



April 7, 2021

To: The Honorable Senator Umberg  
Chair, Senate Judiciary Committee  
Members, Senate Judiciary Committee

Re: **SB 447 (Laird) Amended; March 5, 2021 OPPOSE UNLESS AMENDED – Civil actions: decedent’s cause of action.**

The Civil Justice Association of California (CJAC) *and the organizations listed below* must respectfully OPPOSE UNLESS AMENDED SB 447 which would permanently allow non-economic damages for pain and suffering to be awarded in survival actions, which will give rise to increased costs to consumers and more litigation clogging California courts. This coalition respectfully requests the bill be amended to apply on a temporary basis only to cases delayed by court closures due to the COVID-19 pandemic. Below is more detail on our reasons for opposing unless amended.

**1. SB 447 is an Unnecessary Expansion of Damages when Current Law Already Allows for Recovery of Economic and Punitive Damages**

By amending this statute to delete the bar of recovery for pain and suffering, SB 447 upends the longstanding policy in California that causes of action for personal injuries arising out of a tort are not transferable.<sup>1</sup>

Under current law, damages that can be recovered in a survival action include actual losses and any penalties or punitive damages that the decedent would have been entitled to recover had the decedent lived. Pain and suffering damages are not recoverable in survival actions because those damages are personal to the party injured and not meant to compensate a non-injured party.

Practically speaking the only way to fairly establish evidence of pain and suffering would be through testimony of the injured plaintiff; after a plaintiff’s death, that evidence would amount to hearsay testimony, which is second-hand information that cannot be substantiated. It is inadmissible in California and unfairly leaves defendants without the

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<sup>1</sup> *Goodley v Wank & Wank, Inc.* (1976) 62 Cal.App.3d 389, 393-394.

option of cross-examination.<sup>2</sup> This would result in unjust determinations of damages in personal injury claims.

The impact of allowing recovery for pain and suffering damages in all survival lawsuits will be another vague, subjective and unlimited source for larger awards and settlements in personal injury cases, which will enable plaintiffs' lawyers (who typically get a percentage of any settlement or judgment) to collect more fees.

## **2. SB 447 is Unnecessary Because California Law Allows for Filing with Preference for Plaintiffs with Serious Health Risks**

California has implemented a prioritization system to allow plaintiffs who are at great health risk to jump the case load queue for purposes of trial.<sup>3</sup> Since California law entitles plaintiffs whose health may prevent them from making it through trial to have preferential treatment, it is unnecessary to make a permanent change to longstanding policy for purposes of a temporary court backlog.

The current system, under normal operating conditions, has historically operated well in allowing for an expedited trial based on a claimant's health. It is in the best interest of the plaintiff and defendant in personal injury cases to seek quick resolution, either through trial or settlement, as a lengthy litigation process only increases court costs for defendants and attorney's fees for plaintiffs. This bill makes a permanent and detrimental change in the law for a temporary circumstance.

## **3. Well-Established California Law has Rejected Expansion of Pain and Suffering Damages in Survivor Actions for Valid Public Policy Considerations**

California began allowing for survival of personal tort actions after death, but before final judgement, in 1949. For over 70 years this action has been allowed while the recovery for pain and suffering damages generally disallowed.<sup>4</sup> There are significant and practical issues surrounding the awarding of pain and suffering damages for a decedent plaintiff when those damages are subjective and not directly quantifiable. Courts for many years have recognized the difficulty, if not impossibility, of objectively monetizing something as obscure as another person's pain and suffering.<sup>5</sup>

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<sup>2</sup> Evid Code § 1200(b)

<sup>3</sup> Code Civ. Proc. § 36

<sup>4</sup> Civ. Code § 956

<sup>5</sup> *Garfoot v. Avila* (1989) 213 Cal.App.3d 1205, 1212. See also *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1333 ("In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy."); and *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 892 ("General damages include damages for 'pain and suffering, emotional distress, and other forms of detriment that are sometimes characterized as subjective or not directly quantifiable.'")

In a revisit of the issue in 1961, the California Law Revision Commission explained the ban on pain and suffering damages was warranted because these injuries are personal to the plaintiff, not transferable in nature and should not form the legal basis of an award of damages post victim's death.<sup>6</sup>

In 1961, California did begin allowing the recovery of punitive damages in survivor actions. Given that punitive damages have no statutory cap and juries that award them often take pain and suffering caused by the defendant into account when determining them, adding another set of uncapped and immeasurable damages as SB 447 proposes will allow double-dipping and excessive awards.

Contrary to the assertions of the bill proponents, California is not out of step with other states in allowing for recovery only of punitive damages. Because of the potentially open-ended nature of awards of both pain and suffering and punitive damages, many states allow for only one or the other, rather than both.<sup>7</sup>

The ultimate impact of SB 447 will be more fees for plaintiffs' lawyers and higher awards and settlements in personal injury cases that will be borne by fault-free consumers having to pay higher prices for goods and services, and higher premiums for insurance.

#### **4. SB 447 Should be Amended to Limit Recovery of Pain and Suffering in Survivor Actions to Cases Directly Impacted by the Pandemic Induced Court Backlog**

Every harmed plaintiff deserves access to the civil justice system for redress of injuries. The COVID-19 restrictions have created a backlog of civil cases in the California courts that may have prevented some plaintiffs from fully utilizing the preferential system the way it was intended. Since these court restrictions are soon ending, and courts will resume full operations, there is no need to make a permanent change to the law.

SB 447 should be amended to apply recovery of pain and suffering damages only for those personal injury cases impacted by the court backlog resulting from the pandemic. Limiting the recovery period to cases delayed by COVID-19 court restrictions is a fair way to rectify the delayed redress of claims, while maintaining California's longstanding and well justified public policy surrounding pain and suffering damages.

For the foregoing reasons, CJAC *and the organizations listed below* respectfully OPPOSE UNLESS AMENDED SB 447 and urges your no vote. If you have any questions, please contact Jaime Huff at [jhuff@cjac.org](mailto:jhuff@cjac.org) or by phone 916-956-2905.

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<sup>6</sup> *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 296

<sup>7</sup> Steven H. Steinglass, *Wrongful Death Actions and Section 1983* (1985) 60 IND. L.J. 559, 576-577. See, e.g. Ariz. Rev. Stat. Ann. § 14-3110 (2020); Wash. Rev. Code Ann. § 4.20.046 (2020).

Sincerely,

A handwritten signature in blue ink that reads "Jaime R. Huff". The signature is written in a cursive style with a large initial "J" and a stylized "Huff".

Jaime Huff

Vice President and Counsel, Public Policy

On behalf of the below-listed organizations:

California Building Industry Association – Nick Cammarota  
California Business Properties Association – Matthew Hargrove  
California Chamber of Commerce – Jennifer Barrera  
Civil Justice Association of California – Jaime Huff  
Cooperative of American Physicians, Inc. – Gordon Ownby  
National Association of Mutual Insurance Companies – Seren Taylor  
Personal Insurance Federation of California – Seren Taylor