Trends in the Insurance Industry

In our search to find material worthy of publication in the Drake Law Review Insurance Law Annual, we often come across topics which need to be written upon, but which are usually bypassed because they do not lend themselves to the type of scholarly legal writing most often found in a law review. As a result, we have included a new section in our review entitled "Trends in the Insurance Industry." This new section is our attempt to provide the reader with a source of information concerning recent developments in the insurance industry. The reader will find that the articles appearing under the "trends" subheading will often consist of a survey of the applicable law in the area. It is hoped that these surveys will be of some practical benefit to those associated with the insurance industry, and will be of some aid in the prompt resolution of the issue being examined. We would appreciate any suggestions you, the reader, might have for possible topics under this section; only through your help can this new section become a viable source of information for the readers. Editorial Board of the Drake Law Review.

Proper Measure of Damages for Harm to Personal Property: Cost of Repairs or the Diminution in Value—The Debate Continues

I. Introduction

Two significant developments have emerged in the past few years which have had a serious impact on the cost of acquiring automobile insurance. First, there has been an increased tendency on the part of automobile owners to pocket the proceeds from an insurance claim settlement and to leave the damages unrepaired. This tendency appears to have resulted from the fact that persons are keeping their automobiles much longer, and therefore, are much more willing to put up with the minor dents, scratches and nicks which come about from day-to-day driving.

Secondly, there has been an aggressive effort on the part of independent body shop owners to interject themselves more prominently into the insurance claim negotiation process. The most common form of this interjection has been the insistance by auto body shops that insurers are obligated to reach an agreement as to the price of repairs with the auto body shop of the insured or the claimant's choosing. These two developments have begun to increase the costs incurred by companies engaged in the insurance industry. These increased costs are necessarily

being passed on to the consumer in the form of higher insurance premiums.[1] In response to this problem, certain insurance companies have adopted the following claims policies in order to minimize the costs of insurance:

(a) *Cash Allowance*: Whenever the condition of an automobile or the nature of the damage suggests that repairs are not likely to be made, certain companies will offer a reasonable cash settlement to the claimant. The cash allowance, which can be calculated without resorting to a fully completed repair estimate, will normally be an amount which is more than adequate to compensate a first or third party claimant for the decrease in value of his automobile. The assumption that the damage will not be repaired and the basis of the settlement as representing a more

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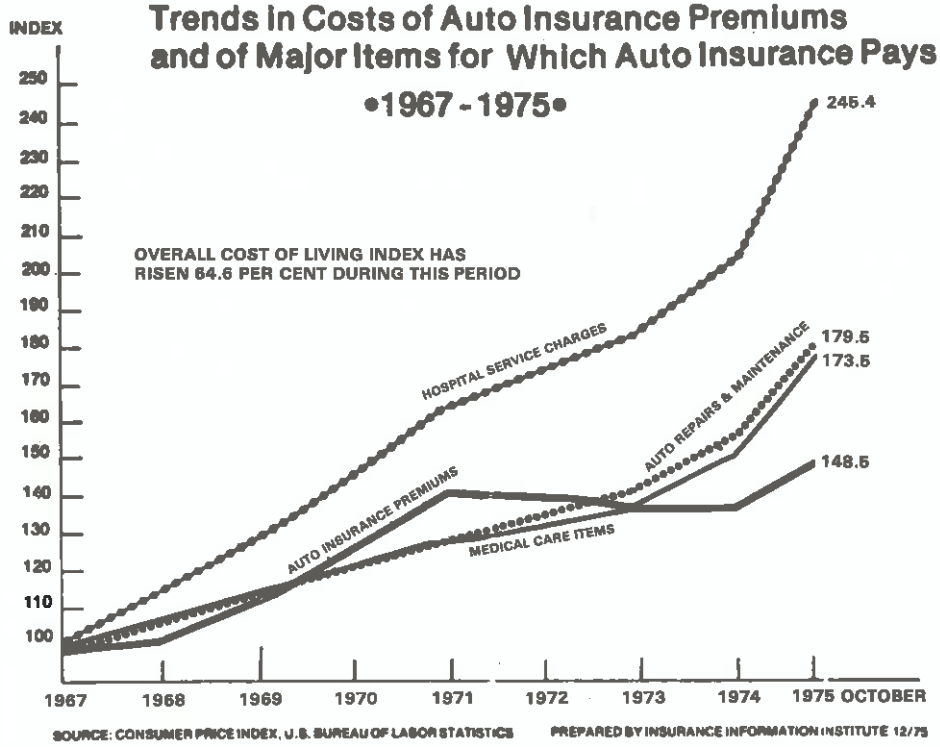

