claim, the question whether the substantive issues of liability should be opened to litigation by the wrongful death plaintiff depended upon the terms of the settlement or release.¹⁰¹ Generally, release was not accorded a *res judicata* effect on the liability issues.¹⁰²

Having established these basic rules regarding the liability issues, the court next considered the issue of damages.¹⁰³ Certain elements of damages were unique to the wrongful death claim, such as funeral expenses and loss of advice and guidance.¹⁰⁴ Other elements of damages, however, presented a very real possibility of duplication,¹⁰⁵ a concern which was often given as the very reason for denying successive actions for personal injury and wrongful death.¹⁰⁶ Foremost among these fears was the possibility of double recovery of damages for future lost earnings.¹⁰⁷ The *Alfone* court expressed particular concern for this problem but resolved that it could not be the basis for denying statutory rights.¹⁰⁸

The *Alfone* court rejected the solutions used by other courts to circumvent the duplication of damages problem, especially the concept of the tort victim as a trustee for his next of kin formulated in *Gaudet*.¹⁰⁹ Instead, the court ordered that the damage award in the

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See N.J. STAT. ANN. § 2A:31-5 (West 1952). See, e.g., *Frasier v. Public Servs. Int'l. Transp. Co.*, 244 F.2d 668, 670 (2d Cir. 1957) (applying New Jersey law); *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980) (advice and guidance of child to parent recoverable in wrongful death action); *Clark v. Prime*, 18 N.J. Misc. 226, 12 A.2d 635 (Cir. Ct. 1940) (loss of maternal advice to child is recoverable in wrongful death action).

¹⁰⁵ 87 N.J. at 114, 432 A.2d at 865. The court did not decide which elements did *not* present a danger of double liability. *Id.* at 118, 432 A.2d at 867. See generally 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 24.6, at 1293 (1956); see also *Roberts v. Union Carbide*, 415 F.2d 474 (3d Cir. 1969); W. PROSSER, *supra* note 50, § 717 (2d ed. 1955).

¹⁰⁶ 87 N.J. at 115, 432 A.2d at 866.

¹⁰⁷ *Id.* at 114, 432 A.2d at 865.

If . . . [the] deceased recovers before his death, his recovery for permanent injuries will be based, under the prevailing American rule, on his prospective earnings for the balance of his life expectancy at the time of his injury *undiminished by any shortening of that expectancy as a result of the injury*. The danger of double recovery becomes clear when it is recalled that any benefits of which the survivors were deprived, by the death, would have come out of these very prospective earnings if deceased had lived.

Id. (footnotes omitted) (emphasis in original).

¹⁰⁸ 87 N.J. at 117, 432 A.2d at 867.

¹⁰⁹ *Id.* at 116, 432 A.2d at 867. As Justice Powell pointed out in dissent, the theory of fiduciary responsibility creates more problems than it solves. It does not define the boundaries of the class

wrongful death action should be tailored to remove the possibility of duplication of damages.¹¹⁰ The directive given was that "no elements of damages may be sought or recovered that were or could have been claimed in the earlier personal injury action."¹¹¹ The trial judge will determine "the lowest amount that the proofs in the earlier action" had shown that the "decendent would have earned between the date of his actual death and the end of his life expectancy."¹¹² "That amount," the court continued, "is subtracted by the personal injury jury in arriving at its damages award."¹¹³ If the original tort victim has recovered or could have recovered all of his potential future lost earnings, the wrongful death plaintiff could not seek them.¹¹⁴

To relieve the harshness of this rule as applied to damages that were in fact not recovered, the court created an equitable exception¹¹⁵ analogous to the discovery rule articulated in *Lopez v. Swyer*.¹¹⁶ The exception was structured for application "[w]here the extent of injuries causing death was not reasonably discoverable at the time of the decedent's suit,¹¹⁷ [allowing] the wrongful death plaintiff [to] pursue elements of damages that technically could have been, but in fact were not, recovered in the earlier action."¹¹⁸ To recover these damages, the burden of proof was placed on the wrongful death plaintiff to show by a preponderance of the evidence that the true extent of the injuries was not reasonably discoverable at the time of the earlier action.¹¹⁹

of potential beneficiaries who are estopped from relitigating loss of support. It also leaves open the question whether the original victim can be enjoined from spending or completely disposing of the original award. 414 U.S. at 608 n.21 (Powell, J., dissenting). It opens the possibility of collusive lawsuits whereby the beneficiaries sue to have the estate surcharged for breach of fiduciary duty. Such suits would be potentially in fraud of creditors.

