

# HOUSE BILL REPORT

## 2ESSB 6508

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**As Passed House:**  
March 10, 2010

**Title:** An act relating to wrongful death or survival actions by changing the class of persons entitled to recoveries and by limiting the liability of state and local agencies or political subdivisions in those recoveries.

**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:**

Judiciary: 2/17/10, 2/10/10, 2/22/10 [DPA];

Ways & Means: 2/27/10, 3/1/10 [DPA(WAYS w/o JUDI)].

**Floor Activity:**

Passed House: 3/4/10, 58-40.

Senate Refuses to Concur.

House Amended.

Passed House: 3/10/10, 58-39.

**Brief Summary of Second Engrossed Substitute Bill**

- Makes changes to statutes governing wrongful death and survival causes of actions, including changes to the beneficiaries who are entitled to recover under these actions.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended. Signed by 6 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Kelley, Kirby, Ormsby and Roberts.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Ross and Warnick.

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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.*

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

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## HOUSE COMMITTEE ON WAYS & MEANS

**Majority Report:** Do pass as amended by Committee on Ways & Means and without amendment by Committee on Judiciary. Signed by 14 members: Representatives Linville, Chair; Ericks, Vice Chair; Sullivan, Vice Chair; Cody, Conway, Darneille, Haigh, Hunt, Hunter, Kagi, Kenney, Kessler, Pettigrew and Seaquist.

**Minority Report:** Do not pass. Signed by 8 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Chandler, Hinkle, Priest, Ross and Schmick.

**Staff:** Kristen Fraser (786-7148).

### **Background:**

At common law, a person's cause of action for personal injuries did not survive the person's death, and there was no right of recovery for the wrongful death of a person. The Legislature has provided for such actions through interrelated statutes governing 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 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 action that the decedent could have brought had he or she survived. A special survival action is limited to actions for injuries resulting in death while a general survival action applies to any injury suffered by the decedent prior to death.

### Beneficiaries.

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 minor child's support. If the deceased child is an adult, the parent may bring the action only if the parent was substantially financially dependent on the adult child for support.

Beneficiaries under the general wrongful death statute and the special survival statute are separated into two tiers. The primary beneficiaries are the spouse or domestic partner and children. The secondary beneficiaries are the parents and siblings who 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.

An action under the general survival statute is for the benefit of, and passes through, the decedent's estate. However, the personal representative may recover the decedent's non-economic damages only on behalf of the two tiers of beneficiaries described above.

### Damages.

The wrongful death of a child statute specifies 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 general wrongful death statute does not specify the types of damages that are recoverable. However, case law has established that damages may be recovered for actual monetary losses and intangible losses such as the loss of the decedent's support, services, love, affection, care, companionship, society, and consortium.

The general survival statute provides that the personal representative may only recover the decedent's non-economic damages for pain and suffering, anxiety, emotional distress, and humiliation on behalf of the statutory beneficiaries.

Under case law, 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.

The special survival statute does not specifically list available damages. Under case law, 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.

### **Summary of Bill:**

Changes are made to various provisions of the wrongful death and survival statutes, including changes to the beneficiaries entitled to recoveries under these actions. A process is established under which the state will reimburse local governments for liability and defense costs that are incurred by local governments as a result of the act.

### **Beneficiaries.**

The wrongful death of a child statute is limited to actions for the death of a minor child. Parents who are financially dependent on the minor child or who have had significant involvement in the minor child's life are able to bring the action (in addition to parents who regularly contributed to the support of the child). Parents are entitled to a separate recovery regardless of marital status.

The beneficiaries entitled to recover under the general wrongful death statute are revised. The secondary beneficiaries (parents and siblings) are separated into a second and third tier. Second-tier beneficiaries are the parents if the parents are financially dependent on the adult child for support or had significant involvement in the adult child's life. Third-tier beneficiaries are siblings who are financially dependent on the decedent for support. For survival actions, the secondary beneficiaries (parents and siblings) are similarly separated into a second and third tier.

In an action under the wrongful death statute that is based on a parent's significant involvement in an adult child's life, the liability of a governmental entity is limited to cases

where the entity's negligence was the proximate cause of the claimant's death, and where the entity is not otherwise immune or its liability otherwise limited under statute or case law.

"Financially dependent for support" means substantial dependence based on the receipt of services that have a monetary or economic value, or actual monetary payments or contributions. "Significant involvement" means demonstrated support of an emotional, psychological, or financial nature at or reasonably near the time of death, or the time of the incident causing death. In determining whether a parent had significant involvement in a child's life, the court must consider, but is not limited to, objective evidence of personal, verbal, written, or electronic contact with the child, and in-person interaction with the child during holidays, birthdays, or other events.

