NON-ECONOMIC DAMAGES:
THE TIMES THEY ARE A-CHANGIN'

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Publications

"When Is Social Media Evidence Admissible?" *Tex Law* 2024; "Alas, Poor Civility! I Knew It Well," *Tex Law* 2023; "*Gregory* Raises Damages Questions," *Tex Law* 2023; "Criminal Conduct in Civil Cases," *Dallas Bar Assoc Headnotes*, Sep 2023; "But Did They Ratify It? Determining Employer Liability for an Employee's Acts," *Tex Law* 2023; "Non-Lawyer Ownership of Law Firms-Coming Soon?" *Tex Law* 2023; "Snap Removal is No Longer a Snap," *Tex Law* 2023; "High Court Puts Cell Phones on Hold," *Tex Law* 2023; "The Empathy Deficit in Pajama-Clad Online Jurors," *Voir Dire*, Fall-Winter 2022; "State of the Art Expert Discovery Practices," *The Advocate*, Winter 2022; "A Closer Look at Limitations in Wrongful Death Cases," *Tex. Law* 2022; "Dos and Don'ts of Opening Statements," *Dallas Bar Assoc Headnotes*, Sep 2022; "When Can Jurors Consider Evidence of Intoxication, Impairment and Mental Health Conditions? *Tex. Law* 2022; "Visiting the Sins of Children on Their Parents: Parental Tort Liability," *Tex. Law* 2022; "The Empathy Deficit in Pajama-Clad Online Jurors," *The Advocate*, Spring 2022; "Forced Arbitration: A Bitter Pill to Swallow," *Tex. 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I. INTRODUCTION

Before the Texas Legislature passed House Bill 4 ("HB 4") in 2003, the distinction between economic and non-economic damages was important primarily because of the limitations in Chapter 41 of the Civil Practice and Remedies Code on the recovery of exemplary damages as a factor of economic damages. *See* former Tex. Civ. Prac. & Rem. Code §§ 41.008(a) & 41.008(b). Although Article 4590i, the statute containing the bulk of the statutory medical liability provisions, imposed a cap on *total* damages (held to violate the Texas Constitution in some circumstances), it imposed no caps nor other limitations on non-economic damages.

HB 4 created a variety of new medical liability caps. Some of the new caps apply to non-economics damages, while other caps apply to total (economic plus non-economic) damages. Post-HB 4, the distinction between economic and non-economic damages retains its importance in the context of Chapter 41's continuing limitations on punitive damages. *See* Tex. Civ. Prac. & Rem. Code Ch. 41. The distinction, however, has a greatly-enhanced significance because of all of the new medical liability caps on non-economic damages.

Furthermore, HB 4 diminished the amounts of recoverable economic losses in some circumstances with other new provisions mandating that: 1) evidence to prove certain losses must be presented in the form of net losses after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law, and 2) recovery of medical or health care expenses incurred is limited to "the amount actually paid or incurred by or on behalf of the claimant." *See* Tex. Civ. Prac. & Rem. Code §§ 18.091 & 41.0105.

For the past thirty years, the Texas Supreme Court has steadily chipped away at the discretion given to jurors to award non-economic damages. In June of 2023, the Court's on-going effort culminated in the Court's issuance of *Gregory v. Chohan*, an opinion that raised as many questions as it provided answers. We will need further opinions from the Texas Supreme Court to have a clear understanding of where plaintiffs and defendants stand in the wake of *Gregory*. In any event, *Gregory* will make the plaintiff's task of obtaining non-economic damages at trial and keeping those damages on appeal more difficult.

II. WHEN A PLAINTIFF DELIBERATELY CHOOSES TO TRY A CASE SOLELY ON NON-ECONOMIC DAMAGES

In the past 10 years or so, there has been a growing trend within the plaintiffs' bar to try certain personal injury cases without introducing evidence of economic damages. What types of personal injury cases? Particularly those with small medical bills and other economic damages. Why? The theory is that a small amount of economic damages gives the jury a low anchor for its verdict, and that plaintiffs in these cases can actually do better at the courthouse without introducing evidence of economic damages.

Jury consultant David Ball summarizes the concern as follows in his book, *David Ball on Damages 3*:

Jurors tend toward noneconomic verdicts that are some proportion, fraction, multiple, or equivalent of the economics damages figure. So if medical bills and lost wages are $125,000, jurors are likely to argue that the plaintiff should get half that amount, or double (once in awhile), or that the amount exactly, or "just a

little more" or "not as much as." This is because they seize on anything tangible as an anchor to help them "calculate" the intangible – even when there is no relationship between the two. This makes your economic damages figure extraordinarily important – and sometimes, extraordinarily dangerous. In a case with $125,000 in economic damages, jurors are likely to add no more than a few hundred thousand inn non-economic damages. With identical noneconomic harms, $2,000,000 in economic losses is almost sure to result in a far greater non-economic verdict than just a few hundred thousand.

Ball, *David Ball on Damages 3* 55-56 (2011).

In addition to cases with a concern about the small amount of medical bills in relation to the harm suffered, trying cases without evidence of medical bills and/or no loss of earning capacity claim may be appropriate for other cases. These include cases with problems proving lost wages or earnings (missing or unfiled tax returns or no steady work history) or questionably high medical bills for services that arguably were not necessary.

Likewise, studies consistently show that verdicts with high medical bills and high lost income numbers consistently receive higher non-economic damages awards than cases with lower economic damages, all things being equal. *See* Kritzer, Liu & Vidmar, "An Exploration of 'Non-Economic' Damages in Civil Jury Awards," 55 Wm. & Mary L. Rev. 971 (2014); Rand Corporation, "Compensation of Injuries: Civil Jury Verdicts in Cook County (1984).

Plaintiffs who decide to try a case without evidence of economic damages need to decide when to show their hand. For example, if the plaintiff files medical bills affidavits before later non-suiting a claim for medical bills, this could strengthen the defendant's argument that the bills are nevertheless admissible at trial.

In cases in which plaintiffs non-suit claims for medical bills, defendants may argue that, although the medical bills are not admissible to support the plaintiff's claims for medical bills, they may still be admissible on the issue of the plaintiff's claims for pain and suffering and other non-economic damages.

Plaintiffs may argue that defendants must first establish the proper predicate through one or more experts to establish the link between the amount of medical bills and the plaintiff's damages.

Plaintiffs may also argue that the collateral source rule prevents evidence of the medical bills if the plaintiff is not seeking to recover medical expenses. The "collateral source rule" in Texas actually is two distinct, but related common law rules – a rule of evidence, and a rule of damages. As a rule of evidence, it prevents the defendant in a personal injury case from introducing evidence that any part of the plaintiff's damages was paid by a collateral source. As a rule of damages, it prevents any offset of the plaintiff's recovery by the amount of damages paid by a collateral source.

In *Haygood v. Escobedo*, 356 S.W.3d 390 (Tex. 2011), the Texas Supreme Court made a number of statements that will be helpful to plaintiffs who seek to exclude evidence of medical bills in cases where the plaintiff seeks no recovery of medical bills. Among others, these statements include:

"Since a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such damages is irrelevant to the issue of damages."

"Only evidence of recoverable medical expenses is admissible at trial."

"The common-law collateral source rule does not allow recovery as damages of medical expenses a health care provider is not entitled to

recover."

"Jurisdictions have expressed concern that limiting the evidence to amounts that have been or must be paid provides the jury an unfairly low benchmark with which to gauge the seriousness of the plaintiff's injuries and awarding non-economic damages, such as for physical pain and mental anguish. But there is no unfairness if reimbursable amounts are reasonable for the services provided."

"'Evidence which is not relevant is inadmissible.' Tex. R. Evid. 402. This includes evidence of a claim of damages that are not compensable."

"The introduction of evidence on [non-compensable] damages ... is improper as a matter of law ..." citing State v. Wood Oil Distrib., Inc., 751 S.W.2d 863, 865 (Tex. 1988).

III. PRE-HB 4: ECONOMIC VERSUS NON ECONOMIC DAMAGES

A. Chapter 41 CPRC – Exemplary

Before HB 4, Chapter 41 of the Civil Practice and Remedies Code, titled "Exemplary Damages," limited the amount of exemplary damages recoverable based upon the amount of economic and noneconomic damages:

(a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of *economic damages* separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of *economic damages*; plus

(B) an amount equal to any *noneconomic damages* found by the jury, not to exceed $750,000; or

(2) $200,000.

Tex. Civ. Prac. & Rem. Code §§ 41.008(a) & 41.008(b) (emphasis supplied).

There were exceptions to these limitations when certain felonies were committed, including but not limited to, felonies involving injuries to a child, elderly individual or disabled individual. *See* Tex. Civ. Prac. & Rem. Code §§ 41.008(c).

Chapter 41 contained the following definition of "economic damages:"

"Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or *damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society*.

Tex. Civ. Prac. & Rem. Code § 41.001(4) (emphasis supplied).

In other words, "economic damages" included all damages *except*:

1. exemplary damages,
2. physical pain and mental anguish,
3. loss of consortium,
4. disfigurement,
5. physical impairment, and
6. loss of companionship and society.

Chapter 41 contained no explicit definition of *non*-economic damages, but one was perhaps implied in the portion of the definition of economic damages that excluded "...damages for

physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." *See* Tex. Civ. Prac. & Rem. Code § 41.001(4).

B. Article 4590i - Medical Liability

Before HB 4, the bulk of the statutory medical liability provisions were contained in Article 4590i. Article 4590i (now, Chapter 74, CPRC) contained no caps nor other limitations premised upon the distinction between economic and non-economic damages. Instead, Article 4590i contained a cap on *total* damages of $500,000, before adjustment by the consumer price index. Article 4590i, §§ 11.02 & 11.03. The current value of the Chapter 74 total damages cap is in excess of $2.0 million.

