



## **MEMORANDUM OF LAW**

### **Article I, Section 16 of the NYS Constitution and The Wrongful Death Expansion Act (A6698/S6636)**

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You have requested an analysis of how Article I, Section 16 of the NYS Constitution might come into play in the enactment of the Wrongful Death Expansion Act with potential amendments. It should be expected that any effort to amend existing law, including through signing the current bill and then enacting a chapter amendment, will be met with a Constitutional challenge, the outcome of which cannot be predicted. Therefore, the best approach is to veto the current legislation and work on a new bill that addresses any outstanding concerns. The following is our legal analysis.

A little-known provision of the New York State Constitution, Article I, Section 16, should be seriously considered by Governor Hochul, when she decides whether or not to sign the Wrongful Death Expansion Act (A6698/S6636). This section of the Constitution expressly prohibits any future statute, that might limit the statutory right to bring a wrongful death action, now existing, whether that limitation was contained in a future standalone statute, or in a chapter amendment agreed to at the signing of the bill.

This section of the State Constitution came about as the result of the 1894 Constitutional Convention and would impact all wrongful death statutes in New York State ever after.

Prior to 1847, litigants in New York, had no Common Law or Statutory Right to bring an action for wrongful death.<sup>1</sup> In 1846, Parliament amended British Law, to afford the first ever statutory right to bring such an action in England, by a law known as Lord Campbell's Act.<sup>2</sup> A year later, in 1847, New York State followed Parliament's lead, and enacted Chapter 450, to afford New Yorkers with a nearly identical statutory right, so as to allow them, to bring such a wrongful death action in New York State Courts.<sup>3</sup>

Almost immediately after the enactment of Chapter 450, the railroad industry, which experienced many workplace fatalities, urged the New York State Legislature, to either repeal, or seriously limit through amendment, Chapter 450.<sup>4</sup> As a result, by 1894, the State Legislature imposed a \$5,000 damage cap on all recoveries, under this statutory right, in a recovery for wrongful death.<sup>5</sup>

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<sup>1</sup> Please See: [Wrongful Death and Survivorship](#), by Walter Beall, W.H. Anderson and Company Printing, 1957, pages 3-6. Please Also See: [The Genesis of Wrongful Death](#), by Wex S. Malone, Stanford Law Review, Vol 17 - July 1965, pages 1043-1058. Please Further See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-105.

<sup>2</sup> Please See: [John Campbell, 1st Baron Campbell](#). Please Also See: [Fatal Accidents Act of 1846](#). Please Also See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65. Please Additionally See: [Wrongful Death and Survivorship](#), by Walter Beall, W.H. Anderson and Company Printing, 1957, pages 5-38. Please Also See: [The Genesis of Wrongful Death](#), by Wex S. Malone, Stanford Law Review, Vol 17 - July 1965, pages 1059-1070. Please Further See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-116. Please Also See: [Fatal Accidents Act 1846](#), by Donald Nolan, Hart Publishing, 2012, pages 131-157.

<sup>3</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65. Please Additionally See: [Wrongful Death and Survivorship](#), by Walter Beall, W.H. Anderson and Company Printing, 1957, pages 5-38. Please Also See: [The Genesis of Wrongful Death](#), by Wex S. Malone, Stanford Law Review, Vol 17 - July 1965, pages 1059-1070. Please Further See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-116. Please Also See: [Fatal Accidents Act 1846](#), by Donald Nolan, Hart Publishing, 2012, pages 131-157.

<sup>4</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65. Please Additionally See: [Wrongful Death and Survivorship](#), by Walter Beall, W.H. Anderson and Company Printing, 1957, pages 5-38. Please Also See: [The Genesis of Wrongful Death](#), by Wex S. Malone, Stanford Law Review, Vol 17 - July 1965, pages 1059-1070. Please Further See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-116. Please Also See: [Fatal Accidents Act 1846](#), by Donald Nolan, Hart Publishing, 2012, pages 131-157.

<sup>5</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65. Please Additionally See: [Wrongful Death and Survivorship](#), by Walter Beall, W.H. Anderson and Company Printing, 1957, pages 5-38. Please Also See: [The Genesis of Wrongful Death](#), by Wex S. Malone, Stanford Law Review, Vol 17 - July 1965, pages 1059-1070. Please Further See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-116. Please Also See: [Fatal Accidents Act 1846](#), by Donald Nolan, Hart Publishing, 2012, pages 131-157.

In 1894, as was aforementioned, New York held a Constitutional Convention<sup>6</sup> One of the Convention delegates, renowned legal scholar Charles Lincoln, would write a detailed report of the convention, its wrongful death amendment, and its proceedings, in his well-regarded "Constitutional History of New York State".<sup>7</sup>

At the 1894 Convention, seeking to permanently prevent the impoverishment and destitution, that the loss of a wage earning spouse or parent would have resulted in, the Constitutional Convention proposed, debated and passed, a new constitutional amendment that would make Chapter 450 permanent and forbid the Legislature from repealing or limiting this previously granted statutory right to maintain a wrongful death action in state court.<sup>8</sup> As a result, the 1894 Constitutional Convention advanced, and the voters approved, a new Article I, Section 18, of the New York State Constitution, (which would be renumbered in 1938 as Article I, Section 16), to solidify and guarantee this statutory right to bring a statutorily limited wrongful death action. Such new section of the constitution provided that:

***"Damages for injuries causing death. The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."***<sup>9</sup>

Pursuant to this provision of the state constitution, the state legislature is potentially forbidden from limiting, in any way, any presently authorized (now existing) statutory right to bring or maintain an action for wrongful death in New York State Courts.

