

Mental Anguish Damages In Personal Injury Cases

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Mental Anguish Damages in Personal Injury Cases

I. Introduction

It should come as no surprise to Trial Lawyers that the Texas Supreme Court has gone out of its way in recent years to restrict access to the courthouse and to limit the recoveries of personal injury plaintiffs. This is especially true in the area of non-economic damages. Over the past 15 years, there has been a concerted and steady effort by the Texas Supreme Court to limit the recovery of mental anguish damages. This effort is multi-faceted. It encompasses an increase in the level of proof required to sustain an award in cases in which mental anguish damages are permitted, a mandate to appellate courts to closely scrutinize such awards, and restrictions on the types of cases in which such damages are even available.

Perhaps the best summary of the current state of the Texas Supreme Court's thought is found in *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997), which the Court elsewhere characterizes as "our most recent comprehensive discussion of mental anguish damages."¹

‘Without **intent or malice** on the defendant's part, **serious bodily injury to the plaintiff**, or a **special relationship between the two parties**, we permit recovery for mental anguish in only a few types of cases involving injuries of such a *shocking and disturbing nature* that mental anguish is a *highly foreseeable result*.’

Likes, 962 S.W.2d at 496 (emphasis added).

II. Non-Physical Injury Cases

A. The standard is set – *Parkway*

1. *Parkway Company v. Woodruff*, 901 S.W.2d 434 (Tex. 1995)

The Court chose to "fire the first shot" at mental anguish damages in a case that the Plaintiff's trial bar paid little, if any, attention to at the time. The case was *Parkway Company v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), opinion by Justice Cornyn, joined by Phillip, Gonzalez, Hightower, Hecht, Enoch, Spector, and Owen, dissent on other grounds by Gammage. This was not a personal injury case; rather, it was a suit brought by a homeowner against a contractor for flood damage. The Plaintiff's trial bar largely assumed the holding was confined to mental anguish damages in non-personal injury cases – until the Court used *Parkway* and its progeny as precedent to deny mental anguish damages in personal injury cases, as well.

¹ See *Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999).

The Woodruff’s home flooded and was badly damaged due to negligence by the defendant contractor in building it in a floodplain. The Woodruffs sued and recovered, *inter alia*, for their mental anguish resulting from the flooding.

The Court, after a historical review of mental anguish damages, set the standard for recovery of mental anguish damages in cases not involving physical injury. Plaintiffs may recover when they “have introduced **direct evidence** of the **nature, duration and severity** of their mental anguish, thus establishing a **substantial disruption in the plaintiffs’ daily routine.**” *Parkway*, 901 S.W.2d at 444 (emphasis added).

This significant language provided the theme for a series of later cases which restrict the recovery of mental anguish damages – even cases involving physical injury.

The *Parkway* Court noted that, historically:

“some types of *disturbing or shocking injuries* have been found sufficient to support an inference that the injury was accompanied by mental anguish. As a general matter, though, *qualifying events have demonstrated a threat to one’s physical safety or reputation or involved the death of, or serious injury to, a family member.*”

Id. at 445 (emphasis added).

In setting this new, heightened standard for establishing mental anguish in non-physical injury cases, the Court called for close judicial scrutiny of the plaintiffs’ evidence:

“Although we stop short of requiring this type of evidence [i.e., direct evidence of the nature, duration and severity of the mental anguish, thus establishing a substantial disruption in the plaintiffs’ daily routine] in **all** cases in which mental anguish damages are sought, *the absence of this type of evidence*, particularly when it can be readily supplied or procured by the plaintiff, **justifies close judicial scrutiny of other evidence** offered on this element of damages.”

Id. at 444 (emphasis added).

In *Parkway*, the Court pointed to two passages of testimony relevant to the issue of mental anguish damages. First, Mr. Woodruff testified that he was “*hot*” and that he was “*very disturbed.*” Mrs. Woodruff testified that “it’s just *not pleasant* walking around on cement floors,” that their whole life “*changed,*” and that it was “*just upsetting.*” In addition, she testified that both she and Mr. Woodruff had become “*very quiet,*” and that it had caused “*some friction*” in their marriage. *Id.* at 445 (emphasis added).

The Court ruled that, although the Woodruff’s “felt anger, frustration, or vexation,” these feelings were nothing more than “mere emotions,” which did not rise to the level of compensable mental anguish. *Id.*

It didn't take long for *Parkway* to become "well-established law."

B. The standard is applied – *Stoker, Saenz and Latham*

1. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995)

In 1995, the Texas Supreme Court followed the *Parkway* opinion with *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995). *Stoker*, however, was not a case in which mental anguish damages were truly considered by the majority. Rather, the only issue that the majority considered was whether Republic Insurance Company was liable to the Stokers for denying the Stokers' claim for uninsured/underinsured motorist coverage. *Id.* at 340. The majority took the opportunity in *Stoker* to chip away at the duty of good faith and fair dealing. In her concurring opinion, however, Justice Spector, joined by Gammage, opined that the Stokers' had failed to establish that they had sustained compensable mental anguish, and argued that the majority could have resolved the case on that simple basis. Citing *Parkway*, Justice Spector stated that the following "exchange does not rise to the level of any evidence of compensable mental anguish":

"Q: What was your reaction to the denial?

