

**THE RATIONAL ALTERNATIVE: A UNIFIED DEFENSE
TRIAL AND APPELLATE STRATEGY ON NON-ECONOMIC
DAMAGES POST-GREGORY**

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TABLE OF CONTENTS

I. THE STRATEGIC IMPERATIVE: ADDRESSING DAMAGES IN
THE TRIAL COURT AND ON APPEAL 1

II. COUNTER-ANCHORING..... 1

III. TRIAL COURT STRATEGY: DEVELOPING A DEFENSE
COUNTER OR EVIDENCE-BASED DAMAGES ATTACK 2

IV. THE APPELLATE HAMMER: SCATTERGRAMS
AND COMPARATIVE ANALYSIS..... 3

V. CONCLUSION: SUMMARY CHECKLIST FOR THE DEFENSE 4

THE RATIONAL ALTERNATIVE: A UNIFIED DEFENSE TRIAL AND APPELLATE STRATEGY ON NON-ECONOMIC DAMAGES POST-*GREGORY*

I. THE STRATEGIC IMPERATIVE: ADDRESSING DAMAGES IN THE TRIAL COURT AND ON APPEAL

For decades, many in the defense bar have embraced a familiar but increasingly risky approach to non-economic damages: argue no liability, say nothing about damages, and hope the jury never reaches the damages questions. The premise is intuitive—offering a damages number, even conditionally, is thought to validate the plaintiff’s case and invite a compromise verdict.

The practical result, however, is that silence leaves the jury with only one anchor: the plaintiff’s number. And in the modern era of “nuclear verdicts,” that anchor is rarely modest. Plaintiffs’ counsel increasingly frame non-economic damages with dramatic, emotionally resonant figures untethered from any meaningful evidentiary framework. When no alternative is offered, jurors are left to assume that the plaintiff’s request is at least within the realm of reason, or, even if the jury believes the request is too high, the damages award nonetheless skews higher by a high anchor.

The landscape has shifted further in the wake of *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. 2023).¹ The Texas Supreme Court made clear that non-economic damages must be supported by reasons grounded in the evidence. *Id.* at 561. Far from retreating, sophisticated plaintiffs’ lawyers have adapted. They now attempt to justify large numbers by selectively tying them to testimony and themes designed to survive appellate review.

In this environment, a reflexive “neglect damages” strategy is no longer prudent. The defense bar must instead adopt a unified approach that operates simultaneously at trial and on appeal: a vigorous defense on liability paired with a principled, evidence-based defense of damages.

- At the trial level, the goal is to shape the evidentiary record and jury arguments to prevent irrational awards.
- On appeal, the objective is to expose verdicts that lack a rational connection to the evidence through comparative and statistical tools.

Damages are no longer an afterthought. They are a core strategic front.

II. COUNTER-ANCHORING

Behavioral science and jury research consistently demonstrate that anchors influence decision-making. When jurors are asked to convert intangible losses—grief, companionship, mental anguish—into dollars, they look for reference points. If only one side offers a number, that number becomes the baseline against which all other figures are evaluated. Hence, counter-anchoring is prudent.

And research confirms that counter-anchoring works. At the end of the chapter titled “Anchors” in the landmark book “Thinking, Fast and Slow,” Daniel Kahneman writes, “The defendant’s lawyers put in a frivolous reference in which they mentioned a ridiculously low amount of damages, and they got the judge anchored on it!” Now, of course we are not suggesting frivolous counter-anchors, but Kahneman’s point is that counter-anchoring is effective. And when the defense offers counter-anchors that are evidence-based, verdicts tend to be lower than when the defense offers no number at all.² Even when jurors do not adopt the defense’s figure wholesale, the presence of a grounded alternative prevents the plaintiff’s request from monopolizing the valuation process.

Jurors are not seeking mathematical precision. They are seeking a rational framework.³ When the plaintiff offers a large number, especially one framed emotionally, and the defense offers nothing, jurors may infer that the defense either agrees with the figure or lacks a credible alternative.

But counter-anchoring is not appropriate in every case. The decision about whether to counter-anchor damages depends on factors such as the strength of the liability defense, the credibility of the plaintiff, the emotional tenor of

¹ See *Kelly Custom Homes, LLC v. Hopper*, NO. 14-23-00793-CV, 2024 WL 3765393, *8 (Tex. App.—Houston [14th Dist.] Aug. 23, 2024, pet. denied) (noting that *Gregory* “is a plurality opinion lacking precedential value”).

² See, e.g., Courtroom Sciences, Inc., Counter-Anchor or Play It Safe? Five Reasons to Present an Alternative Damages Figure (May 12, 2023), <https://www.courtroomsciences.com/litigation-consulting-1/counter-anchor-or-play-it-safe-82/>.

³ Edith Greene, Jane Goodman & Elizabeth F. Loftus, *Jurors’ Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV., 805, 805-20 (1991).

the case, and the availability of concrete evidence tied to the relationships at issue in the case.⁴ To this point, jury consultant Becky Fuentes of R&D Strategic Solutions notes, “I see counter-anchors used increasingly. I am not a huge proponent of counter-anchors if there is a decent liability case (of course), but counter-anchors should be considered in the appropriate case given the increase in nuclear verdicts.”

