Pennsylvania No-Fault Act: The Need for Interpretive Consistency

George N. Stewart

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Pennsylvania No-fault Act: The Need for Interprettive Consistency

I. INTRODUCTION

Whether one embraces the dictates of the Pennsylvania No-fault Motor Vehicle Insurance Act¹ as friend or foe, the resounding public impact of this promulgation demands the closest scrutiny of members of the trial bar. In order to protect the interests of their clients adequately, attorneys must possess an understanding of the common law rights and duties involved in this area and demonstrate an appreciation of the interface of the Act with insurance contractual rights.² The revolutionary change in tort liability alone demands that careful attention be given to developments which are implicit in recent attempts at judicial construction and which penetrate deeply into the fundamental aspects and implications of section 301 of the Act. Any less comprehensive study would be sterile and misleading.³

The availability of punitive damages to the plaintiff injured through the negligence of an intoxicated operator of a motor vehicle is uncertain under the Act in light of the partial abolition of tort liability.⁴ Where the victim of such conduct fails to survive the accident, concerned counsel also faces an uncertain road to recovery in applying the No-fault Act to the Pennsylvania wrongful death and survival action statutes.⁵ Any attempted discourse in these areas requires a cognizance of the judicial interpretations

³. Judge Cercone has noted the difficult nature of applying the No-fault Act. He wrote:
   At the outset, we caution anyone who embarks on the high seas of Pennsylvania's No-Fault Motor Vehicle Insurance Act not do so without a good compass, a knowledge of reefs and storms, and plenty of food and water. Any attempt to choose an alternate route by land in an effort to unlock the secrets of the Act will encounter mazes of paths, pitfalls, underbrush, and deadends.
⁵. See infra pt. IV.
within the last five years that have subtly construed the Act, and that have simultaneously created intense controversy concerning the partial abolition of tort liability. An adequate discussion here also demands an awareness of traditional notions pertaining to punitive damages.

While the Pennsylvania No-fault Act specifically rejected complete abolition of tort remedy, the recent decisions of the Pennsylvania Superior Court in *Reimer v. Delisio*\(^6\) and *Heffner v. Allstate Insurance Co.*\(^7\) demonstrate the uncertain extent of this abolition; in the former, the superior court demanded that the claimant point to the specific section of the Act preserving this tort cause of action, while in the latter, the superior court inferred that preexisting remedies available under the survival act and wrongful death act remain intact unless literally excluded. Furthermore, the *Reimer* mandate advances a belief that the purpose of punitive damages, to provide deterrence to ill-chosen conduct, is not aided within a framework served by mandatory insurance coverage. The Pennsylvania Supreme Court, in affirming *Heffner (Pontius)*\(^8\), determined that survivors of a person fatally injured in a motor vehicle accident are entitled to both survivor's loss and work loss benefits. Subsequently, appellate court decisions have relied upon this decision to permit recovery of work loss benefits by both survivors and representatives to the decedent's estate without distinguishing plaintiff's status as one or the other,\(^9\) and in the process have possibly misapplied the rationale of the decision.

This comment will analyze the delicate problems raised by these recent judicial trends, with particular emphasis on their effect on future victims of intoxicated drivers who must turn to the No-fault Act for recovery. Initially, this comment will examine the historical development of the Act. Thereafter, the role of punitive damages, and the judiciary's perception of their function in the no-fault structure, will be considered. The corollary problem that may arise when a victim dies as a result of his injuries and recovery of work loss benefits is sought will also be addressed. Finally, this comment will consider where these judicial trends may lead, with suggestions toward resolving the conflicting interpretations of the Act.

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8. 491 Pa. 447, 421 A.2d 629 (1980). See *infra* note 167 for an explanation of the consolidation of these cases.
9. See *infra* notes 216-58 and accompanying text.
II. AN OVERVIEW OF THE NO-FAULT ACT

A. Challenge to the Common Law Tort System and the Legislative Response

No-fault legislation is the result of a boom during the 1960's of adversary litigation stemming from automobile accidents which flooded an already swamped judicial system. Consumer clamor for legislative initiatives to provide significant improvements for compensating victims demanded attention, as skepticism turned into criticism concerning the common law tort recovery system, which was castigated as slow and inefficient. Prior to 1971, the Pennsylvania legislature remained diffident to this mounting pressure, unable, or at least unwilling, to embrace any complex solution that could go beyond the common law modus into a fresher and more efficient manner of recovery. Following pressure from Governor Milton Shapp and numerous legislative proposals, the present act was signed into law on July 19, 1974, and became effective on July 19, 1975.

The specified purpose of the Act is: "[T]o establish at reasonable cost to the purchaser of insurance, a Statewide system of prompt and adequate basic loss benefits for motor vehicle accident victims and survivors of deceased victims." This is attempted by compensating victims on a first-party basis, irrespective of fault, through a compulsory insurance system in which the victim is paid...


11. UNITED STATES DEP'T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 94 (1971) ("major shortcoming of the auto accident liability system . . . [is that] only those who can prove that others were at fault while they were without fault in an accident have a legal right to recover their losses. . . . [T]he coverage of the present compensation mechanism is seriously deficient").


14. Id. at xxiv.

by his own insurance company. These basic loss benefits are only available when the claim arises out of the maintenance or use of a motor vehicle. This requisite nexus between the injuries sustained and their causation essentially encompasses any situation in which the claimant or decedent is located in a vehicle which is moving, is situated in a vehicle parked for the purpose of using it in some fashion, or, in certain circumstances, is present near a vehicle.

To effectuate the Act's specified purpose of providing quick and adequate compensation to the accident victim, the Act discourages any refusal to pay basic loss benefits or dilatory responses to claims for benefits by imposing penalties on overdue payments. The Act also seeks to protect a victim who is injured by an uninsured motorist. The assigned claims plan provides uninsured mo-


17. PA. STAT. ANN. tit. 40, § 1009.103 (Purdon Supp. 1982-1983) defines basic loss benefits to include benefits specified to recompense the victim for net loss, not including benefits for damage to property.

18. Id. § 1009.103 defines maintenance or use of a motor vehicle as a "vehicle, including, incident to maintenance or use as a vehicle, occupying, entering into, or alighting from it." Id. See, e.g., Samsel v. Travelers Indem. Ins. Co., 295 Pa. Super. 188, 441 A.2d 412 (1982) (the operator of a motorcycle injured in a collision with an automobile covered under the No-fault Act is not entitled to recover from the insurer of the auto); Dull v. Employers Mut. Casualty Co., 278 Pa. Super. 567, 420 A.2d 688 (1980) (removal of a boat from the roof of automobile is not included within maintenance and use of a motor vehicle); Monaghan v. Pennsylvania Mfr's Ass'n Ins. Co., 14 Pa. D. & C.3d 32 (1980) (plaintiff struck by a car operated by a mechanic while waiting for her vehicle to be repaired at a gas station may recover benefits).


23. See, e.g., Hayes v. Erie Ins. Exch., 493 Pa. 150, 425 A.2d 419 (1981) (where a no-fault insurance carried unsuccessfully challenged a claim, insurer was liable for 18% interest regardless of good faith by insurer; attorney's fees were not awarded since denial was made in good faith). Accord Jolley v. Nationwide Ins. Co., 7 Pa. D. & C.3d 797 (1978). See also Burnett v. Erie Ins. Co., 9 Pa. D. & C.3d 793 (1979) (failure to provide written notice of rejection of a claim for basic loss within 30 days after receipt of reasonable proof of the loss is a factor in the imposition of costs and attorney's fees).

torist coverage ranging from the minimum floors specified in the Insurance Code to a ceiling limit determined by the excess of actual damages suffered over the amount of no-fault insurance benefits received.\textsuperscript{28}

The right of the victim to basic loss benefits is subject to certain limitations.\textsuperscript{26} Basic loss benefits include allowable expenses,\textsuperscript{27} work

\begin{quote}


27. Allowable expenses include the reasonable value or cost of reasonably needed services and accommodations for: "(A) professional medical treatment and care; (B) emergency health services; (C) medical and vocational rehabilitational services; (D) expenses directly
loss payments, replacement services losses, survivor’s loss, funeral expenses, and other economic detriment. Under the Act, the insurer is obligated to recompense the insured victim for all medical bills and rehabilitation expenses, and for the first $15,000 of lost wages regardless of negligence on the part of anyone. Interestingly, habitual unemployment for an extended period of time prior to the date of the accident does not automatically prevent a victim from recovering work loss benefits.

Certain victims of motor vehicle accidents cannot receive no-fault benefits and are termed ineligible claimants. For example, an employee who is injured in the scope of his employment in conjunction with the operation of a motor vehicle owned by his em-


29. Replacement services loss includes “expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the victim would have performed, not for income, but for the benefit of himself or his family, if he had not been injured.” PA. STAT. ANN. tit. 40, § 1009.103 (Purdon Supp. 1982-1983). Section 202 of the Act limits recovery for this category to $25 per day for a total of one year. Id. § 1009.202(c). See, e.g., Easton v. Aetna Life and Casualty Ins. Co., 18 Pa. D. & C.3d 152 (1980) (an insured claiming benefits for once-a-week replacement services for an aggregate period of one year is entitled to only such services during the calendar year after her injuries were sustained and not to 365 once-a-week benefits). See also Habecker v. Nationwide Ins. Co., 445 A.2d 1222 (Pa. Super 1982)(insured is entitled to reimbursement for 365 days of replacement services, even when service days occurred more than one year after her injuries).

30. Survivor’s loss means the:

(A) loss of income of a deceased victim which would probably have been contributed to a survivor or survivors, if such victim had not sustained the fatal injury; and

(B) expenses reasonably incurred by a survivor . . . in obtaining ordinary and necessary services in lieu of those which the victim would have performed, not for income, but for their benefit, if he had not sustained the fatal injury, reduced by expenses . . . avoided by reason of the victim’s death resulting from injury.


31. Id. § 1009.103.

32. Id. §§ 1009.103, .207.


35. PA. STAT. ANN. tit. 40, § 1009.208(b) (Purdon Supp. 1982-1983). See, e.g., Lynngarkos v. Department of Transp., 57 Pa. Commw. 121, 426 A.2d 1195 (1981) (where automobile accident occurred outside of Pennsylvania, and neither the passenger nor the vehicle in which he was injured was insured, and no other insured vehicles were involved, there was no security from which the passenger could recover under the No-fault Act).
ployer, cannot recover no-fault basic loss benefits, but must look to his worker's compensation coverage. More importantly for this discussion, a party who is intentionally injured by a motor vehicle operator must recover in tort.

B. Section 301—A Fundamental Perspective

The most apparent change in all compensatory reorganization plans for motor vehicle accident victims is demonstrated in each plan's response to the aforementioned criticism of the common law tort system, specifically its provisions affecting tort liability. This inquiry concerning the availability of punitive damages for a victim injured by an intoxicated operator, and recovery of no-fault work loss benefits for tortious death, requires a tentative review of the expanse of the section 301 partial abolition of tort liability prior to any formulation of answers to these specific issues. In order to conduct this review, we must move from the bare skeletal dictates of the statute as enacted to the fully embellished, powerful weapon that this section, after judicial interpretation, now represents.

