

# HOUSE BILL REPORT

## ESHB 1873

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### As Reported by House Committee On:

Judiciary  
Appropriations

**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, or a survival action.

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

### Brief History:

#### Committee Activity:

Judiciary: 2/1/08, 2/4/08 [DP2S];

Appropriations: 2/8/08, 2/11/08 [DP3S].

### Brief Summary of Third 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 and recoverable damages.

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## HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass. Signed by 7 members: Representatives Lantz, Chair; Goodman, Vice Chair; Flannigan, Kirby, Moeller, Pedersen and Williams.

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

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

### 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

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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 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.

### **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**

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, 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 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 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.

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.

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### **Summary of Second 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.

### **Beneficiary Provisions**

For actions under the general wrongful death statute and the survival statutes, the second tier of beneficiaries (parents and siblings) are separated and a new category of second-tier beneficiaries is added. Second-tier beneficiaries are: (a) parents who are financially dependent on the decedent for support or had significant involvement in the child's life; and (b) a sole beneficiary of the decedent's life insurance if the person had significant involvement in decedent's life. Third-tier beneficiaries are siblings who are financially dependent on the decedent for support.

The cause of action for wrongful death of a child is extended to a parent who had a significant involvement in the child's life, without requiring the parent to show that he or she was dependent on the child for support if the child was an adult.

"Financial dependence" is defined to include dependence based on the receipt of services that have a monetary or economic value, or actual monetary payments or contributions.

### **Damage Provisions**

The general wrongful death statute is amended to specifically state that both economic and non-economic damages suffered by the beneficiaries may be recovered.

The damages available in a general survival action are amended to specifically include recovery for economic losses.

The special survival statute is amended to specifically allow recovery of economic damages, and non-economic damages personal to and suffered by the decedent. Non-economic damages are specifically listed.

### **Other Provisions**

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

The Risk Management Division of the Office of Financial Management (OFM) 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 deaths occurring before, on, or after the effective date of the act only if the cause of action occurred within applicable statute of limitations period.

### **Second Substitute Bill Compared to Engrossed Substitute Bill:**

The engrossed substitute bill extended the wrongful death and survival actions to parents of developmentally disabled children and parents of children under the age of 26. The engrossed substitute bill retained the two tiers of beneficiaries and did not extend these actions to a sole beneficiary of the decedent's life insurance policy. In addition, the engrossed substitute allowed for the recovery of "loss of enjoyment of life" and "shortened life expectancy" under the survival statutes. The engrossed substitute bill did not include the requirement that OFM and local governments report on the incidents covered by the act that involve the state or local governments.

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**Appropriation:** None.

**Fiscal Note:** Available.

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

### **Staff Summary of Public Testimony:**

(In support) The current law discriminates against families and gives a "pass" to the wrongdoer if the victim is a single adult. The bill will make the statutes fair and uniform in their application for all parents who have suffered the death of a child. The current law makes an artificial distinction between parents based on the child's age, and it is unfair that a child's death goes unrecognized because of the child's age and financial independence. The bill only affects those who are responsible for the wrongful death of others. There is an existing body

of case law regarding what "significant involvement in the decedent's life" means, and juries use a common sense approach. A parent who receives services from a child but is not financially dependent on that child cannot recover for the death of that child under current law. The bill is important for people with disabilities.

(Opposed) The bill changes 150 years of established law. The purpose of the wrongful death statutes has always been to replace the income of the decedent to the family. This change in the law will have a significant impact on all government agencies. Policy-makers must consider what the appropriate level of public fiduciary responsibility is for private losses. Large jury verdicts are not uncommon in wrongful death cases. The cost of the bill is about \$1.2 million per case, and the state has about 20 to 25 cases per year. City, county, and state tax resources will be diverted away from other services to the public. Spouses and children of the deceased are primary beneficiaries and allowing more parents to sue will have an impact on those primary beneficiaries. The bill will increase medical liability insurance and it breaches the accord reached two years ago regarding medical malpractice liability.

**Persons Testifying:** (In support) Representative Ormsby, prime sponsor; Edward and Debra Kitson; Josie Armantrout; Joyce Taylor; Susan Maddler; Larry Shannon; and David Lord.

(Opposed) Stew Estes, Washington Defense Trial Lawyers; Dick Zall, Association of Washington Cities, City of Yakima; Gayla L. Gjertsen and Rashi Gupta, Association of Washington Counties; Rene Tomisser, Office of the Attorney General; and Mary Spillane, Washington State Medical Association, Washington Society of Healthcare.

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

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The third substitute bill be substituted therefor and the third substitute bill do pass. Signed by 19 members: Representatives Sommers, Chair; Dunshee, Vice Chair; Cody, Conway, Darneille, Ericks, Fromhold, Grant, Green, Haigh, Hunt, Kenney, Kessler, Linville, McIntire, Morrell, Pettigrew, Seaquist and Sullivan.

**Minority Report:** Do not pass. Signed by 11 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Haler, Assistant Ranking Minority Member; Anderson, Chandler, Hinkle, Kagi, Kretz, Schmick, Schual-Berke and Walsh.

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

### **Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Judiciary:**

The retroactivity provision is removed. The bill applies only to deaths on or after the bill's effective date.

**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony:**

(In support) No one is adversely affected by this bill who has not caused the wrongful death of a human being. The fiscal note does not reflect the current costs. Section 6, requiring reporting to the Legislature, is important. Earlier legislation established loss review teams but those reports aren't read this section will shine a light on this information.

(Opposed) Washington and its local governments have the most tort exposure in the nation. This bill expands the category of beneficiaries who can bring the most expensive type of lawsuit. Don't make things worse for the taxpayers. Local governments are responsible for hazardous activities and have broad liability; this bill would further strain them. Expanding liability will chill the actions of first responders. Constituents want tax revenues spent on services, not increased insurance costs. Parents do recover damages through the estate when a young adult dies, and the age of majority is an appropriate place to draw a bright-line test.

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

(Opposed) Tammy Fellin, Association of Washington Cities; Jim Broman, Washington Fire Chiefs Association; Rashi Gupta, Washington Association of Counties; and Rene Tomisser, Office of the Attorney General.

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