

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 447 (Laird)
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Fiscal: No
Urgency: No
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SUBJECT

Civil actions: decedent's cause of action

DIGEST

This bill authorizes a decedent's personal representative or successor in interest to recover damages for a decedent's pain, suffering, or disfigurement in an action or proceeding on the decedent's cause of action.

EXECUTIVE SUMMARY

Section 377.20 of the Code of Civil Procedure is California's survival statute. It provides that a cause of action for or against a person is not lost by reason of the person's death. Section 377.34 of the Code of Civil Procedure limits the damages that can be recovered in these survival actions or proceedings, which are brought by a decedent's personal representative or successor in interest on the decedent's cause of action. The damages recoverable in such actions are the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived. However, Section 377.34 specifically excludes any damages for pain, suffering, or disfigurement.

This bill removes the restriction on recovering pain, suffering, and disfigurement damages in a survival action and aligns it with a majority of the states in this country.

The bill is co-sponsored by the Consumer Attorneys of California and the Consumer Federation of California. It is supported by Equal Rights Advocates, the Coalition for Humane Immigrants' Rights, consumer groups, and various labor organizations, including the State Building and Construction Trades Council of California and the United Food and Commercial Workers Western States Council. It is opposed by the California Chamber of Commerce, California Defense Counsel, the California Assisted Living Association, the California Society of Dermatology & Dermatologic Surgery, and various insurance company associations.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that a cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest. (Code Civ. Proc. § 377.30.)
- 2) Requires a court to allow, on motion after the death of a person who commenced an action or proceeding, a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest. (Code Civ. Proc. § 377.31.)
- 3) Limits the damages recoverable, in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and does not include damages for pain, suffering, or disfigurement. (Code Civ. Proc. § 377.34.)
- 4) Applies the above provisions to the commencement of an action or proceeding the decedent was entitled to commence, and to the continuation of an action or proceeding commenced by the decedent. (Code Civ. Proc. § 377.35.)
- 5) Provides that, except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period. (Code Civ. Proc. § 377.20.)
- 6) Establishes a cause of action for the death of a person caused by the wrongful act or neglect of another ("wrongful death action") that may be asserted by any of the following persons or by the decedent's personal representative on their behalf:
 - a) the decedent's surviving spouse;
 - b) domestic partner;
 - c) children, and issue of deceased children;
 - d) if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession;
 - e) the putative spouse, children of the putative spouse, stepchildren, or parents, if they were dependent on the decedent; and
 - f) a minor, whether or not otherwise qualified, if, at the time of the decedent's death, the minor resided for the previous 180 days in the

decedent's household and was dependent on the decedent for one-half or more of the minor's support. (Code Civ. Proc. § 377.60.)

- 7) Provides that any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in the Probate Code. (Prob. Code § 6400 et seq.)
- 8) Provides that where physical abuse, abandonment, or neglect of an elder or dependent adult is proven by clear and convincing evidence and the defendant has been found guilty of recklessness, oppression, fraud or malice, in addition to all other remedies otherwise provided by law, the court shall award reasonable attorney's fees and costs, as specified, and damages for pre-death pain and suffering up to \$250,000. (Welf. & Inst. Code § 15657; Civ. Code § 3333.2.)

This bill authorizes a decedent's personal representative or successor in interest to recover damages for a decedent's pain, suffering, or disfigurement in an action or proceeding on the decedent's cause of action.

COMMENTS

1. Allowing a decedent's representative to collect pain and suffering damages

Liability has the primary effect of ensuring that some measure of recourse exists for those persons injured by the unlawful, negligent, or willful acts of others; the risk of that liability has the primary effect of ensuring parties act reasonably to avoid harm to those to whom they owe a duty. For instance, as a general rule, California law provides that persons are responsible, not only for the result of their willful acts, but also for an injury occasioned to another by their want of ordinary care or skill in the management of their property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon themselves. (Civ. Code § 1714(a).)

