

HOUSE BILL REPORT

HB 1135

As Reported by House Committee On:
Civil Rights & Judiciary
Appropriations

Title: An act relating to actions for wrongful injury or death.

Brief Description: Concerning actions for wrongful injury or death.

Sponsors: Representatives Santos, Jinkins, Gregerson, Valdez, Pollet, Lovick, Orwall, Kilduff, Riccelli, Peterson, Stanford, Fitzgibbon, Macri, Frame, Slatter, Kloba, Appleton, Tarleton, Goodman, Ormsby and Robinson.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/23/19, 2/1/19 [DPS];

Appropriations: 2/20/19, 2/28/19 [DPS(CRJ)].

Brief Summary of Substitute Bill

- Makes a number of changes to statutes governing wrongful death and survival causes of action, including changes to the beneficiaries entitled to recoveries and the damages that may be recovered under these actions.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Jinkins, Chair; Thai, Vice Chair; Goodman, Graham, Hansen, Kilduff, Kirby, Orwall, Shea, Valdez and Walen.

Minority Report: Do not pass. Signed by 3 members: Representatives Irwin, Ranking Minority Member; Klippert and Ybarra.

Minority Report: Without recommendation. Signed by 1 member: Representative Dufault, Assistant Ranking Minority Member.

Staff: Edie Adams (786-7180).

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.

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 types of wrongful death and survival actions: (1) general wrongful death; (2) wrongful death of a child; (3) general survival; and (4) special survival.

Wrongful death actions 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 action that the decedent could have brought had the decedent survived.

General Wrongful Death Action.

Under a general wrongful death action, a decedent's personal representative may bring a cause of action on behalf of specified beneficiaries for damages they suffered as a result of the decedent's death. The statute does not specify the types of damages that are recoverable; however, under case law actual pecuniary losses are recoverable. "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.

There are two tiers of beneficiaries in a general wrongful death action. 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.

Wrongful Death of a Child Action.

The wrongful death of a child statute allows a parent to bring an action for wrongful injury or death of a minor child if the parent regularly contributed to the child's support, or for an adult child if the parent was substantially dependent on the child for support.

The statute lists the following recoverable damages: medical, hospital, and medication expenses; loss of the child's services and 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 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 Action.

Under the general survival statutes, 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 pecuniary losses to the estate such as loss of earnings, medical and hospital expenses, and funeral and burial expenses. The personal

representative also may recover, on behalf of the same beneficiaries under the general wrongful death statute, damages for the decedent's pain and suffering, anxiety, emotional distress, and humiliation. Under case law, post-death damages for the decedent's loss of enjoyment of life or shortened life expectancy are not recoverable.

Special Survival Action.

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 a general wrongful death action, 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.

Recoverable damages under a special survival action are not specified in statute. 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. Post-death damages for the decedent's loss of enjoyment of life or shortened life expectancy are not recoverable.

Summary of Substitute Bill:

A number of changes are made to the statutes governing wrongful death and survival actions, including changes to the beneficiaries entitled to recoveries and the damages available under these actions. In addition, the language of these statutes is updated and restructured.

The act is remedial and retroactive and applies to all claims that are not time barred and all claims that are pending in any court on the effective date of the act.

General Wrongful Death Action.

Beneficiaries. The dependence and residency requirements for secondary beneficiaries (parents and siblings) are removed. A parent or sibling may be a beneficiary of the action if there is no spouse, domestic partner, or child, without having to show dependence on the deceased and residence in the United States at the time of the person's death.

Damages. A specific statement is added that both economic and noneconomic damages are recoverable against the person causing the death in such amounts as the trier of fact determines to be just under the circumstances of the case.

Wrongful Death of a Child Action.

Beneficiaries. Legal guardians are authorized to bring an action for wrongful death of a child. A parent or legal guardian may bring an action for the death of an adult child if the parent or legal guardian has had significant involvement in the child's life. "Significant involvement" means demonstrated support of an emotional, psychological, or financial nature within the parent-child relationship at or reasonably near the time of death, or at or

reasonably near the time of the incident causing the death, including either giving or receiving emotional, psychological, or financial support to or from the child.

A parent or legal guardian may maintain an action for wrongful death of a child only if the child has no spouse, domestic partner, or children, regardless of whether or not the child has attained the age of majority. Each parent is entitled to recover for his or her own loss separately from the other parent regardless of marital status.