As demonstrated above, the rise in cost of automobile repair and maintenance is a major reason why the cost of automobile insurance premiums have grown over the past few years. Thus, any attempts on the part of the insurance industry to cut these costs would be a welcome relief to the consumer. For a more recent restatement of repair costs, *see Car Repairs Take a $23,400 Ride*, 54 J. AM. INS. 12 (Spring 1978). Recently, a large automobile insurer in Iowa announced plans to increase insurance premiums on autos by 13%. The reason given for this increase in premiums was the increase in auto repair costs. Des Moines Tribune, Oct. 6, 1978, at 1, col. 1.

than adequate allowance for the loss in value as a result of the damage are clearly explained to the claimant.

(b) *Advance Against Estimate*: In the event that the insured or claimant should reject the cash settlement offer, insisting instead that the settlement be based upon the full cost of repair, he is expected to obtain damage estimates from one or more repair shops. Thereafter, the insurer will conduct its own appraisal in order to determine the proper price of repair. After the company is convinced that a reasonable appraisal has been procured, and that the contemplated repairs will actually be made, it will make an advance against that appraisal.[2] An explanation accompanies the advancement emphasizing that it is only an advance. Once the insured or the claimant reports that the repairs have been completed, the insurer, following a reinspection, will promptly pay the difference between the advance and the amount owed.

Recently, policies like those described above have come under attack by the various state insurance commissioners on grounds that said policies fail to adequately compensate the claimant and that the insurer's claims representatives are in the position to coerce the insured or the claimant into settling for a lesser amount than he is entitled to. In response to these attacks, this article will focus on the proper measure of damages necessary to compensate an individual whose personal property has sustained injury through the negligence of another. Specific emphasis will be placed on those cases where the damaged personal property was an automobile. Further, since the propriety of such policies is presently pending before the Iowa Insurance Commissioner, specific mention will be given to the relevant Iowa case law.[4]

II. Distinction Between First And Third Party Claims

It is recognized from the outset that the question of what is the proper measure of damages normally arises in two separate contexts. In the first factual situation, an automobile is damaged by the negligence of the insured driver. This third party presents a claim to the insurer of the negligent driver seeking recovery for the damage to his automobile.[5] In the second factual situation, the insured himself sustains damage to his automobile and presents a claim to his insurer for the amount of injury to his automobile.[6]

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2. As a general rule, the amount of the advance is equal to the amount that was offered as a cash settlement.

3. The specific claims procedure proposed in this article has been approved by thirty out of the thirty states that have encountered this type of claims procedures.

4. The proposed claims procedure has recently come under attack by both the Iowa Insurance Commissioner and the Kansas Insurance Commissioner.

5. *See* Downing Dairy, Inc. v. Anderson, 253 Iowa 1004, 115 N.W.2d 200 (1962); Robson v. Zumstein Taxicab Co., 198 Ky. 365, 248 S.W. 872 (1923).

6. *See* MFA Ins. Co. v. Citizens Nat'l Bank, 260 Ark. 849, 545 S.W.2d 70 (1977); In-

Third party claims are governed by the law of torts; the insurance company stands in the shoes of its insured, thereby answering for his negligence. However, where a first party claim is involved, traditionally, the language of the insurance policy in question is dispositive; tort concepts are no longer applicable. In *Haussler v. Indemnity Co. of America*,[7] an Illinois court recognized this distinction in a case involving a first party claim:

> In arriving at what is the correct measure of damages in this case it must be kept in mind that this is not a suit for damages, but is a suit brought on the contract of insurance, and that therefore the measure of damages followed in a suit based upon an alleged tort is not the correct rule in this case, but the language of the contract sued upon must prevail, and such language, so far as applicable to the question, must determine the rule as to the measure of damages to be followed.[8]

In defining the limits of liability for physical damage, the proposed insurance policy uniformly provides that in no event can the insured recover any more than the actual cash value of the vehicle before the accident.[9] However, the policy does not fix any precise rule for measuring the loss resulting from the accident. It seems clear that the majority of courts interpret such policies in the same manner as recovery under tort principles. The liability under such policies is limited to the diminution in value or cost of repairs. In *Chase Investment Co. v. Mid-Western Casualty Co.*,[10] the Iowa Supreme Court interpreted a provision of an automobile policy and in so doing, placed a limit on liability which was consistent with rules normally applied in a tort, rather than a contract, action.[11] The policy did not provide a standard for the measurement of damages and the court interpreted the policy as providing for the same measurement of damages as under the general tort principles.[12]

Likewise, in *Kellog v. National Fire Insurance Co.*,[13] the Iowa Supreme Court had the opportunity to address the issue of what is the appropriate measure of damages under an automobile collision policy. The policy did not provide for the method of determining the amount of

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sured Lloyds v. O.L. Mayo, 244 Ark. 802, 427 S.W.2d 164 (1968); Lincoln v. General Cas. Co., 243 Iowa 1280, 55 N.W.2d 321 (1952); Kellogg v. National Fire Ins. Co., 225 Iowa 230, 280 N.W. 485 (1938).

