

Unpacking NY's Revamped Wrongful Death Bill

By Eric Andrew and David Adams (May 4, 2023)

New York's current wrongful death statute, New York Estates, Powers and Trusts Law Section 5-4.1, allows a personal representative of the deceased person to bring a suit for damages for negligence, malpractice or intentional torts.

Unlike many other states, New York currently provides that a wrongful death lawsuit can only be brought by a child, parent, spouse or personal representative for the estate of the decedent. Extended family members, such as siblings or cousins, do not have the right to bring a wrongful death lawsuit in New York unless they also have been named as the guardian or personal representative of the estate.[1]

Unlike personal injury cases brought by a living adult plaintiff who can bring a lawsuit within three years of an injury, under current law, wrongful death suits must be filed within two years of the death of the decedent,[2] 2 1/2 if the death was the result of medical malpractice,[3] or if the person responsible for the death has a pending criminal case resulting from the event causing the death, one year from the end of that case.[4]

The damages that can be sought in New York are limited to the economic or pecuniary losses of the survivors resulting from the death, the medical and funeral costs related to the final injury or illness, and the value of parental guidance, nurturing and care for surviving children.

If the decedent sustained conscious pain and suffering prior to passing, an action can be brought to recover those damages as well. However, the current law does not allow recovery for pain and suffering, mental anguish or loss of companionship for surviving family members.[5]

Under the pattern jury charge, a surviving child is allowed to recover the economic value of the "intellectual, moral, and physical training, guidance and assistance" of the deceased parent, but the charge provides no similar recovery for a surviving spouse or parent.[6]

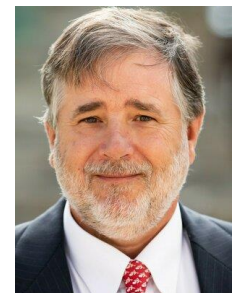
Although a majority of states allow awards for a family's emotional suffering resulting from the wrongful death of a loved one, such recovery is not permitted under the current New York statutory scheme. Currently, New York excludes a broad category of potential recovery and limits the damages to mostly pecuniary loss.

In 2022, both houses of the New York Legislature overwhelmingly passed the Grieving Families Act, ostensibly to address what it perceived as shortcomings in compensating survivors in wrongful death cases.[7] That bill was eventually vetoed by the governor. In that prior legislation, the pool of potential plaintiffs was expanded to "close family members," a term that was not clearly defined — the definition explicitly left up to the discretion of the finder of fact.[8]

This expansion would have permitted virtually anyone to file a claim, leaving the burden on the finder of fact to make the determination whether that person was close enough to the decedent to be warranted compensation.



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The prior legislation also would have expanded the current statute of limitations from two years to three years and six months for most cases.[9]

Most significantly, the prior act would have dramatically increased the categories of damages in wrongful death suits to allow recovery of not just economic damages, but also recovery for grief, sympathy and loss of consortium. The legislation did not include a cap on recoverable damages[10] and would have applied retroactively to all pending wrongful death lawsuits in New York.[11]

This not only would have revived expired unfiled claims, but affected every case pending, up to and including final appeals, vastly expanding the potential verdicts for all.

Based on the potential impact of the legislation, due to the unlimited, expanded pool of potential plaintiffs, the retroactivity, the vastly larger potential damages values and their effect on the economy, as indicated, Gov. Kathy Hochul vetoed the bill in January of this year.[12] In doing so, Hochul noted:

We must fully understand the impacts of potential changes on small businesses, families, doctors and nurses, struggling hospitals in underserved communities, and the overall economy to ensure that undesired consequences don't overshadow the good we can do for grieving families.[13]

The governor signaled the possibility of signing into law revised legislation that struck a balance between the perceived need to provide a more significant remedy to surviving family members and the impact that the expansion of damages would have on defendants, businesses and insurers.