Damages. The recoverable damages are revised to specifically include "other economic losses" beyond those listed, as well as loss of the child's emotional support.

General Survival Action.

Beneficiaries. The dependence and residency requirements for secondary beneficiaries (parents and siblings) are removed. A parent or sibling may be a beneficiary of the action if there is no spouse, domestic partner, or child, without having to show dependence on the deceased and residence in the United States at the time of the person's death.

Damages. Language governing recoverable damages is reorganized, and a specific statement is added regarding the estate's ability to recover economic losses.

Special Survival Action.

The personal representative is entitled to bring the action, rather than the executor or administrator.

Beneficiaries. The dependence and residency requirements for secondary beneficiaries (parents and siblings) are removed. A parent or sibling may be a beneficiary of the action if there is no spouse, domestic partner, or child, without having to show dependence on the deceased and residence in the United States at the time of the person's death.

Damages. The damages that may be recovered are specified. In addition to recovering the decedent's economic losses, the beneficiaries may recover damages for the decedent's pain and suffering, anxiety, emotional distress, or humiliation, in amounts the trier of fact determines to be just under the circumstances of the case.

Substitute Bill Compared to Original Bill:

Noneconomic damages under the special survival statute are limited to the specifically listed damages. References to "the jury" are changed to "the trier of fact."

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is prompted by the tragic Ride the Ducks crash that killed and seriously injured many people. The bill fixes two discriminatory flaws in the law. First, some of the victims were foreign students attending school here, and the law bars their nonresident parents from seeking justice on behalf of their children. This restriction was enacted 100 years ago amid the virulent xenophobic attitudes of the time. Washington is the only state that has this discriminatory remnant in its laws. Parents grieving the loss of the children they have entrusted to the care of this state should be able to seek justice for that loss.

The second flaw is that once a child turns 18 years old, parents are barred from seeking redress for loss of the child. Only a tiny handful of states do not provide a remedy in that situation. A parent's love for a child does not diminish when the child turns 18. A young man was wrongfully killed in an apartment fire due to unsafe premises. It is hard to imagine the confusion, terror, and pain he suffered in his last moments of life, and because of Washington's unjust laws, there were no penalties or accountability for the landlord's wrongful actions. Another young man, aged 19, was horrifically killed on his second day at work when the employer put him in a dangerous situation with no training or safety gear. The parents' lives are shattered but they have no right to hold the company accountable, even though it was found to have knowingly violated safety laws.

It is time to join the vast majority of states and hold negligent health care providers accountable for wrongfully killing our adult children. A woman who was a loving daughter walked into a hospital and died two hours later due to lack of proper care, and no one can hold the hospital accountable because she was not married and had no dependents. A dear sister was killed by a doctor who negligently prescribed drugs that resulted in 17 deaths. If these individuals had survived, they could have held the providers accountable, but since they died there is no justice. Negligent providers do not deserve special protections in the law.

The wrongful death and survival statutes are a relic of the nineteenth century. Washington law has failed to keep up with our modern conception of family relationships and accountability for wrongdoers. The purpose of tort law is to provide accountability and bring recognition to the victim's loss. Washington law fails on both counts. Consider those responsible for causing wrongful deaths versus the claims of families who did nothing wrong and will be paying for the rest of their lives. The law should come down on the side of the innocent.

The life of a precious child means nothing under the law unless a parent is dependent on the child. That is a ridiculous and shameful wrong that needs to be changed. There was a tragic case where a father, his wife, and child were killed when a concrete barrier crushed their vehicle. This was a shocking and preventable tragedy, but the contractor at fault only had to pay small fines and was able to continue in business. The family's lives were turned upside down, but they had no right to seek justice. A young woman with a bright future who devoted herself to helping others died through the negligence of a bus driver, but there is no recourse in the law for her parents. When parents lose a child, they lose their future and the grief is crushing. It is time for lawmakers to champion the rights of grieving families and stop protecting those responsible.

