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**Diverging Approaches to Excessiveness Review:
Non-Economic Damage Awards
in the Fifth Circuit and Texas State Appellate Courts**

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Historically, both the Fifth Circuit and Texas appellate courts were very deferential in reviewing the size of jury awards for non-economic damages like mental anguish, pain and suffering, and loss of consortium. Within both the federal and the state systems, courts differed over whether such excessiveness review was a purely subjective exercise that required only sound judicial judgment, or whether appellate courts should strive for greater objectivity and uniformity across cases by comparing verdicts to prior awards and remitting those that appeared excessive.

Over the last 20 years, the Fifth Circuit and Texas approaches to excessiveness review have diverged dramatically. Through its “maximum recovery rule,” the Fifth Circuit has adopted an increasingly mathematical approach that compares non-economic damage awards to earlier awards in similar cases from the same jurisdiction. In practice, this approach frequently results in the imposition of a cap based on the amount of the prior awards plus a percentage multiplier, thus reducing the jury’s discretion to impose a very large award in any particular case. By contrast, Texas appellate courts continue to show great deference to jury awards of non-economic damages, reviewing them only for factual sufficiency.

Section I of this paper summarizes the origins of the maximum recovery rule and the longstanding tension between Fifth Circuit panels and justices favoring a comparative approach and those favoring a case-by-case approach to excessiveness review. The paper then traces the development of the Fifth Circuit’s current mathematical approach to determining “maximum recovery” and discusses critics who condemn this approach as a judge-made damages cap.

Section II considers the approach of Texas state courts to excessiveness review. While the Texas courts also were historically divided between the comparative and case-by-case approaches, Section II suggests that this debate was largely mooted when the Texas Supreme Court changed the standard of review applicable to remittiturs of large jury awards. Since the court’s adoption of the factual sufficiency standard of review, Texas appellate courts have been extremely deferential to large awards of non-economic damages, in marked contrast to the Fifth Circuit.

I. The Fifth Circuit’s Maximum Recovery Rule and the Mathematical Approach.

The Fifth Circuit’s approach to reviewing the size of non-economic damage awards has been described as “a confusing quagmire of inconsistent and conflicting decisions.”¹ For decades, a debate has been carried on within the Fifth Circuit over whether it is appropriate to evaluate large awards through comparison to prior, similar cases. Although the debate continues, the comparative approach embodied in the court’s “maximum recovery rule” has gained currency in recent years. Today the Fifth Circuit is increasingly likely to invoke that rule to order remittitur of non-economic awards that exceed the highest previous award in a similar case by a fixed mathematical tolerance.

¹ Lawrence J. Madigan, *Excessive Damage Review in the Fifth Circuit: A Quagmire of Inconsistency*, 34 TEX. TECH L. REV. 429, 429 (2003).

A. Origins of the Maximum Recovery Rule.

The Fifth Circuit originally adopted the “maximum recovery rule” in order to resolve a debate about how to set the amount of remittitur in cases where the jury’s verdict clearly exceeds any amount supported by the evidence. As the court explained in *Gorsalitz*,² at the time, there were competing theories for what the amount of remittitur should be when the evidence supported a range of possible awards:

One theory is that an excessive verdict should be reduced to the minimum amount which the jury might have awarded, since award of any greater sum deprives the defendant of his right to a jury trial. Other courts have felt free to reduce the verdict, by remittitur, to that amount which the court itself considers the jury should have allowed. A final theory is that the jury by its excessive verdict intended to award the maximum and defendant cannot complain of any judgment within the permissible limits. This theory permits reduction only to the highest amount which the jury could properly have awarded.³

The Fifth Circuit concluded that the third approach was the most consistent with the Seventh Amendment right to jury trial.⁴ Accordingly, the court adopted the “maximum recovery rule,” which allows trial or appellate courts to remit a jury award only down to “the highest amount which the jury could have found.”⁵

B. Historical Tension Between the Comparative and Particular Case Approaches to Determining Maximum Recovery.

Gorsalitz established the general principle that, in cases involving remittitur orders, a plaintiff is entitled to the maximum recovery supported by the evidence. However, *Gorsalitz* provided no methodology or even guidance for how courts should determine what the amount of “maximum recovery” is in a case involving intangible or non-economic damages.

Without specific standards for determining the amount of “maximum recovery” in such cases, in the years immediately following *Gorsalitz*, the Fifth Circuit largely deferred to trial courts to establish the appropriate amount of remittitur, if any. As Judge Thomas Gee noted in 1974, when the Fifth Circuit is reviewing a trial court’s remittitur order:

² *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033 (5th Cir. 1970).

³ *Id.* at 1047 (quotation omitted).

