Noneconomic Damages

# Anchoring a Verdict Without Angering the Court

**By Eric R. Passeggio and Chris Turney**

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The practice of anchoring in litigation is a well-known, much discussed practice among plaintiff-and defense-oriented attorneys and legal organizations. In *Gregory v. Chohan*, 2023 Tex. LEXIS 528 (Tx. Jan. 31, 2023), the Supreme Court of Texas made the most definitive rejection of the practice to date.

In *Gregory*, plaintiffs secured a $16,447,272.31 judgment, 90 percent of which were noneconomic damages. The case involved a wrongful death action that arose from a tragic multivehicle pileup on a dark, icy highway in Texas. The accident was borne of a jackknifed eighteen-wheeler that blocked all lanes of traffic. As traffic piled into the truck, four people lost their lives. One of those people was another truck driver, the plaintiff, who was a husband, son, and father of three.

The trial court affirmed the judgment, as did the intermediate appellate court. However, the Texas Supreme Court reversed and remanded the case for a new trial. As reflected by the plurality opinion and concurrences, the court's judgment and rejection of anchoring was clear; the court's guidance beyond that was mixed.

## "Unsubstantiated Anchoring" Is Prohibited

The plurality opinion grounds its decision in a thorough discussion of background and purpose of noneconomic damages in tort law. The touchstones include (1) compensating the plaintiff is the primary purpose of damage awards in tort cases; (2) mental anguish and loss of companionship are not punitive or exemplary in nature; and (3) compensatory damage awards must be rational and nonarbitrary "based on evidence and reason, to the extent possible." These considerations come with one very significant caveat, which the plurality recognizes: "emotional injuries are in their nature resistant to monetary qualification." This caveat leads to many good questions.

The opinion frames the issue around comments from the closing argument of other decedents, including the following passages.

> We understand unsubstantiated anchoring to be a tactic whereby attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case. Analogies employed by counsel in this case included a $71 million Boing F-18 fighter jet and a $186 million painting by Mark Rothko.
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> After referencing expensive paintings and military aircraft, counsel for [decedents] urged the jury to give defendants their 'two cents worth' for every one of the 650 million miles that [Defendant's] trucks drove during the year of the accident.

The core problem with decedents' counsel's arguments was that they were not confined to the evidence and the arguments of opposing counsel, as required by Texas Rules of Civil Procedure 269(e). The opinion holds, "It should go without saying that the cost of a painting, a military aircraft, or a percentage of a company's revenue are not 'evidence' to which 'counsel shall be

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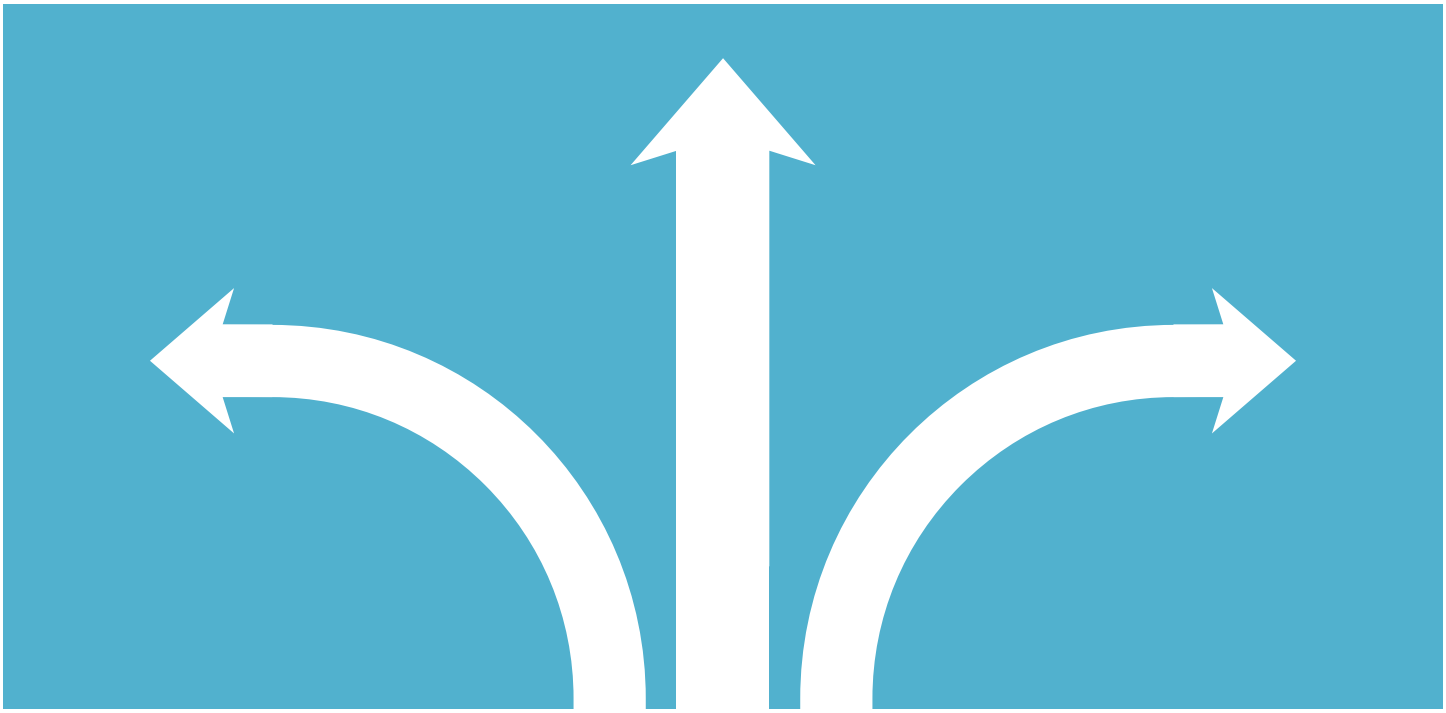