A: I was *very upset*.

Q: Why?

A: Because I felt like they were obligated to pay for the repairs to my car."

Id. at 342-43 (emphasis added).

2. *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996)

In 1996, the Texas Supreme Court followed *Stoker* with *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996), opinion by Justice Hecht, joined by Gonzales I, Enoch, Baker, Abbott. *Saenz* was a worker's compensation case. The carrier allegedly fraudulently induced Ms. Saenz to settle her claim stemming from a workplace head injury without informing her that she might be entitled to lifetime medical benefits. She only found out when, accidentally, while the carrier was transmitting a copy of her medical records to her, it also sent her correspondence it had received from its attorneys indicating that the carrier had saved money by premitting her potential claim for such lifetime benefits. She sued for fraud, rescission, and mental anguish damages. The jury awarded her \$50,000 in past and \$250,000 in future mental anguish damages.

In determining whether the mental anguish awards were appropriate, the Court considered the plaintiffs' testimony at trial, as follows:

"The only evidence in a three-day trial to support any recovery for mental anguish is the following testimony from Mrs. Saenz:

Q: Can you tell the jury what it is that you were concerned about about this lifetime medical benefits and who was going to wind up paying for the lifetime medical benefits that you were told you were going to incur?

A: I *worried* about that *a lot*. My husband was already working two jobs, and I was *worried also that we were going to lose our house* because when we bought it we had two incomes, and *I knew that we couldn't afford the medical bills* that we were going to have.

The question does not inquire specifically about Saenz' mental anguish, but this is the only place in the record where Saenz testified about any worries or concerns."

Saenz, 925 S.W.2d at 614 (emphasis added).

The Supreme Court then held against Mrs. Saenz, based on its ruling in *Parkway* that mental anguish damages cannot be awarded without "*either* 'direct evidence of the nature, duration, or severity of [plaintiffs'] anguish, thus establishing a substantial disruption in the plaintiffs' daily routine', *or* other evidence of 'a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, embarrassment, or anger.'" *Id.* (emphasis added).

The Court concluded that the two sentences of Saenz' testimony, quoted above, did not fall into either category. "Saenz' concern about future medical expenses, while no less real than plaintiffs' concern in *Parkway*, does not rise to the level of compensable mental anguish." *Id.*

3. *Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1997)

Thereafter, the Court considered whether a plaintiff was entitled to mental anguish damages in a legal malpractice/DTPA case, in which the attorney had failed to timely file a medical malpractice case. *See Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998), opinion by Justice Spector, joined by Phillips, Baker, Abbott, and Hankinson. In determining that the plaintiffs in *Latham* had, indeed, sustained compensable mental anguish, the Court compared the trial testimony in *Latham* to the "*mere emotions*" presented in *Parkway* ("hot," "very disturbed," "not pleased," and "upset), *Stoker* ("very upset") and *Saenz* ("worried a lot"). *Latham*, 972 S.W.2d at 70.

The Court found that "the mental anguish testimony in [the Latham] record, ... exceeds that in *Parkway*, *Saenz* and *Stoker*." *Id.* At trial, Mr. Castillo was asked how he felt when Latham told him that he had not filed their lawsuit timely:

"A: Well, it made me *throw up*.

Q: Made you sick?

A: *Sick*, nervous, mad.

Q: Tell the jury how you felt about that, what it did to you.

A: It just – it just *hurt me a lot* because I trusted in him and I – and if I had known, I would have looked for more lawyers... I trusted him... I would have never stopped."

Id. (emphasis added).

In addition, Mrs. Castillo testified to the following:

“A: I – my heart was broken. I was *devastated*, I felt *physically ill*.”

Id. (emphasis added).

Given this testimony, the Court held that “there is some evidence that Latham’s conduct caused the Castillos a ‘high degree of mental pain and distress that a jury could consider.’” *Id.*

Needless to say, the factual distinctions that the Court made between the evidentiary predicates in *Parkway*, *Stoker*, *Saenz*, and *Latham* are fuzzy, at best. It appears as though the Court is more persuaded when there is some physical manifestation or expression of the mental anguish, such as “*throwing up*” or becoming “*physically ill*.”

Despite what appears to be an obvious bias in favor of physical symptoms, however, the Texas Supreme Court actually “eliminated this ‘physical manifestation’ requirement after concluding that physical symptoms are not an accurate indicator of genuine mental anguish.” See *City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997), citing *Boyles v. Kerr*, 885 S.W.2d 593, 598 (Tex. 1993); *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 650 (Tex. 1987), *overruled on other grounds by Boyles*, 885 S.W.2d 593.