⁴ *Id.*

⁵ *United States v. 1160.96 Acres of Land*, 432 F.2d 910, 913 (5th Cir. 1970).

deference will be given to the trial court's determination since he, and not the appellate court, was present during the ebb and flow of the trial, and it will be presumed that the amount which he has chosen is the amount which will reduce the jury's verdict to the "maximum possible" award unless the party opposed to the remittitur can point to credible evidence which would support a greater recovery.⁶

This initial hands-off approach was quickly succeeded, however, by a debate within the court during the 1970s and 1980s over the proper method for reviewing increasingly large awards for mental anguish, pain and suffering, and the like. Recognizing that deciding whether an award is excessive "is not an exact science," most panels of the Fifth Circuit approved the practice of comparing verdicts to prior awards in similar cases, while emphasizing that "such comparison is not controlling."⁷ Other panels expressly rejected the comparative approach and emphasized that an appellate court "must review each case on its own facts."⁸

Attempting to synthesize these two lines of authority in 1988, Judge Gee declared both approaches to be correct and then suggested an approach to remittiturs that would encompass both an objective and a subjective element:

[W]hen we review a damage award, our first task is to examine damage awards in analogous cases, setting an objective frame of reference for our inquiry. Within this framework, we examine the facts that are unique to each case, asking whether the award is "entirely disproportionate to the injury sustained."⁹

Thus, Judge Gee's approach expressly retained an element of judicial discretion and subjectivity in excessiveness review. Although such nuanced analysis retains some currency today, the Fifth Circuit increasingly has gravitated towards an approach based on a more strictly mathematical comparison to awards in previous cases.

C. Origins of the Mathematical Approach to Maximum Recovery.

Although the early cases rarely said so explicitly, the policy goal behind the maximum recovery rule "is to bring rough consistency into comparable damages awards."¹⁰ In an effort to achieve such uniformity among awards, the Fifth Circuit progressively has adopted a strict mathematical approach to determining maximum recovery in remittitur cases. In

⁶ *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 670 (5th Cir. 1974).

⁷ *Wakefield v. United States*, 765 F.2d 55, 59-60 (5th Cir. 1985); *see also, e.g., Osburn v. Anchor Labs., Inc.*, 825 F.2d 908, 920 (5th Cir. 1987) (looking to prior awards for "rough guidance"); *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1156 (5th Cir. 1985) (same).

⁸ *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 587 (5th Cir. 1988), *opinion corrected on denial of reh'g en banc*, 848 F.2d 872 (5th Cir. 1988); *see also Wiley v. Stensaker Schiffahrtsges.*, 557 F.2d 1168, 1172 (5th Cir. 1977) ("Comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness *vel non* in a particular case . . .").

⁹ *Wheat v. United States*, 860 F.2d 1256, 1260 (5th Cir. 1988).

¹⁰ *Lebron v. United States*, 279 F.3d 321, 328 (5th Cir. 2002).

application, this approach has led to a declining level of deference to non-economic damage awards.¹¹

The shift towards a less deferential, more mathematical approach began in 1983 in *Caldarera*,¹² a wrongful death case arising out of an airplane crash. *Caldarera* involved claims against the airline and claims against the United States for negligence by federal air traffic controllers. The claims against the airline were tried to the jury and the claims against the United States were tried simultaneously to the bench. Each fact-finder awarded damages for non-economic losses, but the amounts awarded by the jury and the district judge varied.¹³ Concluding that the jury's award was excessive, the Fifth Circuit noted that the maximum recovery rule "prescribes that the verdict must be reduced to the maximum amount the jury could properly have awarded."¹⁴ Comparing the jury's verdict to the district court's award for the same elements of damage, the Fifth Circuit concluded that the trial judge's awards "are generous, but they cannot be viewed as excessive. *If we add 50% to each, however, we arrive at an amount that appears to us to be a maximum.*"¹⁵ Without explaining the basis for this 50% enhancement, the court ordered a remittitur of the jury's award for emotional damage for the plaintiff's loss of his mother and son to 150% of the district court's award.¹⁶

Shortly after *Caldarera*, the panel in *Haley*, another plane crash case, applied a similar comparative approach, but determined that the maximum possible recovery was only 33% greater than the largest reported award for a parent's mental anguish resulting from the death of an adult child.¹⁷ Although it did not explain the basis for its selection of a 33% (as opposed to 50%) enhancement, the *Haley* panel did quote from *Caldarera* to emphasize the "inherently subjective" nature of reviewing non-economic awards.¹⁸ Recognizing the subjective nature of such review, subsequent panels have explained that, when ordering remittitur based on comparisons to prior cases, the Fifth Circuit applies a percentage enhancement "[t]o avoid substituting our judgment for that of the jury."¹⁹

D. The Percentage Enhancement Becomes a De Facto Damages Cap.

While *Caldarera* and *Haley* originally applied a 50% and 33% enhancement, respectively, in partial deference to the jury's assessment of emotional suffering, those arbitrarily-chosen "enhancement" figures have gradually evolved into "multiples" that impose a

¹¹ See, e.g., *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001) ("[W]hen this court is left with the perception that the verdict is clearly excessive, deference must be abandoned." (quoting *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995))).

¹² *Caldarera v. Eastern Air Lines, Inc.*, 705 F.2d 778 (5th Cir. 1983).

¹³ *Id.* at 783-85.

¹⁴ *Id.* at 784.

¹⁵ *Id.* at 785 (emphasis added).

¹⁶ *Id.* at 786.

¹⁷ *Haley v. Pan American World Airways, Inc.*, 746 F.2d 311 (5th Cir. 1984).

¹⁸ *Id.* at 318 (quoting *Caldarera*, 705 F.2d at 784).

