



HEDONIC DAMAGES

By Ralph F. Holmes

The recoverability of damages for the value of a decedent's lost enjoyment of life is an undecided issue in New Hampshire that is ripe for determination. Although the allowance of so-called hedonic damages is contrary to the common law view that "[t]o allow for the enjoyment of continued life [as an element of damages] would mean an entrance into a boundless field of arbitrary assessment, for which no policy of the law exists," the language of the wrongful death statute, RSA 556:12, as supported by an increasing number of rulings by the Superior Court strongly supports the view that these damages are properly recoverable.

Entitled "Damages for Wrongful Death, Elements," RSA 556:12 provides:

If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money during his probable working life, may be considered as elements of damage in connection with other elements allowed by law, in the same manner as if the deceased had survived.

Thus, the statute sets out, separated by commas, four "elements of damage," including "the probable duration of [the decedent's] life but for the injury."

Looking to the rules of statutory construction, "[i]t is well established law that the intention of the legislature expressed by the words of the statute itself is the touchstone to its meaning." Courts are to "ascribe to the crucial words of the statute their plain and ordinary meaning." "It is an elementary principle of statutory construction that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words." Under these rules of construction, the only interpretation that can be given to the phrase "the probable duration of his life but for the injury" is that it is a separate compensable element of damages under the statute. The phrase cannot be read to modify any of the other elements of damages described and has no other apparent purpose. Viewed in this light, the statute provides that a decedent's estate may recover for the life expectancy a decedent would have enjoyed but for the untimely death caused by the defendant.

Many members of the Superior Court bench agree with this construction of the statute. In denying a motion in limine to exclude hedonic damages, Judge Perkins held:

Our Supreme Court has not yet ruled on whether hedonic damages are recoverable under this statute. This Court finds, however, that since "probable duration of life" is specifically set off from the other elements of damages, thereby constituting a separate clause within the statute, it is a separate element of damages and properly allows plaintiff to seek hedonic damages. Thus, defendant's motion in limine excluding evidence regarding hedonic damages is hereby DENIED.

Denying a similar motion in limine, Judge Murphy stated:

Four, having to do with the loss of enjoyment of life as an element of damage, the Court has reviewed the status of the wrongful death action as it existed prior to 1971, and makes reference to Chapter 71:1 of the 1887 Laws of the State of New Hampshire. I have compared that with the language which now appears, and has appeared since 1971, in, I would say, 546:12. This Court makes a determination that to suggest that the statute does not recognize the right to recover for loss of life would render the language starting with, 'the probable duration of his life, but for the injuries,' ending in "comma," in the same manner as if the deceased, had survived,' meaningless. Therefore, the Court is going to deny the Motion in Limine on that basis, and permit counsel for the plaintiff to argue loss of life to the jury. The defendant's exceptions and objections are noted.

Likewise, in a summary jury trial Judge Smuckler allowed plaintiff's counsel, over the defendant's objection, to present evidence and argue hedonic damages.

Jury instructions allowing hedonic damages that have been given by trial court judges include the following by Judge Dalanis:

Now, the second element of damages in a case such as this that I mentioned a moment ago is the so-called probable duration of life but for the injury element. The estate of Patricia Solomon is entitled to be compensated for the loss of life, meaning the probable length of Mrs. Solomon's life, but for the injury. It's entitled to be compensated for the shortening of her life. In other words, there could be compensation awarded by you after due consideration of the evidence which recognizes Mrs. Solomon's inability by virtue of her shortened life to carry on and enjoy a life in a way she would have had she lived. And, once again, if you find that the estate is entitled to be compensated, you have to assess whatever this amount appropriately would be.

Judge Temple gave the following instruction on this issue in a case tried in the Rockingham County Superior Court:

The third provision of the Statute with which you are concerned, which you will consider with respect to the evidence that has been introduced before you for consideration, is the so-called probable duration of life but for the injury provision.

The plaintiff, meaning the estate of Robert Brann, is entitled to be compensated for the loss of life, meaning the time of life but for the injury, for the shortening of his life. In other words, meaning there shall be compensation awarded by you after due consideration of the evidence by you, recognizing his inability by virtue of a shortened life, to carry on and enjoy a life in a way he would have done had he lived. In other words consideration of total damages will consider and represent, with respect to this provision, shortening of life provision, a consideration by you to assess the extent, again, the deprivation of life, the period of time, the duration of life that would have existed but for this injury and death.

In this regard there has been announced to you by stipulation the fact that the life expectancy here is agreed as 35 point years. What this means is that by a statistical source an age has been presented to you, I presume concerning a white male of the age of Mr. Brann at the time of his death which I believe to be somewhere in the age group of 41, the age area of 41, wherein it is averaged statistically projected that his life expectancy at that time due to this average is stipulated as 35 point years.

This is given to you solely as a guide. You need not accept it. You may accept it, you may view it in light of the evidence that you have to consider concerning his condition outside of the cancer in determining whether or not that would be his life expectancy, meaning the 35 point years, whether it would be shorter or longer, in determining the duration of time his life was shortened. And for that, again, you are called upon to make an award of compensation.

In two separate cases, Judge Devine gave this instruction on hedonic damages in trials in the United States Federal District Court for the District of New Hampshire:

And you may then turn and should turn to the issue of the probable duration of his life but for the injury. The term probable duration of his life but for the injury set forth in RSA:556:12 has reference to an element of damage which is separate from and in addition to the loss of capacity to earn money during his probable working life. This element concerns the inability of the decedent by virtue of a shortened life to carry on and enjoy a life in the way he would have done if he had lived.

Nichols v. Estabrook is the only published New Hampshire case in which the recoverability of hedonic damages in a wrongful death action is addressed. Decided by Judge Devine in the Federal District Court, this case occurred before the two cases referenced above in which he gave the quoted jury instruction. Unlike these two later cases, Judge Devine in Nichols ruled that hedonic damages are not recoverable under this statute.

Nichols does not address in any way the meaning of the critical phrase "the probable duration of his life but for the injury" in the statute and whether this language supports a finding that the lost enjoyment of life is a separate element of recovery. Rather, the analysis in the case proceeds from the stated premise that "hedonic damages are not contained within [the] list" of elements of damages recoverable in a wrongful death action. The case then goes on to consider whether hedonic damages are recoverable under the phrase in the statute that a decedent's estate may recover, in addition to the elements specified in the statute, "other elements allowed by law." The court concluded that hedonic damages are not recoverable under this provision because these damages were not recoverable at common law. While the court is correct that these damages were not recoverable at common law, its reliance on this portion of the statute is unfounded. Rather, the analysis set forth in the beginning of this article, which focuses on applicable rules of statutory construction, is the correct approach. It is understandable that Judge Devine chose not to follow the Nichols decision in later cases as its analysis of the statute is flawed.