In this regard, the Texas Supreme Court in *Likes* opined that “while we recognize that such **artificial evidentiary barriers** as the *Parkway* standard **may merely encourage exaggeration** and penalize those who deal constructively with life’s vicissitudes, **we continue to insist on such safeguards** because **the law has not yet discovered a satisfactory empirical test** for what is by definition a **subjective inquiry**.” *Likes*, 962 S.W.2d at 495 (emphasis added).

Although the Court has paid lip-service to the concept that the *Parkway* standard does not require a physical component, it sure seems that without some “physical manifestation,” the Court is likely to conclude that the allegations are “*mere emotions*.”

C. The requirement for close judicial and appellate scrutiny is emphasized

The *Saenz* opinion contributed another important element to the analysis, requiring scrutiny of the record not only for the *existence* of mental anguish sufficient to support an award of damages, but the *measure or amount* of mental anguish damages as well.

“Not only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the amount awarded. We disagree with the court of appeals that ‘translating mental anguish into dollars is necessarily an arbitrary process for which the jury is given no guideline.’ While the impossibility of any exact evaluation of mental anguish requires that juries be given a measure of discretion in finding damages, **that discretion is limited. Juries cannot simply pick a number and put it in the blank.** They must find an amount that, in the standard language of the jury charge, ‘would fairly and reasonable compensate’ for the loss. Compensation can only be for mental anguish that causes ‘substantial disruption in... daily routine’ or ‘a high degree of mental pain and distress.’ [citing *Parkway*]. 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.**”

Saenz, 925 S.W.2d at 614 (emphasis added).

Thus, litigants in non-physical injury cases now face not only a restrictive threshold test and elevated evidentiary standard for recovery of mental anguish damages, but a Supreme Court mandate to the appellate courts to conduct a rigorous evidentiary review of same.

Following these cases, the Supreme Court decided *Universe Life Insurance Company v. Giles*, 950 S.W.2d 48 (Tex. 1997). This well-known case is critical in the area of bad faith insurance law, but contains evidence of the Court’s deliberate limitation of recovery in the mental anguish area. The Court states:

“[T]his Court has carefully defined the conditions under which plaintiffs may recover the two primary forms of extra-contractual damages most common in bad faith cases, punitive and mental anguish damages ... Similarly, concerned with the subjective nature of mental anguish damages, **we have admonished courts to closely scrutinize such awards.** [citing *Parkway*]. In *most* cases, plaintiffs may not recover mental anguish damages unless they introduce ‘direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs’ daily routine.’ [citing *Parkway*]. This standard ensures that fact-finders are provided ‘with adequate details to assess mental anguish claims.’ [citing *Parkway*]. In the context of bad faith actions, mental anguish damages will be limited to those cases in which the denial or delay in payment of a claim has seriously disrupted the insured’s life.”

Giles, 950 S.W.2d at 54 (emphasis added).

D. Appellate scrutiny is applied

- 1. Insufficient evidence -- *Gunn Infinity v. O’Byrne*, 996 S. W. 2d 854 (Tex. 1999)**

Then, in 1999, came *Gunn Infinity v. O’Byrne*, 996 S. W. 2d 854 (Tex. 1999), opinion by Justice Owen, joined by Phillips, Hecht, Enoch, Abbott, Hankinson, O’Neill and Gonzales II.

Plaintiff O’Byrne, in the market for a very specific Infinity car, called a San Antonio dealership from his home in Louisiana, and was told that it had exactly the car he wanted, brand new. The Infinity dealership then defrauded Mr. O’Byrne, selling him as new a car that had been damaged, had its hood replaced, and been repainted. It also made other misrepresentations about the accessories, such as an air bag supposedly present in the car. Upon discovery of the fraud, and after failed negotiations for reparation, O’Byrne sued for fraud and DTPA violations, and received from the jury, *inter alia*, an award for \$11,000 in mental anguish damages.

Upon Supreme Court review of the mental anguish damages award, the Court cited the dual propositions that (1) “an award of mental anguish damages will survive a legal sufficiency challenge when the plaintiffs have introduced direct evidence of the nature, duration and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs’ daily routine” [citing *Parkway*] **AND** (2) that “Courts should ‘closely scrutinize’ awards of mental anguish damages.” [citing *Giles*].

In determining whether there was legally sufficient evidence to support a jury verdict on mental anguish damages, the Court reviewed Mr. O’Byrne’s trial testimony, as follows:

“It all goes back to, I guess, what I was told that I was getting. What I did not get. *I have a constant, a constant mental sensation of pain or a rude awakening. It’s like nightmare every time I see the car. ... I have stopped driving the car. ... I get to the point where I can’t stand to be in the car. I notice imperfections and I’m detail oriented, but this is obvious. You can see the discoloration of the hood doesn’t match the fenders of the car. Imperfections on the air dam. You can see a chalky appearance. The unreliability again takes into consideration for a lot of anguish, a lot of grief. I have some severe disappointment both in myself and the dealership, my faith to ever do business again. I felt like I’m publicly humiliated. Yes, my friends do give me a lot of grief. ... My friends pick on me a lot. I had bragged about getting a new car. ...After putting up with ridicule from my friends, I feel embarrassed.*”

Gunn, 996 S.W.2d at 860-61 (emphasis added).