7. 227 Ill. App. 504 (1923).

8. Haussler v. Indemnity Co. of America, 227 Ill. App. 504, 507 (1923).

9. The proposed insurance policy provides in part that "the limit of the company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value if such part, at time of loss, nor what it would then cost to repair or replace the property . . . ."

10. 232 Iowa 73, 4 N.W.2d 863 (1942).

11. Chase Inv. Co. v. Mid-Western Cas. Co., 232 Iowa 73, 4 N.W.2d 863 (1942).

12. *Id.*

13. 225 Iowa 230, 280 N.W. 485 (1938).

damages recoverable.[14] The Iowa Supreme Court recognized the appropriateness of the lower court jury instruction which directed the jury to apply the cost of repairs measurement if the automobile could be repaired and placed in as good a condition as before the collision. The instruction further provided that if, however, the jury found that the automobile could not be adequately repaired, then the damages would be the diminution in value of the automobile before and after the accident.[15]

The Arkansas Supreme Court also makes no real distinction between first and third party claims on automobile collision policies. In both circumstances, the applicable measurement of damages is the diminution in value of the automobile or the cost of repairs in certain instances. In *MFA Insurance Co. v. Citizens National Bank*,[16] the Arkansas Supreme Court was faced with determining the proper measure of damages under an automobile collision policy when the policy did not specify the proper measurement. The court adopted the diminution in value method as the outer limit of liability, noting that the cost of repairs[17] was some indication of the diminution in value. Thus, the principles of recovery under third party claims was applied to first party claims.[18]

While in theory there is a distinction to be made between the measure of damages to be used under a first party claim as opposed to a third party claim, practically speaking, the courts make no such distinction; the treatment is entirely consistent in both situations with the com-

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14. Kellogg v. National Fire Ins. Co., 225 Iowa 230, 280 N.W. 485 (1938).

15. The lower court instruction as to the proper measure of damages was as follows:

> No. 5. The first question to be determined by you, is whether or not the automobile of plaintiff could, by repair, have been placed in as good condition as it was before the injury, which question you are to determine from the evidence before you, in accordance with the rules herein given you.
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> In this connection if you find from the evidence before you, under the rules herein given you, that the automobile of the plaintiff herein could have been repaired, so that, when repaired, it would have been in as good condition as it was before the collision, then the amount to be recovered by the plaintiff for damages will be such amount as the evidence shows was the fair and reasonable cost to then repair or replace the injured and damaged parts thereof with others of like kind and quality.
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> If you find from the evidence before you, under the rules herein given you, that the automobile of plaintiff could not, by repair, be placed in as good condition as it was in before the collision, then the amount to be recovered by the plaintiff for damages will be such amount as the evidence shows was the difference between the fair and reasonable market value of plaintiff's automobile immediately before the collision in question, and the fair and reasonable market value thereof immediately thereafter, in the vicinity of such collision.

Id. at 231-32, 280 N.W. 485-86.

16. 260 Ark. 849, 545 S.W.2d 70 (1977).

17. MFA Ins. Co. v. Citizens Nat'l Bank, 260 Ark. 849, 545 S.W.2d 70 (1977).

18. *See also* Southern Farm Bur. Cas. Ins. Co. v. Gaither, 238 Ark. 50, 378 S.W.2d 211 (1964).

mon law rules of damages in tort. In both instances, the courts are seeking to arrive at the equitable result of compensating the aggrieved party for his actual loss.

III. Survey of Applicable Law

In order to sort out the multitude of cases which have addressed the issue at hand, a brief survey seems appropriate. In an analysis of approaches taken by various jurisdictions as to the proper measure of damages for harm to personal property, it becomes clear that the majority of states have adopted the diminution in value method. In most instances, the cost of repairing the property will equal the diminution in value of the property before and after the injury. However, when the cost of repairs does not equal the diminution in value, most courts hold that the diminution in value controls.

