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Proposed Legislative Expansion of Categories of Wrongful Death Damages in New Jersey Could Have Far-Reaching Implications

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On April 5, 2018, the Senate Judiciary Committee pushed forward Senate Bill S-1766, legislation that would markedly expand New Jersey's wrongful death statute to allow recovery for non-economic damages including "mental anguish, emotional pain and suffering, loss of society and loss of companionship." The bill was introduced in February by New Jersey Senate Judiciary Committee Chairman Sen. Nicholas P. Scutari.

Under New Jersey's existing wrongful death statute, a decedent's survivors can recover money damages for the actual and future financial losses of the survivors. The instructions to jurors (Model Jury Charges) sitting on such cases explain that "[y]ou are also not to consider any emotional distress, anguish or grief the survivors may have suffered as a result of the decedent's death, or any loss of emotional satisfaction the survivors may have derived from the society and companionship of the decedent."

The proposed legislation would eliminate this restriction entirely. As the Senate Judiciary Committee explained in reporting favorably on Bill S-1766, "[w]rongful death statutes establish a cause of action for the wrong done to an individual's beneficiaries when that individual dies as the result of the wrongful conduct of another person." Under New Jersey's present wrongful death law, damages are recoverable for pecuniary/economic loss – the amount of money lost by a dependent when a support person dies, as well as hospital, medical and funeral expenses incurred from the deceased. Bill S-1766 "would expand the type of damages for which one may bring suit to include mental anguish, emotional pain and suffering, loss of society and loss of companionship."

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This dramatic expansion of the damages recoverable under the New Jersey wrongful death statute could have far-reaching implications. Unlike damages for pecuniary loss, which can be calculated, damages for “mental anguish, emotional pain and suffering, loss of society and loss of companionship” are unliquidated. The only constraint on a jury verdict is the jury’s own discretion, and whether an award is so outlandish that it “shocks the judicial conscience.” As a likely result, jury verdicts in wrongful death cases under the proposed legislation would not only be much higher, but also far more unpredictable.

With the significant enlargement of the measure of damages, there could be a significant increase in the cost of liability insurance policies. Policies covering liability for personal injury, from auto to homeowners to medical malpractice insurance, could potentially be subject to large premium increases.

The logical question – whose mental anguish, emotional pain and suffering, loss of society and loss of companionship is measured and compensated under Bill S-1766? – is not addressed under the current version of the legislation. The existing wrongful death statute identifies the individuals eligible to receive pecuniary loss damages as those individuals who would inherit under New Jersey’s intestacy statute, with special consideration given to those who are actually dependent on the decedent. There is no similar qualification in the proposed legislation. Any heir-at-law, even without a close emotional relationship to the decedent, may claim an emotional injury, and without limit. The existing statute limits damages to a demonstrable pecuniary loss. The proposed legislation only requires that the heir demonstrate “mental anguish, emotional pain and suffering.”

Notably, except in very rare circumstances, family members who would be heirs-at-law are not entitled to damages for their mental anguish or emotional loss if the injured person survives a catastrophic injury. Under the proposed legislation, such individuals would be entitled to recover emotional distress damages only if the injured person dies.

While New Jersey courts have expanded the quantum of “pecuniary” injuries to include the loss of advice, counsel, companionship and society, these damages are not to include non-economic and emotional type damages. Under the 1980 New Jersey Supreme Court case *Green v. Bittner*, the Court held that New Jersey’s wrongful death statute does allow a plaintiff to recover pecuniary/economic damages for the loss of companionship and society resulting from the death of the decedent, but the Court made clear that the emotional loss flowing from the loss of companionship and society was beyond the reach of any recovery. Since that decision, *Green v. Bittner* type economic damages are routinely recovered in wrongful death cases, but New Jersey courts will not stray into the non-economic categories of damages absent legislative intervention.

The proposed legislation would expand the wrongful death damages recoverable in New Jersey beyond that in neighboring states. New York currently limits the scope of damages recoverable in a wrongful death action to pecuniary losses. New York does allow for an award of punitive damages “if such damages would have been recoverable had the decedent survived.” However, punitive damage awards are rare, and are awarded only when the defendant’s conduct is found to be particularly malicious or willful.

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Connecticut is more expansive, allowing juries to award “just damages,” which Connecticut courts have held can include economic and non-economic damages. The non-economic component can include loss of enjoyment of life (i.e. compensation for the destruction of the capacity of the decedent to carry on and enjoy life’s activities in a way he or she would have done had he or she lived). However, Connecticut does not allow heirs-at-law to recover for their mental anguish or emotional loss.

Pennsylvania’s wrongful death statute, although again not as expansive as Bill S-1766, does allow members of the decedent’s family to recover not only medical, funeral and estate administration expenses, but also for the “loss of services” provided by the decedent, similar to New Jersey’s *Green v. Bittner* damages.

While the wrongful death statutes in this region differ considerably, currently none appears as expansive as that contemplated under New Jersey Bill S-1766. Whether the proposed legislation will be enacted remains to be seen. However, the legislation was sponsored by a Democratic Senator, and with a Democratic Governor in office and a Democratic majority in both houses, the bill may well become law – and the potential therefore exists for greater and more unpredictable wrongful death damages awards.

If you have questions or would like additional information about New Jersey’s wrongful death statute or the proposed legislation, please contact the authors of this Alert, **John D. North** and **Jemi G. Lucey**.