When called for and employed appropriately, effective counter-anchors are not arbitrary. They are grounded in the specific facts of the case, framed as conditional, and presented as a principled alternative rather than a concession.

To adeptly deploy counter-anchors, the defense must master the conditional pivot: we do not believe we are liable, but if the jury disagrees, it must follow the evidence rather than emotion.⁵ The evidence of this specific relationship supports a value of X, not Y. Properly framed, this argument preserves the liability defense while providing jurors with a responsible basis for decision-making.⁶

Finally, even when a counter-anchor is not presented, focusing pre-trial investigation and discovery on non-economic damages equips defense counsel to expose exaggeration and challenge the plaintiff’s attempt to justify extraordinary awards through cross-examination and argument.

III. TRIAL COURT STRATEGY: DEVELOPING A DEFENSE COUNTER OR EVIDENCE-BASED DAMAGES ATTACK

Too often, trial lawyers treat the Texas Pattern Jury Charge damages questions and instructions as afterthoughts. In cases with a “nuclear verdict” risk profile, however, the PJC should instead function as a roadmap for discovery and trial strategy. The instructions identify the precise factors jurors are permitted to consider when valuing non-economic damages, and each factor presents an opportunity for the defense to develop a principled damages record.

The PJC allows jurors to consider the nature of the relationship between the claimant and the decedent, including their living arrangements, extended absences, the harmony of their family relations, and their common interests and activities.⁷ These concepts are not abstractions; they are evidentiary categories that can, and should, be investigated.

- **“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?

Whether the defense ultimately offers a counter-anchor or not, these relationship-dynamic factors should be woven throughout the trial through cross-examination, witness presentation, expert testimony where appropriate, and closing argument that tracks the jury charge. The objective is not to minimize loss, but to contextualize it and prevent the jury from assuming that every loss warrants an extraordinary award.

One way this record can be developed is through straightforward confirmation of relationship realities on cross-examination. For example:

⁴ See, e.g., Courtroom Sciences, Inc., Counter-Anchor or Play It Safe? Five Reasons to Present an Alternative Damages Figure (May 12, 2023), <https://www.courtroomsciences.com/litigation-consulting-1/counter-anchor-or-play-it-safe-82/>.

⁵ John Campbell, Bernard Chao, Christopher Robertson & David V. Yokum, *Countering the Plaintiff’s Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 IOWA L. REV. 543 (2016).

⁶ EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS (Am. Psych. Ass’n 2003).

⁷ PJC 29.3, 29.4, 29.5, and 29.6: “In determining damages for elements 3, 4, 5, and 6, you may consider the relationship between [Blank] and [Blank], their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.”

Q. You testified that your child had a close relationship with her father, correct?

A. Yes.

Q. There were periods when he was not physically present in her life, though, right?

A. Yes.

Q. In fact, he was incarcerated for several stretches during her childhood?

A. Yes.

Q. Those periods lasted months at a time, not just days or weeks?

A. That's right.

Q. There were also times when child-support payments were unpaid?

A. Yes.

In short, once the PJC's non-economic damages instructions are operationalized, competent defense counsel has a rational, defensible way to develop its damages-defense pretrial and then to defend against damages from the outset of trial through closing argument.

And, as to closing argument, a principled discussion of damages, anchored in the PJC's instructions, provides a path for defense counsel to lower the temperature in the courtroom, which is critical in cases presenting nuclear verdict risk. Becky Fuentes of R&D Strategic Solutions notes, "It is important to arm defense-oriented jurors with the law/judge's instructions so they can argue for lower damages on a non-emotional basis. Basing their arguments on the legal instructions rather than on personal judgements (i.e., arguing that 'the plaintiff does not deserve it') lowers the overall temperature of the damages discussion and triggers less pushback from plaintiff-oriented jurors. Further, agreeing to lower damages based on the judge's instructions feels less like a 'loss' or 'compromise' to plaintiff-oriented jurors and is therefore more palatable."

IV. THE APPELLATE HAMMER: SCATTERGRAMS AND COMPARATIVE ANALYSIS

Many practitioners expected *Gregory* to shed light on the standard by which appellate courts should review challenges to outsized non-economic damage awards. While the Texas Supreme Court did not reach that question, it made clear that any attempt to anchor the jury must be grounded in the evidence, rather than "improper yardsticks."⁸ And the plurality opined that there must be a rational justification for the amount of non-economic damages awarded. Rationality, however, cannot be evaluated in a vacuum. Context is essential.

Historically, some appellate courts have used case comparisons to determine whether a particular non-economic damages award "shocks the conscience" or falls so outside the zone of reasonableness as to require remittitur or a new trial.⁹ The *Gregory* plurality signaled its openness to this approach too.¹⁰

⁸ *Gregory*, 670 S.W.3d at 576 (Bland, J., concurring in part) (identifying basis for majority decision).

