

Who Can Sue Docs for Wrongful Death? Some States Are Trying to Expand That Group

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In what some call a "disturbing trend," efforts are being made to broaden the definition of "family members" who can sue physicians for wrongful death. In addition, the types of emotional damage that physicians can be sued for is expanding in pockets across the nation. The latest effort to expand the capacity to sue, a bill in New York state, failed when it was not signed by the governor — but a toned-down bill is in the works.



The impact of New York's proposed expansion of wrongful death lawsuits would have been widespread. The NY legislation would have expanded the definition of "close family members" to include spouses, domestic partners, children, parents, stepparents, siblings, grandparents, and perhaps more. Additionally, lawsuits could have allowed juries to determine "close family members" of the deceased patient on the basis of specific circumstances of the person's relationship with the decedent.

Currently, every state allows a [wrongful death claim](#) to be filed by immediate family members. If the patient who died was married, a surviving spouse could bring the lawsuit. If unmarried, an adult child could bring the lawsuit in some states. A parent typically brings a lawsuit if their minor child has died from alleged wrongful death. In some states, one member of a civil union or domestic partnership may bring a wrongful death lawsuit. And if a single adult has no children or spouse/partner, more distant family members, including aunts, uncles, siblings, or grandparents, may file the suit.

The New York bill would also have expanded compensable damages to include loss of affection and companionship, and it would have expanded emotional damages, which are not currently included in New York. It would also have extended the statute of limitations of a wrongful death claim from 2 years to 3½ years.

In general, in states that allow emotional distress to be included in wrongful death lawsuits, attorneys must demonstrate that survivors have suffered mental harm, such as depression, loss of sleep, fear, and anger, says Russ Haven, Esq, general counsel for the New York Public Interest Research Group (NYPIRG). While not particularly easy to prove, attorneys must show that survivors have ongoing distress that is the direct result of the loss of the loved one and that the distress is significant enough to severely affect their quality of life.

Haven gives an example of emotional distress: "We worked with a woman who lost her fiancée in a motor vehicle accident," he says. "The funeral ended up on the day she had scheduled her wedding dress fitting. A situation like that causes a good deal of lasting emotional distress."

Expanding Family Members Who Can Bring the Lawsuit

The fact that a fiancée could be included in a wrongful death settlement is another aspect of the New York bill that was central both to arguments for and against the expansion of family members who can make claims. "We think a modern society includes unmarried partners, grandparents, siblings and others," says Haven.

"The language of who is a close family member might seem clear, but to a defense attorney, it isn't," says Tom Stebbins, executive director of the Lawsuit Reform Alliance of New York. "This could end up being a situation where someone has 40 grandchildren, and all could be considered close family members."

Many states currently allow damages for claims of grief and mental anguish resulting from a wrongful death.

In her recent veto of the Grieving Families Act, New York Gov. Kathy Hochul took fire for her choices. The bill represented years of effort by the state legislature to expand the qualifiers for wrongful death lawsuits. Those supporting what ultimately became Senate Bill S74A believed they finally had the law over the finish line. Those opposed breathed a sigh of relief when the bill was vetoed.

Had Hochul signed Bill 274A, the effect on costs would have been enormous for physicians. New York already has the highest cumulative medical liability payouts in the nation, according to the Medical Society of the State of New York (MSSNY).

The MSSNY was among many parties that fought against the law. The Greater New York Hospital Association, insurance companies, the Defense Association of New York, and the New York Conference of Mayors all joined in lobbying against the bill.

"Governor Hochul, in her veto message, correctly noted that the proposed New York legislation represented an extraordinary departure from New York's wrongful death jurisprudence," says Remi Stone, director of government relations at The Doctors Company, part of the TDC Group. "I would add that while there are some other states that allow grief damages, none are as wide-ranging as the proposed legislation."

The NYPIRG, the AARP, and the New York Immigration Coalition supported the bill. In a statement following the veto, the New York State Trial Lawyers Association said: "By vetoing the Grieving Families Act, Governor Hochul has sided with insurance companies, the healthcare industry, big corporations, and anyone else who doesn't want to be held accountable for the negligent killing of a person. This bill passed with overwhelming, bipartisan support and would rectify over a century of injustice."

Following Hochul's veto, the bill's proponents and the state legislature vowed to return to the drawing board and construct a bill that the governor would eventually approve. For now, however, the controversial legislation has been put to rest.

Haven and the NYPIRG argue that New York lags behind many other states in allowing survivors to claim loss for their emotional distress. "When there is relationship loss, it has a great impact on your life," Haven says, "and this goes beyond simply the financial impact."

"The bill was well intended but completely vague on who could bring lawsuits and would have increased medical malpractice insurance by far too much," says MSSNY President Parag Mehta, MD. "For safety net hospitals, one lawsuit would halt their ability to provide many programs aimed at underserved populations."

Peter Kolbert, JD, senior vice president of claim and litigation services at Healthcare Risk Advisors (part of the TDC Group), had this to say: "The current 'recoverable' damages in New York in a wrongful death case include loss of guidance and support for minor children of a decedent. Those damages have been sustained at \$2 million per child. It is a rationally very challenging, if not impossible, to distinguish between those damages and the proposed damages that the very same people would have been entitled to under the proposed statute."

What Will Happen in the Future?

While the veto has stalled New York's wrongful death expansion for now, supporters in and out of the legislature remain determined to continue their fight. "Advocates argue that the bill would have brought the state in line with wrongful death law in others," says Brian Whitelaw, a partner at Michigan's Foley, Baron, Metzger & Juip. "But if the bill had become law as written, the economic impact would have been substantial."

Whitelaw says that such wide-ranging lawsuits can have consequences that extend far beyond physicians' insurance premiums. "This could impact the average person on the street's ability to obtain the medical care they need, because doctors will go elsewhere to practice," he says. "Beyond impacting the healthcare system, it can hurt small businesses as well."

Haven says supporters of the expansion are far from finished with their efforts. "New York's current law dates back to 1847, and it was cutting edge then," he says. "It was designed for an agrarian society where if the husband died, his widow and children wouldn't become destitute. Now, 175 years later, we realize that the law has biases, and tort law has evolved. The state needs to evolve as well."

For his part, Mehta is open to a dialogue with lawmakers to revise the law in a manner agreeable to all parties. "We want to work together to make the system right," he says. "The liability system in New York needs an overall holistic change, and we are available at any time to have discussions. The vetoed bill was a band aid, and didn't address the main, underlying issues in the state."

Stebbins, too, says he would like to continue the debate over how an expansion should look. "We hope to go through a discussion on caps to these suits," he explains. "We have already seen the cap of \$10 million broken four times in the past few years through nuclear verdicts. That's something we need to address."

Given the legislature's overwhelming support for the bill, some version of it will likely make another appearance in the coming session. Whether or not it can strike the middle ground that will make all parties happy — including the governor — is yet to be seen. "Is it wrong to seek compensation for pain and suffering from a wrongful death?" asks Whitelaw. "No. But there must be limits to such laws, or where does it end?"

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