No state has yet to enact a no-fault statute providing for the total abrogation of the tort system and the elimination of general damages. All state no-fault laws, the Uniform Motor Vehicle Accident Reparations Act, and the Keeton-O'Connell plan allow some tort remedy. Some states have no-fault laws which either exempt secured owners from tort liability, or which place the insured victim under a disability to sue unless a serious injury results or a threshold is crossed. Section 301(a) of the Pennsylvania Act provides for the abolition of tort liability except under certain circumstances or unless certain parties are involved.

The initial constitutional challenge to the no-fault scheme arose


38. UNIF. MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 5(b) (1972) [hereinafter cited as UMVARA] reprinted in Shrager, supra note 12, at app. D.


in *Singer v. Sheppard*,43 and concentrated its attack on the section 301(a) abolition of tort recovery.44 The plaintiff argued that section 301(a) limited recoverable damages by eliminating general damages recoverable in many tort claims and violated the equal protection clause of the fourteenth amendment of the United States Constitution46 and article III, section 18 of the Pennsylvania Constitution46 by establishing an unreasonable classification among motor vehicle accident victims entitled to general damage recovery.47 The defendants countered, maintaining that the Act did not place a fixed dollar limit on personal injury recovery and that the State had the power to wholly abolish a cause of action without constitutional offense.48 The Supreme Court of Pennsylvania upheld the constitutionality of the Act, essentially for the reasons advanced by the defendants, remarking that the abolition of tort recovery for pain and suffering in some cases was balanced by swift payment of medical expense, loss of income, and other economic losses for all victims.49 Similarly, other jurisdictions have determined provisions affecting tort recovery to be constitutional.50

Section 301(a) exceptions to tort abolition for injuries arising out of the maintenance or use of a motor vehicle specify that:

(1) An owner of a motor vehicle involved in an accident remains liable if, at the time of the accident, the vehicle was not a secured vehicle.

(2) A person in the business of designing, manufacturing, repairing, servicing, or otherwise maintaining motor vehicles remains liable for injury arising out of a defect in such motor vehicle . . . .

(3) An individual remains liable for intentionally injuring himself or another individual.

44. Id. at 391-92, 346 A.2d at 899.
45. The fourteenth amendment provides in pertinent part:
   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
   U.S. CONST. amend. XIV, § 1.
46. Section 18 of article III of the Pennsylvania Constitution provides in relevant part:
   "[No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and, in case of death from such injuries, the right of action shall survive . . . ."
   PA. CONST. art. III, § 18.
47. 464 Pa. at 393, 346 A.2d at 900.
48. Id. at 396 n.10, 346 A.2d at 901 n.10.
49. Id. at 407, 346 A.2d at 907. The court recognized that "the legislature has substituted, in the case of relatively minor accidents, the prompt and sure recovery of economic loss for the delays and uncertain awards of the courts." Id. at 404, 346 A.2d at 904.
(4) A person remains liable for loss which is not compensated because of any limitation in accordance with section 202(a), (b), (c) or (d) of this act. A person is not liable for loss which is not compensated because of limitations in accordance with subsection (e) of section 202 of this act.

(5) A person remains liable for damages for non-economic detriment if the accident results in:

(A) death or serious and permanent injury, or
(B) the reasonable value of reasonable and necessary medical and dental services . . . exclusive of diagnostic x-ray costs and rehabilitation costs in excess of one hundred dollars ($100) is in excess of seven hundred fifty dollars ($750) . . . or
(C) medically determinable physical or mental impairment which prevents the victim from performing all or substantially all of the material acts and duties which constitute his usual and customary daily activities and which continues for more than sixty consecutive days; or
(D) injury which in whole or in part consists of cosmetic disfigurement which is permanent, irreparable and severe.

(6) A person remains liable for injury arising out of a motor vehicle accident to the extent that such injury is not covered by the basic loss benefits payable under this act, as described in section 103.51

The confusion that exists stems primarily from section 301 ambiguities. These ambiguities may have resulted from the Act's arduous journey to final passage. The Act borrowed many of its features from the Uniform Motor Vehicle Accident Reparations Act and the proposed federal bill, S. 354. The Act also suffered extensive legislative committee staff encounters and editing, and numerous amendments resulted, arriving eventually at what has been termed a "scissors and paste" approach. The amendments primarily concerned the tort limitations contained in section 301; particularly the exceptions for maintenance of general damage claims. The Shrager treatise notes that decisions interpreting the Act's provisions began trickling out of trial courts in 1978 and 1979. This comment concerns recent decisions in two areas which now enable an assessment of two issues left unresolved by the Act's statutory language.

52. UMVARA, supra note 38.
54. See Shrager, supra note 12, at xxiv.
55. Id.
56. Id. at xxv.
III. RECOVERY OF PUNITIVE DAMAGES FROM AN INTOXICATED OPERATOR

A. In General

To determine whether a plaintiff injured by an intoxicated operator may recover punitive damages, examination of the statutory exceptions is required to ascertain whether the type of conduct from which punitive damages traditionally flow is preserved within any of these enumerated categories. A general review of the subject of punitive damages must be performed before a discussion of this specific issue can be accomplished.

Punitive damages are damages, other than compensatory or nominal damages, which are awarded against a person to punish him for outrageous conduct.57 Generally, punitive damages are given only when malice, fraud, oppression, or gross negligence is present, with the first three of the mentioned conduct encompassing a category characterized by malicious or evil intent.58 A plaintiff may recover punitive damages for malice, fraud and oppression whenever the defendant’s conduct evidences a formed design to injure and oppress and not mere inadvertence.59 The last type of conduct comprises those instances where a defendant is found to have engaged in gross negligence.60 To be termed grossly negligent for the purposes of punitive damages, the conduct must be so blatant as to demonstrate the actor’s conscious or criminal indifference to the safety or rights of others.61 In sum, this sort of conduct

57. Franklin Music Co. v. American Broadcasting Co., 616 F.2d 528 (3d Cir. 1979); Bacica v. Board of Educ. 451 F. Supp. 882 (W.D. Pa. 1978); Smith v. Brown, 283 Pa. Super. 116, 423 A.2d 743 (1980) (to recover punitive damages, the plaintiff must plead outrageous conduct on the part of the defendant more serious than the underlying tort); Focht v. Rabada, 217 Pa. Super. 35, 268 A.2d 157 (1970) (punitive damages are awarded against a person to punish him for outrageous conduct and may be awarded when the act is done with reckless indifference as well as bad motive).


61. Smith v. Brown, 283 Pa. Super. 116, 423 A.2d 743 (1980) (“outrageous conduct,” which is required in order to recover punitive damages, is an act done with a bad motive or with a reckless indifference to the interests of others; “reckless indifference” to the interests of others or “wanton misconduct” consists of intentionally doing an act of an unreasonable character, in disregard of a risk known to the actor or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow); O’Neill v. Keystone Ins. Co., 11 Pa. D. & C.3d 600 (1979) (court stated that it would not, on preliminary objection, hold that punitive damages were not recoverable for willful, inten-
bears a more stringent burden of persuasion than the gross negligence requisite for compensatory damages — an indifference to the rights of others. Indeed, punitive damages are awarded to these plaintiffs because of the defendant’s extreme conduct standing alone. 62

Punitive damages are awarded to the plaintiff over and above full compensation for his injuries for the purpose of punishing a defendant, to teach a defendant to avoid this sort of conduct, and to deter others from engaging in similar conduct. 63 These exemplary damages are awarded only in instances where the plaintiff proves actual loss. 64 Generally, punitive damages bear a reasonable ratio to the actual loss sustained and traditionally are permitted only in tort actions. 65 Pennsylvania has adopted section 908 of the Restatement (Second) of Torts. 66 This section provides:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant. 67

Traditionally, it has been extremely difficult to obtain punitive


63. J. STEIN, DAMAGES AND RECOVERY § 182 at 357 (1972) ("[p]unitive damages are founded in the interest of society, and the award is in the nature of punishment for the wrong-doer and as an example to deter the defendant and others from committing like offenses in the future and are imposed as a civil penalty").

64. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 (1973).

65. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979)(punitive damages must not be disproportionate to the amount of compensatory damages); Hamilton v. Hartford Accident and Indem. Co., 425 F. Supp. 224 (E.D. Pa. 1977)(the Pennsylvania statute providing that no insurance company shall make any misrepresentation as to the term of the policy does not provide basis for claim by an insured for punitive damages for failure of the insurer to make payments under the policy); Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255 (E.D. Pa. 1976)(punitive damages may not be recovered absent a showing of actual damages and, if recovered, must bear reasonable relationship to the amount of actual damages).


damages in Pennsylvania.68 For example, punitive damages are not generally recoverable in a fraud action69 or in a contract action in Pennsylvania.70 Acts of negligence alone are not sufficient for awarding punitive damages.71 Also, under other states' various no-fault statutes, an insurer's improper refusal to pay its insured could result in an award of punitive damages.72 Pennsylvania has not embraced this latter possibility for plaintiff's potential recovery as rapidly.73

B. The Statutory Language

To determine whether a plaintiff may recover punitive damages in an action for personal injuries sustained in an automobile accident resulting from the defendant operator's intoxicated condition, a review of the section 301(a) exceptions to the abolition of tort liability is required.74 Section 301 clearly demonstrates that there are certain situations in which preexisting tort liability is absolutely unaffected.75 This occurs when the threshold requirements specified by section 301(a) are met.76 The No-fault Act permits re-

73. Hamilton v. Hartford Accident & Indem. Co., 425 F. Supp. 224 (E.D. Pa. 1977)(punitive damages were not recoverable for insurer's refusal to pay insured on the ground that the insured was no longer totally disabled as required by the policy for a continuation of disability benefits).
74. See supra note 51 and accompanying text.
76. The term "threshold" refers to the statutory exceptions specified in § 301(a) which must be demonstrated for a victim of a motor vehicle accident to be entitled to maintain a suit based on traditional tort liability. See Shrager, supra note 12, at 189. See also Donnelly v. DeBourke, 280 Pa. Super. 486, 421 A.2d 826 (1980)(the No-fault Act does not, however, automatically require demonstration of attainment of threshold limits as a prerequisite for filing a tort cause of action); Walk v. Russell, 10 Pa. D. & C.3d 330 (1979)(plaintiff's complaint must set forth facts which establish with reasonable certainty that future medical services will exceed the threshold limits of $750 and in order to recover for non-economic detriment, establish impairment of customary activities which are medically determinable).
covery of all special damages which are not recoverable on a first-party basis; that is, the amount of special damages in excess of the statutory maximum economic loss benefits. Economic loss benefits recovery is limited to work loss up to a monthly maximum of $1,000 and an aggregate of $15,000, funeral expenses up to a limit of $1,500, replacement services benefits payable up to a daily maximum of $25 for an aggregate period of 365 days, and survivor's loss up to a limit of $5,000.