The likely intent of this provision of the New York State Constitution, was that the Legislature could at any time expand the statutory authorization for an action in wrongful death (currently Section 5-4.1 of the New York Estates Powers and Trusts Law), but at no time, before or after such an expansion, could the Legislature ever (abrogate) amend, repeal, or otherwise limit, the law.<sup>10</sup>

Accordingly, Article I, Section 16, may make this statutory right of action for wrongful death, similar to that of NYS pension law, a one-way street. That is what is meant by the term "now existing", however, in Article I, Section 16. According to the phrase's author, Louis Marshall, a distinguished lawyer from Syracuse, this term referred to any statutory right granted by the legislature on a wrongful death action going forward from 1894.<sup>11</sup>

This was also the opinion of Charles Lincoln, who was present at the Convention's debate of the amendment, and who is the author of the principal report of the Convention proceedings.<sup>12</sup> Additionally, contemporaneous Court decisions also followed this perspective.<sup>13</sup>

However, a solitary Court of Appeals case in 1919, in the case of In re Accounting of Meng, has taken, a somewhat different view, when it held without citation to any Convention records that this phrase, "now existing", means

<sup>6</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65.

<sup>7</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65.

<sup>8</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65. Please Additionally See: [Wrongful Death and Survivorship](#), by Walter Beall, W.H. Anderson and Company Printing, 1957, pages 5-38. Please Also See: [The Genesis of Wrongful Death](#), by Wex S. Malone, Stanford Law Review, Vol 17 - July 1965, pages 1059-1070. Please Further See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-116. Please Also See: [Fatal Accidents Act 1846](#), by Donald Nolan, Hart Publishing, 2012, pages 131-157.

<sup>9</sup> Please See: [New York State Constitution](#), New York State Department of State, 2022, page 5.

<sup>10</sup> Please See: Section 5-4.1 of the Estates Powers and Trusts Law specifically provides:

**"1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death; provided, however, that an action on behalf of a decedent whose death was caused by the terrorist attacks on September eleventh, two thousand one, other than a decedent identified by the attorney general of the United States as a participant or conspirator in such attacks, must be commenced within two years and six months after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a will appointing an executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit.**

**2. Whenever it is shown that a criminal action has been commenced against the same defendant with respect to the event or occurrence from which a claim under this section arises, the personal representative of the decedent shall have at least one year from the termination of the criminal action as defined in section 1.20 of the criminal procedure law in which to maintain an action, notwithstanding that the time in which to commence such action has already expired or has less than a year remaining."**

<sup>11</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, page 64. Please Also See: [Louis Marshall](#). Please Also See: [Revised Record of the Constitutional Convention of 1894](#), Page 961. Please Additionally See: [Medinger v. Brooklyn Heights Railroad Company](#), 6 A.D. 42 (1896), at page 45.

<sup>12</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65.

<sup>13</sup> Please See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-116 and [Medinger v. Brooklyn Heights Railroad Company](#), 6 A.D. 42 (1896), at page 45.

only that no limitation can be made upon the wrongful death statute that was actually in existence in New York State in 1894.<sup>14</sup>

It should be noted that this outlier opinion on the meaning of "now existing", contained in the Meng decision, was specifically not a Constitutional interpretation of this phrase.<sup>15</sup> The Meng court, found it specifically unnecessary to expressly decide upon the question of the constitutionality of the new statute, or to make a constitutional ruling on the term "now existing".<sup>16</sup>

This is because the court expressly found that the new statute did not specifically "abrogate" a statutory right of wrongful death, as the statute in question did not limit any right of the estate administrator, who was the sole party entitled to bring the action, both before and after the enactment of the new statute.<sup>17</sup> And because this court found no "abrogation", the question of "now existing", despite their outlying, uncited, interpretation, in dicta, which fails to match that of all other sources, became irrelevant.

Even if the unfounded Meng dicta on the meaning of "now existing" is taken to be more than it actually is, at a minimum, there is now disputing authority as to whether, Article I, Section 16, expressly prohibits the limitation of any the statutory right of wrongful death, enacted after 1894, and up until the present day, or whether it merely only prohibits limiting the statutory authority that was in place in 1894, prior to the ratification of this state Constitutional Amendment that would become Article I, Section 16.<sup>18</sup>

Despite Meng, and perhaps because of its failure to issue a constitutional decision on the matter, most State Constitutional scholars follow the view of Marshall/Lincoln, which holds that this Constitutional provision, of Article I, Section 16, means that any currently enacted wrongful death statute may never be limited from what it is now.<sup>19</sup>

The one-time outlier decision of the Court of Appeals in Meng has never been reversed or distinguished. This may be because this case failed to make any Constitutional decision on the issue of exactly what "now existing" means. Moreover, why would any litigant even challenge a decision that simply argues in dicta, that the "abrogation" clause of Article I, section 16 only applies to the wrongful death statute that was in place back in 1894? The answer is that they wouldn't for two reasons.