For example, in *Winn-Dixie Montgomery, Inc. v. Holt*,[19] the Alabama Appellate Court emphasized that the proper measure of damages for injury to an automobile is the difference between the market value of automobile immediately before and immediately after the accident. In the lower court, an instruction had been given to the jury that the measure of damages was the cost of repairs.[20] The appellant objected to such an instruction, and in addressing that assignment of error, the appellate court stated that the cost of repairs was not the correct measure of damages, but that such cost may be introduced as evidence of the diminution in value.[21] In a similar case decided in Arkansas, *MFA Insurance Co. v. Citizens National Bank*,[22] the plantiff was seeking to recover on an insurance policy for damages to her automobile caused by fire. The court noted that cost of repairs was evidence of the diminution in value of the automobile, but if the cost of repairs was less than the diminution in

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19. 57 Ala. App. 499, 329 So. 2d 556 (1976).

20. The instruction that was objected to read as follows: "I charge you that you are authorized to consider as a measure of damage in personal property such as an automobile, the amount it would take to repair said automobile, to place it in the same or like condition it was before damage." Winn-Dixie Montgomery, Inc. v. Holt, 57 Ala. App. 499, ____ , 329 So. 2d 556, 558 (1976). The court considered the cost of repairs as some indication of the proper measure of damages, i.e., diminution in value. In Austin v. Tennessee Biscuit Co., 255 Ala. 573, 52 So. 2d 190 (1951), the court stated the correct rule to be used in Alabama for measuring damages when injury to an automobile has occurred:

> The general rule is that the measure of damages for injury to an automobile is the difference between the market value of the automobile immediately before the accident and its market value immediately after . . . . The difference between the value of an automobile before and after an injury may be shown by proof of a reasonable cost of restoring it to its original condition.

Id. at ____ , 52 So. 2d at 194.

21. 57 Ala. App. at ____ , 329 So. 2d at 559; *see also* Robbins v. Voight, 280 Ala. 207, 191 So. 2d 212 (1966); Webb v. O'Kelly, 213 Ala. 214, 104 So. 505 (1925).

22. 260 Ark. 849, 545 S.W.2d 70 (1977).

value of the vehicle, the diminution in value measurement would prevail.[23] Similarly, in *Judy v. McDaniel*,[24] the Arkansas Supreme Court again stated "that the correct measure of damages was not what it would, or did, cost to repair the automobile, but the difference in the market value of the automobile immediately before and immediately after the collision."[25] Thus, both the Alabama and Arkansas cases are in harmony with the majority approach in that the cost of repairs is merely evidence of the diminution in value with the latter controlling.

In California, the diminution in value measurement is controlling in actions to recover for injury to personal property. In *Pacific Gas & Electric Co. v. Mounteer*,[26] the plaintiff electric company brought an action to recover damages for the injury to one of its electric poles caused by the alleged negligence of the defendant driver. The court stated that the measure of damages is "the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if that cost be less than the diminution in value."[27] Thus, in California, the maximum recovery allowed is the diminution in value of the personal property with the cost of repairs being an element in the determination of the loss in value.[28]

Another state which utilizes the diminution in value as the proper measure of damages for harm to personal property is Kentucky. In *Robson v. Zumstein Taxicab Co.*,[29] the Kentucky Supreme Court, in a well reasoned opinion, announced that the reasonable cost of repairs was a factor to consider in determining the amount of damages for injury to a taxicab. However, the court further noted that "as the repairs may render the article more valuable than it was before injury, he who causes the injury is not required to bear the full expenditure for the repairs, but is only liable for the difference in the market price of the article before and after the injury."[30] Thus, in Kentucky, the maximum recovery permitted is the diminution in value of the automobile.

In *Fred Frederick Motors, Inc. v. Krause*,[31] the Maryland Appellate Court was faced with determining the proper measure of damages to be

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23. MFA Ins. Co. v. Citizens Nat'l Bank, 260 Ark. 849, 545 S.W.2d 70 (1977). *See also* Holland v. Bogley, 256 Ark. 1, 505 S.W.2d 228 (1974); Insured Lloyds v. O.L. Mayo, 244 Ark. 802, 427 S.W.2d 164 (1968); Southern Farm Bur. Cas. Ins. Co. v. Gaither, 238 Ark. 50, 378 S.W.2d 211 (1964).

24. 247 Ark. 409, 445 S.W.2d 722 (1969).

25. Judy v. McDaniel, 247 Ark. at ____ , 445 S.W.2d at 728.

26. 66 Cal. App. 3d 809, 136 Cal. Rptr. 280 (1977).

27. Pacific Gas & Elec. Co. v. Mounteer, 66 Cal. App. 3d at ____ , 136 Cal. Rptr. at 281.

28. *See also* Pfingsten v. Westenhaver, 39 Cal. 2d 12, 244 P.2d 395 (1952); Santos v. Scharz, 87 Cal. App. 664, 262 P. 764 (1927).

