

# TEXAS LAWYER

## Noneconomic Damages Likely to Face Further Scrutiny in Personal Injury Claims

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**O**n June 16, 2023, the Supreme Court of Texas issued a plurality opinion in *Gregory v. Chohan* dealing with the review of noneconomic damages awards. In *Gregory*—a wrongful death trucking accident case involving a multiple vehicle collision—the Court’s opinion clarifies that noneconomic damages awards *must* be reviewed based on the size of the award and the available evidence. While the opinion is not definitive, the ruling will assuredly be used to attack noneconomic damage awards for the foreseeable future.

The liability claim and damages award stem from a multi-vehicle crash on an icy road in November of 2013. Ms. Gregory applied her brakes in response to what she thought was a traffic jam ahead, leading her to lose control of the vehicle.

Mr. Chohan, the plaintiff’s husband, was the first truck to encounter Gregory’s vehicle, and he exited his vehicle to assist the injured. Tragically, it was at this point that another truck crashed into the pileup, which caused him to be crushed to death. Subsequently, Chohan sued Gregory and won a total award of \$16,447,272.31. The award had a portion of \$15,065,000 attributable to noneconomic damages. Gregory appealed,



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complaining the noneconomic portion of the award was not justified by any evidence presented in the case.

Gregory presented ample evidence to show the *existence* of noneconomic damages, including:

- Her husband’s closeness with herself, their kids and his parents.
- Her prescription for antidepressants after the accident happened.
- Her relocation of her family after the loss of her husband’s income.
- Her deep sadness at loss of sharing milestones in their children’s lives.

- Personality changes and weight gain in their children.

Crucially, the Supreme Court acknowledged this was good evidence to prove the *existence* of damages but not the *amount* of damages. The Court also held that the jury was properly instructed, and the award was not shocking to the judicial conscience was not enough to justify the *amount* of damages. Finally, unsubstantiated anchors and unexamined ratios were held to not be a proper justification.

An unsubstantiated anchor is a monetary amount tied to an item that has no relation to the case; for example, counsel elicited testimony that a Boeing F-18 fighter jet costs \$71 million and a certain painting by Mark Rothko costs \$186 million.

An unexamined ratio is when argument about the ratio of economic to noneconomic damages is made without reference to any rational reason why those two amounts should be related. The Court did not like the idea of wealthier plaintiffs recovering more for noneconomic damages just because they had higher lost wage damages.

No evidence was presented that would tie any dollar amount to the noneconomic injuries, and the opinion leaves open what kind of evidence may be sufficient to justify an amount of noneconomic damages. Nevertheless, it should be expected that this case can be used to refute a plaintiff's attempt to offer unsubstantiated anchors, argue against ratios without a rational connection, and to seek remittitur of noneconomic damages where the amount awarded is based on no evidence.

How this case applies to *punitive* damages is unclear. Ratios have often been used in the punitive damages context. In fact, SCOTUS has held that ratios can help determine whether due process has been violated. Since punitive damages have the purpose of punishment, unlike

compensatory noneconomic damages, it is possible that they could be justified through evidence that would not be rationally connected to the just compensation of a plaintiff.

How remittitur would proceed is also an open question. The Court stated it would usually remand a case like *Gregory* to the court of appeals for remittitur, but for separate reasons (an improperly disallowed third-party designation) the Court remanded *Gregory* for a new trial. The implication appears to be that when noneconomic damages are not justified, they are completely remitted. In *Gregory*, that would mean the court of appeals would lessen the damages award by the entire \$15,065,000 attributable to noneconomic damages from the \$16,447,272.31 total award, leaving \$1,382,272.31 for the plaintiff.

There "is not a requirement of precise quantification or a requirement that a particular type of evidence must always be proffered; it is instead merely a requirement that the amount of damages must have a rational basis grounded in the evidence." There must be a rational and articulable reason justifying the amount of noneconomic damages awarded to the plaintiff. If there is no evidence, then the damages are improperly awarded. Plaintiffs' attorneys will be forced by defense counsel, through expert testimony and cross examination, to provide more concrete evidence substantiating their noneconomic damages and providing a nexus between the numbers alleged and the "nature, duration and severity" of plaintiff's mental anguish. This is surely an issue that will work its way through Texas courts for many years to come.

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