

SENATE BILL REPORT

ESSB 6508

As of Second Reading

Title: An act relating to changing the class of persons entitled to recoveries under a wrongful death action or survival action.

Brief Description: Changing the class of persons entitled to recoveries under a wrongful death action or survival action.

Sponsors: Senate Committee on Government Operations & Elections (originally sponsored by Senators Fairley, Prentice, Pridemore, Kline, Rockefeller, Ranker, Tom, McDermott, Gordon and Keiser).

Brief History:

Committee Activity: Government Operations & Elections: 1/26/10, 2/02/10 [DPS-WM, w/oRec].

Ways & Means: 2/08/10, 2/09/10 [DPS(GO), DNP, w/oRec].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: That Substitute Senate Bill No. 6508 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Fairley, Chair; Oemig, Vice Chair; Roach, Ranking Minority Member; Benton, McDermott and Pridemore.

Minority Report: That it be referred without recommendation.

Signed by Senator Swecker.

Staff: Sharon Swanson (786-7447)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Substitute Senate Bill No. 6508 as recommended by Committee on Government Operations & Elections be substituted therefor, and the substitute bill do pass.

Signed by Senators Prentice, Chair; Fairley, Hobbs, Keiser, Kline, Kohl-Welles, McDermott, Murray, Oemig, Pridemore, Regala and Rockefeller.

Minority Report: Do not pass.

Signed by Senators Brandland, Carrell, Honeyford, Pflug and Schoesler.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: That it be referred without recommendation.

Signed by Senators Zarelli, Ranking Minority Member; Hewitt and Parlette.

Staff: Steve Jones (786-7440)

Background: At common law, a person's cause of action did not survive the person's death, and there was no right of recovery for a person's wrongful death. The Legislature has provided for such actions through four interrelated statutes relating to wrongful death and survival actions: (1) general wrongful death statute; (2) child death statute; (3) general survival statute; and (4) special survival statute. Wrongful death statutes provide a new cause of action on behalf of specified beneficiaries for damages they suffer as a result of the decedent's death. In contrast, survival actions do not create a new cause of action; rather they allow for the continuation of any causes of actions that the decedent could have brought had he or she survived.

General Wrongful Death Statute. Under the general wrongful death statute, the personal representative of the deceased may bring a cause of action on behalf of specified beneficiaries for damages suffered as a result of the decedent's death. The statute does not specify the types of damages that are recoverable, however case law has established that actual pecuniary losses may be recovered. Pecuniary losses include not only actual monetary losses, but also intangible losses such as the loss of the decedent's support, services, love, affection, care, companionship, society, and consortium.

The wrongful death statute creates two tiers of beneficiaries. The primary beneficiaries are the decedent's spouse or domestic partner and children and they are automatically entitled to recovery under the statute. The secondary beneficiaries are the parents and siblings and they are entitled to recover only if: there are no primary beneficiaries; they were dependent on the decedent for support; and they resided within the United States at the time of the decedent's death. In *Phillipides v. Bernard*, 151 Wn. 2d 376, 88 P.3d 939 (2004), the Washington Supreme Court interpreted the support requirement to mean financial dependence, not emotional or psychological support.

Child Death Statute. The child death statute allows a parent to bring a cause of action for the wrongful injury or death of a minor child if the parent regularly contributed to the child's support, or an adult child if the parent was substantially dependent on the adult child for support. The statute lists the following recoverable damages: medical, hospital, and medication expenses; loss of the child's services and support (contributions the child would have made to the parent's support); loss of the child's love and companionship; and injury to, or destruction of, the parent-child relationship (which includes mental anguish, grief, and suffering).

The action may be brought by either one or both parents, but only one cause of action is created. If the parents are separated or not married to each other, damages may be awarded to each parent separately.

General Survival Statute. Under the general survival statute, any cause of action that the decedent could have brought prior to death may be brought by the decedent's personal representative, and is for the benefit of, and passes through, the decedent's estate.

The recoverable damages for the estate are the pecuniary losses to the estate such as loss of earnings, medical and hospital expenses, and funeral and burial expenses. In addition, the personal representative may recover, on behalf of the same beneficiaries listed under the wrongful death statute, damages for the pain and suffering, anxiety, emotional distress, and humiliation personal to and suffered by the decedent. Under case law, post-death damages for the decedent's loss of enjoyment of life or shortened life expectancy are not recoverable.

Special Survival Statute. The special survival statute provides a cause of action for personal injuries that resulted in the decedent's death. The action may be brought by the executor or administrator of the decedent's estate and is for the benefit of, and is distributed directly to, the statutorily-defined beneficiaries. As in the general wrongful death statute, there are two tiers of beneficiaries. The primary beneficiaries are the spouse or domestic partner and children of the decedent. The secondary beneficiaries are the parents and siblings if they were dependent on the decedent for support and resided in the United States at the time of the decedent's death.