29. 198 Ky. 365, 248 S.W. 872 (1923).

30. Robson v. Zumstein Taxicab Co., 198 Ky. 365, ____ , 248 S.W. 872, 873 (1923).

31. 12 Md. App. 62, 277 A.2d 464 (1971).

used in assessing the injury sustained by a motor vehicle involved in a collision. After first noting that damages should compensate the injured party for the wrong suffered by him,[32] the court stated that when an automobile is repairable, the repaired vehicle should be equal in value to the vehicle prior to the injury.[33] If the cost of repair places the automobile at a value greater than before the accident, the value prior to the accident is controlling.[34] The court's rationale was based upon the theory of compensation in tort: to place the injured party in the same position as he was before the accident. Also, the court reasoned that if the vehicle was totally destroyed, then the diminution in value measurement would be the only possible ascertainable standard for damages. Therefore, the court held that when the vehicle is repairable, the injured party should receive at the maximum, the diminution in value of the automobile.[35]

In *Hammerlund v. Troiano*,[36] the Connecticut Supreme Court stated that the proper measure of damages in personal property cases is to be "proof of either the difference between the fair market value before and the fair market value after the damage or the cost of the repairs if they will restore the automobile to its former condition."[37] Thus, the court recognized that the cost of repair is the measure of damages only when that standard is equal to the value of the property prior to the injury.

In *Smith v. Brooks*,[38] the District of Columbia Court of Appeals had the opportunity to address the issue in question. The court cited an earlier District of Columbia case, *Knox v. Akowskey*,[39] for the proposition that the basic rule for injury to personal property, in this case an automobile, was the difference in value of the property immediately before and after the accident. It further noted that an alternative measure of damages is the reasonable cost of repairs; but when it appears that the reasonable cost of repairs may exceed the value of the property prior to the injury, then before the cost of repair measure may be utilized, the plaintiff must set forth proof that those costs will not exceed the diminution in value caused by the injury nor exceed the value of the property before the injury.[40]

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32. Fred Frederick Motors, Inc. v. Krause, 12 Md. App. at ____ , 277 A.2d at 465.
33. *Id.* at ____ , 277 A.2d at 466.
34. *Id.*
35. *Id.* The court in essence held that when the cost of repairs was less than the diminution in value of the vehicle, the additional loss is recoverable. But when the cost of repairs is greater than the diminution in value, this excess is not recoverable. The diminution in value of the vehicle is the maximum amount recoverable. *See also* Taylor v. King, 241 Md. 50, 213 A.2d 504 (1965).
36. 146 Conn. 470, 152 A.2d 314 (1959).
37. Hammerlund v. Troiano, 146 Conn. at ____ , 152 A.2d at 316.
38. 337 A.2d 493 (D.C. 1975).
39. 116 A.2d 406, 408 (D.C. 1955).
40. Smith v. Brooks, 337 A.2d 493, 494 (D.C. 1975).

The fact situation in *Knox* provides an excellent example of when the cost of repairs would be an inappropriate measure of damages under District of Columbia law. Plaintiff's station wagon was involved in an accident and as a result, sustained damage to the right rear.[41] The car was not repaired prior to trial. The station wagon was a 1949 model, which the plaintiff had paid about $400 for a few months before the accident. The body of the car was made of wood and, therefore, the cost of repairing the vehicle was substantially increased. In fact, out of the $473 cost of repair estimate, about $350 was allocated to replacing the wood body which had rotted with age. At trial, the court limited the award to $400, the original cost of the station wagon to the plaintiff.[42]

In limiting the award to $400, the court had to deal with their earlier decision of *Wright v. Capital Transit Co.*,[43] a case in which it was held that the proper measure of damages to personal property was the reasonable cost of necessary repairs.[44] The court in *Knox* recognized that even though it had committed itself to the cost of repairs as the proper measure of damages, it would not hesitate to use the diminution in value in the appropriate situation. It noted that the cost of repairs would only be used when the damage could *reasonably* be repaired;[45] it further implied that where those repair costs exceed the diminution in value, a situation exists where the damage is not reasonably repairable.[46] In such an instance, the diminution in value rather than the cost of repairs will be used as the proper measure of damages. The approach taken by the District of Columbia court clearly demonstrates how a flexible court can utilize both the cost of repair and the diminution in value to compensate a plaintiff for the *actual loss* incurred. Cost of repairs is normally an excellent means for estimating the diminution in value. However, when the cost of repairs fails to provide an accurate approximation of the diminution in value, then diminution in value controls.

