

COMMENTS

Impacts of Modern Life Support Techniques on Wrongful Death Actions Brought After Final Personal Injury Judgments

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I. INTRODUCTION

When an individual suffers personal injuries that ultimately result in death, two separate legal actions are available. Initially, the victim may seek compensation for his or her personal injuries.¹ Later, if the victim dies because of those injuries, the decedent's survivors may institute a wrongful death action.² Until recently, while both of these actions were theoretically possible, only the wrongful death action was actually taken to final judgment. Double litigation seldom occurred because the victim rarely survived long enough to obtain a final personal injury judgment. Therefore, neither claim preclusion nor issue preclusion barred the wrongful death beneficiaries' cause of action,³ and no equitable concerns over double recovery arose.

Recent advances in medical care, however, have "exacerbated a deficiency in the law."⁴ Because life support technologies can substantially prolong survival, it is increasingly possible for a personal injury action to reach final judgment

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1. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* 201-72 (1988). A personal injury plaintiff may frequently seek compensation for medical expenses, lost earnings and impairment of earning capacity, as well as for pain, suffering, and other intangibles. *Id.*

2. *Id.* at 273-75. A cause of action accrues upon death where that death results from a defendant's tortious conduct. *Id.*

3. See *infra* notes 44-48, 53-60 and accompanying text.

4. See Maureen Chesson, *TORTS—Wrongful Death—Actions for Wrongful Death Not Extinguished by Decedent's Personal Injury Recovery*—*Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857 (1981), 12 SETON HALL L. REV. 371, 378 (1982).

before death occurs.⁵ If the victim dies as a result of life support withdrawal, complex legal and ethical dilemmas arise in the survivors' wrongful death action because two judgments are rendered and, therefore, two awards may accrue to survivors.

The drafters of the earliest wrongful death acts could not foresee this double litigation scenario, or the bearing that medical developments would have upon it, when the first statutes were created in the mid-nineteenth century.⁶ These acts, now incorporated in the statutes of all states, sought to create recovery for a decedent's survivors to compensate them for the very real injuries that they might sustain from the loss of a relative.⁷

This Comment examines the legal and equitable dilemmas that arise in such circumstances and proposes various solutions. Section II examines both the history of wrongful death actions and modern applications of law. This historical overview reveals that most courts reject the doctrinal bases of wrongful death actions.⁸ Specifically, when one has recovered on behalf of a decedent for fatal injuries, these courts tend to construe wrongful death statutes in a manner that denies statutory beneficiaries of a cause of action. Such preclusion is driven by the following policy concerns: finality of judgments,⁹ perceived windfalls to wrongful death beneficiaries,¹⁰ and ill-motivated decisions made by those beneficiaries to withdraw life support, thereby creating a death upon which to sue.¹¹

To the extent that problems of finality and overcompensation are real, this Comment asserts that the remedy does not lie in misconstruing wrongful death acts so as to deny beneficiaries all recovery. Rather, the answer lies in fashioning damages rules that avoid overcompensation without precluding recovery altogether. Alternative damages rules can also minimize the risk that beneficiaries will prematurely withdraw life

5. See *infra* notes 14, 15.

6. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945-46 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

7. STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:9, at 29 (2d ed. 1975).

8. PROSSER AND KEETON, *supra* note 6, § 127, at 955-56; SPEISER, *supra* note 7, § 5:20, at 631; see also *infra* note 27 and accompanying text.

9. JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.1, at 607 (1985). See *infra* note 29 and accompanying text.

10. PROSSER AND KEETON, *supra* note 6, § 127, at 955.

11. See *Suber v. Ohio Medical Prods., Inc.*, No. C14-90-00069-CV, 1991 Tex. App. LEXIS 144 (1991), *withdrawn*, 811 S.W.2d 646 (Tex. App.—Houston 1991, writ denied).

support in order to create a death upon which to sue or to preserve to the decedent's estate the prior personal injury award. To the extent that new damages rules fail to eliminate this risk, additional safeguards can guide surrogate medical decision-making and the use of living wills. Accordingly, these solutions would enable courts to construe wrongful death statutes in a manner consistent with the doctrines that produced them, while preventing excessive recoveries.

Section III sets forth the case of *Suber v. Ohio Medical Products, Inc.*,¹² which illustrates the problems and conflicts inherent in the prevailing statutory construction. *Suber* involved a wrongful death action brought by survivors of a permanently comatose victim who obtained a final award on injuries from which she later died. Section IV discusses policy issues and proposes solutions to determine whether survivors' actions should accrue. In particular, this section focuses on periodic payment systems as an answer to the most serious problems raised in these instances of double litigation. Finally, Section V applies the proposed solutions to the *Suber* line of cases.

II. HISTORY AND MODERN APPLICATIONS OF LAW

Prior to developments in modern life support techniques, an injured victim would often die before commencing a personal injury action or bringing it to final judgment. Even when such an action was commenced, death would often follow soon enough to permit a wrongful death action brought by the victim's survivors to be joined to the decedent's pending personal injury action.¹³

Modern medical developments now permit a victim to survive beyond final litigation,¹⁴ notwithstanding the two- to five-

12. *Id.*

13. See Chesson, *supra* note 4, at 388-99; PROSSER AND KEETON, *supra* note 6, at 943 (under a few survival statutes, an action does not survive if death follows from the tort; rather, only a wrongful death action is permitted).

14. Cf. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (patient persisted nearly seven years in a vegetative state); *In re Estate of Greenspan*, 558 N.E.2d 1194 (Ill. 1990) (patient maintained on life support for at least five years); see generally W.F.M. Arts et al., *Unexpected Improvement After Prolonged Posttraumatic Vegetative State*, 48 JOURNAL OF NEUROLOGY, NEUROSURGERY, AND PSYCHIATRY 1300 (1985); Council on Scientific Affairs and Council on Ethical and Judicial Affairs, *Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support*, 263 JAMA 426 (1990); Kenichiro Higashi et al., *Five-Year Follow-Up Study of Patients with Persistent Vegetative State*, 44 JOURNAL OF NEUROLOGY, NEUROSURGERY, AND

year time frames of many personal injury actions.¹⁵ These developments pose new dilemmas in the context of personal injury litigation—dilemmas that will likely bear increasingly on the application of wrongful death acts.

A. Doctrinal Bases of Wrongful Death Actions

To understand what recovery a decedent's survivors might reasonably seek as wrongful death beneficiaries, it is important to evaluate the legal doctrines that produced this cause of action and to view what recovery was historically available to injured victims themselves. Distinguishing between recovery available to victims, as opposed to their survivors, clarifies both historical trends and modern applications of law. Importantly, an historical overview aids in the evaluation of modern courts' fidelity to the doctrinal foundations of wrongful death actions in the context of prior adjudication.

Prior to the mid-nineteenth century, certain restrictive rules applied where a victim died from tortiously-inflicted injuries. First, a victim's right to sue for his or her injuries died with either the tortfeasor or the unfortunate victim.¹⁶ This harsh rule has been replaced in virtually all states by acts known generally as "survival statutes," which permit the victim's cause of action to survive his or her death.¹⁷

A second harsh rule that existed prior to the mid-1800s

PSYCHIATRY 552, 552-54 (1981); David E. Levy et al., *Predicting Outcome from Hypoxic-Ischemic Coma*, 253 JAMA 1420 (1985).

15. See Benjamin R. Civiletti, *Zeroing In on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40 (1986); Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984); Kirk B. Johnson et al., *The American Medical Association/Specialty Society Tort Reform Proposal: A Fault-Based Administrative System*, 1 Courts, Health Science & The Law 7 (1990); Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991); Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121 (1988).

16. PROSSER AND KEETON, *supra* note 6, § 125A, at 940.

17. *Id.* §§ 125, 126, at 941-42. It is important to note that a survival action is not a new cause of action, but a means of permitting an already available cause of action to be brought, or an already initiated suit to be concluded, notwithstanding the original plaintiff's death. *Id.* § 126, at 942. For example, under a typical state survival statute, a personal injury suit commenced by or on behalf of a victim prior to death transfers (in his or her name) to the decedent's personal representative. Because this survival action is the continuation of a suit, the same defenses apply and damages are restricted to those the victim could have sought had he or she survived. *Id.* § 126, at 943. Typical recovery includes lost wages, medical expenses prior to death, and pain and suffering. *Id.*; HENDERSON & PEARSON, *supra* note 1, at 274.

denied survivors and dependents of an independent cause of action, despite the fact that they might have suffered severe financial and emotional loss as a result of the victim's death.¹⁸ No independent recovery existed to compensate these "secondary" victims of a defendant's illegal conduct.¹⁹ Rather, at common law "the death of a human being could not be complained of as an injury."²⁰ Thus, prior to the creation of survival and wrongful death actions, it was "cheaper for the defendant to kill the plaintiff than to injure him."²¹

In England, a remedy for a victim's relatives appeared in 1846 with Lord Campbell's Act,²² the progenitor of wrongful death statutes now adopted in the United States and in Canada. Entitled "[a]n act for compensating the families of persons killed by accidents,"²³ this act provided as follows:

[W]hensoever 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 would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured.²⁴

Lord Campbell's Act, therefore, created a new and independent cause of action limited to certain beneficiaries and measuring damages by *their* loss as opposed to that of the deceased victim.²⁵ This act represents the first legal recognition of the very real injuries experienced by survivors—and of their independent right of recovery—where a tortfeasor's conduct leads to a loved one's death.

