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WRONGFUL DEATH—New Mexico Adopts Hedonic Damages in the Context of Wrongful Death Actions: *Sears v. Nissan (Romero v. Byers)*

I. INTRODUCTION

In *Sears v. Nissan*,¹ the New Mexico Supreme Court held that the non-pecuniary value of a decedent's life is compensable under the New Mexico Wrongful Death Act.² With the decision in *Sears*, New Mexico joined a handful of jurisdictions that have ventured into the complex and controversial maze of "hedonic damages" in wrongful death actions. Hedonic damages are "[d]amages awarded . . . for the loss of enjoyment of life, or for the value of life itself, as measured separately from the economic productive value that an injured or deceased person would have had."³ This Note explores the historical background of hedonic damages in wrongful death actions, analyzes the rationale behind the *Sears* decision, and discusses its possible ramifications.

II. STATEMENT OF THE CASE

Jeffrey Sears, a thirty-year-old repairman,⁴ died in a one-car collision while driving his Nissan pickup truck.⁵ Individually, and as personal representative of his estate, his wife ("Plaintiff") brought a wrongful death action in New Mexico federal district court.⁶ Plaintiff alleged that the Nissan Motor Company, Ltd. and the Nissan Motor Corporation in USA ("Defendants") negligently designed, manufactured, sold, assembled, supplied, and distributed the decedent's truck.⁷

1. 117 N.M. 422, 872 P.2d 840 (1994). The New Mexico Supreme Court consolidated its grant of certiorari and acceptance of a certified question from the court of appeals in *Romero v. Byers* with its acceptance of two certified questions from the federal district court of New Mexico in *Sears*. In *Romero*, the court created a cause of action for loss of spousal consortium in New Mexico. *Id.* at 424, 872 P.2d at 842. This Note discusses only the *Sears* portion of the consolidated appeal.

2. *Sears*, 117 N.M. at 424, 872 P.2d at 842. In *Sears*, the court also held that loss of guidance to minor children is a pecuniary injury under the New Mexico Wrongful Death Act. *Id.* This Note is limited to an analysis of the portion of *Sears* that addresses the issue of hedonic damages.

3. BLACK'S LAW DICTIONARY 391 (6th ed. 1990). A number of synonyms exist for the term "hedonic damages," including "loss of life damages," "loss of enjoyment of life damages," "damages for the value of life itself," and "damages for the loss of life's pleasures." The *Sears* court avoids the term "hedonic," which has engendered much controversy, by coining the phrase "nonpecuniary value of life itself." *Sears*, 117 N.M. at 424, 872 P.2d at 842. For the sake of clarity, the author often uses "hedonic damages" in place of the various synonyms.

4. Brief of the Association of Commerce and Industry of New Mexico at 3, Amicus Curiae, *Sears v. Nissan*, 117 N.M. 422, 872 P.2d 840 (1994) (No. 20,441).

5. Brief-in-Chief of Plaintiff at 2, *Sears v. Nissan*, 117 N.M. 422, 872 P.2d 840 (1994) (No. 20,441).

6. *Sears*, 117 N.M. at 427, 872 P.2d at 845.

7. Brief-in-Chief of Plaintiff at 2, *Sears v. Nissan*, 117 N.M. 422, 872 P.2d 840 (1994) (No. 20,441).

At trial, Plaintiff sought to introduce the expert testimony of Dr. Dillman, an economist.⁸ Based on the decedent's age, his hourly wage of \$13.61, and the value of his household services, Dr. Dillman calculated the pecuniary losses resulting from the death to be roughly \$1,060,000.⁹ In addition, Dr. Dillman offered testimony concerning the non-pecuniary value of the decedent's life itself.¹⁰ Defendants moved to exclude Dr. Dillman's testimony on the subject of non-pecuniary damages.¹¹ At this point, the federal district court certified the following question to the New Mexico Supreme Court:

Does the New Mexico Wrongful Death Act and the language in SCRA 13-1830 permit Plaintiff to introduce expert testimony by an economist for establishing a non-pecuniary value of life itself of the decedent and be awarded damages for the non-pecuniary value of decedent's life itself?¹²

On certification, the New Mexico Supreme Court held that "the value of life itself is compensable under our [Wrongful Death] Act."¹³ The court reasoned that "just as the jury in a personal injury case must determine the monetary worth of nonpecuniary losses, so too must the jury in a wrongful death action determine fair and just compensation for the reasonably expected nonpecuniary rewards the deceased would have reaped from life."¹⁴ The court declined to rule on the question of whether or not expert testimony is admissible for the purpose of proving the non-pecuniary value of life, holding that that question "is a matter best left to the rules of evidence of the applicable trial court."¹⁵

III. HISTORICAL BACKGROUND

A. Hedonic Damages Under State Law

Although every state has a statute that permits actions for wrongful death,¹⁶ state "[c]ourts generally have not held tortfeasors liable for the

8. *Id.* at 2-3.