Finally, in *Averett v. Schircliff*,[47] the Supreme Court of Virginia was given the opportunity to address the question of the proper measure of compensation recoverable where an automobile is damaged in a collision. The controversy out of which that issue developed centered around the trial judge's jury instruction, and his subsequent setting aside of the jury verdict.[48] On appeal, the court reversed the trial judge's action and

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41. Knox v. Akowskey, 116 A.2d 406, 407 (D.C. 1955).
42. *Id.*
43. 35 A.2d 183 (D.C. 1943).
44. Wright v. Capital Transit Co., 35 A.2d 183, 184 (D.C. 1943).
45. 116 A.2d at 408.
46. *Id.*
47. 237 S.E.2d 92 (Va. 1977).
48. Following a trial limited to the issue of damages, the trial judge instructed the jury, as follows:

reinstated the jury verdict. The court noted that the instruction, which was based upon section 928 of the *Restatement of Torts*,[49] provided a sufficient basis from which the jury could determine the fair and adequate amount recoverable. Thus, the jury decision to award damages based upon a diminution in value formula was found to be proper.[50]

As demonstrated above, the majority of courts find that the diminution in value measure of damages is the proper rule from which to initiate calculation of the permissible recovery. Further, the majority views the cost of repairs formula as merely one element which may be considered in arriving at the diminution of value.[51] Notwithstanding, the diminution of value provides the measure for the outer limits of recovery.[52]

> The Court further instructs the jury that an exception to this rule is that where personal property can be restored by repairs and the repairs would be less than the diminution in value because of the injury, the amount recoverable is the reasonable cost of restoring the property to its former condition.
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> Thus, if you believe from the preponderence of evidence that the car involved could not be restored to its former condition by repairs, the measure of damages is the difference between the market value of the car immediately before and after the accident.
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> And if you believe from a preponderance of the evidence that the car involved could be restored to its former condition by repairs, the measure of damages is the reasonable cost of repairs, with reasonable allowance for depreciation.

Id. at 96.

49. RESTATEMENT OF TORTS § 928 (1939) provides:

> Where a person is entitled to a judgment for harm to chattels not amounting to a 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 the plaintiff's election, the reasonable cost of repair or restoration *where feasible*, with due allowance for any difference between the original value and the value after repairs, and (b) the loss of use. (emphasis added).

50. Stated in terms of a mathematical formula, the jury's verdict was calculated in the following fashion:

MARKET VALUE (PRE-ACCIDENT)	$13,000-13,500
MARKET VALUE (POST-ACCIDENT)	$ 9,500
JURY VERDICT	$ 4,000

The market value (post-accident) was arrived at only after the jury had weighed the testimony of the many individuals involved. For an interesting example of how expert testimony may differ from witness to witness, the reader should consider the majority opinion. *Id.* at 94-95.

51. *See e.g.*, MFA Ins. Co. v. Citizens Nat'l Bank, 260 Ark. 849, 545 S.W.2d 70 (1977); Averett v. Shircliff, 237 S.E.2d 92, 96 (Va. 1977); Ripley v. C.I. Whitten Transfer Co., 135 W. Va. 419, 422, 63 S.E.2d 626, 628 (1951).

52. Other jurisdictions which have addressed the issue of the proper measure of damages in personal property cases are as follows: Otness v. United States, 178 F. Supp. 647 (D.C. Alaska 1959) (court held that the proper measure of damages for the injury to plaintiff's ship was the diminution in value of the ship with cost of repairs being the measure if such standard equaled the diminution in value); Alber v. Wise, 53 Del. 126, 166 A.2d 141 (1960) (court held that diminution in value standard applied to damaged automobile even though

IV. IOWA LAW

Upon examining Iowa law in an attempt to ascertain the proper measure of damages for an injury to an automobile as the result of a collision, it becomes clear that there are no cases which expressly provide for the proposed claims practices. However, at the same time, it must also be recognized that there are no cases which expressly prohibit the practice in question. In an analysis of the Iowa cases on the proper measure of damages for injuries to automobiles, it becomes apparent that the proposed claims procedures are actually entirely consistent with Iowa law.