Section 301(a)(4) preserves liability for loss which is not compensated due to basic loss benefit limitations. Section 202 lists the basic loss benefits compensable on a first-party basis from the injured insured's own insurer. Section 301(a)(4) then coordinates the receipt of economic loss benefits within the first-party no-fault system and the third-party tort recovery system when this threshold is met. For example, medical expenses are not recoverable in a tort action since they are recoverable without limit on a first-party basis as a basic loss benefit and therefore the threshold cannot be met. In order for a plaintiff injured by a drunken driver to demonstrate a right to punitive damages via section 301(a)(4), he must establish that he exceeds the threshold of recovery permitted on a first-party basis; therefore, the plaintiff must initially estab-

77. See Shrager, supra note 12, at 14.
78. PA. STAT. ANN. tit. 40, § 1009.202(b)(Purdon Supp. 1982-1983). This pertains to recovery on a first-party basis under § 202 of the Act. To the extent not compensable under the Act a claimant must maintain his action, if available, pursuant to § 301. The Shrager treatise notes that "a tort claim for economic loss which otherwise may be maintained under the law will have impressed against it deductible amounts measured by the same maximum limits of no-fault benefits." Shrager, supra note 12, at 14.
80. Id. § 1009.202(c). Replacement services loss includes those "expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the victim would have performed, not for income, but for the benefit of himself or his family, if he had not been injured." Id. § 1009.103.
81. Id. § 1009.202(d); see id. § 1009.103.
82. Id. § 1009.301(a)(4).
83. The Shrager treatise states that:
A . . . common thread in the Act is the manner in which its provisions attempt to coordinate the receipt of economic loss benefits both within the first-party no-fault system and the third-party tort recovery system. In the latter instance . . . coordination works rather neatly. In general, when the Act otherwise applies, no-fault benefits up to the statutory maximums may not be recovered in a tort case unless there is an explicit black letter exception provided in the tort abrogation provisions of the law. Shrager, supra note 12, at 3-4.
84. See Shrager, supra note 12, at 5, 14.
lish that punitive damages are an accrued economic loss. The definitional section of the Act clearly indicates that allowable expenses, work loss, replacement services loss and survivor’s loss cannot be expanded, even with the most liberal construction, to include punitive damages.\textsuperscript{85}

The threshold may also be met by demonstrations that the factual situation falls within the section 301(a) exceptions. The section 301(a)(1) threshold is met when the plaintiff demonstrates that the motor vehicle involved in the accident was not insured.\textsuperscript{86} Section 301(a)(2) recognizes tort liability when the injury arises out of a defect in a motor vehicle and suit is brought against the designer, manufacturer, or repairer, i.e., a products liability situation.\textsuperscript{87} The section 301(a)(5) threshold is met when the accident results in death or serious and permanent injury,\textsuperscript{88} physical or mental impairment which prevents customary daily activities for more than sixty consecutive days,\textsuperscript{89} cosmetic disfigurement which is permanent and severe,\textsuperscript{90} or reasonable and necessary medical and dental services, the value of which is in excess of $750 exclusive of diagnostic x-ray and rehabilitation costs in excess of $100.\textsuperscript{91} This section provides the threshold for general damage recovery, termed as “non-economic detriment.”\textsuperscript{92} While non-economic detriment pertains to the injuries suffered by the plaintiff, the Act’s definitional section declares that this “term does not include punitive or exemplary damages.”\textsuperscript{93} Section 301(a)(6) pertains to motorcycle accidents.\textsuperscript{94}

Thus, the Act’s literal language precludes any action for punitive


\textsuperscript{86} Id. § 1009.301(a)(1). This section declares that “[a]n owner of a motor vehicle involved in an accident remains liable if, at the time of an accident, the vehicle was not a secured vehicle.” Id.

\textsuperscript{87} Id. § 1009.301(a)(2).

\textsuperscript{88} Id. § 1009.301(a)(5)(A).

\textsuperscript{89} Id. § 1009.301(a)(5)(C).

\textsuperscript{90} Id. § 1009.301(a)(5)(D).

\textsuperscript{91} Id. § 1009.301(a)(2)(B).

\textsuperscript{92} The Shrager treatise recognizes that “[g]eneral damages are styled in the No-fault Act as ‘non-economic detriment.’ This term is defined in the law to include all of the elements of general damage recovery previously available with the exception of the punitive or exemplary damages.” Shrager, supra note 12, at 15.

\textsuperscript{93} PA. STAT. ANN. tit. 40, § 1009.301(a)(5)(Purdon Supp. 1982-1983). Section 103 specifically states that noneconomic detriment means “pain, suffering, inconvenience, physical impairment, and other nonpecuniary damage recoverable under the tort law applicable to injury arising out of the maintenance or use of a motor vehicle. The term does not include punitive or exemplary damages.” Id. § 1009.103.

\textsuperscript{94} Id. § 1009.301(a)(6).
damages based on section 301(a) exceptions because the would-be plaintiff cannot demonstrate that he has met the threshold. Accordingly, it may be argued that this potential element of recovery has been abolished by the Act. To avoid such a result, a plaintiff must rely on section 301(a)(3) to recover punitive damages against the intoxicated operator who causes a vehicular collision. This section preserves the tort liability of an individual who intentionally injures himself or others. In Karpecik v. Houck, the defendant was determined to have intentionally driven through a picket line and into the plaintiff's back, injuring her. The court permitted recovery under section 301(a)(3) of punitive damages upon proof that defendant intentionally injured her.

Other conduct cannot be so readily inserted within the parameters of section 301(a)(3). In cases which arose prior to the effective date of the Act, Pennsylvania courts permitted recovery of punitive damages against intoxicated drivers for injury to others even when malice or evil intent had not been proven. In Focht v. Rabada, the superior court decided that driving while under the influence of intoxicating liquor, with its staggering potential for harm and serious injury, demonstrates reckless indifference to the interests of others and is outrageous conduct sufficient to allow the imposition of punitive damages. This language echoes the broad discretion appearing in section 908 of Restatement (Second) of Torts. The Focht court pointed out that the risk to others created by the presence of a drunken driver may be so apparent and the probability that harm will result from his operation of a motor vehicle so unacceptably great, that the outrageous misconduct may be established without reference to intent. That court relied on section 500, comment (d) of the Restatement (Second) of Torts and concluded that "if the conduct involves a high degree of chance that serious harm will result [the] fact that he knows or has

95. Id. § 1009.301(a)(3).
96. 11 Pa. D & C.3d 622 (1979)(plaintiff's complaint demanding punitive damages in an action to recovery injuries sustained in a motor vehicle accident was deemed sufficient where it alleged that the defendant operated his vehicle with knowledge that such injuries were substantially certain to follow, which clearly evidences intentional conduct within the meaning of § 301(a)(3) of the Act).
97. Id. at 623.
98. Id. at 624.
100. Id. at 41-42, 268 A.2d at 166.
101. See supra note 67 and accompanying text.
reason to know that others are within the range of its effect, is conclusive of his recklessness. This language has been held to encompass driving while intoxicated.

The uncertainty in this area results from the interim between the dates of decision for these cases imposing punitive damages on intoxicated drivers and the date of the Act’s enactment, and the conflicting results in lower courts. Additionally, the Pennsylvania Superior Court has not permitted the imposition of punitive damages since the effective date of the Act for reckless or grossly negligent conduct. Ostensibly, the prior right to recover punitive damages against the drunken driver of a motor vehicle no longer exists and any reliance on Focht or section 908 of the Restatement (Second) of Torts is misplaced.

Any attempt to label intoxicated operation of a motor vehicle and subsequent involvement in an accident resulting in injuries or death as intentional injury of others for purposes of section 301(a)(3) is a tortured construction of that section. At best, drunken driving is outrageous conduct rising to a status of gross negligence with entirely separate duties and rights. Although the Pennsylvania Supreme Court has not yet addressed this issue, a few lower court decisions provide the slightest glimmer of hope for our hypothetical plaintiff. Intermediate level appellate courts have yet to accept any proposition suggesting that punitive damages are available for grossly negligent operation of motor vehicles.

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103. Id. at 39, 268 A.2d at 159 (emphasis in original). See Restatement (Second) of Torts § 500 comment d, (1965).

104. See Fugagli v. Camasi, 426 Pa. 1, 229 A.2d 735 (1967)(where the evidence indicated that the defendant was operating his automobile while under the influence of intoxicating liquor and travelling at a rate of speed of at least 90 miles an hour, defendant can be found guilty of wanton misconduct).


106. The trial court in Tcheou v. Weimer, 13 Pa. D. & C.3d 243 (1980), stated: We believe that section 301(b) of the Pennsylvania Act indicates the legislature’s disagreement with the position of the National Conference of Commissioners on Uniform State laws that punitive damages should only by recoverable for purposely inflicted harm. . . . [W]e conclude that section 301 . . . is an attempt to mold that Act to specific public policies of the Commonwealth, to wit: the policy that punitive damages may be imposed on a tortfeasor who acts in a reckless and wanton manner as well as intentionally . . . ."

Id. at 249. See also J. Strin, supra note 63, § 187 at 375 (1972)("Mixing driving and drinking is also a frequent basis for the imposition of punitive damages. However, a claim for exemplary damages on account of intoxication must usually be supported by some other conduct that is grossly negligent . . . . The test seems to be the nature of the wrongful act, rather than the fact of intoxication.").

or that intoxication represents intentional conduct for purposes of section 301 tort abolition. Indeed, recently in Teagle v. Hart,\textsuperscript{108} the superior court rejected a plaintiff's contention that intentionally injuring someone included an injury arising from gross negligence.\textsuperscript{109} The Teagle court concluded that allegations that the defendants operated their vehicles in a wanton and reckless manner and in complete disregard for plaintiff's personal feelings, well-being and safety, which resulted in injury and loss to plaintiff were insufficient to state a case of action for punitive damages under the No-fault Act in the absence of any assertion that the plaintiff had been injured intentionally by the defendants.\textsuperscript{110} Interestingly, the contentions advanced in the plaintiff's complaint, which were held insufficient by the Teagle court, track the language of Focht v. Rabada and sections 500 and 908 of the Restatement (Second) of Torts with unerring accuracy, and were obviously the result of a recognition that these provisions were relied upon in cases in the pre-no-fault era to award punitive damages for nonintentional conduct. As a result, it is clear that an averment of gross negligence is an insufficient basis to structure a claim for punitive damages for an injury arising out of the maintenance or use of a motor vehicle in the 1980's.