¹¹⁰ 87 N.J. at 117, 432 A.2d at 867.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 120, 432 A.2d at 868.

¹¹⁴ *Id.* at 117, 432 A.2d at 867.

¹¹⁵ *Id.* at 118-19, 432 A.2d at 867-68.

¹¹⁶ 62 N.J. 267, 272, 300 A.2d 563, 565 (1973). The "discovery rule" provides that "a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." *Id.* The discovery rule is New Jersey's equitable exception to the statute of limitations in personal injury actions.

¹¹⁷ 87 N.J. at 119, 432 A.2d at 868.

¹¹⁸ *Id.* Procedural guidelines were also set out to govern the application of the rule. A hearing will be held to determine if the wrongful death plaintiff has sustained the burden necessary to meet the equitable indulgence of the rule. The judge will then decide precisely what elements of damage the wrongful death plaintiff may seek. The judge is allowed full discretion as to the types of proof he will entertain at the hearing, including past transcripts, documents and testimony of witnesses. *Id.* at 121-22, 432 A.2d at 869.

¹¹⁹ *Id.* at 119-20, 432 A.2d at 868.

The record developed by the trial court was insufficient for the supreme court to apply directly the rules established by the case.¹²⁰ Accordingly, the court remanded the case for a determination of precisely what damages Concetta Alfone did or could have sought and what damages her beneficiaries could now pursue in the wrongful death action.¹²¹ The trial court was specifically directed to make findings regarding the question of future lost earnings.¹²²

In his dissent, Justice Clifford argued that a "literal reading of the statute yield[ed] the built-in prerequisite of [the decedent's ability] to maintain a suit at the time of death."¹²³ The majority had concluded through statutory analysis that the Act was beneficiary-centered; however, the dissent used the same means of analysis to conclude that the statute was decedent-centered."¹²⁴ While admitting that the Wrongful Death Act was remedial in nature, Justice Clifford argued that it must be considered in terms of its relationship to the common law.¹²⁵ He contended that the controlling case for the interpretation of the Act was *Turon v. J. & L. Construction Co.*,¹²⁶ which suggested that because the statute is in derogation of the common law, the class "for whom the remedy [was] provided [may] not be expanded beyond its terms."¹²⁷

Justice Clifford also argued that the inferences to be drawn from the New Jersey courts' past interpretation of the Wrongful Death Act were unambiguous and clearly in accord with the legislative intent to bestow derivative rights on the next of kin.¹²⁸ Justice Clifford also pointed out that reliance upon precedent from other jurisdictions was misplaced due to the literal differences between the statutes.¹²⁹ Unpersuaded by the legal arguments advanced by the majority, the

¹²⁰ *Id.* at 123, 432 A.2d at 870.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 125, 432 A.2d at 871 (Clifford, J., dissenting).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 8 N.J. 543, 86 A.2d 192 (1952).

¹²⁷ *Id.* at 558, 86 A.2d at 199.

¹²⁸ 87 N.J. at 129, 432 A.2d at 873 (Clifford, J., dissenting). *Contra, id.* at 109, 432 A.2d at 863.

¹²⁹ Justice Clifford wrote:

[T]he [court] has created a new, super cause of action—[it] cannot be extinguished by a settlement with the injured party during his lifetime, it cannot be extinguished by satisfying a judgment awarded to the injured party during his lifetime; and cannot be defeated by the failure of the injured party to have brought suit within the statutory period during his lifetime. According to the [court] such a cause of action is an almost invincible right that springs into existence at that decisive moment when death comes to an injured party.

