

## TRIAL TECHNIQUES AND TACTICS

SEPTEMBER 2023

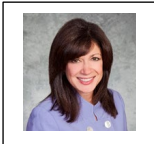
### IN THIS ISSUE

*In the age of “reptile theory” and “nuclear verdicts,” the Texas Supreme Court produced a plurality opinion that combats untethered noneconomic damages awards in wrongful death cases – requiring “a rational connection, grounded in the evidence, between the injuries suffered and the amount awarded.” This article discusses the circumstances giving rise to the plurality opinion, and explores the guidance provided by the Court regarding what may, and may not, be sufficient to justify the amount of a noneconomic damages award in ongoing and future cases.*

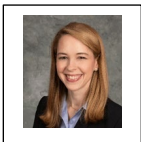
### **Gregory v. Chohan:**

## Clarifying the Standard of Review for Legal Sufficiency Challenges to Noneconomic Damages Awards or Muddying the Waters?

### ABOUT THE AUTHORS



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## Introduction

On June 16, 2023, the Texas Supreme Court issued a plurality opinion in *Gregory v. Chohan*, \_\_\_ S.W.3d \_\_\_, 2023 WL 4035886, in which the Court overturned a jury verdict in favor of six wrongful death plaintiffs due, in part, to legally insufficient evidence to support a \$15 million noneconomic damages award. The plurality opinion, authored by Justice Blacklock, articulated a new standard of review for legal-sufficiency challenges to the amount of noneconomic damages awards in wrongful death cases. Specifically, the plurality stated that to justify the amount of a noneconomic damages award, a wrongful death plaintiff bears the burden of demonstrating “a rational connection, grounded in the evidence, between the injuries suffered and the amount awarded.” Although the type and amount of evidence necessary to satisfy this standard remain unclear, the plurality opinion provided useful guidance as to the types of evidence and argument that will not suffice to support a noneconomic damages award on appeal.

## Background and Procedural History

The lawsuit stems from a multi-vehicle accident that occurred near midnight on November 23, 2013, near Amarillo, Texas. Sarah Gregory was driving an eighteen-wheeler for her employer, New Prime, on an unlit stretch of Interstate 40 when her truck slid on the icy surface of the road and jackknifed across the highway. Gregory’s disabled vehicle on the roadway led to a deadly multi-vehicle pileup involving six additional eighteen-wheelers and two passenger vehicles. Four people were killed, including Bhupinder Deol.

Deol’s estate and family sued Gregory and New Prime, among others, seeking compensatory damages for: (1) economic losses caused by Deol’s death, (2) Deol’s conscious pain and suffering, and (3) the mental anguish and loss of companionship suffered by Deol’s wife, three children, and parents. At trial, the jury found that the negligence of the defendants proximately caused Deol’s death. The final judgment awarded a total of \$16.45 million to the Deol plaintiffs. Of that amount, \$15,065,000 constituted damages for mental anguish and loss of companionship.

After the verdict, the defendants filed an appeal, challenging, among other things, the amount of the noneconomic damages award. The Court of Appeals for the Fifth District of Texas, sitting en banc, affirmed the award. Four of the thirteen justices dissented, however, noting the lack of clarity in the law regarding the proper standard of review for evidentiary sufficiency challenges to noneconomic damages awards.

## The Court’s Plurality Opinion

In a plurality opinion, Justice Jimmy Blacklock (joined by Chief Justice Nathan Hecht, Justice Brett Busby, and, in part, by Justice Jane Bland) sought to clarify the standard of review for legal-sufficiency challenges to awards of noneconomic damages in wrongful death cases. The plurality began its analysis by summarizing the development of the law governing mental anguish damages in Texas. It explained that Texas courts initially allowed mental anguish damages only in cases involving a physical injury to the plaintiff. The Texas Supreme Court later expanded that rule

to allow recovery when the mental anguish produced some physical manifestation. In wrongful death cases, however, the Court adhered to the “pecuniary loss” rule—i.e., the principle that damages for wrongful death are measured by the pecuniary injury to the surviving party and not by reference to the surviving party’s pain or mental anguish.

In 1983, the Court in *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983), abandoned the pecuniary loss rule in wrongful death cases, thus opening the door for wrongful death claimants to recover mental anguish damages. Three years later, in *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986), the Court held that family members in a wrongful death case could recover mental anguish and loss of companionship damages without a showing of a physical manifestation.