B. *Construction of Wrongful Death Statutes*

Nearly all state wrongful death statutes incorporate the very wording of Lord Campbell's Act or language that provides

18. PROSSER AND KEETON, *supra* note 6, § 127, at 945; SPEISER, *supra* note 7, § 1:1, at 2.

19. PROSSER AND KEETON, *supra* note 6, § 127, at 945.

20. *Baker v. Bolton*, 1 Camp. 493, 493, 170 Eng. Rep. 1033, 1033 (Nisi Prius 1808).

21. PROSSER AND KEETON, *supra* note 6, at 942.

22. 9 & 10 Vict. ch. 93 (1846).

23. *Id.*

24. *Id.*

25. See SPEISER, *supra* note 7, § 1:8, at 28.

for essentially the same basis of liability.²⁶ Yet, in applying that language, the majority of courts largely undermine the principles that originally gave rise to wrongful death actions. Those principles addressed the compensation of a victim's surviving relatives for very real injuries sustained by them, independent of those injuries sustained by the decedent.

1. Majority Rule

When a deceased victim has litigated a prior personal injury suit to final judgment, courts in the majority of jurisdictions construe wrongful death acts in a manner that withholds compensation from survivors.²⁷ Despite the fact that wrongful death acts confer on surviving beneficiaries the independent right to recover, under the majority rule, survivors may sue only if the decedent herself could actually have done so at the time of death.²⁸

The majority rule rests in part on the policy concern for finality of judgments: a cause of action merges into a (personal injury) judgment, and once that judgment is final, no cause of action remains.²⁹ The denial of recovery to surviving beneficiaries turns on judicial construction of the "derivative" language of wrongful death statutes; that is, the extent to which the right to sue in wrongful death derives from the decedent's right to sue for personal injuries at the time of death.³⁰

Seeking to deny survivors a cause of action where the victim has already litigated personal injuries, courts following the majority rule interpret Lord Campbell's Act as placing survivors in the shoes of the decedent. Thus, a final judgment in the prior personal injury suit precludes recovery in wrongful

26. *Id.* § 2:l, at 61-62.

27. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 579, *reh'g denied*, 415 U.S. 986 (1974); *Rumo v. Celotex Corp.* (*In re Joint E. and S. Dist. Asbestos Litig.*), 726 F. Supp. 426, 432-33 (E.D.N.Y. 1989); *Variety Children's Hosp. v. Perkins*, 445 So. 2d 1010 (Fla. 1983); *Hall v. Knudsen*, 535 A.2d 772 (R.I. 1988); PROSSER AND KEETON, *supra* note 6, § 127, at 946, 954-56; SPEISER, *supra* note 7, § 5:20, at 631; RESTATEMENT (SECOND) OF JUDGMENTS § 92.1 (Tentative Draft No. 3, 1976); Vitants M. Gulbis, Annotation, *Judgment in Favor of, or Adverse to, Person Injured As Barring Action For His Death*, 26 A.L.R. 4th 1264 (1991). *See, e.g.*, *Delesma v. City of Dallas*, 770 F.2d 1334, 1338 (5th Cir. 1985); *Rimer v. Safecare Health Corp.*, 591 So. 2d 232 (Fla. 1991); *Wilson v. Whittaker*, 154 S.E.2d 124 (Va. 1967).

28. *Sea-Land*, 414 U.S. at 579-80; SPEISER, *supra* note 7, § 5:20, at 631.

29. FRIEDENTHAL ET AL., *supra* note 9, § 14:l, at 607; Donovan Flora, *Periodic Payment of Judgments in Washington*, 22 GONZAGA L. REV. 155, 155 (1986/1987).

30. PROSSER AND KEETON, *supra* note 6, § 127, at 955.

death.³¹ By this reasoning, any substantive or procedural bar to the *decedent's* ability to litigate a cause of action, but for death, likewise prevents survivors from bringing a wrongful death suit.³²

2. Minority Rule

The minority rule,³³ in contrast to the above approach, is more true to the compensatory principles upon which wrongful death actions are based. Under this rule, it is the *tortious nature of a defendant's injurious conduct* that determines whether a wrongful death action will stand, independent of the victim's legal situation at death.³⁴ Therefore, survivors are permitted to sue for wrongful death if the defendant's conduct is negligent; the derivative language of Lord Campbell's Act would preclude suits only where a defendant's conduct affords no substantive basis of liability.³⁵

Granting survivors a cause of action in wrongful death

31. This arguably follows from a plain reading of the Act's critical clause, incorporated into most states' wrongful death statutes, which confers upon survivors a cause of action when a "wrongful 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. . . ." *Id.* at 954 (quoting Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846)) (emphasis added).

32. Thus, in *Suber*, the court reasoned that "a wrongful death claim derives wholly from the cause of action that the decedent could have asserted for personal injuries had he lived The survivors thus occupy the decedent's legal shoes." 811 S.W.2d at 649 (citing *Delesma v. City of Dallas*, 770 F.2d 1334, 1338 (5th Cir. 1935)). Because *res judicata* would have barred a subsequent action by the decedent (for example, for unforeseen complications arising from injuries already sued on) by virtue of her final judgment, the survivors could not maintain an action for her wrongful death.

33. See *Alfone v. Sarno*, 432 A.2d 857, 861 (N.J. 1981); PROSSER AND KEETON, *supra* note 6, § 127, at 956. See, e.g., *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, *reh'g denied*, 415 U.S. 986 (1974); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1969); *James v. Samaritan Health Servs., Inc.*, 744 P.2d 695 (Ariz. 1987).

34. *Alfone*, 432 A.2d at 861. By this rationale, the focus is on the "wrongful [*a*]ct . . . such as would have *entitled* the [*p*]arty injured to maintain an [*a*]ction and recover." PROSSER AND KEETON, *supra* note 6, § 127, at 954 (quoting Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846)) (emphasis added).

35. Adopting this view, Prosser observes that:

It is not at all clear . . . that such provisions of the death acts ever were intended to prevent recovery where the deceased once had a cause of action, but it has terminated before his death. The more reasonable interpretation would seem to be that they are directed at the necessity of some original tort on the part of the defendant, under circumstances giving rise to liability in the first instance, rather than to subsequent changes in the situation affecting only the interest of the decedent.

DEAN WILLIAM PROSSER, THE LAW OF TORTS § 127, at 911 (4th ed. 1971).

despite a final personal injury judgment resolves the inherent illogic of the majority rule, because where (as under that rule) wrongful death beneficiaries stand in the shoes of the decedent, a wrongful death suit amounts to nothing more than a survival action.³⁶ The two causes of action, however, were created to address distinct victims, distinct injuries, and distinct liabilities based on the same tortious conduct.

The minority rationale was adopted in the case of *Alfone v. Sarno*.³⁷ The *Alfone* court held that the statutory language of New Jersey's wrongful death act referred only to the tortious nature of a defendant's conduct, thus removing obstacles to survivors' cause of action.³⁸ Observing that the majority of jurisdictions "have allowed [the concern for double recovery] . . . to confound the statutory rights of wrongful death beneficiaries as to wipe them out completely,"³⁹ the court proceeded to tailor recovery, awarding only for those injuries sustained by survivors that were not compensated for as part of the decedent's prior personal injury award.⁴⁰ This tailoring, in turn, alleviated the concern over double compensation so often expressed in majority rulings.

The United States Supreme Court has indicated support for the minority rationale, albeit in an admiralty case. In *Sea-Land Services, Inc. v. Gaudet*,⁴¹ the Court upheld wrongful death recovery under the Death on the High Seas Act,⁴² notwithstanding a prior personal injury award, applying the relevant statute in accordance with the "independent" inter-

36. *Sea-Land*, 414 U.S. at 575 n.2; *Suber*, 811 S.W.2d at 654-55 (Ellis, J., dissenting).