The Court’s conclusion? No mental anguish! In denying recovery, the Court held the following:

“This is not legally sufficient evidence of mental anguish. It does not rise to the level of ‘a high degree of mental pain and distress’ that is ‘more than mere worry, anxiety, vexation, embarrassment, or anger.’ [citing *Parkway*]. Nor is there any evidence that there was a substantial disruption in O’Byrne’s daily routine. ...

The ... testimony that O’Byrne offered to establish mental anguish is **conclusory ... Simply because a plaintiff says he or she suffered mental anguish does not constitute evidence of the nature, duration, and severity of any mental anguish that is sufficient to show a substantial disruption of one’s daily routine.** ...The evidence does not show that it rose to the level of compensable mental anguish.”

Id. at 861 (emphasis added).

2. **“Minor bodily symptoms” not enough -- *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1998)**

The *City of Tyler v. Likes* case² is a significant, though often overlooked case. The opinion in *Likes* has been described by the Court as “our most recent comprehensive discussion of mental anguish damages.” See *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999).

The central holding in *Likes* is that mental anguish based on property damage is not recoverable as a matter of law. But, what makes *Likes* significant is the Court’s clarification that, in addition to the *Parkway* criteria for evidentiary support and magnitude of damages, there are categories of cases in which mental anguish damages are simply not recoverable.

In the opinion, the Court points out that “Texas has authorized recovery of mental anguish damages in virtually all personal injury actions.” *Likes*, 962 S.W.2d at 495, citing *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex. 1995). Thereafter, quoting from several cases that are well over 100 years old, the Court opined:

“Where **serious bodily injury** is inflicted, ...we know that **some degree of physical and mental suffering is the necessary result**’³...Similarly, when the defendant’s negligence causes a **mental shock which produces a serious bodily injury**, the **defendant is liable** for that injury provided it was foreseeable (e.g., plaintiff suffered ‘brain deterioration’ after almost being struck by a bus⁴; plaintiff miscarried after witnessing violent altercation⁵) and mental anguish is one element of damages just as it would be for any other serious injury. **Likes has not claimed damages for bodily injury** [in this property damage/destruction case], however, and the **minor physical symptoms she describes such as difficulty sleeping, are not serious bodily injuries** that can form the basis of recovering mental anguish damages.”

Likes, 962 S.W.2d at 495-96.

² 962 S.W.2d 489 (Tex. 1998), opinion by Justice Phillips, joined by Gonzalez I, Hecht, Enoch, Owen, Baker, Abbott, and Hankinson.

³ *Brown v. Sullivan*, 71 Tex. 470, 10 S.W. 288, 290 (1888).

⁴ *Houston Elec. Co. v. Dorsett*, 145 Tex. 95, 194 S.W.2d 546 (1946).

⁵ *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890).

We see, then, that the Court is systematically elevating the level of injury required before mental anguish damages are recoverable. In a personal injury case, one touchstone is now serious bodily injury.

III. Personal Injury Cases

A. *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002)

In *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002), opinion by Justice Hecht, the Supreme Court applied the *Parkway* and *Saenz* criteria in a personal injury case.

Bentley was a defamation case, in which a television talk show host, Bunton, repeatedly accused a local district court judge, Bentley, of being corrupt.

The jury found that Bunton caused Bentley \$7 million in mental anguish damages and \$150,000 in damages to his character and reputation. The Court agreed that the following evidence was sufficient to support a finding of mental anguish damages:

“The record leaves no doubt that Bentley suffered mental anguish as a result of Bunton's ... statements. Bentley testified that the ordeal had *cost him time, deprived him of sleep*, caused him *embarrassment* in the community in which he had spent almost all of his life, *disrupted his family*, and *distressed his children* at school. The *experience*, he said, *was the worst of his life*. Friends testified that he had been *depressed*, that his *honor and integrity had been impugned*, that his *family had suffered*, too, adding to his own distress, and that he would *never be the same*.

Bentley, 94 S.W.2d at 606-07 (emphasis added).

