

THE DEFENSE ASSOCIATION OF NEW YORK, INC.
Executive Offices
P.O. Box 950
New York, New York 10274-0950
(212) 313-3657

December 11, 2024

Honorable Kathy Hochul
Governor of the State of New York
NYS Capitol Building
Albany, New York 12224

A. 9232B by M. of A. Weinstein
S. 8485B by Sen. Hoylman

AN ACT to amend the estates, powers and trusts law, in relation to the payment and distribution of damages in wrongful death actions.

DISAPPROVAL RECOMMENDED

The Defense Association of New York (hereinafter referred to as “DANY”) is a statewide bar organization whose members regularly defend individuals, corporations, municipalities and public authorities against wrongful death suits. DANY **strongly opposes** the above referenced proposed legislation and urges you to disapprove the above referenced Bill.

SUMMARY OF OBJECTIONS

Despite the claims of the proponents of this legislation, the proposed Bill is not in line with how the majority of States compensate family members for emotional loss in a wrongful death lawsuit. The claim that “forty-seven other states compensate family members for emotional loss” is incomplete and inaccurate at best because the scope and breadth of this Bill vastly expands the method of distribution and amount of damages well beyond what is recoverable in other States in wrongful death cases. Indeed, the vast majority of States (48) limit recovery in wrongful death cases to a defined class of persons in a specified order, typically via the laws of intestate succession. Furthermore, of the States that allow recovery for emotional damages, thirty-three (33) States place some sort of cap on the damages that may be recovered. The proposed Bill would multiply the amount of claimants who could recover in an unlimited fashion beyond New York’s intestacy statute, and add additional line items of damages without caps on nebulous and ill-defined emotional damages.

The attempt to narrow the individuals who can recover in wrongful death actions from the previous versions of this Bill that you have already vetoed two times does not alleviate the overwhelming impact that this statute will have on the costs of wrongful death claims that will be

borne by taxpaying private citizens and businesses in New York. There is no language in the Bill to prioritize who can recover amongst the list of individuals and the Bill specifically allows any one of them to bring a case. The inclusion of “any person standing in loco parentis to the decedent” opens the door to a plethora of new plaintiffs that never existed before, especially when “an in loco parentis relationship shall be presumed when an adult and minor share or have recently shared a household.” This statute has no real guardrails to prevent any adult to claim that they “recently shared a household” with a decedent and places an unrealistic burden on juries to determine what facts are required to establish “recently shared a household” and the litigation arising from the statute on this issue will overwhelm the already overburdened court system.

Also, the proposed retroactive application of this law to include any wrongful death from January 1, 2021 to present will upend the handling of almost every pending wrongful death action in the State and cause new and additional lawsuits for which no cause of action ever existed to be filed and litigated. The retroactivity provision of the statute violates the procedural and substantive due process rights of civil defendants in New York State. Defendants in pending wrongful death actions where discovery has been completed will be required to defend against claims for emotional damages without the opportunity to conduct discovery. Defendants who believed that they had resolved wrongful death actions will be subjected to new lawsuits. DANY submits that the prejudicial impact of the retroactivity provision of the Bill is clear and that as a consequence, the Bill will surely be subject to significant constitutional attacks causing a further backlog in an already overburdened Court system. The enactment of the proposed amendments will also have the unintended effect of delaying resolution of pending wrongful death actions.

Furthermore, the reference in the legislation that the fiscal implications for State and Local Governments will be “none” is simply incorrect. There will be a vast expansion of awards for new line items of monetary damages that do not currently exist. As they have failed to do in the past, the proponents of this legislation continue to offer no fiscal analysis whatsoever on the impact of increased payouts for damages awards and/or increased cost of insurance premiums for State and Local Governments. State Government is not only responsible for the additional administrative costs of its Courts, but also State and Local Governments are frequently the defendants in wrongful death cases bearing the burden of defense costs, awards and insurance premiums. Simply put, there is no reasonable explanation as to how the additional fiscal impact can be “none” when the Bill allows multiple new plaintiffs who never before had a right of recovery to receive awards for new line items of monetary damages that never existed combined with new additional costs of defending against such claims and the additional costs of the Court system administering such claims.