Article 4590i's cap on total damages did not apply "to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury." Article 4590i, § 11.02(b).

In *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988), the Texas Supreme Court held that Article 4590i's limits were *unconstitutional* as applied to catastrophically damaged malpractice victims seeking a "remedy by due course of law." *Lucas*, 757 S.W.2d at 690.

In *Rose v. Doctors Hospital*, 801 S.W.2d (Tex. 1990), the Texas Supreme Court held that the Article 4590i caps were *constitutional* when applied to wrongful death actions. *Rose*, 801 S.W.2d at 848.

In *Horizon v. Auld*, 34 S.W.3d 887 (Tex. 2000), the Texas Supreme Court held that Article 4590i's caps did not include punitive damages, but did include prejudgment interest. *Horizon*, 34 S.W.3d at 907.

B. Significance of Distinction

Before HB 4, the distinction between economic and non-economic damages was important primarily because of Chapter 41's limitations on the recovery of exemplary damages. *See* former Tex. Civ. Prac. & Rem. Code §§ 41.008(a) & 41.008(b).

IV. POST HB-4: ECONOMIC VERSUS NON-ECONOMIC DAMAGES

A. Chapter 41 CPRC - Damages

Before HB 4**,** Chapter 41 of the Civil Practice and Remedies Code was titled "Exemplary Damages." It is now titled simply "Damages."

Chapter 41 retains the prior provision's language concerning limitations on the amount of exemplary damages recoverable:

(a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of *economic damages* separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of *economic damages*; plus

(B) an amount equal to any *noneconomic damages* found by the jury, not to exceed $750,000; or

(2) $200,000.

Tex. Civ. Prac. & Rem. Code §§ 41.008(a) & 41.008(b) (emphasis supplied).

Chapter 41 retains exceptions on these limitations for certain felonies, but the exception for felonies involving injuries to a child, elderly individual or disabled individual is no longer

applicable "if the conduct occurred while providing health care as defined by Section 74.001." Tex. Civ. Prac. & Rem. Code §§ 41.008(c)(7).
Chapter 41 now contains an altered definition of "economic damages:"

"Economic damages" means compensatory damages *intended to compensate a claimant for actual economic or* pecuniary loss; *the term does not include exemplary damages or noneconomic damages.*

Tex. Civ. Prac. & Rem. Code § 41.001(4) (emphasis supplied).

The phrases, "intended to compensate a claimant for actual economic ...." and "the term does not include exemplary damages or noneconomic damages" are new.

Chapter 41 now contains a definition of "noneconomic damages," where no prior explicit definition existed in the statute:

"Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental *or emotional pain or* anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, *inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages*.

Tex. Civ. Prac. & Rem. Code § 41.001(12) (emphasis supplied).

The phrases "...or emotional pain," and "inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages," are additions to the former *implied* definition of noneconomic damages that was contained in the portion of the former definition of economic damages excluding "...damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." *See* former Tex. Civ. Prac. & Rem. Code § 41.001(4).
Chapter 41 contains a new section, entitled, "Evidence Relating to Amount of Economic Damages:"

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

Tex. Civ. Prac. & Rem. Code § 41.0105.

The following is relevant legislative history:

Senator Hinajosa:

Governor, on page 106, lines 6-8 (CPRC, Section 41.0105), does this provision mean that a patient can't recover future damages?

Senator Ratliff:

No, it just means that *economic damages* are limited to those actually incurred. You can't recover more than you've actually paid or been charged for your health care expenses in the past or what the evidence shows you will probably be charged in the future.

Senate Journal, 78th Leg., 5005 (June 1, 2003) (emphasis supplied).

The House Bill Analysis states:

[M]anaged care companies have special contracts with physicians and hospitals, so they pay less. Similarly, Medicare reimburses at a rate below most private insurers. In both cases, successful litigants should be reimbursed the reduced amount originally paid for the services, (i.e., health care providers should not be charged for money they never received.).

House Research Organization, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. 14 (2003) (Appendix B).

Chapter 41 now explicitly states that "exemplary damages are neither economic or noneconomic damages." Tex. Civ. Prac. & Rem. Code § 41.001(5). "Exemplary damages" are defined to be "any damages awarded as a penalty or by way of punishment but not for compensatory purposes." *Id.*

Chapter 41 now contains a definition of "compensatory damages:"

"Compensatory damages" means *economic* and *noneconomic damages*. The term does not include exemplary damages.

Tex. Civ. Prac. & Rem. Code § 41.001(5) (emphasis supplied).

Chapter 41 now contains definitions of "future damages" and "future loss of earnings:"

"Future damages" means damages that are incurred after the date of the judgment. Future damages do not include exemplary damages.

....

"Future loss of earnings" means a pecuniary loss incurred after the date of the judgment, including:

A) loss of income, wages or earning capacity; and

B) loss of inheritance.

Tex. Civ. Prac. & Rem. Code §§ 41.001(9) & 41.001(10).

B. Chapter 74 CPRC - Medical Liability

Before HB 4, Chapter 74 of the Civil Practice and Remedies Code was titled "Good Samaritan Law: Liability for Emergency Care." It is now titled "Medical Liability." In addition to numerous new substantive changes in the area of medical liability, Chapter 74 now contains the non-superceded statutory provisions formerly contained in Article 4590i.

Chapter 74 now incorporates the definitions of "economic damages" and "noneconomic damages" contained in Chapter 41, the damages chapter of the Civil Practice and Remedies Code:

"Economic damages" has the meaning assigned by Section 41.001.

....

"Noneconomic damages" has the meaning assigned by Section 41.001.

Tex. Civ. Prac. & Rem. Code §§ 74.001(6) & 74.001(20).

C. Chapter 18 CPRC - "Proof of Certain Losses

Proof of certain types of losses now must be presented in the form of a net loss after tax liability:

PROOF OF CERTAIN LOSSES: JURY INSTRUCTION.

(a) Notwithstanding any other law, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law.

(b) If any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, the court shall instruct the jury as to whether any recovery for compensatory

damages sought by the claimant is subject to federal or state income taxes.

Tex. Civ. Prac. & Rem. Code § 18.091.

Of course, this new provision has the potential to spawn an entire new cottage industry of potential tax experts. It also has the potential to add time and complexity to almost every trial, given the ever-present uncertainties in attempting to predict what tax laws and rates Congress may enact in the future.

D. HB4's Medical Liability Caps

HB 4 created a variety of new medical liability caps. Some of the caps apply to non-economics damages, while other caps apply to total (economic plus non-economic) damages. Many, but not all of the caps are contained in Chapter 74 of the Civil Practice and Remedies Code.

Chapter 74's new limitations on *non-economic damages* are as follows:

(a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for non-economic damages of the physician or health care provider other than a health care institution, inclusive of all persons or entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(b) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for non-economic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.

(c) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for non-economic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant and the limit of civil liability for non-economic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.

Tex. Civ. Prac. & Rem. Code § 74.301.

In summary:

1. Physicians and Health Care Providers

Physicians and health care providers now have a $250,000 *non-economic damages cap*, no matter how many physicians or providers are sued. *See* Tex. Civ. Prac. & Rem. Code § 74.301(a).

2. Institutions

Institutions now have a $250,000 *non-economic damages cap* for each institution, and a $500,000 aggregate cap for institutions, *no matter how many institutions* are sued. *Id*. at § 74.301(b) & (c).

There are no cost of living adjustments for these caps, and the caps are "per claimant." *Id*. at § 74.301. One deceased person equals one "claimant," regardless of number of wrongful death beneficiaries. *Id*. at 74.001(2).

Hypothetically, then, if a person with *three* wrongful death beneficiaries dies, and *three*

physicians are sued, the cap on non-economic damages is $250,000. If *three* physicians and *three* institutions are sued, then the total cap on non-economic damages would be $750,000 – $250,000 for the physicians, plus $500,000 for the institutions. The only way to extend the cap to $750,000 is to have a minimum of one doctor and two institutions *in the same case*. Needless to say, this will be an extremely rare occurrence.

3. Exemplaries Not Capped by Economic Caps

By the plain terms of the new statutory provisions, these caps on non-economic damages do *not* apply to exemplary damages.

Chapter 74 now incorporates the definitions of "economic damages" and "noneconomic damages" contained in Chapter 41, the damages chapter of the Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code §§ 74.001(6) & 74.001(20).

As discussed above, Chapter 41's definition of "noneconomic damages" now provides:

"Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind *other than exemplary damages*.

Tex. Civ. Prac. & Rem. Code § 41.001(12) (emphasis supplied).

Chapter 41 now explicitly states that "*exemplary damages are neither economic or noneconomic damages*," and defines "exemplary damages" as "any damages awarded as a penalty or by way of punishment *but not for compensatory purposes*." Tex. Civ. Prac. & Rem. Code § 41.001(5).

Finally, Chapter 41 now contains the following definition of "compensatory damages:" "Compensatory damages" means economic and noneconomic damages. *The term does not include exemplary damages.*

Tex. Civ. Prac. & Rem. Code § 41.001(5) (emphasis supplied).

4. Wrongful Death

Post HB 4, the wrongful death cap on health care liability claims ($500,000, adjusted by the Consumer Price Index to in excess of $1.5 million, on *total damages* – economic plus non-economic damages) is maintained, but it is altered in several critical ways. *See* Tex. Civ. Prac. & Rem. Code § 74.303.

1. This cap now applies to *survival* actions, in addition to wrongful death actions. *Id* at § 74.303(a).

2. This cap now caps punitive damages, in addition to actual damages. *Id*. The Texas Supreme Court, in *Horizon v. Auld*, 34 S.W.3d 887 (Tex. 2000), had held that the prior wrongful death cap did *not* apply to punitive damages. *See Horizon*, 34 S.W.3d at 895-96.

