

STRADDLING THAT VERY FINE MENDOZA-DAUBERT LINE: RESISTING THE TEMPTATION TO CUT CORNERS OR ADVOCATE

Tony Wayne CPA, CVA, CFF, CIRA, FCPA

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Thirty years ago, in the midst of an early-season slump, George Brett told reporters, "The first thing I look for in the Sunday papers is who is below the Mendoza line." Brett, who went on to hit .390 that year for the Kansas City Royals, was referring to Mario Mendoza, a light-hitting shortstop for the Seattle Mariners whose surname became synonymous with hitting futility.

While the term Mendoza Line has come to symbolize the .200 mark in baseball parlance, the phrase has also crossed over into America's pop culture lexicon and is frequently used to describe almost any type of sub-par performance, from the performance of stocks and mutual funds to bad grades and to quotas for salespeople.

A few months ago, I was contacted by a para-legal with a national law firm about possibly assisting them on future lost wage analyses. She tracked me down on the internet (yes, it **can happen**) and emailed me as follows (emphasis added):

*We are looking for someone to do some **simple** economics work for lost wages on a couple of cases. Would you mind sending me your CV?*

In response, I offered to make the easy trip to their offices on my dime for an intro meeting.

Her reply (emphasis added)?

*Until we have a case that we can talk about specifically, I feel that it would not be beneficial for you to make the trip. Perhaps in the near future we can identify a case and set a time for you come to meet with us about what you can do for us. (It is more incentive to get more than one attorney to meet with you when you are here if we are actually thinking we are going to give you work to do, don't you think?) Then take the materials, meet with the client if you need to, and **work your magic** returning figures to us. I doubt that it would be more than a couple of months. I just must have an economics person who I can rely on for those several cases a year where we really need them. Now, on the other hand, **if you also do a "mini" report for those clients who have had reduced wages for a period of time or who have lost their part-time wages or even those who didn't earn that much, let me know. I still have no idea about the cost of your reports. I can't justify paying you \$1,000 to gain \$3,000.***

Will that work for you?

I replied by emphasizing that IronHorse does outstanding work in highly complex cases where the stakes are quite high. And, I explained that we were "not the cheapest on the block," but we added "considerable value" (thank you friends at SEAK! ☺). Lastly, I suggested if she was hunting for a "one size fits all, commodity-type solution" then we were not their best fit. If fees and costs were their over-riding or primary concern, I offered to make some recommendations.

Surprised as I was, I received the following email from her just this past week:

We are planning to use your services to establish the amount of lost future wages for a client. How much time do you generally need between the time you receive documents/information and the time the report is finished? What information do you need? Do you have any sort of list of items which need to be provided to you?

Tax returns for the past several years; our Client's date of birth; how long they expected to continue to work I would think would be information necessary to make your report.

And once again, I suggested in response at least a phone conference to discuss and clarify the need for additional information about the pertinent facts in the subject case in question before providing an estimate. I reminded her that cliché as it may seem, each case is different in terms of:


- a. The specific case facts and circumstances
- b. The nature of the claim (s)
- c. Local venue case law and protocol
- d. Claimant's line of work and industry conditions
- e. Work history
- f. Degree of disability (if any)
- g. Mitigating compensation opportunities
- h. Case history/status to this point
- i. Urgency in terms of discovery timing, scheduled hearings, etc.

With this additional information, we would be in a stronger position to work up an initial work program and better estimate the time needed from start to finish. I explained that whether the case is wrongful term, PI, diminished capacity to earn, etc., local rules and the specifics of the case can and do influence the nature of the work product and how we compile/present the findings.

We had that phone call.


Needless to say it was short and a bit sweet, and I suggested again that we may not be the best fit given retained counsel's desire not to consider "off-sets" (mitigating compensation) because of the straight-forward nature of a "total disability claim".

From their home-page:



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DESIGNING AN ECONOMIC MODEL OF LOST COMPENSATION

The objective of a lost compensation analysis is to provide an estimate of compensatory amount that would make a plaintiff whole, or in other words, that would restore the plaintiff's pre-incident earnings-related conditions. It is the role of the economic expert to provide an estimate of the compensatory amount that would satisfy this objective. Lost compensation analyses are not "one-size-fits-all". Jurisdiction, type of claim, and employment and economic data are factors that play a key role in the design of the lost compensation model that fits the case.