DANY is also particularly concerned that if you sign this legislation as written, there may not be a legal method to allow for chapter amendments afterwards. Article I, Section 16 of the New York State Constitution provides as follows:

The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

If this bill is signed, any subsequent chapter amendments limiting the recovery of damages may be unconstitutional. Consequently, DANY cannot support any chapter amendments to this legislation, and strongly opposes and urges you to disapprove and veto this Bill.

DANY's opposition to the proposed Amendments can be summarized as follows:

- The Bill as drafted is a vast expansion of New York's existing law and is a massive expansion beyond how the majority of States compensate family members for emotional loss in wrongful death lawsuits.
- The Bill as drafted would deprive civil defendants of their substantive and procedural due process rights in pending and previously resolved lawsuits.
- The proposed amendments undermine the concept of "finality" in law.
- Enactment of the Bill will dramatically increase the already high damage awards in New York beyond reasonable and sustainable compensatory damages.
- The unsupported claim that the "fiscal impact" on State and Local Governments will be "none" is patently false.
- Common sense dictates that there will indeed be an enormous "fiscal impact" on New York's State and Local Governments for new line items of damages that do not currently exist and there will be substantial additional costs of defending against such claims and the Court system administering such claims.

**PROPOSED BILL IS NOT IN ACCORD WITH HOW MAJORITY OF OTHER STATES
AWARD DAMAGES IN WRONGFUL DEATH CASES**

The vast majority of States and the District of Columbia generally limit the class of persons who may recover emotional damages to a defined class of family members via the laws of intestate succession (which depends on who the surviving family members are at the time of death).¹ Only two states, Kansas and Utah, allow for recovery beyond a limited class of persons typically defined by intestate succession.

In the proposed Bill, the class of persons who are able to seek a recovery is multiplied and expanded beyond New York's laws of intestate succession to include "any person standing in loco parentis to the decedent, and to any person whom the decedent stood in a position of in loco parentis. An in loco parentis relationship shall be presumed when an adult and minor share or have recently shared a household. The finder of fact shall determine which of those persons for whose benefit the action is brought, as defined in this paragraph, are entitled to damages under this section based upon the specific circumstances relating to the person's relationship with the

¹ New York's law of intestate succession is set forth in the New York Estates, Powers and Trusts Law (EPTL). Under this law if a person dies without a will, the distribution of their assets will depend on who their surviving relatives are at the time of death. If the deceased person is survived by a spouse and no children, the spouse will inherit the entire estate. If the deceased person is survived by a spouse and children, the spouse will inherit the first \$50,000 of the estate plus half of the remaining balance, and the children will inherit the other half of the remaining balance. If the deceased person is not survived by a spouse but has children, the children will inherit the entire estate equally. If the deceased person is not survived by a spouse or children, the estate will pass to the deceased person's parents. If the parents are not alive, the estate will pass to the deceased person's siblings, and if the siblings are not alive, to the deceased person's nieces and nephews.

decedent.” Unlike the vast majority of other States, the effect of the proposed Bill as written is that any spouse, domestic partner, distributee or person standing in loco parentis may simultaneously seek recovery without limitation. In the vast majority of other States, a decedent’s spouse and children would be the only the only persons who could recover. If a decedent had no spouse or children, his parents could recover. There is no right of recovery for all these different types of parties simultaneously in other States.

Furthermore, of the States that do allow for recovery of emotional damages in wrongful death cases, thirty-three (33) States have some form of a cap on the amount of damages awarded in wrongful death cases. New York has no cap on economic or non-economic damages in the context of wrongful death, including those actions resulting from medical malpractice.

The addition of several parties who cannot recover normally under intestacy statutes with several additional line items for emotional damages that never previously existed without a cap is a massive expansion beyond how the majority of States compensate family members for emotional loss in a wrongful death case.

