

# HOUSE BILL REPORT

## SSB 5163

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**As Passed House:**  
April 15, 2019

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

**Brief Description:** Concerning actions for wrongful injury or death.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Hasegawa, Pedersen, Kuderer, Darneille, McCoy, Saldaña, Dhingra, Frockt, Wilson, C., Lias, Palumbo and Nguyen).

**Brief History:**

**Committee Activity:**

Civil Rights & Judiciary: 3/19/19, 3/22/19 [DP];

Appropriations: 4/1/19, 4/5/19 [DP].

**Floor Activity:**

Passed House: 4/15/19, 61-37.

**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.

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### HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

**Majority Report:** Do pass. Signed by 10 members: Representatives Jenkins, Chair; Thai, Vice Chair; Goodman, Hansen, Kilduff, Kirby, Orwall, Shea, Valdez and Walen.

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

**Minority Report:** Without recommendation. Signed by 1 member: Representative Graham.

**Staff:** Edie Adams (786-7180).

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*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.*

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** Do pass. Signed by 18 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Cody, Dolan, Fitzgibbon, Hansen, Hudgins, Jinkins, Macri, Pettigrew, Pollet, Ryu, Senn, Stanford, Sullivan, Sutherland, 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, Schmick, Springer, Steele, Volz and Ybarra.

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

**Staff:** Meghan Morris (786-7119).

### **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 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.

**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony (Civil Rights & Judiciary):**

(In support) The bill is designed to fill two holes in the state's wrongful death laws. The first hole bars recovery when the family member was not resident in the United States. This issue came to light when the victims in the Ride the Ducks crash were barred from seeking redress because of this archaic law. This law was enacted in the early 1900s to prevent lawsuits for the death of Chinese railroad workers and mine workers. Washington is the only state that still has this discriminatory law.

The second hole that exists in Washington law affects parents of adult children. The law does not recognize the value of children once they turn 18, when in reality those relationships become more valuable over time. The fiscal note indicates estimated costs to the state and local governments, but it is of note that they do not have to pay unless it is found that, but for their actions, the death never would have occurred. Consider those responsible for causing wrongful deaths versus the families who are suffering the ultimate loss. The law should come down on the side of the families.

A young woman who was a giving person and active in her community died as the result of medical negligence when she went to the emergency room. Another young woman who was an advocate and leader for children with disabilities was hit by a car while crossing in a well-lit crosswalk. Their lives were valuable, and their loss was huge for their families and also for the people they inspired. The responsible persons will never be held accountable because the law is discriminatory and treats these young women as if they never existed. When a parent loses a child, they lose a part of their future, and each day becomes a living hell. Parents are shocked when they learn the law does not allow them to hold a negligent person accountable simply because the child is an adult with no spouse or children.

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. The law would hold the driver accountable if any of the young children on the bus had been killed. An adult child has just as much value, but the law discriminates against them. Another young woman was killed on impact in a vehicle crash caused by another driver. That knock on the door in the middle of the night is something a parent will never forget and should never have to experience. Parents think about planning a college graduation, a wedding, a baby shower; they do not think about planning a funeral. When parents lose a child, they lose their future, and the grief is crushing. Opponents would not oppose this bill if they had lost their children through the negligent acts of others.

No one can say the current law is fair or right. It is not just wrong and discriminatory; it is shameful. The bill will extend the same rights to seek justice to all families. It includes a safeguard by requiring that the parent or legal guardian have a substantial relationship with the child. The bill will help low-income folks who have no place to turn. How are they to pay the medical bills and funeral costs, not to mention the outrageous costs associated with

the lawyers that are needed to handle the estate? Opponents are worried about the money they have to pay out, but the loss of life is much more valuable.

(Opposed) This legislation will have a significant fiscal impact on local governments. Because of joint and several liability, governments and other solvent defendants are often included in wrongful death actions in the hopes that some fault will be attributed to them so that the plaintiffs can collect the entire judgment from the government or other solvent defendant. Even if a local government wins a case, it still loses because of high defense costs. In the Ride the Ducks case, the state and City of Seattle were sued for negligence, but the jury found that they were not at fault in any way. However, they had to spend over \$6 million defending the case. Governmental defendants will often settle claims that have no merit in order to control risks associated with joint and several liability. Expanding the scope of beneficiaries expands the number of lawsuits that will be filed. The Legislature should limit the excessive burden it will create for local governments by limiting liability to several liability only.

The bill will have a negative impact on rural hospitals. Rural hospitals are often the safety net provider in their communities. They serve remote locations and provide critical care to vulnerable populations. Maintaining stable finances for rural hospitals is very difficult. Most of them operate on razor-thin or negative margins, and incurring legal bills from malpractice claims can significantly impact those margins. Even when a rural hospital wins a malpractice case, the legal defense costs can be significant. These legal costs can have a big impact on the viability of community hospitals. Costs to rural hospitals will rise under this bill because it expands the categories of people who can bring suit and the types of recoverable damages.

