Articles + Publications | June 20, 2023

Locke Lord QuickStudy: The Texas Supreme ?Court Grapples ?With Standard for Recovering ?and Reviewing Noneconomic ?Damages

Locke Lord LLP

WRITTEN BY

Susan A. Kidwell

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The Texas Supreme Court recently discussed the standard for recovering and reviewing noneconomic damages in a wrongful-death case. *Gregory v. Chohan*, No. 21-0017, 2023 WL 4035886 (Tex. June 16, 2023)?. The court of appeals had affirmed a jury award of over $15 million in noneconomic damages to surviving family members. The size of the noneconomic damages caught the Texas Supreme Court's attention—and the award gave the Court an opportunity to consider what is required to sustain such an award, and how such awards should be reviewed on appeal. Although the six justices who participated in the case wrote three opinions on the subject, all of them agreed that the noneconomic damages had to be reversed. They also agreed that certain tactics used by plaintiffs' counsel in the case, and the "shock the conscience" standard used by the court of appeals in reviewing the award, are improper. Beyond that, the opinions underscore the inherent difficulty in quantifying damages for noneconomic injuries.

The plurality opinion by Justice Blacklock and joined by Chief Justice Hecht and Justice Busby ultimately concludes that, "to survive a legal-sufficiency challenge to an award of noneconomic damages, a wrongful death plaintiff should bear the burden of demonstrating both ?(1) the existence of compensable mental anguish or loss of companionship and (2) *a rational connection, ?grounded in the evidence, between the injuries suffered and the amount awarded*." The ?"rational connection" standard is based on existing precedent (*Parkway*, *Saenz*, and *Bentley*) that requires legally sufficient evidence to support both the *existence* and the *amount* of noneconomic damages. But how can an *amount* of noneconomic damages be supported by *evidence*?

Before attempting to answer that question, the plurality gives several examples of what *not* to do. First, the opinion expressly rejects the use of "unsubstantiated anchoring," a practice by which attorneys try to support a large damage award by referring to "objects or values with no rational connection to the case," *e.g.*, the price of a fighter jet or a famous painting, because such anchors "have nothing to do with the emotional injuries ?suffered by the plaintiff and cannot rationally connect the extent of the injuries to the amount ?awarded."? The opinion also disapproves of plaintiffs' request for "'two cents worth' for every one of the 650 miles that [the defendant trucking company] drove during the year of the accident." As the opinion explains, that is an improper argument to punish the defendant, rather than compensate the plaintiffs for their claimed injuries. Because the jury's award was very

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close to the “two cents” calculation (and there was no other way to explain it), the plurality “conclude[d] that the improper argument influenced the result.” The absence of an objection would not seem to matter, as “[c]ourts have an obligation to prevent improper jury argument and ‘will not be required to wait for objections to be made when the rules as to arguments are violated.’”

The plurality also rejected arguments that ratios between economic and noneconomic damages must be considered in wrongful-death actions, because in such actions, the survivors’ noneconomic damages (emotional trauma and loss) have no connection to economic damages (lost income from the decedent). As the opinion points out, using economic damages as a benchmark in wrongful-death cases would tend to “suggest that families of a well-paid decedent suffer more grief and pain than the families of those with less income.” However, the plurality was quick to point out that the prohibition on ratios in death cases does not mean that “economic damages can never be considered when assessing noneconomic damages.” In cases where “economic and noneconomic damages may correlate or inform one another,” the use of ratios will depend on “case-specific reasons why such analysis is suitable.”

Having explained what *not* to do, the plurality has a harder time explaining how a party could satisfy the rational-connection standard. The opinion makes clear that the same sort of evidence used to establish the existence of compensable mental anguish, *i.e.*, evidence of the “‘nature, duration, and severity’ of the anguish suffered,’ … will naturally also be relevant to the *amount* awarded.” And the opinion points to two types of direct evidence that could be quantified to support an amount for mental-anguish damages: evidence showing the “financial consequences of severe emotional disruption in the plaintiff’s life,” and evidence of “some amount of money [that] would enable the plaintiff to better deal with grief or restore his emotional health.” But the plurality gives no other examples. Instead, it emphasizes plaintiff’s burden to provide “a rational reason, grounded in the evidence,” that the amount requested is “reasonable and just compensation for the injuries suffered.” Post-verdict arguments that a number picked by the jury was “reasonable” will not suffice.

As for the standard of review on appeal, the plurality concluded that the court of appeals’ analysis “is not so much wrong as it is incomplete.” Although the plurality agreed that there was sufficient evidence of compensable injuries, it emphasized that evidence about grief and loss is “no evidence … of the *amount* of damages incurred on account of that suffering.” The plurality also rejected the vague and subjective “shocks the conscience” standard commonly used to affirm awards of noneconomic damages. Shocking or not, it is “error to allow a verdict to stand when no rational basis for the verdict’s amount is proffered.” Because there was insufficient evidence to support the $15 million amount of damages awarded, the award was reversed. Due to another error relating to the failure to submit a responsible third party on the jury charge, the entire case was remanded for a new trial.

Justice Devine, joined by Justice Boyd, concurred in the judgment but took issue with the plurality’s “‘rationally connected’ standard.” In Justice Devine’s view, the plurality’s standard “would effect a sea change without providing any reasonably defined parameters.” Given the policy implications, Justice Devine appears to favor a legislative solution to “shap[ing] policy through hamster-wheel litigation.”

Justice Bland also concurred in the judgment, arguing that “we neither need to adopt the plurality’s standard for determining whether the evidence demonstrates a rational connection to the amount awarded for every case, nor reject such a standard as Justice Devine advocates.” Instead, she would leave it to “further development in 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." However, it is unclear how a jury could be "properly informed about what to consider" unless the Court adopts some sort of standard by which noneconomic damages can be measured.

The three opinions underscore the difficulty of linking a quantifiable *amount* of noneconomic damages to evidence about the nature, duration, and severity of *injuries* that, by their very nature, are not readily quantifiable. Absent the kind of direct evidence discussed in the plurality opinion, it remains to be seen what, if any, evidence could provide the requisite link to support an amount of noneconomic damages. But this much is clear: unsubstantiated anchors are out; unexamined ratio are also out (at least in wrongful-death cases); and appellate courts can no longer affirm large awards of noneconomic damages on the ground that the amount does not "shock the judicial conscience." Whether the "rational connection" standard adopted by the plurality eventually gains the support of a majority remains a matter to be determined.

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