required to confine the argument.'" This is a practical, common-sense analysis that probably has a basis in almost every jurisdiction. There will likely be ongoing disputes about the "evidence" that a party can reference in closing argument.

## So, How Do We Talk About Noneconomic Damages?

It is not completely clear.

Although exposing an improper closing argument using unsubstantiated anchoring, *Gregory* notably lacks guidance as to proper evidence and argument of noneconomic damages. Accordingly, the concurring opinions spotlight limitations of the plurality's remaining analysis. While this may seem like an issue for plaintiffs' counsel only, the plurality discussion of the type of "rational connection" to the evidence may also make it challenging for defense counsel to address noneconomic damages, when appropriate to do so.

The court, with the support of two concurring justices, "rejects any requirement that the ratio between economic and noneconomic damages must be considered." Therefore, making an analogy to punitive damages jurisprudence is probably a nonstarter.

The concurring opinions do not join two parts of the plurality opinion. Part II.C.2 of the plurality opinion holds:

> [T]o survive a legal-sufficiency challenge to an award of non-economic 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.

For different reasons, the concurring opinions would not have articulated this standard of review, limiting the court's decision to reversal and remand due to decedents' counsel's use of improper arguments.

## Challenges Presented by the Plurality Holding

The concurring opinions' issues with the plurality's holding are self-evident from the plurality opinion. Consider the following:

> We do not offer these examples to suggest that in all cases there must be direct evidence of a quantifiable amount of damages."
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> We will not speculate here about all the permissible ways in which parties may demonstrate that a rational connection between the evidence and the amount awarded exists or is lacking. But merely asserting, without rational explanation, that any amount picked by the jury is reasonable compensation simply because a properly instructed jury picked the number is to argue that a jury may "simply pick a number and put it in the blank."
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> If the amount sought is genuinely thought to be reasonable and just compensation, then there should be an articulable reason why that is so. 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.

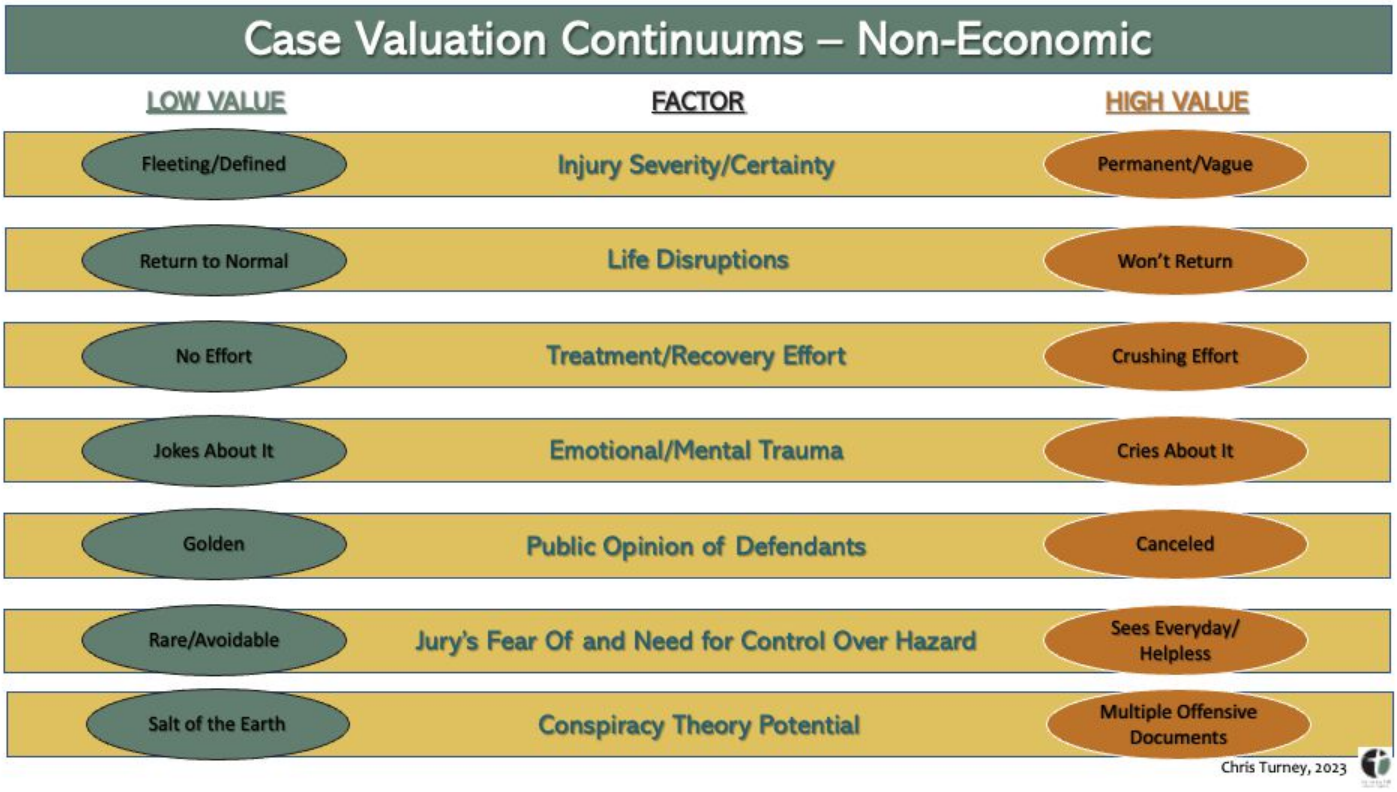
The plurality's analysis makes sense. "Pick a number" is not an acceptable way to determine an award for compensatory damages. However, despite noting that noneconomic damages do not have to be quantifiable, its requirement of an articulable "reason" for a particular amount essentially requires some discussion of the economic consequences. It is not clear what evidence is sufficient to sustain a verdict for noneconomic damages or the limits of argument by counsel for plaintiffs or defendants (apart from obviously unconnected references).