¹⁹ *Giles*, 245 F.3d at 489; accord *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 589 (5th Cir. 1985) (remitting a verdict to 150% of the award in prior cases because "[w]e must be careful . . . not simply to substitute our view of a reasonable amount for the verdict of a jury").

de facto cap on a plaintiff's recovery. This evolution began in 1990 in *Douglass*,²⁰ where Judge Jerry Smith adopted the 33% tolerance recognized in *Haley* as establishing a safe harbor range in which the maximum recovery rule would not be triggered to reduce a plaintiff's damages. As explained in *Douglass*, the maximum recovery rule "essentially provides that we will decline to reduce damages where the amount awarded is not disproportionate to at least *one factually similar* case from the relevant jurisdiction."²¹ To allow a zone of deference to the jury while still providing for meaningful review, the *Douglass* court concluded that "the maximum recovery rule does not become operative unless the award exceeds 133% of the highest previous recovery in the state."²²

Under the reasoning of *Douglass*, the percentage multiplier was conceived as "a guideline for invoking [the maximum recovery rule] rather than a formula for capping recoveries under the rule."²³ In practice, however, the multiplier is often applied as if it were a cap. For example, in the recent *Vogler* opinion, after reviewing Texas wrongful death cases awarding mental anguish damages in similar circumstances, the court strictly applied a 50% multiplier to calculate the amount of maximum allowable recovery:

Applying the fifty percent multiplier to these awards, the maximum amount that could be awarded to the estate of Mrs. Vogler for her conscious pre-death mental suffering is \$30,000.²⁴

Similarly, in another recent case, *Moore*, while purporting to decide the amount of remittitur based "primarily on the evidence in this record," the court in fact calculated the maximum recovery by applying a 33% multiplier to the largest reported Louisiana award for loss of consortium:

Applying the "maximum recovery rule" to the award in this case requires remittitur of the non-pecuniary award to 133% of \$300,000, or \$399,000 for non-pecuniary damages.²⁵

Thus, in the Fifth Circuit's application of the maximum recovery rule, the "enhancement" percentages have evolved from a safe harbor from appellate review into a precisely-enforced cap on damages that often limits plaintiffs' recovery of non-economic damages—even in diversity cases involving claims under state tort law where no statutory caps apply.

E. Criticisms of the Mathematical Approach.

The Fifth Circuit's increasingly mathematical application of the maximum recovery rule has drawn criticism from both inside and outside the court. In a lengthy special concurrence in *Thomas*, Judge James Dennis agreed with the ultimate dollar amount of remittitur

²⁰ *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336 (5th Cir. 1990).

²¹ *Id.* at 1344.

²² *Id.* at 1344 n.14.

²³ *Lebron*, 279 F.3d at 327.

²⁴ *Vogler v. Blackmore*, 352 F.3d 150, 160 (5th Cir. 2003).

²⁵ *Moore v. M/V ANGELA*, 353 F.3d 376, 385 (5th Cir. 2003).

ordered by the majority, but attacked the mathematical methodology used to calculate a “maximum” recovery:

This practice is highly suspect and contrary to controlling law in this circuit. Although judgments in comparable cases may provide some frame of reference when reviewing awards for excessiveness, they do not control our assessment of an individual case.²⁶

Citing the practical limitations of such “hindsight review,” Judge Dennis noted that comparisons across cases are difficult because most published opinions include “only summaries of the evidence presented at trial.”²⁷ Moreover, since such comparisons are based only on reported cases, ignoring unreported decisions and settlements, “the sample size of relevant cases is often too small to realize any sort of average maximum award.”²⁸ Judge Dennis also observed that the comparative approach raises “the separate concern of deciding which past awards we should consider.”²⁹ This echoes critics who observe that the comparative approach may be subject to results-oriented manipulation of which cases are deemed similar enough to be included in the comparison.³⁰

Throughout his *Thomas* concurrence, Judge Dennis advocated a return of deference to the jury, which “has the benefit of hearing live testimony and observing witness demeanor, [and therefore] is more qualified to determine the appropriate amount of emotional distress damages.”³¹ Because awards for non-economic damages are inherently “fact-driven” and a “matter of judgment,”³² Judge Dennis believes that they should be left largely to the discretion of the jury.

Picking up the call for greater deference to the jury, Judge Thomas Reavley—who only a year earlier joined the majority opinion in *Thomas*—has also criticized the strict mathematical approach as being arbitrary and inconsistent with the tradition of case-by-case review:

Apart from the Seventh Amendment and with respect, I would personally prefer that the decision [on the amount of non-economic damages] be made after a full and fair trial by these eight jurors rather than by my fine judicial colleagues.³³

²⁶ *Thomas v. Tex. Dep’t of Criminal Justice*, 297 F.3d 361, 373 (5th Cir. 2002) (Dennis, J., concurring).

²⁷ *Id.* at 376.

²⁸ *Id.* at 377.

²⁹ *Id.*

³⁰ See, e.g., Madigan, *supra* note 1, at 441.

³¹ *Thomas*, 297 F.3d at 376.

³² *Id.*

³³ *Vogler*, 352 F.3d at 161 (Reavley, J., dissenting).