C. Judicial Clarification in the Area of Punitive Damages

In Reimer v. Delisio,\textsuperscript{111} the defendant-operator crossed the centerline and collided with the plaintiff's vehicle while traveling in excess of fifty miles per hour on a public street adjacent to a playground.\textsuperscript{112} The plaintiff suffered extensive permanent injuries.\textsuperscript{113} The plaintiff claimed on appeal that the trial court erred in determining that punitive damages were not recoverable for reckless or willful conduct under the No-fault Act, asserting that punitive liability for gross negligence or recklessness could only be abolished by use of language expressly denying any right to punitive damages.\textsuperscript{114}

The Reimer court affirmed the decision of the trial court with an analysis exhibiting exquisite attention to the interaction of section

\begin{itemize}
\item \textsuperscript{108} 279 Pa. Super. 487, 421 A.2d 304 (1980).
\item \textsuperscript{109} Id. at 490, 421 A.2d at 305.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} 296 Pa. Super. 205, 442 A.2d 731 (1982).
\item \textsuperscript{112} Id. at 208, 442 A.2d at 732.
\item \textsuperscript{113} The plaintiff's left knee cap had to be surgically removed. Id.
\item \textsuperscript{114} Id. at 209, 442 A.2d at 733.
\end{itemize}
103 definitions of loss and non-economic detriment,\textsuperscript{115} section 208 declaration of acts insufficient to constitute an intentional act,\textsuperscript{116} and section 301(a) threshold requirements.\textsuperscript{117} Relying on the Act’s expressed purpose and its perception of problems then present in the traditional tort system, the court concluded that section 301 abolished all tort actions arising within the Act’s coverage, including recovery of punitive damages for grossly negligent conduct, and then recreated specifically enumerated and limited exceptions to this abolition.\textsuperscript{118} This construction is accurate because the Act provides for an abolition of tort liability, not a restriction on recovery. While a statute formed with a restrictive lattice would demand a clause expressly affecting punitive recovery, an abolition with enumerated preservations indicates an entirely different intent of the General Assembly.\textsuperscript{119}

Moreover, \textit{Reimer} is supported by the additional fact that the Act itself appears to inform claimants that reliance on the \textit{Focht} rationale is misplaced. Section 208(b), entitled “Intentional Injuries,” states in pertinent part: “An individual does not intentionally injure himself or another individual: (A) merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of causing injury.”\textsuperscript{120} Assuredly, an intoxicated operator reaches his impaired condition as a result of intentionally consuming alcoholic beverages. But whether he appreciates the risk that he might be involved in an accident while motoring home, he does not drink with the intent of injuring others later that evening.\textsuperscript{121}

In \textit{Reimer v. Delisio}, section 301(b) represented the plaintiff’s final stab at salvaging a right to recover punitive damages.\textsuperscript{122} This section creates a concept entitled a “Nonreimbursable tort fine,”

\begin{itemize}
  \item[115.] \textit{Id.}
  \item[116.] \textit{Id.} at 210-13, 442 A.2d 733-34.
  \item[117.] \textit{Id.} at 210-17, 442 A.2d at 733-37.
  \item[118.] \textit{Id.} at 210-11, 442 A.2d at 733.
  \item[119.] Shrager, supra note 12, at 190.
  \item[121.] Reporter Robert Stuart cites statistics indicating one of four drivers on the road at 2 a.m. on any given day is intoxicated but continues to drive, commenting that “[d]runken driving is . . . considered humorous or, at the most, embarrassing sometimes, ‘socially acceptable’ most times, tragic only rarely and unforgivable hardly ever.” The Pittsburgh Press, July 13, 1982, at 1, col. 4. \textit{See also} J. Stein, supra note 63 § 186 at 371 (1972): “In most cases involving personal injuries, proving the defendant’s malice would be difficult, if not impossible. Obviously, most automobile drivers who become involved in accidents do not intend to injure everyone.” \textit{Id.}
  \item[122.] 296 Pa. Super. at 210, 442 A.2d at 734.
\end{itemize}
which under the Act means that:

Nothing in this section shall be construed to immunize an individual from liability to pay a fine on the basis of fault in any proceeding based upon any act or omission arising out of the maintenance or use of a motor vehicle: Provided, That such fine may not be paid or reimbursed by an insurer or other restoration obligor.\textsuperscript{123}

The \textit{Reimer} court recognized the inherent ambiguity present in this provision, especially since "tort fine" represents an unfamiliar concept with no ready characterization.\textsuperscript{124} Judge Cercone,\textsuperscript{125} however, believed that the historically conceived definitions of punitive damages were so precise and universally acknowledged that the General Assembly could not have created a new term in section 301(b) to so ambiguously represent punitive damages, especially since traditional wording was possible.\textsuperscript{126} He placed great emphasis on federal congressional committee reports to conclude that the intended meaning of "tort fine" in no way includes punitive damages.\textsuperscript{127}

\textit{Reimer} observed that various drafts of the National No-Fault Motor Vehicle Act resulted in extensive committee dialogue pertaining to the availability of punitive damages in actions arising under no-fault systems.\textsuperscript{128} One such report discussed the term "tort fine" in depth and provided, in pertinent part:

The development of liability insurance . . . served to vitiate the deterrent function of tort law as applied to the enforcement of safe driving requirements. . . . [T]o the extent that [a large tort] judgment is paid by his insurance company, the driver himself is neither punished nor deterred from similar conduct in the future . . . . Any state . . . may maintain a motor vehicle liability system based on fault so long as no insurer . . . is permitted to pay the 'fine' imposed in any such proceeding . . . . The term 'fine' does not include a device in present law which has, at least in some states, a similar purpose—punitive damages. No award of punitive damages may be entered under Section 354 even in cases in which tort lawsuit liability is preserved. The reason for this exclusion is in part because under some caselaw decision awards for punitive damages may be paid by liability insurance, a practice which vitiates the purpose of a punitive damages

\begin{footnotesize}
\begin{enumerate}
\item 296 Pa. Super. at 205, 442 A.2d at 734.
\item Judge Watkins concurred in the result. 296 Pa. Super. at 222, 442 A.2d at 739 (Watkins, J., concurring).
\item Id. at 211, 442 A.2d at 734 (citing D. DOBBS, REMEDIES § 3.9 (1973); C. McCORMICK, DAMAGES § 77 (1935); Restatement (Second) of Torts § 908 comment 2 (1977)).
\item 296 Pa. Super. at 212-15, 442 A.2d at 734-36.
\item Id. at 212, 442 A.2d at 734. See, \textit{e.g.}, UMVARA, \textit{supra} note 38, § 5(b); the National No-Fault Motor Vehicle Act, S. 354, 93d Cong., 1st Sess. § 210 (1973).
\end{enumerate}
\end{footnotesize}
Additionally, Senator Magnuson, in a subsequent committee report, specifically excepted punitive damages from 'fines' imposed under the No-Fault Insurance Act. Review of this legislative history led Judge Cercone to conclude that the concept of a tort fine is totally distinct from that of punitive damages. Also, believing the tort system to be a most unfair and insufficient means for compensating victims of motor vehicle accidents, he interpreted section 301(a) as primarily seeking to aid victims of accidents by providing quick recompense to victims. Implicitly, he deemed the conduct of the negligent operator to be of no, or meager, concern to the court.

Judge Cercone was swift to point out that the Act did not jettison a right to punitive damages in all situations, noting that this remedy was still available when the defendant intentionally injures another. Accordingly, the superior court approved the lower court’s refusal to allow punitive damages when the plaintiff fails to allege acts which do not constitute intentional conduct.


132. Id. at 209, 442 A.2d at 736. Many authors have recognized this belief. A study by the United States Department of Transportation in 1971 concluded that:

Today, our society need not settle for a reparation system that deliberately excludes large numbers of victims from its protection or gives clearly inadequate levels of protection to those who need it most. With only 45% of those killed or seriously injured in auto accidents benefiting in any way from the tort liability insurance system, and one out of every ten of such victims receiving nothing from any system of reparations, the coverage of the present compensation mechanism is seriously deficient.

UNITED STATES DEP'T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 94 (1971).

133. 296 Pa. Super. at 215-16, 442 A.2d at 736.

134. Id. The court utilized language from W. Rokes, No-FAULT INSURANCE 213 (1971), stating:

The whole thrust of the evolution of automobile insurance, the emergence of financial responsibility laws, and the clamor for no-fault systems, has been to focus on the plight of the insured party in the automobile accident. Punishment of the guilty driver is a secondary consideration and a minor one at that.

Id.

135. 296 Pa. Super. at 217, 442 A.2d at 737.
Arguably, a plaintiff injured by a drunken driver may still aver that defendant’s conduct does constitute intentional conduct for purpose of the No-fault Act because Reimer and Teagle did not specifically involve a drunken driver, only a driver who operated his vehicle in a reckless and grossly negligent fashion. As noted earlier, however, pre-no-fault cases permitting recovery of punitive damages against an intoxicated operator did so while characterizing defendant’s conduct as grossly negligent and/or reckless. In contrast, none deemed it intentional. For a court to characterize this conduct as intentional would be extremely inconsistent in light of judicial precedent and without sound basis. Such an analysis would fly in the face of no-fault’s foundation: examination and compensation of the injured party without regard to fault with only incidental focus on defendant’s conduct.

IV. A COROLLARY PROBLEM: WHETHER AN ESTATE OF A DECEDEDENT MAY RECOVER WORK LOSS UNDER THE ACT

Statutory ambiguity and inconsistent judicial attempts to interpret the Act have created an uncertain right to recovery which surfaces when the hypothetical plaintiff involved in an accident with an intoxicated operator dies as a result of the mishap. The specific question that remains unanswered is whether a decedent’s estate is considered a “survivor” under the Act and is thereby entitled to work loss benefits. If not, then on what statutory justification can such a recovery rest? Also, uncertainty envelops cases involving actions brought by the decedent’s estate because the intermediate courts insist on relying on the Heffner (Pontius) decision, a case almost entirely concerned with recovery of work loss benefits by an individual. Furthermore, a number of superior court cases expound at length on the dependency requirement included in the Act’s definition of “survivor” when the plaintiff is actually the nondependent decedent’s estate.

The controversy in this area stems from the judicial recognition that “work loss”\(^1\) and “survivor’s loss”\(^2\) are independent basic

\(^1\) “Work loss” means:

(A) loss of gross income of a victim, as calculated pursuant to the provisions of section 205 of this act; and

(B) reasonable expenses of a victim for hiring a substitute to perform self-employment services, thereby mitigating loss of income, or for hiring special help, thereby enabling a victim to work and mitigate loss of income.


\(^2\) Id. § 1009.103.
loss benefits creating distinct categories of damages recoverable following a fatal motor vehicle accident when there is no coherent statutory basis for such a division in the No-fault Act’s language. Unfortunately, the judicial interpretations striving to permit recovery of work loss benefits to plaintiffs suing as individuals and as representatives of the decedent’s estate on the theory that work loss benefits are akin to Survival Act damages on a no-fault basis and survivor’s loss akin to Wrongful Death Act damages demonstrate a mistaken reliance on pre-no-fault tort remedies, especially when one recognizes that these same courts have declared that the initial clause of section 301 of the Act explicitly abolished all causes of action arising from the maintenance or use of a motor vehicle. Therefore, only those remedies expressed in the Act’s language exist for victims of a motor vehicle accident. For example, the Act clearly provides for a situation where a wage loss is incurred by a surviving victim. The Act doesn’t ignore accidents which result in fatalities; in fact, the Act defines “deceased victim.” The Act provides survivor’s loss upon death; it is silent, however, with regard to wage loss where the victim dies. The Superior Court and Supreme Court of Pennsylvania have attempted to clarify this issue with unfortunately ambiguous results.

