

Proving noneconomic damages post-'Gregory v. Chohan'

Elisa Reiter and Daniel Pollack | February 6, 2024



This past summer, the Texas Supreme Court considered the issue of the size of the noneconomic damages in *Gregory v. Chohan*. The underlying case involved a wrongful death. An 18-wheeler driven by Sarah Gregory jackknifed near Amarillo Texas, crossing lanes of traffic, and resulting in the death of four people. Bhupinder Deol died as a result of the accident. Deol worked as a truck driver and was described as “a husband, son, and father of three.” Several other vehicles were involved in the accident.

The estate of Deol and his family “sued Gregory and New Prime, among others, seeking compensatory damages for (1) economic losses caused by Deol’s death, (2) Deol’s conscious pain and suffering, and (3) the mental anguish and loss of companionship suffered by his wife, three children, and parents.” The estates of the other decedents and the other decedents’ families intervened in the Deol case. However, one group (the Jones parties) settled prior to trial. The Deol, Vasquez, and Perales plaintiffs proceeded to trial. The jury awarded approximately \$39 million to the plaintiffs, of which the Deol family was awarded \$16,447,272.31. Of that sum, \$15,065,000 was to compensate the Deol family for “past and future mental anguish and loss of companionship.”

The defendants appealed, based on the size of the noneconomic damages award. The appeals court affirmed en banc, holding that the noneconomic damages award was not “flagrantly outrageous, extravagant, and so excessive that it shocks the judicial conscience.” However, the Texas Supreme Court reversed and remanded for several reasons. The court’s holding provides sound guidance for litigating noneconomic damages in the future.

The court noted that “[a]ssigning a dollar value to nonfinancial, emotional injuries such as mental anguish or loss of companionship will never be a matter of mathematical precision.” As to whether noneconomic damage awards shock an appellate court’s collective conscience, are grounded in properly developed evidence, and/or are neither excessive nor unreasonable, the court added: “Precedent requires courts reviewing the size of noneconomic damages awards to do more than consult their consciences.”

There are a number of takeaways from the court's ruling:

1. In the instant case, 50 pages of the reporter's record from the trial proceeding focused on Deol's widow's testimony as to how she, her in-laws, and her children were impacted by Deol's passing. The testimony is heart-wrenching, yet was not tied to the calculation of the amount awarded. The Texas Supreme Court viewed the intermediate appellate court's en banc decision that upheld the trial court's verdict as "not so much wrong as it is incomplete."
2. Lawyers for the plaintiffs also argued at trial that the jury should calculate an amount that would somehow send a message to the defendants, raising a correlation to the amount of mileage driven by the defendants' trucks over the four-year period it had taken to bring the matter to trial—another argument rejected by the Texas Supreme Court.
3. Damages must be proven to be "genuinely compensatory" based on a "rational connection" developed by a plaintiff to show a rational basis and connection between the "injuries suffered and the amount awarded."
4. Mental anguish and loss of companionship claims should be couched as "compensatory" claims, not as punitive damages, nor as exemplary damages.
5. Assure that all potentially responsible third parties have been properly added prior to trial.
6. Present evidence on all familial relationships, and how those relationships have been impacted by the loss.

7. In a personal injury case, plaintiffs must provide evidence of compensable mental anguish, along with proof to “justify the amount awarded.”

8. A jury cannot have unlimited discretion in crafting an award for noneconomic damages.

9. As with defamation cases, when dealing with wrongful death cases, a jury must base its verdict on evidence that shows a correlation between the amount awarded for noneconomic damages and a sum that fairly and reasonably compensates plaintiffs for the losses suffered.

10. The amount awarded must have a rational basis in placing the plaintiffs in the position they would have been in had the decedent not died.

11. Closing arguments at the trial court level in the case included an allusion to the costs of a “\$71 million Boeing F-18 fighter jet and a \$186 million painting by Mark Rothko,” which the Texas Supreme Court dismissed as “unsubstantiated anchoring,” lacking anything “to do with the emotional injuries suffered by the plaintiff and cannot rationally connect the extent of the injuries to the amount awarded.”

12. The Texas Supreme Court rejected the notion that a wealthier family is de facto entitled to more compensation than a family in a lower economic stratum. The mere fact that a decedent stood to earn more during his life than another victim is not necessarily enough to justify more noneconomic damages.

13. There must be case specific correlations in every case, e.g., the pain and suffering occasioned by a lengthy hospital stay and its impact on the family versus instantaneous death at the crash scene.

14. Plaintiffs must establish the “nature, duration and severity” of the anguish suffered.

15. Plaintiffs should establish financial consequences occasioned by the emotional harm suffered.

16. Parties cannot simply assert that the amount sought is justified. They must present a rational basis for the amount of noneconomic damages sought.

17. Genuine belief should not be mistaken as a rational basis for an argument. “There must be a reason given for why the belief is valid, a reason given for why the amount sought or obtained is reasonable and just. And it must be a rational reason grounded in the evidence.” The fact that one may be wowed by a Mark Rothko painting and what that Rothko garners at auction is irrelevant to the case.

18. Attorneys will be expected to present evidence answering why a certain amount should be awarded as noneconomic damages: “An attorney asking a jury to award that amount in damages should be expected to articulate the reason why the amount sought is reasonable and just, so the jury can rationally decide whether it agrees.”

19. We rarely ask why. Apparently, as to noneconomic damages, we must ask that question.

20. Harmful error means going back to the trial court.

Wrongful death cases are difficult. Families have suffered the loss of a parent, a spouse, a sibling, and/or a child, as well as a wage earner. Leave anchoring to sailors. In Texas, following the Texas Supreme Court's holding in *Gregory v. Chohan*, plaintiffs' attorneys may substantiate noneconomic damages by providing more evidence rather than simply relying on crafty arguments that attempt to guilt and inspire jurors to dig deeply into defendants' coffers. The court's plurality opinion, joined by Chief Justice Nathan Hecht and Justice Brett Busby, rejected the use of economic damages as a benchmark for noneconomic damages. The opinion views using a ratio of economic and noneconomic damages skeptically. Evidence must be provided to provide a basis for the noneconomic damages sought.

Hire an expert who can substantiate the pain and suffering of the decedent based on the accident report. Hire an actuary to come up with a means of quantifying noneconomic losses. Get the survivors into counseling, and pull their counselors in as experts at trial, as well as others who have witnessed their grief following the accident. How has the family dynamic changed? What are the financial repercussions of the loss? How can the family measure the emotional toll of the loss and the litigation? Be creative, but work the numbers in a way to create a rational connection in submitting the charge for noneconomic damages to the jury.

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