3. The cap is now a *per case* cap, and is no longer a *per defendant* cap. Tex. Civ. Prac. & Rem. Code § 74.303(a).

4. Finally, *Stowers* liability is now abolished for health care liability claims. *Id* at § 74.303(d).

Chapter 74 now provides:

(a) In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, shall be limited to an amount not to exceed $500,000

for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(b) When there is an increase or decrease in the consumer price index with respect to the amount of that index on August 29, 1977, the liability limit prescribed in Subsection (a) shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index, as published by the Bureau of Labor Statistics of the United States Department of Labor, that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average- All Items), between August 29, 1977, and the time at which damages subject to such limits are awarded by final judgment or settlement.

(c) Subsection (a) does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

(d) The liability of any insurer under the common law theory of recovery commonly known in Texas as the "Stowers Doctrine" shall not exceed the liability of the insured.

(e) In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the court's written instructions to the jurors:

(1) "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law."

(2) "A finding of negligence may not be based solely upon evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given this kind of evidence."

Tex. Civ. Prac. & Rem. Code § 74.303

5. Municipal and Hospital District Management Contractors

Municipal and hospital district management contractors are now considered governmental units" with Texas Tort Claims Act protection ($100,000 per person; $300,000 per occurrence, *total* caps). *See* Tex. H & S Code § 261.052 (HB 4 § 11.02). "Municipal hospital management contractor" is defined as "a nonprofit corporation, partnership, or sole proprietorship that manages or operates a hospital or provides services under a contract with a municipality." *Id*. at § 261.051. "Hospital district management contractor" is defined as "a nonprofit corporation, partnership, or sole proprietorship that manages or operates a hospital or provides services under a contract with a hospital district that was created by general or special law." *Id*. at § 261.072. *Employees* of those entities, while performing services under the contract for the benefit of the hospital, are now treated as employees of governmental units. *Id*.

There is also an automatic election of remedies provision. Filing suit against a governmental unit bars suit against the individual employee regarding the same subject matter, and vice versa. *See* Tex. Civ. Prac. & Rem. Code § 101.106 (HB 4 § 11.05). If a suit is filed against both a governmental unit and any of its employees, the employees shall be immediately dismissed on the filing of a motion by the governmental unit. *Id*. If a suit is filed against an employee of a governmental unit based upon conduct within the general scope of

that employee's employment, and the suit could have been brought against the governmental unit, then the suit is considered to be against the employee in the employee's official capacity only. *Id*. On the employee's motion, the suit against the employee must be dismissed unless the plaintiff dismisses the employee and names the governmental unit as a defendant on or before the 30th day after the motion is filed. *Id*.

6. ER Physicians in Governmental Hospitals

A "licensed physician who provides emergency or postemergency stabilization services to patients in a hospital owned or operated by a unit of local government" is now considered to be a "public servant" under the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code § 108.001 (HB 4 § 11.06). "Public servants" are not personally liable for damages in excess of $100,000. *See* Tex. Civ. Prac. & Rem. Code § 108.002 (HB 4 § 11.01).

7. Volunteer Health Care Providers

A volunteer health care provider who is serving as a direct service volunteer of a charitable organization is immune from civil liability if: a) the volunteer commits the act or omission in the course and scope of providing health care services to the patient, b) the services were within the scope of the license of the volunteer, and c) the patient or a representative in the case of a minor or an incompetent, signs a statement acknowledging that the volunteer is providing care without expectation of compensation and the limitations on recovery in exchange for the provision of those services. *See* Tex. Civ. Prac. & Rem. Code § 84.004(c) (HB 4 § 18.01). This immunity does not apply to "an act or omission that is intentional, wilfully negligent, or done with conscious indifference or reckless disregard for the safety of others." *Id*. at 84.007(a) (HB 4 § 18.02).

8. Volunteer Fire Departments and Fire Fighters

Volunteer fire departments and volunteer fire fighters now have Texas Tort Claims Act immunity for acts and omissions during an "emergency response." *See* Tex. Civ. Prac. & Rem. Code §§ 78.101-78.104 (HB 4 § 19.02). "Emergency response" is defined as "a response involving fire protection or prevention, rescue, emergency medical, or hazardous material response services." *Id* at § 78.101(1).

9. Non-Profit Hospitals

Texas Tort Claims Act caps ($100,000 per person; $300,000 per occurrence) are now the caps for *non-economic* damages (*not* for total damages) for non-profit hospitals and hospital systems. Tex. H & S Code § 311.0456 (HB 4 § 22.02). In order to qualify for these protections, a hospital or hospital system must provide: a) charity care in the amount of at least 8% of net patient revenue, *plus* b) provide at least 40% of the charity care in the county in which the hospital is located. *Id* at § 311.0456(c). The qualifying hospital or hospital system must submit an annual report to the Texas Department of Health certifying its compliance. *Id*. at § 311.0456(d).

10. Indigent Care

There is now a $500,000 cap for *total damages* (economic plus non-economic), if the patient signs waiver acknowledging that : a) that the hospital is not providing care for compensation, and b) the limitations on recovery of damages. *See* Tex. Civ. Prac. & Rem. Code § 84.0065 (HB 4 § 10.06). The cap applies even if: a) "the patient is incapacitated due to illness or injury and cannot sign the acknowledgment statement ....", or b) the patient is a minor or otherwise legally incompetent and the person responsible for the patient is not reasonably available to sign the acknowledgment. *Id*. at § 84.0065(b).

E. New Significance of Distinction

Post-HB 4, the distinction between economic and non-economic damages retains its importance in the context of Chapter 41's continuing limitations on punitive damages. *See* Tex. Civ. Prac. & Rem. Code Ch. 41. The distinction, however, has a greatly-enhanced significance because of all of the new medical liability caps on non-economic damages.

V. THE FUZZY LINE BETWEEN ECONOMIC AND NON-ECONOMIC DAMAGES: NOW CLEAR?

Before HB 4, there was ambiguity concerning whether some types of damages were *economic* damages , *non-economic* damages or *both*. HB 4 attempted to eliminate this ambiguity with a tightened-up definition of "economic damages," and the addition of an explicit definition of "noneconomic damages." *See* Tex. Civ. Prac. & Rem. Code §§ 41.001(4) & 41.001(12). Certainly, there is less ambiguity in the wake of HB 4, but whether all ambiguity is now eliminated remains to be seen.

A. Texas Supreme Court's Discussion of the Line

The line in the reported cases between economic and non-economic damages has not always been clear.

In *Horizon v. Auld*, 34 S.W.3d 887 (Tex. 2000), the Texas Supreme Court noted that:

In general, those who suffer personal injury as the result of the negligence of another can recover two general types of damages: first, damages for *non-economic* losses that go by the name of physical pain and mental suffering; second, *economic losses*, such as expenses and loss of earnings.

Horizon, 34 S.W.3d at 893.

In 2003, the Texas Supreme Court, in *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757 (Tex. 2003), discussed in some detail the lack of a clear line between economic and non-economic damages with respect to some categories of damages. The particular focus of the court's discussion in *Golden Archery* was damages for physical impairment.

In *Golden Eagle*, the plaintiff was struck in the eye by a metal rod separating the bow string from the cables on a compound hunting bow. Among other injuries, he suffered broken bones around the orbit of his eye, some loss of vision, a ruptured sinus, and a broken nose. He spent over ten days in the hospital. The jury awarded him:

Medical care:	$ 25,393.10
Physical pain and mental anguish:	$ 2,500
Physical impairment of loss of vision:	$ 2,500
Physical impairment other than loss of vision:	$ 0
Disfigurement:	$ 1,500
Loss of Earnings in the Past:	$ 4, 600

The plaintiff appealed on the grounds that the jury's failure to award any damages for "physical impairment other than loss of vision" was against the great weight and preponderance of the evidence and that the jury's awards for the other elements of damages were inadequate.

The court of appeals in *Golden Eagle* had determined that the jury's failure to award any damages whatsoever in the category of "physical impairment other than loss of vision" was so against the great weight and preponderance of

the evidence that the zero damages award was manifestly unjust and required a new trial. *See* 29 S.W.3d at 929. The Texas Supreme Court, however, reversed the court of appeals and remanded the case for consideration in light of a new factual sufficiency standard applicable to cases in which "the jury's failure to find greater damages in more than one overlapping category is challenged ...." *Golden Eagle*, 116 S.W.3d at __.

Golden Eagle's new factual sufficiency standard requires a court of appeals to:

[F]irst, determine if the evidence unique to each category is factually sufficient. If it is not, the court of appeals should then consider all the overlapping evidence, together with the evidence unique to each category, to determine if the total amount awarded in the overlapping categories is factually sufficient.

Golden Eagle, 116 S.W.3d at __.

The Texas Supreme Court reasoned in *Golden Eagle* that:

When someone suffers personal injuries, the damages fall within two broad categories - economic and non-economic damages. Traditionally, economic damages are those that compensate an injured party for lost wages, lost earning capacity, and medical expenses. Non-economic damages include compensation for pain, suffering, mental anguish, and disfigurement. "Hedonic" damages are another type of non-economic damages and compensate for loss of enjoyment of life.

This court has never considered the historical origins of the term "physical impairment" or its parameters in any detail. But Texas courts, including this one, have long recognized that "physical impairment" or similar concepts could encompass both economic and non-economic damages. Early Texas decisions seemed to recognize that while an injured party was entitled to a full recovery, care should be taken to prevent a double recovery when instructions are given to a jury.
....

The courts of appeals have recognized that physical impairment can encompass both economic as well as non-economic damages. A number of those courts have attempted to separate physical impairment from economic damages by defining physical impairment to exclude any impediment to earning capacity and also to separate physical impairment from the non-economic damages of pain and suffering.
....

