

Trends in Product Liability Litigation & Legislation in New York



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I. The Grieving Families Act

Under current New York law, damages in a wrongful death case belong solely to distributees of the decedent who sustained pecuniary (monetary) loss.¹ Pecuniary loss includes funeral and burial expenses, future earnings of the decedent, parental guidance, and physical, moral, and intellectual training. Distributees (commonly called “next of kin”) are persons entitled to take or share in the estate or property of a decedent, as defined by statute. These persons cannot currently recover for emotional loss, mental anguish, or loss of companionship. While there is no statutory cap on the amount of damages that can be recovered in a wrongful death suit, the inability to recover for companionship-type loss effectively keeps juries from awarding runaway verdicts. New York is one of only nine states in the U.S. that does not allow for the recovery of mental anguish/emotional loss in a wrongful death case.

Intense efforts are underway to modernize the State’s wrongful death law, which has not been updated since it was enacted in 1847. Entitled the “Grieving Families Act” (S.74/A.6770), the measure would significantly reform New York’s current law to allow for compensation for emotional trauma and love lost by family members of a decedent. Specifically, the family members of the decedent could recover for:

- Grief and anguish;
- Loss of love, society, protection, comfort, companionship, and consortium;
- Reasonable funeral expenses;
- Reasonable expenses for medical care, treatment, etc. prior to death;
- Pecuniary injuries due to loss of services, support, inheritance; and
- Loss of nurture, guidance, or education.

The Act also expands the list of persons entitled to recover beyond distributees of the decedent’s estate. The proposed list of persons includes: a spouse, a domestic partner, close family members, issue, parents, grandparents, step-parents, and siblings. The determination of which family members are “close” will be a question for the jury based upon the evidence. The Act, which has overwhelming bipartisan support, passed both Judiciary Committees in the New York State Senate and

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1. A personal representative of the decedent can also recover non-economic damages for the conscious pain and suffering of the decedent prior to death, including pre-impact terror.

Assembly. But recently, the Bill was sent back to these committees with a proposed amendment to extend the statute of limitations for these actions from two years to three and a half years from the date of death.

If this Bill passes the Senate and Assembly, and is signed into law by the Governor, wrongful death suits in New York will likely present a significantly higher risk of exposure to corporate defendants, depending on the number of persons deemed able to recover damages for emotional loss. We expect the Act to pass sometime in 2022, perhaps as early as this Summer.

II. General Personal Jurisdiction: *Aybar v. Aybar*, 37 N.Y.3d 274 (2021)

On October 7, 2021, New York's Court of Appeals (the State's highest court) issued a significant decision that debunked the myth that a foreign corporation consents to general jurisdiction in New York merely by registering to do business in the State and designating a local agent to accept service of process.²

In *Aybar v. Aybar*, a products liability lawsuit, the Court disabused the plaintiffs' reading of old precedent in *Bagdon v. Philadelphia & Reading Coal & Iron Company*, 217 N.Y. 432 (1916). Plaintiffs argued that *Bagdon* stood for the proposition that foreign corporations, by registering to do business in New York and designating a local service agent in accord with statutory mandates, contractually consented to the general jurisdiction of New York courts. The *Aybar* court disagreed and clarified that *Bagdon's* holding was much narrower: a foreign corporation's designation of an in-state agent amounted to consent to in-state service, even if the causes of action extended beyond the company's New York business. In other words, *Bagdon* is only half of the jurisdictional equation; whether a New York court has the power to exercise personal jurisdiction over a foreign corporation (beyond service of process) is a separate analysis.

In rejecting plaintiffs' arguments, the *Aybar* court relied on the plain language of New York's Business Corporation Law, which requires a foreign corporation to register in New York and appoint an in-state agent for service of process, to do business in the State. The Court maintained that the statute, by its own terms, does not condition a foreign corporation's right to do business in the State on consent to the general jurisdiction of New York courts. "A different reading would improperly amend the statute by adding words that are not there and would impermissibly read into a statute a provision which the legislature did not see fit to enact." *Aybar*, 37 N.Y.3d at 283.

2. This decision was not about specific jurisdiction or general jurisdiction under *Daimler AG v. Bauman*, 571 U.S. 117 (2014). Plaintiffs abandoned these separate theories of jurisdiction on appeal.



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