Harkening back to the days of greater deference, Judge Reavley asserted that appellate review and remittitur should be limited to those awards that “shock [the] conscience” or appear “to be unjust or contrary to reason.”³⁴

At least one Texas state court has criticized the Fifth Circuit’s mathematical approach on separation-of-powers grounds, noting that when the fixed percentage “enhancements” are applied to calculate the largest allowable recovery, “the maximum recovery rule is a damages ‘cap.’ Such limits are best imposed by legislative bodies, not courts.”³⁵ Indeed, the Fifth Circuit itself has recognized that the maximum recovery doctrine is a “judge-made rule.”³⁶

Finally, the most strident criticism of the maximum recovery rule has resulted from the Fifth Circuit’s own inconsistency in applying the mathematical approach.³⁷ For example, since being arbitrarily adopted in the 1980s, the 33% and 50% enhancement standards have been applied almost interchangeably with little explanation. In *Salinas*, Judge Smith—who himself applied the 33% multiplier in the seminal *Douglass* decision—announced that, as between the two, “we choose the 50% figure” announced in *Caldarera*, since *Caldarera* is the earlier decision and, therefore, is controlling.³⁸ However, the following year, the *Moore* panel reverted to the 33% multiplier in ordering remittitur of an award following a bench trial.³⁹ Although it expressly cited *Salinas*, the *Moore* opinion concluded that 33% was the appropriate multiplier since the 50% enhancement had been applied only to jury verdicts, while 33% had been used in cases involving both jury and bench trials.⁴⁰ The Fifth Circuit’s inconsistent application of the multiplier not only leads to criticism of the maximum recovery rule as being arbitrary and result-driven, but it also tends to undermine the policy purpose behind the rule of achieving some level of uniformity and predictability in non-economic damage awards.

II. Texas Courts’ Evolving Approach to Reviewing Non-Economic Damage Awards.

Texas courts’ approach to reviewing non-economic damage awards for excessiveness has evolved in parallel with—but largely independently of—the federal cases. Both the Texas courts and the Fifth Circuit have struggled with the merits of a comparative versus a case-by-case approach. However, with the exception of one El Paso Court of Appeals case expressly rejecting the use of mathematical multipliers,⁴¹ modern Texas cases have virtually ignored the Fifth Circuit’s discussion of these issues.

Indeed, the two jurisdictions’ approaches appear to have evolved in inverse relation to each other. As the Fifth Circuit’s use of mathematical multipliers to cap recovery has

³⁴ *Id.*

³⁵ *Atchison, Topeka & Santa Fe Ry. Co. v. Cruz*, 9 S.W.3d 173, 183 (Tex. App.—El Paso 1999, pet. granted, judgm’t vacated).

³⁶ *Douglass*, 897 F.2d at 1344.

³⁷ *See, e.g.*, Madigan, *supra* note 1, at 437 (noting that “the eleven panel decisions decided since [*Douglass*] involving the maximum recovery rule have been anything but consistent”).

³⁸ *Salinas v. O’Neill*, 286 F.3d 827, 831 n.6 (5th Cir. 2002).

³⁹ *Moore*, 353 F.3d at 384.

⁴⁰ *Id.*

⁴¹ *Atchison, Topeka & Santa Fe Ry.*, 9 S.W.3d at 183.

become increasingly common, Texas courts have grown increasingly deferential to the jury's assessment of non-economic damages. The divergence between the approaches of these two jurisdictions can be traced to the different standards of review that each now applies to remittitur orders. While the Fifth Circuit has consistently applied an abuse-of-discretion standard to review of such orders, in 1986 and 1987 the Texas Supreme Court changed from an abuse-of-discretion standard to one based on the factual sufficiency of the evidence to support the jury's verdict.

Under factual sufficiency review, an appellate court's focus is confined to the evidentiary record in the particular case at hand, thus mooted the historical debate over whether comparisons to prior awards are proper. Moreover, the adoption of factual sufficiency review has reduced the discretion of both appellate and trial courts to suggest a remittitur when the jury's verdict is supported by some evidence. As a result, under the changed standard of review, Texas appellate courts today show much greater deference to jury verdicts than does the Fifth Circuit.

A. The Historical Split Over the Comparative Approach.

Through the late 1980s, there were "two distinct lines of authority in Texas" for the correct approach to reviewing non-economic damage awards for excessiveness.⁴² Under the first line of cases, many courts endorsed the practice of comparing large verdicts to prior awards that had been approved by other courts in similar litigation.⁴³ These courts believed that "precedents are helpful in determining whether damages awarded for similar personal injuries are or are not excessive"⁴⁴ because precedents provide an objective standard by which to measure inherently subjective awards. As one early court put it in endorsing the comparative approach:

There is almost no yard stick which may be employed which will remove the decision [on excessiveness] from the realm of pure subjective thinking. The only objective approach to the problem of which this Court is aware is that of comparing the award made with those which have been approved by other courts in comparable litigation.⁴⁵

In adopting the comparative approach, some courts cited the related policy goal of bringing some measure of fairness and uniformity to the amount of damage awards, particularly where it

⁴² *Best Steel Bldgs. Inc. v. Harden*, 553 S.W.2d 122, 132 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); see *Bedgood v. Madalin*, 589 S.W.2d 797, 804 (Tex. Civ. App.—Corpus Christi 1979) ("Texas courts have historically followed two approaches in determining excessiveness and damages....), *aff'd in part, rev'd in part*, 600 S.W.2d 773 (Tex. 1980).

⁴³ See, e.g., *Kimbriel Produce Co. v. Webster*, 185 S.W.2d 198, 203 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.) (holding that "the verdict is clearly excessive when compared to awards which have been upheld in cases relating to injuries similar to those sustained by appellee here").

⁴⁴ *Moses v. Adams*, 428 S.W.2d 131, 134 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.).