We are persuaded that in a proper case, when the evidence supports such a submission, loss of enjoyment of life fits best among the factors a factfinder may consider in assessing damages for physical impairment. Indeed, if other elements such as pain, suffering, mental anguish, and disfigurement are submitted, there is little left for which to compensate under the category of physical impairment other than loss of enjoyment of life. Accordingly, if "physical impairment" is defined for a jury, it would be appropriate to advise the jury that it may consider as a factor loss of enjoyment of life. But the jury should be instructed that the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity and that a claimant should not be compensated more than once for the same elements of loss or injury.

Golden Eagle, 116 S.W.3d at ___, ___, and ___ (citations omitted) (emphasis supplied).

In *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.,* 57 Tex. Sup. Ct. J. 527 (Tex. May 9, 2014), the Texas Supreme Court considered the issue of whether damages to reputation are economic damages or non-economic damages for purposes of the cap on exemplary damages. The Court in *Waste Management* held that general damages in

defamation cases are non-economic damages, such as damages for loss of reputation, while special damages are economic damages, such as for lost income. During the course of its analysis, the Court cited with approval the discussion in *Dobbs Law of Remedies* regarding the distinction between pecuniary and non-pecuniary harm:

Plaintiffs prove three basic elements of recovery in personal injury actions. 1) Time losses. The plaintiff can recover loss or [sic] wages or the value of any lost time or earning capacity where the injuries prevent work. 2) Expenses incurred by reason of the injury. These are usually medical expenses and kindred items. 3) Pain and suffering in its various forms, including emotional distress and consciousness of loss.

The *Waste Management* court observed that the first two categories of these damages concern pecuniary losses, while the third category concerns non-pecuniary losses. The court determined that injury to reputation falls into the third category as a non-pecuniary loss because "it is neither time lost nor an expense incurred."

B. Hedonic Damages

In *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757 (Tex. 2003), the Texas Supreme Court, as a part of its analysis, addressed "hedonic damages," and clearly placed these types of damages in the non-economic damages category:

Non-economic damages include compensation for pain, suffering, mental anguish, and disfigurement. "Hedonic" damages are another type of *non-economic damages* and compensate for loss of enjoyment of life.

Golden Eagle, 116 S.W.3d at __.

The term "hedonic damages" was discussed in detail in *Loth v. Truck-A-Way Corporation*, 60 Cal. App. 4th 757, 70 Cal. Rptr.2d 571 (Cal. Ct. App. 1998), a case cited by the *Golden Eagle* court. In *Loth*, the court stated that:

The term hedonic damages itself was first suggested by economist Stanley Smith in the case of *Sherrod v. Berry*, [(N.D. Ill. 1985) 629 F. Supp. 159, affirmed (7th Cir. 1987) 827 F.2d 195, vacated (7th Cir. 1988) 835 F.2d 1222, reversed on other grounds (7th Cir. 1988) 856 F.2d 802]. Hedonic damages derives its name from the Greek word "hedonikos' meaning pleasure or pleasurable. As interpreted by the courts around the United States, hedonic damages means either a loss of enjoyment of life or loss of life's pleasures.

Loth, 70 Cal. Rptr.2d at 573, n. 1. *See also* Alice Oliver-Parrott, *On the Fringe (Annuitists, Hedonics, Life Care Planners, and Crystal Balls)*, *in* Tex. Trial Law. Ass'n Adv. Med. Mal. Conf. (2001).

In much the same manner that a vocational rehabilitation expert compares the plaintiff's pre-injury and post-injury earning capacity, a hedonic damages report evaluates the pre-injury and post-injury lifestyle of the plaintiff. The loss of enjoyment of life is broken into four broad areas and a psychologist evaluates *how much* enjoyment the plaintiff has lost in each area. A hedonic expert then analyzes this percentage of loss determines dollar values for the losses. *See* Alice Oliver-Parrott, *On the Fringe (Annuitists, Hedonics, Life Care Planners, and Crystal Balls)*, *in* Tex. Trial Law. Ass'n Adv. Med. Mal. Conf. 23 (2001).

The four areas are:

1. Practical Functioning– loss of ability to enjoy every day activities,

2. Emotional/Psychological Functioning– diminished self-esteem and dignity,

3. Social Functioning–lost ability to enjoy

social interaction, and

4, Occupational Functioning–loss of ability to perform a pleasurable and rewarding career.

Id. at 23-24.

The *Golden Eagle* court noted that "there is a logical nexus between loss of enjoyment of life and each of the categories of non-economic damages recognized in Texas – pain, suffering, mental anguish, disfigurement, and physical impairment." *Golden Eagle*, 116 S.W.3d at __. The court reasoned, however, that loss of enjoyment of life "fits best among the factors a factfinder may consider in assessing damages for physical impairment." *Id* at __. Accordingly, "if 'physical impairment' is defined for a jury, it would be appropriate to advise the jury that it may consider as a factor loss of enjoyment of life." *Id*. at __. The *Golden Eagle* court cautioned, however, that "the jury should be instructed that the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity and that a claimant should not be compensated more than once for the same elements of loss or injury." *Id*.

C. Pecuniary Versus Non-Pecuniary Losses

Post HB 4, "pecuniary loss" is unambiguously an economic damage. Chapter 41's new definition of "economic damages" explicitly references "pecuniary loss" as a part of the definition:

"Economic damages" means compensatory damages intended to compensate a claimant for actual economic *or pecuniary loss*; the term does not include exemplary damages or noneconomic damages.

Tex. Civ. Prac. & Rem. Code § 41.001(4) (emphasis supplied).

Likewise, Chapter 41 unambiguously defines non-pecuniary losses as non-economic damages. Chapter 41's new definition of "noneconomic damages" provides:

"Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, *and all other nonpecuniary losses of any kind* other than exemplary damages.

Tex. Civ. Prac. & Rem. Code § 41.001(12) (emphasis supplied).

Accordingly, pre-HB 4 caselaw concerning pecuniary versus non-pecuniary losses may be relevant in the analysis of the post HB 4 dividing line between economic and non-economic damages.

In *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986), a wrongful death case, the Texas Supreme Court defined "pecuniary loss" for the parent of an adult child as:

the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that the parents would, in reasonable probability, have received from their child had the child lived.

Moore, 722 S.W.2d at 687.

The *Moore* court further opined:

The definitions for mental anguish and loss of society and companionship, present more difficulty. Some have suggested that these damages necessarily overlap. Both of these awards compensate *non-economic losses* while pecuniary loss and loss of inheritance damages represent direct *economic losses*. 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?"

Moore, 722 S.W.2d at 687-88 (emphasis supplied).

Many of the references to, and definitions of, the term "pecuniary loss" create as much confusion as they dispel. The references and definitions therefore may create some ambiguity concerning which precise types of damages fall into the categories of economic and non-economic damages. The term "pecuniary loss" has variously been referred to as follows:

"[I]nclud[ing] money and everything that can be valued in money." *Kneip v. Unitedbank-Victoria*, 734 S.W.2d 130, 134 (Tex. App.–Corpus Christi 1987, *aff'd on other grounds*, 774 S.W.2d 757.

"A loss of money, or of something by which money or something of money value may be acquired." Black's Law Dictionary (5th ed. 1979).

"...loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary nature.... the measure of pecuniary loss is speculative and imprecise and best left to the jury's common sense and sound discretion." *Atchison, Topeka & Santa Fe Ry Co. v. Cruz*, 9 S.W.3d 173, 180 (Tex. App.–El Paso 1999, no pet.).

VI. LEGAL SUFFICIENCY ISSUES RELATED TO MENTAL ANGUISH

The legal definition of mental anguish in the jurisdiction at issue is key, regardless of whether it is given directly to the jury in the court's charge. It is critical that the plaintiff's attorney introduce sufficient evidence of mental anguish in light of the particular jurisdiction's legal requirements, to ensure that any award for mental anguish is upheld on appeal. Although mental anguish arguably always may be *presumed* in the wake of the death of a loved family member, it is best to introduce explicit evidence of the mental anguish, even in wrongful death cases, in order to maximize the family members' recovery and to avoid any possible reversal by the appellate courts.

The following may constitute evidence of pain and mental anguish:

1. Testimony of treating doctors or counselors;
2. Testimony of the plaintiff,
3. The plaintiff's statements to others, as testified to in court, or as contained in the medical or counseling records, and
4. Testimony of friends and family members. "Moaner/groaner" witnesses, friends and family who can confirm the existence, nature and duration of injuries to the beneficiaries may be invaluable. The plaintiffs' attorney should name them in discovery responses and call them as witnesses in an appropriate case. Moaner/groaners who exaggerate or tell inconsistent versions should be avoided at all costs, however.

In Texas, the jury does not receive an instruction concerning the definition of "mental anguish" *except* in wrongful death cases. *See Trotti v. K-Mart Corp*., 686 S.W.2d 593 (Tex. 1985); Texas Pattern Jury Charge 8.2, 9.2-9.5. In wrongful

death cases, "mental anguish" is defined as "the emotional pain, torment, and suffering experienced by [the plaintiff] because of the death of [the deceased]." *See, e.g.*, PJC 9.2; *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986).

Mental anguish has also been defined in the caselaw in Texas in the following terms:

The term "mental anguish" implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, and/or public humiliation.

Treviño v. Southwestern Bell Tel. Co., 582 S.W.2d 582, 584 (Tex.Civ.App. – Corpus Christi 1979, no writ).

In Texas, there has been a trend toward raising the legal hurdle for the recovery for mental anguish damages. In the past 15 years, the Texas Supreme Court to raise the hurdle that plaintiffs must clear in order to recover mental anguish damages in all types of cases. In *Parkway Company v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), homeowners sued a developer for damages in connection with the flooding of their home caused by the developer's negligence in causing the diversion of surface water across their property. In determining whether the award of mental anguish damages to the homeowners survived a legal sufficiency challenge, the court stated that the absence of "direct evidence of the nature, duration, and severity of [the plaintiffs'] mental anguish, *thus establishing a substantial disruption in the plaintiffs' daily routine*," justified "close judicial scrutiny of other evidence offered on this element of damages." *Parkway*, 901 S.W.2d at 445.

