

Plaintiff and Defense Strategies on Non-Economic Damages



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Recusing:	Justices Huddle, Lehrmann, Young
Plurality Opinion:	Justices Blacklock (author), Busby, Hecht
Concurring Opinion 1	Justices Devine (author), Boyd
Concurring Opinion 2	Justice Bland

Supreme Court of Texas

No. 21-0017

Sarah Gregory and New Prime, Inc.,

Petitioners,

v.

Jaswinder Chohan, et al.

Respondents

On Petition for Review from the
Court of Appeals for the Fifth District of Texas

Argued January 31, 2023

JUSTICE BLACKLOCK announced the Court's judgment and delivered an opinion, in which Chief Justice Hecht and Justice Busby joined in full, and in which Justice Bland joined except as to Parts II.C.2 and II.D.

JUSTICE DEVINE filed an opinion concurring in the judgment, in which Justice Boyd joined.

JUSTICE BLAND filed an opinion concurring in part and concurring in the judgment.

Justice Lehrmann, Justice Huddle, and Justice Young did not participate in the decision.

Unified holding

- ▶ **Gregory v. Chohan, 670 S.W.3d 546 (Tex. 2023)**
 - ▶ \$71M fighter jet
 - ▶ \$186M Rothko painting
 - ▶ “Two cents worth” for every one of the 650M miles that its trucks drove during the year of the accident.
 - ▶ Ct: No “unsubstantiated anchors.”

Evidence that
Cannot be Used to
Prove
Non-economic
Damages



“Unsubstantiated
Anchoring”



“Flawed analogies” to
amounts paid for
unrelated objects



Mathematical calculations
based on unrelated
factors

Previous
Standard
of Review
Expressly
Overruled
by
Gregory:

**A jury's award
of damages
must be
affirmed if:**

There is no extraneous evidence of bias or prejudice; and



The amount doesn't shock the conscience of the court.



Principles from
Parkway, Saenz,
and *Bentley*
Applied to Non-
economic PI
damages in
Gregory:

- Must be evidence to justify the amount awarded
- Jury's discretion is limited; it can't simply pick a number

Principles from
Parkway, Saenz,
and Bentley
Applied to Non-
economic PI
damages in
Gregory:

- Mental anguish only recoverable for “substantial disruption in daily routine” or “a high degree of mental pain and distress”
- There must be proof of the “nature, duration, and severity” of mental anguish

The new battlefield on non-economic damages



Evidence of the nature, duration, and severity of the injury



Financial consequences of a life disrupted by mental anguish and loss of companionship



Comparison to damage awards in other cases



Case Comparison Approach

- ***Anderson v. Durant***, 550 S.W.3d 605, 620 & n.65 (Tex. 2018) - Noting, after comparing a trio of other similar cases, that the “jury’s \$400,000 award appears to be excessive compared to awards in cases involving similar or more egregious behavior.”
- ***Gregory v. Chohan***, 670 S.W.3d 546 (Tex. 2023): “We do not foreclose the possibility that comparison to other cases may play some role in a plaintiff’s effort to establish that a given amount of noneconomic damages is reasonable and just compensation rationally grounded in the evidence. We have in the past invoked similar reasoning.” (citing *Anderson*)
- ***Exxon Mobil Corp. v. Brown***, 2026 WL 59875 (TA 14th 2026) – “We may look to other cases as “reasonable guideposts” in our assessment of damages, though we must be mindful that each case is unique and that individuals may experience mental anguish in myriad ways.”) (citing *Anderson*).

Supreme Court of Texas

No. 21-0017

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Concurring Opinion 1

Justices Devine
(author), Boyd

delivered an opinion, in which Chief Justice Hecht and Justice Busby joined in full, and in which Justice Bland joined except as to Parts II.C.2 and II.D.

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Justice Lehmann, Justice Huddle, and Justice Young did not participate in the decision.

Themes of the Devine-Boyd Dissent



Non-economic damages traditionally have been, and should be, left to the discretion of the jury.



Plurality erects an impossible barrier because noneconomic damages cannot be quantified.

Core Gregory Plurality Principles



Juries need rational, evidence-grounded reasons for amounts.



Economic/non-economic ratios are generally not probative without case-specific reasons.



Unsubstantiated anchors are improper.



Precise quantification is not required but rational justification is.

Is *Gregory's* “Rational Connection” Ruling binding?

▶ Yes

- ▶ *Team Indus. Services, Inc. v. Most*, 711 S.W.3d 31 (TA1 2024, no pet.)

