

HOUSE BILL REPORT

ESHB 1873

As Passed House:

March 14, 2007

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

Brief Description: Changing the requirements for, and recoveries under, a wrongful injury or death cause of action.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Ormsby, Haler, Pedersen, Wood, VanDeWege, Campbell, Flannigan, Kessler, Williams and Lantz).

Brief History:

Committee Activity:

Judiciary: 2/16/07, 2/27/07 [DPS];

Appropriations: 3/3/07 [DPS(JUDI)].

Floor Activity:

Passed House: 3/14/07, 64-32.

Brief Summary of Engrossed Substitute Bill

- Makes a number of changes to the statutes governing wrongful death and survival causes of action, particularly in the areas of the beneficiaries of these actions and the damages that are recoverable.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Lantz, Chair; Goodman, Vice Chair; Kirby, Moeller, Pedersen and Williams.

Minority Report: Do not pass. Signed by 5 members: Representatives Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan and Ross.

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.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Judiciary be substituted therefor and the substitute bill do pass. Signed by 23 members: Representatives Sommers, Chair; Dunshee, Vice Chair; Cody, Conway, Darneille, Ericks, Fromhold, Grant, Haigh, Hunt, Hunter, Kagi, Kenney, Kessler, Linville, McDermott, McDonald, McIntire, Morrell, Pettigrew, Seaquist, P. Sullivan and Walsh.

Minority Report: Do not pass. Signed by 10 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Haler, Assistant Ranking Minority Member; Anderson, Buri, Chandler, Dunn, Hinkle, Kretz and Priest.

Staff: Kristen Fraser (786-7148).

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 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 under the statute only if there are no primary beneficiaries and they are dependent on the decedent for support and resided within the United States at the time of the decedent's death.

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 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: The general survival statute continues any cause of action that the decedent could have brought prior to death. An action under the general survival statute is brought by the decedent's personal representative and is for the benefit of, and passes through, the decedent's estate.

The damages that are recoverable 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 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.

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 number of changes are made to the wrongful death and survival statutes, particularly in the areas of the beneficiaries of these actions and the damages that are recoverable. In addition, the language of these statutes is updated and restructured for clarity.

General Wrongful Death Statute: The general wrongful death statute is amended to specifically state that both economic and non-economic damages suffered by the beneficiaries are recoverable in such amounts as determined by a jury to be just.

In addition, this statute is amended to remove the residency requirement for secondary beneficiaries and to allow a parent to recover as a secondary beneficiary for the wrongful death of a deceased child who had a developmental disability if the parent regularly contributed to the deceased child's support.

Child Death Statute: The child death statute is amended to extend the cause of action to a parent who regularly contributed to the support of either an adult child who is under the age of 26 or a child who had a developmental disability, without requiring the parent to show that he or she was dependent on the child for support.

The child death statute is also amended to provide that each parent is entitled to a separate recovery regardless of marital status.

General Survival Statute: The damages available in a general survival action are amended to specifically refer to economic losses, and to include the ability to recover for a decedent's "loss of enjoyment of life" and "shortened life expectancy." In addition, the current language stating that the damages must be "suffered by" the decedent is removed.

The residency requirement for secondary beneficiaries under the general survival statute is removed. In addition, a recovery may be obtained on behalf of a parent of a deceased child who had a developmental disability if the parent regularly contributed to the deceased child's support.

Special Survival Statute: The special survival statute is amended to specifically provide that economic damages and non-economic damages personal to the decedent may be recovered. Non-economic damages are specifically listed, and include damages for the decedent's loss of enjoyment of life and shortened life expectancy.

The statute is amended to remove the residency requirement for the secondary beneficiaries and to allow a parent to recover as a secondary beneficiary for a deceased child who had a developmental disability if the parent regularly contributed to the deceased child's support.

In addition, the statute is amended to provide that the action may be brought by the personal representative, rather than the executor or administrator.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

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

Staff Summary of Public Testimony: (Judiciary)

(In support) This bill will honor the value of family relationships and how our notion of family has evolved over time. It will update our law to include the complexities of families in our modern society, including the relationship of parents with children who are 18 years of age or older. Why wouldn't the Legislature want to do something that honors and increases the value of families across the state?