The *Parkway* court considered the following testimony from the husband:

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, 901 S.W.2d at 445.

The wife testified as follows:

It's just not pleasant walking around on cement floors....well, [our life] changed. It just – I don't know, it's a hard feeling to describe, unless you go through it. It was just upsetting, [my husband] would come home and he would become very quiet. He was – I guess we both were. It caused some friction between us because I wanted to just get it done and get over with and things couldn't move as quickly as I wanted them to....Afraid? I wasn't afraid. I guess I was – I was just upset that it changed our lifestyle. We were all very happy, and since I lived at home quite – well, most of the time, it meant a lot to me. I'm a very private person, and I really maybe depended upon my house a little more than other people.

Id.

The *Parkway* court conceded that these statements showed that the plaintiffs felt anger, frustration, or vexation, but the court categorized these things as "mere emotions" that did not support the award of compensable mental anguish. *Id.*

In a subsequent case, *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996), the Texas Supreme Court went further and stated that, with respect to mental anguish damages, "juries cannot simply pick a number and put it in a blank." *Saenz*, 925 S.W.2d at 614. Instead, "there must be evidence that the amount found is fair and

reasonable compensation, just as there must be evidence to support any other jury finding," and "the law requires appellate courts to conduct a meaningful evidentiary review of those determinations." *Id.* The Court expressly disapproved of a line of court of appeals cases that suggested the contrary. *Id. See, e.g., State Farm Mut. Auto Ins. Co. v. Zubiate*, 808 S.W.2d 590, 601 (Tex.App. – El Paso 1991, writ denied).

Without intent or malice on the defendant's part, serious bodily injury to the plaintiff, or a special relationship between the two parties, the Texas Supreme Court has permitted recovery for mental anguish in only a few types of cases involving injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result. This includes suits for wrongful death and actions by bystanders for a close family members' serious injury. *See, e.g., City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997); *Kavnar v. Quality Control Parking, Inc*., 696 S.W.2d 549, 551 (Tex. 1995); *Freeman v. City of Pasadena*, 744 S.W.2d 923 (Tex. 1988).

In June of 2023, the Texas Supreme Court turned the law of evidence of mental anguish damages on its head in *Gregory v. Chohan*, an opinion that raised as many questions as it provided answers. *Gregory* was the culmination of an almost 30 year-long effort by the Texas Supreme Court to raise the hurdles that plaintiffs must clear to recover damages for mental anguish. The Court began the effort in 1995, in *Parkway Company v. Woodruff*, a case in which s developer's negligence caused flooding of a home. In determining whether the award of mental anguish damages to the homeowners survived a legal sufficiency challenge, the Court stated the absence of "direct evidence of the nature, duration, and severity of [the plaintiffs'] mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine," justified "close judicial scrutiny of other evidence offered on this element of damages." In *Saenz v. Fidelity & Guaranty Insurance Underwriters* in 1996, the Texas Supreme Court went further and expressly disapproved of a line of cases suggesting appellate courts should show great deference to jurors on the issue of mental anguish damages.

The Texas Supreme Court is prohibited from engaging in factual sufficiency reviews of evidence, but that has not stopped the Court from doing just that in reviewing awards for mental anguish damages. For example, in *Bentley v. Bunton* in 2002, the Court overturned an award of $7 million for mental anguish damages on the grounds that the jury's award "strongly suggests its disapprobation" of the defendant's conduct "more than a fair assessment" of the plaintiff's injuries. The only way the Court could make such a statement would be to conduct its own "fair assessment" of the plaintiff's injuries and compare the result to the jury's award – a transparent factual sufficiency review exercise.

Gregory v. Chohan was a four-fatality case arising out of a motor vehicle pileup on the highway. The final jury verdict for all involved families was $38.8 million. Only one family did not settle after the verdict, and the *Gregory* Court directly considered just that family's recovery – a total recovery of $16.8 million in damages, of which $15 million was for non-economic damages. The Dallas Court of Appeals, *en banc* had upheld the recovery, using a long-standing test to determine the award was not "flagrantly outrageous, extravagant, and so excessive that it shocks the judicial conscience."

The Texas Supreme Court's opinion in *Gregory* was only a plurality opinion, and there is strong authority that plurality opinions are non-binding. Nevertheless, *Gregory* provides a window into the thinking of many of the justices on mental anguish damages. In the plurality opinion authored by Justices Blalock, Hecht and Busby, the Texas Supreme Court remanded the entire case to the trial court for a new trial. Justice

Bland joined except as to two parts of the plurality opinion. Justices Devine and Boyd concurred in the judgment, only. Justices Lehrmann, Huddle and Young did not participate.

The core holding of *Gregory* is the amount of non-economic damages, including mental anguish damages awarded by a jury "must have a rational basis grounded in evidence." The Court maintained that this "is not a requirement of precise quantification or a requirement that a particular type of evidence must always be proferred." Instead, the requirement is "courts and jurors alike should be told why a given amount of damages, or range of amounts, would be reasonable and just compensation." What types of evidence of mental anguish damages should a plaintiff introduce at trial to avoid reversal on appeal? The answer from the *Gregory* plurality is as clear as mud. Although the plurality rejected any *explicit* ratio between economic damages and non-economic damages, language within the opinion appears to endorse a potential *implicit* ratio: "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." Of course, the "financial consequences" for the family members of a dead white-collar high-wage earner will be much greater than the financial consequences for the family members of a dead blue-collar fast-food worker.

The *Gregory* court also noted "there may be evidence that some amount of money would enable the plaintiff to better deal with grief or restore his emotional health." But any lawyer who has handled more than a few wrongful death cases knows *almost none* of the family members receive counselling after the death of a family member – *almost none*. Consequently, the idea that the cost of counselling received could be used as a benchmark to value mental anguish after the death of loved works only *in theory*. But does the plurality's statement that this evidence is admissible, with no stated limitation that the counselling must have been received by the plaintiff open the door for evidence of the cost of past counselling, even if never received by a plaintiff? Arguably, yes.

The plurality opinion also decried so-called "unsubstantiated anchoring," which the court described as "a tactic whereby attorneys suggest damage amounts by reference to objects or values with no rational connection to the facts of the case." The opinion noted the plaintiff's attorney analogized the plaintiffs' losses to a $71 million Boeing F-18 fighter jet and a $186 million painting by Mark Rothko. The attorney also argued the jury should award two cents a mile for the miles driven by the defendant's trucks, and the Court pointedly noted the calculation added up to $38.8 million, in comparison to the final verdict of $39 million for both families. The Court found it "not difficult to conclude that the improper argument influenced the result."

What type of lawyer arguments are still allowed in the wake of *Gregory*? The plurality specifically blessed "lawyer argument rationally connected to the amount sought." Appellate courts in Texas repeatedly have upheld lawyer arguments based on the following: 1) reasonable inferences and deductions from the facts, 2) relating the facts of the case to history, fiction, personal experience, anecdotes, Bible stories, and jokes, 3) a "per diem" method for the computation of damages -- a mathematical computation based on a unit of time, 4) common knowledge, and 5) philosophical arguments not directly raised by the evidence, such as an argument that older people place a higher value on life than younger people. *Gregory* does not explicitly invalidate any of these types of arguments *unless* they involve prohibited "unsubstantiated anchoring."

Justices Devine and Boyd concurred but criticized the plurality's "new evidentiary standard that is not only foreign to our

jurisprudence but also incapable of being satisfied." They characterized the plurality's standard as, "we'll know it when we see it, but we will never see it." They lamented the plurality opinion "sets up a Sisyphean pursuit that would burden litigants with costly do-over trials," and "would require claimants and their counsel to find that evidentiary needle in a haystack" – "but there is no needle there." Finally, they noted the plurality "neutralizes the jury's role by requiring them to rely on evidence a claimant simply cannot present."

In her concurring opinion, Justice Bland advocated leaving further development of the law related to mental anguish damages 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."

What did *Gregory not* do? In the face of amici briefs urging otherwise, *Gregory* explicitly rejected any requirement of a ratio between economic and noneconomic damages and *Gregory* did not adopt a Fifth Circuit style "maximum recovery rule," requiring a reviewing court to compare a verdict to other similar cases. But *Gregory* does appear to bless an *implicit* ratio between economic and non-economic damages. And in a footnote to the opinion, the plurality indicated, "we do not foreclose the possibility that comparison to other cases may play some role in a plaintiff's effort to establish a given amount of noneconomic damages is reasonable and just compensation rationally grounded in the evidence." Left unanswered is whether evidence of recoveries in other cases could be introduced to the jury, or whether it should be shown only to the trial judge and to the appellate court.

We will need further opinions from the Texas Supreme Court to have a clear understanding of where plaintiffs and defendants stand in the wake of *Gregory*. Does *Gregory* open the door to evidence of costs of past counselling, even if a plaintiff never received the counselling? Does *Gregory* open the door to evidence of recoveries in similar cases to the jurors, or only to the trial court and to the appellate court? Is the door now open for a plethora of plaintiffs' and defendants' experts on the value of mental anguish? Finally, how will *Gregory* affect plaintiffs' lawyers' closing arguments? The plurality clearly forbids "unsubstantiated anchoring," but beyond that limitation do the traditional rules still apply?