The opposition from counties is not to the policy of the bill. The concern is purely with the financial impact. An internal study shows that costs to counties from this bill could be over \$7.5 million annually. Counties are self-insured, so tort payouts are funded by taxpayer dollars, and counties only have the revenue the Legislature authorizes. Counties do not object to paying damages if they do something wrong, but they should only have to pay their share based on their proportionate share of the fault.

#### **Staff Summary of Public Testimony (Appropriations):**

(In support) Businesses should operate under the assumption that everyone shares the same liability, which would lower risk in the first place. A 17 year old should be treated just like an 18 year old. Single adults should be treated the same as adults who are married or have children. Every organization, business, and local or state government should be equally liable and equally responsible for all people of this state.

People should not speak of children in dollars and cents. Some parents cannot find peace because those who caused the death of their child are not held accountable and are free to continue committing negligence. There is no greater loss of love. One innocent woman who was loved by many was hit by a car inside a crosswalk the night before her twenty-ninth birthday. Another healthy young woman died due to the negligence of medical providers. Another young woman was killed by an impaired bus driver carrying over 30 young kids. Parents are shocked to learn that Washington law does not allow families to hold negligent

people accountable. Washington's existing law treats remarkable people as if their lives have no value. Why would any parent or lawmaker support such an unfair law? What message does it send to families? Washington families need to be treated equally. This bill will prevent wrongful death cases and legal murders. Opponents of this bill would not be opposing it if they lost their child. A "no" vote on this bill is saying to every family that if someone kills their 18 year old or older child, "that is okay." Thoughts and prayers cannot correct such a gross injustice. It is time to reflect the real values of our state and recognize anyone who suffers the ultimate loss. The current law is discriminatory, wrong, inconceivable, and shameful.

On the fiscal note, payments will only occur if the entity is responsible for the death and if but for their actions that death would not have occurred. The Legislature is balancing the rights of families suffering the ultimate loss, who are short changed, versus those responsible for the wrongful death, who are protected by the law. Great work has been done over the years for victims and this will be another step forward. This archaic law needs to be removed from the books.

(Opposed) The changes in this bill broaden the scope of litigation leading to more lawyers, more billable hours, more depositions, and more trial time. If the state or a public entity defends a case, even if it wins, there are large defense costs. Even if the public entity does nothing wrong, it must defend itself or even settle because of the 1 percent threshold in joint and several liability. It is an unwinnable situation and erodes critical resources in already limited systems. Public systems are also at risk of losing reinsurance. The state and City of Seattle were recently found to have no fault on the Ride the Ducks crash, but the state spent more than \$3.5 million and the City of Seattle spent \$2.6 million in legal costs without this broad expansion.

This bill will have a significant impact on local government entities by expanding the class of beneficiaries for whom this litigation can be brought. More lawsuits will be brought against local government entities. The fiscal note assumes a 20 percent increase for the state in both the number of lawsuits and the litigation costs. The costs cannot be discounted because even when the claim against the governmental entity has little to no merit, the defense costs are staggering. Local governments are largely self-insured and are taxpayer funded in one form or another. This will be a mandate where local government will have to come up with the money. Local governments only have the revenue provided by the Legislature, which is often dedicated for specific purposes. Many local governments cannot absorb these costs. Local governments should be liable, but only in proportion of the actual responsibility to the tort.

The increase in claim costs for schools is unprecedented. In fiscal year (FY) 2016-17, state school insurance pool members paid \$33.9 million for their general liability coverage, while in FY 2018-19, members paid \$55.8 million for the same coverage. This is a 65 percent increase over 36 months. The cost inflation of claims for wrongful death for sports concussion claims are costing millions and escalating every year far above the cost of inflation.

This bill will have a negative effect on rural health care, medical centers, and community hospitals, which save lives. The perception that hospitals have deep pockets is false, but they

are consistently seen as entities that can absorb legal costs and awards. Some facilities operate on thin margins, but this bill will increase defense costs by broadly expanding the categories of people who can bring suit and the types of damages they can recover. For instance, this bill proposes that a personal representative of the deceased may recover economic losses on behalf of the deceased and their estate. This goes beyond family members and anyone could have an interest in the lawsuit.

**Persons Testifying (Civil Rights & Judiciary):** (In support) Senator Hasegawa, prime sponsor; Larry Shannon, Washington State Association for Justice; Cindy Locke; Jeff Chale; Loli Mahoney; Dianna Smith; and Charles Thompson.

(Opposed) Jean Homan, Washington Defense Trial Lawyers; Jennifer Burkhardt, Washington State Hospital Association; and Mike Hoover, Washington State Association of Counties.

**Persons Testifying (Appropriations):** (In support) Larry Shannon, Washington State Association for Justice; Cindy Locke; Loli Mahoney; Jeff and Dolly Chale; and Chris Chisholm, Wolf Camp at Blue Skye Farm.

(Opposed) Deborah Callahan, Washington Schools Risk Management Pool; Jennifer Burkhardt, Olympic Medical Center and Washington State Hospital Association; Jean Homan, Washington Defense Trial Lawyers Association; and Mike Hoover, Washington State Association of Counties.

**Persons Signed In To Testify But Not Testifying (Civil Rights & Judiciary):** None.

**Persons Signed In To Testify But Not Testifying (Appropriations):** None.