Our civil justice system is generally designed to compensate injured persons for the harmful conduct of others and to provide a strong deterrent to reckless and wrongful conduct. Our laws are failing that purpose. We are an outlier among the states as a result of not having punitive damages and because of the anomalies of these statutes. In Washington, to use the

famous words of Dean Prosser, it is still better to kill a person under these laws than it is to seriously injure the person. Justice is denied in our state for these families and parents who suffer the ultimate loss of a child or a family member.

People with disabilities are disproportionately impacted by the inadequacies of our laws because they are less likely to have jobs and less likely to have spouses or children.

We need to make the current wrongful death statute more just so that it allows parents to have their day in court. It is the jury who should decide the value of a lost relationship between a parent and a child. The current law draws an arbitrary line at age 18. It is unconscionable for the state to not recognize that a parent suffers a loss just because the child is 18 years old. All parent-child relationships are valuable and should be recognized as vital in our civil law system.

Words can't do justice to the impact of the loss of a child. It is the ultimate loss. The grief a parent suffers can have devastating impacts on the parent's work, physical health, and marriage. There is also suffering based on the longing for the things that might have been. This bill is necessary to ensure that parents have the right to seek justice and fair compensation on behalf of their children. Society as a whole has a substantial stake in seeking justice whenever the loss of a human life occurs.

(Opposed) This bill will have substantial impacts on liability and could cause an enormous escalation of damages in wrongful death cases. The bill overturns the *Otani* and *Phillipides* decisions. The decisions in those cases did not change the law. Allowing damages for loss of enjoyment of life that isn't actually suffered isn't compensatory; it's punitive.

This bill will impose a substantial and unwarranted expansion of liability for public entities. Smaller governmental entities are already struggling to operate with scarce resources, and the increase in their liability exposure from this bill could be devastating. The state annually defends about 20 to 25 wrongful death cases, and under this bill the potential damages in those types of cases would be substantially expanded.

This bill is a significant backtrack from the medical malpractice compromise that was reached last year and will disrupt the balance that was reached at that time.

Staff Summary of Public Testimony: (Appropriations)

(In support) The state risk management task force examined the situations that give rise to preventable tragedies. In the last couple of years, state tort liability payments have been cut in half. By looking at what went wrong, the review teams established by the task force prevent harm from occurring in the future. This issue is about entities who are legally responsible for harm versus injured families.

(Opposed) This bill affects local governments. The underlying bill attempts to overturn two state Supreme Court cases. Eighteen may be an arbitrary age to end the cause of action for child wrongful death, but what other age could be chosen? Eighteen is the age of majority, the age where a person can enter a contract, vote, and join the military. There are good public

policy reasons to use age 18 as the cut-off for liability under the statute. Many local governments will have wrongful death cases filed against them under this bill. The fiscal impact on local government should be considered. Local governments are unable to change their obligations and conduct, and are opposed to this new liability exposure.

Persons Testifying: (Judiciary) (In support) Representative Ormsby, prime sponsor; Larry Shannon, Washington State Trial Lawyers Association; Mark Strull, Washington Protection and Advocacy System; James Headley, Professor, Eastern Washington University; Suzanne Kirkpatrick; and Bridgett Malmoe.

(Opposed) Mary Spillane, Physicians Insurance and Liability Reform Coalition; Jayne Freeman, Washington Defense Trial Lawyers Association; Rene Tomisser, Office of the Attorney General; Eric Faison, Association of Washington Cities; Cliff Webster, Washington State Medical Association; and Lisa Thatcher, Washington State Hospital Association.

Persons Testifying: (Appropriations) (In support) Larry Shannon, Washington State Trial Lawyers Association.

(Opposed) Cliff Webster, Liability Reform Coalition; Mel Sorensen, Washington Defense Trial Lawyers; and Jim Justin, Association of Washington Cities.

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

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