Id. at 131, 432 A.2d at 874 (Clifford, J., dissenting).

dissent alone focused upon the resultant problems such as "lack of repose, double recovery, discouragement of settlement, the interests of unborn heirs and *res judicata*."¹³⁰ According to Justice Clifford, the practical problems created by the instant decision necessitated legislative rather than judicial reform.¹³¹

Although, the *Alfone* decision represents a major breakthrough in recognizing the independent right of action for wrongful death,¹³² the collateral problems generated by the holding diminishes its positive impact. The possibility exists that this decision may expose defendants and their insurance companies to relitigation of settled claims. Repetitious litigation undermines *res judicata*, one of the bedrock principles of the judicial system.¹³³ Inherent in the *Alfone* decision was a one-sided enforcement of the principles of repose and *res judicata*.¹³⁴ The defendant was adjudged to owe his victim \$100,000 for forty years of future pain and suffering.¹³⁵ The victim died before satisfaction of the judgment, but based upon the principle of repose, that judgment remained valid.¹³⁶ Unfortunately for the defendant, however, damage issues litigated in the original action did not remain inviolate and the defendant was exposed to further litigation. The failure or preclusion of the victim from obtaining certain elements of damages should not be visited on the defendant. Such a result weakens *res judicata* by undermining the principles of mutuality and finality of judgment.¹³⁷

The *Alfone* decision also has possible disadvantages for plaintiffs, as insurance companies will show increased reluctance to settle with a plaintiff who has a potentially serious injury.¹³⁸ The strategy of refusing settlement will force a plaintiff's claim to remain on the trial lists as long as possible, in hope that the plaintiff will die and two

¹³⁰ *Id.* at 130, 432 A.2d at 873 (Clifford, J., dissenting).

¹³¹ *Id.* at 131, 432 A.2d at 874 (Clifford, J., dissenting).

¹³² *Id.* at 102, 432 A.2d at 859.

¹³³ See note 94 *supra*.

¹³⁴ See note 94 *supra*.

¹³⁵ 87 N.J. at 102, 432 A.2d at 859.

¹³⁶ *Id.* at 121, 432 A.2d at 869.

¹³⁷ These policy considerations were discussed by Duffy:

A judgment may not, in fact, cover all the damages. . . . Such a circumstance is simply an error of fact occurring in the personal injury action. On principles of finality of decision, the judgment should be considered conclusive as to all damages that could or should have been recoverable. A judgment against the injured person should operate as a bar on principles of mutuality. It should be remembered that error is no respecter of sides and works as much against defendants as against plaintiffs.

Duffy, *supra* note 35, at 212 n.39.

¹³⁸ See Brief *Amici Curiae* on behalf of American Insurance Association & Alliance of American Insurers at 4-5, *Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857 (1981).

potential claims will be reduced to one. This situation will cause the "tortfeasor to live with the mortality table at his side and try to speculate on the risk of double liability if a settlement is made and then a death occurs."¹³⁹

Even assuming a sincere desire to dispose of the entire claim by full compensation, the defendant may be precluded from so doing. The class of statutory beneficiaries does not close until the victim's death;¹⁴⁰ therefore, the defendant cannot be sure until that point that he has obtained all the necessary releases.¹⁴¹ The possibility of unborn heirs¹⁴² or a status change such as reaching majority, marriage, or divorce, can significantly alter the population of a class of beneficiaries, thus destroying the finality of the settlement.¹⁴³ Certain procedures can diminish these hazards, but elimination of the problem is impossible. The most useful device for avoiding the problem of relitigation will be the increased use of structured settlements. In appropriate cases where the injury is permanent and potentially life-threatening, the personal injury settlement can provide for a "period certain" annuity which would continue to pay designated beneficiaries after the victim died, until the expiration or depletion of the annuity.¹⁴⁴ This procedure might insure that the beneficiaries' claims are settled in the first action.

Obtaining releases or contracts not to sue from the next of kin is another solution.¹⁴⁵ This involves open speculation on the part of the defendant that his tort will be the cause of the victim's death, and that he can determine who will belong to the class of beneficiaries that he must compensate. No solution to the problems caused by the possibility of unborn heirs or subsequent marriage or divorce was proffered in the *Alfone* decision. The tortfeasor was consigned to live with those risks should he try to settle.