⁴⁵ *Port Terminal R.R. Ass'n v. Noland*, 288 S.W.2d 276, 283 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.).

appeared that a large award resulted from juror sympathy or misunderstanding of the trial court's charge.⁴⁶

In contrast, the second line of Texas cases roundly rejected the practice of comparing large awards to prior verdicts. Adopting a "particular case" approach, these courts asserted that "each case must stand on its own facts" for purposes of determining whether the jury's award is excessive.⁴⁷ Courts employing the "particular case" approach emphasized that there "is no rule prescribing the manner by which the courts determine whether the damages are too large or too small."⁴⁸ Accordingly, these courts relied on "sound judicial judgment and discretion"⁴⁹ to determine reasonable compensation in each case, and they approved a remittitur only if the award "exceed[ed] the outside limits of propriety."⁵⁰

"Particular case" courts were skeptical of the supposed objectivity of the comparative approach, emphasizing that factual differences among cases made any genuine comparison difficult,⁵¹ and noting that varied awards may be justified since similar types of injuries may have different effects on different individual plaintiffs.⁵² In the 1960s and 1970s, "particular case" courts also cited the effect of inflation as casting doubt on the validity of any comparison to past damage awards.⁵³

B. Criticisms of the Comparative and Particular Case Approaches.

The lack of a single standard for considering the excessiveness of non-economic damage awards was sometimes frustrating for Texas judges. As Justice Keith of the Beaumont Court of Appeals commented in *Collins*:

⁴⁶ See, e.g., *Kimbriel Produce Co.*, 185 S.W.2d at 202 (discussing the need for "reasonable uniformity as to the amount of verdicts and judgments in the various cases"); *Landreth v. Reed*, 570 S.W.2d 486, 492 (Tex. Civ. App.—Texarkana 1978, no writ) (approving the remittitur of pain and suffering awards that are "to some extent the product of an understandable but improper attempt to award compensation not justified by the evidence or permitted by law").

⁴⁷ *Claunch v. Bennett*, 395 S.W.2d 719, 725 (Tex. Civ. App.—Amarillo 1965, no writ).

⁴⁸ *Best Steel Bldgs.*, 553 S.W.2d at 133.

⁴⁹ *Id.*; see also *Caterpillar Tractor Co. v. Boyett*, 674 S.W.2d 782, 790 (Tex. App.—Corpus Christi 1984, no writ).

⁵⁰ *Coastal States Gas Producing Co. v. Locker*, 436 S.W.2d 592, 600 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

⁵¹ See *id.* ("We are not persuaded that tests of uniformity or comparability offer an objective approach to the solution of *this* problem in *this* case."); see also *Best Steel Bldgs.*, 553 S.W.2d at 133 (calling the practice of comparing awards across cases "unsatisfactory").

⁵² See, e.g., *Caterpillar Tractor Co.*, 674 S.W.2d at 790 (applying the particular-case rule because "the same loss will occasion different damages to different individuals, depending upon mental attitude and the effect of injuries on earning capacity"); *Gonzalez v. Southwestern Bell Tel. Co.*, 555 S.W.2d 219, 223 (Tex. Civ. App.—Corpus Christi 1977, no writ) (same).

⁵³ E.g., *Best Steel Bldgs.*, 553 S.W.2d at 133; *Moore's, Inc. v. Garcia*, 604 S.W.2d 261, 266 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.c.).

The standards laid down for our guidance in the review of damage findings leave much to be desired. In fact, from my study of the subject, I have concluded that there are *no* guidelines laid down for an appellate review of monetary awards in suits for damages involving personal injury and death or allowances for pain and suffering.⁵⁴

Indeed, faced with two competing approaches, each supported in Texas case law, some courts sought to avoid error by purporting to apply *both* the comparative and the particular case standards simultaneously.⁵⁵

While pleading for “more specific criteria by which to measure the amount of [an] award,” Judge Keith’s concurrence in *Collins* also neatly summarized the criticisms of each of the prevailing Texas approaches.⁵⁶ The justice noted that the comparative approach was often unsatisfactory since no two cases are alike, and because it opened appellate courts to the criticism that they had gone outside the record in deciding to modify a jury award.⁵⁷ Judge Keith equally criticized the “permissive” nature of the particular-case approach, which he believed consisted largely of “subjective ratiocination by three judges who have not seen or heard a living witness with any knowledge of the facts.”⁵⁸

Courts applying the “particular case” approach had special difficulty articulating the legal standard that was guiding their decisions about whether a specific award was excessive. Despite the inherently subjective nature of their approach, these courts often tried to frame their decisions in terms of lofty-sounding principles that could be applied objectively. For example, some courts recited that they would not overturn a verdict for excessiveness “in the absence of a clear showing that passion, prejudice, or other improper matters influenced the jury,”⁵⁹ or unless the award was “so excessive as to shock the sense of justice in the minds of the appellate court.”⁶⁰ Other courts applying the particular-case approach were admirably candid about their application of subjective judicial judgment and discretion to the excessiveness question:

⁵⁴ *Collins v. Gladden*, 466 S.W.2d 629, 638 (Tex. Civ. App.—Beaumont 1971, writ ref’d n.r.e.) (Keith, J., concurring).