▶ No

- ▶ *Kelly Custom Homes, LLC v. Hopper*, 2024 WL 3765393 (TA14 2024, pet. denied)
- ▶ *Garza v. Escamilla*, 712 S.W.3d 718 (TA14 2025, no pet.)
- ▶ *Landry v. Currie*, 2026 WL 249020 (Waco 2026, no pet. h.)

Even if *Gregory* is not binding precedent, it should impact the way you should litigate non-economic damages!

**PRACTICAL TIPS FOR PLAINTIFFS FOR
PROVING NON-ECONOMIC
DAMAGES POST-*GREGORY***



Avoiding Unsubstantiated Anchors

Avoid misplaced monetary guidelines for damages **both in the evidence by analogy** and in closing argument.



Avoiding Unsubstantiated Anchors

“suggest[ing] an amount of damages with reference to objects or values having no rational connection to the facts of the case.” *Garza v. Escamilla*, 712 S.W.3d 718 (14th)



Avoiding Unsubstantiated Anchors

- Per diem of \$16/day or \$1/hour for every waking hour ok. *Garza*
- Six COAs for almost 70 years have held permissible



Avoiding Unsubstantiated Anchors

Use life expectancy charts



Avoiding Unsubstantiated Anchors

Garza: Jury argument referring to the billions spent on medications to avoid pain was not preserved



Avoiding Unsubstantiated Anchors

Garza: Jury argument that pain is both expensive and intolerable has rational connection to evidence, particularly in view of per diem argument



Avoiding Unsubstantiated Anchors

Potential problems if argue for large amounts per day or hour?



Consider using medical expenses for pain avoidance

Potential problems if argue for large amounts per day or hour?

Draft the Charge in View of *Gregory*

Consider Defining Physical impairment: see Negligence PJC 28.3, Comment (2024)

Provide Parkway factors?

Factors to consider in awarding compensatory damages, if any, are the nature, *frequency*, duration and severity of any physical pain or mental anguish sustained by Plaintiff that resulted from the occurrence in question.

Parkway v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995); *Gregory*, 670 S.W.3d at 557.



Drafting the Charge

“Compensation can only be for mental anguish that causes ‘substantial disruption in ... daily routine’ or ‘a high degree of mental pain and distress.’” *Gregory*, 670 S.W. 3d at 555 (quoting *Parkway*, 901 S.W.2d 434, 444 (Tex 1995)).

EXPRESSLY DISCUSS NATURE, DURATION,
[FREQUENCY], AND SEVERITY

Team Industrial Services v. Most

- ▶ No bifurcated trial on punitives and then nonsuited
- ▶ Refused requested instruction n.13
 - ▶ Your award, if any, for compensatory damages should not consider damages as a penalty or by way of punishment.

EFFECTIVELY USE LAY WITNESSES TO
ESTABLISH NON-ECONOMIC DAMAGES

DAY IN LIFE FILMS



- Use photographs and demonstrative exhibits
- Put in record



Explain and
explain



Tell the jury why
explaining

One possible suggestion

- ▶ “P should offer evidence of how a particular monetary amount would be a step toward making the plaintiff whole. That is, the P should endeavor to explain how cash might off-set some of the distress.” Keltner and deKeratry, Advocate Fall 2024
- ▶ Ex: How often did you play tennis? What would you pay to play tennis again each week?

P cannot be cross-examined on the amount of non-economic damages

Q: State the amount of money you are claiming for physical pain and mental anguish in the future, and state all factors relied upon by you in arriving at such amount.

A: I will ask the jury to decide this.

Baylor Med. Plaza Services Corp. v. Kidd, 834 S.W.2d 69, 78 (Texarkana 1992, writ denied) (matter for pleadings)

What about direct examination on the amount of damages?

- ▶ Property damage rule
- ▶ Sentimental value of property

Possible direct examination

► Q: if the defense were to argue that fair and reasonable compensation to you for the loss of your husband would be the amount you could be paid for a minimum wage job, \$7.25 per waking hour, would you agree or disagree that \$7.25 per hour was a fair and reasonable amount to compensate you for the loss of your husband?

A. It would not be a fair amount.

Q. In your opinion would \$30 per waking hour would be fair and reasonable compensation for your suffering?

A. No. [Note \$30/hour would be 480/day for 16 hours)

Possible Direct examination

- ▶ Q: What would it be worth to you to go all day without the anxiety, sleeplessness, worry and from mental anguish you suffer daily?
- ▶ Q: If you could pay to get through a day without the crushing weight of knowing you'll never be the father you planned to be, what would that be worth to you?

