

INSURANCE LAW

Diminished Value in Automobile Damage Cases

By Stephen Hankin

At times, we as practitioners lack a keen sense for the obvious. Take, for example, the instance of a rear-ended personal injury client, where the natural focus is usually upon a recovery for bodily injury. The faultless client's carrier in the normal course pays for, and then, by subrogation, recovers the payment. So the process goes. Little, if any, thought is given to the resultant value of the client's vehicle, once repaired. After all, the repair costs have been paid and presumably the vehicle looks the same as it always did.

However, this is a short-sighted practice which overlooks the prevalence of modern day, readily online available vehicle history reports and the impact they have upon post-repair value. These reports contain critical information regarding not only a vehicle's title history but also a record of accidents and repairs. Of course, these historical reports admittedly reflect only those repairs which have been reported—reports which may be delayed up to a year—and many times fail to distinguish between minor and major repairs and are otherwise inaccurate. "Carfax" is the most popular commercial website-based service that supplies history reports. In fact, Carfax lists a "price adjustment" based upon the repaired damage it reports—an adjustment which some experts believe is nebulous at best. Nonetheless, rarely do (or should) consumers or dealers purchase vehicles without a Carfax or similar repair history.

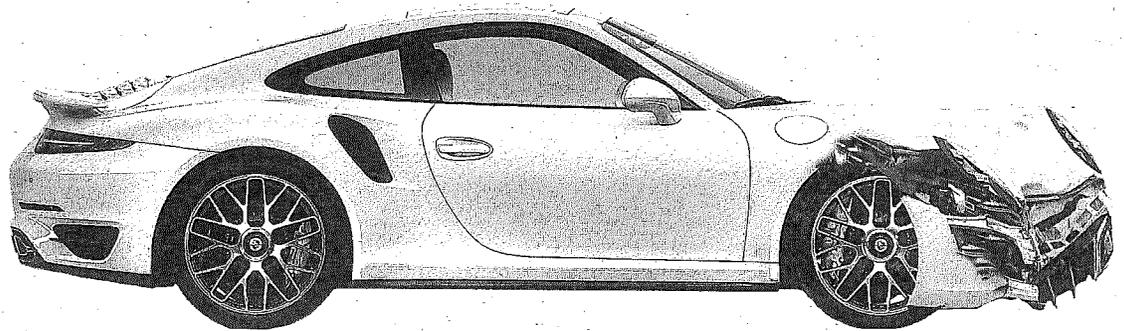
The present-day availability and use of repair history, as inaccurate as it may be, has a substantial impact upon dealer auction and thus consumer prices. The impact is especially noticeable among higher price foreign and collector vehicles. For example, the diminished value of a perfectly repaired quarter panel of a 2015 911 Porsche Turbo "S" would be close to \$30,000. As Robert Hollenshead, CEO of R. Hollenshead Auto Sales, North America's largest and most well-respected wholesaler, has so simply put it: "If you had the choice between the same car, same color, same options, same everything and same apparent condition but one had repairs, which one would you choose?"

Naturally, the unchosen vehicle will have a lesser value. Fortunately, a remedy does exist for the blameless vehicle owner who is left with the damaged goods.

The Diminished Value Doctrine

The doctrine of diminished value is really a very elementary principle: It inures from what some have labeled the "damaged goods syndrome," that is, a repaired vehicle should have the same value both before and following repair. Put another way, diminished value recognizes that even after perfectly completed repairs, a faultless plaintiff's vehicle will be worth less than it was immediately before the damage occurred.

It is well settled in New Jersey that in an action for injury to a vehicle, the mea-



sure of damages in the absence of total destruction is the difference in value of the automobile immediately before and after the damage. *Heintz v. Roberts*, 98 N.J.L. 768 (1923). In establishing diminished value, a claimant must demonstrate the condition of the vehicle before the accident in order to prove that the repairs did not put it in better condition than it was. *Nixon v. Lawhon*, 32 N.J. Super. 351 (App. Div. 1954). Thus, in *Fanfarillo v. East End Motor Company*, 172 N.J. Super. 309 (App. Div. 1980), the court squarely held that the cost of repair and the depreciated value of the vehicle is an appropriate measure of damages; provided the sum does not exceed the natural decline in market value and does not exceed the pre-accident market value of the vehicle. The proposition is not surprising because rarely are windfall damages recoverable. Accordingly, a plaintiff must be careful to prove the value of the vehicle both before and after repairs. *Premier XXI Claims Mgmt. v. Rigstad*, 381 N.J. Super. 281 (App. Div. 2005).