Frequently, minors will be among the dependents of a tort victim. Release of the future claims of minor children would probably require the use of court-regulated "friendly" hearings according to New Jersey Court Rule 4:44.¹⁴⁶ Past procedures developed to release

¹³⁹ *Id.* at 4.

¹⁴⁰ See N.J. STAT. ANN. § 2A:31-4 (West 1952). A survivor may be considered a dependent if the decedent's contributions aided the survivor in a significant way. *Carianni v. Schwerker*, 38 N.J. Super. 350, 118 A.2d 847 (App. Div. 1955).

¹⁴¹ See note 124 *supra*.

¹⁴² *Id.*

¹⁴³ *Id.*; see 87 N.J. at 130, 432 A.2d at 873 (Clifford, J., dissenting).

¹⁴⁴ See generally J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 81-82 (2d ed. 1965).

¹⁴⁵ 168 N.J. Super. at 332, 403 A.2d at 18.

¹⁴⁶ N.J. Ct. R. 4:44 states:

Actions brought in the Superior Court on behalf of an infant or incompetent, instituted without process, for the purpose of obtaining the court's approval of a

present claims of minors should be expanded to encompass the resolution of potential claims of minors so that the number of claims subject to relitigation is reduced.

A major shortcoming of the *Alfone* decision is its ambiguous discussion of the damage issue. The danger of duplication of damages is a direct consequence of the holding that a wrongful death claim is not extinguished by the decedent's prior personal injury action arising out of the same tortious conduct.¹⁴⁷ Prospective earnings is the item of damages that poses the most conspicuous or persistent instance of duplication.¹⁴⁸ Not only are prospective earnings a major portion of the damages recoverable by the personal injury plaintiff, they are an inevitable element of the classic wrongful death claim, which is statutorily confined to pecuniary losses.¹⁴⁹ As a result of *Alfone*, there is a definable period for which the two plaintiffs' rights to prospective earnings are coextensive, thus creating the potential for duplication between the actions.¹⁵⁰ It is the formula for limiting duplication of damages for prospective earnings that is the proving ground for the viability of the court's holding.

Double recovery between successive tort actions is a very real problem as the usual form of the personal injury award is the general verdict or lump sum award. It is impossible to discern what portion of the personal injury award was given to compensate for loss of prospective earnings. The court ordered, therefore, that the trial judge who hears the wrongful death action examine the proofs from the personal injury action to determine "the lowest amount that the proofs in the earlier action show decedent would have earned between the date of his actual death and the end of his life expectancy."¹⁵¹ That "lowest

settlement shall be brought in any county in which the venue might be laid under R. 4:3-2, and in such actions in the Superior or a county court the papers shall unless the court otherwise orders, be filed with the clerk of the court before the hearing on the application for approval.

Id.

¹⁴⁷ Prior to the holding in *Alfone* the problem of duplication of damages between successive actions for personal injury and wrongful death did not exist. The personal judgment was thought to extinguish the wrongful death claim. *Roberts v. Union Carbide Corp.*, 415 F.2d 474 (3d Cir. 1969).

¹⁴⁸ 87 N.J. at 114, 432 A.2d at 866.

¹⁴⁹ *Id.*

¹⁵⁰ A tort victim may recover for future lost earnings for the period between the injury and the end of his life expectancy. The wrongful death plaintiff may lay claim to those earnings that would have existed in the period between the decedent's death and the end of his projected life expectancy. Thus, the wrongful death claim has two definite termini varying only in the point of commencement from the personal injury claim.

¹⁵¹ 87 N.J. at 120, 432 A.2d at 868. One logical but weak argument is that the wrongful death plaintiff may recover that entire "lowest" amount. That construction would undoubtedly cause duplication between the original award and the wrongful death award if the original plaintiff had contended any degree of permanent disability.

amount" must be determinative of the maximum amount recoverable in the wrongful death action for prospective lost earnings. Although the determination made through examination of proofs offered in the earlier action may be imprecise or erroneous, it is nonetheless required under the principle of collateral estoppel. Furthermore, it is the only viable source by which the component parts of a lump sum verdict may be distinguished.