VII. EVIDENCE OF MENTAL ANGUISH IN WRONGFUL DEATH CASES

A picture (or videotape) really is worth a thousand words. Most, but not all, of the relevant information to be collected and presented to substantiate mental anguish will come from the grieving family. Go to the decedent's home. Hanging on the wall, you will find family photos, "I love daddy" artwork with small handprints, little league and scouts photos with dad as coach or troop leader, and much else that will be helpful. You should gather and create the following for use at mediation and in trial:

1. Letters and cards to, from, and about the decedent;
2. Photographs of the decedent and his family. See, e.g., *Russell v. Ramirez*, 949 S.W.2d 480, 487 (Tex. App.–Houston[14th Dist.] 1997, no writ) (admitting old photographs of decedent to establish close personal relationship between decedent and his mother and to support her claims of mental anguish);
3. Videotapes, such as home movies and "day in the life" videos, and audiotapes of the decedent and his family;
4. Documentation confirming decedent's involvement in family activities involving surviving children, such as little League, scouts, cheerleading, etc.
5. Funeral service program and sympathy cards;

6. Internet social media postings and websites related to decedent and/or his death;
7. Counseling records and bills related to counseling received by family members following decedent's death;
8. Report cards and other academic records documenting academic difficulties suffered by decedent's children following his death;
9. Invoices and other records related to repairs and other services which have now had to be hired out in decedent's absence;
10. Photographs and other evidence of the manner of decedent's death and how decedent's family members first learned of the death. *See Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1004-05 (5th Cir. 1998) (allowing *oral testimony* regarding condition of decedent's body after the accident to establish mental anguish, but excluding *photographs* of body rendered unduly prejudicial and inflammatory); *Girouard v. Skyline Steel, Inc.*, 158 P.3d 255 (Ariz. App. 1st Div. 2007) (evidence of manner of decedent's death and necessity for closed casket of decedent held to be relevant to survivors' mental anguish);
11. Picture of decedent's headstone;
12. Any other evidence tending to Substantiate the closeness of the decedent to the beneficiaries;
13. Testimony of treating doctors, EMTs, counselors, family members, friends, neighbors, co-workers, and damages experts regarding pain and mental anguish sustained by the decedent and/or survivors. "Moaner/groaner" witnesses, friends and family who can confirm the existence, nature and duration of injuries to the beneficiaries may be invaluable. The plaintiffs' attorney should name them in discovery responses and call them as witnesses in an appropriate case. Moaner/groaners who exaggerate or tell inconsistent versions should be avoided at all costs, however.

See the discussion in the "Wrongful Death Damages" section, below, for a discussion of the applicable law related to the sufficiency of evidence of pain and mental anguish in wrongful death cases.

VIII. EVIDENCE OF PAIN AND MENTAL ANGUISH IN INJURY CASES

The following may constitute evidence of pain and mental anguish in injury cases:

1. Testimony of treating doctors or counselors;
2. Testimony of the plaintiff,
3. The plaintiff's statements to others, as testified to in court, or as contained in the medical or counseling records.
4. Testimony of friends and family members. Again, "moaner/groaners" who exaggerate or tell inconsistent versions should be avoided at all costs, however.
5. Photographs or injuries.
6. Entries in medical, counseling, or work records**.**

IX. DISFIGUREMENT

Disfigurement has been defined as an impairment of beauty, symmetry or appearance which renders unsightly or deforms in some manner. *Hopkins County Hosp. Dist. v. Allen*, 760 S.W.2d 341 (Tex.App. – Texarkana 1988, no writ). It is an element of damages separate and apart from physical pain and mental anguish. *See Pedernales Electric Cooperative, Inc. v. Schultz*, 583 S.W.2d 882 (Tex.Civ.App. – Waco 1979, writ ref'd n.r.e.); PJC 8.2. The existence of disfigurement at the time of trial permits an inference of future disfigurement, and no evidence of additional scarring or deformity

is required to recover damages for future disfigurement. *See Robertson v. Rig-A-Lite Co.*, 394 S.W.2d 838 (Tex.Civ.App. – Houston 1965, writ ref'd n.r.e.); *Hopkins County*, 760 S.W.2d at 344.

X. PHYSICAL IMPAIRMENT

Physical impairment as a separate element of damage is defined as impairment beyond loss of earning capacity or mere pain and suffering. *See Green v. Baldree*, 497 S.W.2d 342 (Tex.Civ.App. – Houston [14th Dist.] 1973, no writ). Physical impairment can be submitted as a separate element of damages along with loss of earning capacity. *Id.* The defendant is entitled to a jury instruction advising the jurors not to award any sum for physical impairment that has otherwise been awarded for the same loss under another element of damages. *See French v. Grigsby*, 571 S.W.2d 867 (Tex.Civ.App. – Beaumont 1978, no writ).

The plaintiff must show some significant physical limitation to recover for physical impairment. *See, e.g., Peter v. Ogden Ground Servs., Inc*., 915 S.W.2d 648 (Tex.App. – Houston [14th Dist.] 1996, n.w.h.). In cases in which injuries are extremely severe, such as cases involving paralysis or amputations, physical impairment may be inferred by the jury. *See Sunset Brick & Tile, Inc. v. Miles*, 430 S.W.2d 388 (Tex.Civ.App. – Corpus Christi 1968, writ ref'd n.r.e.) In cases involving less demonstrable disabilities, there must be direct evidence concerning how the disability causes the plaintiff a separate and distinct loss that is substantial. *See Green v. Baldree*, 497 S.W.2d 342 (Tex.Civ.App. – Houston [14th Dist.] 1973, no writ).

In *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757 (Tex. 2003), the Texas Supreme Court focused on damages for physical impairment. In *Golden Eagle*, the plaintiff was struck in the eye by a metal rod separating the bow string from the cables on a compound hunting bow. Among other injuries, he suffered broken bones around the orbit of his eye, some loss of vision, a ruptured sinus, and a broken nose. He spent over ten days in the hospital. The jury awarded him: Medical care: $ 25,393.10; Physical pain and mental anguish: $ 2,500; Physical impairment of loss of vision: $ 2,500; Physical impairment other than loss of vision: $ 0; Disfigurement: $ 1,500; Loss of Earnings in the Past: $ 4, 600.

The plaintiff appealed on the grounds that the jury's failure to award any damages for "physical impairment other than loss of vision" was against the great weight and preponderance of the evidence and that the jury's awards for the other elements of damages were inadequate.

The court of appeals in *Golden Eagle* had determined that the jury's failure to award any damages whatsoever in the category of "physical impairment other than loss of vision" was so against the great weight and preponderance of the evidence that the zero damages award was manifestly unjust and required a new trial. *See* 29 S.W.3d at 929. The Texas Supreme Court, however, reversed the court of appeals and remanded the case for consideration in light of a new factual sufficiency standard applicable to cases in which "the jury's failure to find greater damages in more than one overlapping category is challenged ...." *Golden Eagle*, 116 S.W.3d at 775.

Golden Eagle's new factual sufficiency standard requires a court of appeals to:

> [F]irst, determine if the evidence unique to each category is factually sufficient. If it is not, the court of appeals should then consider all the overlapping evidence, together with the evidence unique to each category, to determine if the total amount awarded in the overlapping categories is factually sufficient.
>
> *Golden Eagle*, 116 S.W.3d at 775.

The Texas Supreme Court reasoned in *Golden Eagle* that:

When someone suffers personal injuries, the damages fall within two broad categories - *economic* and *non-economic damages*. Traditionally, *economic damages* are those that compensate an injured party for lost wages, lost earning capacity, and medical expenses. *Non-economic damages* include compensation for pain, suffering, mental anguish, and disfigurement. "Hedonic" damages are another type of *non-economic damages* and compensate for loss of enjoyment of life.

This court has never considered the historical origins of the term "physical impairment" or its parameters in any detail. But Texas courts, including this one, have long recognized that "physical impairment" or similar concepts could encompass both *economic* and *non-economic damages*. Early Texas decisions seemed to recognize that while an injured party was entitled to a full recovery, care should be taken to prevent a double recovery when instructions are given to a jury.
....

The courts of appeals have recognized that physical impairment can encompass both *economic* as well as *non-economic* damages. A number of those courts have attempted to separate physical impairment from *economic damages* by defining physical impairment to exclude any impediment to earning capacity and also to separate physical impairment from the *non-economic damages* of pain and suffering.
....

We are persuaded that in a proper case, when the evidence supports such a submission, loss of enjoyment of life fits best among the factors a factfinder may consider in assessing damages for physical impairment. Indeed, if other elements such as pain, suffering, mental anguish, and disfigurement are submitted, there is little left for which to compensate under the category of physical impairment other than loss of enjoyment of life. Accordingly, if "physical impairment" is defined for a jury, it would be appropriate to advise the jury that it may consider as a factor loss of enjoyment of life. But the jury should be instructed that the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity and that a claimant should not be compensated more than once for the same elements of loss or injury.

Golden Eagle, 116 S.W.3d at 763-65, and 772_ (citations omitted) (emphasis supplied).

XI. LOSS OF CONSORTIUM

A spouse has an independent cause of action for the negligent impairment of consortium when a third party negligently injures the other spouse. *See Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978). Loss of consortium generally is defined to be the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage. *Id.* It does not include the services rendered by a spouse to the marriage, such as the performance of household and domestic duties. *Id*.

In *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990), the Texas Supreme Court held that a child may recover for loss of parental consortium when a third party causes serious, permanent and disabling injury to his or her parent that severely impairs the quality of society and companionship of the parent-child relationship. *Reagan*, 804 S.W.2d at 466-67.

In *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003), the Texas Supreme Court held that parents are not entitled to recover for consortium when their children are seriously injured. *Roberts*, 111 S.W.3d at 117. The court rationalized that parents do not normally depend

upon their childrens' companionship, love, guidance, and nurturing in the same way that spouses do for each other, or that a minor or disabled adult depends upon their parents' companionship, love, guidance, and nurturing. *Id*.