9. Brief of the Association of Commerce and Industry of New Mexico, Amicus Curiae at 3, *Sears* (No. 20,441).

10. *Id.* at 4. Dr. Dillman's economic model would have provided the jury with two "benchmark" values of life: a "low-end" value (cost of maintaining a prison inmate) and a "high-end" value (cost of maintaining an intensive care patient for an extended period). *Id.* When multiplied by the decedent's life expectancy, Dr. Dillman's "benchmarks" fixed the non-economic value of the decedent's life somewhere between \$1,038,000 and \$13,083,000. *Id.*

11. Brief-in-Chief of Plaintiff at 1, *Sears* (No. 20,441).

12. *Sears v. Nissan*, 117 N.M. 422, 427, 872 P.2d 840, 845 (1994) (citations omitted). The New Mexico Supreme Court "may answer by written opinion questions certified to it" by federal courts. N.M. STAT. ANN. § 34-2-8 (Repl. Pamp. 1990). The certified questions must involve propositions of New Mexico law for which "there are no controlling precedents in decisions of the New Mexico [S]upreme [C]ourt or the New Mexico [C]ourt of [A]ppeals." *Id.*

The federal court also certified an additional question involving the compensability of loss of guidance and counseling to minor children under the Act. *Sears*, 117 N.M. at 427, 872 P.2d at 845. This question is beyond the scope of this Note.

13. *Sears*, 117 N.M. at 424, 872 P.2d at 842.

14. *Id.*

15. *Id.* at 429, 872 P.2d at 847.

16. MINZER ET AL., DAMAGES IN TORT ACTIONS § 20.00 (1991). American jurisdictions enacted

value of the decedent's life in wrongful death actions."¹⁷ Until *Sears*, "only Connecticut, among all the states . . . held that hedonic damages [were] recoverable under a state wrongful death statute."¹⁸ State courts that reject hedonic damages rely on the actual language of their respective statutes, as well as general policy considerations.¹⁹

1. State Wrongful Death Statutes and Hedonic Damages

Because "[t]he right to recover damages for wrongful death is entirely statutory,"²⁰ the availability of hedonic damages under a state wrongful death statute depends on what type of statute the state has. In general, there are three types of wrongful death statutes: "survival" statutes, "wrongful death" statutes, and "hybrid" statutes.²¹

Survival statutes allow any claims that a person could have brought during his or her lifetime to survive the person's death.²² Quite simply, survival statutes limit recovery to damages for injury that occurs before death. Thus, under a survival statute, a plaintiff representing the decedent's estate may recover any damages that the decedent could have recovered if he or she had lived, such as medical expenses and pain and suffering *between the date of injury and the date of death* (ante-mortem damages).²³ Consequently, survival statutes probably preclude post-mortem

these statutes soon after the passage of the Fatal Accidents Act (or Lord Campbell's Act) in England in 1846. *Id.* No cause of action for wrongful death existed at common law. *Id.*

17. Erin A. O'Hara, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away With Murder?*, 78 GEO. L.J. 1687, 1706 (1990).

18. *Spencer v. A-1 Crane Service*, 880 S.W.2d 938, 943 (Tenn. 1994); see generally Lloyd R. Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 EMORY L.J. 295, 306 (1985). One prominent case in which Connecticut recognized the availability of hedonic damages in wrongful death actions is *Estate of Katsetos v. Nolan*, 368 A.2d 172 (Conn. 1976).

It is important to note, however, that many states, including New Mexico, allow hedonic damages in *personal injury* cases. See, e.g., *Gregory v. Carey*, 791 P.2d 1329, 1336 (Kan. 1990) (victim of catastrophic brain damage could recover for loss of enjoyment of life as it related to disability and pain and suffering); *Collins v. Perrine*, 108 N.M. 714, 720, 778 P.2d 912, 918 (1989) (child who suffered brain damage could recover for loss of enjoyment of life).

19. See *Southlake Limousine v. Brock*, 578 N.E.2d 677, 680 (Ind. Ct. App. 1991) (noting that hedonic damages are not available under Indiana's wrongful death statute); *Willinger v. Mercy Catholic Medical Center*, 393 A.2d 1188, 1191 (Pa. 1978) (instruction on hedonic damages for death of child due to medical malpractice constituted reversible error); *Spencer v. A-1 Crane Service*, 880 S.W.2d 938, 943-44 (Tenn. 1994) (court properly refused request for instruction on hedonic damages for death of man killed in construction accident); *Wooldridge v. Woolett*, 638 P.2d 566, 570 (Wash. 1981) (shortened life expectancy of man killed in automobile accident was relevant only to the extent that it related to his future earning capacity).

20. *Stang v. Hertz Corp.* 81 N.M. 69, 72, 463 P.2d 45, 48 (Ct. App. 1970), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970), *rev'd*, 83 N.M. 730, 497 P.2d 732 (1972) (citing *Baca v. Baca*, 71 N.M. 468, 379 P.2d 765 (1963)); see also N.M. STAT. ANN. §§ 41-2-1 to 41-2-4 (Repl. Pamp. 1991).

21. MINZER ET AL., *supra* note 16, § 20.10.

22. *Id.* For example, WASH. REV. CODE ANN. § 4.20.046 (1994) provides: "All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter."

23. MINZER ET AL., *supra* note 16, § 20.12. Some survival statutes, however, may also enumerate the categories of damages that are or are not available in wrongful death actions. Under the Washington survival statute, for instance, a plaintiff can recover for the "pain and suffering, anxiety, emotional distress, or humiliation" of the deceased *only* on behalf of certain enumerated beneficiaries.

hedonic damages for wrongful death,²⁴ because loss of the value of life itself necessarily occurs after death.