Once the "lowest amount admitted into proof" is ascertained, "[t]hat amount is subtracted by the personal injury jury in arriving at its damages award."¹⁵² Clearly, that step in the formulation is subject to several interpretations. It may mean that the wrongful death jury is first instructed as to the maximum amount awardable for prospective earnings, then, based upon evidence presented in the wrongful death case, the jury reduces the recovery for the wrongful death plaintiff to the extent that the original plaintiff claimed permanent disability.¹⁵³

An alternative construction of the formulation is that the recovery for prospective earnings is based upon the diminished capacity of the initial plaintiff. If the original plaintiff claimed that his injury reduced his earning capacity, the wrongful death plaintiff is entitled to an award based upon the diminished prospective earnings.¹⁵⁴ Support for that conclusion can be based upon the premise that such tailoring of the award reduces it to an amount clearly not awarded since it was not initially claimed.

Future application of the damage formula by trial courts will require creativity to effectively tailor the recovery as the formulation contained in *Alfone* is neither truly concrete nor complete. The general directive is that no element of damages may be recovered in both actions.¹⁵⁵ The ambiguity of the opinion, however, necessitates that

¹⁵² *Id.*

¹⁵³ A hypothetical example can best illustrate the theory underlying this construction. The trial judge determines that the lowest amount of prospective earnings for the victim is \$10,000. Since the initial plaintiff claimed a disability of 20%, then 80% of the \$10,000 would be available to the wrongful death plaintiff.

¹⁵⁴ To illustrate this formulation, consider the hypothetical plaintiff who contends that he is disabled but still capable of earning \$10,000 per year. The wrongful death plaintiff's recovery would be based upon the \$10,000 figure, *not* the full extent of the victim's earning capacity. The subtraction process involves a calculation by the personal injury jury in the first action that the victim will not recover for what he can still earn. It is a hypothetical "subtraction." Actually, the jury simply excludes the victim's continued earning capacity from their consideration of recoverable damages. Thus, the wrongful death plaintiff's recovery is based upon the \$10,000 figure. This formulation is possible, but it runs contrary to established damage principles. Seemingly, this formulation would give the tortfeasor the benefit of injuring the tort victim.

¹⁵⁵ 87 N.J. at 117, 432 A.2d at 867.

the trial courts be left to their own ad hoc devices in molding the directive into a concrete formula.¹⁵⁶ Complete elucidation of the formula requires presentation of that issue in a future case.

Speculation in the area of damages recoverable in an action involving injury to a human being is inevitably compounded by successive actions.¹⁵⁷ Many of the damages recoverable, such as pain and suffering or loss of services, are calculated through visceral reactions rather than concrete facts.¹⁵⁸ The strictures laid down in *Alfone* may help to restrain duplication of damages based upon jury speculation, but as Justice Powell pointed out in his dissent in *Gaudet*,¹⁵⁹ such rules "will in no way guarantee that the second trier of fact will succeed in compartmentalizing the allowable from the unallowable elements of damages in the second trial."¹⁶⁰

In future actions, therefore, to avoid speculation on the part of the trial judge and jury in the wrongful death action, a party may request a special verdict in the original action. As the supreme court ruled in *Nylander v. Rogers*,¹⁶¹ "when it is shown that future collateral questions may be affected, the grant [of a special verdict] should be well nigh automatic."¹⁶² Justice Hall pointed out that "there can be no doubt of the power of a trial judge on his own motion or the request of a party to direct a jury to assess and report damages separately on a plaintiff's separate claims or even in special situations on items of a single claim."¹⁶³ Precision in the determination of the

¹⁵⁶ Conceivably, cases will arise wherein any possible formulation of the *Alfone* rules will be palpably unfair. Hypothetically, a case could arise wherein the plaintiff proved \$50,000 in special damages (medical expenses, etc.). The jury may have returned a verdict of \$20,000, that is, a figure below the claimed special damages. Assume further that the plaintiff did not appeal and subsequently died. Both plaintiff and defendant in the subsequent wrongful death action can argue that application of *Alfone* rules would be unfair. The plaintiff, for example, may argue that any reduction in the prospective earnings recovery is unjust as the initial plaintiff never recovered any prospective earnings. The defendant may argue that the initial jury award is indicative of the victim's failure to adequately prove his case and that jury sympathy carried the day. Therefore, allowing the wrongful death plaintiff to relitigate this issue is manifestly unfair.