⁵⁵ See, e.g., *Halliburton Co. v. Olivas*, 517 S.W.2d 349, 354 (Tex. Civ. App.—El Paso 1974, no writ) (“We have followed both of the suggested approaches to the problem.”); *Bedgood*, 589 S.W.2d at 805 (“[W]e will consider these [verdicts in prior] cases as merely instructive and look with greater emphasis on the particular facts of this case.”); *Landreth*, 570 S.W.2d at 492 (reciting both that “each case must be judged on its own facts” and that “courts have traditionally, and we think correctly, looked to approved awards in similar cases”).

⁵⁶ *Collins*, 466 S.W.2d at 639 (Keith, J., concurring).

⁵⁷ *Id.* at 638.

⁵⁸ *Id.* (noting that a review of damages awards under the “particular-case” approach is necessarily based on “a visceral reaction to the whole case . . . affected by the idiosyncrasies of the reviewing judge”).

⁵⁹ *Gonzalez*, 555 S.W.2d at 223.

⁶⁰ *Moore’s, Inc.*, 604 S.W.2d at 266.

All a court can do . . . is to exercise its sound judicial judgment and discretion in the ascertainment of what amount would be reasonable compensation for the loss or injury sustained and treat the balance, if any, as excess.⁶¹

In many ways, such judicial candor might have been marginally more satisfying to litigants than the practice of those courts that, while applying the supposedly more objective comparative approach, simply announced a conclusion on excessiveness without discussing—or even citing—the “other cases” that were deemed comparable.⁶²

C. *Pope and Larson Change the Standard of Review, Shifting the Focus from the Objective-Subjective Debate to the Factual Sufficiency of the Evidence.*

The tension between the comparative and particular-case approaches to reviewing excessive damage awards largely came to an end after the Texas Supreme Court announced a change in the standard of review for remittitur orders. Through the late 1980s, Texas appellate courts reviewed trial courts’ remittitur orders under an abuse of discretion standard (as the Fifth Circuit continues to do today).⁶³ That standard began to change with the Texas Supreme Court’s 1986 *Pope* decision, which held that a court of appeals could not suggest a remittitur if the evidence supporting the damage award was factually sufficient to sustain a jury finding.⁶⁴ *Pope* instructed lower courts to “examine all the evidence in the record to determine whether sufficient evidence supports the damage award,” and to order remittitur only if the award (or any part of it) is “factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust.”⁶⁵ The court also noted that, under the factual sufficiency standard, lower courts “need not find passion, prejudice, or other improper motive on the jury’s part to order a remittitur.”⁶⁶

A year later, in *Larson*, the Texas Supreme Court clarified that the factual insufficiency standard applies to both remittiturs suggested by the court of appeals and to appellate review of a trial court’s remittitur order:

⁶¹ *Best Steel Bldgs.*, 553 S.W.2d at 133; see also *Caterpillar Tractor Co.*, 674 S.W.2d at 790 (noting that, in remittitur cases, “we are required to exercise sound judicial judgment and discretion”).

⁶² See, e.g., *City of Houston v. Moore*, 389 S.W.2d 545, 550 (Tex. Civ. App.—Houston 1965, writ ref’d n.r.e.) (upholding a jury verdict with only a string citation to cases involving supposedly similar injuries); *Missouri Pac. R.R. Co. v. Rhoden*, 310 S.W.2d 607, 615 (Tex. Civ. App.—Houston 1958, no writ) (reducing an award by \$15,000 “[a]fter a study of many [unspecified] cases and a careful weighing of the testimony in the present case”).

⁶³ See, e.g., *Flanigan v. Carswell*, 324 S.W.2d 835, 840 (Tex. 1959) (resolving a conflict among the courts of civil appeals and adopting the abuse of discretion standard).

⁶⁴ *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986) (“Factual sufficiency is the sole remittitur standard for actual damages.”).

⁶⁵ *Id.*

⁶⁶ *Id.*

Trial courts and courts of appeals should be subject to the same standard for a simple reason: no court is free to substitute its judgment for that of the jury. A court of appeals should uphold a trial court remittitur only when the evidence is factually insufficient to support the verdict.⁶⁷

Larson expressly rejected the subjective, “shocks-the-judicial-conscience” standard recited in many of the older opinions applying the particular-case approach:

Such review effectively allows jurists’ determinations to be substituted for those of the jury, a practice condemned since *Carter v. Carter*, 5 Tex. 93 (1849).⁶⁸

Pope and *Larson* effectively ended the longstanding tension between the objective and subjective approaches to excessiveness review since, in a review of a verdict for factual sufficiency, neither prior cases nor visceral judicial reactions are particularly relevant. Moreover, by adopting factual sufficiency review of remittiturs, the Texas Supreme Court eliminated much of the judicial discretion that previously had been applied to the review of large non-economic damage awards. As Dean Powers and Professor Ratliff have noted, after *Pope* and *Larson*, “the presumption of correctness now attaches to the jury award, not to the trial court’s suggestion of remittitur.”⁶⁹ The result of this shift in the standard of review “is to favor jury awards over remittiturs.”⁷⁰

D. Review of Non-Economic Damage Awards Since *Pope* and *Larson*.

In the immediate aftermath of *Pope* and *Larson*, some Texas courts adopted an approach that rendered the amount of most non-economic damage awards essentially unreviewable. For example, the El Paso Court of Appeals held that, since assigning a dollar value to mental anguish is “necessarily an arbitrary process,” the reviewing court was powerless to disturb the amount awarded so long as there was any evidence that the plaintiff had suffered compensable anguish:

Once the existence of some amount of mental anguish has been established, the incalculable quantity *cannot logically be refuted or shown to be factually insufficient* because there are no objective facts to calibrate measurement.⁷¹

⁶⁷ *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1986).

