

SENATE BILL REPORT

SB 5163

As of February 13, 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].
Ways & Means: 2/06/19.

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.

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)

SENATE COMMITTEE ON WAYS & MEANS

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: Sarian Scott (786-7729)

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 (Law & Justice): *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 (Law & Justice): 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: Jaelyn 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 (Law & Justice): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): PRO: Two major flaws in our current wrongful death statute. One is our discriminatory bar from 1907 on non-residents not being able to bring this action. Secondly, the discriminatory bar against parents, almost uniquely fails to recognize the loss of a parent from the day their child turns eighteen. I would note that that is never paid out unless those entities are responsible for the death of a fellow human being.

My child, his wife, and my beautiful grandson were heading out on a sunny Monday morning for a family day. Only to drive under a bridge when a concrete barrier landed on my family's truck leaving nothing but nine hours of removing debris. Our hearts forever broken. So much life ahead of them. No voice, rights or protection. This is a child I carried in my womb. That should be enough of a right. This law should give the voices to all of us who have lost our right. Many of us sit here today with the loss of the greatest lives, different stories. Our children are priceless. Do not silence the cries of those who stand up for justice and truth. Do not shut this down.

My sister Emily was hit by a car the night before her birthday, she was crossing inside of a crosswalk in a well-lit area. When the bright yellow lights of the large crosswalk signs were flashing, as she made her way across the road. According to the sheriff on scene, Emily was doing everything right as she crossed the street. The S.U.V. that hit her was traveling 30 miles an hour. Her little body was thrown into the road. I imagine the cold wet ground soaking into her clothing as she lay in the dark, unable to breathe or move. Many good people stopped and rushed to help her but the damage was done. Five days after the collision she passed away surrounded by our family. We held her memorial service just last month. Her loss leaves a huge hole in our family and the community she helped to build. She was an advocate, a Special Olympics gold medalist, a camp leader for children at disabilities; she was an artist, a photographer, and a poet. Today I am demanding justice for my sister in the state of Washington you hold parties accountable for the wrongful death of a loved one unless the person in question did not have dependents or a spouse. This is unjust. The way the law is currently written provide special protections for wrong doers who are responsible for killing an innocent people. Disabled citizens in our state are especially vulnerable because they are less likely to be married or have dependents. Emily spent her whole life trying to show others that people with disabilities mattered and had meaning. The way the law is written it indicates that this is not so. However, that could not be further from the truth. Our current law discriminates against disabled citizens and the families who love them. The people of Washington State grow restless waiting for a revision of this outdated law. We are not the first family to have experienced this injustice. I hope we can be the last you.

It is time for Washington to join the rest of the states in our nation that support the legal rights of parents to hold negligent healthcare providers accountable for the wrongful death of their adult, unmarried child who does not have any dependents. Current law discriminates against that support the legal rights of parents to hold negligent healthcare providers accountable for the wrongful death of their adult unmarried child who does not have any dependents the current law discriminates against families and have legitimate claims. On October 21, 2016, we lost my daughter Christina to a preventable negligent health care at Lourdes Hospital in Pascoe Washington she walked into the emergency room. Less than two hours later, my daughter was dead we deserve answers we deserve accountability and my daughter deserves justice. Had she survived the negligence our laws would have challenge the care she received at the hospital and the fact that she died from the negligence and has no justice is truly mind boggling. Most of the parents I talk to are truly shocked when they learn that this is our current law. Washington's current law not only prevents parents from investigating the deaths of their adult children, they reward the persons and institutions responsible for their death. How can this to be our law in a state with such a strong record of advocating for people's legal rights? I learned this the hardest way possible. Tia was having chest pains and difficulty breathing when she walked into the emergency room seeking medical attention. She was thirty-six years old, not married and had no children. That did not mean that she did not have a family who loved her and cared about her. As a single parent from the time she was seven she was my confidant, my emotional support when I needed it, and my best friend. The emergency room doctors did not treat her case with attention and care that she required that night. They placed her in a room while waiting for labs. They did not hook her up to a monitor, they did not give her oxygen, and 45 minutes later my daughter went into cardiac arrest and I watched her die. We need to ensure all families have equal rights under the law.

Our daughter who graduated from the University of Portland in 2014 with degrees in biology and Spanish, a G.P.A. of 3.8, on the dean's list every semester. She was the captain of the university's traveling soccer club team. She was considering a career in medicine. She volunteered in Peru, Paraguay, Mexico, and Guatemala; where she served on a mission using her Spanish abilities translate between the doctors, patients, and their families. The summer after graduation, Katie was killed. After returning home from Peru, an impaired driver of a tour bus carrying over 30 young kids lost control, crossed the centerline, and hit her head on. Had one of those kids on board been killed, their families would have had the legal right for a wrongful death lawsuit. Because of her age, we have no right to hold those responsible for their actions. The laws treat us as if she never existed. We are left without the ability to create a multi-generational legacy for daughter. I promise you that those you will hear from today, who represent municipalities, hospitals, legal associations; any of them would not have the courage to express their position if it were their child that was killed. Instead, they would be in my chair right now. Explain to me why on the day our daughter was killed my ninety-five-year old mother may have been killed in hospital due to medical negligence and I would have legal standing in my mother's wrongful death but not my twenty-two-year old daughters. This law is wrong. It is discriminatory.