XII. BYSTANDER DAMAGES

"Bystander claims" for mental anguish arise out of the witnessing of injuries to third parties. Although Texas courts have recognized bystander claims for over 100 years, the seminal modern Texas case concerning bystander claims is *Freeman v. City of Pasadena*, 744 S.W.2d 923 (Tex. 1988). In *Freeman*, John Freeman sued the City of Pasadena for damages arising out of an automobile accident in which two of Freeman' stepsons were injured. After someone rang Freeman's doorbell and told him about the wreck, he hurried to the scene, where he saw the demolished automobile, surrounded by lights, ambulances, wreckers, helicopters and police cars. When Freeman approached an open ambulance, he saw one of his stepsons lying on a gurney, his face covered with blood and one arm broken.

The *Freeman* court cited the California case, *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), in setting out the following foreseeability factors that determine whether a defendant owes a bystander plaintiff a duty of care:

1) whether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it;

2) whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;

3) whether the plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. *Freeman v. City of Pasadena*, 744 S.W.2d 923, 923-34 (Tex. 1988), *citing Dillon v. Legg*, 441 P.2d 912, 920 (1968).

In *Freeman*, the Texas Supreme Court held that Freeman had no cause of action for bystander damages, as a matter of law, because Freeman "did not contemporaneously perceive the accident or otherwise experience the shock of unwittingly coming upon the accident scene." *Freeman*, 744 S.W.2d at 924. Although the *Freeman* majority did not address Freeman's status as a stepparent, Justice Ray, in a concurrence, stated that Freeman's status would *not* have barred him from bystander recovery, assuming that he had satisfied the "contemporaneous perception" factor. *Freeman*, 744 S.W.2d at 924-25.

Texas courts have struggled with the degree of contemporaneous perception required to support a bystander claim.

In *Freeman*, the Texas Supreme Court held that, as a matter of law, a stepfather's subsequent arrival at the scene of the motor vehicle accident did not support a bystander claim, even though a bloody stepson, the demolished automobile, ambulances, wreckers, helicopters and police cars were still present at the scene. *Freeman*, 744 S.W.2d at 924.

In *United Automobile Association v. Keith*, 970 S.W.2d 540 (Tex. 1998), the Texas Supreme Court likewise barred a bystander claim for failing to satisfy the contemporaneous perception element. In *Keith*, a motor vehicle accident involving Lyndsay Keith occurred about one block from the Keith residence, where Lyndsay's mother, Dianna Keith was asleep at the time of the crash. A friend of Lyndsay's drove to the Keith residence, awoke Mrs. Keith, and told her that the urgency had "something to do with Lyndsay." The friend rushed Mrs. Keith to the scene, where the wrecked car was still smoking and a tail light was blinking.

Although Mrs. Keith could not see her daughter, she could hear her inside the wreckage making "scary noises and crying out." Mrs. Keith then accompanied her daughter in an ambulance to a location from where a helicopter took Lyndsay to the hospital. Mrs. Keith later arrived at the hospital, waited while her daughter was in the operating room, and then learned that her daughter had died. *Keith*, 970 S.W.2d at 541.

The *Keith* court observed that, just as in *Freeman*, Mrs. Keith was not at the scene when the crash occurred and she did not see or hear the crash. *Keith*, 970 S.W.2d at 542. The court noted that, "[t]he fact that Dianna Keith arrived at the scene when rescue operations were still underway and witnessed her daughter's pain and suffering at the site of the accident rather than at the hospital or some other location does not affect the analysis." *Id*. Mrs. Keith had no bystander claim, as a matter of law, because Texas law "requires the bystander's presence when the injury occurred and the contemporaneous perception of the accident." *Id*.

A number of courts of appeals have likewise barred claimants who arrived at the scene after an incident from recovering bystander damages. *See, e.g., National County Mut. Fire Ins. v. Howard*, 749 S.W.2d 618, 621-22 (Tex. App.--Fort Worth 1988, writ denied) (subsequent arrival at auto accident scene while husband still pinned inside auto); *Lehman v. Wieghat*, 917 S.W.2d 379, 384 (Tex. App.--Houston[14th Dist.] 1996, writ denied) (father heard gunshot from half-mile away, drove up and discovered son's body); *City of Austin v. Davis*, 693 S.W.2d 31 (Tex. App.--Austin 1985, writ ref'd n.r.e.) (father, accompanied by hospital personnel, discovered son's body at base of ten-story air shaft).

In *General Motors Corporation v. Grizzle*, 642 S.W.2d 837 (Tex. App.--Waco 1982, writ dismissed), however, a mother who did not actually see the auto accident *was* allowed to recover bystander damages because she "was brought so close to the reality of the accident as to render her experience an integral part of it." *Grizzle*, 642 S.W.2d at 844. In *Grizzle*, the mother was traveling just a few minutes behind her daughter's truck, and came upon the accident before any emergency personnel arrived. As she approached the vehicles, she screamed and fainted. After she regained consciousness, she attempted to go to the collision because she heard her daughter screaming. She was restrained and did not actually see her daughter. She then waited at the hospital as her daughter underwent surgery for about ten hours.

Texas courts have also struggled, on a case by case basis, with the "close relationship" element of bystander recovery.

The following *have* been held to satisfy the close relationship requirement:

1. An uncle, if he was a resident in his nephew's apartment. *Garcia v. San Antonio Housing Authority*, 859 S.W.2d 78, 82 (Tex. App.--San Antonio 1993, no writ);

2. Grandparents. *Genzer v. City of Mission*, 666 S.W.2d 116 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.); and

3. Stepsons. *Grandstaff v. City of Borger*, 747 F.2d 161 (5th Cir. 1985). *See also Freeman v. City of Pasadena*, 744 S.W.2d 923, 924-25 (Tex. 1988) (Ray's concurrence).

The following have been held *not* to satisfy the close relationship requirement:

1. A cousin-in-law who lived in a separate residence from the decedent. *Rodriguez v. Motor Exp., Inc.*, 909 S.W.2d 521 (Tex. App.--Corpus Christi 1995), *rev'd on other grounds*, 925 S.W.2d 638 (Tex. 1996);

2. A friend and co-worker. *Hinojosa v. So. Tex. Drilling & Exploration*, 727 S.W.2d 320 (Tex. App.--San Antonio 1987, no writ); and

3. An alleged common-law wife (because she did not sufficiently prove the existence of the common-law marriage). *Hastie v. Rodriguez*, 716 S.W.2d 675 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.).

XIII. WRONGFUL DEATH DAMAGES

At common law, a decedent's cause of action died with him, and relatives and dependents had no cause of action for their own damages. As Prosser and Keeton on Torts (1984) characterizes the common-law state of affairs, "[F]rom the defendant's point of view, it was cheaper to kill a person than to scratch him."

The English Parliament passed the Fatal Accidents Act of 1846, otherwise known as "Lord Campbell's Act," to give families of deceased victims a remedy. Most American states, including Texas, modeled their own wrongful death statutes after Lord Campbell's Act.

In Texas, two potential statutory causes of action now arise out of the wrongful death of a person: a survival cause of action and a wrongful-death cause of action. Section 71.021 of the Texas Civil Practice & Remedies Code gives the heirs, legal representatives and estate of a decedent a survival cause of action "for personal injury to the health, reputation, or person of an injured person" after the death of the injured person. Section 71.004 gives the surviving spouse, children and parents of a decedent a wrongful death cause of action for their own damages.

In a survival cause of action in Texas, the plaintiff may recover for the decedent's pain and mental anguish, medical expenses and funeral expenses, and he or she also may recover exemplary damages. To recover damages for pain and mental anguish, a plaintiff in a survival cause of action must establish that the decedent suffered some conscious pain as a result of an injury.

A jury exercises great, but not unlimited discretion in determining whether the decedent experienced pain and suffering before death. For example, in *Carlisle v. Duncan*, 461 S.W.2d 254 (Tex. Civ. App.–Dallas 1970, no writ), the Dallas Court of Appeals held that mere testimony of a "groan" coming from a car after a wreck was inadequate to support a finding of conscious pain and suffering. 461 S.W.2d at 256-57.

On the other hand, Texas courts have found that jurors can infer pain and suffering in cases involving deaths by drowning or burning, and sometimes in other types of cases, as well. For example, in *Green v. Hale*, 590 S.W.2d 231 (Tex. Civ. App.–Tyler 1979, no writ), the Tyler Court of Appeals allowed the jury to infer that a child facing a truck backing up over him for a distance of 10 feet necessarily experienced conscious pain and suffering before his death. 590 S.W.2d at 237-238.

In *Luna v. Southern Transportation Co.*, 724 S.W.2d 383 (Tex. 1987), the Texas Supreme Court upheld an award for conscious pain and suffering based on the testimony of a young boy's father that his otherwise unresponsive child would open his eyes when the father would visit him in the hospital. 724 S.W.2d at 385.

In *Las Palmas Medical Center v. Rodriguez*, 279 S.W.3d 413 (Tex. App.–El Paso 2009, no pet.), the El Paso Court of Appeals found that testimony of "agonal breathing"—gasping breathing that often precedes death—coupled with a doctor's testimony that the decedent's breathing attempts confirmed consciousness, supported a finding of conscious pain and suffering. 279 S.W.3d at 416-18.

In a wrongful-death cause of action in Texas, the surviving spouse, children and parents may recover their own damages, but not those damages suffered by the decedent. They may recover damages for pecuniary losses, mental anguish, loss of companionship and society, loss of inheritance and (except for parents) exemplary damages. *See Sanchez v. Schindler*, 651 S.W.2d 249, 251-53 (Tex. 1983); *Yowell v. Piper Aircraft*, 703 S.W.2d 630, 632-34 (Tex. 1986); *Moore v. Lillibo*, 722 S.W.2d 683, 688 (Tex. 1986); Tex. Constitution, Art. 16, Section 26.

Pecuniary losses include damages for loss of advice and counsel, loss of services, expenses for psychological treatment and funeral expenses if the beneficiaries paid those expenses. *See Moore v. Lillibo*, 722 S.W.2d 683, 687-88 (Tex. 1986). Loss of advice and counsel includes the pecuniary value of professional recommendations and personal guidance that the decedent would have given the plaintiff if the decedent had lived. Mental anguish is defined as the emotional pain, torment and suffering that the plaintiff would, in reasonable probability, experience from the death of the family member. *See Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); PJC 9.2.