The court in *Nunez v. Palmer*, 96 Conn. App. 707, 902 A.2d 660 (2006), outlined the factors to be considered in determining a plaintiff's **loss of earning capacity** due to the defendant's negligence. The court made it clear that past wages or income are merely evidentiary facts than can form the basis for an award:

In determining whether there is a loss of earning capacity the essential question is whether the plaintiff's capacity to earn [has been] hurt. Wages before and after an accident are only material as guides to the trier. The assessment of such damages does not depend on the plaintiff's receipt of any wages at all because it is the capacity to earn that governs the amount of damages to which a plaintiff is entitled. Recovery of damages for loss of earning capacity is not merely a recovery of wages lost. Salary or wages earned at the time of the injury are merely evidential facts, relevant but not conclusive, in the inquiry as to the pecuniary value of the impairment of earning capacity which an injured person has sustained.

Earnings of a person are merely evidence in aid of the establishment of value of earning capacity and do not themselves fix the value thereof for the purposes of an award of damages based in part on impairment of earning capacity. When a plaintiff is alleging a diminution in earning capacity or a complete loss of earning capacity, his claim of proof should be based on the market value of his services.

CROSSING THE MENDOZA LINE

As expert testimony became more and more commonplace in our court system, the United States Supreme Court determined that judges must insure that all scientific testimony for which a party seeks admission is not only relevant but reliable. ***Daubert v. Merrell Dow***, 519 U.S. 879 (1993). The Court held that it was the role of the trial judge to determine whether the methodologies used by expert witnesses were scientifically valid. If not, the opinion witness testimony should be ruled inadmissible.

Reduced to its simplest terms, the cross-examination of an opposing party's expert is often focused upon a single theme: the witness has been paid to manipulate otherwise straightforward figures for the purpose of delivering as high (or low) a damages total as possible. Moreover, most plaintiff attorneys work primarily with but one or two experts in similar cases. If plaintiff's counsel has an active practice, an expert often consults many times with her each year. This fact may be helpful to defense counsel in several ways. First, the bias of "purchased testimony" is apparent. Second, plaintiff's counsel may become complacent in his preparation of the expert in a particular case because he has presented this expert so often that he or she believes preparation is no longer necessary. Third, the defense attorney has an ability to obtain transcripts of testimony by this expert and can compare the "future economic forecasting" contained within older projections to what actually occurred. It is highly unlikely that plaintiff's expert hits a home run every time in his economic forecasting.

Although consistently hitting home runs in all cases for your referring counsel may seem a worthy goal and good for the top-line, there is no way to ensure with certainty that this can be accomplished. And, although the application of a commodity-like, one size fits all approach to similar cases with comparable claims may seem good for the expert's business, I am reminded of an insight I gained a couple decades ago:

"Not all business is good business".

Bumping up against the Mendoza line of risking a Daubert claim by streamlining and tailoring an economic model whose primary goal is efficiency may indeed serve the perceived needs of retaining counsel, but undermine your career to the likes of a sub .200 perpetual slump. Know when and how to say "no" without saying it explicitly and resist the temptation to compartmentalize your work to solely fit the desires of your referral source who is indeed your gatekeeper. The better cases are out there, and the gatekeepers who refer these will respect your commitment to objectivity, thoroughness and opinions that hold-up to the rigors of attack by their opponents.

About the Author:



Tony Wayne founded IronHorse LLC in 1998 with specialty practice concentrations in forensic and valuation services, litigation support, turnaround consulting, CFO services and due diligence. IronHorse has extensive expertise and experience in insolvency & restructuring, complex litigation, lost profits & other damage computations, and valuation. He is an adjunct professor of accounting at Rockhurst University and Johnson County Community College and is an active presenter and published author. He serves on the Fraud Task Force and Business Reorganization committee of the American Institute of Bankruptcy and is an Executive Fellow at Rockhurst.