

## Mitigation of damages: Professional obligations for the expert witness computing damages

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Economic damages experts are often confronted with legal theories that must be carefully applied to their casework within the context of the economic analysis. One example is the Mitigation of Damages Doctrine.

The Mitigation of Damages Doctrine is actually quite straightforward. It simply says that anyone who has suffered a loss or an injury of some sort is expected to take realistic steps to prevent further loss or injury, except if doing so would be impossible financially or result in severe hardship. In fact, if a plaintiff refuses to take steps that would be considered prudent and reasonable, a court can justifiably reduce the amount of money recoverable by the plaintiff or eliminate damages entirely. However, it is normally the defendant's responsibility to prove that the plaintiff failed to properly mitigate or eliminate damages entirely.

Consider the following hypothetical case: the plaintiff is crossing a street when the defendant drives through a stop sign and hits the plaintiff with their car, breaking the plaintiff's arm. Now, if the plaintiff seeks immediate medical care and recovers completely, with full and unaffected use of their arm, a court may well decide that the defendant is liable for the injury and require that the driver pay damages – that is, the driver must cover the costs of tests, medical care, and therapy for the injury.

Suppose, on the other hand, that the plaintiff does not seek medical care; that they refuse to consult a doctor and, as a result, becomes permanently disabled. In this case, the court might reasonably conclude that the plaintiff failed to mitigate damages. So, even if the court still holds the defendant liable for the accident, the compensation received by the plaintiff may

amount to no more than they would have received had they sought the appropriate medical care. The plaintiff would not be entitled to the amount their now permanent disability might cost them, such as lost salary, reduced career prospects, lack of mobility, and so on.

In another example, an owner of a commercial building experiences a serious problem in one of the rental units, caused by the actions of another tenant, leading to the vacancy of the affected unit. The owner cannot just leave the damaged space unrepaired, then claim damages. Instead, the owner should take the necessary steps to fix the problem and make reasonable efforts to secure a new tenant.

If such efforts, which the original tenant can prove could have been made, but were not, the tenant can agree to have damages reduced or eliminated. It is the expert's job to consider the economic impact of actual or possible mitigation.

Nothing in law is easy, but the hard part in such cases is determining what an expert witness will need to consider when called upon to provide a damage computation for a plaintiff; that, and how that expert witness computes an offset to the damages for mitigation of loss where such mitigation was or is still feasible. When damages are forecast into the future, the impact of potential mitigation continues to exist and ought to be considered when quantifying damages for lost net profits.

A distinction should be made between the kinds of expert who might be called to testify in a case involving economic damages. On the one hand, there are fact witnesses who will testify about liability. There may also be experts

called upon to testify to issues of liability, whose main role is to establish whether or not a particular action taken by the defendant did, or did not, result in harm being done to the plaintiff. As the damages expert knows, the fact of damages must be proved before there can be an economic consequence.

However, the expert who is called upon to assess damages has one single, solitary purpose: to determine the 'value' – the dollar amount – of the injuries or impairments suffered by the plaintiff. Contrary to popular belief, such experts are not required to testify as to who caused the damages at issue. They simply create a causal link between the action(s) that led to the proposed loss and then apply a series of complex formulas and intricate calculations to the testimony rendered by the damage experts to arrive at the dollar amount awarded once the facts have been proved.

Once again, nothing is as simple as it seems. Although experts on economic damages may concur on the nature and extent of the injuries sustained by the plaintiff, that is where any agreement will probably end. There is every chance that the 'value experts' retained by counsel for the plaintiff and the defendant will disagree on what constitutes a 'fair' financial settlement.

This is to be expected even though the experts on either side of the courtroom or deposition table might employ similar methodologies or assessment approaches. The reasons for the divergence may vary, but it often comes down to the fact that the 'values' they assign are probably founded on conflicting assumptions about the extent of the 'suffering' alleged by the plaintiff or how the facts have been applied to the particular case.

Loss comes in many forms: lost net profits, lost future income streams, increased costs due to delay, etc. In many cases, the loss of income also generates saved costs, which must be considered as reduction of damages.

So, what can a court reasonably expect of 'value experts'? What are 'value experts' able to contribute to the proceedings? They focus on those elements that can be assigned a quantifiable market value. For example, net profits before and after a specified event or series of events can be measured with the delta equating to the loss. When the loss is projected into the future, there is a need for the expert to reduce the projected damages to present value (normally date of trial), using an appropriate discount rate. Discount rates will vary, depending on the particular industry and the relative time frame involved in the matter. Experts for both plaintiff and defendant will likely have differing views on the most appropriate discount rate.

However, 'value experts' are not restricted to determining potential lost net profits. They can also project the other costs a plaintiff might face, such as the increased expenses due to delay caused by the actions of the defendant. In cases where there is an impact of delay, the damages expert should consider the potential impact of higher costs of inflation or other factors.

As long as a 'value expert' can formulate estimates (for the losses of the injured plaintiff) based on evidence or reliable testimony in the case, then the expert's testimony will likely be found to be based in sound logic. The use of proper methodology and the correct application of facts to build opinions will be essential to survive a Daubert challenge.

Some experts make a grave mistake by failing to consider mitigation. They may be unduly influenced by their client – likely the plaintiff, who prefers to claim economic damages against one or more parties instead of taking reasonable and available steps to recoup projected losses through new efforts, thereby reducing damages they otherwise might be able to claim. I believe the damages expert should consider the issue of mitigation even when their client prefers they ignore it. Failure to raise the concern at the time of proposed retention could lead to a possible clash of philosophies between the expert and the attorney.

Otherwise, the model of damages preferred by the expert will be subject to rebuttal from the defence expert. Therefore, due consideration of this potentially offsetting damage element can help to decrease the plaintiff's vulnerability to dilution of credibility of their claim, were mitigation to be completely ignored or inadequately measured.

*If you have any questions or would like to discuss this article further, please contact:*

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