37. 432 A.2d 857 (N.J. 1981). In *Alfone*, a surgery patient suffered permanent injuries and recovered damages for temporary and permanent physical injury; past, present and future pain and suffering; and medical expenses projected over her estimated survival of 44 years. *Id.* at 859. The victim died during the appeals process, and a wrongful death action was instituted just prior to the expiration of the statute of limitations period. *Id.* at 859 n.2. The state appellate division reversed the trial court's decision to uphold the defendant's motion for summary judgment, submitted on grounds that the survivor's cause of action was barred by the victim's prior final judgment. *Id.* at 859-60.

38. *Id.* at 863; Chesson, *supra* note 4, at 379.

39. *Alfone*, 432 A.2d at 866.

40. *Id.* at 867-68.

41. 414 U.S. 573, *reh'g denied*, 415 U.S. 986 (1974).

42. *Id.* at 577-83. The Court reinforced the concept of a true wrongful death remedy "founded upon the death itself and independent of any action the decedent may have had for his own personal injuries." *Id.* at 578 (referring to *Morgagne v. States Marine Lines*, 398 U.S. 375 (1970)). The Court went on to observe that "[b]ecause the respondent's suit involves a different cause of action, it is not precluded by *res judicata*." *Id.*

pretation of the derivative language of Lord Campbell's Act. The majority was not deterred by alleged risks of excessive or overlapping recovery.⁴³

The *Alfone* and *Sea-Land* decisions recognize the distinct injuries that wrongdoers potentially inflict on distinct victims and, in adhering to the minority rule, these decisions uphold both the doctrinal bases of wrongful death acts and the equitable interests of statutory beneficiaries.

C. *Res Judicata and Collateral Estoppel Reconciled in the Context of Prior Adjudication*

Disputes over a cause of action's scope present crucial threshold battles that influence the outcome of litigation.⁴⁴ In resolving such disputes, both majority and minority advocates invoke the doctrines of res judicata and collateral estoppel in the context of wrongful death actions initiated after final personal injury judgments are rendered.⁴⁵

43. *Id.* at 583-84.

As to the availability of damages, the majority held that an injured longshoreman's recovery for future wages, medical expenses, and pain and suffering did not preclude his widow's suit on his death. *Id.* at 591. The Court reasoned as follows:

Obviously, the decedent's recovery did not include damages for the dependents' loss of services or of society, and funeral expenses. Indeed, these losses—unique to the decedent's dependents—could not accrue until the decedent's death. Thus, recovery of damages for these losses in the maritime wrongful-death action will not subject [the defendant] to double liability or provide the dependents with a windfall.

Id. at 591-92.

Sea-Land reversed the lower court with respect to damages sought under general maritime law and those authorized by federal statutes. Except as applied to longshoremen and territorial waters, *Sea-Land's* holding permitting recovery for loss of society has been subsequently reversed in wrongful death actions arising under the Death on the High Seas Act. *Mobil Oil v. Higginbotham*, 436 U.S. 618 (1978). In all other respects (that is, in cases involving coastal waters and to which the Death on the High Seas Act is inapplicable), *Sea-Land* continues to uphold a general maritime cause of action in wrongful death subsequent to final personal injury actions.

44. FRIEDENTHAL ET AL., *supra* note 9, § 14.2, at 620; SPEISER, *supra* note 7, § 5:19, at 629.

45. See, e.g., *Sea-Land*, 414 U.S. at 578-92 (minority rule); *Delesma v. City of Dallas*, 770 F.2d 1334, 1338 (5th Cir. 1985) (majority rule); *Semler v. Psychiatric Institute of Washington, D.C.*, 575 F.2d 922, 926 (D.C. Cir. 1978) (consistent with the majority rule, Virginia law permits a wrongful death action only when predicated on the non-availability of a survival action); *Rumo v. The Celotex Corp. (In re Joint E. and S. District Asbestos Litigation)*, 726 F. Supp. 426, 432-33 (E.D.N.Y. 1989) (majority rule); *Rimer v. Safecare Health Corp.*, 591 So. 2d 232, 233-35 (Fla. 1991) (majority rule); *Variety Children's Hosp. v. Perkins*, 445 So. 2d 1010, 1012 (Fla. 1983) (majority rule); *Alfone v. Sarno*, 432 A.2d 857, 865-67 (N.J. 1981) (minority rule); *Hall v. Knudsen*, 535 A.2d 772 (R.I. 1988) (majority rule); *Brown v. Rahman*, 282 Cal. Rptr 815 (Cal. App.

1. Res Judicata

To advocate the minority position, it is necessary to reconcile the doctrine of res judicata in the context of prior litigation. This is because the doctrine is frequently cited under the majority approach as a reason for withholding recovery from wrongful death beneficiaries where the decedent has already recovered for personal injuries.⁴⁶

The doctrine of res judicata prevents a plaintiff from bringing any claim that has been or could have been decided in prior litigation; the fact of judgment forecloses later actions.⁴⁷ The rule is based on the following two policies: "first, . . . no person should be twice vexed by the same claim; and second, . . . it is in the interest of the state that there be an end to litigation."⁴⁸ The target of any application of res judicata is the measure of precisely what was litigated or what could have been litigated in a prior lawsuit. Thus, it is necessary to characterize exactly what constitutes the "claim" or basic unit of litigation.⁴⁹

Res judicata should apply in the context of prior adjudication to protect a defendant from answering more than once for a single wrong. But to reason that only one wrong is committed in this situation (i.e., that a single transaction gives rise to only one claim) requires, as the majority of courts conclude,⁵⁰

1991), *rev. denied*, 1991 Cal. LEXIS 4252 (Cal. 1991) (majority rule); *Suber v. Ohio Medical Prods., Inc.*, 811 S.W.2d 646, 652-53 (Tex. App.—Houston 1991, writ denied) (majority rule).

46. *Cf.* FRIEDENTHAL ET AL., *supra* note 9, § 14.1, at 607; *Flora*, *supra* note 29, at 155.

47. FRIEDENTHAL ET AL., *supra* note 9, § 14.2, at 612.

48. *Id.* § 14.3, at 615. *See also* Chesson, *supra* note 4, at 387, and *Flora*, *supra* note 29, at 155, which illustrate the majority rule application of this principle in the context of prior adjudication.

49. In some states, the "claim" to which res judicata applies includes all recovery, on any ground, that a plaintiff could seek as against a defendant for injuries arising out of a single event, transaction, or occurrence. Friedenthal discusses this broadened modern definition of the unit of litigation to which res judicata applies; such a concept arguably promotes the purposes of res judicata by facilitating resolution in a single lawsuit of "all legal questions that may arise from the same transaction or occurrence" so that "the whole controversy between the parties may . . . be brought before the same court in the same action." FRIEDENTHAL ET AL., *supra* note 9, § 14.4 n.7, at 621. This broad definition encompasses what other courts consider to be the narrower "cause of action" target of res judicata or the legally cognizable basis of recovery (e.g., personal injuries, defamation, contract, fraud) on which a plaintiff sues. *See id.* § 14.1, at 607. *Compare* *Pittman v. LaFontaine*, 756 F. Supp. 834, 841-42 (D.N.J. 1991).

50. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 579, *reh'g denied*, 415 U.S. 986 (1974); SPEISER, *supra* note 7, § 5:22, at 631.

that the wrongful death beneficiaries' claim or cause of action derive wholly from that of the injured victim.

The minority position resolves issues of *res judicata* by viewing a defendant's conduct in these circumstances as constituting a single transaction or occurrence, yet one that gives rise to two independent claims.⁵¹ One claim encompasses all rights that the injured victim may potentially invoke against the defendant for his or her injuries. The other claim derives directly from the same tortious conduct and encompasses all causes of action that survivors may bring against the same defendant for independent injuries that they suffer from a relative's death.⁵² This position rests on the rationale that the respective suits involve different, and differently situated, plaintiffs. For purposes of *res judicata*, therefore, a final judgment as to one suit is not a final judgment as to the other, notwithstanding the fact that both suits target the same defendant.

2. Collateral Estoppel

While *res judicata* addresses some or all claims arising from a transaction, the doctrine of collateral estoppel addresses individual issues.⁵³ Collateral estoppel protects against the risk of duplicative compensation, a policy concern often cited under the majority approach.⁵⁴

As previously described,⁵⁵ the doctrine of collateral estoppel was applied by the United States Supreme Court in *Sea-Land* to satisfy the compensatory purposes of the wrongful death statute while characterizing damages already awarded and eliminating those damages from subsequent recovery.⁵⁶

51. PROSSER AND KEETON, *supra* note 6, § 127, at 946. See also *Sea-Land*, 414 U.S. at 577-78.

52. PROSSER AND KEETON, *supra* note 6, at 941. Accord *Brown v. Rahman*, 282 Cal. Rptr. 815, 816-18 (Cal. App. 1991), *rev. denied*, 1991 Cal. LEXIS 4252 (Cal. 1991).

