

# Non-Economic Damages: The Times They Are A-Changin'



**Quentin Brogdon**

Crain Brogdon

214.598.1009 cell

[Qbrogdon@crainbrogdon.com](mailto:Qbrogdon@crainbrogdon.com)

A wooden gavel with a dark, polished head and a lighter, textured handle rests diagonally across the top right of a white document. The document is placed on a light brown, textured surface, possibly a desk or folder. A silver paperclip is attached to the top left corner of the document. The words "COMMON" and "LAW" are printed in a large, bold, black serif font, stacked vertically and slightly angled to the right. The entire scene is set against a dark blue background with a subtle, wavy texture.

# COMMON LAW

- “Mental anguish” in a wrongful death case is defined as “The emotional pain, torment, and suffering that the named plaintiff would, in reasonable probability, experience from the death of the family member.”



What evidence may/must the jury consider in determining damages for mental anguish?



- Moore v. Lillebo (TX 1986):
- 1. Relationship between husband & wife, or parent & child
- 2. Living arrangements
- 3. Absence of deceased from beneficiary for extended periods
- 4. Harmony of family relations
- 5. Common interests or activities.

Is a physical manifestation of  
mental anguish required?

- Not required in wrongful death case
- Can be evidence of extent and nature, but is not the only proof.



- What is relationship between mental anguish damages and other similar elements of damages, such as damages for “loss of society and companionship”?

- Moore v. Lillebo (Tx 1986):
- “The definitions for mental anguish and loss of society and companionship, present ... difficulty. Some have suggested that these damages necessarily overlap...”

- “Mental anguish represents an emotional response to the wrongful death itself. Loss of society, on the other hand, constitutes a loss of positive benefits which flowed to the family from the decedent’s having been a part of it ...”



- “Mental anguish is concerned not with the benefits [the beneficiaries] have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one...”

- “Loss of society asks, ‘what positive benefits have been taken away from the beneficiaries by reason of the wrongful death?’ Mental anguish damages ask about the negative side: ‘what deleterious effects has the death, as such, had upon the claimants?’”

- Mental Anguish:
- Emotional pain, torment and suffering that plaintiff would, in reasonable probability, experience from death of family member.



# Pain and Mental Anguish



# Pain and Mental Anguish

- No instruction to jury, except in wrongful death cases.
- Wrongful death: “emotional pain, torment, and suffering experienced by [the plaintiff] because of the death of [the deceased].”

# Pain and Mental Anguish

- “implies a relatively high degree of mental pain and distress....more than mere disappointment, anger, resentment or embarrassment, although it may include all of these...



# Pain and Mental Anguish

- “...includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, and/or public humiliation.”

## *Parkway (Tex. 1995)*

- Homeowners sued for flooded home.
- Need “direct evidence of the nature, duration, and severity of [the plaintiffs’] mental anguish, thus establishing a substantial disruption in the plaintiffs’ daily routine.”

## Parkway (Tex. 1995)

- Husband testified:
  - I was hot. I was very disturbed about that, and called him and said, “I would like to sell you a house. I think you have just flooded my property, I think you have messed up my house.” I begged the guy not to.



## Parkway (Tex. 1995)

- Wife testified:
  - “Not pleasant”
  - “[Our life] changed”
  - “Caused some friction between us”
  - “Upset that it changed our lifestyle”

## Parkway (Tex. 1995)

- Court conceded these statements showed that P's felt anger, frustration, or vexation, but these things were "*mere emotions.*"

## Saenz (Tex. 1996)

- With respect to mental anguish damages, “*juries cannot simply pick a number and put it in a blank.*”



## Saenz (Tex. 1996)

- “There must be evidence that the amount found is fair and reasonable compensation,” and “the law requires appellate courts to conduct a meaningful evidentiary review of those determinations.”

## Saenz (Tex. 1996)

- Court expressly disapproved of line of court of appeals cases that suggested the contrary.

## *Bentley v. Bunton* (Tex. 2002)

- \$7 mi mental anguish overturned.
- “Damage awards left largely to a jury’s discretion threaten too great an inhibition of speech.”
- “First amendment requires appellate review of amounts awarded for non-economic damages in defamation cases.”



## *Bentley v. Bunton* (Tex. 2002)

- “The jury’s award of \$7 million in mental anguish damages strongly suggests its disapprobation of (defamer’s) conduct more than a fair assessment of (P’s) injury.”

## *Bentley v. Bunton* (Tex. 2002)

- Baker's dissent: "Because whether damages are excessive and whether a remittitur is appropriate are factual determinations that are final in the courts of appeals, this Court lacks jurisdiction to review such findings."