Section 103 of the Pennsylvania No-fault Act defines “survivor’s loss.” The Act limits survivor’s loss recoverable on a first-party basis from the insured’s carrier to $5,000. It also specifically defines survivor to include a spouse, child, parent, brother, sister, or relative dependent upon the deceased for support.

At common law, a right of action for personal injuries did not survive the death of the injured person, and an action for wrongful death was created and permitted by statute in Pennsylvania.

141. Id. § 1009.103.
144. Id. § 1009.202(d).
145. Id. § 1009.103.
146. 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1982).
The common law principle of abatement of actions by death has been abrogated by several statutes. A survival action is distinct from an action for wrongful death. In Pennsylvania, a survival action compensates a decedent's estate for various categories of damage sustained by the decedent and is not a new cause of action, but rather is one which continues in his personal representative. A wrongful death action is designed to remedy the economic impact of the death upon certain statutorily enumerated persons. One of the means for fixing damages in a wrongful death action is the detriment that the plaintiffs have suffered through the loss of the deceased's future earnings. In a survival action, the estate is substituted for the decedent, and its recovery is based upon the rights of action which were possessed by the decedent at his death. Work loss is not a consideration in a common law survival action. A cause of action for wrongful death is possessed by certain

147. See, e.g., Pa. Stat. Ann. tit. 20, § 3371 (Purdon 1971)(all causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death of the plaintiff).


Death Action

(a) General rule — An action may be brought to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no action for damages was brought by the injured individual during his lifetime.

(b) Beneficiaries — Except as provided in subsection (d), the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere. The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person under the statutes of this Commonwealth.

(c) Special damages — The plaintiff in an action under subsection (a) shall be entitled to recover, in addition to other damages, damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by the reason of injuries causing death.

(d) Action by a personal representative — If no person is eligible under subsection
specified relatives of the deceased who recover on their own behalf and not as beneficiaries of the estate. While these two actions are distinct, confusion under the Act arises because certain damages for each action may arise from a common fund — the lost earning power of the decedent.

The No-fault Act provides that survivors of fatally injured victims are entitled to receive basic loss benefits. Work loss is considered under the Act to be a special form of basic loss. While this would appear to be very straightforward and would enable a survivor to recover work loss, a persuasive argument can be made that the Act created two separate classes of accident victims, victims and deceased victims, and that deceased victims, as represented by their estate, are not entitled to work loss benefits.

Support for this theory is derived from a literal reading of two sections of the Act. Initially, section 103 differentiates between victims and deceased victims. Arguably, the General Assembly would have no reason for creating a "victim — deceased victim" definitional dichotomy unless it intended to differentiate benefits for surviving victims and survivors of deceased victims. Secondly, article II of the Act enunciates the "right to benefits." Section 201 within this article declares that "any victim or any survivor of

(b) to bring an action under this section, the personal representative of the deceased may bring an action for the damages expressly specified in subsection (c).


154. One commentator has stated that:
Under the wrongful death statutes, the survivors recover for the injury to themselves because of the death; under the survival statutes, the successors of the victim recover for the injury to the victim.

Viewed from this standpoint, the two actions are quite independent of each other, and there is no reason why both should not be maintained against the tortfeasor. However, the difficulty is that the elements of the two injuries often overlap, so that unless care is taken to distinguish them, a double recovery for the same injury is liable to result.


156. Id. § 1009.202(b).

157. On one hand, if the victim survives, he is entitled to basic loss benefits including: professional medical treatment and care, emergency health services, medical and vocational rehabilitation services; work loss benefits and replacement services loss. Id. §§ 1009.202(b), (c), (d), 1009.103. Alternatively, if the victim dies as a result of the accident, the survivor is only entitled to survivor's loss and funeral expense. Id. §§ 1009.202(a), (d), 1009.103.

158. Id. § 1009.103.

159. Article II encompasses § 201 through § 209. Id. § 1009.201-.209.
a deceased victim is entitled to receive basic loss benefits.” 160 Basic loss benefits include work loss, 161 however, there is no mention of the estate as an entity entitled to recovery under section 201. If the estate relies on section 301(a)(4) to recover in tort, defendant certainly will argue that the estate cannot recover since it has no right to basic loss benefits, let alone the amount in excess of section 202 limitations, because it is not an entity specifically entitled to basic loss under section 201. Basic loss benefits include survivor’s loss, 162 and of course, a “survivor” could recover in tort for work loss not compensated due to section 202 limitations under section 301(a)(4).

Thus, a dichotomy develops. At common law, a survival action allowed the estate to substitute itself for the decedent, and any claims available to the decedent were available to his estate. This notion, applied to the Act, would suggest that the estate could recover the basic loss benefits, including work loss, that are provided to the decedent as a victim. However, the Act provides that one must be a “survivor” of a “deceased victim” in order to recover basic loss benefits, and does not include in its definition of survivor the decedent’s estate. There is no simplistic statutory directive for an estate’s recovery of work loss benefits. There exists, as a result of recent judicial decisions permitting this recovery by a decedent’s estate, a statutory uncertainty.

Prior to the decisions of the Pennsylvania Supreme and Superior Courts in Heffner v. Allstate Insurance Co. 163 and Pontius v. United States Fidelity and Guaranty Co., 164 the Shrager treatise noted that Pennsylvania courts had widely held that work loss benefits were not recoverable on behalf of a decedent. 165 Under this approach, it was argued that “work loss” provides for the recovery of loss of gross income for a victim, while “survivor’s loss” pays for the loss of income for a deceased victim. 166 The Heffner (Pontius) supreme court opinion 167 however, has clearly rejected

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160. Id. § 1009.201.
161. Id. § 1009.103.
162. Id. § 1009.202(d).
164. The superior court decided Pontius in an unreported opinion, based soley upon its opinion in the Heffner case. 491 Pa. at 449, 421 A.2d at 630. Heffner and Pontius were companion cases at the supreme court level. Id. at 447, 421 A.2d at 629-30.
165. See Shrager, supra note 12, at 105.
166. Id. at 106-07.
167. For purposes of this analysis, the author refers to the supreme court’s opinion for these companion cases as the “Heffner (Pontius) opinion.” The reader should realize that
this theory, placing work loss benefits within the ambit of survival action damages and, therefore, recoverable by a decedent’s estate.\textsuperscript{168}

In the superior court \textit{Heffner} decision, Judge Cercone arrived at this conclusion as the result of a three part analysis: reflection on the purpose of the Act,\textsuperscript{169} construction of the Act’s definitional section,\textsuperscript{170} and specific reliance based upon the distinction between the damages recoverable outside of the No-fault Act in a survival action and those recoverable in a wrongful death action.\textsuperscript{171} Judge Cercone concluded that it was error for the Common Pleas Court of Philadelphia to deny recovery for work loss benefits to the wife of a deceased victim where the decedent would have been paid work loss benefits had he lived,\textsuperscript{172} and stated that the insured survivor should be entitled to recovery.\textsuperscript{173}

Allstate argued that the Act’s definitional distinction between victim and deceased victim created separate classes of victims and, therefore, created separate classes of available recovery.\textsuperscript{174} The court rejected the “victim/deceased victim dichotomy” because the dichotomy ignored the impact of the Act’s definition of “injury.”\textsuperscript{175} Section 103 specifies that “injury” describes “accidently sustained bodily harm to an individual and that individual’s illness, disease, or death resulting therefrom.”\textsuperscript{176} Because the Act specifically defines the term “injury” for the purposes of construing the Act, Judge Cercone decided that this word is a “term of art” and all analysis must specifically adhere to the meaning given by the

\begin{footnotesize}
168. 491 Pa. at 459-60, 421 A.2d at 636.
171. \textit{Id}.
172. \textit{Id} at 193, 401 A.2d at 1166.
175. \textit{Id} at 187, 401 A.2d at 1163.
\end{footnotesize}
Act. While admitting that the Act differentiated victims from deceased victims, he pointed out that it did not differentiate injuries from fatal injuries. While Allstate insisted that some sections of the Act applied only to non-fatal injuries, Judge Cercone maintained that those sections were not so limited by their express language. He supported this conclusion with special attention to statutory construction, pointing to the Act's definition of loss as: "accrued economic detriment resulting from injury . . . consisting of, and limited to, allowable expense, work loss, replacement services loss, and survivor's loss." Since injury means death, as well as non-fatal injury, section 103, in Judge Cercone's view, must be construed to mean that work loss is an accrued economic detriment resulting from death. Judge Cercone found it inconceivable that if the legislature intended to establish benefits for two different classes, it would proceed in such an unclear fashion.

In terms of this definitional analysis, there is no major distinction between payments of loss benefits to victims or deceased victims if lost wages become due a victim/deceased victim when an injury/fatal injury is suffered. In the case where the loss is the result of death, Judge Cercone stressed that the work loss is payable to the decedent's estate, because the estate is the successor entity to the individual as a victim. Therefore, under the No-fault Act, work loss operates as a partial replacement for damages in a survival action. When the superior court's Heffner opinion's various references to survival action and wrongful death victim damages are extracted and viewed successively, it is reasonable to argue that the court decided that, in a case of a motor vehicle death, no-fault work loss benefits must be paid to the decedent's estate because

178. Id. at 187, 401 A.2d at 1163.
179. Id. at 188, 401 A.2d at 1163.
180. Id.
181. Id.
184. Id. at 193, 401 A.2d at 1166. The court points out that this conclusion could have been expressed with more apparenan, directing the reader's attention to 17A GA. CODE ANN. § 66-3403b(b)(4) (1977), which specifically entitled survivors of a deceased victim to recover work loss benefits. 265 Pa. Super. at 193, 401 A.2d at 1166.
they are a form of survival action damages.\textsuperscript{185} Judge Cercone noted that in Pennsylvania, damages recoverable in survival actions include the victim's probable lifetime earnings\textsuperscript{186} and in a wrongful death action, they include the present value of the services the victim would have rendered to his family had he lived.\textsuperscript{187} He noted that a problem with Allstate's interpretation of the Act is that it would abolish the right of a deceased victim's estate to recover from a tortfeasor the earnings the deceased victim would have contributed to his estate had he survived.\textsuperscript{188} In order to recover damages for lost earnings in a survival action against a tortfeasor, the estate must prove that the damages have exceeded the limits of the insurance coverage under section 202(b) of the Act.\textsuperscript{189} Under Allstate's construction, no decedent's estate could ever have this opportunity because the estate would never qualify for work loss benefits in the first place.\textsuperscript{190} Furthermore, insurance carriers would contend that providing work loss benefits in addition to survivor's loss benefits to the survivors of deceased victims would result in overlapping coverage and double payments. The Shrager treatise disputes this notion:

\begin{quote}
[I]n the case of work loss, the Act is simply providing a certain measure of survival act damage, on a no-fault basis . . . . With respect to so much of [No-fault] survivor's loss recovery as represents contributions to survivors this is simply no-fault wrongful death recovery. There is in fact no duplication of recovery.\textsuperscript{191}
\end{quote}

Judge Cercone recognized that, except as modified by the No-fault Act, the preexisting substantive and procedural tort law remains in effect, particularly as it applies to death actions.\textsuperscript{192} Section 301(a)(5) of the Act specifically exempts fatal accidents from the general abolition of tort remedy for injuries resulting from the maintenance or use of motor vehicles expressed in section

\begin{flushright}
\textsuperscript{185} 265 Pa. Super. at 190-92, 401 A.2d at 1164-65.
\textsuperscript{189} 265 Pa. Super. at 191, 401 A.2d at 1165.
\textsuperscript{190} Id.
\textsuperscript{191} \textit{See} Shrager, \textit{supra} note 12, at 112.
If Allstate's argument were to survive, Justice Cercone stated that it would have to be concluded that the Act abolished only one particular form of damages previously available in a survivor action—economic loss. This is clearly contrary to the initial decision interpreting the No-fault Act. In Singer v. Sheppard, the Supreme Court of Pennsylvania realized that the legislature sought to preserve all aspects of recovery for economic losses and that the No-fault Act permits recovery without limitation for proven economic loss.