Although the Court concluded that Bentley was entitled to recover for mental anguish, the Court felt that \$7 million (which was 40 times the amount awarded for damage to reputation) was “not merely excessive and unreasonable; it is far beyond any figure the evidence can support.” *Id.* In this regard, the Court stated that, although “non-economic damages like these cannot be determined by mathematical precision ... they can be determined only by the exercise of sound judgment” and a jury does not have “carte blanche to do whatever it will.” *Id.* at 605. The Court held that “the jury's award of \$7 million in mental anguish damages strongly suggests its disapprobation of Bunton's conduct more than a fair assessment of Bentley's injury.” *Id.*

B. *Houston Livestock Show and Rodeo v. T.L. Hamrick*, 125 S.W.3d 555 (Tex. App. – Austin 2003, no pet.)

The Austin Court of Appeals followed suit in *Houston Livestock Show and Rodeo v. T.L. Hamrick*, 125 S.W.3d 555 (Tex. App. – Austin 2003, no pet.). In *Hamrick*, the plaintiffs were high school student participants in the Houston Livestock and Rodeo, and

their parents. Each student plaintiff had entered farm animals they raised for consideration in the Livestock show. They competed against other students who also entered farm animals into the competition for various prizes, including the proceeds of the sale of their animals in a live auction. The student plaintiffs won their respective categories, but were later disqualified when their animals tested positive for appearance enhancing drugs. The student plaintiffs were not only disqualified but were prohibited from ever again participating in the Houston Livestock Show and Rodeo. The student plaintiffs proceeded to have their animals re-tested. Upon re-test, two of the tests returned negative, but a third remained disqualified.

At trial, the plaintiffs described their mental anguish in the following terms:

- Leslie H. (student): *confused and sick to her stomach* over incident; sometimes at school, I would be in the restroom, and I would *cry; embarrassment* and *nausea*;
- Connie H. (mother): after undergoing surgery for brain aneurism, *migraine headaches increased* in frequency and were caused by ‘*stress and worry*’; *sick to her stomach; lost sleep*; ‘*worried*’ herself until ‘*physically ill*’;
- Lynn H. (father): *humiliated* and had ‘*knots*’ in his stomach; quit attending chamber-of-commerce meetings because he *did not ‘feel like he could face those people*’;
- Jimmy B. (student): *few sleepless nights*; some *loss of appetite*; *knots in his stomach*; grades suffered;
- Jacque B. (mother): she *often cried*; did not go to stock shows anymore; *lost interest* in starting planned businesses; *did not eat or sleep* when she thought of the disqualification;
- Craig B. (father): *consumed* by the disqualification; ‘*overlooked everything else*’ in his life; *not sleeping* well; *daily routine ‘all but stopped*’; family *self-esteem completely taken away*; *negative feelings* still effect business dealings;
- Kevin C. (student): *scared* when questioned by FDA investigators; didn’t receive any awards at FFA banquet, unlike past years; *affected his stomach*; news was ‘*in his head at all times*’; *irritable*; *did not want to go to school*; *no longer rose early* to care for animals.

Hamrick, 125 S.W.3d at 579-80.

Based upon this evidence, the jury awarded each of the three families \$100,000.00 in mental anguish damages. The court of appeals held that the evidence of

mental anguish was sufficient to support both the finding of mental anguish damages and the reasonableness of the award.

C. *Sunbridge Healthcare Corporation v. Penny*, 160 S.W.3d 230 (Tex. App. – Texarkana 2005, no pet.)

The Texarkana Court of Appeals upheld a finding of compensable mental anguish and a \$1 million award for the mental anguish of a resident in a nursing home negligence case. Between November 2000 and February 2001, she fell fourteen times. In March of 2001, a staff member of the nursing home took the plaintiff to visit a physician. She was taken out of the vehicle and placed into a wheelchair, where she was left unattended. Her wheelchair rolled backwards down the sidewalk and threw the plaintiff into a concrete parking lot. She sustained sever injuries, which later caused her death.

In finding compensable mental anguish, the Court distinguished the case from *Parkway*, based on the factual testimony regarding mental anguish elicited at trial, as follows:

“Penny testified that his grandmother *cried as a result of an earlier fall* and had *grown scared of the staff*. White testified to the *expression of fear on Mrs. Penny’s face* as she rolled alone in the wheelchair. Additionally, Mrs. Penny’s *constant moaning and agitation* during her final days indicate she suffered mental anguish. Dr. LeGrow testified that Mrs. Penny *cried in the parking lot after the fall.*”

Sunbridge, 160 S.W.3d at 251.

In addition, the appellate court stated that their decision was actually consistent with the Supreme Court’s ruling in *Parkway* because “the severity of Mrs. Penny’s fatal injuries is probably sufficient, in and of itself, to support an inference that mental anguish accompanied those injuries.” *Id.*

D. *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788 (Tex. 2006)

In a surprising opinion by the Texas Supreme Court, the Court finally drew a distinction between compensable mental anguish damages in a *non-physical injury* case versus a *personal physical injury* case – although the line drawn is still blurred by *Parkway* and its progeny. See *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788 (Tex. 2006), opinion by Justice Green, joined by Jefferson, O’Neill, Brister, and Medina; dissent by Justice Willett, joined by Hecht, Wainwright, and Johnson.

In *Fifth Club*, the Court held that the evidence was legally sufficient to support an award of \$20,000.00 in future mental anguish damages to a bar patron who was assaulted by a bouncer after he was escorted from the bar for being intoxicated. Ramirez arrived at the Fifth Club after several hours of drinking. He tried to enter the bar but was denied.