At common law, an individual's causes of action for personal torts were extinguished with the death of the injured party or the tortfeasor, following the Latin expression *actio personalis moritur cum persona*, i.e., a personal action dies with the person concerned.¹ As documented by multiple opinions by the California Supreme Court: "After at least a half century of debate and many unsuccessful legislative initiatives, California's first statute providing for the survival of personal tort actions was enacted in 1949."² This initial "survival action" applied only to causes of action for personal injury.

In 1961, then-Senator, and later Justice James A. Cobey introduced SB 202 (Cobey, Ch. 657, Stats. 1961). The bill was prepared by the California Law Revision Commission in

¹ *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 293.

² *Id.* at 297; see also *County of L.A. v. Superior Court* (1999) 21 Cal.4th 292

the wake of its report, *Recommendation and Study Relating to Survival of Actions* (Oct. 1960) 3 Cal. Law Revision Com. Rep. (1961) (“the Report”). Three main recommendations were made to overhaul the statute and were included in SB 202. The first urged the expansion of the survival statute to include actions for personal torts that do not involve physical injury, including invasion of privacy, defamation, and malicious prosecution.³ The second recommendation was that the survival statute should allow recovery of punitive damages that the decedent would have been entitled to, reasoning “[t]he object of awarding such damages being to punish the wrongdoer, it would be particularly inappropriate to permit him to escape such punishment in a case in which he killed rather than only injured his victim.”⁴ Both of these recommendations were included in the final bill that was signed into law by Governor Edmund G. Brown.

Relevant here, the third recommendation faced considerable difference of opinion. It urged the Legislature to “discontinue the provision in the 1949 survivorship legislation precluding the estate of the deceased plaintiff from recovering damages for pain, suffering, or disfigurement.”⁵ A study accompanying the Report disagreed, arguing:

[D]amages should not be awarded for the deceased’s pain and suffering, bodily disfigurement or loss of a member of his body. Such injuries are strictly to the person of the deceased and, in and of themselves, do not lessen the value of his estate and are not of such a transmissible nature that they should be made the basis of legal liability or an award of compensatory damages after the victim’s death.⁶

However, the California Law Revision Commission made its case and addressed this argument and other concerns involving the change:

The provision in the 1949 survival legislation that damages may not be allowed to the estate of the deceased plaintiff for “pain, suffering or disfigurement” should also be discontinued. One reason advanced in support of this limitation is that the victim’s death and consequent inability to testify renders it difficult and speculative to award damages for such highly personal injuries. The Commission believes, however, that while it may be more difficult to establish the amount of damages in such a case the victim’s death should not automatically preclude recovery. Other competent testimony relating to the decedent’s pain, suffering or disfigurement will be available in many cases. The argument has also been made that the purpose of awarding such damages is to compensate the victim for pain and suffering which he himself has sustained and that when he is dead the object of such damages is lost and his heirs receive a

³ *Sullivan*, at 298-299; Report at F-6.

⁴ *Sullivan*, at 299; Report at F-7.

⁵ *County of L.A. v. Superior Court*, 21 Cal.4th at 296.

⁶ *Ibid.* (discussing the history of survival action legislation and the accompanying Report and study).

windfall. This argument suggests that the primary reason for providing for survival of actions is to compensate the survivors for a loss to or diminution in the expectancy which they had in the decedent's estate. The Commission does not agree. Causes of action should survive because they exist and could have been enforced by or against the decedent and because, if they do not survive, the death of a victim produces a windfall for the wrongdoer. Under this view it is inconsistent to disallow elements of damages intended to compensate the decedent for his injury merely because of the fortuitous intervention of the death of either party.⁷

Ultimately, Senator Cobey included the provision in SB 202. However, "[t]he Senate amended the bill at the request of the insurance companies to restore [the] provision of the existing law that prevents the recovery of damages for pain, suffering and disfigurement by the representative of a deceased victim."⁸ A contemporaneous letter from the California Law Revision Commission also highlights that the amendment was proposed by representatives of the insurance industry and that it "was apparent at the hearing that extensive lobbying had been accomplished by the insurance industry prior to the hearing."⁹