In addition, the Shrager treatise on the Pennsylvania No-fault Act rejected the victim/deceased victim distinction, commenting:

It may be argued that the legislature intended that "deceased victim" would merely be a sub-class of "victim" according to the definitions of the Act and not a separate species of claimants to be treated differently. The legislature specified that "deceased victim means a victim," while it states that "victim means an individual." Surely, if the legislature had intended to separate "victim" and "deceased victim," it would have placed "deceased victim" in its own category in the definitional section (Section 103) in alphabetical order and then it could readily have stated "a deceased victim is an individual."

Even in the definition of "survivor's loss," the legislature treats a deceased victim merely as another category of victim. In fact, the terms are used almost interchangeably in Section 103.

Additional support for the above conclusions is found in the Pennsylvania Supreme Court's view in the Heffner (Pontius) opinion authored by Justice Nix, where the supreme court affirmed the analysis of Judge Cercone and simultaneously decided that the wife in Heffner and the decedent's estate in Pontius could recover work loss benefits. The plaintiff in Pontius was the administrator of the estate of his daughter, who had been killed in an automobile accident. The defendant insurer paid survivor's loss benefits pursuant to section 202 of the Act but rejected the estate's claim for work loss benefits under the Act. The Court of Common Pleas of Dauphin County sustained the defendant's preliminary

196. Id. at 396, 346 A.2d at 901.
197. Shrager, supra note 12, at 109-10 (emphasis in original).
198. 491 Pa. 447, 421 A.2d 629 (1980). See supra note 167 for an explanation of the history of these companion cases.
199. 491 Pa. at 449, 421 A.2d at 630.
200. Id.
objections in the nature of a demurrer to the complaint.\textsuperscript{201} The superior court reversed in an unreported opinion, based solely upon its opinion in the \textit{Heffner} case.\textsuperscript{202} The defendant appealed, and the case was consolidated for argument to the supreme court with that of \textit{Heffner}.\textsuperscript{203} The supreme court affirmed in the \textit{Heffner (Pontius)} opinion, but did so without specifically directing its rationale to the crucial issues in \textit{Pontius}. The supreme court rejected the theory of a deceased victim/victim dichotomy, relying in part on the presence of several non-Pennsylvania statutes where the legislature clearly denied work loss benefits to survivors of deceased victims.\textsuperscript{204} The court decided that “[i]f our legislature had intended to establish different benefits for victims and survivors of deceased victims under the Act, it would have done so in an equally clear and lucid fashion.”\textsuperscript{205}

The result of the \textit{Heffner (Pontius)} supreme court holding is that no-fault work loss is akin to survivor action benefits while survivor’s loss benefits correspond to wrongful death benefits payable to certain statutory family members. Implicit in a determination that work loss corresponds to Survivor Act benefits is the conclusion that these benefits, if available at all, are recoverable by decedent’s estate.\textsuperscript{206} However, the \textit{Heffner (Pontius)} supreme court decision permitted the plaintiff in \textit{Heffner} to recover in her individual capacity, i.e., as a survivor.\textsuperscript{207} To add to the confusion, the \textit{Heffner (Pontius)} supreme court inferentially permitted the decedent’s estate in \textit{Pontius} to also recover these work loss benefits.\textsuperscript{208} The \textit{Heffner} aspect of the holding, that a survivor may recover work loss benefits, necessitates the conclusion that this right is created by the Act and therefore work loss benefits must be a form of survivor’s loss.\textsuperscript{209} With this in mind, for the estate in \textit{Pontius}...
ius to recover work loss benefits, the supreme court must have concluded that a decedent's estate is a no-fault survivor. Both conclusions cannot stand together. Survivors are very clearly listed by the Act. An estate is not included. Alternatively, if the recovery as a survivor stems from a conclusion that work loss is a form of survivor's loss, an estate cannot recover because the Act specifies that only a "victim or any survivor of a deceased victim is entitled to receive basic loss benefits." Other aspects of the Heffner superior court and Heffner (Pontius) supreme court decisions add to the confusion, in that there are repeated statements to the effect that these survival action lost wage damages are payable to "survivors" of the deceased. This is particularly misleading because it is stated in other places that these damages are payable to the decedent's estate. When a decedent has no survivors, this ambiguous language will assuredly result in situations where insurance companies will refuse to pay work loss benefits on the basis that the Heffner aspect requires that they be paid to survivors as defined by the No-fault Act, rather than to the estate, taking the position that the deceased lacked any survivors as defined by the Act. The supreme court decision in Heffner (Pontius) established that survivors of deceased victims are entitled to recover work loss benefits. Unfortunately, the supreme court in the decision failed to resolve the issue of whether a decedent's estate is a survivor and, therefore, entitled to recover work loss benefits.

The superior court in Freeze v. Donegal Mutual Insurance Co. sought to eliminate this muddled aspect of the Act. Indeed, the Freeze court unequivocally arrived at a decision that the estate is entitled to recover work loss benefits. However, this po-

recovery damages is specifically enunciated in § 103 of the Act. Any other conclusion would demand finding that the courts have legislatively supplemented the statutory remedy. See supra notes 30, 137 and accompanying text.

211. Id. § 1009.201(a).
212. 265 Pa. Super. at 184, 401 A.2d at 1161; 491 Pa. at 459-60, 421 A.2d at 636.
214. 491 Pa. at 460, 421 A.2d at 636.
215. Id.
217. Judge Hester noted that the supreme court's opinions in Heffner (Pontius) "concerned only the effort of the spouse of the deceased victim to collect work loss benefits. His [the decedent's] estate was not a party." Id. at 1006 (Hester, J., dissenting).
218. Id. at 1004. The representative of the estate of the deceased victim sought to recover work loss benefits under the No-fault Act. The Court of Common Pleas of York
position is extremely susceptible to analytical attack. In the Freeze case, the decedent was an eleven year old male. The decedent’s father brought this action against the no-fault carrier on the family automobile as representative of the estate. The no-fault insurer provided funeral benefits due under the insurance policy, but refused to pay work loss benefits. The carrier argued that a decedent’s estate is not allowed to recover work loss benefits, asserting that work loss benefits may be recovered only by the statutorily defined class of survivors. Also, the carrier maintained that any attempt to ascertain the amount of future loss incurred due to the loss of a child demanded unacceptable speculation.

The trial court utilized the basic character of survival statutes, noting that the plaintiff, as representative of his son’s estate, assumes the role of the deceased victim, and accordingly denied recovery of work loss benefits on the basis that an estate is not a no-fault statutory survivor. On appeal, the superior court emphasized that the Heffner (Pontius) supreme court decision, while not directly addressing the question whether a deceased victim’s estate may recover work loss benefits under the No-fault Act, affirmed the Pontius aspect where the plaintiff was the administrator of the decedent’s estate. The Freeze court inferred that the Heffner (Pontius) supreme court affirmed sub silentio the superior court’s decision in Pontius, allowing a deceased victim’s estate to recover under the Act. Perhaps this is a correct holding. However, the superior court relied on this naked dictum and did not advance any justification for adding the decedent’s estate to section 103 survivors entitled to survivor’s benefits. The superior court provided

County sustained the insurer’s preliminary objections, but granted leave to amend. By agreement of counsel, the original argument in the case was stayed pending the decision in Heffner (Pontius). Id. at 1001.

219. Id. at 1001.
220. Id.
221. Id.
222. Id. Pa. Stat. Ann. tit. 40, § 1009.103 (Purdon Supp. 1982-1983) specifies that survivors include “(A) spouse; or (B) child, parent, brother, sister or relative dependent upon the deceased for support.”
223. 447 A.2d at 1001.
224. Id. at 1002.
225. Id. at 1004.
226. Id.
227. Id. The Freeze superior court also did not state that survivors alone are entitled to work loss benefits. Therefore, this author suggests that the superior court has relied on the Heffner (Pontius) supreme court opinion as a basis for granting recovery of work loss benefits to an estate, but ignores the one clear aspect of Heffner (Pontius); that work loss benefits are recoverable by a survivor. These are incompatible aims. See supra notes 226-
no rationale in relying on a supreme court decision which does not specifically address the question of recovery of work loss benefits by a decedent’s estate.

Shortly after the Freeze decision, the superior court drafted a similarly confusing analysis in Chesler v. Government Employees Insurance Co.\(^\text{228}\) In Chesler, the plaintiff brought suit as administrator of the decedent’s estate.\(^\text{229}\) First, the Chesler court\(^\text{230}\) declared that the estate was entitled to work loss benefits on the basis of its holding in Freeze.\(^\text{231}\) Then, with striking inconsistency, the Chesler superior court engaged in lengthy analysis determining that a mother need not establish dependency to demonstrate entitlement to survivor’s loss benefits and awarded survivor loss benefits to the plaintiff, ignoring the fact that they had based the first part of their opinion on the status of the plaintiff as a representative of the decedent’s estate.\(^\text{232}\)

While the second portion of the opinion interpreting the definition of survivor manifests correct statutory construction,\(^\text{233}\) the Chesler court ignored the fact that the plaintiff in this instance brought suit as administrator for the decedent’s estate.\(^\text{234}\) Note that Freeze involved a father’s action as administrator and no

\(^{228}\) Id. at 1081. In Chesler, the decedent’s mother, as administrator of the estate of an unwed physician killed in an automobile accident, brought an action to recover work loss benefits and survivor’s loss benefits. The trial court denied recovery, declaring that the plaintiff failed to establish dependency upon her son for support. Id.