Following *Sanchez* and *Moore*, the Court did not have occasion to elaborate on the appellate standard of review for awards of noneconomic damages in wrongful death cases. In other types of cases, however, the Court continued its development of the governing standard. In *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), a personal injury case, the Court held that “evidence of the nature, duration, and severity of [ ] mental anguish” is required to establish the existence of compensable mental anguish damages. Later, in *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996), a personal injury action, the Court held that “[n]ot only must there be evidence of the *existence* of compensable mental anguish, there must also be some evidence to justify the *amount* awarded.” Additionally, in *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002), a defamation case,

the Court applied the requirement announced in *Saenz* for the first time, overturning a \$7 million mental anguish verdict in favor of the plaintiff on the basis that there was no evidence justifying the *amount* awarded, even though the record left no doubt as to the *existence* of compensable mental anguish.

Applying the principles set forth in *Saenz* and *Bentley* for the first time in a wrongful death case, the plurality in *Gregory* concluded that when a legal-sufficiency challenge is made to a noneconomic damages award, a wrongful death plaintiff bears the burden of demonstrating both:

- (1) the existence of compensable mental anguish or loss of companionship, and
- (2) evidence justifying the amount awarded.

With respect to the second element, the Court explained that to justify the amount of a noneconomic damages award, a plaintiff must demonstrate “a rational connection, grounded in the evidence, between the injuries suffered and the amount awarded.” Stated differently, the plaintiff must tell the court or the jury “*why* a given amount of damages, or a range of amounts, is reasonable and just compensation[,]” and the reason provided by the plaintiff must be both rational and grounded in the evidence.

In providing guidance as to how a plaintiff might satisfy this burden, the plurality noted that evidence of the “nature, duration, and severity” of the anguish suffered “will naturally . . . be relevant to the *amount* awarded[,]” just as it is relevant to prove the

*existence* of compensable mental anguish damages. Additionally, the plurality stated that, in some cases, “[t]he required rational basis for the award may come from evidence suggesting a quantifiable amount of damages, such as testimony about the potential financial consequences of severe emotional trauma.” In other cases, “the rational basis may be revealed by lawyer argument rationally connecting the amount sought—or on appeal, the amount awarded—to the evidence.” The plurality explained, however, that a plaintiff cannot merely assert, without rational explanation, that any amount picked by the jury is reasonable compensation simply because a properly-instructed jury picked the number. To do so would equate to impermissibly allowing the jury to “simply pick a number and put it in the blank.”

The plurality also identified specific types of evidence and argument that would **not** be legally sufficient to support the amount of a noneconomic damages award. Notably, it rejected the tactic known as “unsubstantiated anchoring” to support a noneconomic damages award. As defined by the Court, unsubstantiated anchoring is a tactic “whereby attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case.” At the trial in this case, counsel for the settling plaintiffs employed the tactic of unsubstantiated anchoring during closing arguments by: (1) making analogies to a \$71 million Boeing F-18 fighter jet and a \$186 million painting when arguing the proper amount of damages to be awarded for noneconomic injuries, and (2) urging the jury to award for each defendant two cents a mile for every one of the 650 million miles that New Prime’s trucks had driven during the year

of the accident. The plurality explained that such “unsubstantiated anchoring” constitutes improper jury argument because it has “nothing to do with the emotional injuries suffered by the plaintiff and cannot rationally connect the extent of the injuries to the amount awarded.”

The plurality also cautioned against the use of economic damages as a benchmark for noneconomic damages in wrongful death cases. It explained that “[t]he severity of mental anguish and loss of companionship felt by surviving family members does not correlate with economic status[,]” and to suggest that greater pecuniary loss justifies greater noneconomic damages would be to impermissibly “suggest that the families of a well-paid decedent suffer more grief and pain than the families of those with less income.” Accordingly, it concluded that, “[l]ike other unsubstantiated anchors, unexamined use of the ratio between economic and noneconomic damages—without case-specific reasons why such analysis is suitable—cannot provide the required rational connection between the injuries suffered and the amount awarded.”

Applying its evidentiary standard, the plurality concluded that while the evidence presented at trial was sufficient to show that the Deol plaintiffs suffered compensable mental anguish and loss of companionship, it was legally insufficient to support the amount of the noneconomic damages awarded. The Deol plaintiffs’ evidence established the existence of family relationships and provided an explanation as to how each member of the family grieved Deol’s loss. Further, the Deol plaintiffs presented examples of the appreciable ways in which each of their lives

was made worse by Deol's passing. The plurality explained, however, that none of this evidence provided any indication of what amount of damages would be enough to compensate the plaintiffs for the injury suffered. Additionally, plaintiffs' counsel did not attempt at any stage of the proceedings to proffer a rational argument justifying the amount sought or the amount awarded. As such, the plurality concluded that the Deol plaintiffs presented no evidence to justify the amount of noneconomic damages awarded.