53. For example, this doctrine precludes relitigation of an issue of fact or of liability where the issue has been fully litigated in an adversarial context and where the parties in the respective suits are in privity (i.e., are situated and share interests such that one party's interests effectively represent those of the other). FRIEDENTHAL ET AL., *supra* note 9, § 14.2, at 613. Compare *Pittman v. LaFontaine*, 456 F. Supp. 834, 841-42 (D.N.J. 1991).

54. PROSSER AND KEETON, *supra* note 6, § 127, at 955. See *Sea-Land*, 414 U.S. at 583-84; *Rumo v. Celotex Corp. (In re Joint E. and S. Dist. Asbestos Litig.)*, 726 F. Supp. 426, 432 (E.D.N.Y. 1989); *Variety Children's Hosp. v. Perkins*, 445 So. 2d 1010, 1012 (Fla. 1983).

55. See *supra* notes 41-43 and accompanying text.

56. *Sea-Land*, 414 U.S. at 591-92.

Thus, in that case, previous recovery by the injured victim for permanent disability, physical agony, and loss of earnings did not preclude his wife's recovery on his death for loss of society and funeral expenses. The previous judgment did, however, prevent recovery of financial support to the extent that the issue of compensation for future earnings was fully litigated in the prior proceeding.⁵⁷

Thus, the concern under the majority approach regarding double recovery is misplaced in view of (1) distinctions between wrongful death and personal injury actions and (2) the doctrinal foundations of *res judicata* and collateral estoppel. Double recovery can be avoided, at least in part, by direct applications of collateral estoppel. Even in majority rule jurisdictions, courts have held that, considering distinctions between parties and damages in survival actions (victims' actions) as opposed to those in wrongful death suits (brought by survivors), neither *res judicata* nor collateral estoppel preclude recovery under one cause of action on grounds of a judgment in the other.⁵⁸ Therefore, neither *res judicata* nor collateral estoppel supports denying a cause of action to wrongful death beneficiaries where a decedent's personal injury suit has reached final judgment.

D. *Statute of Limitations Issues*

Timing dilemmas that arise from wrongful death statutes of limitation demonstrate the inappropriateness of the majority statutory construction in the context of prior adjudication. This is especially true where life support systems prolong survival for periods of years, making it more likely that either the victim's action will be concluded by the time of death, or that the statute of limitation on a personal injury action will expire prior to death. As one dissenting judge has forcefully noted, where a wrongful death beneficiary's action is seen as being wholly derivative of the decedent's right to sue at the time of death, it is possible for a wrongful death action to expire under the relevant statute of limitation even before it accrues.⁵⁹

In virtually all jurisdictions, a wrongful death action

57. *Id.* at 592-93.

58. *Suber v. Ohio Medical Prods., Inc.*, 811 S.W.2d 646, 652 (Tex. App.—Houston 1991, writ denied).

59. *Id.* at 655 (Ellis, J., dissenting).

accrues at death.⁶⁰ Yet, to tie survivors' rights to sue to the decedent's rights at the time of death creates a conflict when the decedent fails to file a personal injury suit and when the statute of limitation has expired by the time of death with respect to any causes of action on which the decedent could have sued. In these circumstances, a decedent dies without a cause of action; thus, under the majority rule, the surviving beneficiaries' cause of action is precluded even before the victim dies.

Only the minority construction of the derivative language in wrongful death statutes resolves this conflict. Thus, a wrongful death beneficiary's right to sue should be viewed as directly rooted in the tortious nature of the defendant's conduct and independent of the deceased victim's right to sue at the time of death. In contrast, the majority construction raises and perpetuates statute of limitation dilemmas and, in doing so, violates the doctrinal bases of wrongful death actions by denying recovery to survivors who have suffered real injuries.

III. ILLUSTRATIVE CASE: *SUBER V. OHIO MEDICAL PRODUCTS*

A recent case that illustrates the legal and equitable dilemmas posed by this double litigation scenario is *Suber v. Ohio Medical Products, Inc.*⁶¹ In 1985, while undergoing minor surgery, Christy Suber suffered an overdose of anesthetic gases that produced permanent physical and mental injury and rendered her comatose.⁶² While she was still alive, her husband instituted a personal injury suit on her behalf against Ohio Medical Products (the maker of the anesthetic apparatus), a hospital physician, and the hospital.⁶³

A jury found Ohio Medical negligent and awarded the victim over \$6,000,000.⁶⁴ Approximately \$5,000,000 of this lump

60. SPEISER, *supra* note 7, § 11:10, at 184; *see generally id.* §§ 11:9, 11:15, at 183-192.

61. 811 S.W.2d 646 (Tex. App.—Houston 1991, writ denied).

62. *Ohio Medical Prods., Inc. v. Suber*, 758 S.W.2d 870, 871 (Tex. Ct. App. 1988) (final appeal in personal injury accident) [hereinafter *Ohio Medical Prods.*]; Gary Taylor, *Wrongful Death Case Presents Novel Issue; Texas' Court Weighs Whether Once Is Enough*, NAT'L L.J., Mar. 25, 1991, at 3.

63. *Ohio Medical Prods.*, 758 S.W.2d at 871. Following dismissal of charges pertaining to the hospital and physician, the case proceeded against only Ohio Medical Prods., Inc. *Id.*

64. The damages awarded compensated the decedent and her husband for past and future medical expenses, past and future mental and physical impairment, loss of decedent's future earnings, past and future loss of consortium, and past and future loss of decedent's services. *Suber*, 811 S.W.2d at 652.

sum award was allocated to future medical expenses based on projections of Ms. Suber's expected survival.⁶⁵ The judgment was affirmed by the Texas State Court of Appeals on September 15, 1988.⁶⁶

Ms. Suber died on February 1, 1989, following her family's decision on January 12, 1989, to withdraw nutrition and hydration.⁶⁷ A wrongful death action was then filed in a Texas district court by the decedent's mother and husband on their own behalf, and also on behalf of Ms. Suber's two minor children, against the same defendants sued in the prior personal injury action.⁶⁸

All defendants moved for summary judgment contending that the suit was barred by *res judicata*, satisfaction and release, and the language of the Texas Wrongful Death Act.⁶⁹ The trial court granted these motions, holding that the wrongful death action was barred because the decedent, having recovered on a final judgment in the prior action, could not have sued for additional damages arising from her original injuries had she survived.⁷⁰ Thus, viewing these beneficiaries as standing in the procedural shoes of the decedent, the wrongful death action was precluded because a subsequent personal injury suit would have been precluded.

In accordance with the minority rule, the Texas Court of Appeals reversed, holding that under a proper reading of the wrongful death act it is the tortious nature of a defendant's action that confers a right of recovery on survivors and not merely the absence of procedural obstacles to a victim's right to sue had she survived.⁷¹ The court summarized the issue in

65. *Suber v. Ohio Medical Prods., Inc.*, No. C14-90-00069-CV, 1991 Tex. Ct. App. LEXIS 144, at *20 (1991), *withdrawn*, 811 S.W.2d 646 (Tex. App. 1991, writ denied); Taylor, *supra* note 62, at 3.

66. *Ohio Medical Prods.*, 758 S.W.2d 870.

67. *Suber*, 1991 Tex. Ct. App. LEXIS 144, at *20.

68. *Id.* Damages sought pursuant to the state's wrongful death statute included damages for mental anguish, loss of society and companionship, pecuniary loss or loss of support, and loss of inheritance. *Id.* at *8-9; *Suber*, 811 S.W.2d at 652.

69. *Suber*, 1991 Tex. Ct. App. LEXIS 144, at *2-5; *Suber*, 811 S.W.2d at 648. Texas' original wrongful death statute adopted the very language of Lord Campbell's Act. In the current statute, the language is modernized and provides that beneficiaries may sue in wrongful death "only if the individual injured would have been entitled to bring an action for the injury if he had lived." TEX. PRAC. REM. CODE ANN. § 71.003(a) (Vernon 1986).

70. *Suber*, 1991 Tex. Ct. App. LEXIS 144, at *1, 15-17; *Suber*, 811 S.W.2d at 648.

