

## The Grieving Families Act

Senate Bill S74A, titled “The Grieving Families Act”, seeks to vastly expand the potential damages available to surviving families in a wrongful death action. It has been passed by the legislature and awaits Governor Hochul’s signature. The proposed statute includes compensation for the following damages: “(iii) grief or anguish caused by the decedent's death, and for *any disorder* (emphasis added) caused by such grief or anguish; and (iv) loss of love, society, protection, comfort, companionship” *The Grieving Families Act*, S74A§2(a)(iii-iv). These damages are not presently compensable. Additionally, the proposed statute would extend the current wrongful death statute of limitations from two years to three years and 6 months following the death of the decedent. *The Grieving Families Act*, S74A§1. Finally, the law, as presently constituted, will take effect immediately upon signing and will apply to all pending and future actions.

Under current New York law, wrongful death damages are limited to “fair and just” compensation for the pecuniary injuries resulting from the decedent’s death. See, EPTL §5-4.3. These damages include loss of support, voluntary assistance, and possible inheritance as well as medical expenses incidental to death and funeral expenses. See, *Gonzalez v. New York City Housing Authority*, 77 N.Y.2d 663 (1991). Essentially, the present law only provides compensation for financial loss.

While economic damages are recoverable, other less easily quantifiable losses are not. The court in *Liff v. Schildkraut*, explained that the term pecuniary damages was “consistently construed by the courts as excluding recovery for grief, and loss of society, affection and conjugal fellowship—all elements of the generic phrase “loss of consortium”. See, *Liff v. Schildkraut*, 49 N.Y.2d 622, 633 (1980). Courts construed pecuniary damages to exclude any

other types of damages, limiting the recovery by the statutory distributees. The loss of a child with no salary or an elderly person past their working years would lead to a low damage award as the pecuniary loss would be minimal. In *Punturieri v. Marciano*, the jury awarded the decedents \$1,500,000 in a case where a hospital failed to diagnose the minor decedent's condition leading to his premature death. All of the damages were limited to those for the decedent's pain and suffering. See, *Punturieri, Individually and as Administrator of Putnurieri, Estate of v. Marciano, D.O.; Winthrop University Hopsital Association*, JVR No. 1302010007, 2012 WL 6966645 (Sup. Ct. Nassau Cty. 2012).

Further, a court held that a plaintiff could not recover for the wrongful death of her sister in a facility for people with developmental disabilities. In *Thurston v. State*, # 2013-031-019 (N.Y. Ct. Cl. May. 2, 2013), the judge acknowledged that the defendant acted negligently with respect to the decedent when she was left unattended while bathing despite the need for supervision. The decedent was discovered unconscious and unresponsive in the bathtub. Despite the defendant's negligence, the court was compelled to grant the defendant's motion for summary judgment under the New York wrongful death standard as there was no pecuniary injury. The court labeled the law "Draconian" and the outcome "repugnant". Still, the court had no choice but to rule in favor of the defendant and dismiss the plaintiff's case for the wrongful death of her sister.

In addition to limiting recovery to economic damages, the law also placed limitations upon who could recover damages in a wrongful death case. Only distributees of the decedent's estate could take part in the award. See, EPTL §4-1.1. This led to a limited class of plaintiffs as ordinarily only the plaintiff's spouse or children could recover. The Grieving Families Act expands those who can recover to include "surviving close family members, which may include,

but are not limited to, spouse or domestic partner, issue, parents, grandparents, step-parents and siblings. The finder of fact shall determine which persons are close family members of the decedent under this section based upon the specific circumstances relating to the person's relationship with the decedent.” *The Grieving Families Act*, S74A§3(a).

The Grieving Families Act would allow recovery for grief and anguish as well as loss of love, society, protection, comfort, companionship and consortium in addition to the previously recoverable damages for loss of nurture, guidance or education; reasonable funeral expenses; reasonable expenses for medical care and treatment prior to death; and pecuniary injuries due to loss of services, support, and inheritance. *The Grieving Families Act*, S74A§2(a)(i-v). Additionally, the proposed statutory language includes recovery for *any* disorder caused by grief or anguish. There are no similar provisions in New York law to predict how this language will be interpreted. This will likely lead to a broad application allowing recovery for a myriad of psychological disorders including depression, addiction, and anxiety.

The Grieving Families Act would align New York law with the laws of several other states. In those states, these statutes have led to large damages awards. In Texas, several members of a decedent brought an action for wrongful death after the decedent was killed by an explosion while performing work on piping. See, *Grimaldo v. Kinder Morgan*, 2013 WL 8148734 (Tex. Dist. Ct. Harris Cty. 2013). The decedent’s family received a jury award of \$20,178,653.00 divided between the decedent’s wife, children, brothers, and father. Each of the family members received awards for loss of companionship and society as well as past and future mental anguish.

Juries in other states have also addressed damages involving decedents who have limited pecuniary loss. In Washington, a jury awarded \$11,781,668.45 to the parents of a two-year-old

boy who passed away after he walked out of a daycare facility and drowned in a nearby lake. See, *Tobin v. State of Washington*, 2008 WL 5100879 (Sup. Ct. Wash. Pierce Cty. 2008). The parents each received \$4,500,000 for loss of love and destruction of the parent/child relationship, including grief, mental anguish and suffering.

In Illinois, a mother received a \$21,880,620.00, later reduced to \$16,410,465.00, when she lost her four children in a fire caused by a defective space heater. See, *Perkins v. Lakewood Eng'g & Mfg.* 2013 WL 6045465 (Ill. Cir. Ct. Cook Cty. 2013). In her wrongful death action, the mother received a jury award of \$2,500,000 for each child for loss of consortium, grief and anguish resulting from the deaths of her children.

Other states have expanded awards for the families of elderly decedents as well. A court in Delaware awarded \$2,864,000.00 to the spouse of a retired decedent in a wrongful death action. See, *Gallagher v. American Optical Corp.*, 2012 WL 5942439 (Del. Super. Ct. New Castle Cty. 2012). In that case, the decedent developed mesothelioma after years of exposure to asbestos during his career building toilets and sinks during which he used a dusting agent to prepare molds for the component parts. His wife filed a wrongful death suit for damages for medical expenses, the decedent's pain and suffering, and her loss of society and grief. The jury awarded her \$1,500,000 for loss of society, mental anguish and grief under the Wrongful Death Act in Delaware.

If passed, the impact that the newly enacted Grieving Families Act will have on damages awards in New York will be enormous. Cases from other states provide some insight into potential verdict amounts. It should be expected that damages awards will increase greatly. Juries will award damages for emotional injuries such as grief, anguish, and loss of companionship. Expanding the class of those who can recover to include parents, siblings, and other close family

members will lead to a need for more extensive discovery to determine who was close enough to the decedent to qualify to take part in the damage award. If the law is passed, as is, it will apply to all cases. It will increase the exposure for defendants and affect the underwriting and reserves of their insurance carriers. The law will have a large and immediate impact on wrongful death actions in New York. All plaintiff and defense attorneys are keeping close watch on when, or if, Governor Hochul will sign this bill and whether it will be signed as is or with changes.

**Kevin G. Faley** and **Andrea M. Alonso** are partners in the firm of *Morris Duffy Alonso Faley & Pitcoff*. **Rory McManus**, a paralegal with the firm, assisted in the preparation of this article.