First, the legislature has not enacted any abrogating statutes on wrongful death since that 1919 decision was issued (thereby not giving rise to such a potential challenge), and second, as aforementioned, the Meng decision never actually issued a constitutional interpretation of the actual Article I, section 16, since it found no abrogation existed in the statute that was challenged.

In our current environment, one thing is certain. These disputed views mean that if any additional rights or remedies are ever granted by the Legislature with respect to New York's Wrongful Death Statute (EPTL 5.4.1), that such additional rights and remedies, if they are more extensive than the 1894 statute, may or may not be prohibited from being taken away and would likely be challenged in a court of law.

Moreover, if the Marshall/Lincoln view is accepted, as most legal scholars believe it to be, any limitation on the current law of wrongful death, would thus be prohibited, even if for a second (as with respect to a Chapter

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<sup>14</sup> Please See: [In Re Accounting of Meng](#), 227 NY 264 (1919) at 272-275.

<sup>15</sup> Please See: [In Re Accounting of Meng](#), 227 NY 264 (1919) at 267-279.

<sup>16</sup> Please See: [In Re Accounting of Meng](#), 227 NY 264 (1919) at 267-279.

<sup>17</sup> Please See: [In Re Accounting of Meng](#), 227 NY 264 (1919) at 267-279.

<sup>18</sup> Please See: [The Constitutional History of New York State](#), by Charles Z. Lincoln, 1905, Lawyers Cooperative Publishing, Volume III, pages 57-65. Please Also See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-116 and [Medinger v. Brooklyn Heights Railroad Company](#), 6 A.D. 42 (1896), at page 45. Please See: [In Re Accounting of Meng](#), 227 NY 264 (1919) at 272-275.

<sup>19</sup> Please See: [Wrongful Death and Survivorship](#), by Walter Beall, W.H. Anderson and Company Printing, 1957, pages 5-38. Please Also See: [The Genesis of Wrongful Death](#), by Wex S. Malone, Stanford Law Review, Vol 17 - July 1965, pages 1059-1070. Please Further See: [Sharrow v. Inland Lines Ltd.](#), 214 N.Y. 101 (1915), pages 101-116. Please Also See: [Fatal Accidents Act 1846](#), by Donald Nolan, Hart Publishing, 2012, pages 131-157.

Amendment). This view holds that if any expansion of statutory wrongful death rights is ever granted by the legislature, and signed into law, then any future limitation (abrogation) of those expanded rights, is prohibited (whether such limitation is by simple statutory amendment or by chapter amendment).

This is the case with a chapter amendment because according to the Marshall/Lincoln interpretation once the expanded legislation is passed by the legislature and signed into law by the Governor (which may be subject to a Chapter Amendment), especially if it has an immediate effective date (as A6698/S6636 does), then the wrongful death provisions of the original chapter so signed into law would thereby become "now existing" and prohibited by Article I, section 16, from being limited (abrogated).

The entire purpose of the statutory right of wrongful death, which did not exist at Common Law, was solely to grant spouses and children the ability to obtain a recovery for a wrongful death of their wage earner parent or spouse so they would not become impoverished or destitute. This is far from the purpose of the current bill (A6698/S6636) which seeks to dramatically expand an action in wrongful death, both in respect to damages and parties who could bring such an action.

Under a Marshall/Lincoln view of Article I, Section 16, such an expansion of the wrongful death law may represent a completely irreversible change that cannot be undone without a constitutional amendment. This means, that unlike most Chapters of Law, this issue may not simply be revisited by the Legislature through a future statute or chapter amendment.

**Due to the foregoing serious questions involving the State Constitution, this is an issue that cries out for further consideration, negotiation and thoughtfulness, and not a matter to be dealt with in haste or without great care.**

For if this current bill is signed into law, even for an instant as with a chapter amendment, litigation almost unquestionably would be brought to strike down any chapter amendment's limitations, under the "now existing" prohibition against "abrogation" view of Article I, section 16. Equally, such litigation would further also be brought, to prevent any future legislature, from correcting any provision of the current Wrongful Death Expansion Act, after it proved to be too costly or damaging.

Once again, the Constitution of the State of New York sends out a cautionary message in this arena.

Accordingly, the most prudent strategy for the Governor to take, in light of the Constitution, and to assure that this issue is handled correctly, would be to veto the bill (A6698/S6636), and then negotiate a new bill, next session. This course of action would have the same exact effect as a chapter amendment, without the real specter of having the agreed upon sections of such a chapter amendment challenged in litigation and then struck down under the abrogation clause of Article I, section 16.

Therefore, the best approach is to veto the current legislation and draft a new bill that addresses the many outstanding concerns.