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UNFINISHED BUSINESS

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Bill No: SB 447  
Author: Laird (D)  
Amended: 8/30/21  
Vote: 21

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SENATE JUDICIARY COMMITTEE: 9-2, 4/20/21  
AYES: Umberg, Caballero, Durazo, Gonzalez, Hertzberg, Laird, Stern,  
Wieckowski, Wiener  
NOES: Borgeas, Jones

SENATE FLOOR: 24-10, 4/29/21  
AYES: Allen, Atkins, Becker, Bradford, Caballero, Cortese, Dodd, Durazo,  
Eggman, Glazer, Gonzalez, Hueso, Kamlager, Laird, Leyva, McGuire, Min,  
Newman, Portantino, Roth, Skinner, Umberg, Wieckowski, Wiener  
NOES: Bates, Borgeas, Dahle, Grove, Jones, Melendez, Nielsen, Ochoa Bogh,  
Pan, Wilk  
NO VOTE RECORDED: Archuleta, Hertzberg, Hurtado, Limón, Rubio, Stern

ASSEMBLY FLOOR: 49-16, 9/2/21 - See last page for vote

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**SUBJECT:** Civil actions: decedent's cause of action

**SOURCE:** Consumer Attorneys of California  
Consumer Federation of California

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**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, as specified.

*Assembly Amendments* clarify the proceedings to which these changes apply and require certain information and documentation to be submitted to the Judicial Council by prevailing plaintiffs. The Judicial Council is thereafter required to report to the Legislature, as provided.

**ANALYSIS:**

## 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 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 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, 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 their 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, 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:

- 1) 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 if the action or proceeding was granted a preference pursuant to Section 36 of the Code of Civil Procedure before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.
- 2) Requires a plaintiff who recovers damages pursuant to the above between January 1, 2022, and January 1, 2025, inclusive, to, within 60 days after obtaining a judgment, consent judgment, or court-approved settlement agreement entitling the plaintiff to the damages, submit to the Judicial Council a copy of the judgment, consent judgment, or court-approved settlement agreement, along with a cover sheet detailing the following information:
- a) The date the action was filed;
  - b) The date of the final disposition of the action; and
  - c) The amount and type of damages awarded, including economic damages and damages for pain, suffering, or disfigurement.
- 3) Requires the Judicial Council, on or before January 1, 2025, to transmit to the Legislature a report detailing the information received pursuant to the above for

all judgements, consent judgements, or court-approved settlement agreements rendered from January 1, 2022, to July 31, 2024, inclusive, in which damages were recovered pursuant to paragraph 1) above.

- 4) Clarifies that it does not alter Section 3333.2 of the Civil Code or affect claims brought pursuant to Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code.

## **Background**

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, as provided.

### *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.<sup>1</sup> As documented by multiple opinions by the California Supreme Court: “After at least a half century of debate and many unsuccessful

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

legislative initiatives, California's first statute providing for the survival of personal tort actions was enacted in 1949.”<sup>2</sup> 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, Chapter 657, Statutes of 1961). The bill was prepared by the California Law Revision Commission (CLRC) in 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.<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup>

However, the CLRC 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

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

<sup>3</sup> *Sullivan*, at 298-299; Report at F-6.

<sup>4</sup> *Sullivan*, at 299; Report at F-7.

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

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

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 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.<sup>7</sup>

Ultimately, the provision was included 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.”<sup>8</sup> A contemporaneous letter from the CLRC 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.”<sup>9</sup> 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

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<sup>7</sup> Report at F-7.

<sup>8</sup> Senator James Cobey, letter to Governor Edmund G. Brown, May 31, 1961.

<sup>9</sup> John H. DeMouilly, Executive Secretary with the CLRC, letter to Commissioners, April 14, 1961.

decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

*Revising California's Survival Statutes*

Sixty years later, this bill seeks to carry out the final recommendation asserted by the CLRC. It discontinues the provision in Section 377.34 that precludes the recovery of damages for pain, suffering, and disfigurement for specified cases until January 1, 2026. 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.” 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, Chapter 212, Statutes of 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.

**FISCAL EFFECT:**      Appropriation:      No      Fiscal Com.:Yes      Local:No

According to the Assembly Appropriations Committee, cost pressure (General Fund (GF)) possibly in the upper hundreds of thousands of dollars to low millions of dollars to state agencies, including the University of California, the Department of Transportation (CalTrans), the California Department of Forestry and Fire Prevention (Cal Fire) and Department of General Services (DGS), in monetary damages for a deceased person's prior pain and suffering, if sued by a decedent's representative. Existing law prohibits next of kin or decedent's representatives from receiving compensation for the deceased person's pain and suffering. University of California, Los Angeles, Cal Fire, CalTrans and DGS have all faced million dollar lawsuits in the past five years from decedents' successors in interest where compensation for the decedent's pain and suffering could have been significant if authorized by law and awarded by the court.

**SUPPORT:** (Verified 9/2/21)

Consumer Attorneys of California (co-source)  
Consumer Federation of California (co-source)  
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:** (Verified 9/2/21)

6Beds, Inc.  
California Assisted Living Association  
California Association of Health Facilities  
California Association of Joint Powers Authority  
California Medical Association  
California Podiatric Medical Association  
Cooperative of American Physicians  
LeadingAge California  
The Doctors Company

**ARGUMENTS IN SUPPORT:** The Consumer Attorneys of California, write in support: “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.”

**ARGUMENTS IN OPPOSITION:** Writing in opposition, the Cooperative of American Physicians argues: “While our physicians work to [protect] their patients from the effects of COVID-19, we know that policy leaders and court officers are diligently planning the return of our courts to their pre-pandemic efficiencies. In SB 447, however, we see an attempt to use the temporary situation of the pandemic to push aside longstanding tenets of California to allow awards of non-economic damages for pain and suffering in survival actions. A policy shift of the magnitude



included in SB 447 deserves careful consideration of the collateral damage such a change would bring to all stakeholders of our civil justice system.”

ASSEMBLY FLOOR: 49-16, 9/2/21

AYES: Aguiar-Curry, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Bryan, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Daly, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Lee, Levine, Low, Maienschein, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Salas, Santiago, Stone, Ting, Villapudua, Ward, Wicks

NOES: Bigelow, Choi, Cunningham, Megan Dahle, Davies, Flora, Fong, Gallagher, Kiley, Lackey, Mathis, Seyarto, Smith, Valladares, Voepel, Waldron

NO VOTE RECORDED: Arambula, Chen, Cooley, Cooper, Frazier, Gray, Mayes, Nguyen, O'Donnell, Patterson, Blanca Rubio, Akilah Weber, Wood, Rendon

Prepared by: Christian Kurpiewski / JUD. / (916) 651-4113  
9/2/21 18:49:25

\*\*\*\* END \*\*\*\*