Unlike survival statutes, wrongful death statutes create a new cause of action that arises upon the death of the victim.²⁵ Thus, wrongful death statutes allow recovery for any damages resulting from the death itself (post-mortem damages).²⁶ Some wrongful death statutes measure damages in terms of loss to the decedent's beneficiaries, while others measure the loss to the decedent's estate.²⁷ Loss of enjoyment of life is an injury to the decedent, rather than to the decedent's beneficiaries. Therefore, "loss-to-the-beneficiaries" statutes theoretically preclude hedonic damages for wrongful death.²⁸ "Loss-to-the-estate" statutes, on the other hand, do not appear to bar post-mortem hedonic damages.²⁹ Presumably, injury to the decedent's estate could include the post-mortem loss of the decedent's ability to enjoy life.³⁰

WASH. REV. CODE ANN. § 4.20.046 (Cum. Supp. 1995). The Washington Supreme Court rejected hedonic damages under an earlier version of the statute, which prohibited recovery for the pain and suffering of the deceased. WASH. REV. CODE ANN. § 4.20.046 (1988); *Wooldridge v. Woollett*, 638 P.2d 566, 570 (Wash. 1981) (rejecting hedonic damages as "a backdoor method for obtaining compensation for pain and suffering").

24. Yet, some jurisdictions with "survival" statutes allow hedonic damages *between the date of injury and the date of death*. *Fetzer v. Wood*, 569 N.E.2d 1237, 1244-45 (Ill. Ct. App. 1991) (finding that loss of enjoyment of life of decedent is a "relevant consideration in determining damages for pain and suffering").

25. MINZER ET AL., *supra* note 16, § 20.13. For example, KY. REV. STAT. ANN. § 411.130 (1994) provides: "Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it."

26. MINZER ET AL., *supra* note 16, § 20.13.

27. *Id.*

28. *Southlake Limousine v. Brock*, 578 N.E.2d 677, 680 (Ind. Ct. App. 1991) (rejecting hedonic damages and noting that the "sole inquiry" under the Indiana wrongful death statute is "how many dollars are necessary to compensate the beneficiaries for the pecuniary loss caused to them by the wrongful death?").

29. Some loss-to-the-estate statutes, however, enumerate the categories of damages that are available in wrongful death actions. Exhaustive lists may preclude hedonic damages. Andrew J. McClurg, *It's A Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 96-97 (1990). For example, TENN. CODE ANN. § 20-5-113 (1994) provides: the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives.

In *Spencer v. A-1 Crane Service*, 880 S.W.2d 938, 943 (Tenn. 1994) (quoting 66 NOTRE DAME L. REV. 57, 96-97 (1990)), the Tennessee Supreme Court held that the exhaustive list of categories "appears to absolutely preclude the recovery of hedonic damages."

30. Connecticut's wrongful death statute is a loss-to-the-estate statute; it allows the executor or administrator of a decedent's estate to recover "just damages." CONN. GEN. STAT. ANN. § 52-555 (1991). The Connecticut Supreme Court has held that the phrase "just damages" is broad enough to include damages for "the destruction of [the victim's] capacity to carry on and enjoy life's activities in a way [he or] she would have done had [he or] she lived." *Estate of Katsetos v. Nolan*, 368 A.2d 172 (Conn. 1976). Connecticut courts have allowed juries to determine hedonic damages on a case-by-case basis. *See id.* at 183; *Waldron v. Raccio*, 353 A.2d 770, 775-76 (Conn. 1974). Juries may consider various "factors" in order to determine how "'pleasurable' the decedent's future might have been 'if he or she had lived.'" *Id.* at 775 (upholding award of \$75,000 where decedent had "obtained joy and satisfaction from his active family life," had "energetically pursued several hobbies," and had been "a happy and well-adjusted individual.>").

Finally, hybrid statutes combine features of both survival and wrongful death statutes.³¹ In other words, hybrid statutes allow for the survival of causes of action belonging to the decedent prior to death as well as for a cause of action arising from the death itself. This dual nature raises problems in terms of hedonic damages. The survival aspect of a hybrid statute seems not to allow hedonic damages for wrongful death,³² while the wrongful death aspect seems to indicate that they are available.³³ Consequently, hybrid statutes present an internal contradiction, which may lead to confusion in judicial interpretation.

2. General Policy Considerations

States also reject hedonic damages in wrongful death actions for policy reasons.³⁴ For example, some courts reason that hedonic damages are contrary to the "compensatory" function of tort law.³⁵ Compensatory damages attempt "to restore the tort victim as nearly as possible to the position he would have been in had injury not occurred."³⁶ In a wrongful death case, however, no amount of money can bring the decedent back to life.³⁷ In addition, despite the recent availability of economic models that place monetary values on human life, some courts have also concluded that hedonic damages are "too speculative to form a basis for computing damages."³⁸ Furthermore, hedonic damages may also overlap other types of damages, such as pain and suffering, raising problems of double recovery.³⁹ Finally, courts may reject hedonic damages "out of fidelity to precedent,"⁴⁰ or due to a reluctance to demean human life by placing a "price tag" on it.⁴¹

B. Hedonic Damages in § 1983 Civil Rights Actions

Although hedonic damages for wrongful death are not available in most states, several federal circuits have experimented with hedonic dam-

31. MINZER ET AL., *supra* note 16, § 20.10. The New Mexico Wrongful Death Act is an example of a hybrid statute. See *infra* note 61.

32. See *supra* notes 22-24 and accompanying text. Some states with hybrid statutes, however, have allowed recovery for loss of enjoyment of life of a decedent between the date of injury and the date of death. See *Eyoma v. Falco*, 589 A.2d 653, 662 (N.J. Super. Ct. App. Div. 1991).

33. See *supra* notes 25-30 and accompanying text.

34. McClurg, *supra* note 29, at 66-71; O'Hara, *supra* note 17, at 1706-12.

35. See *Willinger v. Mercy Catholic Medical Center*, 393 A.2d 1188, 1190 (Pa. 1978); *Spencer v. A-1 Crane Serv.*, 880 S.W.2d 938, 943 (Tenn. 1994).

