

## Lessons From The *Golden Eagle*

By David W. Holman<sup>1</sup>

Ah, no, grasshopper, you will not learn today lessons from abstruse Eastern oracles. Instead, you will learn the secrets from an abstruse opinion styled *Golden Eagle Archery, Inc. v. Jackson*—an opinion issued by the Texas Supreme Court in September, 2003<sup>2</sup>. That opinion will have a significant impact on litigation because, among other things, it provides new definitions and instructions for multiple damages submissions in personal injury cases, and new standards of review for challenges to damages findings on appeal.

When the opinion was issued, appellate practitioners, including myself, described the opinion as “baffl[ing]”(me) and “difficult to understand” (Wendall Hall) and “exceedingly odd.”(James Paulsen)<sup>3</sup>. In dissent, Justice Harriett O’Neill stated that if she were directed to apply the new standards, “I wouldn’t have a clue.”<sup>4</sup>

That having been said, I have now had an opportunity to analyze the opinion in depth and—although I still do not feel that I yet have a complete understanding—I at least feel that I have enough of a working knowledge of the opinion so as to pass along some of the lessons learned.

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<sup>2</sup> *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757 (Tex. 2003)(hereinafter “*Golden Eagle*”).

<sup>3</sup> See “Factual Sufficiency Review Standard Perplexes Judges”, *Texas Lawyer*, at 1, 24 (September 22, 2003).

<sup>4</sup> See *Golden Eagle*, 116 S.W.2d at \_\_\_\_ (O’Neill, J., dissenting, joined by Schneider, J.).

## Background

*Golden Eagle* is a product liability action. Ronald Jackson was severely injured when a metal rod on a compound hunting bow struck him in the eye, causing fractures to the orbit around his eye, a ruptured sinus, a broken nose, hospitalization, reconstructive surgery, and some permanent loss of vision.<sup>5</sup> The jury found that there was a marketing defect in the bow, but awarded damages as follows:

- a. Medical care: \$25,393.00
- b. Physical pain and mental anguish: \$2,500.00
- c. Physical impairment of loss of vision: \$2,500.00
- d. Physical impairment other than loss of vision: \$0
- e. Disfigurement: \$1,500.00
- f. Loss of earnings in the past: \$4,600.00

The trial court entered judgment on this verdict. Mr. Jackson appealed, contending, among other things, that the jury findings were inadequate or supported by factually insufficient evidence.<sup>6</sup> The court of appeals found that the jury's finding of zero damages for physical impairment other than loss of vision was so against the great weight of the evidence as to be manifestly unjust, and the court of appeals remanded for a new trial.

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<sup>5</sup> *Golden Eagle*, 116 S.W.3d at 760.

<sup>6</sup> This was actually the second trip to the Supreme Court for Mr. Jackson. The court of appeals first held that there was rampant jury misconduct and that the rules that prevented the admissibility of testimony concerning juror misconduct were unconstitutional. The Supreme Court reversed, and held that the rules were constitutional and that there was no jury misconduct. *See Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 364 (Tex. 2000). The Supreme Court remanded to the court of appeals for consideration of the other points not reached.

The Supreme Court of Texas reversed that judgment and remanded to the court of appeals to conduct another factual sufficiency review. In discussing factual sufficiency review, the Court forayed into a number of other areas.

### **Lessons Learned**

#### **1. New Instruction To Prevent Double Recovery.**

In multiple element damages submission, the Pattern Jury Charge recommends the inclusion of the following instruction to prevent double recovery:

Consider the elements of damages listed below and none other.  
Consider each element separately. Do not include damages for one element in any other element.<sup>7</sup>

The trial court in *Golden Eagle* submitted that recommended instruction. No one objected.

However, the Supreme Court approved another instruction as “clearer.”<sup>8</sup> That instruction reads:

In answering this special issue you shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss, that is, do not compensate twice for the same injury.<sup>9</sup>

Thus, to prevent double recovery, litigants should use the Court’s approved instruction instead of the Pattern Jury Charge instruction.

#### **2. New Definition of Physical Impairment.**

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<sup>7</sup> TEXAS PATTERN JURY CHARGE PJC 8.2.

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*Golden Eagle*, 116 S.W.2d at 770.

<sup>9</sup> *Id.* (quoting from *French v. Grigsby*, 567 S.W.2d 604, 608 (Tex. Civ. App.—Beaumont), writ ref’d n.r.e., 571 S.W.2d 867 (Tex. 1978)).

