Proposals to allow more wrongful death lawsuits would increase the legal liability of taxpayers

by Brandon Houskeeper
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Introduction

The doctrine of sovereign immunity, rooted in English common laws, holds that citizens cannot sue a state government, or the federal government, without that government’s consent.

Over the years, the federal government and all state governments have to some degree waived their sovereign immunity to allow citizens bring lawsuits against the government because of harm done by public employees or for violations of the terms of public contracts. All other states, however, enacted only a limited waiver. They retained a degree of sovereign immunity in order to protect their taxpayers against frivolous, unreasonable or high-cost lawsuits.

Only Washington state has completely waived its sovereign immunity against lawsuits, and thus has eliminated the last legal protection taxpayers had against over-reaching lawsuits and costly jury awards. Among the professions, trial lawyers have benefited most from the full waiver of immunity, because it made it easier to file suits against an entity with a seemingly bottomless ability to pay.

Although the waiver of sovereign immunity initially impacted state government, the impacts also affected local governments, such as cities, counties, schools, hospital districts and fire districts. The full waiver has left all levels of government unprotected from lawsuits, leaving taxpayers as exposed as any private company.
Wrongful death and survival claims

The greatest costs of the immunity waiver are court rulings that create even greater liability for taxpayers, such as lawsuits for wrongful death and survival actions.\(^1\)

Wrongful death is a claim for payment from a person or entity, such as the state or a unit of local government, whose negligence caused or contributed to someone’s death. A survival action is a claim for payment from a person or entity made after the death of a claimant, even if the person or entity being sued did not cause or contribute to the claimant’s death.

Either type of claim is brought in a civil action, usually by the personal representative of the estate of the dead person on behalf of surviving family members.

As mentioned, most states have waived part of their sovereign immunity to allow limited wrongful death lawsuits. Washington’s waiver of immunity, however, is much broader. Washington has four laws that allow such suits: 1) general wrongful death statute; 2) child death statute; 3) general survival statute; and 4) special survival statute.

Expanding the liability of taxpayers

In the 2008 session, the legislature is considering bills (HB 1873 and SB 6696) to further expand lawsuits based on wrongful death and survival claims. The expansion of these statutes would increase the liability of taxpayers by providing individuals with an increased ability to sue the state. The most significant changes being proposed are:

- Adding a decedent’s “loss of enjoyment of life” and “shortened life expectancy” to the list of payments a judge or jury could levy against taxpayers. These payments, often called “hedonic” damages, would be in addition to payments for any pain and suffering, anxiety or emotional distress suffered by the deceased.

- Overturning the long-established principle that allows payments only for damages suffered by the decedent during his or her lifetime, by allowing survivors to receive payments for similar non-economic damages, such as their own pain and suffering, emotional distress, and loss of enjoyment of life. Current law permits some of these payments only in the case of the death of a child.

- Allowing a parent of a child of any age with a developmental disability to receive payments for the death or injury of the child, if the parent regularly contributed to the support of the child.

- Eliminates the age limitation of a child whose death can be the basis of a claim on behalf of the surviving parents, if the parents regularly contributed to the support of the child, or if the parent was dependent on the child for financial support. The current limit is age 18.

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\(^1\) Seattle University Law Review; Volume 29, Fall 2005, Number 1: Washington State’s 45-year Experiment in Government Liability, by Tardif and McKenna
• Allowing a parent to receive payments in the case of the death of a child of any age, if the parent has “significant involvement” in the child’s life.

• A single beneficiary under the decedent’s life insurance policy if the beneficiary had a significant involvement in the decedent’s life

These legislative proposals to expand “wrongful death” claims would have several major effects. If enacted, they would increase significantly the number of lawsuits filed against the state and against local governments, and it would greatly increase the amount of money the state would have to pay out in court awards.

Increased cost to taxpayers

Thus far, the fiscal impact statements that have accompanied proposals for wrongful death and survival actions did little to explore the true cost to both state and local governments. The Attorney General’s office supplied the only significant analysis of cost to the State. That analysis shows the costs taxpayers would face under this proposal.