After Ramirez was denied entry, he was allegedly assaulted by the security guard and sustained multiple injuries, including a fracture to his skull.

In reviewing the sufficiency of the evidence to support an award for mental anguish damages, the Court reiterated the standard set in *Parkway* (i.e., “the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs’ daily routine.”). However, the Court additionally emphasized that “some types of disturbing or shocking injuries have been found sufficient to support an inference that the injury was accompanied by mental anguish.” *Fifth Club*, 196 S.W.3d at 797 (quoting *Parkway*, 901 S.W.2d at 445). The Court then quoted from ancient precedent for the following proposition: “Where serious bodily injury is inflicted involving fractures, dislocations, etc., and results in protracted disability and confinement to bed, we know that some degree of physical and mental suffering is the necessary result.” *Brown v. Sullivan*, 71 Tex. 470, 10 S.W. 228, 290 (1888). The Court based its holding on that notion.

At trial, Mr. Ramirez’s wife testified that he continued to be “*depressed, humiliated, non-communicative, unable to sleep, and angry*, continued to have *headaches and nightmares*, and that his *relationships* with his wife and daughter continued to be *detrimentally affected* almost two years after the incident.” *Fifth Club*, 196 S.W.3d at 797 (emphasis added). Ramirez also presented evidence of the severity of the beating he received by the nightclub security guard, including a *fractured skull* and other significant injuries to his body, his loss of consciousness, hospital visits and medical needs in the future. *Id.* (emphasis added). **“The evidence shows the nature of Ramirez’s mental anguish, its lasting duration, and the severity of his injuries, and is therefore legally sufficient to support future mental anguish damages.”** *Id.* at 797-98 (emphasis added).

Significantly, the Court went to great lengths to distinguish *Fifth Club* from its opinions in *Parkway* and *Saenz*, presumably because the dissent argued that the evidence in *Fifth Club*, as in *Parkway* and *Saenz*, was insufficient to support the jury’s award of future mental anguish damages. *Id.* at 798.

The Court emphasized that the distinguishing factor between *Saenz* (wrongful inducement to settle workers comp claim) and *Parkway* (flooded home) and the subject case was that neither *Saenz* nor *Parkway* involved claims for personal injuries. The Court held: **“We believe the severe beating received by Ramirez provided an adequate basis for the jury to reasonably conclude that he would continue to suffer substantial disruptions in his daily routine of the kind described in his wife’s testimony that he had already suffered in the past. The evidence in this case amounts to far more than mere worry that medical bills might not get paid, as in Saenz, or that someone is disturbed or upset as in Parkway.”** *Id.* (emphasis added).

The curious thing about this opinion is that the Court could have easily reached its holding by relying solely upon *Brown v. Sullivan*, *supra*, and the concept that mental anguish is the “necessary result” of “serious bodily injury ... involving fractures, dislocations, etc.” After all, hadn’t Ramirez suffered serious bodily injuries, including a fractured skull? But, despite paying lip-service to the distinction between non-personal

injury and personal injury cases, the Court felt compelled to commingle the *Parkway* standard into its *Fifth Club* holding (i.e., “lasting duration” of mental anguish, “severity of his injuries,” “substantial disruptions in his daily routine”). Accordingly, the Court seems unwilling to relegate *Parkway* and its progeny solely to non-personal injury cases.

E. *N.N. a/n/f of A.B. v. Inst. for Rehab. and Research*, --- S.W.3d ---, 2006 WL 3513809 (Tex. App. – Houston [1st Dist.] Dec. 7, 2006)(en banc)

The Houston 1st District’s initial opinion in *N.N. a/n/f of A.B. v. Inst. for Rehab. and Research*, 2005 WL 1704808 (opinion withdrawn), was an example of the harm the *Parkway/Saenz* standard can do when misapplied to personal injury cases. Noteworthy, at the time the Houston 1st District Court issued their July 2005 opinion, the Texas Supreme Court had not yet handed down the *Fifth Club* opinion.

After reconsideration *en banc*, the Houston 1st District Court of Appeals withdrew its opinion and judgment of July 21, 2005 and issued *N.N. a/n/f of A.B. v. Inst. for Rehab. and Research*, 234 S.W.3d 1 (Tex. App. – Houston [1st Dist.] Dec. 7, 2006). Curiously, however, on December 5, 2007, on joint motion to dismiss the appeal, the Houston 1st District Court of Appeals dismissed the appeal and withdrew its opinion and judgment of December 7, 2006. Given this bizarre procedural history, the *N.N. a/n/f of A.B.* opinions are of no real precedential value.

In the initial (subsequently withdrawn) opinion, the 1st appellate court denied recovery for future mental anguish damages to A.B., a rape victim! Sadly, the rape victim, who had been in rehabilitation for a brain injury, was unable to give evidence of damages that revealed “a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger.” This being because she was brain damaged! Nonetheless, the evidence clearly showed that she had been raped and that she had been terribly upset by this at the time. However, her inability to give clear testimony about her future damages precluded an award.