36. McClurg, *supra* note 29, at 66.

37. *Id.*

38. See *Southlake Limousine v. Brock*, 578 N.E.2d 677, 681 (Ind. Ct. App. 1991); *Spencer*, 880 S.W.2d at 943. Many commentators have attacked economic models for valuing human life as unreliable. See, e.g., Eric J. Guerin, *Pandora's Damages and the Undoing of Tort Reform: An Argument Against the Recovery of Hedonic Damages Under Michigan's Wrongful Death Act*, 1 DET. C.L. REV. 77, 115 (1992); McClurg, *supra* note 29, at 100-06.

39. *Wooldridge v. Woolett*, 638 P.2d 566, 570 (Wash. 1981).

40. O'Hara, *supra* note 17, at 1711-12.

41. *Id.* at 1710-11.

ages in the context of § 1983 civil rights actions.⁴² Section 1983,⁴³ in conjunction with § 1988,⁴⁴ provides a basis for hedonic damages in cases that involve the unconstitutional deprivation of life⁴⁵ under color of state law. Under § 1983 and § 1988, federal courts have relied on compensatory and deterrence theories to justify hedonic damages.⁴⁶

In *Sherrod v. Berry*, for example, the Seventh Circuit Court of Appeals upheld an award of hedonic damages based solely on the compensatory purpose of § 1983.⁴⁷ In *Sherrod*, a police officer wrongfully shot and killed a nineteen year-old African-American man at point blank range.⁴⁸ After hearing expert testimony regarding the hedonic value of human life, the jury awarded \$850,000 in hedonic damages.⁴⁹ The trial court upheld the verdict, noting that the purpose of § 1983 is to "compensate persons for injuries caused by the deprivation of Constitutional rights."⁵⁰ The court reasoned that "[t]he deprivation of life that is prohibited by the Fourteenth Amendment includes . . . deprivation of the pleasures of life."⁵¹ Accordingly, the court concluded that the expert economic testimony "enabled the jury to perform its function in determining the proper measure of damages."⁵²

Other federal courts have focused on the deterrent purpose of § 1983 in awarding hedonic damages.⁵³ In *Roman v. City of Richmond*, police officers wrongfully shot and killed two men.⁵⁴ The jury in *Roman* included "deterrence" damages in its wrongful death award,⁵⁵ and the trial court

42. See, e.g., *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985) (upholding instruction on "loss of life" damages where prisoner died as a result of medical malpractice); *Linzie v. City of Columbia*, 651 F. Supp. 740 (W.D. Mo. 1986) (allowing parents to seek damages for "loss of life" of daughter killed by police officers); *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985) (upholding award of hedonic damages where man was shot and killed by police officer), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *vacated*, 835 F.2d 1222 (7th Cir. 1988), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988); *Roman v. City of Richmond*, 570 F. Supp. 1554 (N.D. Cal. 1983) (upholding award of "deterrence" damages where two men were shot and killed by police officers).

43. 42 U.S.C. § 1983 (1988). Section 1983 imposes liability on "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia," deprives another person of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. *Id.*

44. 42 U.S.C. § 1988 (1988). Under § 1988, a federal court must look to the law of the state in which it sits whenever federal law is "deficient" in "furnish[ing] suitable [civil rights] remedies," unless state remedies are "inconsistent with the Constitution and laws" of the United States. *Id.*

45. U.S. CONST. amend. XIV, § 1 provides: "[N]o state shall deprive any person of life, liberty, or property, without due process of law."

46. McClurg, *supra* note 29, at 85.

47. *Sherrod v. Berry*, 827 F.2d 195, 206 (7th Cir. 1987), *vacated*, 835 F.2d 1222 (7th Cir. 1988), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988).

48. *Sherrod v. Berry*, 629 F. Supp. 159, 162 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *vacated*, 835 F.2d 1222 (7th Cir. 1988), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988).

49. *Id.* at 160.

50. *Id.* at 163.

51. *Id.*

52. *Id.* at 164.

53. See e.g., *Linzie v. City of Columbia*, 651 F. Supp. 740 (W.D. Mo. 1986); *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985); *Roman v. City of Richmond*, 570 F. Supp. 1554 (N.D. Cal. 1983).

54. 570 F. Supp. 1554, 1555 (N.D. Cal. 1983).

55. *Id.* at 1556-57 n.1. The jury awarded \$1.5 million for each victim. *Id.* at 1555.

upheld the verdict. The court noted that the "deterrence of future Constitutional violations is an important function of § 1983."⁵⁶ Relying on § 1988, the trial court found that California state remedies, which did not provide for deterrence damages, were inconsistent with the deterrent purpose of § 1983.⁵⁷ Thus, the court concluded that plaintiffs were "not limited to the damages provided by state law,"⁵⁸ and that "[d]eterrent damages [were] an appropriate remedy."⁵⁹

In sum, some federal courts have awarded hedonic damages in § 1983 civil rights actions. Using § 1988 to avoid the constraints of state remedies, they "fashion . . . appropriate remed[ies] that will fulfill the purposes of § 1983."⁶⁰

C. Wrongful Death Damages in New Mexico Prior to Sears

1. The New Mexico Wrongful Death Act

The New Mexico Wrongful Death Act⁶¹ is a hybrid statute. First, the Act resembles a survival statute. Under § 41-2-1, a tortfeasor is liable for wrongful death if his or her "act, neglect, or default is such as would, if death had not ensued, *have entitled the party injured to maintain an action and recover damages in respect thereof.*"⁶² In other words, the

56. *Id.* at 1557.