In an early Iowa Supreme Court case,[53] the rule as to the measure of damages resulting from an automobile collision was announced and clarified. In *Langham v. Chicago, R.I. & R. Ry. Co.*,[54] the plaintiff sought to recover damages in the amount of one thousand dollars alleged to have resulted from a collision between an automobile owned and operated by the plaintiff and a passenger train owned by the defendant. The lower

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cost of repairs standard was less); Hillside Van Lines, Inc. v. Matalon, 297 So. 2d 848 (Fla. Dist. Ct. App. 1974) (court held that proper measure of damages was the diminution in value or at the plaintiff's election, the cost of repairs with due allowance for the difference in the original value and the value after repair); Rutledge v. Glass, 125 Ga. App. 549, 188 S.E.2d 261 (1972); Lucas v. Beuman Dairy Co., 50 Ill. App. 2d 413, 200 N.E.2d 374 (1964) (court held that normal rule of damages was cost of repairs but if the cost of repairs is less than the diminution in value, the additional amount is awarded); Lake Erie & W.R. Co. v. Molloy, 78 Ind. App. 39, 134 N.E. 913 (1922); Foster v. Humburg, 180 Kan. 64, 299 P.2d 46 (1956) (adopts the rule that best fits the case and facts); Collins v. Kelly, 133 Me. 410, 179 A. 65 (1935) (court held that diminution in value was the appropriate measure of damages with cost of repairs being an important element); O'Connor v. Schwartz, 229 N.W.2d 511 (Minn. 1975) (auto damage measured by diminution in value formula); Brown v. Webb, 567 P.2d 450 (Mont. 1977) (diminution in value used to measure damages sustained when owner's cattle were lost through negligence of hauler); Spackman v. Parsons, 147 Mont. 500, 414 P.2d 918 (1966) (diminution in value considered proper damage formula for new washer, stored in motel basement, and injured when pipeline burst and flooded basement); Fredenburgh v. Allied Van Line, Inc., 79 N.M. 593, 446 P.2d 868 (1968) (use of diminution in value formula to measure damage to furniture caused by defendant carrier's negligence); Eichenberger v. Wilhelm, 244 N.W.2d 691 (N.D. 1976) (diminution in value used to measure damages sustained from negligent application of weed retardant); Mischel v. Vogel, 96 N.W.2d 233 (N.D. 1959) (court applied diminution in value measure for calculating damages sustained to plaintiff's house when defendant's negligent excavation caused fire); Imus v. Huber, 71 N.W.2d 339 (N.D. 1955) (diminution in value held proper formula for damages to automobile involved in collision); Sanft v. Haisfield, Inc., 197 Pa. Super. 447, 178 A.2d 791 (1962) (diminution in value used to calculate damage occurring through auto collision); Wells v. Village of Orleans, 132 Vt. 216, 315 A.2d 463 (1977) (diminution in value used to value damages sustained by independent contractor's snow removal equipment); Bartlett v. Menard, 126 Vt. 215, 227 A.2d 300 (1967) (court held that diminution in value was proper valuation for damages sustained in auto accident); Riddle v. Baltimore & O.R.R. Co., 137 W. Va. 733, 73 S.E.2d 793 (1952) (diminution in value formula used to determine damages resulting from overflow of railroad's culvert); Meredith GMC, Inc. v. Garner, 78 Wyo. 396, 328 P.2d 371 (1958) (diminution in value used to measure the damage sustained by plaintiff's car while stored in defendant's garage).

53. Langham v. Chicago, R.I. & P. Ry. Co., 201 Iowa 897, 208 N.W. 356 (1926).

54. *Id.*

court awarded a one thousand dollar judgment to the plaintiff and the defendant appealed.[55] On appeal, the appellant, Chicago Railway, objected to a jury instruction given by the trial judge as to the proper measure of damages to be awarded if the jury found for the plaintiff.[56] The instruction essentially stated that the proper measure of damages was the diminution in value of the automobile but that this measurement was only one consideration.

The basis of appellant's objection to the instruction was twofold. The appellant first objected to the form of the instruction as it did not confine the jury to the difference in the value of the car immediately before and after the accident.[57] Secondly, the appellant objected to the instruction because it contended that even if the instruction was deemed to have limited the damages to the difference in value before and after the accident, such an instruction was not applicable to the facts of the case.[58]

The Iowa Supreme Court noted that the instruction should have been limited to the difference between the value before and after the accident, and in so doing, recognized the first objection as being valid and reversed the case.[59] In order to clarify the issue as to the proper measure of damages for future cases, the court set forth the general rules as to damages resulting from injury to an automobile:

> (1) when the automobile is totally destroyed, the measure of damages is its reasonable market value immediately before its destruction.
>
> (2) where the injury to the car can be repaired, so that when repaired, it will be in as good of condition as it was before the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the car while being repaired with ordinary diligence not exceeding the value of the car before the injury.
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> (3) when the car cannot by repair be placed in as good of condition as it

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55. *Id.*

56. The instruction given by the trial judge was as follows:

> You will then consider the proposition of damages in favor of the plaintiff and proceed to assess the damages herein to which the plaintiff is entitled as shown by the evidence. In such sum you should take into consideration the value of the automobile as shown by the evidence immediately before the happening of the accident and the value of the automobile as shown by the evidence immediately after the happening of the accident, but in no event can your verdict herein against the defendant exceed the gross sum of $1,000.