On average, the state is involved in about 20 to 25 wrongful death suits per year. In about half of these cases state taxpayers may have to pay special damages, based on the net accumulation of a decedent’s estate.

Under the proposals before the legislature, the state would likely be liable for pain and suffering damages in virtually all lawsuits filed against it, not just half. In analyzing the potential impact of HB 1873, the Attorney General estimates it would result in an average pay out of $1.3 million per case. A further $1.3 million per case would likely be levied for the new hedonic damages, bringing the total cost to taxpayers to $2.6 million per case settled.²

Based on the number of cases filed each year, taxpayers would become liable for payouts of approximately $63 million a year. These new costs would be further increased by the unknown number of added cases that would be filed each year because of the greater chance of securing large payouts from the state.

Costs to local government

The increased costs to local governments is hard to quantify and must be estimated based on the liability insurance pools for cities, counties, public hospital districts, fire districts, and other public entities in addition to self-insured public entities.

The Washington Cities Insurance Authority (WCIA) has incurred exposure to over 160 wrongful death claims in the past ten years. About 40 cases of these cases were litigated or settled.

² HB 1873; Fiscal Note attached – 2007 Attorney General
The combined courts awards and legal costs is $490,000 per case, with 26 of the cases still unresolved. The financial reserve maintained by the Authority to cover legal costs is $5.2 million.

WCIA estimates the proposal to allow more wrongful death lawsuits would triple local governments’ liability costs, requiring a financial reserve of more than $15 million just for the 26 pending lawsuits. This estimate does not include the increased cost of the additional lawsuits that would be filed if the legislature makes it easier to sue local governments.

WCIA’s legal liability fund serves 128 cities and special districts. It is just one of 15 such liability pools that serve Washington’s 1,720 local governing bodies. It is likely the other 14 pools would face similar increases in exposure and costs, and a tripling of their reserve requirements. These costs would be passed on directly to local homeowners, employers and other taxpayers.

Other states

There is perhaps an additional point or question that should be taken into account when analyzing the proposed legislation that would amend the wrongful death and survival statutes in Washington. First, what are the fiscal impacts and other limitations that other states have in place regarding wrongful death and survival claims.

Perhaps the most complete review of wrongful death damages comes from a New Jersey law firm, McCarter & English LLP. This review looks at the range of general and special damages that are recoverable, as well as, any caps limiting the payments allowable under applicable damages by individual states. While this state-by-state analysis helps to get an idea of the types of damages allowed in other states, it says little about the actual costs to state or local governments. The reason is because of sovereign immunity.

Conclusion

Increasing the number of ways to sue the state and local governments by adding more wrongful death and survival claims will increase costs to Washington taxpayers.

The increased costs to liability insurance pools for the state, counties, cities and local districts, needs to be better understood before lawmakers further weaken sovereign immunity protections. The incomplete fiscal notes produced so far are not enough.

Recently the New Jersey lawmakers passed a similar wrongful death bill, to increase the amount of jury awards against the state with no monetary limits. The state’s Democratic governor, Jon Corzine, vetoed the bill. In explaining his action he said,

“unlimited damages based on emotional anguish or pain and suffering could have a significant impact on state and local budgets, since government entities are not infrequently named as

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3 State by State Analysis for damages and caps: by McCarter & English, LLP; Newark, NJ
defendants in wrongful death suits, and there are similar concerns as the State undertakes efforts to attract and grow businesses here.

“Unfortunately, I do not believe that this bill...strikes a fair balance that would avoid using a strict monetary valuation of a person’s life while also addressing the adverse effect of allowing unlimited and unpredictable damages.”

Governor Corzine’s reasoning applies equally to the expanded wrongful death liability proposals being debated in Washington. The real costs and increased number of lawsuits against taxpayers is unknown. Washington lawmakers should get a more realistic idea of the costs, and the long-term fiscal impact on taxpayers, before further eroding the state’s sovereign immunity protections.

Brandon Houskeeper is a policy analyst with Washington Policy Center, a non-partisan public policy research organization in Seattle and Olympia. Nothing here should be construed as an attempt to aid or hinder the passage of any legislation before any legislative body. For more information contact WPC at 206-937-9691 or online at www.washingtonpolicy.org.