## *Bentley v. Bunton* (Tex. 2002)

- *Saenz* disting. *no* evidence in *Saenz*.
- Here: 1. Sleep, 2. Embarrassment  
3. Disrupted family, 4. Distressed children.
- No authority for factual sufficiency review.



## Gregory v. Chohan (June 2023)

- Death arising out of truck crash.
- \$16.8 million in damages.
- \$15 million in non-economic damages.
- Court of appeals, *en banc*: not “flagrantly outrageous, extravagant, and so excessive that it shocks the judicial conscience.”

## *Gregory v. Chohan* (June 2023)

- Unsubstantiated anchoring: “A tactic whereby attorneys suggest damage amounts by reference to objects or values with no rational connection to the facts of the case.”

## *Gregory v. Chohan* (June 2023)

- Unsubstantiated anchoring: “Analogies employed by counsel in this case included a \$71 million Boeing F-18 fighter jet and a \$186 million painting by Mark Rothko.”



## *Gregory v. Chohan* (June 2023)

- “The ‘two cents a mile’ calculation yields \$39 million in damages. The combined final jury verdict was \$38.8 million, so it is not difficult to conclude that the improper argument influenced the result.”

## *Gregory v. Chohan* (June 2023)

- Plurality opinion: Blalock, Hecht & Busby.
- Bland joined except as to two parts.
- Devine and Boyd concurred in judgment.
- Lehrmann, Huddle & Young did not participate.

## Gregory v. Chohan (June 2023)

- “the requirement that some evidence support the amount of damages for emotional injury is not a requirement of precise quantification or a requirement that a particular type of evidence must always be proffered. It is instead merely a requirement that the amount of damages must have ***a rational basis grounded in evidence.***”



## *Gregory v. Chohan* (June 2023)

- “In wrongful death cases, however we reject any requirement that the ratio between economic and noneconomic damages must be considered.”

## *Gregory v. Chohan* (June 2023)

- “In some cases, there may be direct evidence supporting quantification of an amount of damages, such as evidence of the likely financial consequences of severe emotional disruption in the plaintiff’s life. Or there may be evidence that some amount of money would enable the plaintiff to better deal with grief or restore his emotional health.”



## *Gregory v. Chohan* (June 2023)

- “The 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. Or the rational basis may be revealed by lawyer argument rationally connecting the amount sought – or on appeal, the amount awarded – to the evidence.”



## Gregory v. Chohan (June 2023)

- “If awarding and reviewing noneconomic damages is to be a rational and non-arbitrary exercise, as surely we must insist that it be, then courts and jurors alike should be told *why* a given amount of damages, or range of amounts, would be reasonable and just compensation.”

## Gregory v. Chohan (June 2023)

- “If awarding and reviewing noneconomic damages is to be a rational and non-arbitrary exercise, as surely we must insist that it be, then courts and jurors alike should be told *why* a given amount of damages, or range of amounts, would be reasonable and just compensation.”

## *Gregory v. Chohan* (June 2023)

- Devine and Boyd Concurrence:
- “advocates a new evidentiary standard that is not only foreign to our jurisprudence but also incapable of being satisfied.”
- “We’ll know it when we see it. But we will never see it.”



# Gregory v. Chohan (June 2023)

- Devine and Boyd Concurrence:
- “Sets up a Sisyphean pursuit that would burden litigants and the legal system with costly do-over trials.”
- “Would require claimants and their counsel to find that evidentiary needle in the haystack. But *there is no needle there.*”

## *Gregory v. Chohan* (June 2023)

- Devine and Boyd Concurrence:
- “Effectively neutralizes the jury’s role by requiring them to rely on evidence a claimant simply cannot present.”

## *Gregory v. Chohan* (June 2023)

- Bland:
- “We should leave further development of the law to a case in which the jury is properly informed about what to consider and, importantly, not told to apply measurements wholly outside the mental anguish evidence presented.”



## *Gregory v. Chohan* (June 2023)

- Not required: Any ration between economic and noneconomic damages.
- Not expressly forbidden: unit of time or per diem.
- No mandate: Fifth Circuit-style maximum recovery rule, but ...

## *Gregory v. Chohan* (June 2023)

- Footnote 12:
- “Although neither party advocates for a comparative method under which the size of damages awards can be justified based on the damages previously awarded in factually similar cases, several amici suggest such an approach...”

## *Gregory v. Chohan* (June 2023)

- Footnote 12:
- “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..”



## Post-Gregory v. Chohan

- Plurality opinion binding?
- Per-diem, unit of time arguments?
- Closing arguments more restricted?
- Evidence of other “similar” verdicts?
- More expert witnesses on damages?
- Evidence re cost of grief counselling, even if not obtained?

# Conclusion