The underpinning of these decisions is the *Restatement (Second) of Torts* which at Section 928(a) provides:

When one is entitled to a judgment for harm to chattels not amounting to total destruction in value, the damages include compensation for:

(a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repair or restoration with due allowance for any difference between the original value and the value after repairs

In establishing diminution in value it is critical to demonstrate through expert testimony the condition and thus value of the vehicle before the damage occurred, and as well sale prices of comparable vehicles with "clean" and poor CarFaxes sold post-accident. This is especially important because motor vehicle appraisal guides such as the NADA Official Used Car Guide, Galves Auto Price List and Kelly's Blue Book do not take into consideration the repaired damages in their calculations of used car values. However, these appraisal guides are useful and admissible in establishing pre-accident value. See *State v. Lungsford*, 167 N.J. Super. 296, 303 (App. Div. 1979) (noting that under N.J.R.E. 63 (30), the predecessor

to N.J.R.E. 803 (c)(17), a judge must first be convinced the compilation is published for all persons engaged in that business and that it is generally considered useful and reliable); *Bishop v. GMC*, 925 F. Supp. 294 (D.N.J. 1996). (N.A.D.A. Official Used Car Guide accepted for threshold jurisdictional amount determination and recognizing diminution of value as a result of public disclosure of a brake defect); *In re Maddox*, 194 B.R. 762, 764 (Bankr.

Diminished value recognizes that even after perfectly completed repairs, a vehicle will be worth less than it was immediately before the damage occurred.

D. N.J. 1996) (N.A.D.A. Used Car Guide admissible for determination of value). In establishing post-repair value, as usual, care should be taken in the choice of an expert. Strong consideration should be given to providing testimony from an experienced automobile wholesaler or used car manager with a long history of trades for the type of vehicle in issue.

So much for claims made against an at-fault operator by an innocent plaintiff.

No First-Party Recovery

Only because of the express exclusions which exist in most collision policies, *Myska v. New Jersey Manufacturers Ins. Co.*, 440 N.J. Super 458 (App. Div. 2015), a first-party claim against a claimant's own carrier for diminution in value is not maintainable. *Kieffer v. High Point Ins. Co.*, 442 N.J. Super. 38 (App. Div. 2011) (noting that based upon the exclusion a first-party carrier's "obligation does not include liability for any inherent diminished value caused by conditions or defects that are not subject to repair or replacement, such as a stigma or resale resulting from 'market psychology' that a vehicle that has

been damaged and repaired is less than a similar one that has never been damaged"). However, first-party diminished value claims are permissible under the underinsured and uninsured motorist provisions of a faultless insured's policy. *Myska*, 440 N.J. Super. at 466. Because "there is no common provision directed to payment of diminution of value damages payable as a result of UM/UIM claim," *Myska*, 440 N.J. Super. at 478, counsel should always inspect the policy at the outset, including a careful review of the definition section.

The Appellate Division made clear in *Myska* that where a policy clearly excludes first-party diminished value claims, generally claims under the Consumer Fraud Act, for a breach of the implied covenant of good faith and fair dealing or based upon unconscionability will not save the day. *Myska*, 440 N.J. Super. at 487. In *Kieffer*, for example, the policy excluded payment "for any loss to your automobile or any non-owned automobile due to diminution in value," which was defined as "[t]he actual or perceived loss in market or resale value which results in a loss." *Kieffer*, 422 N.J. Super. at 42. But see 12 Couch on Insurance, §177.19 (Third Edition, June 2015), suggesting "[t]he insured should make a public policy argument that any formula used must be adequate to place the insured in the same position he or she was prior to the loss."

Conclusion

Despite consumer urgings, our Legislature has not enacted any statutory mandate, nor has the state Department of Banking and Insurance enacted any regulatory requirement, to include diminution in value as part of an insured's first-party coverage. Yet, given the prevalence and the effect of vehicle history reports, diminished value is very real, not imaginary. Indeed, many insureds do not realize their loss until their vehicle is traded or sold. At the very least, some legislative or regulatory consideration should be given to requiring insurers to conspicuously disclose diminished value exclusions. Further, based upon an accurately developed blueprint, diminished value presents a wonderful opportunity for a progressive insurance carrier to corner the market by offering special coverage. ■

Hankin is the senior member of Hankin, Sandman, Palladino & Weintrob in Atlantic City. His practice is focused upon complex commercial transactions, real estate, land use, employment, environmental law and related trial and appellate litigation.

Next Week...

Health Care Law