Breakdown in components

- ▶ Consider sleep disruption at a specific dollar amount per night of lost restorative sleep,
- ▶ anxiety episodes valued per episode times their frequency,
- ▶ depressive days calculated per day times occurrence rate,
- ▶ relationship strain valued daily for damaged marital intimacy, and
- ▶ parental grief assessed per day for inability to parent as desired.

Final argument

- ▶ The law requires me to explain why our requested award is a fair amount. . . Here's why: Steven experiences anxiety that disrupts his sleep every single night—that's 12,775 nights over 35 years. He testified he'd pay \$25 per night for peaceful sleep. That's \$319,375. He battles depression requiring medication to lessen the emotional pain every day—365 days times 35 years times \$30 per day equals \$383,250. He grieves his lost identity as a capable provider—\$40 daily for 35 years equals \$511,000. Total: \$1,213,625. We're asking for \$1 million. That's not speculation, it's math based on the evidence about his daily suffering."



Effectively Use Lay
Witnesses to Establish Non-
economic Damages

Types of Lay Witnesses

- Co-workers and managers
- Clergy
- Friends
- Educators
- Business partners



ECONOMIC

Minimum Life Care Plan:

\$29,916,807

Loss of Earnings: \$2,897,367

Household Services: \$568,596

Past Medical Bills: \$1,500,000+

\$34,882,770

**TOTAL ECONOMIC
DAMAGES**

NON-ECONOMIC

Freedom

Independence

Dignity

Happiness

Safety

Spouse you once knew

Best friend

Partner

Parent

Companionship

Emotional Support

Conversation

Stability

Peace of mind

Mobility

Ability to assist

Activities

Travel

Fun

Role Model

Guidance

Comfort

Breadwinner

Family leader

Dignity

Can't eat what he wants

Can't eat when he wants



Use Expert Testimony to
Establish Non-economic
Damages



The Rational Alternative

A UNIFIED DEFENSE TRIAL AND APPELLATE
STRATEGY ON NON-ECONOMIC DAMAGES
POST-GREGORY

The Strategy? A Unified Approach.

- **Shape an evidentiary record and charge-tracked argument** that makes large awards appear irrational at trial.
- **Contextualize any verdict on appeal** using comparative tools to show whether it is an outlier lacking evidentiary support.

Counter-Anchoring: What, When and Why?

Counter-anchoring = offering a conditional, evidence-based alternative that supplies jurors a rational framework.

Counter-anchoring reduces the gravitational pull of plaintiff's number and should be used judiciously based on liability strength, case emotion, and available relationship-specific proof.

Counter- Anchoring Guardrails



Counter-anchors should not be “frivolous” or unmoored.



Counter-anchors must be tightly tied to record evidence and framed as conditional so as not to concede liability.

