

# SENATE BILL REPORT

## SB 5747

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As of February 3, 2015

**Title:** An act relating to prohibiting actions for wrongful life and wrongful birth, and expanding the beneficiaries in an action for wrongful death.

**Brief Description:** Prohibiting actions for wrongful life and wrongful birth, and expanding the beneficiaries in an action for wrongful death.

**Sponsors:** Senators Padden and Miloscia.

**Brief History:**

**Committee Activity:** Law & Justice: 2/02/15.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Tim Ford (786-7423)

**Background:** At common law, a person's cause of action for personal injuries does not survive the person's death, and there is no right of recovery for the wrongful death of a person. Washington 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 separate 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 the deceased survived. Under the general survival statute, any cause of action that the decedent could have brought prior to death may be brought by the decedent's personal representative. The special survival statute allows for the continuation of actions for personal injuries resulting in death.

Who May Bring the Action. An action for wrongful death using the general wrongful death statute may only be brought by the personal representative of the deceased. This includes the wrongful death of minors. A spouse who is not the personal representative of the deceased cannot bring a claim for post-death loss of consortium. Under the wrongful death of a child statute, a parent may 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 dependent on the adult child for support.

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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.*

Under the general survival statute or the special survival statute, the personal representative may bring the action. The special survival statute does not require the survivors to establish their dependency.

Beneficiaries. Beneficiaries under the general wrongful death statute and the special survival statute are separated into two tiers. The primary beneficiaries are the spouses or domestic partners and children. 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 U.S. 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 damages that are recoverable under wrongful death and survival actions vary under the statutes and case law.

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 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 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 the damages that may be recovered. 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:** Wrongful life lawsuits are prohibited by a child based on a claim that but for an act or omission the person would not or should not have been born. Wrongful birth lawsuits are prohibited by a parent based on a claim that but for an act or omission the child would not or should not have been born. A person is not prohibited from any civil action for damages based on (1) the failure of a contraceptive method or sterilization procedure; or (2) a negligence action that had tests or treatment been properly provided, the tests or treatment would have made possible the prevention, cure, or amelioration of any disease, defect, deficiency, or handicap. Abortion is not a prevention, cure, or amelioration of any disease,

defect, deficiency, or handicap. The failure or refusal of any person to perform or have an abortion is not a defense in any action and may not be considered in awarding damages.

The beneficiaries in a legal action for wrongful death are expanded to include the parents or personal representative of a deceased child. Damages may include loss of the society and companionship of the deceased person and for destruction of the parent-child relationship.

**Appropriation:** None.

**Fiscal Note:** Requested on January 29, 2015.

**Committee/Commission/Task Force Created:** No.

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

**Staff Summary of Public Testimony:** PRO: Wrongful death statutes need repair. There are glaring inequities. The statute is based on wages and economic loss. A claim may be worth a lot if for brain surgeons or stockbrokers who make lots of money, but teachers don't make a lot and claims should not be based on economic loss alone. Homeless people have no claim. Parents are very emotionally sensitive when told that their child will not be normal. The perception of physicians is that they may be liable if they don't advise of the option for abortion. There is no legal obligation to advise an abortion; the duty is to fully inform the patient. It is the right of the patient to decide the treatment when fully informed. There is no such thing as a wrongful life. Every person has value. The term defective implicitly recognizes a social intolerance. People are terminating 90 percent of children with downs syndrome and where does it stop, who decides what is defective?

CON: The current law creates a fair balance on who should be able to bring these types of claims. Health care providers and local government representatives did a study and found these kind of changes will result in millions of dollars of liability for the state.

OTHER: The wrongful death portion of the bill is good but not the wrongful birth and life portions. Washington is an outlier; wrongful death statutes are based on dependency and courts have interpreted that as only financial dependency. It is unjust because it doesn't recognize the value of a life after age 18. Section 2 is a good start but needs improvement to add a guardian and other family members into the provision. The wrongful life section will give a free pass to a lab that makes a mistake, and it will crush a family with a child that has a defect, and the costs will be passed onto the taxpayer. For genetic defects like a chromosomal translocation, if passed on in an unbalanced form, the child would have a lifetime of profound disability – both mental and physical. The costs of that are not the normal costs of raising a child but only the extraordinary costs. The damages were over \$25 million for the life of the child in the Harbeson case. These claims are extremely rare, only three cases in Washington State. These are insured losses and the negligent party should have to pay rather than shifting the cost to the parents which will just be passed onto the taxpayer. Also, the draft may be creating a cause of action that doesn't currently exist. Any birth of a normal child is a prohibited action, the common law only allows wrongful life and birth lawsuits for defective children. The bill may inadvertently create wrongful life and

birth actions for normal children. The Washington Defense Trial Lawyers needs more time to review the bill before commenting.

**Persons Testifying:** PRO: Jack Connelly, Marshall Casey, Kerry Hooks; citizens.

CON: Cliff Webster, Liability Reform Coalition.

OTHER: Larry Shannon, Tom Vertetis, Peter Meyers, WA State Assn. for Justice; Mel Sorenson, WA Defense Trial Lawyers.