\(^{229}\) Id. at 1081. In Chesler and Freeze, the same six superior court judges rostered the majority: President Judge Cercone, and Judges Cavanaugh, Wickersham, Beck, Montemuro, and Popovich. Judge Hester dissented in each case.

\(^{230}\) 448 A.2d at 1081. The Freeze court wrote: “[w]e hold today that the estate of a deceased victim is entitled to recover work loss benefits under the No-fault Act.” 447 A.2d at 1004.

\(^{231}\) Id. at 1081. Judge Cercone utilized the “last antecedent rule” to interpret the § 103 definition of survivor. Id. Accordingly, he read “dependent” as modifying “relative” alone, and not child, parent, brother, and sister. Id. Black’s Law Dictionary defines the “last antecedent rule” as follows:

A canon of statutory construction that relative or qualifying words or phrases are to be applied to the words or phrases immediately preceding, and as not extending to or including other words, phrases, or clauses more remote, unless such extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act.


\(^{232}\) 448 A.2d at 1084-85.

\(^{233}\) Id. at 1083. Judge Cercone utilized the “last antecedent rule” to interpret the § 103 definition of survivor. Id. Accordingly, he read “dependent” as modifying “relative” alone, and not child, parent, brother, and sister. Id. Black’s Law Dictionary defines the “last antecedent rule” as follows:

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\(^{234}\) See supra note 229 and accompanying text.
mention of dependency was present. This anomaly unfortunately places insurance carriers in a position where they must pay both work loss benefits and survivor's loss benefits to an estate, as in Chesler.236 The insurer cannot rely on the literal language of the statute defining survivors and specifying the right to benefits due to the Freeze and Chesler decisions which supplement Heffner (Pontius) and create the remarkable result that both decedent's estates and survivors are entitled to work loss benefits. Such an evolution of the No-fault Act is supported neither by the Act's language nor by existing Wrongful Death and Survival Acts. The beneficiary is in the enviable situation where he may sue for work loss benefits by bringing either a survivor's action in his individual capacity or as a representative for the decedent's estate.240

Judge Hester dissented in the Freeze and Chesler decisions. In both decisions, Judge Hester noted that the majority failed to distinguish between the plaintiff as a parent of the deceased victim, and the parent as an administrator of his estate. He termed any discussion of dependency irrelevant to the action because the estate, rather than the mother, is the plaintiff. Judge Hester found it inconceivable that the majority ignored something as obvious as the distinction in bringing suit as an individual as opposed to the estate.

235. See supra notes 226-31 and accompanying text.
236. 448 A.2d 1080 (Pa. Super. 1982). After concluding that an estate can collect work loss benefits, the superior court determined that the appellant, here the decedent's estate, is also entitled to survivor's loss, even though mentioned nowhere in the statutory definition of survivor. Id. at 1081-82. The Chesler court's interpretation of the Act is astonishingly inaccurate. For a more coherent approach, see Judge Hester's dissents, analyzed in this comment at supra note 241-49 and accompanying text.
237. See supra note 222.
239. See the majority's opinion in Freeze, where this result is clearly prescribed. 447 A.2d at 1004.
240. See, e.g., Miller v. United States Fidelity and Guar. Co., 452 A.2d 16 (Pa. Super. 1982). In this case, the administrator of the decedent's estates sought payment of "work loss benefits" pursuant to the No-fault Act. The insurer refused payment of the claim on the theory that work loss benefits are payable only to spouses or dependent relatives of deceased victims. The lower court granted the insurer's motion for summary judgment on this basis. The plaintiff asserted that "all deceased victims are entitled to recover work loss benefits regardless of who asserts the claim." To demonstrate the ambiguity of the Act's language, Judge Popovich commented that an equal number of Pennsylvania courts had embraced both positions. This court reversed, declaring that "in the case of a deceased victim the work loss claim is comparable to a survival action and the survivor's loss claim is comparable to a wrongful death action." Judge Popovich continued, "in a survival action the damages are measured by the pecuniary loss to decedent and therefore accrue to his estate." Id.
241. 448 A.2d at 1085 (Hester, J., dissenting); 447 A.2d at 1005 (Hester, J., dissenting).
242. 448 A.2d at 1085 (Hester, J., dissenting); 447 A.2d at 1006 (Hester, J., dissenting).
243. 448 A.2d at 1085 (Hester, J., dissenting); 447 A.2d at 1006 (Hester, J., dissenting).
to as a representative of the estate. He noted that the legislature excluded an estate from the definition of survivor, therefore, under the principle of *expressio unius est exclusio alterius* an estate cannot be considered a survivor. Judge Hester pointed out that the General Assembly sought to provide "the maximum feasible restoration of all individuals injured and compensation of the economic losses of the survivors of all individuals killed in motor vehicle accidents" and, therefore, a claimant must be a survivor as defined by the Act to recover work loss benefits. This writer must agree. The majority advances little justification for their Freeze decision. While relying on the Heffner (Pontius) decision, the majority fails to support its decision in Freeze, or express its reasons for determining Chesler on a separate basis. This type of decision making evokes considerable inconsistency and little support and it can only result in future litigation. Indicative of this, is the fact that on remand, in *Pontius v. United States Fidelity and Guaranty Co.*, the Dauphin County Court of Common Pleas decided that the Heffner (Pontius) opinion did not stand for the proposition that an estate may collect work loss benefits. Furthermore, the superior court, in *Miller v. United States Fidelity and Guaranty Co.*, declared work loss benefits to be a separate form of recovery and not survivor's loss benefits as defined by the Act, and accordingly allowed the estate to recover work loss benefits without a showing of dependency. Conversely, the superior court

244. 448 A.2d at 1085 (Hester, J., dissenting); 447 A.2d at 1006 (Hester, J., dissenting).
245. 448 A.2d at 1085 (Hester, J., dissenting); 447 A.2d at 1006 (Hester, J., dissenting).
246. *Black's Law Dictionary* defines this term as follows:

A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. . . . When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.


247. *See supra* note 245.

248. 448 A.2d at 1086 (Hester, J., dissenting) (quoting PA. STAT. ANN. tit. 40, § 1009.102 (Purdon Supp. 1982-1983)). Judge Hester conceded that the majority interpreted the dependency requirement expressed in the definition of survivor correctly; however, he declared that dependency was not the issue, but rather whether the estate of a deceased victim, by statute, can collect survivors loss benefits under the Act. 448 A.2d at 1086 (Hester, J., dissenting).

249. 448 A.2d at 1086 (Hester, J., dissenting); 447 A.2d at 1009 (Hester, J., dissenting).
251. *Id.* at 433-34.
253. *Id.*
in *Wingeart v. State Farm Mutual Automobile Insurance Co.*, \(^{254}\) determined that the decedent's estate was a survivor and entitled to work loss benefits as such. \(^{255}\) The district court in *Kirsch v. Nationwide Insurance Co.*, \(^{256}\) utilized a third distinct basis for permitting recovery of work loss benefits by a decedent's estate. \(^{257}\) The *Kirsch* court determined that work loss benefits were not limited to statutory survivors, and on that basis allowed recovery. \(^{258}\) These varying rationales illustrate that the *Heffner (Pontius)* and *Freeze* decisions have not produced a consistent rationale for entitlement to work loss benefits under the No-fault Act. What we must seek, as demanded by Judge Hester, is a thorough legal analysis directly addressed to the distinction existing when suit is brought by the decedent's estate and when the action is brought in an individual capacity as a survivor. The current fundamental oversight results in unmanageable problems for insurance carriers in construing their no-fault obligations.

A recognition of the remaining confusion in this area is demanded when these cases are reviewed in a capsule. The *Heffner* decision granted recovery of work loss benefits by an individual suing as a survivor of the decedent. \(^{259}\) Work loss type benefits prior to the No-fault Act were only recoverable by a decedent’s estate in a survival action. \(^{260}\) Therefore, it must be assumed that the *Heffner* court found the right of a survivor to work loss benefits within the Act's parameters. \(^{261}\) Inferentially, work loss benefits are a form of survivor's loss benefits. \(^{262}\) Because the *Heffner (Pontius)* su-


\[255. \] Id. at 41.


\[257. \] Id. at 768.

\[258. \] Id. The *Kirsch* court initially framed the issue before it as "whether these benefits [work loss] were payable only to statutory survivors, requiring proof of dependency." Id. at 767. The *Kirsch* court also restrictively interpreted the *Heffner (Pontius)* opinion as only concluding that work loss benefits are available under the Act upon death of the insured. Id.

\[259. \] See supra text accompanying notes 172, 206-08.


\[262. \] See supra note 219 and accompanying text. See also *Daniels v. State Farm Mut. Auto. Ins. Co.*, 283 Pa. Super. 336, 423 A.2d 1284 (1980). In *Daniels*, the decedent’s wife instituted suit as an individual. The superior court held that *Heffner (Pontius)* did not actually create a new right to work loss benefits, nor redefine survivor’s loss, but only specified
premre court decision dealt almost exclusively with the right of an individual to recover work loss benefits without even minimal attention to the right of a decedent’s estate to such recovery, the basis for the supreme court affirming Pontius sub silentio remained unclear. 263

Eventually, the superior court in Freeze and Chesler held that an estate could recover work loss benefits, deciding that work loss benefits are akin to Survival Act benefits and survivor loss benefits closely related to wrongful death recovery. 264 The court believed that these tort remedies remained even though the Act does not by its language provide a right to benefits by a deceased victim, i.e., a decedent’s estate. 265 However, doesn’t the Act abolish tort remedies, except for those exceptions listed in the section 301 threshold requirements? 266 The Reimer superior court, with Judge Cercone authoring the opinion as he did Freeze and Chesler, unequivocally declared that the Act “explicitly abolished all causes of action falling within the ambit of the Act.” 267 Yet, in the same year, Judge Cercone relied on traditional tort system remedies expressed in the Survival Act upon realizing that the Act did not provide for recovery of work loss benefits by a decedent’s estate. 268 The Act sought to provide stability and a foreseeability of loss for a liability underwriter. 269 This goal is betrayed by the varying opinions.

Further inconsistencies have presented themselves. The Chesler court engaged in a lengthy discussion surrounding the dependency requirement contained in the definition of survivor in an attempt to enable a mother to recover survivor’s loss. 270 An insurer can only be astounded by this digression, especially when it is realized that the plaintiff was the decedent’s estate, not the decedent’s mother. By relying on the preexisting Survival Act, the superior court ap-

that work loss benefits are a separate type of benefit from survivor’s loss. Id. at 338, 423 A.2d at 1286-87. These work loss benefits were recoverable by the mother in her capacity as the decedent’s wife. Id.