(Opposed) Hospitals provide important care to our residents and are engines of our local economies. There is a perception that hospitals are financially healthy, but many are not. Many rural hospitals have unhealthy or even negative profit margins. Rural hospitals serve remote locations and provide critical care to a vulnerable population. The increased legal bills and liability will have a detrimental impact on rural health care. The bill allows anyone in the decedent's estate to sue and expands the categories of damages. This could dramatically expand liability, and it is the hospitals that pay the largest share. Under joint and several liability, the hospital can be forced to pay the entire award even if it is only 1 percent at fault. Hospitals are often named in suits not because they did wrong but because of the perception they have deep pockets. There is support for removing the residency requirement but not the rest of the bill.

Current law has provided a stable paradigm for the health care industry and this bill, with its drastic expansion of liability, will upset that balance. The harm caused by this bill is not just the extra 20 percent increase in cases but also the destabilizing environment that will result. Physicians need predictability. The bill will exacerbate an already stressed workforce and shortage of physicians in the state and could cause further market consolidation.

The bill will result in an unwarranted expansion in damages. One section states that a party may recover any noneconomic damages personal to the decedent, including listed damage. This could dramatically expand damages beyond what is currently allowed. The definition of "significant involvement" is nebulous and will result in more lawsuits. The increased costs from this bill include not just damages but also the significant costs of defending the suits.

The opposition from the cities and counties is not related to the policy but rather to the inherent unfairness of joint and several liability which allows an entity that is 1 percent liable to have to pay 100 percent of the damages. Cities and counties do not object to paying damages if they do something wrong, but they should only have to pay their share. Cities and counties need predictability, but there is no way to plan because it is unclear how many lawsuits could be filed if the bill were to pass.

Cities are stewards of public resources, and they are faced with the same societal and fiscal issues as the state. They provide important services to the public and at times engage in inherently dangerous activities. Joint and several liability makes it extremely difficult for cities to budget and predict their future, especially with the retroactivity language. There is no way to plan because it is unclear how many lawsuits could be filed if the bill were to pass.

The opposition from counties is not to the policy of the bill. The concern is purely with the financial impact. Counties are taxpayer funded, and they have to budget with fixed revenue sources that are limited by the state. Most counties combine to form a risk pool, which has seen significant increases in costs of 20 percent or more over the years. It is becoming more challenging to get insurance, and expansion of the statute will further increase costs. The retroactivity language in the bill is concerning because every year stands on its own when the program is funded and claims from previous years could have a significant impact.

Persons Testifying: (In support) Representative Santos, prime sponsor; Larry Shannon, Washington State Association for Justice; Gerry Gibson; Bonnie Gibson; Rhonda Nissan; Jeff Chale; Dolly Chale; Rhonda Ellis; Joel Rosas; Deanna Hogue; and Alan Hogue.

(Opposed) Jaelyn Greenberg and Kathryn Kolan, Washington State Hospital Association; Jennifer Burkhardt, Olympia Medical Center; Maggie Sweeney, Washington Defense Trial Lawyers; Sharon Swanson, Association of Washington Cities; Mike Hoover, Washington State Association of Counties; and Derek Bryan, Washington Counties Risk Pool.

Persons Signed In To Testify But Not Testifying: David Lord; and Sarah Locke.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Civil Rights & Judiciary be substituted therefor and the substitute bill do pass. Signed by 17 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Cody, Dolan, Fitzgibbon, Hansen, Hudgins, Jinkins, Macri, Pettigrew, Pollet, Ryu, Senn, Stanford, Sullivan, Tarleton and Tharinger.

Minority Report: Do not pass. Signed by 12 members: Representatives Bergquist, 2nd Vice Chair; Stokesbary, Ranking Minority Member; Caldier, Chandler, Dye, Hoff, Kraft, Mosbrucker, Schmick, Springer, Steele and Ybarra.

Minority Report: Without recommendation. Signed by 3 members: Representatives MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Sutherland.

Staff: Meghan Morris (786-7119).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Civil Rights & Judiciary:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill addresses two major flaws. First, the day a child turns 18 years old, the law fails to recognize their value as part of a family. The law does not recognize a parent's ultimate loss and there are no actions if the child is an adult. Secondly, the law prohibits actions by nonresident parents of the United States. This law is old and outdated. Washington is the only state in the country that still has a residency requirement and one of few states with a prohibition against a parent seeking justice. This bill is about accountability

and redress: accountability for the person who caused the harm, and recognition of redress for families that suffer the ultimate loss.