The plurality noted that, typically, when sufficient evidence exists to support the existence of damages but not the amount awarded, the Court will reverse and remand the case to the court of appeals for a remittitur. However, because the court also decided to remand the case for a new trial based on a separate error in excluding a responsible third party from the jury charge, the plurality reversed and remanded the entire case to the trial court for a new trial.

### **Justice Devine's Concurring Opinion**

Justice Devine filed a concurring opinion in which Justice Boyd joined. In his concurring opinion, Justice Devine agreed with the plurality opinion that wrongful death claimants bear the burden of establishing both the existence and amount of noneconomic damages and, to meet that burden, a claimant must produce evidence sufficient to support the amount awarded. He further agreed that wrongful-death claimants cannot engage in "unsubstantiated anchoring" and cannot ask or encourage the fact-finder to simply "pick a number" unrelated to the nature, duration, or severity of the noneconomic injury or anguish.

Justice Devine, however, disagreed with the new evidentiary standard advocated by the plurality, describing it as "incapable of being satisfied." Noting that pain and mental anguish have "no market value" and are "impossible to objectively quantify[,]," he opined that no claimant will ever be able to demonstrate that his mental anguish is "worth" any particular amount of compensation. Thus, he concluded, no claimant will ever be able to demonstrate "a rational connection between the amount awarded and the evidence of injury," as the plurality would require.

Justice Devine instead opined that our legal system should continue to entrust the task of determining the proper amount of noneconomic damages to juries, on whom it relies "to apply common sense, community values, and their own life experiences" in determining how much money, if any, a wrongdoer must pay to compensate claimants for their noneconomic injuries. Although this standard vests juries with considerable discretion in determining the amount of noneconomic damages awards, he explained that such discretion is tempered by the role of judges "in determining whether a particular award [is] 'manifestly unjust,' 'shock[s] the conscience[,] or 'clearly demonstrate[s] bias.'" Moreover, he noted that even if there is a compelling need for a change in the law governing the standards for reviewing the size of noneconomic damages awards, the Legislature is better equipped than the courts to "balance the Constitutional demand of just compensation and the plurality's concerns about the potential for arbitrariness." Justice Devine agreed, however, that counsel's improper jury

argument regarding “unsubstantiated anchoring” potentially influenced the damages award at trial. Therefore, he joined in the judgment to reverse and remand the case for a new trial.

### Justice Bland’s Concurring Opinion

Justice Bland also filed a concurring opinion. In that opinion, Justice Bland explained that it was not necessary for the Court to either: (1) adopt the plurality’s standard for determining whether the evidence demonstrates a rational connection to the amount awarded for every case, or (2) reject such a standard as Justice Devine advocated. Instead, Justice Bland noted that all six justices participating in the decision agreed that counsel’s jury argument regarding “unsubstantiated anchoring” was improper and rendered the verdict legally infirm. As such, Justice Bland advocated for reversing the judgment and remanding the case for a new trial based on the common ground that the jury’s verdict was infected by counsel’s repeated requests to use improper measures to assess mental anguish damages. Justice Bland, therefore, took the position that the Court should “leav[e] for another day the resolution of the debate as to the precise standard of review” for the size of noneconomic damages awards.

### Takeaways

- The Court confirmed that in a wrongful death case, as in other tort cases, the plaintiff bears the burden of establishing both the existence and the amount of noneconomic damages. To meet that burden, the plaintiff must, among other things, present evidence sufficient to support the amount

awarded. The jury cannot simply “pick a number and put it in the blank.” Rather, the amount of noneconomic damages awarded must reasonably and fairly compensate the plaintiff for his or her injuries.

- Because only six justices participated in the decision and no more than four justices joined any one section of the lead opinion, the Court’s opinion constitutes a plurality opinion. As such, the new legal-sufficiency standard articulated by the plurality—i.e., that the plaintiff must demonstrate a “rational connection, grounded in the evidence, between the injuries suffered and the amount awarded”—does not constitute binding precedent. Therefore, the type and amount of evidence required to justify the amount of a noneconomic damages award remains open to further clarification and development by Texas courts. The plurality’s opinion, however, provides useful guidance with respect to types of evidence and arguments that may, and may not, be sufficient to justify the amount of a noneconomic damages award and suggests the direction in which the Court may go with a full bench.

- All six justices that participated in the decision agreed that the use of “unsubstantiated anchoring” constitutes improper jury argument and will not support the amount of a noneconomic damages award on appeal. Thus, the Court’s decision will likely curb the use of unsubstantiated anchoring at trial by plaintiff’s counsel.

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