CON: My opposition to this bill is not directed at the larger public policy question of whether or not a parent should be allowed to sue for the death of their adult child. My opposition to the bill is in regard to what cities view as the unfairness of joint and several liability. Joint and several liability creates a scenario where a city could be minimally liable and still be required to pay 100 percent of a financial judgment. The fiscal note, as you heard, indicates we could expect up to a 20 percent increase in lawsuits. But, the retroactivity language makes it almost impossible to quantify because people who would not be able to sue currently would be under the bill. Cities, like state government, are stewards of public resources. We provide services to the public and at times we engage in inherently dangerous activities. I want to stress one point. Cities do not object to paying, when we are liable. If we have created a situation, where we have contributed to a situation where an individual has lost their life we feel we should pay. We feel we should pay proportional to our responsibility, however. I just ask that as you deliberate this very difficult and emotional topic, you consider the position of cities. We deal with many if not all of the same issues that the state does. We are grappling with homelessness, behavioral health challenges, and other fiscal responsibilities. We just ask you to consider that and we would be happy to discuss with anyone any options to mitigate our liability under the legislation.

I am here in opposition to this bill. Like the cities, our opposition is fiscal in nature. We do not oppose necessarily the underlying policy choices made in the bill. I find the stories of the victims both tragic and compelling and want to make that clear. Like the state however we largely self-insured so most of our tort payments are essentially taxpayer money in one form or another. The retroactivity makes it very difficult for us to budget. We budget prospectively in this case. We would need to take a backwards look and that is tough to do a time when we already are facing some other fiscal challenges. It is hard to measure claims if we open it up to retroactivity. We are willing to pay our share.

Washington counties risk pool. We are not an insurance company. The risk pool consists of 26 counties that joined an inter-local, and purchase insurance from insurance companies.

The risk pool collects annually. It is about \$15 million dollars a year. We have seen 10 percent, 20 percent, 30 percent increases in costs. This is not about the expansion relative to siblings and parents. It has to do with joint several liability. It is a reality. The millions of dollars it costs each year. We hope some thought be given to the over correction of a law.

I am here to speak in opposition for many of the reasons that were outlined by the representatives from the local governments previously. I think it is important to note at the outset that the WDTL has no objection to the repeal of the residency restrictions that are included in this bill. Our objections relate to the increased number of claims and the increased changes in the actions that could be maintained. The bill functionally overturns two state Supreme Court cases the Otani and Philippides cases that deal with the death of adult children. Those represent seminal decisions fully argued and determined by the state Supreme Court that relate to these matters. We note that the fiscal note assumes a 20 percent increase in claims. We think that other defendants will be in a similar circumstance.

I have given your staff a statement in opposition to this bill. If you turn it over you will see organizations who endorse our position regarding this bill. Having said that I would call your attention to the dots in the blue box on it, which deal with the fiscal impact. If this bill were only about doing the right thing by nonresident parents we would not be opposed to the bill. But the bill substantially expands the state's current wrongful death statutes. Specifically it would allow all parents to bring claims irrespective of the child's age, and irrespective of whether there was any financial dependency on the child. It also expands damages. We think that that goes too far. It is a difficult decision for you to try to balance the interests that are here. But it is true that frequently deep pocket defendants whether they be school districts, local government, state, physicians, and hospitals face liability beyond their proportionate share of the fault. So, we have suggested that that would be considered in reaching the appropriate balance. Here in our view I can understand why parents who have lost children feel they need to be accountability. But we think in circumstances where the parents were not financially dependent, saying that defendants will be liable in their proportionate share provides a measure of accountability. This bill is about balancing the competing interests. Many states provide caps on the damages that are paid out by local governments, in the state government, or other kinds of reforms. The second bullet dot there points out that JLARC in a study in 2011 found that this state has a higher potential for tort payouts than other states because you do not have those kinds of protections. Equally true, in the medical malpractice arena where many states such as California provide a quarter of a million dollar cap on noneconomic damages. Our Supreme Court said we can not do that so our solution is to look at joint civil liability.

Persons Testifying (Ways & Means): PRO: Senator Bob Hasegawa, Prime Sponsor; Larry Shannon, Washington State Association for Justice; Sarah Locke, citizen; Rhonda Ellis, citizen; Rhonda Nissan, citizen; Jeff and Dolly Chale, citizens.

CON: Mike Hoover, Washington State Association of Counties; Sharon Swanson, Association of Washington Cities; Derek Bryan, Washington Counties Risk Pool; Cliff Webster, Liability Reform Coalition; Mel Sorensen, Washington Defense Trial Lawyers.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.