71. *Suber*, 1991 Tex. Ct. App. LEXIS 144, at *10; *Suber*, 811 S.W.2d at 654 (Ellis, J., dissenting).

the case as follows: "[whether] the death, in fact, was caused by the wrongful act or omission of the defendant . . . is the vital inquiry in each case. The statute imposes no other condition upon the right to sue. [Courts have] no authority to impose an additional or different one."⁷² Res judicata did not bar the beneficiaries' action because different plaintiffs initiated the later action and because these survivors sought different damages than those awarded in the prior personal injury suit.⁷³ Collateral estoppel, however, applied to preclude recovery of damages to the extent that the same damages were awarded in the prior suit.⁷⁴

This Texas Court of Appeals ruling was withdrawn on rehearing by the same court sitting en banc.⁷⁵ The trial court judgment was reinstated and recovery was precluded altogether. The final appellate opinion followed the majority rule, in that the survivors' rights were foreclosed by procedural bars to the decedent's own right to recover but for her death. Thus, in construing the derivative language of the Texas Wrongful Death Act, the court's reasoning focused on the victim's situation as opposed to the nature of the defendant's conduct. Judge Pressler concluded in this decision that res judicata barred the wrongful death action because the defendant's conduct gave rise to only one cause of action on which either the victim herself or, alternatively, her survivors, could sue.⁷⁶

The final *Suber* opinion revealed Judge Pressler's concern over excessive and duplicative recovery.⁷⁷ Possibly, this concern was expressed in order to reinforce the court's construction of the state wrongful death act and its consequent preclusion of a survivor's cause of action. Moreover, this ruling

72. *Suber*, 811 S.W.2d at 655 (citing *Louisville, Evansville, and St. Louis R.R. Co. v. Clarke*, 152 U.S. 230, 238-39 (1894)) (Ellis, J., dissenting).

73. *Suber*, 1991 Tex. App. LEXIS 144, at *10.

74. *Id.* at *11, 14.

75. *Suber*, 811 S.W.2d 646.

76. Specifically, the court observed that "[t]he language [of the act] renders it practically certain that the purpose of the Legislature was to furnish a remedy for the injury caused by the death to those dependent upon the deceased, by giving them an action in lieu of that which he might have maintained but did not assert, but not to provide double recovery for one wrong." *Id.* at 649 (quoting *Thompson v. Fort Worth and R.G. Ry. Co.*, 80 S.W. 990, 992 (1904)) (emphasis added). However, acknowledging that the wrongful death action involved different plaintiffs and damages issues than the already concluded personal injury action, Judge Pressler observed that "[a]part from this statutory language [by which survivors are seen as occupying the legal position of the decedent] . . . res judicata is inapplicable to the instant case." *Id.* at 652.

77. *Suber*, 811 S.W.2d at 651.

was consistent with, and arguably driven by, concern that a second large award would flow to the decedent's survivors through her estate.⁷⁸

In the original appeal, Judge Pressler had reasoned that recovery in a double litigation situation "could affect a family's decision as to whether to discontinue life-support measures."⁷⁹ Specifically, in the first wrongful death proceeding, Judge Pressler emphasized that the largest portion of the personal injury award, \$5,000,000, was allocated to future medical costs.⁸⁰ He noted the survivors' possible motivation to withdraw life support in order to reserve this large lump sum award to themselves by way of the decedent's estate.⁸¹

While acknowledging that statutory beneficiaries are often the same individuals appointed to make life support withdrawal decisions, and even conceding their possible motivations to withdraw support in order to create a death upon which to sue, the decision by the *Suber* court to deny wrongful death recovery fails to entirely protect against survivors' ill motives. Motivations may continue to underlie decisions to withdraw life support in order to preserve personal injury awards. Further, if, as under the majority rule, beneficiaries' recovery derives wholly from the rights that the decedent had at death, premature life support withdrawal may result from a "race" against the statute of limitation applicable to the personal injury claim that the decedent could have brought but perhaps did not assert.

The latest ruling in this case illustrates current policy concerns and dilemmas that wrongful death actions raise when brought in the wake of concluded personal injury suits. Arguably, it is the concern for excessive recovery and for the risk of inappropriate life support withdrawal, rather than the doctrinal principles underlying wrongful death statutes, that drives

78. *Suber*, 1991 Tex. Ct. App. LEXIS 144, at *20 (Pressler, J., dissenting).

79. *Id.*

80. *Id.*

81. In this regard, Judge Pressler stated as follows:

Now the bulk of this award will go to the decedent's estate because, at the family's request, feeding and hydration were discontinued on January 12, 1989 and Christy Suber died on February 1, 1989. Having recovered substantial damages for future medical costs, appellants had financial incentive to request the discontinuation of life-support measures. The majority's holding increases the incentive to discontinue life-support by allowing the statutory beneficiaries to seek further damages under the wrongful death statute.

Id.

courts in the majority of jurisdictions to interpret these acts in a manner that denies any recovery for statutory beneficiaries.

IV. POLICY CONCERNS AND PROPOSED SOLUTIONS

A. *Overcompensation of Statutory Beneficiaries*

Considering the doctrinal conflicts inherent in the majority construction of wrongful death statutes, it is possible that the majority rule is driven not by fidelity to the underlying principles of wrongful death and survival actions, nor by concerns for duplicative recovery, but rather by fears of windfalls to statutory beneficiaries. This concern is arguably best resolved by legislatures, not by courts. However, until the problem is legislatively addressed, existing judicial principles can be employed to avoid inequitable results. Collateral estoppel, for example, minimizes perceived risks of excessive recoveries by isolating damages in wrongful death suits from those already litigated in personal injury actions.⁸² Special jury verdicts⁸³ also represent a valuable procedural solution for tailoring recovery and avoiding overcompensation.⁸⁴

Concern for excessive compensation has intensified despite the fact that wrongful death statutes were created to provide recovery for different injuries and to different plaintiffs than those involved in personal injury or survival actions.⁸⁵ Courts appear reluctant to uphold suits where statutory beneficiaries stand to accede to both a wrongful death judgment and, through the decedent's estate, to the decedent's prior personal injury award.⁸⁶ In order to limit survivors' recovery, courts arguably misconstrue wrongful death statutes on the ground that the survivors have recovered enough.⁸⁷ The result is inequitable because it completely bars recovery by survivors for identifiable pecuniary and emotional injuries they have suffered independent of injuries suffered by the decedent.⁸⁸

82. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 591-92, *reh'g denied*, 415 U.S. 986 (1974); FRIEDENTHAL ET AL., *supra* note 9.

83. *See infra* note 89 and accompanying text.

84. *See Alfone v. Sarno*, 432 A.2d 857, 867 (N.J. 1981): "As was said earlier, the wrongful death statute was intended to create a separate cause of action in favor of the next of kin and accordingly was designed to provide specific elements of damages tailored to fit their needs."

85. *Id.* *See also supra* note 52 and accompanying text.

86. *See Suber*, 811 S.W.2d at 656 (Ellis, J., dissenting).

87. *Id.*

88. *See Alfone*, 432 A.2d at 867-68 (noting funeral expenses, lost support by way of decedent's lost earnings, and lost parental advice and guidance). In light of such

Double recovery issues in wrongful death actions that follow final personal injury judgments can be resolved through the use of special jury verdicts that itemize damages.⁸⁹ Through special verdicts, collateral estoppel more effectively prevents recovery by beneficiaries of damages already recovered by the decedent in the prior suit (for example, the victim's lost future earnings). This requires that proof of damages offered in prior suits be examined in subsequent wrongful death proceedings. Where a personal injury case raises the likelihood of a future wrongful death suit (as in the *Suber* and *Alfone* cases), special verdicts should be employed.⁹⁰

Criticisms remain, however, concerning juries' practical abilities to make these speculative estimations, and concerning the potential unfairness in requiring juries to tailor recovery so narrowly.⁹¹ As discussed below, however, segregating damages is arguably no more speculative than the process of arriving at a lump sum figure.⁹² Also, considering the problems obviated by itemizing damages, making additional demands on juries is justified.⁹³

On balance, judicial concern for excessive recovery is arguably resolved through procedural mechanisms of special verdicts and collateral estoppel. Tailoring recovery should encourage courts to apply wrongful death statutes with respect to the equitable purposes of these acts. This, in turn, should also encourage courts to acknowledge what, in these circum-

inequities the court in *Alfone* stated the following: "Considerations of fairness toward the survivors, who have suffered a loss at the hands of a wrongdoer, and the desire to fulfill the beneficent purposes of the wrongful death statute impel us to temper the severity of our general rule with an exception." *Id.*

89. In contrast to the general verdict, by which the jury finds for either party without disclosing the grounds for its decision, the special verdict is rendered in response to factual questions submitted to the jury. The court then applies the law to these findings. The primary advantages of special verdicts include efficiency, clarity (by which the basis for a decision is determined, thereby facilitating review on appeal of a portion of a verdict), and elimination of the need for jury instructions. Special verdicts accompanied the advent of apportionment rules in tort actions requiring relative fault or specific damages estimation. See FRIEDENTHAL ET AL., *supra* note 9, § 12.1, at 530-36; FED. R. CIV. P. 49(a); BLACK'S LAW DICTIONARY 1399 (5th. ed. 1979).