⁶⁸ *Id.*

⁶⁹ William Powers, Jr. & Jack Ratliff, *Another Look at “No Evidence” and “Insufficient Evidence,”* 69 TEX. L. REV. 515, 566 (1991).

⁷⁰ *Id.*

⁷¹ *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590, 601 (Tex. App.—El Paso 1991, writ denied).

The San Antonio Court of Appeals also adopted this hands-off approach to mental anguish awards, noting that under *Larson*, “[a]ppellate courts are not free to substitute their judgment for that of the jury.”⁷²

In reaction to such cases, in 1996 the supreme court issued its opinion in *Saenz*. In *Saenz*, the court reiterated that any award of mental anguish damages must be supported by evidence of either a high degree of mental pain or distress or a substantial disruption to the plaintiff’s daily life.⁷³ Additionally, the court emphasized that “[n]ot only must there be some evidence of the existence of compensible injury, but there must also be some evidence to justify the amount awarded.”⁷⁴ The *Saenz* opinion specifically instructed the courts of appeals to review the *amount* of a mental anguish award under the same sufficiency-of-the-evidence standard applicable to other jury findings:

[Juries] must find an amount that, in the standard language of the jury charge, “would fairly and reasonably compensate” for the loss. . . . 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.*⁷⁵

Significantly, however, *Saenz* provided no guidance on how courts of appeals are to conduct this “meaningful evidentiary review” of awards for intangible damages like mental anguish.⁷⁶

Following *Saenz*, appellate review of the verdict and of requests for remittitur are governed by the same standard: factual sufficiency. As a result, the two issues are frequently conflated into a single discussion,⁷⁷ where strong deference is paid to the jury’s findings.⁷⁸ This

⁷² *Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 528 (Tex. App.—San Antonio 1996, writ denied).

⁷³ *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996).

⁷⁴ *Id.*

⁷⁵ *Id.* (emphasis added).

⁷⁶ See *Schindler Elevator Corp. v. Anderson*, 78 S.W.3d 392, 421 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgment vacated) (Brister, C.J., dissenting from denial of rehearing en banc) (noting that *Saenz* “did not suggest how” appellate courts should meaningfully review the amount of awards for mental anguish).

⁷⁷ See, e.g., *Durban v. Guajardo*, 79 S.W.3d 198, 211 (Tex. App.—Dallas 2002, no pet.) (noting that the trial court did not err in denying remittitur because “[w]e have already determined the evidence is legally and factually sufficient” to support a mental anguish award); *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 237-38 (Tex. App.—Corpus Christi 2001, pet. granted) (rejecting a separate remittitur point following a detailed discussion of the evidence in connection with the appellant’s factual insufficiency points).

⁷⁸ See, e.g., *County of Dallas v. Wiland*, 124 S.W.3d 390, 402 (Tex. App.—Dallas 2003, pet. filed) (noting that a “reviewing court affords great deference to the jury’s assessment of mental anguish and pain and suffering damages”); *Rescar, Inc. v. Ward*, 60 S.W.3d 169, 179 (Tex. App.—Houston [1st Dist.] 2001, pet. granted, judgment vacated) (“Matters of pain and suffering are necessarily speculative, and it is within the province of the jury to set the amount of such damages.”); *Missouri Pac. R.R. Co. v. Roberson*, 25 S.W.3d 251, 258 (Tex. App.—Beaumont

deferential pattern continues despite the Texas Supreme Court's recent admonition that "the necessity that a jury have some latitude in awarding [non-economic] damages does not, of course, give it carte blanche to do whatever it will."⁷⁹

The absence of clear guidelines for conducting a factual sufficiency review has led at least two Texas courts to revert to a comparative approach when reviewing non-economic damage awards. In *Lee Lewis Construction*, the Amarillo Court of Appeals stated that "the similarity of [an] award with those in other cases" is one of several factors relevant to determining whether a jury's verdict constitutes fair and reasonable compensation for a plaintiff's injuries.⁸⁰ Similarly, in evaluating the evidence supporting a mental anguish award, the Corpus Christi Court of Appeals in *Garza* compared the plaintiff's testimony about "the nature, duration, and severity of his mental anguish" to the testimony in prior reported cases.⁸¹ Although focused more on the quality of the evidence than the amount of the prior awards, the comparative approach adopted in *Garza* represents one attempt at a method for conducting the more objective, "meaningful evidentiary review" demanded by the Texas Supreme Court.⁸²

It is too early to know whether *Lee Lewis Construction* and *Garza* portend a re-emergence of the comparative approach to excessiveness review in Texas, or whether these opinions will rekindle the controversy over such comparisons that raged in Texas jurisprudence for decades prior to *Pope* and *Larson*.

E. Criticisms of the Factual Sufficiency Standard.

The factual sufficiency standard adopted in *Pope* and *Larson* has been criticized for hampering Texas courts' ability to effectively review jury awards that appear truly aberrant. Professors Powers and Ratliff have observed that in cases involving non-economic damages, "it will be difficult for appellate courts to point to specific testimony that demonstrates excessiveness."⁸³ These scholars suggest that, under factual sufficiency review, Texas courts lack the tools needed to achieve the degree of predictability and fairness that are the hallmarks of a well-functioning judicial system:

2000, no pet.) ("There are no objective guidelines by which a court may measure the money equivalent of mental pain, and much discretion must be allowed to the jury in fixing this amount").

