

# SENATE BILL REPORT

## SB 5163

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As Reported by Senate Committee On:  
Law & Justice, January 24, 2019

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

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

**Sponsors:** Senators Hasegawa, Pedersen, Kuderer, Darneille, McCoy, Saldaña, Dhingra, Frockt, Wilson, C., Liias, Palumbo and Nguyen.

**Brief History:**

**Committee Activity:** Law & Justice: 1/22/19, 1/24/19 [DPS-WM, DNP, w/oRec].

**Brief Summary of First Substitute Bill**

- Removes the requirements that second tier beneficiaries—parents and siblings—reside in the United States at the time of the decedent's death and be dependent on the the decedent for financial support in order to recover in a wrongful death or survival action.
- Clarifies damages that may be recovered in wrongful death and survival causes of action.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5163 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Kuderer and Salomon.

**Minority Report:** Do not pass.

Signed by Senator Wilson, L..

**Minority Report:** That it be referred without recommendation.

Signed by Senators Padden, Ranking Member; Holy.

**Staff:** Shani Bauer (786-7468)

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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.*

**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 five interrelated statutes that create 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 actions that the decedent could have brought had they survived.

General Wrongful Death Action. Under a general wrongful death action, the personal representative of the decedent 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, case law has established that 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 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 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 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 general 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 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 (First Substitute):** 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 retroactive and applies to all claims that are not time barred or pending in court on the effective date of the bill.

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 regardless of whether the parent or sibling resided 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 jury 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. Standards for when a parent may bring an action for the death of a child are revised to remove the requirement that a parent must have regularly contributed to the support of a minor child or been dependent for support on an adult child.

Instead, a parent or legal guardian may bring an action if the parent or legal guardian has had significant involvement in the child's life, including either giving or receiving emotional, psychological, or financial support to or from the child. 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.

Each parent is entitled to recover for their 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 regardless of whether the parent or sibling resided in the United States at the time of the person's death.

*Damages.* A specific statement is added regarding the estate's ability to recover economic losses.

Special Survival Action. In a survival action, the personal representative is designated as 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 regardless of whether the parent or sibling resided in the United States at the time of the person's death.

*Damages.* The damages that may be recovered in a special survival action are specified. In addition to recovering the decedent's economic losses, noneconomic damages personal to the decedent may be recovered in such amounts as determined by the jury to be just under the circumstances of the case. Noneconomic damages are limited to damages for the decedent's pain and suffering, anxiety, emotional distress, or humiliation.

**EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute):** References to jury are replaced with trier of fact throughout, to include bench trials. Noneconomic damages in a survival action are limited to the decedent's pain and suffering, anxiety, emotional distress, or humiliation.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony on Original Bill:** *The committee recommended a different version of the bill than what was heard.* PRO: Over 100 years ago, the state passed a law barring those that are not residents of the United States from bringing a wrongful death settlement. This provision was an amendment to the statute in 1907 and was the result of

foreign workers coming to the United States at that time to work in dangerous and unsafe working conditions. Corporations needed to seek refuge from these lawsuits due to a lack of industrial safety. Today, this type of law would be considered discriminatory or even racist. The accident with the Ride the Duck in Seattle brought this issue to our recent attention. The folks who were killed in that incident were mostly students visiting the United States, and many of the parents were not United States residents. Unfortunately, the time for bringing action on their behalf lapsed after the end of last session.

The wrongful death and survival statutes constitute a very complex overlapping system of statutes that is a relic of the early 1900's. The residency requirement does not continue to exist in any other state and only a handful contain the dependency provision. These provisions do not recognize that children have value to their parents after turning age eighteen. In our society, as we become older, parents actually become more dependent on children. The law does not value that relationship. This bill is needed to recognize a parent's loss and hold the wrongdoer accountable.

The current law discriminates against families who have lost loved ones and have legitimate claims. If the person had survived the negligence, the person would have had a cause of action. It makes no sense that the wrongdoer is less accountable because the person died. This law rewards the entity that is responsible for the death.

When you lose your child you lose part of your future. What they don't tell you is that the grief is crushing. The laws treat us as if our relationship did not exist - that there is no value to what we have lost. We have no resources to provide our child with the emotional legacy that I am confident she would have provided on her own had she been able to survive. If it is true physicians are fleeing the state, they are likely fleeing to states where this archaic law does not exist.

This law is discriminatory to parents of disabled children. If something were to happen to an adult disabled child, there would be no recovery for the parent. It is unlikely that child is going to grow up, have a spouse, and have children. That child remains the center of the parent's life. This becomes another issue of civil rights for a disabled person to prove they have value.

CON: Hospitals are pillars of communities. People have the view that all hospitals are prosperous. However, many rural hospitals do not have healthy profit margins, yet serve 70 percent of the state's population. This bill would challenge the ability of these hospitals to provide adequate services to these communities. This bill goes beyond allowing a cause of action for parents and siblings. Further, it expands the categories of damages that may be recovered. Under joint and several liability, a hospital could be responsible for an entire award even if they are only 1 percent at fault. We support removing the residency requirements, but do not support the remainder of the changes.

Physicians are leaving practice in droves and there is an increase in premature retirement. Physicians are opting to work for large corporations rather than going out on their own due to the exposure to liability.

Section 4(3) - allows for recovery of noneconomic damages suffered by the decedent. The terms "any" and "including" expand noneconomic damages beyond that which is currently allowed. Damages should be an exclusive list consistent with .046.

Our objections are not about who may recover damages but about joint and several liability. An entity that is found to be 1 percent liable can be held liable for the entire judgment. Washington State counties and cities believe this legislation will result in an increase in liability. We don't object to paying when at fault, but object to paying more than our share of responsibility. Local governments face the same crises as that of the state and are struggling with mental health, substance abuse, and culvert liability. Anything that adds to the financial burden is difficult.

Twenty-six of thirty-nine counties combine to form a risk pool. The cost of the pool has gone up every year - 10, 15, 20 percent increases due to jury verdicts and other costs. Expansion of the statute will further increase costs to the risk pool which will eventually be passed onto the taxpayer. We implore the committee to look at creative solutions to mitigate the costs to local government.

**Persons Testifying:** PRO: Senator Bob Hasegawa, Prime Sponsor; Diana Stadden, The Arc Of Washington; Gerry Gibson; Bonnie Gibson; Larry Shannon WSAJ; Rhonda Nissan; Jeff Chale, citizen; Dolly Chale, citizen; Rhonda Ellis, citizen; Joel Rosas, citizen; Alan Hogue, citizen; Deanna Hogue, citizen; Sarah Locke, citizen.

CON: Jaclyn Greenberg, Washington State Hospital Association; Kathryn Kolan, Washington State Hospital Association; Jean Homan, Washington Defense Trial Lawyers; Mike Hoover, Washington State Association of Counties; Sharon Swanson, Association of Washington Cities; Derek Bryan, Washington Counties Risk Pool.

**Persons Signed In To Testify But Not Testifying:** No one.