57. *Id.*

58. *Id.*

59. *Id.* In *Carey v. Phipus*, 435 U.S. 247, 266 (1978), the United States Supreme Court held that "substantial damages [in § 1983 actions] should be awarded only to *compensate actual injury* or, in the case of exemplary or punitive damages, to deter or *punish malicious deprivations of rights*" (emphasis added). In *Memphis Community School District v. Stachura*, 477 U.S. 299, 310 (1986), the Court noted that § 1983 does have a deterrent purpose. The Court found, however, that "damages that compensate for actual harm ordinarily suffice to deter constitutional violations." *Id.* Thus, pure "deterrence damages" are probably inappropriate in § 1983 actions. McClurg, *supra* note 29, at 87. Accordingly, federal courts often tie the compensatory and deterrence purposes of § 1983 together to justify hedonic damages. *Bass v. Wallenstein*, 769 F.2d 1173, 1190 (7th Cir. 1985) (finding Illinois law inconsistent with both the "compensatory and deterrent purposes underlying section 1983").

60. *Roman v. City of Richmond*, 570 F. Supp. 1554, 1557 (N.D. Cal. 1983).

61. N.M. STAT. ANN. § 41-2-1 to 41-2-4 (Repl. Pamp. 1991). Sections 41-2-1 and 41-2-3, respectively, provide:

[w]henver the death of a person shall be caused by the wrongful act, neglect or default of another . . . and the act, neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

[e]very such action . . . shall be brought by . . . the personal representative . . . and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment . . . and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default.

N.M. STAT. ANN. § 41-2-1, -3 (Repl. Pamp. 1991). Section 41-2-3 provides an order for distribution of a wrongful death award to listed beneficiaries, and also provides the means for distribution in the absence of any listed beneficiaries. N.M. STAT. ANN. § 41-2-3 (Repl. Pamp. 1991).

62. N.M. STAT. ANN. § 41-2-1 (Repl. Pamp. 1991) (emphasis added).

plaintiff can only recover those damages that the decedent could have recovered if he or she had lived (ante-mortem damages). Thus, the survival aspect of the Act does not appear to allow hedonic damages occurring after the death of the decedent.⁶³

Second, the Act resembles a wrongful death statute. Section 41-2-1 creates a new cause of action for wrongful death.⁶⁴ This cause of action accrues at the date of death.⁶⁵ Moreover, the Act contains attributes of both the loss-to-the-beneficiaries and the loss-to-the-estate types of death acts discussed above.⁶⁶ For example, § 41-2-3 refers to the "surviving party or parties *entitled to the judgment . . .*"⁶⁷ The decedent's beneficiaries actually receive the proceeds of a wrongful death award, according to the order of distribution set forth in § 41-2-3.⁶⁸ Section 41-2-3, however, allows a jury to award "fair and just [damages], *taking into consideration*" the loss to a decedent's beneficiaries.⁶⁹ The phrase "taking into consideration" suggests that pecuniary loss to a decedent's beneficiaries is only one element of a wrongful death award. Thus, the loss-to-the-beneficiaries aspect of the Act does not seem to bar other types of post-mortem damages, such as post-mortem hedonic damages.

In addition, section 41-2-3 allows *all* damages that are "fair and just" and provides a means for distribution of a wrongful death award in the absence of any listed beneficiaries.⁷⁰ This section seems to allow damages for any post-mortem injury to the decedent's estate, which could include post-mortem hedonic damages.

2. New Mexico Case Law

The hybrid nature of the New Mexico Wrongful Death Act has caused a great deal of confusion in the New Mexico courts.⁷¹ Since the passage of the Act in 1882,⁷² the New Mexico Supreme Court has struggled to determine whether the Act is a survival statute or a wrongful death statute, and to define the scope of wrongful death damages under the Act.⁷³ To date, the struggle has created more confusion than resolution.

63. The survival aspect of the Act, however, does not appear to bar hedonic damages between the date of injury and the date of death. *See supra* note 24 and accompanying text.

64. N.M. STAT. ANN. § 41-2-1 (Repl. Pamp. 1991).

65. N.M. STAT. ANN. § 41-2-2 (Repl. Pamp. 1991).

66. *See supra* notes 25-30 and accompanying text.

67. N.M. STAT. ANN. § 41-2-3 (Repl. Pamp. 1991).

68. *Id.*

69. *Id.*

70. *Id.*

71. *See Solon v. WEK Drilling Co.*, 113 N.M. 566, 829 P.2d 645 (1992); *Stang v. Hertz Corp.* 81 N.M. 69, 463 P.2d 45 (Ct. App. 1970), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970), *rev'd*, 83 N.M. 730, 497 P.2d 732 (1972).

72. 1882 N.M. Laws ch. 61, § 3.

73. The court has gradually expanded the types of damages that are available under the Act. *See, e.g.*, *Hogsett v. Hanna*, 41 N.M. 22, 30-31, 63 P.2d 540, 548-49 (1936) (pecuniary loss to statutory beneficiaries not a prerequisite to recovery); *Kilkenny v. Kenney*, 68 N.M. 266, 270, 361 P.2d 149, 155 (1961) (juries may award damages for pain and suffering of deceased between time of injury and time of death); *Lujan v. Gonzales*, 84 N.M. 229, 241, 501 P.2d 673, 685 (1972) (pecuniary loss includes loss of services performed by decedent); *Folz v. State*, 110 N.M. 457, 467, 797 P.2d 246, 256 (1990) (juries may consider "mitigating or aggravating" circumstances in setting compensatory damages").