⁷⁹ *Bentley v. Bunton*, 94 S.W.3d 561, 605 (Tex. 2002); *see id.* (reaffirming *Saenz* and the requirement of meaningful appellate review of non-economic damage awards).

⁸⁰ *Lee Lewis Constr. Inc. v. Harrison*, 64 S.W.3d 1, 14 (Tex. App.—Amarillo 1999) (ordering remittitur), *aff'd on other grounds*, 70 S.W.3d 778 (Tex. 2001).

⁸¹ *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 236 (Tex. App.—Corpus Christi 2001, pet. granted). Although the supreme court has granted the petition for review in *Garza*, a review of the parties' briefing suggests that the excessiveness issue is not separately presented in that case.

⁸² *Saenz*, 925 S.W.2d at 614.

⁸³ Powers & Ratliff, *supra* note 69, at 567.

[C]ommon sense suggests that courts should have some authority to review excessive or inadequate damage awards. It would be unwise to permit a jury to make any award it thinks fit without limit, even though it is dealing with damages that resist exact calculation or quantification. . . . Without some kind of review, the system will produce radically inconsistent awards for the same kinds of injuries and will be destined to take on more of the aspects of a lottery than it already has.⁸⁴

In a similar vein, then-Chief Justice Brister of the Fourteenth Court of Appeals criticized the factual sufficiency standard in a dissent from the court's denial of rehearing en banc of a panel decision in *Schindler Elevator Corp.*⁸⁵ The case involved a trial court's remittitur of a multi-million-dollar jury verdict for serious injuries to a child's foot in an escalator accident. Detailing the evidence presented at trial, the panel opinion concluded that sufficient evidence supported the verdict as to the child's future pain and mental anguish and the father's loss of consortium.⁸⁶ Therefore, the panel overturned the trial court's remittitur order on those elements. However, pointing to evidence that the jury was confused about bifurcation and mistakenly "included punitive damages in the guise of compensatory damages," Judge Brister urged that trial judges be given greater discretion to modify such aberrant awards, even when the baseline test of factual sufficiency is satisfied:

Reviewing awards for intangible damages will never be easy, but trial judges have more tools at their disposal than we do. In this case, the jurors admitted making a mistake in their verdict, and an experienced trial judge reduced it by remittitur. . . . I hope the Texas Supreme Court will reconsider whether, at least as to intangible damages, some room ought to be left for a trial judge's discretion.⁸⁷

Echoing Professors Powers and Ratliff, Judge Brister also endorsed the concept of empowering trial courts to use remittitur orders to achieve greater consistency among awards, especially since trial courts see a larger sample of jury verdicts and are likely to be more familiar with community standards and settlement ranges than their appellate colleagues.⁸⁸ Judge Brister's interest in returning to such a comparative approach was criticized by some of his colleagues as opening the door to "ruminations about matters outside the appellate record."⁸⁹

⁸⁴ *Id.* (footnote omitted).

⁸⁵ *Schindler Elevator Corp. v. Anderson*, 78 S.W.3d 392, 417-23 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgment vacated) (Brister, C.J., dissenting from denial of rehearing en banc).

⁸⁶ *Id.* at 416.

⁸⁷ *Id.* at 422.

⁸⁸ *Id.*

⁸⁹ *Schindler Elevator Corp.*, 78 S.W.3d at 425 (Seymore, J., concurring on denial of rehearing en banc); see also *Schindler Elevator Corp.*, 78 S.W.3d at 423 (Edelman, J., concurring on denial of rehearing en banc) (criticizing Judge Brister's opinion for suggesting that decisions be made on "other considerations" than the evidence presented at trial).

That the debate over the proper method of reviewing damages continues to resonate after *Pope* and *Larson* is reflected by the fact that Judge Brister was questioned about this aspect of his *Schindler Elevator* opinion at a recent Texas Senate hearing to confirm his appointment to the Texas Supreme Court.⁹⁰

III. Conclusion.

Although some debate continues within both the Fifth Circuit and the Texas appellate courts over the propriety of comparing awards across cases, the divergence between the dominant approaches to excessiveness review in the two jurisdictions is striking.

Applying its increasingly mathematical approach to the maximum recovery rule, the Fifth Circuit regularly remits jury awards that exceed a percentage tolerance over prior awards in similar cases, though the percentage raises. Ironically, the doctrinal tool through which the court implements these remittiturs is the percentage multiplier, which was originally conceived as an “enhancement” to ensure that the reviewing court gave a reasonable amount of deference to the jury’s determination of non-economic damages, as required by the Seventh Amendment.

In contrast to the Fifth Circuit, today Texas appellate courts are powerless to remit any award of non-economic damages that meets the test of factual sufficiency. Although the Texas Supreme Court has emphasized that factual sufficiency review of such damages must be “meaningful,” the court has provided no concrete guidance for how the courts of appeals are to scrutinize the connection between a plaintiff’s subjective suffering and the amount of the jury’s award. As a result, Texas courts are increasingly deferential to jury awards of non-economic damages, even where the amount of the award appears large in the context of other similar cases.

⁹⁰ See Polly Ross Hughes, *Senators OK Justice for State’s High Court*, HOU. CHRONICLE, May 5, 2004, at 25A.