¹⁵⁷ Fleming, *supra* note 51, at 602, explains that: "all awards for loss of earnings are necessarily based on speculation of imaginary earnings in the sense that, *ex hypothesi*, the accident has prevented the plaintiff from actually earning them." *Id.*

¹⁵⁸ The New Jersey Supreme Court has recognized that some of the damages recoverable for wrongful death are "conjectural" and "based upon uncertainties." See *Green v. Bittner*, 85 N.J. 1, 15, 424 A.2d 210, 217 (1980).

¹⁵⁹ 414 U.S. 573, 609-10 (1974); see note 170 *infra*.

¹⁶⁰ 414 U.S. at 609.

¹⁶¹ 41 N.J. 236, 196 A.2d 1 (1940).

¹⁶² *Id.* at 240, 196 A.2d at 3.

¹⁶³ *Id.* at 239, 196 A.2d at 3.

damages released in the original action will necessarily reduce speculation in a subsequent wrongful death action.

Justice Clifford pointed out two additional damage questions unanswered by the majority. The court left open the problem of duplication of damages in the situation where a spouse had joined as a party to the personal injury action and recovered for *per quod* damages,¹⁶⁴ and subsequently brings a wrongful death action.¹⁶⁵ The extent to which the judgment in the personal injury action restrains the spouse's second action is unclear.¹⁶⁶ Certainly a *per quod* recovery under the personal injury claim is, in many respects, functionally equivalent to loss of services. The question whether a *per quod* recovery will bar a wrongful death action is unanswered.

Another unanswered question was whether the restriction against recovery for those damages obtained in the personal injury actions implied a right to enjoin the original victim from wasting the damages award.¹⁶⁷ Since the *Alfone* court rejected the fiduciary duty concept articulated in *Gaudet*, it is doubtful that the original victim could be restrained from disposing of his entire award should he so desire. That recovery could include all of his future lost earnings if the initial jury found that the victim would never work again. The wrongful death plaintiff has an expectant interest in that recovery since his recovery may not duplicate the original recovery.¹⁶⁸ The

¹⁶⁴ For a complete discussion of *per quod* damages, see *Patrusco v. Prince Macaroni*, 50 N.J. 365, 235 A.2d 465 (1967); *Ekalo v. Constructive Serv. Corp. of America*, 46 N.J. 82, 215 A.2d 1 (1965); *Zalewski v. Gallagher*, 150 N.J. Super. 360, 375 A.2d 1195 (App. Div. 1977). In *Zalewski*, the appellate division described *per quod* damages as the value of a spouse's attention to "household duties, companionship, comfort and consortium." *Id.* at 372, 375 A.2d at 1201. These elements almost duplicate the elements of damages which comprise the pecuniary damage award for wrongful death, except for consortium. See *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980). The possibility of *per quod* recovery highlights a major difference between the actions for personal injury and wrongful death. If future lost earnings are recovered in the personal injury action, they belong to the tort victim, not the spouse. The spouse of a deceased tort victim, however, may claim future lost earnings in a wrongful death action.

¹⁶⁵ 87 N.J. at 131, 132 A.2d at 874.

¹⁶⁶ *Id.* N.J. Cr. R. 4:28-3(b) requires mandatory joinder of all claims by spouses for physical injury and consortium losses resulting from the negligent conduct of others. Claims that are not joined shall be deemed waived unless the court for good cause otherwise orders. The issue has not been raised and it is not clear as to whether a spouse could be a party to both the wrongful death action and the personal injury action. Another question arises as to whether a spouse who fails to join in the initial personal injury action should be barred from bringing a wrongful death action by N.J. Cr. R. 4:28-3(b). The most important question is the extent to which the *per quod* recovery in the personal injury action is *res judicata* to the wrongful death claim. As the court pointed out in *Zalewski v. Gallagher*, 150 N.J. Super. 350, 372, 375 A.2d 1195, 1201 (1977), "[the spouse's] injury consisted of the loss of her husband's services for one continuing time period. To allow her to recover twice for this period of time would violate the self-evident principle that there should be one satisfaction for a wrong when dealing with compensatory damages." *Id.*

¹⁶⁷ See 87 N.J. at 131, 432 A.2d at 874 (Clifford, J., dissenting).