## Defense Suggestion

Because setting a counter anchor number must be strategically considered, defense

counsel would be wise to articulate some methodology for analyzing noneconomic damages. If defense counsel offers too low an anchor, the jury could render a punitive award masked as compensatory.

Consider the following chart when evaluating noneconomic damages:




In discovery, defense counsel can make a chart of each factor and determine where on each continuum the plaintiff's case lands. For example, if the plaintiff's injury is fleeting and well-defined as a recoverable malady, then the plot point on the "injury severity/certainty" continuum will be closer to the green side. However, if the plaintiff has ongoing and unexplained severe pain that has no present hope of a cure, the plot point will go toward the high value. The other factors can be evaluated similarly, but we will walk through a few more examples for clarity.

**Treatment/Recovery Effort**

If the plaintiff is regularly meeting with her physical therapist and trying to improve her predicament with strong effort, the "treatment/recovery effort" plot point may tend toward the high value side. However, if the plaintiff seems half-hearted about recovery efforts, defense counsel can likely argue for a lower noneconomic valuation on that continuum—urging the jury to find that there is evidence that the injury is not severe enough to warrant significant effort from the plaintiff.

**Jury's Fear of and Need for Control over Hazard**

This may be a critical factor in the noneconomic damage analysis. Because fear often drives verdicts, a jury who feels that it cannot protect itself—or the public—against dangers posed by a product or a defendant may be more likely to bolster noneconomic damages out of fear. If the accident causes an out-of-the-blue significant injury or death (a) that routinely occurs, and (b) that the plaintiff could not control, the plot point will tend toward the high valuation end of the continuum. However, if the plaintiff walked into the hazard, or if the outcome is extremely rare, the plot point will be placed in the low exposure side.

Each of the continua should be plotted with a fair eye to the evidence obtained in discovery. Depositions can flush out each of these factors, as well, so defense counsel can begin assembling a file to justify a reasonable anchor number for noneconomic damages at trial.

When defense counsel offers a substantiated anchor in closing, the jury can be guided to specific evidence within the continua methodology to justify the anchor. While not every line on the continua will apply in every case, defense counsel can create the logical methodology in any given case using a mix of the criteria above (or other criteria that apply) to justify to the jury and the judge a reasonable—and substantiated—noneconomic damage number.

Because this is not a formula, defense counsel should approach these continua flexibly and creatively. It is important that defense counsel, clients, and other stakeholders in each case have an open dialogue about these factors. These considerations factor into the

discovery plan, case assessment, and trial strategy. A diversity of points of view can lead to more accurate and informed decisions during the life of a claim or lawsuit.

### Closing Observations

Although the Supreme Court of Texas's rejection of "unsubstantiated anchoring" is an unqualified good development for defendants who seek a reasonable verdict, the lack of a standard for dealing with nonobvious anchors will continue to create challenges for case assessment. It is reasonable to expect plaintiffs' counsel will push the limits of any rulings like *Gregory*. More litigation and appeals will likely follow; however, this decision shows that reliance on basic concepts—the compensatory purposes of tort damages and rules concerning improper argument—may be enough to beat back some of the more egregious comparisons and arguments that are used to inflate jury verdicts.

Finally, it is important to recognize that *Gregory*, on its face, has limited applicability to "unsubstantiated anchoring" by counsel during argument. However, by extension, defense counsel should be prepared to argue against such anchoring in other phases of trial, such as voir dire or creative examination of witnesses.