



NUCLEAR VERDICT RISK GROWS AS STATES EXPAND WRONGFUL DEATH LIABILITY

by Cary Silverman

In January 2023, New York Governor Kathy Hochul vetoed legislation that would have vastly expanded liability under the state’s Wrongful Death Act. Taking such a step could not be easy in a blue state on a bill entitled the “Grieving Families Act,” but the governor understood the likely impact of the bill. With minor tweaks, the legislature passed it again last summer, and it is expected to soon land on the Governor’s desk a second time. The New York experience is part of a larger national trend of proposals to abandon traditional constraints on wrongful death acts. These constraints have long been in place to reduce the significant risk of nuclear verdicts that can flow from tragic injuries, understandable sympathy for the victim and their families, and anti-corporate sentiment, while ensuring that the families of those who have died receive reasonable and fair compensation for their losses.

Origin of wrongful death acts and traditional constraints. States adopted wrongful death acts to address the unfairness of the common law rule that a person’s cause of action died at their death. Legislation, adopted by most states in the 1800s, provided families of those who died as a result of negligent or other tortious conduct with a cause of action to seek damages. These laws typically authorized a personal representative of a decedent to seek pecuniary damages, such as the expected income lost from the decedent, on behalf of the person’s spouse and children. Pecuniary damages can include anything of quantifiable economic value, from the value of services that a spouse would have contributed to a household to the guidance and training a parent would have provided to a child.¹

In enacting these laws, states were cognizant that opening the door to subjective, non-quantifiable forms of damages was a recipe for excessive verdicts stemming from the passion and prejudice that can be expected in wrongful death cases. While some states have, over time, allowed for recovery by spouses or children for loss of consortium, society, comfort, or companionship, most have not permitted recovery of broader noneconomic damages. The American Law Institute’s (ALI) tentatively approved new Restatement of the Law Third Torts: Remedies, recognizes the “clear trend is toward more compensation,” yet “[m]ost states compensate loss of society, but some do not; most states do not compensate grief or emotional distress. . . .”² Although some recent ALI Restatement projects have favored liability expansions, this statement accurately “restates” the law. Even proponents of liability-expanding bills recognize that allowing damages for grief or anguish is a minority approach.³ What is often overlooked is that many of the states that *do* allow broader forms of noneconomic damages have statutory caps in their wrongful death acts, generally applicable caps on noneconomic damages, or limits that apply in medical liability cases.

¹ Wrongful death actions are typically separate from survival actions, which permit a decedent’s estate to seek damages incurred after the injury but prior to death, such as medical expenses incurred and conscious pain and suffering.

² Restatement of the Law Third Torts: Remedies § 23, comment b, at 363-64 (Tentative Draft No. 2, Apr. 2023).

³ See, e.g., New York Public Interest Research Group, News Release, [Families From Across the State Call on Lawmakers to Pass the Grieving Families Act Now](#), May 3, 2022 (indicating that NYPIRG’s 50-state review found that only 20 states permit recovery for grief and mental anguish in wrongful death suits).

2023 legislative activity. Over the past year, legislators in at least eleven states introduced bills that would unmoor wrongful death acts from their traditional bounds. These proposals would expand who can recover, what damages they can recover, and the amount of time within which they must sue under their wrongful death acts. This multi-state effort suggests that wrongful death liability expansion is a new high-level priority of the plaintiffs' bar that is likely to spread.

Five states enacted these proposals into law in 2023.⁴ Maine raised the amount recoverable for loss of comfort, society and companionship, including emotional distress, from \$750,000 to \$1 million, which will automatically increase each year for inflation, and increased the law's punitive damages maximum from \$250,000 to \$500,000.⁵ Delaware and Illinois added the threat of punitive damages in wrongful death claims.⁶ Minnesota altered its wrongful death and survival statutes to permit recovery beyond economic losses.⁷ Rhode Island, a state that uniquely sets a *minimum* amount of recovery in wrongful death actions, raised that floor from \$250,000 to \$350,000.⁸

New York's pending legislation. The potential scope of these liability expansions is best demonstrated by the New York legislation that awaits Governor Hochul's action.⁹ That bill authorizes several forms of unquantifiable noneconomic damages in wrongful death actions that have long been unavailable in New York, such as loss of love, society, protection, comfort, companionship, and consortium, as well as grief and anguish caused by the decedent's death. Jurors will find it difficult to distinguish and separate these forms of nonpecuniary damages, creating the potential for overlapping, duplicative awards. New York has no damage cap, nor does the bill include one.¹⁰ The bill exacerbates these expansions of liability by allowing individuals beyond immediate family to seek recovery.¹¹ Finally, the passed bill, if signed, would extend the statute of limitations for wrongful death claims from two years to three years.

When Governor Hochul vetoed the previous year's version of this bill, she commented that the bill represented an "extraordinary departure from New York's wrongful death jurisprudence and may result in significant unintended consequences."¹² These consequences would include confusing judges, juries and litigants with overlapping categories of damages, requiring courts and claimants to grapple with competing claims asserted by family members, worsening the "already-high insurance burdens on families and small businesses, and further straining already-distressed healthcare workers and institutions."¹³ Despite calling for "a serious evaluation of the impact of these massive changes on the economy, small businesses, individuals, and the State's health care system,"¹⁴ the legislature promptly passed the bill again with only minor modifications that do not address these concerns.

Organizations such as the American Tort Reform Association and state-based civil justice groups, which expect more of these types of proposals in 2024, are closely monitoring this trend and opposing proposed unreasonable liability expansions.

⁴ Examples of states in which legislators introduced bills that would expand wrongful death liability that were not enacted in 2023 include Florida (H.B. 1143, S.B. 690), Indiana (H. 35), Kansas (H. 2183), New Jersey (A. 3109, S. 465), and Virginia (H. 136, H. 1539).

⁵ [H.P. 581](#) – L.D. 934 (Me. 2023) (amending Me. Rev. Stat. tit. 18-C §§ 1-108(2) and 2-807(2)).

⁶ [S.B. 81](#) (Del. 2023) (amending Del. Code § 3723); [H.B. 219](#) (Ill. 2023) (amending 740 ILCS §§ 180/1 and 180/2, and 755 ILCS § 5/27-6).

⁷ [S.F. 2909](#), § 33-34 (Minn. 2023) (amending Minn. Stat. § 573.02 to authorize recovery of "all damages").

⁸ [H. 5513](#) (R.I. 2023) (amending R.I. Gen. Laws § 10-7-2(c)).

⁹ A.6698/S.6636 (N.Y. 2023).

¹⁰ Some may suggest that Article I, § 16 of the New York Constitution, which states there may be no statutory cap on the right of action for wrongful death "now existing," precludes the legislature from limiting damages. This provision, however, should not apply to nonpecuniary damages that were unavailable when the state adopted this constitutional amendment in 1894.

¹¹ New York's 2023 legislation broadly defines a "close family member" as "decedent's spouse or domestic partner, issue, foster-children, step-children, and step-grandchildren, parents, grand-parents, step-parents, step-grandparents, siblings or any person standing in loco parentis to the decedent."

¹² [Veto #192](#) (Jan. 30, 2023) (veto message on S.B. 74-A (2022)).

¹³ *Id.*

¹⁴ *Id.*