Focus PERSONAL INJURY

Mitigation can be a double-edged sword

Stephen Moore

Every personal injury lawyer is aware of the duty to mitigate. Most of us spend very little time thinking about it. We rarely incorporate mitigation concepts into our discoveries or into the questions that we pose for our expert witnesses. Failing to appreciate the role of the duty to mitigate can lead to real problems for both defendants and plaintiffs.

Lord Justice Pearson's oft quoted judgment in *Darbishire v. Warren* [1963] 3 All E.R. 310 aptly summarizes the duty: "It is important to appreciate the true nature of the so-called 'duty to mitigate the loss' or 'duty to minimize the damage.' The plaintiff is not under any obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases, but not at the expense of the defence."

Mitigation is, however, a two-edged sword. If the plaintiff fails to mitigate, then he or she cannot recover the damages which could have been avoided. However, plaintiffs are entitled to recover any expenses reasonably incurred in an attempt to mitigate, even if the attempt fails.

The onus is on the defendant to prove three things — namely, the steps the plaintiff might have taken to avoid the loss; that it would have been reasonable for the plaintiff to have taken such steps, and; the extent to which the loss would have been reduced if the steps had been taken.

The most perplexing questions in the law of mitigation concern reasonableness. The duty to mitigate often bumps up against the thin-skull principle. The most obvious examples concern plaintiffs who are afraid to undergo recommended medical treatment such as surgery.

The courts have attempted to resolve this issue. The current law appears to excuse the plaintiff if they have a pre-existing fear of medical treatment which actually prevents them from making a rational decision. Similarly, if the accident creates the fear and it prevents the plaintiff from making a rational choice, then the plaintiff will also probably be excused. However, if the reason the plaintiff does not wish to undergo the treatment arises following the accident but was not caused by the accident, then the plaintiff will not be excused from mitigating their loss.

Where the plaintiff receives conflicting medical opinions, then he or she may be at liberty to forego recommended treatment. The onus of showing that the refusal was not reasonable lies upon the defence.

Generally, genuinely held religious, cultural, family or financial reasons which pre-date the accident will excuse the plaintiff from mitigating. The most obvious example would be a refusal to undergo surgery which requires a blood transfusion for religious reasons. However, if the plaintiff adopted this religious belief after the accident, this may not excuse the refusal.

Plaintiffs' counsel should be vigilant on the issue of mitigation. Both plaintiff and defence doctors will make a myriad of recommendations for treatment. All should be discussed with the plaintiff and the medical team to ensure that reasonable recommendations are acted upon. If a recommendation is not going to be acted upon, then the plaintiff's experts should document the reasons.

Plaintiffs' counsel must also be diligent in documenting and claiming any costs incurred by the plaintiff for reasonable attempts to mitigate. Examples would include the cost of medical treatment or the cost of hiring a replacement worker to fill in for the plaintiff in a family business.

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If a plaintiff does not want to undergo a particular medical treatment, they need to understand the impact that such a refusal may have on their recovery. Plaintiffs' counsel should also canvass whether the recommendations are actually reasonable, or whether a medical opinion can demonstrate that a proposed treatment will not be as effective as claimed or carries unreasonable risks for the plaintiff.

Defence lawyers often obtain expert opinions that the damages would be less if a particular step had been taken. However, they often fail to document how much less, and the onus is on the defence on this issue. Your experts must understand onus and address all three questions in their reports.

Mitigation is not just defence — it is also a concept permits plaintiffs to augment recovery. Every personal in lawyer needs to consider how legal concept can affect each every case they are handling.

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'MZU SUX' OK, court rules

It was a decision that will hearten champions of free speech but inflame inter-college football animosity. A Missouri state appeals court has ruled that a University of Kansas Jayhawks fan can keep the personalized licens plate on his vehicle despite the fact that the plate insults the school's bitte sports rival the Missouri Tigers, Courthouse News Service reports. The Missouri revenue director attempted to recall the plate after receiving a complaint that Toby Gettler's personalized plate that reads "MZU SUX" – shorthand for "Mizzou Sucks" – was obscene. Gettler challenged the decision, citing, among several examples, the Merriam-Webster Online Dictionary's definition of the word, which is "to be objectionable or inadequate." The Administrative Hearing Commission found in favor of Gettler on Oct. 1 last year. On Oct. 17, the Missouri Court of Appeals Western District upheld the commission's ruling with a unanimous decision against the Director of Revenue. "Competent and substantial evidence supported the AHC's determination that Gettler's license plate v not obscene to the average person applying contemporary community standards," Chief Judge James Welsh wrote for a three-judge panel. – **STA**