DUE PROCESS

The Bill as drafted would be effective immediately and include retroactive application for matters that accrue on or after January 1, 2021. DANY submits that the retroactivity provision of the statute violates the procedural and substantive due process rights of civil defendants in New York State. The Bill’s expansion of persons entitled to recover to include the spouse, domestic partner, distributee, and an amorphous class of “any person standing loco parentis”, and expansion of recoverable damages to include recovery for “any disorder caused by grief or anguish” will clearly prejudice defendants by making them liable to a class of persons for a cause of action which heretofore has not existed in this State. Defendants in pending wrongful death actions where discovery has been completed will be required to defend against claims for emotional damages without the opportunity to conduct discovery. DANY submits that the prejudicial impact of the retroactivity provision of the Bill is clear and that as a consequence the Bill will surely be subject to constitutional due process attacks.

FINALITY OF JUDGMENT

The Bill as drafted provides for retroactive enlargement of the statute of limitations governing wrongful death claims. DANY submits that New York has historically endorsed certainty, predictability and finality in the resolution of claims. Statutes of limitation are an expression of the societal interest in “giving repose to human affairs” and the articulated public policy of protecting defendants from having to litigate stale claims. Enactment of this legislation would subject civil defendants who have resolved wrongful death actions to the specter of defending against new claims for emotional distress brought by this new class of “surviving close family members” who seek to recover for “grief or anguish.” This uncertainty also makes it nearly impossible to forecast potential liability. This would have a significant impact on the ability of the State, its municipalities, its public authorities and insurers who write coverage in New York to properly budget for litigation expenses. To claim that the fiscal impact to State and Local Governments is “none” is a quite simply a gross misrepresentation.

“GRIEF OR ANGUISH”

DANY strenuously opposes expanding recovery for non-economic damages to include “grief or anguish caused by the death of the decedent.” This category of damages is inherently nebulous, especially when invoked by the expansive class of persons entitled to recover contemplated by this legislation. Grief and anguish are unfortunately an inevitable part of the universal human condition. They are innately deeply personal and incalculable. No jury could assess these categories without speculation. Without objective definitions, the determination of such emotional damages by a jury would be entirely subjective and inherently arbitrary.

DANY submits that New York’s wrongful death law as presently drafted provides a full and fair opportunity for the estate of a decedent and the decedent’s spouse, heirs and children to achieve full and fair compensation. The current law compensates the estate of the decedent for both specified pecuniary losses and for the physical and emotional pain and suffering a decedent may endure prior to death. This money is distributed through the estate to the decedent’s spouse and heirs. The current law also provides for compensation to certain distributees of the estate, i.e., the surviving spouse and children, for pecuniary losses arising out of the decedent’s death. Pecuniary losses include medical expenses; nursing expenses; custodial care; rehabilitation services; funeral expenses and the loss of financial support to the spouse and children, as well as the loss of parental guidance to the children.²

New York juries routinely return, and appellate courts routinely sustain, significant verdicts for conscious pain and suffering in wrongful death cases. New York provides for compensation for the emotional pain and suffering a decedent endured in contemplation of his or her death as well as for the physical pain and suffering a decedent endures from the moment of physical injury to the moment of death. Lack of parental guidance, whether a distributee child is a minor or an adult, is also compensable.

A review of New York case law establishes that juries and courts regularly make large non-economic and pecuniary awards in wrongful death cases. *See generally*, In Re 91st Street Crane Collapse Litigation, 154 A.D.3d 139 (1st Dept. 2017) (Upheld awards of \$5,500,000.00 and \$7,500,000.00 respectively to the estates of two (2) plaintiffs who received crushing injuries and experienced emotional and physical pain and suffering for sixteen (16) minutes and four (4) hours); Schneider v. Hanasab, 209 A.D.3d 684 (2nd Dept. 2022) (The Second Department upheld an award of \$2,000,000.00 for decedent’s conscious pain and suffering for four (4) days); Hyung Kee Lee v. New York Hospital Queens, 118 A.D.3d 750 (2nd Dept. 2014) (The Second Department upheld an award of \$3,750,000.00 for a decedent who suffered for three and a half (3½) days from intermittent but ongoing sharp gallbladder pain and discomfort, intermittent bouts of agitation, sense of impending death.); Maracallo v. Board of Education of the City of New York, 21 A.D.3d 318 (1st Dept. 2005) (\$2.5 million award, including for approximately six minutes of conscious pain and suffering, for death of a 14-year-old boy sustained); Murphy-Claggett v. AO Smith Water