In *Cerrillos Coal Railroad Co. v. Deserant*, the territorial supreme court characterized the New Mexico Wrongful Death Act as a loss-to-the-beneficiaries wrongful death statute.⁷⁴ The *Cerrillos* court limited wrongful death damages to "compensation for the pecuniary loss" to a decedent's beneficiaries.⁷⁵ The court articulated a formula for estimating loss to the beneficiaries: "from proof as to age, earning capacity, health, habits, and probable duration of life, the jury shall say what is the present worth of the life of deceased."⁷⁶ The *Cerrillos* court essentially viewed wrongful death damages as a "cold question of dollars."⁷⁷

In *Hogsett v. Hanna*, however, the New Mexico Supreme Court re-characterized the Act as a loss-to-the-estate wrongful death statute.⁷⁸ In *Hogsett*, the court upheld an award of \$15,000 for the wrongful death of a physician,⁷⁹ despite the lack of evidence of pecuniary injury to his statutory beneficiaries.⁸⁰ The court held that "substantial damages are recoverable . . . [in wrongful death cases] without actual proof of loss [to a decedent's beneficiaries]."⁸¹ Thus, the Court modified the *Cerrillos* measure of wrongful death damages: in all cases, the proper measure is "the present worth of [the] life of the deceased [to the estate]"⁸² as determined from "proof as to age, earning capacity, health, habits and probable duration of life."⁸³

The New Mexico courts first began to struggle with the inherent contradiction between the survival and wrongful death aspects of the Act in *Stang v. Hertz Corp.*⁸⁴ In *Stang*, a nun died in an automobile accident.⁸⁵

74. 9 N.M. 49, 67 (1897).

75. *Id.*

76. *Id.* at 68. The court also held that juries could not consider "mitigating or aggravating circumstances" in the context of compensatory damages. *Id.* Juries could, however, consider "aggravating circumstances" in deciding whether to award punitive damages. *Id.*

77. *Id.*

78. 41 N.M. 22, 31, 63 P.2d 540, 549 (1936). The court found that the Act was a survival statute because: 1) § 41-2-3 provides for distribution of a wrongful death award in the absence of statutory beneficiaries, 2) § 41-2-3 lists the beneficiaries in an arbitrary priority, rather than according to actual loss suffered, 3) § 41-2-1 provides for damages in "every such case" and 4) the purpose of the Act involves "more than compensation. It is intended . . . also, to promote safety of life and limb by making negligence that causes death costly to the wrongdoer." *Id.* at 30, 63 P.2d at 548.

Some language in the opinion, however, suggests that the court also viewed the Act as a survival statute. *Id.* at 27, 63 P.2d at 545. The Court apparently regarded the survival aspect of the statute as a prerequisite to liability, unrelated to the issue of damages: "[t]he first inquiry [in a wrongful death action] is whether the injured party would have had a cause of action against the defendant . . . had death not ensued." *Id.*

79. *Id.* at 24, 37, 63 P.2d at 542, 555. Dr. Hogsett died after falling through a doorway in the floor of a garage. *Id.* at 24, 63 P.2d at 542.

80. *Id.* at 26, 63 P.2d at 544. Although Dr. Hogsett had considerable financial worth, his statutory beneficiaries were his parents. *Id.* His parents did not suffer any pecuniary loss as a result of his death. *Id.*

81. *Id.* at 31, 63 P.2d at 549 (quoting withdrawn opinion in *Valdez v. Azar Bros.*, 33 N.M. 230, 246 P. 962 (1928)).

82. *Id.*

83. *Id.* at 22, 28, 63 P.2d at 540, 546.

84. 81 N.M. 69, 463 P.2d 45 (Ct. App. 1970), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970), *rev'd on other grounds*, 83 N.M. 730, 497 P.2d 732 (1972).

85. *Id.* at 71, 463 P.2d at 47.

Because she had taken a vow of poverty, her beneficiaries suffered no pecuniary loss as a result of her death.⁸⁶ Nevertheless, the New Mexico Court of Appeals decided to allow wrongful death damages.⁸⁷

Like the *Hogsett* court, the *Stang* court characterized the Act as a loss-to-the-estate wrongful death statute.⁸⁸ Thus, the *Stang* court found that the measure of damages for wrongful death was "the present worth of life of decedent to the decedent's estate."⁸⁹ The court held that pecuniary injury to a decedent's beneficiaries was only one factor for a jury to consider.⁹⁰ The court also stated that "pecuniary injury [itself] is not a prerequisite to recovery of damages," suggesting that a plaintiff can recover more than just *pecuniary* damages in a wrongful death case.⁹¹

The *Stang* court, however, contradicted itself by characterizing the Act as a survival statute, under which "the damages recoverable are those that the *person injured could have recovered if that person had not died.*"⁹² This language seems to limit wrongful death recovery to ante-mortem damages.⁹³

The New Mexico Supreme Court only added to the confusion in *Solon v. WEK Drilling Co.*, in which it classified the Act as a survival statute.⁹⁴ In *Solon*, the parents of a man killed in a drilling rig accident sought to intervene in an wrongful death action brought by his personal representative.⁹⁵ In dicta, the supreme court stated that the proper measure of wrongful death damages is the "value of the decedent's life, which the decedent himself would have been able to recover had death not ensued."⁹⁶ The *Solon* rule completely contradicts itself. The language of *Solon* classifies the statute as a survival statute, thereby limiting recovery to ante-mortem damages. Yet, *Solon* suggests that a plaintiff can recover damages for the "value of the decedent's life," a post-mortem loss.