263. See supra notes 208-15 and accompanying text.
264. See supra notes 216-39 and accompanying text.
265. See supra notes 139-42 and accompanying text. Also, the title of Article II of the Act specifically states that survivors and victims have a “right to benefits.” Pa. Stat. Ann. tit. 40, § 1009.201 (Purdon Supp. 1982-1983). A deceased victim is nowhere mentioned as possessing a right to benefits.
266. See supra note 51 and accompanying text.
267. 296 Pa. Super. at 209, 442 A.2d at 733.
268. Judge Cercone in Freeze found such a position “legislatively unintended.” 447 A.2d at 1004 (quoting from his Heffner analysis, 265 Pa. Super. at 193, 401 A.2d at 1165-66).
270. 448 A.2d at 1083.
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parently decided that work loss benefits are recoverable by individuals other than statutory survivors since an estate is not a survivor under the Act’s definitional section.271

Conversely, in Wingeart v. State Farm Mutual Automobile Insurance Co.,272 the superior court273 construed the Heffner (Pontius) supreme court decision to require establishment of survivor status in order for a plaintiff to be entitled to recover work loss benefits.274 In Wingeart, the plaintiff was the decedent’s estate.275 The superior court did not attempt to incorporate preexisting tort remedies by references to the Survival Act as was done in Freeze and Chesler.276 The court felt compelled to consider whether the right of the estate to work loss benefits within the parameters of the Act was intended by the legislature.277 Unfortunately, the court concluded that an estate was a survivor under the Act.278 The Wingeart court did not explain how it fit an “estate” into the statutory list of survivors which includes: spouse, child, parent, brother, sister, or relative dependent upon the deceased for support.279 The court mistakenly relied on Freeze and Chesler as support for its finding that an estate was a survivor.280 In fact, while those cases allowed an estate to recover work loss benefits, they did not rely on any section of the Act for such a right and specifically did not hold that a decedent’s estate was a survivor as defined by the Act.281

In light of these incompatible holdings, our discussion next must consider who should be entitled to work loss benefits. The starting point of this search for a coherent approach is the supreme court decision in Heffner (Pontius). The debate in the supreme court over the implications of this decision is not over yet.282 The fact

271. Id. at 1084.
273. The court was rostered by Judges Wieand, Price, and Lipez.
274. 449 A.2d at 41.
275. Id. at 40.
276. Id. at 41.
277. The insurer contended that a decedent’s estate is not a survivor and, therefore, is not entitled to recover work loss benefits under the No-fault Act. 449 A.2d at 41.
278. Id. The court cited Freeze and Chesler as having addressed this issue earlier. Id. at 91.
280. 449 A.2d at 41. The court apparently believed that Freeze and Chesler had concluded that an estate is a statutory survivor.
281. See supra notes 216-40 and accompanying text.
that the discussion by the supreme court was exclusively directed to the right of a survivor to recover work loss benefits that weighs heavily in favor of a conclusion that the decision's holding is solely that work loss benefits can be collected only by those individuals included in the definition of survivors in the No-fault Act. This very conclusion was reached by the superior court in Wingear.

Under this approach, an estate would therefore have to be a statutory survivor to recover work loss benefits. The dissenting opinions of Judge Hester in Freeze and Chesler beckon like an island of judicial clarity, attempting to reclaim lost territory from an ever approaching sea of judicial illogic. Judge Hester interfaced the Act's sections and the legislative dictates with the Heffner (Pontius) decision in a most logical manner in Freeze. He recognized that the supreme court held in Heffner (Pontius) that a sur-

Anfuso v. Erie Ins. Group, 452 A.2d 870 (Pa. Super. 1982). The Shrager treatise points out the error in attempting to analogize work loss benefits with survival act remedies and no-fault survivor's loss with wrongful death act remedies, which is the basis for Freeze, Chesler and most decisions permitting recovery of work loss benefits by an estate, stating:

This approach would be erroneous .... The Wrongful Death Act incorporates by reference the Intestate Act. Under the Intestate Act, a survivor is eligible to share in the distribution if one member of his class (i.e., children of the decedent) was dependent upon the decedent. Under the No-fault Act, relatives other than the spouse can recover only if they, as individuals, can show dependency upon the deceased victim. Also, the persons entitled to recover under the wrongful death statute are more stringently limited than those eligible for survivors loss under the No-fault Act. Therefore, it would be inappropriate to distribute survivors loss under the No-fault Act in the same manner as provided in the wrongful death and intestacy statutes.

Shrager, supra note 12, at 102.

Shrager continues, considering whether traditional Survival Act remedies should be recoverable as work loss under the No-fault Act:

[T]he language of the Act has seemed to refute such an analysis. "Loss in income" which would have been contributed by the decedent prior to death is encompassed by the definition of survivor's loss. Also, the statute provides that survivor's loss shall be paid for the "loss of income of a deceased victim which would probably have been contributed to a survivor or survivors." The statutory definition of "work loss," however, provides for the recovery of "loss of gross income of a victim." The distinction between "victim" and "deceased victim" in the statute has been urged as crucial. Since work loss refers to loss of gross income of a victim, while survivor's loss is loss of income of a deceased victim, they are mutually exclusive. Thus, it has been claimed that the Act's black letter requires that survivor's loss be available for the loss of income of deceased victim, whereas work loss is concerned with the loss of income of one injured but not killed, so that a claim for the latter benefit is not appropriate in the case where death resulted from the injury.

Shrager, supra note 12, at 104-105 (citations omitted) (emphasis in origial).

283. See supra notes 208-15 and accompanying text.
284. See supra notes 205-11 and accompanying text.
285. 449 A.2d at 41.
286. See supra notes 241-49 and accompanying text.
287. 447 A.2d at 1005-09 (Hester, J., dissenting).
ivor was entitled to recover work loss benefits. Judge Hester found this conclusion obvious because the Act makes no such provision for this recovery. The legislative intent that only survivors recover for work loss is evident in the Act’s statement of its purpose: “Therefore, it is hereby declared to be the policy of the General Assembly to establish at reasonable cost to the purchaser of insurance, a statewide system of prompt and adequate basic loss benefits for motor vehicle accident victims and the survivors of deceased victims.” Work loss is a form of basic loss benefits. An estate is not a survivor. Any attempt to incorporate the preexisting Survival Act, or expand the definition of survivor to include an estate by the appellate courts symbolizes an attempt to amend the Act. If an estate is ever to recover work loss benefits, the courts must await legislative amendment of the Act to permit same. Until then, only survivors should be entitled to recover work loss benefits with the application of the dependency requirements.

V. Conclusion

Judicial interpretation of the No-fault Act created the confusion in both issues raised by this comment. The Reimer decision correctly characterizes and utilizes the Act’s purpose of compensating injured parties. Virtually no conduct will be termed intentional for purposes of escaping the tort abolition in section 301(a)(3) for one obvious and essential reason: to brand an act causing the injury

288. Id. at 1006 (Hester, J., dissenting).
289. Id.
290. Id. at 1006-09 (Hester, J., dissenting).
292. Id. § 1009.202(b).
293. Judge Hester, noting that the Freeze majority attempts to expand the legislative definition of survivor to include the estate of a deceased victim, commented on the role of the judiciary:

We are often inclined to become “robed legislators.” In the instant case, there is no cause to inject the court into the role of the Legislature. The definition of “survivor” in the statute is clear and precise.

In construing the provisions of the No-fault Act, we must be mindful of our obligations to follow established rules of statutory construction under which we are not permitted to disregard the clear and unambiguous language of the Act on the pretext that its literal interpretation will frustrate its spirit.
447 A.2d at 1008 (Hester, J., dissenting).
294. Id. at 1009 (Hester, J., dissenting).
intentional removes it from the insurance coverage required under section 104. This characterization, while permitting a tort claim based on the section 301(a)(3) exclusion for intentionally inflicted injuries, would conversely mandate as unreachable the only source of funds available for compensation of the injured person when injured by an intoxicated operator and, therefore, defeat the purpose of the Act. All courts must be attentive to these far-reaching implications. Compensation of the injured party must be permitted whenever possible and may feasibly outweigh a determination of liability. Our system must be interpreted to serve the needs of injured victims directly and foremost, rather than focus attention on the conduct of the tortfeasor. The Reimer verdict, in the long run, performs this function by refusing to include gross negligence as conduct falling within the section 301(a)(3) exception. To have permitted this action would potentially allow insurers to refuse to provide first-party benefits to its insureds when injured by an intoxicated operator. Such a result would be startling, tragic, and obviously incompatible with the beneficial aims intended by the General Assembly when the Act was passed. While public sentiment and outcry would appear to demand the imposition of punitive damages, the courts must not supersede the clear directive of the statute: insurance carriers shall not pay that portion of a judgment constituting punitive damages.

The recent decisions pertaining to the recovery of work loss benefits by a decedent's estate do not evince a similar clarity. The court's analysis apparently attempts to compensate similarly, regardless of whether the action is brought by the estate's representative or sought by an individual on his own behalf. As illus-

295. PA. STAT. ANN. tit. 40, § 1009.208(b)(1) (Purdon Supp. 1982-1983) states that: "An individual who intentionally injures himself or another individual is ineligible to receive no-fault benefits for injury arising out of his acts." Id.

296. Professor Jaffe has commented that "the crucial controversy in personal injury torts today is not in the area of liability but of damages. Questions of liability have great doctrinal fascination. Questions of damage — and particularly their magnitude — do not lend themselves so easily to discourse." Jaffe, supra note 2, at 221.

297. The only section in the Act which focuses on the conduct of the tortfeasor removes the actor from the Act's coverage. PA. STAT. ANN. tit. 40, § 1009.208(b)(1)(Purdon Supp. 1982-1983) states that "an individual who intentionally injures himself or another individual is ineligible to receive no-fault benefits for injury arising out of his acts, including benefits otherwise due him as a survivor." Id.


299. It appeared that the superior court was finally prepared to address this criticism. In Hiers v. Keystone Ins. Co., 454 A.2d 134 (Pa. Super. 1982), the plaintiff was administrator of his son's estate. The court addressed the "proper claimant issue." Id. at 135. The Hiers court recognized that the issue of the distinction between an individual as a survivor
trated, the decisions subsequent to Heffner (Pontius), based upon varying rationales, result in renewed uncertainty. Until appellate courts determine the role of the section 103 definition of survivors and provide on a sound legal foundation how an estate falls within its ambit, any decision providing survivor's benefits to a decedent's estate will appropriately receive resounding criticism because the holdings now in force represent an attempt by the superior court to amend the Act. Until this necessary dialogue occurs, insurers are forced to engage in costly litigation. This result clearly betrays the Act's purpose: to provide efficient compensation of motor vehicle accident victims while avoiding confusion and uncertainty present in the compensation system.

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and the victim's estate had not been addressed. Id. The Hiers court also realized that the issue of dependency had been left unresolved. Judge Johnson stated that, while the Freeze court addressed the proper claimant issue, Freeze did not face the question whether the plaintiff should recover work loss benefits since a father is a statutory survivor. Id. at 136. The plaintiff was the decedent's estate. Id. The proper claimant issue was again decided without determining if an estate is a no-fault survivor.