In review of the factual sufficiency of the evidence, the court of appeals used the definition of “physical impairment” that the courts of appeals have frequently used for the past thirty years:

[T]o recover damages for physical impairment, a plaintiff must prove “that the effect of his physical impairment extends beyond any impediment to his earning capacity and beyond any pain and suffering to the extent that it produces a separate and distinct loss that is substantial and for which he should be compensated.”<sup>10</sup>

After reviewing opinions from Texas and other jurisdictions, the Supreme Court held that the court of appeals should not have applied that traditional definition:

The widely disparate views of courts in Texas and across the country lead us to conclude that in the case before us today, the court of appeals should not have applied the definition of “physical impairment” so frequently quoted by Texas courts of appeals in considering the factual sufficiency of the evidence.<sup>11</sup>

The Court gave the following reasons why the court of appeals erred in using the traditional definition: (1) the definition did not “eliminate the overlap among physical impairment, pain, suffering, mental anguish, and disfigurement”; and (2) the definition was “not given to the *jury* in this case.”<sup>12</sup>

While the Court did not write the definition of “physical impairment” that should be submitted to the jury, the Court did say what such definition would include:

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<sup>10</sup> 29 S.W.3d at 928 (quoting *Blankenship v. Mirick*, 984 S.W.2d 771, 777 (Tex. App.—Waco 1999, pet. denied); see *Golden Eagle*, 116 S.W.2d at 756-773 (discussion of parameters of physical impairment).

<sup>11</sup> *Golden Eagle*, 116 S.W.2d at 769.

<sup>12</sup> *Id.* at 770 (emphasis in original). It is noted that the defendant never objected or requested that Mr. Jackson submit a definition of “physical impairment” to the jury.

Accordingly, if “physical impairment” is defined for a jury, it would be appropriate to advise the jury that it may consider as a factor loss of enjoyment of life. But the jury should be instructed that the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity and that a claimant should not be compensated more than once for the same elements of loss or injury.<sup>13</sup>

Two lessons come from this discussion. First, although the universal practice had been not to define “physical impairment”, the Supreme Court tells us that a definition of “physical impairment” should be given to the jury. Second, the old definition of “physical impairment” no longer applies. To properly define “physical impairment”, it will be necessary to include the elements suggested in the Supreme Court’s discussion.

### **3. Define Individual Damages Elements.**

Before *Golden Eagle*, the universal practice, as set forth in the Pattern Jury Charges, was to not define individual elements of personal injury damages.<sup>14</sup> Indeed, the Supreme Court in *Golden Eagle* notes that “defining damage categories for juries in such a way that they do not overlap . . . **may not be feasible** . . . .”<sup>15</sup> However, in several places in the opinion, the Supreme Court states that the new standard of review is required because damage elements were **not defined** for the jury.<sup>16</sup> Further, as pointed out above, despite the

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<sup>13</sup> *Id.* at 772.

<sup>14</sup> TEXAS PATTERN JURY CHARGE PJC 8.2.

<sup>15</sup> *Golden Eagle*, 116 S.W.3d at 770 (emphasis added).

<sup>16</sup> *Id.* at 763 (“For the reasons we consider below, we conclude that this evidence pertains to more than one of the categories that were submitted, particularly in light of the fact that neither ‘physical impairment’ nor any of the other damage elements were defined.”); *id.* at 770 (“Given that some of the categories of damages submitted to the jury in this case were not defined and therefore not cleanly and clearly segregated from one another, the question, then, is how should the court of appeals review the factual sufficiency of the evidence supporting the jury’s award for physical

fact that no one objected in the trial court, the Court criticized the court of appeals' definition of "physical impairment" because that definition "was not given to the *jury* in this case."<sup>17</sup>

Thus, to avoid the question of overlapping damages, it appears that the Court is telling litigants to provide a definition of each element of damages, where possible.

#### **4. Submit Damages With A Single Line.**

For years, appellate lawyers have counseled that the prudent procedure would be to submit damages elements individually; that way, if one of the damages elements is without evidentiary support, the court of appeals need only reform the judgment, not remand for a new trial.<sup>18</sup> However, after *Golden Eagle*, it appears that the case should be submitted with one answer line for all damages.

Because the jury answered separately for each element of damages, the Court developed a complex standard of review to determine whether there is sufficient evidence to support all "overlapping" categories of damages.<sup>19</sup> But, the Court notes that such a standard of review does not apply if the jury answers for all damages on a single line.<sup>20</sup> In fact, the standard of review of such a single-line damages submission is much less foreboding. The Court explains that standard of review as follows:

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impairment.”).

<sup>17</sup> *Id.* at 770 (emphasis in original)

<sup>18</sup> Such is also the counsel of the drafters of the Pattern Jury Charges. *See* TEXAS PATTERN JURY CHARGE PJC 8.2, *Comment*.

<sup>19</sup> *Golden Eagle*, 116 S.W.3d at 770-775.

<sup>20</sup> *Id.* at 771.

In the latter circumstance [single-line submission], we have held that a challenge must address all the elements that could have been considered by the jury in making its total, single-amount award. “If there is just one element that is supported by the evidence, the damages award will be affirmed if it is supported by the evidence.”<sup>21</sup>

The single-line standard of review, then, only requires that there be some evidence to support any of the individual damage elements. The multiple-line standard of review requires that there be a comprehensive analysis of the evidence to support all of the elements of damages. Thus, prudence would appear to dictate that the litigant would seek to submit all damages elements with a single line answer.<sup>22</sup>

## **5. Hedonic Damages Are Recoverable.**

A few years ago, courts were deluged with requests to award so-called “hedonic” damages—or, damages for loss of enjoyment of life. Texas courts of appeals “uniformly” held that hedonic damages could not be a separate category of damages.<sup>23</sup> However, the Supreme Court noted that it had never decided “whether loss of enjoyment of life can be an element of recovery.”<sup>24</sup>

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<sup>21</sup> *Id.*(quoting in part *Greater Houston Transp., Inc. v. Zrubeck*, 850 S.W.2d 579, 589 (Tex. App.—Corpus Christi 1993, writ denied)).