90. Chesson, *supra* note 4, at 391.

91. *Id.* ("Speculation in the area of damages recoverable in an action involving injury to a human being is inevitably compounded by successive actions.") See *infra* notes 103-107 and accompanying text.

92. See *infra* note 107 and accompanying text.

93. For discussion of the burdens and practical problems posed by juries' tailoring damages in this way, see *infra* notes 114, 115 and accompanying text.

stances, are proper boundaries between legislative and judicial functions.

Any decision to systematically and entirely preclude recovery in circumstances such as those in *Suber* is best left to legislatures.⁹⁴ Representative legislatures conferred the original right of recovery upon survivors. Thus, any consensus that recovery in cases such as *Suber* produces unjustified windfalls to beneficiaries should similarly emerge from legislatures and not from courts, as should any effort to alter the objectives of wrongful death legislation.

B. Structured Settlements and Periodic Payments

To the extent that concern for overcompensation of wrongful death beneficiaries is justified, deferred payment mechanisms represent another solution. Under structured settlements and periodic payment systems, recipients are compensated over time rather than by a single lump sum award. In other words, the injured claimant receives as his or her award a promise from some entity to make future payments according to an agreed-upon schedule.⁹⁵

94. Civiletti, *supra* note 15, at 44.

95. Two deferred payment mechanisms, periodic payments systems and structured settlements, represent a part of an overall movement toward tort reform. See Flora, *supra* note 29, at 171. Both were developed in response to states' interests in controlling medical costs by reducing malpractice insurance premiums, which are directly affected by lump sum personal injury awards. These plans vary, but generally include immediate cash payment for past and current expenses and other immediate needs, including attorney fees. DANIEL W. HINDERT ET. AL., STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT JUDGMENTS § 1.01, at 1-2, 1-3 (1989).

A deferred payment plan may provide for future damages in the form of (1) regular flat payments over one's lifetime, (2) periodic payment increases, (3) provisions for continuation of payments to decedent's estate for a specified time or termination of payments at death, (4) provisions for lump sum payments at specified dates, (5) payments for a fixed period of years, (6) provisions addressing specific anticipated expenses, (7) provisions for lump sum payment at the plaintiff's death, and (8) provisions for medical trusts. *Id.* § 1.01(2), at 1-3. See also MODEL PERIODIC PAYMENT OF JUDGMENTS ACT, 14 U.L.A. 141 (1990), which provides for termination of medical expense payments at death.

Apart from certain distinctions, the terms "periodic payments" and "structured settlements" are often used interchangeably. Two major features of structured settlements are (1) their individualized nature, which allows parties to determine the terms, amounts, and frequency of payments, and (2) the fact that they are voluntary and provide for judicial recourse for purposes of an alternative lump sum award. Flora, *supra* note 29, at 157-58. Periodic payments, as opposed to structured settlements, apply to judgments as well as to settlements and do not mandate annuities (utilized frequently in structured settlements). HINDERT ET AL., *supra* § 1.01(3), at 1-5.

As part of a movement for tort reform, many state statutes now provide for mandatory or elective periodic payment of economic damages in personal injury suits and other actions. To date, at least thirty-one states have enacted legislation providing for periodic payment awards.⁹⁶ Most statutes address only medical malpractice or personal injury cases.⁹⁷ The majority of these states (approximately two-thirds) now make periodic payment schedules mandatory, either above a statutory threshold award (usually \$100,000 to \$250,000) or on motion by an interested party or the state. The remaining states provide for court discretion in instituting periodic payment awards.⁹⁸

Periodic payment plans resolve concerns for overcompensation of survivors. This is especially true where such plans are used to administer decedents' personal injury awards, and where they permit the award of certain economic damages only as those damages are incurred (subject to the limit of an otherwise immediate lump sum award, or until death occurs).⁹⁹ Such provisions often apply to future medical costs incurred over an injured person's convalescence or projected survival.¹⁰⁰ This approach eliminates the risk that survivors will inappropriately accede to personal injury awards through a decedent's

96. ALA. CODE §§ 6-5-543 (1987), 6-11-3 (1991); ALASKA STAT. §§ 09.17.040(d), 09.55.548 (1991); ARK. CODE ANN. § 16-114-208 (Michie 1992); CAL. CIV. PROC. CODE §§ 667.7, 697.320 (Deering 1991); COLO. REV. STAT. §§ 13-64-201 to 204 (1991); CONN. GEN. STAT. ANN. § 52-225d (West 1991); DEL. CODE ANN. tit. 18, § 6864 (1989); FLA. STAT. ANN. §§ 768.78(1), 768.78(2) (West Supp. 1992.) HAW. REV. STAT. § 657-24 (1988); IDAHO CODE § 6-1602 (1990); ILL. ANN. STAT. ch. 110, para. 2-1705 (Smith-Hurd Supp. 1992); IND. CODE ANN. §§ 16-9.5-2-2.1 to 2.4 (West 1990); IOWA CODE § 668.3(7) (1987); KAN. STAT. ANN. §§ 60-3407 to 3411 (1990) (held unconstitutional by Kansas Supreme Court, *Victims v. Bell*, 757 P.2d 251 (Kan. 1988)); KY. REV. STAT. ANN. § 65.2004 (Michie/Bobbs-Merrill Supp. 1990); LA. REV. STAT. ANN. § 13:5114 (West 1991), §§ 40:1299.39, 40:1299.4 (West Supp. 1992); ME. REV. STAT. ANN. tit. 24, § 2951 (West 1990); MD. CTS. & JUD. PROC. CODE ANN. § 11-109 (1991); MICH. COMP. LAWS § 600.6309 (1987); MINN. STAT. ANN. § 549.25 (West 1992); MO. ANN. STAT. § 538.220 (Vernon 1988); MONT. CODE ANN. § 25-9-403 (1991); N.M. STAT. ANN. § 41-5-7 (Michie 1992); N.Y. CIV. PRAC. L. & R. §§ 5031, 5041 (McKinney 1992); N.D. CENT. CODE § 32-03.2-09 (Supp. 1991); OHIO REV. CODE ANN. § 2744.06 (Anderson 1992) (at court's discretion, party may request trier of fact to make a separate finding with respect to continuing custodial care), §§ 2323.56, .57 (Anderson 1991); R.I. GEN. LAWS § 9-21-12 (1991); S.C. CODE ANN. § 38-79-480 (Law Co-op. 1991); S.D. CODIFIED LAWS ANN. § 21-3A-6 (Supp. 1991); UTAH CODE ANN. §§ 63-30-25, 78-14-9.5 (1991); VA. CODE ANN. § 8.01-424 (Michie 1992); WASH. REV. CODE § 4.56.260 (1990); WIS. STAT. ANN. § 655.015 (West Supp. 1992). See HINDERT ET AL., *supra* note 95, Appendix C, at C-1 to C-3.

97. See HINDERT ET AL., *supra* note 95, Appendix C, at C-4 to C-14.11.

98. *Id.*

99. *Id.* at §§ 1.02[1]-[3], and 1-6 to 1-13.

100. *Id.* at §§ 1.01[1], [2], and 1-2, 1-3.

estate, especially considering that future medical costs often constitute the greatest portion of the overall personal injury award. This was the case in *Suber*.¹⁰¹

Critics of periodic payment systems, however, question departures from traditional monetary awards and voice concern over speculation as to future damages. The plans also raise potential issues of equal protection, undue jury burdens, and the right to a jury trial. First, these periodic payment schemes are attacked on grounds that they violate historic common law principles favoring single lump sum monetary judgments.¹⁰² Lump sum awards are based on the principle that "a judgment must be certain in amount and unconditional in effect."¹⁰³ This principle is based in turn on *res judicata*.¹⁰⁴ Although early rulings did not depend on the form of judgment, both American and English courts have interpreted this principle to require single monetary awards.¹⁰⁵

A second criticism of periodic payments focuses on difficulties in estimating what damages accrue over time.¹⁰⁶ Lump sum estimates, however, may be no more inherently accurate than periodic payment schemes.¹⁰⁷

101. See *supra* notes 64, 65 and accompanying text. The foregoing is a general introduction to periodic payment systems and structured settlements as a proposed solution to risks of overcompensation and premature life support withdrawal in instances of double litigation such as that in *Suber*. Exhaustive review of these systems is beyond the scope of this article. See generally *Flora, supra* note 29; *HINDERT, supra* note 95; the MODEL PERIODIC PAYMENT OF JUDGMENTS ACT, 14 U.L.A. 141 (1990).