To recover loss of inheritance damages, the plaintiff must offer proof of the decedent's probable lifetime income and expenditures, plus proof that the plaintiff probably would have been the beneficiary of the decedent's estate. *See C & H Nationwide v. Thompson*, 903 S.W.2d 315, 322-24 (Tex. 1994); *Yowell v. Piper Aircraft*, 703 S.W.2d 630 (Tex. 1986).

In *Moore v. Lillibo*, 722 S.W.2d 683 (Tex. 1986), the Texas Supreme Court required jurors to consider the following before awarding damages for mental anguish and loss of companionship and society in wrongful death cases: 1) the relationship between the plaintiff and the decedent, 2) the living arrangements of the plaintiff and decedent, 3) any extended separations of the decedent from the plaintiff, 4) the harmony of their family relations, and 5) their common interests and activities. 722 S.W.2d at 688.

The Texas Constitution limits the recovery of exemplary damages in wrongful death cases to the decedent's spouse and children, and it prohibits the decedent's parents from recovering those damages. Tex. Constitution, Art. 16, Section 26.

Section 71.005 of the Civil Practice & Remedies Code allows the jury to hear evidence of "actual ceremonial remarriage" in a wrongful-death case. But it prohibits the defendant from "directly or indirectly mentioning or alluding to a common-law marriage, an extramarital relationship, or the marital prospects" of the surviving spouse.

Texas courts generally are protective of the surviving spouse. For example, in *General Motors Corp. v. Saenz*, 829 S.W.2d 230 (Tex. Civ. App.–Corpus Christi 1991, *rev'd on other grounds*, 873 S.W.2d 353 (Tex. 1993), the Corpus Christi Court of Appeals rejected the defendant's argument that evidence of subsequent relationships was admissible for impeachment purposes. 829 S.W.2d at 242.

In *Richardson v. Holmes,* 525 S.W.2d 293 (Tex. Civ. App.–Beaumont 1975, writ ref'd n.r.e.) the Beaumont Court of Appeals rejected the argument that jurors should be allowed to hear evidence about the effects of the surviving spouse's remarriage, as opposed to evidence of the simple fact of the remarriage. 525 S.W.2d at 299.

There are important differences in how the law treats damages in wrongful-death and survival cases. In a wrongful-death case, unlike in a survival case, section 71.010 requires the jury, not the laws governing descent and distribution, to determine the division of damages among the plaintiffs. Section 71.011 provides that damages

in a wrongful death suit, unlike survival damages, are not subject to the decedent's debts.

If the decedent's employer is a subscriber under the Workers' Compensation Act, then Section 408.001 of the Labor Code allows a surviving spouse or heir to recover exemplary damages—but not actual damages from the employer if the employer's gross negligence or intentional act caused the worker's death. The courts are split on whether the cap on exemplary damages as a multiple of actual damages contained in Chapter 41 of the Civil Practice & Remedies Code nevertheless requires a finding of actual damages in such a case.

See Quentin Brogdon, "How to Win Wrongful Death, Survival Damages," *Texas Lawyer*, January 13, 2014.

XIV. PUNITIVE DAMAGES

Overview

The common law definition of gross negligence was originally set forth in a landmark Texas Supreme Court case, *Burk Royalty Company v. Walls*, 616 S.W.2d 911, 920 (Tex.1981), as follows:

Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.

In 1987, the legislature codified the rules governing punitive damages, and modified the common law definition as follows:

"Gross negligence" means more than momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.

Act effective September 1, 1987, 70th Leg., 1st C.S., Ch. 2, 2.12, 1987 Tex. Gen. Laws 44 (formerly Tex. Civ. Prac. & Rem. Code Ann. 41.001(5)).

In *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10(1994), another landmark decision, the Texas Supreme Court "clarified" the definition "gross negligence." *Moriel* holds that there must be evidence that: (1) the act or omission, viewed objectively from the stand point of the actor, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor had actual, subjective awareness of the risk involved, but nevertheless proceeded in conscious indifference to the rights, safety, or welfare of others. *Moriel*, 879 S.W.2d at 23. The "extreme degree of risk" factor is a significantly higher standard than the "reasonable person" test for ordinary negligence. *Id*.at 22. The risk must be one that the defendant creates. *Id.* In order to determine whether the acts or omissions involve an extreme risk, the events and circumstances from the defendant's perspective at the time the harm occurred must be analyzed without resort to hindsight. *Id* at 23.

The risk created by the defendant's conduct must have been so extreme as to have created the "likelihood of serious injury" to the person it affected. *Universal Servs. Co. v. Ung,* 904 S.W.2d 638, 642 (Tex.1995). The extreme risk prong is not satisfied by a remote possibility of injury or even a high probability of minor harm, but rather it requires the likelihood of serious injury to the plaintiff. *Moriel*, 879 S.W.2d at 22. Extreme risk of harm is a function of both the magnitude and the probability of the anticipated injury to the plaintiff. *Id.* This objective prong is the distinguishing feature between conduct which is deserving of punishment and that which merely

demands restitution. *Wal-Mart Stores, Inc. v. Alexander,* 868 S.W.2d 322, 326 (Tex.1993).

HB 4 has now amended Chapter 41 of the Civil Practice and Remedies Code to define "gross negligence" as "an act or omission: a) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and b) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others." Tex. Civ. Prac. & Rem. Code § 41.001(11). This is essentially the "Malice B" definition that reigned in Chapter 41 from 1995 through 2003. The standard of proof for the recovery of exemplary damages is "clear and convincing," and HB 4 amended Chapter 41 to provide that exemplary damages may now be awarded "only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." *See* Tex. Civ. Prac. & Rem. Code § 41.003(b) & (c).

Pre-HB 4

Before the enactment of HB 4 in 2003, Chapter 41 of the Civil Practice and Remedies Code, titled "Exemplary Damages," limited the amount of exemplary damages recoverable based upon the amount of economic and noneconomic damages:

(a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of *economic damages* separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of *economic damages*; plus

(B) an amount equal to any *noneconomic damages* found by the jury, not to exceed $750,000; or

(2) $200,000.

Tex. Civ. Prac. & Rem. Code §§ 41.008(a) & 41.008(b) (emphasis supplied).

There were exceptions to these limitations when certain felonies were committed, including but not limited to, felonies involving injuries to a child, elderly individual or disabled individual. *See* Tex. Civ. Prac. & Rem. Code §§ 41.008(c).

Chapter 41 contained the following definition of "economic damages:"

"Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or *damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society*.

Tex. Civ. Prac. & Rem. Code § 41.001(4) (emphasis supplied).
In other words, "economic damages" included all damages *except*:

1. exemplary damages,
2. physical pain and mental anguish,
3. loss of consortium,
4. disfigurement,
5. physical impairment, and
6. loss of companionship and society.

Chapter 41 contained no explicit definition of *non*-economic damages, but one was perhaps implied in the portion of the definition of economic damages that excluded "...damages for

physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." *See* Tex. Civ. Prac. & Rem. Code § 41.001(4).

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Chapter 41 retains the prior provision's language concerning limitations on the amount of exemplary damages recoverable:

(a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of *economic damages* separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of *economic damages*; plus

(B) an amount equal to any *noneconomic damages* found by the jury, not to exceed $750,000; or

(2) $200,000.

Tex. Civ. Prac. & Rem. Code §§ 41.008(a) & 41.008(b) (emphasis supplied).

Chapter 41 retains exceptions on these limitations for certain felonies, but the exception for felonies involving injuries to a child, elderly individual or disabled individual is no longer applicable "if the conduct occurred while providing health care as defined by Section 74.001." Tex. Civ. Prac. & Rem. Code §§ 41.008(c)(7).

Chapter 41 now contains an altered definition of "economic damages:"

"Economic damages" means compensatory damages *intended to compensate a claimant for actual economic or* pecuniary loss; *the term does not include exemplary damages or noneconomic damages.*

Tex. Civ. Prac. & Rem. Code § 41.001(4) (emphasis supplied).

The phrases, "intended to compensate a claimant for actual economic ...." and "the term does not include exemplary damages or noneconomic damages" are new.

Chapter 41 now contains a definition of "noneconomic damages," where no prior explicit definition existed in the statute:

"Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental *or emotional pain or* anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, *inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages*.

Tex. Civ. Prac. & Rem. Code § 41.001(12) (emphasis supplied).
The phrases "...or emotional pain," and "inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages," are additions to the former *implied* definition of noneconomic damages that was contained in the portion of the former definition of economic damages excluding "...damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." *See* former Tex. Civ. Prac. & Rem. Code § 41.001(4).

Chapter 41 now explicitly states that "exemplary damages are neither economic or noneconomic damages." Tex. Civ. Prac. & Rem. Code § 41.001(5). "Exemplary damages" are defined to be "any damages awarded as a penalty or by

way of punishment but not for compensatory purposes." *Id.*

Chapter 41 now contains a definition of "compensatory damages:"

"Compensatory damages" means *economic* and *noneconomic damages*. The term does not include exemplary damages.

Tex. Civ. Prac. & Rem. Code § 41.001(5) (emphasis supplied).

XV. CONCLUSION

For the past thirty years, the Texas Supreme Court has steadily chipped away at the discretion given to jurors to award non-economic damages. In June of 2023, the Court's on-going effort culminated in the Court's issuance of *Gregory v. Chohan*, an opinion that raised as many questions as it provided answers. We will need further opinions from the Texas Supreme Court to have a clear understanding of where plaintiffs and defendants stand in the wake of *Gregory*. In any event, *Gregory* will make the plaintiff's task of obtaining non-economic damages at trial and keeping those damages on appeal more difficult.