¹⁶⁸ See Fleming, *supra* note 51, at 605.

extent to which a potential wrongful death plaintiff may protect his expectant interest is totally unresolved, and the bench and bar have been given no guidelines as to its resolution.¹⁶⁹

While in theory the limitations imposed by the *Alfone* court were impartial, the speculative nature of the damages and the frequency of expression of jury sympathy will lead to inequitable results.¹⁷⁰ The inequities inherent in the *Alfone* decision reveal an underlying lack of logical consistency, the application of which will lead to incongruous results. For example, a wrongful death plaintiff may be foreclosed from pursuing his claim, regardless of its validity, if the original victim proceeded to suit on an erroneous theory of liability. This bars the wrongful death plaintiff from raising a valid theory of liability.¹⁷¹ In contrast, a valid release executed by the victim, or a decision not to prosecute his claims against the tortfeasor, will not bar the wrongful death claim.¹⁷²

Noticeably absent from the holding in *Alfone* was any reference to the cases of *Knabe v. Hudson Bus Transportation Co.*¹⁷³ and *Coulter v. New Jersey Pulverizing Co.*¹⁷⁴ These cases held that if a person failed to institute a personal injury action within the statute of limitations, the wrongful death action was precluded even though filed within two years of death.¹⁷⁵ The decision in *Alfone* raises considerable doubt as to the continued vitality of these holdings. If the court continues the logic of *Alfone*,¹⁷⁶ the resulting law may be truly anoma-

¹⁶⁹ 87 N.J. at 131, 432 A.2d at 874 (Clifford, J., dissenting).

¹⁷⁰ Justice Powell, dissenting in *Gaudet*, stated:

As anyone who has tried jury cases knows, jury sympathy commonly overcomes a theoretical inability to recover. . . .

One expression of jury sympathy is commonplace, despite its conflict with the damages principles that in theory control. But certainly two opportunities for jury sentiment cross the line between benignity and bonanza and should not be sanctioned.

414 U.S. at 609-10 (Powell, J., dissenting).

¹⁷¹ 87 N.J. at 114, 432 A.2d at 865.

¹⁷² *Id.* The wrongful death plaintiff will be constrained by the terms of the release as far as the elements of damages he may pursue. The issues open to litigation will depend upon the terms of the settlement or release. Usually, a general release will not have a *res judicata* effect on the liability issue. See text accompanying note 101 *supra*.

¹⁷³ 111 N.J.L. 333, 168 A. 418 (1933).

¹⁷⁴ 11 N.J. Misc. 5, 163 A. 661 (1932).

¹⁷⁵ See note 58 *supra*.

¹⁷⁶ Schumaker, *supra* note 40, at 124, stated:

If it is to be admitted that there are two causes of action, it would seem absurd to hold that where the decedent's right is barred by the statute of limitations, the right of the administrator is also barred because the deceased if alive could not have an action. The proper holding in such a case would be to look at the death as the time when the cause of action first accrued in favor of the administrator under Lord

lous. The possibility exists that if the original victim ignores his claim he will not jeopardize the rights of his beneficiaries. Proceeding to suit and not succeeding for such reasons as choosing the wrong theory of liability, wrong expert or wrong attorney, however, may bar the wrongful death plaintiff from recovery. Such results are logically inconsistent.

The decision in *Alfone* also raises some thorny problems for the practicing tort litigator. The damages recoverable in the wrongful death action are limited to those damages that the original plaintiff sought or could have sought in the original action, subject to the equitable discovery exception.¹⁷⁷ An issue arises as to whether the wrongful death plaintiff should be represented by the attorney who represented the original victim. Once the victim has died, the original attorney may be the most qualified witness to testify as to what the victim knew about the state of his claim and how diligently such knowledge was pursued. An attorney cannot usually act as both counsel and witness, and under circumstances where his testimony may affect his personal interests he may be absolutely barred from acting as counsel.¹⁷⁸ One must also question whether the attorney's file would be subject to discovery by the defendant.¹⁷⁹ Defense counsel lack guidance as to what lengths they should pursue these questions. The *Alfone* rationale might reasonably be extended to allow a right of action by the beneficiary against the original attorney for negligent representation of the original victim, as that negligence may have foreclosed his own legitimate claim.