The statute does not specifically list the damages that are recoverable. Under case law, the recoverable damages include the decedent's lost earnings; medical and funeral expenses; and the pain and suffering, anxiety, emotional distress, and humiliation suffered by the decedent. Under case law, post-death damages for the decedent's loss of enjoyment of life or shortened life expectancy are not recoverable.

Summary of Engrossed Substitute Bill: A wrongful death action may be maintained for the benefit of the parents of a deceased adult child if the parents are financially dependent upon the adult child for support or if the parents have had significant involvement in the adult child's life. In every such action the jury may award economic and noneconomic damages as under all circumstances of the case that may, to them, seem just.

Financially dependent for support is defined as substantial dependence based on the receipt of services that have an economic or monetary value, or substantial dependence based on actual monetary payments or contributions.

Significant involvement is defined as demonstrated support of an emotional, psychological, or financial nature within the relationship, at or reasonably near the time of death, or at or reasonably near the time of the incident causing death.

The special survival statute is amended to allow the recovery of noneconomic damages in such amounts as determined by a jury to be just under all the circumstances of the case.

The child death statute is amended to provide that each parent, separately from the other parent, is entitled to recover for his or her own loss regardless of marital status.

The Risk Management Division of the Office of Financial Management is required to report to various committees of the Legislature each December on the incidents covered by the act that involve state agencies. Local risk management pools must report to local government bodies each December on the incidents covered by the act that involve the local government.

The act applies to all causes of action filed on or after the effective date of the act.

A severability clause is added.

Appropriation: None.

Fiscal Note: Available on original bill.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill (Government Operations & Elections): PRO: Many of the changes made in this legislation over the past two years were made at the request of cities in Washington, so it is interesting that the cities now come and make the same objections. This bill allows the cities to bring before a jury the fact that they attempted to take action to address a liability or a situation prior to an accident. This bill is a step towards recognizing the changes in families and society over the past decades. Washington State is one of the very few states that fails to recognize that the relationship between parent and child continues well past the age of maturity. This bill allows the parent of an adult child to seek justice in their child's name. This is not a bill that is about collecting money. In many instances, the provisions of this bill will allow a family to get answers. It's about holding people accountable and knowing what happened and why my child died. It is about preventing future deaths. Is my child's life meaningless because he died at age 19 and not age 17? Because he wasn't married or a father his life and death means nothing legally? Parents need answers. This bill will provide access to answers and accountability. Do the right thing and pass this bill.

CON: This bill increases the exposure to liability for counties and cities. The projection is that this bill will increase, on an annual basis, payouts by city risk pools of \$2 million. This bill does one thing: expands the liability of local jurisdictions. This bill will place city attorneys in a position of waiving the attorney client privilege. An attorney cannot be both an advocate and a witness. This bill also places city and county attorneys in the untenable position of trying to prove that a parent of a deceased adult child did not have significant involvement in that adult child's life. This is an awful, unwinnable position. This bill expands the pool of who can sue, changes the liability, and opens up a huge costs to cities at a time they cannot afford their basic responsibilities, let alone the threat of additional million dollar payouts.

Persons Testifying (Government Operations & Elections): PRO: Anne Millikan, parent; Larry Shannon, Washington State Association for Justice; Joyce Taylor, citizen; David Lord, Disability Rights Washington.

CON: Candice Bock, Bob Christie, Association of Washington Cities; Glen Anderson, Washington State Attorney General; Brian Enslow, Washington State Association of Counties.

Staff Summary of Public Testimony on Recommended Substitute (Ways & Means):

PRO: This legislation applies only to entities that have caused the death of a human being. Washington State is an outlier on this issue; at least 47 other states already recognize this cause of action. The bill only applies if there is no surviving spouse or child of the decedent. The bill does not require any new money in the Liability Account to pay for tort claims against the state; the fiscal impact for this biennium is minimal. The Fiscal Note overstates the impact of this legislation.

CON: This legislation represents a significant expansion of the class of potential tort claimants against state and local governments, at the expense of the taxpayers. The increased costs result from higher legal defense expenditures as well as increased tort payments averaging \$1 million per case. The Fiscal Note relies on extensive data from years of actual tort claims against the state. This data accurately predicts the average value of the tort claims likely to arise as a result of this bill. These are very expensive cases; one \$12 million case is currently on appeal. The bill puts the state's attorneys in the very difficult position of having to argue to a jury that a parent was not significantly involved in his or her child's life. The language of the bill is very vague and will produce unintended liability and damages because judges will have wide latitude under the imprecise language. The Milliman study is a very reliable product produced by a well-respected actuarial firm. The cost to local governments is likely to reach \$4 million annually for increased tort claims, plus the cost of legal defense. The doctrine of joint and several liability means that the taxpayers of local governments will have to bear the lion's share of the judgments although the local government may bear only a small fraction of the legal responsibility.

Persons Testifying (Ways & Means): **PRO:** Larry Shannon, Washington State Association for Justice.

CON: Rene Tomiser, Glen Anderson, Attorney General's Office; Brain Enslow, Washington Association of Counties; Candace Bock, Association of Washington Cities.