The life of a precious child means nothing under the law unless a parent is dependent on the child. The law is a ridiculous and shameful wrong that needs to be changed. There was a tragic case where a father, his wife, and his child were killed when a concrete barrier crushed their truck. This was a shocking and preventable tragedy, but the contractor at fault only had to pay small fines and was able to continue in business. The family was left with no voice, rights, or protection. Another young woman suffered a coma and death from medical negligence, and nobody was held accountable. A young woman with a bright future died after being struck by a bus driver who was driving under the influence, but there is no recourse in the law for her parents. Another young woman was hit by a car the night before her twenty-ninth birthday as she was crossing inside the crosswalk. The man who hit her is not even held accountable to pay for her burial costs. This law discriminates against families and vulnerable adults. The experience of burying your own child is the ultimate worst. When a parent loses a child, they lose their life's work and future. The grief is crushing. It is time for lawmakers to champion the rights of grieving families and stop protecting those responsible. How can this law possibly exist in the state of Washington?

Regarding the fiscal note, money is only paid when the entity is responsible and, but for their actions, the death of another human being would not have occurred. This bill weighs the competing interests of the families who suffered the ultimate loss against those who are responsible for that loss. Washington law has inflicted that burden on the families since statehood, which is backwards. This bill reflects the real Washington values.

There should not be amendments to create special protections for wrongdoers currently not held accountable under the law. Joint and several liabilities ensure that all parties responsible for the death of an innocent child are held accountable and that the victims are not victimized a second time by granting special protections for negligence. Each case should be carefully considered by a judge and a jury—a legal right other Washington families have. Everybody should be equal under the law, but when it relates to wrongful death from negligence, they are not. It is time for Washington to do its part and reform this immoral and unjust law.

(Opposed) The bill expands damages and the allowable beneficiaries from just the primary and secondary beneficiaries under the statute to include the estate of the deceased, even if no primary or secondary beneficiary is available to bring the claim. To balance interests, each defendant should be responsible for their own proportionate share of the fault, not for the entirety. Even when states and cities are not found liable, they still have to pay defense costs. The Office of the Insurance Commissioner has collected medical malpractice data since 2010; between 2013 and 2017, insurers and self-insurers paid about \$31 million in plaintiff's verdicts. In contrast, defending those lawsuits cost \$70.6 million. It costs 2.3 times more to defend an action than it does to ultimately pay. The reasoning behind changing the joint and several portion of the bill is not so anybody is held less accountable; it is so they are only held accountable for their proportional fault. Right now in joint and several liability, the defendant may have to pay more than what they were held to be responsible for. This bill would disproportionately increase litigation defense costs and liability exposure.

This legislation functionally overturns two seminal state Supreme Court cases that deal with the death of adult children. Those were cases fully argued to completion and represent settled law in Washington. These cases should be considered before adopting this legislation, particularly for those lawyers who defend public entities. The existence of joint and several liability frequently results in public defendants paying substantially more than their portion of fault, because defendants are judgment-proof or do not have resources.

There is not opposition from cities and counties related to the larger policy issue, but rather to the joint and several liability and how it is inherently unfair. A city could be found minimally liable, yet be in a position of paying 100 percent of a judgment. This is not only inherently unfair, but also very difficult for stewards of public resources to plan for the fiscal impacts, especially with the retroactivity language. It is challenging to figure out future costs because it is unclear how many lawsuits and claims could be brought under this bill. Local governments should be held responsible, but only proportionally to the amount of fault. There should be ways to mitigate liability, whether through proportional liability caps or other means. Local governments, like the state, are often self-insured, so tort payments are essentially payments of taxpayer money.

The fiscal note assumes a 20 percent increase in the number of death claims and suits for the state. The number of plaintiff's cases and related costs are also expected to increase by 20 percent. Additionally, there would be similar fiscal impacts to the medical community. Hospitals are the proverbial "deep pockets" and are disproportionately impacted by the medical liability system.

Persons Testifying: (In support) Larry Shannon, Washington State Association for Justice; Rhonda Ellis; Loli Mahoney; Paul Mahoney; Cindy Locke; Jeff Chale; and Dolly Chale.

(Opposed) Cliff Webster, Washington Liability Reform Coalition; Lisa Thatcher, Washington State Hospital Association; Mel Sorensen, Washington Defense Trial Lawyers; Sharon Swanson, Association of Washington Cities; and Mike Hoover, Washington State Association of Counties.

Persons Signed In To Testify But Not Testifying: None.