Outraged, the dissent correctly argued the following in the initial (subsequently withdrawn) opinion:

“Here, there is ample direct evidence in the record that A.B., while disabled, was the victim of an aggravated sexual assault ... raped by a brain-injured patient as A.B. lay, quite literally, helpless, in her own feces after a bowel movement. It is difficult to imagine a more shocking or particularly disturbing event than what A.B., while helpless, had to endure at the hands of her assailant. Under these circumstances, mental anguish damages are not at all ‘hard to justify,’ and A.B.’s mental suffering, including future mental anguish, should be presumed to flow from such a horrific act.

A sexual-assault victim should not have to provide expert testimony or jump through formulaic, rhetorical hoops to prove the obvious ... that she will carry the burden of having been raped with her for the rest of her life, especially here, given

A.B.'s previous brain injury and the grotesque circumstances. *This simple fact should be beyond dispute by people of good will in a civilized society as 'an acknowledged result of human experience.'*”

N.N. a/n/f of A.B. v. Inst. for Rehab. and Research, 2005 WL 1704808 at *17, July 21, 2005, opinion withdrawn)(dissent)(emphasis added).

Upon rehearing *en banc*, the 1st District Court of Appeals court did a remarkable about-face. Relying heavily on the Supreme Court's *Fifth Club* opinion, the appellate court concluded upon rehearing that there was ample evidence to support the jury's \$625,000 verdict for future mental anguish, as follows:

- A.B. was sexually assaulted in a shocking and disturbing manner;
- A.B. was threatened with physical harm if she told anyone about the assault;
- On the night of the assault, A.B. had a flushed face;
- Shortly after the assault, A.B. began to weep and asked for “mommy”;
- During the 3-year period of time following the assault, A.B. cried, broke down, could not speak, felt heartbroken, feared going to sleep, had trouble sleeping, took medication to sleep, apologized for not stopping the assault, felt ‘dirty,’ and embarrassed about telling her boyfriend about the assault because he would think she was dirty;
- After the sexual assault, A.B. expressed that she felt uncomfortable in the hospital, felt uncomfortable with some sexual positions, and ‘felt dirty’;
- Dr. Perez explained that rape victims commonly respond that they feel dirty;
- Dr. Perez stated that A.B. ‘is suffering from anguish in her implicit memory’;
- A.B.'s impaired explicit memory makes her ‘incapable’ of treatment through traditional counseling or talking therapy;
- Because of the inability to treat A.B. with traditional counseling or talking therapy, A.B. would be unable to ‘put the incident in some sort of perspective’;
- A.B. cannot express her emotions clearly because part of her brain that controls expression of emotion has been removed;
- A.B.'s improving memory will cause her to remember the assault more in the future; and
- A.B.'s implicit memories will not lesson as quickly with the passage of time as would explicit memories.

N.N. a/n/f of A.B., 234 S.W.3d at 10 (opinion withdrawn).

Although the parties in *N.N. a/n/f of A.B.* ultimately filed a joint motion to dismiss this appeal, which prompted the Houston 1st District Court of Appeals to withdraw this excellent opinion in which they finally got it right, it is truly distressing that appellate courts feel pressured by the Texas Supreme Court to forsake the spirit of the law by giving deference only to the letter.

F. *Adams v. YMCA of San Antonio*, 265 S.W.3d 915 (Tex. 2008), reversing 220 S.W.3d 1 (Tex. App. –San Antonio 2006).

This may be the only wrong-righting opinion to come out of the Texas Supreme Court in years. In *Adams*, the Texas Supreme Court found the courage to reverse an incredibly calloused opinion of the Fourth Court of Appeals.

In *Adams*, a YMCA camp counselor, Trimble, was arrested and confessed to molesting about 20 summer campers, one of whom was A.A, a 9 year old boy. A.A. was experiencing his first adventure of summer camp. A.A. testified that one night he awoke screaming and distressed by a bad dream. Trimble came to check on him, got into his bed and dry-humped him. A.A. was dressed in loose-fitting boxers and a t-shirt. The only time A.A. acknowledged the event, he told his parents that Trimble had “dry-humped” him so hard that he thought he was going to fall off the bed.