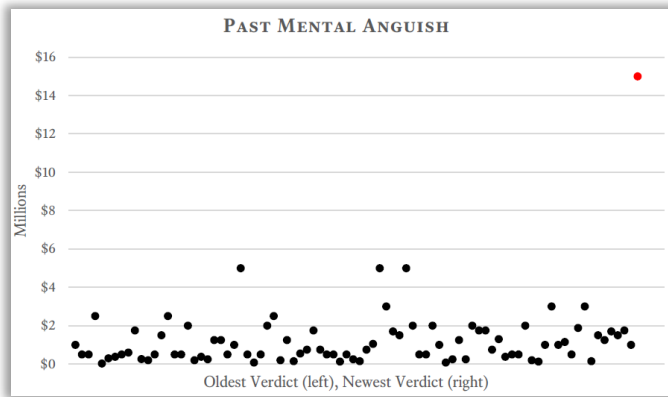
⁹ See, e.g., *Anderson v. Durant*, 550 S.W.3d 605, 620 & n.65 (Tex. 2018) (noting, after comparing a trio of other similar cases, that the "jury's \$400,000 award appears to be excessive compared to awards in cases involving similar or more egregious behavior").

¹⁰ *Gregory*, 670 S.W.3d at 561, n.12 (indicating openness to verdict comparisons as a means to ascertain whether "a given amount of noneconomic damages is reasonable and just compensation rationally grounded in the evidence").

Building on that concept, the Haynes Boone appellate team has pioneered the use of “scattergrams” to provide appellate courts with a visual and statistical framework for assessing whether a verdict is within a reasonable range or represents an irrational outlier.¹¹ What is a scattergram, you many ask?

It is a visual way to depict data—in this case, a verdict or particular damages award—in a manner that shows how one data point relates to the other data points. It involves identifying all the wrongful death or catastrophic injury verdicts that are available and verifiable for a particular jurisdiction going back many years (to 2000, in our cases), and then using this data to visually depict where a new verdict or award appears on the plot. By plotting verdicts in comparable wrongful-death cases within the same jurisdiction and involving similar relationships, the defense can demonstrate how a challenged award compares to historical norms.

Here’s what one such scattergram looked like.



Many others appear in the briefs identified in footnote 11.

The appellate argument is straightforward. If the median award for the loss of a parent in Texas is \$X and the jury awarded 50 times that amount, *Gregory* requires record evidence explaining why this loss is fifty times more severe than the typical case. Where the record reflects ordinary grief rather than extraordinary circumstances, the award lacks a rational basis and must be reduced or set aside. This approach obviously works best when defense counsel pursues the strategies discussed in Part C above.

Scattergrams do not replace record review. They illuminate it by providing courts with the context necessary to evaluate rationality. And they offer a sounder statistical basis for this analysis than the traditional case comparisons, which often rely on only a handful of comparators cases.

V. CONCLUSION: SUMMARY CHECKLIST FOR THE DEFENSE

- **Do not cede damages.** Silence allows the plaintiff to set the only anchor and leaves the jury without a principled alternative or framework.
- **Use the PJC as a damages roadmap.** Treat the Pattern Jury Charge not only as an instruction set, but as a checklist for discovery, witness examination, and trial themes.
- **Develop damages evidence through discovery.** Non-economic damages should be investigated with the same rigor as liability, including relationship dynamics, living arrangements, absences, and functional realities of the relationship.
- **Address damages at trial.**
 - Where appropriate, offer a conditional, evidence-based counter-anchor tied to the specific relationship at issue; or
 - At minimum, present defense-developed evidence that constrains and contextualizes the plaintiff’s damages narrative.

¹¹ See, e.g., [Brief of Appellants](#) at 58-92, *Allied Aviation Fueling Co. of Houston, Inc. v. Cruz*, No. 01-22-00083-CV, (Tex. App.—Houston [1st Dist.] filed Nov. 30, 2022); [Brief of Appellants](#) at 48-61, *Union Pac. R.R. Co. v. Johnson*, 2024 WL 3508371, No. 01-23-00900-CV (Tex. App.—Houston [1st Dist.] filed July 15, 2024); [Appellants’ Opening Brief](#) at 51-55, *Greystar Dev. & Constr., LP v. Williams*, No. 05-23-01168-CV (Tex. App.—Dallas filed Nov. 20, 2023).

- **Object and preserve.** Promptly object to unsubstantiated anchors, emotional appeals untethered from evidence, and improper argument to preserve appellate review under *Gregory*.
- **Build the appellate record.** Ensure the trial record reflects ordinary versus extraordinary circumstances so that the rationality of the award can be meaningfully assessed on appeal.
- **Use comparative tools on appeal.** Employ scattergrams and statistical context to demonstrate when a verdict is an irrational outlier lacking evidentiary justification.
- **Remember the goal.** The objective is not to minimize loss, but to require that non-economic damages be grounded in evidence, reason, and the jury charge.