102. See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 533 (1983); *Flora, supra* note 29, at 155-56, 158.

103. *Flora, supra* note 29, at 158 (citing *U.S. v. Bauman*, 56 F. Supp. 109, 117 (D. Ore. 1943)).

104. *HINDERT ET AL., supra* note 95, § 1.02(1) at 1-6 (citing *Fetter v. Beale*, 1 Ld. Raym. 339, 91 Eng. Rep. 11 (1699), *aff'd*, 1 Ld. Raym. 692, 91 Eng. Rep. 1122 (1702)).

105. *Id.*

106. "The determining factors by which future damages are actually awarded are by their very nature things that cannot be known." *Flora, supra* note 29, at 180.

107. On the issue of lump sum estimates, one commentator has stated as follows:

The single recovery rule has been the object of criticism of bar and bench, since it forces a jury or judge to lump into one sum what is, at best, an educated guess of what will compensate a claimant for future damages. By requiring the finder of fact to lump into one sum compensation for all past and future actual and probable injury, the law has been accused of resorting to 'haphazard methods of assessing compensation in actions for personal injuries.'

HINDERT ET AL., supra note 95, § 1.02(1), at 1-7. Further, the Supreme Court has reasoned that "[o]ther courts have recognized that calculation of the loss sustained by dependents or by the estate of the deceased, which is required under most present wrongful-death statutes . . . does not present difficulties more insurmountable than

A third criticism of periodic payment schemes rests on equal protection grounds. Critics allege that plaintiffs who are forced to take personal injury awards in the form of periodic payments are disadvantaged as compared to plaintiffs bringing other causes of action who benefit from the historical rule favoring lump sum tort awards.¹⁰⁸ Yet these plans have passed constitutional muster under rational basis review,¹⁰⁹ whereby state interests in containing health costs were upheld against an individual's right to recover a lump sum judgment.¹¹⁰ Other courts, however, hold that ordering periodic payments violates a personal injury plaintiff's constitutional right to dispose of property on the grounds that a judgment "becomes the plaintiff's property when obtained."¹¹¹

Critics argue that heightened judicial scrutiny should be applied to these equal protection challenges to periodic payment schemes.¹¹² Under this standard, payment provisions would pass constitutional muster only if the state could show a compelling or important state interest and a close nexus between that interest and the means employed to advance it.¹¹³

To date, no equal protection challenges to periodic payment systems have addressed the particular risks posed in *Suber*-type cases, where dilemmas raised by advances in life

assessment of damages for many non-fatal personal injuries." *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 589, *reh'g denied*, 415 U.S. 986 (1974) (citing *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 385 (1970)).

108. See generally *Flora*, *supra* note 29, at 159-67.

109. Rational basis review connotes a lesser degree of judicial scrutiny in equal protection challenges by which courts show the greatest deference to state legislative enactments. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 532-65 (2d ed. 1991). Under this standard, the United States Supreme Court has required that statutes be "reasonable, not arbitrary, . . . rest[ing] upon some ground . . . having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 541 (citing *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)). The Court has also been satisfied by a "rational[] relat[i]onship [of the proposed legislative means] to a legitimate state interest," and in other cases has upheld statutes unless "the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* (citing *New Orleans v. Dukes*, 427 U.S. 297 (1976) and *McGowan v. Maryland*, 366 U.S. 420 (1961), respectively).

110. *Flora*, *supra* note 29, at 160-61 (citing *American Bank & Trust Co. v. Community Hosp.*, 683 P.2d 670 (Cal. 1984)).

111. *Id.* at 164 (citing *Carson v. Maurer*, 424 A.2d 825, 838 (N.H. 1980), in which the New Hampshire Supreme Court reasoned that its state statute unconstitutionally burdened seriously injured malpractice victims with inordinate responsibility to combat rising medical costs).

112. *Id.* at 180-81.

113. See STONE ET AL., *supra* note 109, at 541.

support systems arguably reinforce states' interests. Those interests may now also include controlling risks that survivors might withdraw a victim's life support in order to create a death upon which to sue, in addition to states' interests in combatting rising health care costs by controlling medical malpractice premiums. These state interests (clearly advanced by periodic payment systems) would likely withstand equal protection and due process challenges under even heightened judicial scrutiny.

Critics further argue that periodic payment systems potentially place unreasonable burdens on juries.¹¹⁴ Generally, periodic payment statutes require juries to determine past damages, future damages, and intervals over which future damages are expected to accrue annually (segregating medical costs as well as other economic and non-economic losses).¹¹⁵ These are serious demands to make of juries, especially in view of limited judicial resources and the social costs of prolonged trials. But the importance of minimizing overcompensation and preventing premature life support withdrawal arguably justifies these burdens.

Finally, where statutes allow courts to fashion recovery schedules once the juries have itemized damages, the argument has been raised that periodic payments deny personal injury victims the right to a jury trial.¹¹⁶ Where a jury arrives at a total damages estimate, however, the integrity of that estimate is not violated by a court's subsequent scheduling of payments. Rather than substitute its own recovery figure for the jury's, a court's application of a payment schedule only affects how the award, as determined by the jury, will be distributed to recipients over time. Critics may assert that courts substitute their

114. *Flora*, *supra* note 29, at 178-79.

115. MODEL PERIODIC PAYMENT OF JUDGMENTS ACT § 4, 14 U.L.A. 141 (1990). Further, "more detailed findings . . . could be required because [of] . . . periods of maximum loss, periods of stabilized loss, requirements for one time medical procedures or separate medical procedures at different points in the future." *Id.* § 4 cmt., at 16.

116. *Flora*, *supra* note 29, at 177. Washington's statute is one example. It provides that a court or arbitrator shall, on the request of an interested party, enter a judgment providing for periodic payment "in whole or in part." WASH. REV. CODE § 4.56.260 (1990). Critics argue that such provisions are unsound for two reasons. First, they violate state constitutions that provide (as does Washington's) that "the right of trial by jury shall remain inviolate." WASH. CONST. art. I, § 21. Second, they violate common law rules that exclusively reserve determination of damages to juries. *Flora*, *supra* note 29, at 177.

own factual determinations for those of juries.¹¹⁷ But it may be noted that courts have upheld statutes that place certain determinations entirely outside the reach of juries (for example, by stipulating present value reduction rates).¹¹⁸ Similarly, courts should be able to set the amount and/or frequency of periodic personal injury award payments independent of the jury's autonomous determination of overall recovery.

In summary, fears of overcompensation of statutory beneficiaries are misplaced in view of procedural, common law, and statutory provisions that tailor recovery. The doctrine of collateral estoppel and the use of special verdicts in personal injury judgments protect against duplicative recovery in subsequent wrongful death proceedings. Periodic payment systems further minimize risks of plaintiff windfalls by providing a mechanism for recovery only for personal injuries experienced and only as damages accrue. Where a court elects or mandates periodic payment of a jury's award, no greater danger of speculation necessarily exists than where a lump sum is awarded.¹¹⁹ Also, the interests that these payment systems advance justify additional burdens that they allegedly place on fact finders. These payment plans are flexible enough to serve principles of finality of judgment in that they do not prevent determination of overall liability. They also withstand equal protection challenges.

Finally, in addition to protecting against overcompensation, the use of periodic payment schemes greatly minimizes the risk that beneficiaries will withdraw life support in order to preserve a prior personal injury award otherwise designated for future medical expenses. Where personal injury awards for future medical needs are distributed only as those needs arise, and where such payments terminate completely upon death, no lump sum exists to trigger survivors' ill motives.

Thus, periodic payment systems promote statutory objectives while protecting both injured victims and survivors.¹²⁰

117. Flora, *supra* note 29, at 178.

118. See *Bernier v. Burris*, 497 N.E.2d 763, 772 (Ill. 1986).

119. See *infra* note 107 and accompanying text.

120. This Comment focuses primarily on periodic payments as particularly responsive to problems raised by wrongful death actions in the context of advanced life support systems. Other more generally applicable devices exist to minimize risks of overcompensation of statutory beneficiaries. For example, damages ceilings can be employed in these instances of double litigation as in the overall movement for tort reform. Also, restricting classes of beneficiaries that could bring wrongful death actions would restrict liability for damages. Under most statutes, beneficiaries include

On balance, the use of these payment schemes promotes the proper application of wrongful death acts by reducing the likelihood that actions will be improperly brought under these statutes. This, in turn, protects and promotes the rights of survivors injured through the wrongful death of a family member.

