



## Ending the death discount

WORKING TO PASS SB 447 SO THAT HUMAN SUFFERING DAMAGES DON'T DIE WITH THE VICTIM

### SACRAMENTO UPDATE

Consumer Attorneys of California is working to pass legislation that will end the death discount that wrongdoers currently enjoy when a victim of their negligence dies before trial or resolution of their case. Senate Bill 447 (by Sen. John Laird D-Santa Cruz) would amend CCP section 377.34 to specifically allow for the survival of a decedent's damages for pain, suffering, or disfigurement. If enacted, the bill would go into effect on January 1, 2022 and would apply to causes of action that accrued before January 1, 2026.

When the California Legislature enacted laws on survival damages in 1961, the insurance industry lobbied to extinguish damages for human suffering when a plaintiff dies. The legislature at the time was strongly in favor of preserving these damages but buckled under industry pressure.

As a result, today California is *one of only five states* that allow a victim's human suffering damages to die with them. All too often, corporate defendants take advantage of this law; purposefully prolonging court proceedings in hopes that delays will outlive the victims of their own negligence. Allowing defendants and bad actors to pocket a windfall of cash simply because a victim of their negligence has died is grossly unfair, and SB 447 would correct this injustice.

COVID-19 has amplified the effects of this unjust law, especially for victims who suffer from terminal illnesses. Courts are forced to set trial dates with long delays – and even to ignore preference statutes that are supposed to give dying and elderly plaintiffs a speedy trial date.

Defendants take every advantage of these delays, refusing to agree to bench trials and then objecting to virtual trials, in the hopes that the plaintiffs will die before trial.

Current law creates a perverse incentive for defendants to delay cases and harass ill plaintiffs in the hopes that the plaintiff will die before trial, allowing the wrongdoer to avoid paying any damages or restitution for the human suffering they have caused. This 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.

Of course, this effort is being met with heavy industry opposition from the California Defense Counsel, tort reform groups like the Civil Justice Association of California, the California Chamber of Commerce, insurers and the medical industry. The opposition is arguing that the bill should be limited to only COVID-delayed cases and cases entitled to a CCP 36 Preference. First, this does not solve the problem of the death discount. A company that deliberately sells a dangerous product, or a drunk driver who runs over an elder, should not get a windfall just because their victims are not expected to live longer than six months. Second, it creates bad incentives around preference. Defendants, who already oppose preference motions, will fight even harder against every preference motion, no matter how meritorious, since they will have an even greater incentive to delay trial until the plaintiff dies. And plaintiffs will be motivated to ask for preference in every single case where they can do so. This will needlessly burden the courts and result in defendant gamesmanship.

The opposition is also arguing that current damages, including punitive damages are sufficient and that human suffering damages are far too speculative to award to a deceased party. We know, however, that punitive damages can prove malice, oppression or fraud on behalf of the defendant, typically in cases of intentional harm or extreme reckless conduct. (Civ. Code, § 3294, subd. (a).) Further, human suffering damages are not speculative, and in order to determine the correct amount of human suffering damages to award, the trier of fact will usually consider the testimony of the person while they are alive, or their family members (before or after death). This is exactly the same way it is calculated in a living case.

Finally, the opposition claims that this bill is just an attempt to enrich trial lawyers' pockets. The cruel fact is that the status quo benefits the defendants and wrongdoers, who actually committed the harm who get a death discount for their negligence if their victim dies. Wrongdoers should be held accountable for the harms, including the human suffering, they cause to another. A victim's death does not negate that the harm happened and was suffered.

At a time when the courts are in disarray and trying to get through the pandemic-induced backlog, plaintiffs need to feel confident that their rights are not going to be further decimated by the guillotine of time.

If you have victim stories that you can share with our legislative team, now is the time to reach out to us and help us get this important bill passed.