In practical application the rules laid down in *Alfone* may be costly, cumbersome and, in some cases, nearly impossible to apply. Limiting the statutory language solely to a question of whether there

Campbell's Act and to allow him to recover whether or not the action of the injured person is barred. If . . . the cause of action under Lord Campbell's Act does not arise until death, the statute of limitations should not start running until that event.

Id. See also *Goodman v. Mead Johnson & Co.*, 543 F.2d 566 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Judge Gibbons implied in *Goodman* that the links between the two statutes of limitation is a "gloss" not legislatively intended.

¹⁷⁷ 87 N.J. at 118-19, 432 A.2d at 867-68.

¹⁷⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR5-101 to 102 (1979).

¹⁷⁹ In theory, the file of the plaintiff's attorney might be discoverable under rule 26(b)(3) of the Federal Rules of Civil Procedure, which reads as follows:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party . . . only upon a showing that the party seeking the discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

FED. R. CIV. P. 26(b)(3).

was original tortious conduct is an artificial constraint which very few courts have accepted.¹⁸⁰ As Justice Clifford aptly pointed out, neither New Jersey precedent¹⁸¹ nor legislative action supports such a construction.¹⁸²

The construction given the Wrongful Death Act for the past eighty years granted a claim to the wrongful death plaintiff only if the decedent had possessed a viable claim. The logical consistency of that position and the enormity of the practical problems¹⁸³ caused by *Alfone* make a persuasive argument for legislative action. It is time for the legislature to rectify the situation by amending the Act to meet present day realities.¹⁸⁴

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¹⁸⁰ Annot., 39 A.L.R. 2d 579 (1925). See note 50 *supra*.

¹⁸¹ 87 N.J. at 128, 432 A.2d at 873. See generally *Small v. Rockfeld*, 66 N.J. 231, 330 A.2d 335 (1974); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Turon v. J. & L. Construction Co.*, 8 N.J. 543, 86 A.2d 192 (1952); *Knabe v. Hudson Bus Transp. Co.*, 111 N.J.L. 333, 168 A. 418 (1933); *McKeering v. Pennsylvania R.R. Co.*, 65 N.J.L. 57, 46 A. 715 (1900); *Cooper v. Shore Elec. Co.*, 63 N.J.L. 558, 44 A. 633 (1899); *Tharp v. Shannon*, 95 N.J. Super. 298, 230 A.2d 902 (Law Div. 1967); *Brignoli v. Durotest Corp.*, 44 N.J. Super. 95, 129 A.2d 727 (App. Div. 1957), *aff'd on other grounds*, 26 N.J. 33, 138 A.2d 408 (1958); *Liberia v. Whittaker, Clark & Daniels, Inc.*, 20 N.J. Super. 292, 89 A.2d 734 (Law Div. 1952); see notes 75-76 *infra*.

¹⁸² 87 N.J. at 126 n.1, 432 A.2d at 87 n.1. The bill presently pending in the New Jersey Senate, No. 1043, does not contemplate such a change.

¹⁸³ The practical considerations for attorneys and insurance companies caused by the instant case are enormous. The cost of successive litigation will have an effect upon the cost and availability of insurance. A more mundane problem involves the closing and disposal of files. No attorney or insurance company can dispose of any file relating to a personal injury action until two years after the death of the original victim, without fearing that valuable evidence may have been destroyed. Courts will be faced with the requirement of keeping transcripts of trials long past their usual life span since these transcripts will be required should there be an *Alfone* hearing. The utility of these transcripts in older cases is doubtful, since the idiosyncrasies of one reporter are not always decipherable by a subsequent transcriber.

¹⁸⁴ 87 N.J. at 131, 432 A.2d at 871 (Clifford, J., dissenting).