She voiced support for a more limited reform of New York's wrongful death statute, which may include limiting claims for grief and emotional damages to parents who suffered the loss of a child, implementing a cap on emotional damages, refraining from applying new legislation retroactively to pending claims, maintaining the current statute of limitations, and excluding claims for medical malpractice.

In response, on May 2, a number of legislators submitted revised legislation, purportedly to address the criticism of the vetoed bill.[14]

Significantly, the 2023 legislation limits the pool of plaintiffs who would be able to bring a case for wrongful death to only spouses or domestic partners, children, foster children, stepchildren, stepgrandchildren, parents, grandparents, stepparents, stepgrandparents, siblings or anyone acting in loco parentis to the deceased person.[15]

This not only limits the pool of potential plaintiffs, but provides a clearer definition that does not rely on a fact-finder to determine closeness as in the prior bill, facilitating perhaps an earlier resolution of most standing issues.

Within that limited pool, the fact-finder still has the power to determine who is to be compensated under the statute. The award is then apportioned among those within the pool of close family members upon notice to each and a hearing.

The statute of limitations in the proposed legislation is expanded to three years from the date of death, up from the current 2 1/2 years, but not as long as the 3 1/2 years passed last year.

What will likely raise the ire and concern of the business community and insurance industry is that the 2023 legislation would apply retroactively to any cause of action accruing on or after July 1, 2018, regardless of when the claim was filed.[16] While limiting retroactivity, the bill immediately increases the value of any pending claim, thwarting potential settlements and increasing litigation costs, as it makes its way through the Legislature.

Notably, the amended proposed legislation does not implement a cap on damages, nor carve out an exception for medical malpractice claims.

The expansion of damages appears to be the same as that passed in the prior legislation, which advocates of the bill argue is a necessary step to deliver justice to "the families of women, people of color, children, seniors and low-income earners." [17]

The addition of "loss of love, society, protection, comfort, companionship, and consortium resulting from the decedent's death" brings the damages more in line with what is recoverable in most other states, but also adds an element of cost and recovery not previously contemplated or reserved, putting an additional strain on defendants and their insurance carriers.

This concern could be eliminated by removing the retroactivity provision in the proposed legislation and allowing insurers to account for the increased exposure prospectively.

Besides business and health care opposition to these additional financial burdens, we can expect significant insurance industry opposition to this new legislation, which imposes severe financial consequences not contemplated when calculating premiums and setting reserves. Doubtless, the bill, if passed and signed into law, will face constitutional challenges.

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[1] N.Y. Est. Powers & Trusts Law §§ 5-4.3, 5-4.4 (2021).

[2] N.Y. Est. Powers & Trusts Law § 5-4.1 (2021).

[3] N.Y. C.P.L.R. § 214-a (2021).

[4] N.Y. Est. Powers & Trusts Law § 5-4.1 (2021).

[5] N.Y. Est. Powers & Trusts Law § 5-4.3 (2021).

[6] New York Pattern Jury Instructions 2:320 (Thomson 2009).

[7] Senate Bill S74A (2022).

[8] *Id.* at. § 3(a).

[9] Id. at § 1.

[10] Id at § 2(a).

[11] Id. at § 5.

[12] <https://www.hurwitzfine.com/blog/ny-governor-vetoes-grieving-families-act>.

[13] <https://www.nydailynews.com/opinion/ny-oped-lets-agree-on-helping-grieving-families-today-before-midnight-deadline-20230130-jim7ltxwofdm3nwurnidmi6mvi-story.html>.

[14] A06998/S06636.

[15] https://nyassembly.gov/leg/?default_fld=%0D%0A&leg_video=&bn=A06698&term=2023&Summary=Y&Text=Y&utm_campaign=the-grieving-families-act-has-been-reintroduced&utm_source=membercentral-emailblast&utm_medium=email&utm_content=2023-05-02-the-grieving-families-act-has-been-reintroduced#.

[16] Id. § 5.

[17] <https://www.nysenate.gov/newsroom/in-the-news/brad-hoylman-sigal/politico-lawmakers-introduce-amended-grieving-families-act>.