#### Damages.

Provisions of the wrongful death and survival statutes are amended to provide more specificity to the damages that are recoverable. These changes include specifically stating that economic and non-economic damages are recoverable and that the damages may be awarded in amounts determined by the jury to be just under all the circumstances of the case. In an action under the general wrongful death statute that is based on a parent's significant involvement in an adult child's life, economic damages include any of the decedent's student loan balances that the parent may be obligated to repay, as a co-signor or guarantor, except for loan balances that are eligible for a complete discharge upon the death of the borrower.

#### Other.

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 legislative bodies each December on the incidents covered by the act that involve the local government.

The act applies to causes of action that are based on deaths occurring on or after the effective date of the act.

**Appropriation:** None.

**Fiscal Note:** Available.

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

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

(In support) This bill is about fairness and justice for families that have suffered the ultimate loss of losing a child. There is a loophole in the law that denies some families access to a legal action to have questions answered. This prevents families from holding the wrongdoer accountable and from finding out the truth about what happened. By expanding these actions, the bill will help achieve justice for families by honoring the memory of beloved

children, demanding responsibility when someone kills another human being, and helping to prevent other families from experiencing similar tragedies. The bill gives the same fair and equal rights that other families have under the current law.

The provision eliminating joint and several liability for governmental entities is not sound policy because it hurts innocent victims and helps those who have engaged in wrongdoing. Joint and several liability applies only where each defendant was found at fault for causing the injury. This standard is met only if the person's death would not have occurred but for the defendant's actions. If one of the at-fault defendants is insolvent, who should bear the burden of that, the innocent victim or the person responsible? Eliminating joint and several liability for the government treats victims of government negligence differently than victims of negligence by private entities or individuals. This raises serious equal protection concerns.

(Opposed) These are heartrending situations, but the law already provides an avenue for family members to seek answers and accountability through a survival cause of action. This bill will add to the burden on Washington taxpayers by millions every year. Washington is more exposed to liability claims than almost all other states because of the broad waiver of immunity and lack of limits on damage awards. Government entities are target defendants because they have money. Even if the government is only a small percentage at fault, it can face payment for the entire damages far in excess of the actual public responsibility.

The provision eliminating joint and several liability for government applies only in a narrow circumstance and is one small step towards more taxpayer fairness. Government should be held responsible, but only for their share of the damages. Even with the limitation on joint and several liability, the bill has significant impacts that will stretch already thin government resources. There needs to be a balance between compensating family members and providing services and fairness to taxpayers. A policy of allowing claims by all parents regardless of the child's age does not represent a proper balance. A better balance would be achieved by limiting these actions to children under the age of 26.

#### **Staff Summary of Public Testimony (Ways & Means):**

(In support) This bill moves recognition of family relationships from the nineteenth century into the twenty-first. Children are no longer chattel. This bill balances the rights of entities who have caused a wrongful death against families who have suffered the ultimate loss. The fiscal note is overstated as the amended bill applies to causes of action filed after July 1, 2011. The loss review panels instituted by the Division of Risk Management have resulted in reduced losses. Payouts from the Liability Account have dropped by over two-thirds, down to \$33 million, and there is a \$67 million fund balance in the account. At most this bill will result in three or four new claims each year. The Milliman report is inaccurate, as it reflects legislation from two years ago. Changes to joint and several liability punish the innocent and reward the guilty. The bottom line in joint and several liability is a proximate cause analysis of whether the wrongdoer caused the harm.

(Opposed) In comparison to other states, Washington has more tort liability exposure. It has no damage caps and no sovereign immunity. Oregon, in contrast, has a hard damage cap. Governments are target defendants because they have money. For example, in a police

pursuit case, it only takes 1 percent of fault to expose the government to liability for 100 percent of the damages. The issue should be holding taxpayers accountable for their percentage of the fault. It is incorrect to say that claims would not increase; the Milliman report indicates the number of new claims that would result. Funding is not provided for the local government liability that will result from this legislation. This is related to discussion of House Bill 3182, the bill that would limit the state's ability to impose unfunded mandates on local government. Counties are engaged in inherently risky activities--costs that go to defend cases arising from these activities could be used for public safety instead. This legislation will be very expensive for local governments. Under joint liability, local governments may be held entirely responsible for a judgment even if they are only 1 percent at fault. Please consider the restrictions on joint liability for governments that were found in the Senate bill.

**Persons Testifying (Judiciary):** (In support) Joyce Taylor; Larry Shannon, Washington State Association for Justice; Marie C. Jubie; and Jenny Wieland, Friends and Family of Crime Victims.

(Opposed) Rene Tomisser, Office of the Attorney General; Brian Enslow, Washington State Association of Counties; Candice Bock, Association of Washington Cities; and Cliff Webster, Washington Liability Reform Coalition.

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

(Opposed) Rene Tomisser, Office of the Attorney General; Brian Enslow, Washington State Association of Counties; Candace Bock, Association of Washington Cities; and Cliff Webster, Washington Liability Reform Coalition.

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

**Persons Signed In To Testify But Not Testifying (Ways & Means):** None.