The relevant statutes were later reenacted in the Code of Civil Procedure. Section 377.20 authorizes the survival action, providing that a cause of action is not lost by reason of the person's death, but survives subject to the applicable limitations period, except as otherwise provided by statute. Section 377.34 lays out the remedies available in such actions:

In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

2. Revising California's survival statutes

Sixty years later, this bill seeks to carry out the final recommendation asserted by the California Law Revision Commission. It discontinues the provision in Section 377.34 that precludes the recovery of damages for pain, suffering, and disfigurement. The same justifications for the change continue to hold weight. Foremost, that if a cause of action for such damages does not survive, it results in "a windfall for the wrongdoer."

⁷ Report at F-7.

⁸ Senator James Cobey, letter to Governor Edmund G. Brown, May 31, 1961.

⁹ John H. DeMouly, Executive Secretary with the California Law Revision Commission, letter to Commissioners, April 14, 1961.

The author and sponsors emphasize a point made by the Commission that the recovery of a certain remedy should not be foreclosed “merely because of the fortuitous intervention of the death of either party.” The Legislature recently passed SB 645 (Monning, Ch. 212, Stats. 2019). That bill tightened the limits on the length of deposition testimony in cases involving plaintiffs dying of mesothelioma or silicosis in order to address the perverse incentive that exists for defendants to prolong such litigation as much as possible to secure the windfall that comes if the plaintiff dies before judgment is entered.

The Consumer Attorneys of California, a co-sponsor of the measure, highlight this element of existing law:

Current law creates a perverse incentive for defendants to delay cases and harass ill or injured plaintiffs in the hopes that the plaintiff will die before trial, allowing the wrongdoer to avoid paying any damages for the human suffering they have caused. That is unjustifiably cruel, and punishes surviving families as they mourn the loss of a loved one. It is especially devastating when the plaintiff is elderly, a child, a stay-at-home parent, disabled, lower income, or anyone else whose damages are not primarily based on how much they earn.

Writing in opposition, the California Defense Counsel argue:

Some proponents of SB 477 have argued that a defendant should not “escape” the payment of noneconomic damages due to the fortuity of the plaintiff’s death before judgment. But that rationale, which advocates for a rule that provides extra-compensatory damages to heirs who did not experience the plaintiff’s noneconomic damages, smacks of punishment *without the protections built into the punitive damages statute*. A defendant who is merely negligent cannot, [by] definition, be deterred by liability exposure expanded beyond the amount necessary for just compensation, because that defendant acted unintentionally. The defendant is “punished” in the sense of having to make the estate of the deceased plaintiff whole in a survival action and to make the surviving spouse, children and or parents whole for their own economic and non-economic losses in a wrongful death action. But further punishment in the form envisioned in SB 447 without any clear and convincing evidence of malice or oppression is bad public policy.

The author challenges the fairness of the existing restriction and highlights California’s minority position on the issue:

When it comes to giving families a chance to recover non-economic damages, California is one of only five states in the entire nation that

rewards defendants for prolonging court procedures – leaving victims unable to obtain justice. SB 447 will end a decades-old injustice in California by finally extending a victim’s right, and the right of their loved ones, to pursue accountability for human suffering – even if they die prior to case resolution.

The State Building and Construction Trades Council of California writes in support:

This bill is important to construction workers because it will help protect persons who are dying from mesothelioma or silicosis, two common terminal diseases found in the construction industry that all too often kill construction workers at too young of an age. The pain and suffering that workers afflicted by both of these diseases endure cannot be overstated. Victims of mesothelioma, a disease caused only by exposure to asbestos that predominately afflicts construction workers and their families, often have no idea when they were exposed to asbestos earlier in life. Symptoms of the disease do not appear for years after exposure but, once present, victims commonly survive less than a year after diagnosis. It is a particularly painful disease that fills the lung cavity with fluid causing a drowning sensation and leading ultimately to death.