After over one hundred years of conflicting and often confusing decisions, the New Mexico courts failed to resolve the inherent contradiction between the survival and wrongful death aspects of the New Mexico Wrongful Death Act. Under *Stang*, the wrongful death aspect of the Act seems to allow post-mortem non-pecuniary or hedonic damages. Yet under both *Stang* and *Solon*, the survival aspect of the Act seems to prohibit

86. *Id.*

87. *Id.* at 76, 463 P.2d at 52.

88. *Id.* (citing withdrawn opinion in *Valdez v. Azar Bros.*, 33 N.M. 230, 246 P. 962 (1928)). The court relied largely on the reasoning in *Hogsett*. See *supra* note 78.

89. *Id.* at 72, 463 P.2d at 48 (Ct. App. 1970). This language in *Stang* seems to limit wrongful death damages to *pecuniary* loss, such as lost wages. The New Mexico UJI supports this conclusion. Under the UJI, one element of damages for wrongful death is "the monetary worth of the life of the deceased," as determined by "age, earning capacity, health, habits, and life expectancy." N.M. UNIF. JURY INSTRUCTION CIV. 13-1830 (Repl. Pamp. 1991).

90. *Stang*, 81 N.M. at 72, 463 P.2d at 48.

91. *Id.*

92. *Id.* at 78, 463 P.2d at 54 (emphasis added).

93. Accordingly, the court held that the plaintiff could recover damages for the pain and suffering of the deceased between the date of injury and the date of death. *Id.* at 79, 463 P.2d at 55.

94. 113 N.M. 566, 829 P.2d 645 (1992).

95. *Id.* at 567, 829 P.2d at 646.

96. *Id.* at 568, 829 P.2d at 647.

post-mortem hedonic damages. Until *Sears*, however, the court did not address the issue of whether non-pecuniary or hedonic damages were available under the Act.⁹⁷

IV. SEARS: RATIONALE AND ANALYSIS

In a brief opinion, the New Mexico Supreme Court decided in *Sears* that hedonic damages are available under the New Mexico Wrongful Death Act.⁹⁸ The *Sears* court left the actual calculation of damages to juries on a case-by-case basis; yet, the court failed to provide any meaningful guidelines for placing values on human life itself.

The *Sears* court noted that the Act allows "all damages that are fair and just,"⁹⁹ "taking into consideration" pecuniary injury to the decedent's beneficiaries.¹⁰⁰ The court noted that "'taking into consideration' . . . is not a limiting phrase, but indicates that more than the single factor of pecuniary loss should be considered . . . to determine fair and just compensation."¹⁰¹ Following *Stang*, the *Sears* court found that *pecuniary* injury is not a prerequisite to wrongful death recovery.¹⁰² Accordingly, the *Sears* court reasoned that *nonpecuniary*, or hedonic, damages were available under the Act.¹⁰³

Like the *Stang* court and the *Solon* court, however, the *Sears* court contradicted itself by implicitly holding that the New Mexico Wrongful Death Act is a survival statute.¹⁰⁴ Thus, the court found that a plaintiff can recover those damages that "the decedent himself would have been entitled to recover had death not ensued."¹⁰⁵ The *Sears* court failed to address the concern that the survival aspect of the Act prohibits post-mortem hedonic damages for wrongful death.

Although the *Sears* court decided to allow hedonic damages under the Act, it set forth few guidelines for actually measuring the value of human life. The court stated that

97. *But see* *Ortega v. Plexco*, 793 F. Supp. 298, 299 (D.N.M. 1991) (holding that hedonic damages are unavailable under New Mexico law).

98. *Sears v. Nissan*, 117 N.M. 422, 424, 872 P.2d 840, 842 (1994). The court left the issue of the admissibility of expert economic testimony to "the rules of evidence of the applicable trial court." *Id.* If trial courts allow expert economic testimony, a wide range of economic models will provide "benchmark" values of life for juries in wrongful death cases. *See generally* McClurg, *supra* note 29, at 100-06 (explaining the two basic economic models for valuing human life: the "human capital" approach and the "willingness-to-pay" approach). It is unclear, however, whether trial courts in New Mexico will actually decide to allow such testimony. Courts in many other states have excluded expert testimony on the value of life, on the basis that it invades the province of the jury. *See, e.g.*, *Fetzer v. Wood*, 569 N.E.2d 1237, 1246 (Ill. App. Ct. 1991); *Southlake Limousine v. Brock*, 578 N.E.2d 677, 681 (Ind. Ct. App. 1991).

99. *Sears*, 117 N.M. at 428, 872 P.2d at 846.

100. *Id.* at 427, 872 P.2d at 845.

101. *Id.* at 427-28, 872 P.2d at 845-46.

102. *Id.* at 428, 872 P.2d at 846.

103. *Id.*

104. *Id.* The court favorably cited language in *Solon v. WEK Drilling Co.*, 113 N.M. 566, 829 P.2d 645 (1992), which referred to the Act as a survival statute.

105. *Sears*, 117 N.M. at 428, 872 P.2d at 846 (quoting *Solon*, 113 N.M. at 568, 829 P.2d at 647).