² It is also important to note that the following jurisdictions do not allow for recovery of “grief” damages sought in this proposed bill: California; Connecticut; District of Columbia; Georgia; Hawaii; Idaho; Iowa; Kentucky; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; New Jersey; North Carolina; South Dakota; Tennessee; Utah; Wisconsin; and Wyoming. Washington and Indiana permit damages for grief or anguish but only for the death of a minor.

Prods. Co., 218 N.Y. Misc. Lexis 4325 (Justice Manuel Mendez³ , then sitting in New York Supreme Court, granted a defense motion to set aside a verdict in an asbestos case unless plaintiff stipulated to reduce the decedent's award for conscious pain and suffering from \$25,000,000.00 to \$10,000,000.00 for sixteen (15) months of conscious pain and suffering and to reduce the loss of parental guidance awards from \$17,000,000.00 to \$9,000,000.00 for one (1) child and \$18,000,000.00 to \$10,000,000.00 for another child.).

These are substantial awards and in the opinion of many members of the defense bar border on punitive. The argument that plaintiffs in wrongful death suits are somehow being denied fair and reasonable compensation under the current legislative scheme is belied by these cases.

THE BILL AS DRAFTED WILL DRASTICALLY INCREASE WRONGFUL DEATH AWARDS BEYOND SUSTAINABLE LEVELS

Enactment of this Bill would contribute to the troubling trend of ever higher damage awards that exceed the traditional bounds of compensatory damages and verge on unreasonable punitive awards. It is well known that tort awards are currently rising quicker than inflation. This phenomenon known as social inflation will be further exacerbated by the proposed expansion of the class of potential plaintiffs and creation of a separate awards for “grief” and “anguish” in wrongful death actions. If enacted this law will result in awards and settlements in wrongful death cases that will devastate private citizens, businesses, municipalities and even the State of New York. Awards and settlements will certainly reach amounts never seen before. We expect cases that are routinely worth millions of dollars to become cases routinely worth tens of millions of dollars. The extreme cases that are worth tens of millions of dollars for one person's wrongful death could become cases where the plaintiff seeks \$100,000,000.00 or more.

We also expect the cost of this Bill to be borne by each and every private citizen and business in the form of increased insurance premiums and additional taxes. It is without question that municipalities, public authorities and the State of New York itself will have to raise taxes and fees in order to cover awards and the increased cost of insurance. The already overburdened court system in the State of New York will become further burdened by a flood of litigation causing more access to justice problems and increased taxes to each individual in New York just to handle the additional administrative caseload. Some businesses will surely choose to no longer do business in our State, further eroding not only our tax base but opportunities for employment for the citizens of New York State. Some insurance carriers will simply stop underwriting in New York and others will have to dramatically increase their premiums. This is especially worrisome in the context of the construction industry where the cost of insurance alone is a bar to entry for many minority and women owned businesses.

CHAPTER AMENDMENTS MAY BE PROHIBITED BY THE CONSTITUTION

We also submit that that if this legislation is signed into law, there may be no opportunity for chapter amendments afterward. We expect those who support this legislation as drafted to argue that Article I, Section 16 of the New York State Constitution does not allow any right to

³ Justice Mendez is an Associate Justice of the Appellate Division , First Department.

recover wrongful death damages to be abrogated. Consequently, if the Bill is signed into law, any chapter amendments seeking to limit recovery could be abrogating the right to recovery and be unconstitutional.

In light of the foregoing, the Defense Association of New York strongly opposes this Bill and urges you to vote against this legislation.

Should you have any questions or concerns regarding the foregoing, our Executive Board would be happy to discuss these issues further.

Very truly yours,

Steven R. Dyki

Steven R. Dyki

President Elect

Co-Chair -Legislative Committee

Claire F. Rush

Claire F. Rush

Past President

Co-Chair -Legislative Committee