<sup>22</sup> The Court’s holding in *Golden Eagle* on the standard of review for single-line damages submissions is difficult to reconcile with the Court’s earlier holding in *Harris County v. Smith* that where certain individual damage elements were not supported by the evidence, the trial court’s broad-form submission of damages was error. 96 S.W.3d 230 (Tex. 2002). The distinction may lie between factual sufficiency review and legal sufficiency review. However, a full discussion of this problem will have to await another day.

<sup>23</sup> *Golden Eagle*, 116 S.W.3d at 767 n. 42 (citing cases).

<sup>24</sup> *Id.* at 766.

In *Golden Eagle*, the Supreme Court held that hedonic damages are recoverable as part of physical impairment damages.<sup>25</sup> The Court said, “loss of enjoyment of life fits best among the factors a fact finder may consider in assessing damages for physical impairment.”<sup>26</sup> In fact, the Court noted that if other elements such as pain, suffering, , mental anguish and disfigurement are submitted, “there is little left for which to compensate under the category of physical impairment other than loss of enjoyment of life.”<sup>27</sup> The Court also held that it was “appropriate” to include loss of enjoyment of life in the definition of “physical impairment” submitted to the jury.<sup>28</sup>

#### **6. New Standard Of Review For Multiple-Line Damages Submission.**

Although the Supreme Court in *Golden Eagle* discussed the standard of factual sufficiency review for single-line damages submissions, the central thrust of the opinion was the creation of a new standard of factual sufficiency review where there are several damages elements, each with a separate answer on the amount of damages. The new standard of review is difficult to follow, but may be summarized as follows<sup>29</sup>:

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<sup>25</sup> *Id.* at 772.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> This is the standard of review when the appellant attacks the evidence to support multiple damages findings. If the appellant only attacks one finding, and the evidence under that category is not against the great weight and preponderance of the evidence, “the court’s inquiry should end there.” *Id.* at 773.

First, the court of appeals should review each of the categories of damages and consider the evidence “unique to each category.”<sup>30</sup>

Second, if, after considering the “unique” evidence, the court of appeals decides that the jury’s failure to award larger damages in that category is against the great weight and preponderance of the evidence, the court of appeals should consider all the “overlapping” evidence, “together with the evidence unique to each other category to determine if the total amount awarded in the overlapping categories is factually sufficient.”<sup>31</sup>

The Court also held that courts of appeals should not conclude that a jury’s failure to award any damages for physical impairment is against the great weight and preponderance of the evidence “simply because there is objective evidence of injury.”<sup>32</sup>

This new standard of factual sufficiency review will apply any time an appellant in a personal injury case<sup>33</sup> challenges a jury finding of damages or a finding of zero damages as being so against the great weight and preponderance of the evidence as to be manifestly unjust.

## **7. New Standard of Review For Excessiveness.**

The *Golden Eagle* opinion did not just discuss the challenges to the inadequacy of jury findings. As a “necessary corollary”, the Court also discussed challenges that an award for

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 774.

<sup>33</sup> The Court distinguished between the non-economic damages at issue and economic damages not subject to the opinion. *Id.* at 763.

a category of damages is excessive.<sup>34</sup> When the court of appeals is faced with a challenge that the award is excessive because there is factually insufficient evidence to support it, the court of appeals “should consider all the evidence that bears on that category of damages, even if the evidence also relates to another category of damages.”<sup>35</sup> If more than one award is challenged as excessive, the court of appeals “should consider all the evidence that relates to the total amount awarded in all overlapping categories to determine if the total amount awarded was excessive.”<sup>36</sup>

Thus, the *Golden Eagle* opinion creates a new standard of review for plaintiffs who challenge the inadequacy of jury awards and for defendants who challenge the excessiveness of jury awards.

#### **8. The Case Argued Is Not The Case Decided.**

Finally, on a practical note, one of the lessons learned from *Golden Eagle* is that the case argued before the Texas Supreme Court is not necessarily the case decided. The appellant, Golden Eagle Archery, contended that the zero damages rule violated the traditional standard of factual sufficiency review. That was the issue briefed and the issue argued.

The opinion, on the other hand, never addressed that issue. Instead, it addressed entire areas of the law and issues that were not briefed nor argued. With regard to the new standards of review that were created by the Court, there was no hint that the Court was even

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<sup>34</sup> *Id.* at 773.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

considering the new standards. Not a single question on a new standard of review was asked at oral argument. Thus, this opinion teaches that whatever may be the issues, the practitioner should anticipate the unanticipated.