Likewise, victims of silicosis, caused by exposure to crystalline dust from cutting stone, quartz, or tile, are often years removed from their exposure to silica dust before symptoms are present. Silica dust is classified as a lung carcinogen and can cause shortness of breath, scarring of the lungs, labored breathing, and respiratory failure among other symptoms. In the case of both diseases, neither discriminates and, occasionally, it is the family members of the workers who are struck down by one of the diseases through exposure to asbestos or silica that a construction worker carried home on his or her clothing. The symptoms for both diseases are painful and chronic and lead to a significantly reduced lifespan and quality of life.

It is time for California to dismantle its draconian laws that rob victims and their families of the compensation they deserve when their rights are violated.

A coalition of groups, including the Civil Justice Association of California and various insurance company associations, writes in opposition to the bill, which the coalition believes is an unnecessary expansion of damages. They argue for an amendment to limit the scope of the bill:

Every harmed plaintiff deserves access to the civil justice system for redress of injuries. The COVID-19 restrictions have created a backlog of

civil cases in the California courts that may have prevented some plaintiffs from fully utilizing the preferential system the way it was intended. Since these court restrictions are soon ending, and courts will resume full operations, there is no need to make a permanent change to the law.

SB 447 should be amended to apply recovery of pain and suffering damages only for those personal injury cases impacted by the court backlog resulting from the pandemic. Limiting the recovery period to cases delayed by COVID-19 court restrictions is a fair way to rectify the delayed redress of claims, while maintaining California's longstanding and well justified public policy surrounding pain and suffering damages.

In order to address concerns about the impacts such a change in the law will have, the author has agreed to place a four-year sunset on the change. Therefore, the bill will only make pain and suffering damages available in survival actions in connection with causes of action that accrue before January 1, 2026.

SUPPORT

Consumer Attorneys of California (co-sponsor)
Consumer Federation of California (co-sponsor)
Asbestos Workers Local 16 Retirees Club
California Alliance for Retired Americans
California Employment Lawyers Association
California Nurses Association
California Teamsters Public Affairs Council
Choice in Aging
Coalition for Humane Immigrant Rights
Consumer Watchdog
Courage California
District Council of Iron Workers of the State of California
Equal Rights Advocates
State Building and Construction Trades Council of California
United Food and Commercial Workers Western States Council
Western Center on Law and Poverty
31 Individuals

OPPOSITION

6Beds, Inc.
American Academy of Pediatrics, California
American Property Casualty Insurance Association
California Assisted Living Association
California Association of Health Facilities

California Association of Joint Powers Authority
California Defense Counsel
California Medical Association
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Manufacturers & Technology Association
California Retailers Association
California Society of Dermatology & Dermatologic Surgery
Civil Justice Association of California
Cooperative of American Physicians
The Doctors Company
LeadingAge California
National Association of Mutual Insurance Companies
Personal Insurance Federation of California

RELATED LEGISLATION

Pending Legislation: SB 2 (Bradford, 2021) provides, among other things, that a cause of action pursuant to the Tom Bane Civil Rights Act for the death of a person may be asserted by any person described in Section 377.60 of the Code of Civil Procedure. This bill is currently in the Senate Judiciary Committee.

Prior Legislation:

AB 2445 (Reyes, Ch. 51, Stats. 2020) affords the legal guardians of a decedent the right to bring a wrongful death claim as if they were the decedent's parents, as specified.

SB 314 (Dodd, Ch. 21, Stats. 2019) explicitly includes abandonment as a basis for securing enhanced remedies for a victim of elder or adult dependent abuse, including the exemption from the limitation in Section 377.34 for pain and suffering damages, as specified.

SB 645 (Monning, Ch. 212, Stats. 2019) *See* Comment 2.

SB 202 (Cobey, Ch. 657, Stats. 1961) *See* Comment 1.