[j]ust as the jury in a personal injury case must determine the monetary worth of nonpecuniary losses, so too must the jury in a wrongful death action determine fair and just compensation for the reasonably expected nonpecuniary rewards the deceased would have reaped from life as demonstrated by his or her health and habits.¹⁰⁶

The court delineated two aspects of nonpecuniary damages that make up "fair and just" compensation. Pain and suffering devolves from 1) that which the victim must newly endure and 2) that which the victim may no longer enjoy.¹⁰⁷ The court also stated that the proper measure of damages is "the worth of the deceased's life had he [or she] continued to live."¹⁰⁸ In sum, *Sears* allows the jury to determine the value of human life itself on a case-by-case basis, using ordinary personal injury principles. The *Sears* court did not recognize, or at least did not acknowledge, that the task of placing a monetary value on human life itself has serious moral and ethical implications.¹⁰⁹

V. RAMIFICATIONS OF *SEARS*

The issue of hedonic damages for wrongful death is complex and controversial. Thus, it deserves close judicial scrutiny. In *Sears*, the New Mexico Supreme Court failed to conduct a searching inquiry into the language of the New Mexico Wrongful Death Act, New Mexico case law, or possible methods for measuring hedonic damages. Furthermore, the court gave no insight into the policy behind its decision. Overall, the *Sears* opinion reflects the court's reluctance to delve too far into the controversy that has surrounded the issue of hedonic damages.

On the positive side, the *Sears* decision may result in increased deterrence of acts that lead to wrongful death and larger wrongful death awards for low-income victims. First, one purpose of the New Mexico Wrongful Death Act is to "promote the safety of life and limb by making negligence that causes death costly to the wrongdoer."¹¹⁰ The adoption of hedonic damages in *Sears* may help to protect all members of society against negligent conduct by creating a potentially large liability in every wrongful death action.¹¹¹ Second, prior to *Sears*, it was possible that a tortfeasor would pay very little for the death of a low-income victim.¹¹² By allowing

106. *Id.*

107. *Id.*

108. *Id.*

109. See *infra* note 114 and accompanying text.

110. *Stang v. Hertz Corp.*, 81 N.M. 348, 351, 467 P.2d 14, 17 (1970), *rev'd on other grounds*, 83 N.M. 730, 497 P.2d 732 (1972).

111. Hedonic damages may have a particularly strong deterrent effect on businesses and professionals, especially those dealing with a low-income clientele. See McClurg, *supra* note 29, at 73.

112. Under a similar approach to wrongful death damages, the Supreme Court of Washington upheld a jury award of only \$2,339.51 for the wrongful death of a twenty-two year-old man killed in an automobile accident. *Wooldridge v. Woollett*, 638 P.2d 566, 571 (Wash. 1981). The award represented funeral and burial expenses. *Id.* at 568. The court noted that the decedent's job history was "spotty," that he had no savings, and that he had little more than a high school education. *Id.* at 571.

juries to consider more than an individual's economic productivity, *Sears* may result in higher wrongful death awards for low-income victims.

The *Sears* decision, however, also creates several serious problems. First, a case-by-case determination of hedonic damages could result in excessively high wrongful death awards.¹¹³ Second, an ad hoc determination of the value of human life seems undesirable from a moral and ethical standpoint. Hedonic damages differ from other types of damages traditionally left to the jury, such as emotional distress, pain and suffering, or even loss of enjoyment of life due to injury. A hedonic damage award in a wrongful death action actually represents the worth of the decedent as a human being. An ad hoc approach presupposes that some human lives are worth more than others and actually allows courts to put the value of a decedent's human life on trial.¹¹⁴ Finally, the lack of clarity in *Sears* will probably create confusion in the lower courts, thus increasing the number of appeals in wrongful death cases.

VI. CONCLUSION

Jeffrey Sears' accident took from him "what all the wealth in the world could never purchase":¹¹⁵ the pleasure of being alive. In an attempt to redress this injury, the New Mexico Supreme Court has adopted hedonic damages in the context of wrongful death actions. While the *Sears* decision may result in increased deterrence of wrongful conduct and higher wrongful death awards for low-income victims, it may also result in excessive wrongful death awards, an ad hoc approach to the valuation of human life, and confusion in the lower courts. Overall, the complex problems that may stem from the Court's adoption of hedonic damages admit to no easy solution.¹¹⁶

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113. Particularly, in the case of wealthy decedents, juries will be able to award hedonic damages over and above already large pecuniary loss awards.

114. Potentially, *Sears* could create a "judgment day" scenario in the lower courts. "[W]itnesses could be dragged into court testifying as to whether a particular decedent was happy or unhappy, what he did in his spare time, what personality traits he possessed . . . [and] what his consumption patterns indicated about his enjoyment of life" O'Hara, *supra* note 17, at 1708.

115. *Sherrod v. Berry*, 629 F. Supp. 159, 163 (N.D. Ill. 1985).

116. There is little agreement among courts and commentators as to whether hedonic damages should be available, and if so, how to measure hedonic damages. For an introduction into the maze of hedonic damages, see Cohen, *supra* note 18 (advocating hedonic damages and outlining a possible method of life valuation); Guerin, *supra* note 38 (arguing against adoption of hedonic damages under the Michigan Wrongful Death Act); McClurg, *supra* note 29 (arguing that hedonic damages are necessary to deter wrongdoing against lower-wage earners in society and advocating a fixed legislative sum for hedonic damages in all wrongful death actions); O'Hara, *supra* note 17 (arguing that hedonic damages are necessary to deter wrongdoing and advocating a "willingness to pay" approach to measuring such damages).