Operationalize
the PJC's Non-
Economic
Damage
Considerations

TEXAS PATTERN JURY CHARGES

**GENERAL NEGLIGENCE,
INTENTIONAL PERSONAL TORTS
& WORKERS' COMPENSATION**

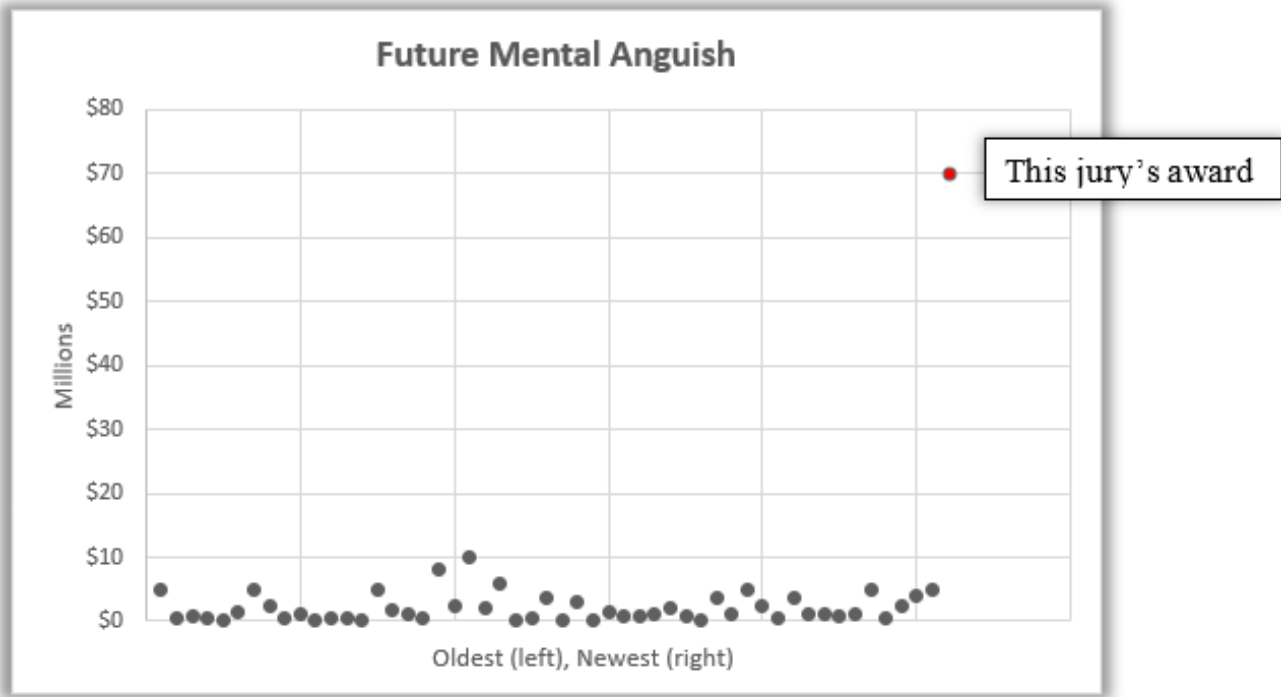


Operationalize the PJC's Non-Economic Damage Considerations in Discovery

- ▶ **“Living Arrangements”**: Was the plaintiff actually living with the decedent? Or had they moved out years ago? E.g., establish separations and periods of non-cohabitation; quantify days, weeks, and months apart; and corroborate with leasing records, utility accounts, mail, school records, travel logs, and location data.
- ▶ **“Extended Absences”**: Were there long periods of no contact? E.g., identify work travel, deployments, relocations, hospitalizations, incarceration, or estrangements; lock down dates and durations; obtain contemporaneous communications that reflect the frequency and quality of contact during absences.
- ▶ **“Harmony of Family Relations”**: Don't settle for “we loved him.” E.g., dig for estrangement, conflicts, dysfunction, separations, family violence, protective orders, and substance abuse and associated dysfunction; neutral witnesses—neighbors, clergy, teachers, supervisors—carry outsized credibility on harmony or discord.
- ▶ **“Common Interests and Activities”**: Was this a relationship of daily interaction or merely holiday visits? E.g., move beyond generalities: what activities, how often, how long, and how recently? Who else participated? Are there photos, calendars, membership records, or transaction histories that reflect participation?

Operationalize the PJC's Non-Economic Damage Considerations in Closing Argument

- ▶ Principled discussion of the PJC's non-economic damage considerations to lower the courtroom temperature—cloak yourself in the Court's charge, i.e., “The Court has instructed you...”
- ▶ Arming defense-oriented jurors with the law/judge's instructions allows them to argue in deliberations on a non-emotional basis based upon the defense's development of the PJC's considerations.



The Appellate Hammer

ExxonMobil v. Brown, 2026 WL 59875 (14th COA 2026)

Category	Brown	Roque	Friels
Future Medical	\$416K	\$374K	
Earnings (Past)	\$104K	\$45K	
Earnings (Future)	\$90K	\$874K	
Past Pain	\$2M	\$1.5M	\$150K
Future Pain	\$2M	\$3M	
Past Anguish	\$2M	\$1.5M	\$200K
Future Anguish	\$2M	\$1.5M	\$1.5M
Past Impairment	\$1.5M	\$2M	\$150K
Future Impairment	\$2M	\$1M	
Past Disfigurement	\$500K	\$250K	
Future Disfigurement	\$500K	\$250K	

Key: Yellow highlighting – challenged on appeal. Red – stricken on factual insufficiency grounds. Blue – stricken on legal insufficiency grounds.

ExxonMobil v. Brown (14th COA 2026)

- ▶ Entire award reversed, even awards unchallenged on appeal. Scope of new trial = liability plus damages, minus categories in which awards were supported by legally insufficient evidence.
- ▶ No remittitur because no guidance offered on how to calculate.
- ▶ Ringing endorsement of the case comparison approach. “[W]e may look to other cases as “reasonable guideposts” in our assessment of damages.” Op. at 20.

Key Takeaways



Never cede damages—force Plaintiff to prove every element.



Run discovery to the PJC to shape the charge and limit theories..



Decide whether to counter-anchor early and strategically.



Object and preserve at every damages inflection point.



Build an appellate record distinguishing ordinary from extraordinary awards.



Use comparative analytics on appeal to show when a verdict is an outlier.

*We welcome your
questions and discussion.*