C. Other Policy Concerns

One critic of the minority statutory construction of wrongful death statutes argues that defendants, aware that an independent right of recovery vests in wrongful death beneficiaries despite a final personal injury judgment, will consequently resist settling a personal injury claim in the hope that the injured victim will die and that two theoretically possible claims will regularly be reduced to only one (the wrongful death action).¹²¹ This result disadvantages the injured victim who seeks settlement. Such a strategy on the part of defendants is frustrated, however, to the extent that the decedents' representatives elect (via survival statutes) to litigate personal injury actions after the death. Thus, theoretically, defendants still must answer two independent claims.

Critics who concede that finality of judgments is not threatened by periodic payment systems nevertheless suggest that this threat persists where, because the class of wrongful death beneficiaries does not close until death, that class might expand significantly from the time a personal injury action is concluded up to the time of the victim's death.¹²² Such class expansion might occur upon the birth of heirs after the personal injury litigation, upon members subsequently reaching majority, or upon intervening marriage.¹²³

spouses, natural or adoptive children, and sometimes parents. Dependency requirements vary. Finally, excessive recovery can be minimized by restricting the types of damages that wrongful death plaintiffs may seek; this argues in support of limiting recovery to economic damages, but even this alternative would not entirely withhold recovery as under the current majority statutory construction.

Exhaustive examination of the foregoing devices is beyond the scope of this article. See generally Civiletti, *supra* note 15; Leonard J. Nelson, *Tort Reform in Alabama: Are Damages Restrictions Unconstitutional?*, 40 ALA. L. REV. 533 (1989); SPEISER, *supra* note 7, chs. 2-4, 10; Peter Biging, Note, *Section 1983 Actions by Family Members Based on Deprivation of the Constitutional Right to "Family Association" Resulting from Wrongful Death: Who Has Standing?*, 14 FORDHAM L. REV. 441 (1986); Dale Katzenmeyer, Comment, *Issues Complicating Rights of Spouses, Parents, and Children to Sue for Wrongful Death*, 19 AKRON L. REV. 419 (1986).

121. Chesson, *supra* note 4, at 388-89.

122. *Id.*

123. *Id.*

Such class expansions might not arise in enough cases, however, to justify imposing the majority construction of wrongful death statutes and the wholesale denial of recovery on behalf of statutory beneficiaries. Further, to the extent that class expansions might significantly threaten finality in litigation, statutes can be amended to restrict classes of beneficiaries. Such a restriction would limit uncertainty with respect to possible future claimants and, thus, with respect to total liability as well.¹²⁴ Settlements that provide for continued periodic payments to statutory beneficiaries beyond an injured person's death can also fix the class at the time personal injury settlements are struck.

Finally, majority rule advocates suggest that, although collateral estoppel prevents duplicative compensation of wrongful death beneficiaries, available means for tailoring recovery nevertheless fail to prevent a personal injury recipient from wasting portions of an award, to which survivors have a claim, upon death.¹²⁵ This potential disadvantage to beneficiaries may, however, be too speculative to outweigh the clear benefits conferred on survivors in the form of an independent cause of action for wrongful death following a final personal injury judgment.

Wrongful death suits do not, therefore, significantly threaten the settlement process, finality of judgments, or the interests of statutory beneficiaries in such a way as to justify withholding a cause of action from these plaintiffs.

V. PROPOSED SOLUTIONS: APPLICATION TO *SUBER*

The foregoing solutions can be illustrated by hypothetical application to the *Suber* case.¹²⁶ To begin with, if the original personal injury plaintiffs had sought a settlement on Ms. Suber's behalf, because her right of action would have survived her death, the defendant's resistance to settlement would have been minimized given its hope of ultimately answering to only one cause of action.

Next, a cause of action would have vested in the wrongful death plaintiffs. That cause of action would have derived directly from the defendant's negligent manufacture of its anesthetic apparatus. This approach follows a minority con-

124. *Id.*

125. *Id.* at 392.

126. *See supra* part III.

struction of the derivative language of Texas' wrongful death statute,¹²⁷ which closely tracks Lord Campbell's Act,¹²⁸ the progenitor of most wrongful death statutes. The minority interpretation accords most closely with Lord Campbell Act's goal of creating a new and independent cause of action in the decedent's survivors, and with its compensatory objectives. Thus, when Ms. Suber died, her mother, husband, and children would have been able to sue the defendant and, possibly, to recover for their injuries.

Res judicata would have posed no obstacle to the wrongful death action in *Suber* because different plaintiffs brought the wrongful death action and, thus, sought different damages than those awarded in Ms. Suber's prior personal injury suit. Also, Ohio Medical's negligent conduct arguably gave rise to two independent claims or causes of action: one addressing personal injuries inflicted on Ms. Suber, and the other addressing injuries inflicted on her family by virtue of her wrongful death. Accordingly, the subsequent wrongful death suit would not constitute relitigation of the prior personal injury cause of action. Nor would the defendant have been subjected to double liability for a single wrong; by the foregoing rationale, two independent wrongs existed. Res judicata would continue to protect the defendant from relitigation of either cause of action.

Collateral estoppel would also have assured that Ohio Medical would not be subject to relitigation of liability, and damages would have been limited to those not already awarded in Ms. Suber's personal injury judgment. In this regard, damages sought in the wrongful death action for financial support would have been precluded by the prior award of Ms. Suber's lost future earnings. Similarly, recovery by the victim's husband and children for loss of society could have been denied to the extent that Ms. Suber's recovery for loss of consortium and services included compensation for identical loss. Collateral estoppel thus eliminates concerns for double recovery.

Further, as may be typical in a double litigation scenario, no intervening expansion of the class of beneficiaries occurred that would have raised uncertainty or posed risks of excessive

127. *Suber v. Ohio Medical Prods., Inc.*, 811 S.W.2d 646, 653-54 (Tex. App.—Houston 1991, writ denied). See TEX. PRAC. REM. CODE ANN. § 71.003(a) (Vernon 1986).

128. *Suber*, 811 S.W.2d at 653-54. See Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846).

liability so as to justify withholding recovery for wrongful death. In any event, such risks are minimized by restricting the statutory class and by addressing future contingencies in the language of wrongful death legislation.

As to the court's fear of potential plaintiff windfalls by way of Ms. Suber's estate, such fear would have been largely allayed had Texas' judgment rules provided for periodic payments of the personal injury award. Because over eighty percent of the \$6,000,000 judgment was allocated to Ms. Suber's future medical expenses throughout her then-projected lifetime, a periodic payment scheme would have applied to the greatest portion of the total award and, therefore, would have largely eliminated the risk of excessive compensation. That risk, in any case, arises only where survivors actually do succeed to the decedent's estate by will or by intestacy. While survivors may succeed to the decedent's estate, they cannot control this outcome; moreover, in some instances, a wrongful death action represents survivors' only source of recovery, even after a final personal injury judgment.

VI. CONCLUSION

When a plaintiff concludes a suit on personal injuries that later cause death, surviving wrongful death beneficiaries generally meet with a complete denial of recovery despite the very real injuries that they have suffered through the loss of a relative. This inequity may become more commonplace as life support techniques increasingly prolong life well beyond final judgments in personal injury suits. Fearing excessive recovery by wrongful death beneficiaries, courts may continue to respond with wholesale exclusion of damages, thus undermining the principles that produced wrongful death acts.

The underlying principles of wrongful death acts should not be violated in order to solve modern litigation problems. Instead, available statutory and common law devices should be employed to better achieve the compensatory objectives upon which wrongful death actions are based. *Res judicata* is not involved in circumstances where both plaintiffs and damages differ irrespective of personal injury and wrongful death actions. Collateral estoppel can minimize risks of excessive recovery without violating principles of *res judicata* and the principles that underlie wrongful death actions. In addition, special jury verdicts can further tailor recovery to reduce over-

compensation. Importantly, periodic payment systems prevent windfalls to wrongful death plaintiffs who might otherwise accede to both a decedent's lump sum personal injury award and to a wrongful death judgment. By awarding for certain expenses only as they arise, such devices also protect against the possible withdrawal of life support by beneficiaries seeking to preserve a personal injury award or to create a death upon which to sue.

The interests in properly construing wrongful death statutes and in serving their compensatory objectives justifies the burdens that might follow from reliance on collateral estoppel, special verdicts, periodic payments, and other procedural and legislative devices. Such devices, at least, help prevent concerns for excessive recoveries from so "confound[ing] the statutory rights of wrongful death beneficiaries as to wipe them out completely."¹²⁹ In any event, if a justifiable public policy lies in withholding recovery from wrongful death beneficiaries when a decedent has already recovered from a final personal injury judgment, then this policy is best implemented through legislative, not judicial, amendment of existing statutes. Meanwhile, in departing from prevailing interpretations of wrongful death acts, courts would more appropriately adapt to developing life support techniques and their complicating influence on litigation.

129. *Alfone v. Sarno*, 432 A.2d 857, 866 (N.J. 1981).