The evidence at trial established the following:

- When A.A.’s parents learned of Trimble’s confession and asked A.A. about Trimble, A.A. became “*hysterical almost*,” “*went ballistic*,” and was “*inconsolable*;”
- A.A.’s grandfather testified that he witnessed A.A.’s *fury* and *rage* over the incident, and that A.A.’s yelling was so “*visceral*” that it left a “*lasting impression*” on him.
- A.A. was coping with the incident by *not talking* about it;
- A.A. testified that his experience with Trimble was like a book that should be *kept in a vault*.
- Plaintiff’s expert, who is a leading national expert on the traumatic effects of sexual abuse sustained by children, testified that, because A.A. was coping through *denial*, A.A.’s symptoms may not surface until some time in the future and that, in many cases like this, there is an “*enormous reaction*” when the vault opens later in life;
- Plaintiff’s expert testified that if A.A. were forced into therapy before he was ready to discuss the abuse, it would recreate the dynamics that A.A. had experienced when he was under the control of Trimble.
- Plaintiff’s expert testified that the *effects of sexual assault do not simply “go away”* – and the only way to make them go away therapeutically is to provide “*enough treatment with a person to ... process what has happened, so that the [victim] can consciously file it away as a memory*;
- Plaintiff’s expert testified that *sexual abuse robs a child of his innocence and of a natural progressive establishment of some type of normal sexuality* with his own peers;
- Plaintiff’s expert reported that A.A. is *more cautious about strangers* when he is out and about;
- Plaintiff’s expert testified that there were several instances where A.A. exhibited *abnormal outbursts* as a sign of the effects of the incident:

- A.A.’s *emotional state* when his parents asked him about his experiences at camp;
- The letter that A.A. addressed to Trimble that was filled with *profanity*;
- A.A.’s *failure in math class*, which was caused by a phobic anxiety because the male math teacher’s inappropriate conduct (e.g., snapping girl’s bras and slapping boys on the butt) triggered memories of Trimble; and
- A.A.’s *comments to his grandfather* about his feelings towards Trimble.
- A.A.’s father testified that A.A. carries a *deep shame*; and
- A.A. testified that he was *angry* at Trimble, and would *always remember* the incident.

The jury determined that (1) Trimble intentionally or knowingly caused serious mental impairment or injury to A.A.; (2) the YMCA’s negligence in hiring/retaining/supervising Trimble proximately caused the injury; and (3) A.A. sustained no past mental anguish, but will likely sustain \$500,000 in future mental anguish damages.

Despite the evidence presented to the trial court, the 4th Court reversed the judgment of the trial court and rendered a take-nothing judgment against Adams! The 4th Court determined that Adams had not met his burden in proving compensable mental anguish. Forsaking the spirit of the law and giving deference only to the letter, the 4th Court held that, “circumstantially, A.A.’s behavior and reactions are no evidence that there was a substantial disruption in A.A.’s daily routine or that A.A. suffered from a high degree of mental pain and distress.” *Adams*, 220 S.W.3d at 4 (Tex. App. – San Antonio 2006). In addition, the 4th Court held that, since the jury failed to award *past* mental anguish damages, “the jury implicitly rejected the proposition that mental anguish is a natural consequence of the event or injury that A.A. endured ... and the jury could not have concluded otherwise for *future* mental anguish.” *Id.* at 6 (emphasis added).

The Texas Supreme Court applied a traditional no-evidence standard to determine whether the “record reveals any evidence of a ‘high degree of mental pain and distress’ that is ‘more than mere worry, anxiety, vexation, embarrassment, or anger.’” *Adams v. YMCA of San Antonio*, 265 S.W.3d at 915, quoting *Parkway*. The Texas Supreme Court held the following:

The jury’s failure to award damages for A.A.’s past mental anguish does not mean that they found no injury to A.A. in the past; to the contrary, the jury specifically found that Trimble’s conduct “cause[d] serious mental impairment or injury [to A.A.]” The jury’s allocation of damages was entirely consistent with the testimony presented that A.A. was coping well by repressing his intense distress, which would inevitably surface in the future. We have recognized the consensus among experts that child victims of sexual abuse frequently repress and suppress memories and emotions associated with the event until their adult years. ... The evidence of A.A.’s emotional outbursts and phobic anxiety, coupled with the expert testimony, supports a reasonable inference that an “enormous” reaction is likely when the “vault” of A.A.’s memory opens. Texas law permits jurors to

make such a determination, and the trial court did not err in rendering judgment on their verdict.

Adams, 265 S.W.3d at 919.

IV. Conclusion

The Texas Supreme Court's goal of precluding the recovery of mental anguish damages in most cases is almost complete. In *Parkway*, the Texas Supreme Court created a strict legal standard for recovering mental anguish damages in non-personal injury cases and, later, deftly applied that onerous standard to personal injury cases. At the same time, the Texas Supreme Court mandated that trial and appellate courts closely scrutinize all awards for mental anguish.

The application of the *Parkway* standard, and the mandate of close judicial scrutiny, has had a bone-chilling effect on the recovery of mental anguish damages in personal injury cases. Most recently, the combination resulted in the *Adams* opinion by the Fourth Court of Appeals, which, thankfully, the Texas Supreme Court had the good sense to overturn.

Now, more than ever before, it is now imperative for Trial Lawyers to devote considerable time and attention to ensuring that the evidentiary predicate laid at trial for the recovery of mental anguish damages is sufficient to withstand close scrutiny on appeal.