Id. at 900, 208 N.W. at 357-58.

57. In the jury instruction, the court merely stated that the diminution in value was a consideration to be taken into account and not the sole measurement. *Id.*

58. The appellant contended that the evidence presented only revealed the value of the automobile after the accident and not the value of the car prior to the accident. Thus, the diminution in value measurement was not proper under the facts presented. *Id.* at 900, 208 N.W. at 358.

59. *Id.*

> was in before the injury, then the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident.[60]

When evaluating the three rules stated above, it becomes clear that the *Langham* case stands for nothing more than a restatement that the rule for determining the measure of damages for harm done to an automobile is limited to the diminution in value of the automobile.

Under the first rule stated above, when the car is totally destroyed, the measure of damages is the value of the car before the accident.[61] This statement is merely another method of stating that the plaintiff is entitled to the difference in the value of his car before and after the accident. In such a situation, the value of the car after the accident would be zero. The value of the car before the accident minus zero, the value after, equals the value before. As a result, rule (1) above is entirely consistent with the diminution in value rule.

Likewise, rule (3) above expressly states that where the automobile cannot be repaired so as to place it as good a condition as it was before the accident, the measure of damages is the difference in value before and after the accident, better known as the diminution in value.[62]

The only portion of the rule announced in *Langham*[63] which appears to be inconsistent with the diminution in value rule is rule (2) above. However, it must be questioned why the Iowa Supreme Court would deviate from the diminution in value rule merely because the automobile can be repaired. In examining the rule more closely, it becomes apparent that in all practical respects, there has been no deviation. The court has merely determined that when the damaged automobile can be adequately repaired, usually the most accurate method for determining the diminution in value of the automobile is to look at the reasonable cost of repairs.

An earlier Iowa case helps to clarify this apparent conflict.[64] In *Lonnecker v. Van Patten*,[65] the Supreme Court had before it a situation where the instruction given by the lower court set forth the measure of damages to be the cost of repairs.[66] The appellant insisted that the in-

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60. *Id.*

61. Although this rule is in substantial harmony with most jurisdictions when the car is totally destroyed, the majority of jurisdictions allow a reduction in the damages awarded by the salvage value of the automobile. *See* BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 480.4 (3d ed. 1969). Iowa apparently allows the salvage value to reduce the amount of damages recoverable when the automobile is totally destroyed. *See* Downing Dairy, Inc. v. Anderson, 253 Iowa 1004, 1005, 115 N.W.2d 200, 201 (1962).

62. This rule is entirely consistent with the majority of jurisdictions. *See* cases collected in BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 480.5 (3d ed. 1969).

63. 201 Iowa 897, 208 N.W. 356.

64. Lonnecker v. Van Patten, 179 N.W. 432 (Iowa 1920).

65. *Id.*

66. At the trial court, the instruction given to the jury was "the reasonable cost of repairs made, or necessary to be made, to place his car in as good condition as it was just

struction should have outlined the measure of damages to be the diminution in value. In addressing the appellant's contention, the court stated:

> Doubtless the rule contended for, by appellant, would have been appropriate; but the rule adopted by the court was likewise so. Ordinarily, there would not be any material difference between the value before and after it was injured and the actual cost of the repairs required to return it to its former condition; *that is, the difference in value before and after would be the amount that it would cost to repair it and return it to its former condition.*[67]

Thus, it seems clear that the cost of repair is but a mere method of arriving at the true rule as to the measure of damages in automobile cases—diminution in value.

The above interpetation of the *Langham* rule is reinforced by numerous other Iowa cases which apply the diminution in value rule when determining the amount of compensation a person is entitled to for damage to automobiles and personal property. In *Downing Dairy, Inc. v. Anderson*,[68] a collision occurred between a dairy truck and an automobile. In determining the amount of damages that were recoverable, the court took note of the fact that the truck was completely destroyed.[69] The court stated that the measure of damages was the diminution of value of the vehicle.[70] In *Conditioned Air Corp. v. Rock Island Motor Transit Co.*,[71] the court considered the appropriate measure of damages for harm caused by a carrier to an interstate shipment of aluminum panels. The court stated that "the most commonly applied measure of a shipper's loss for injury to the shipment is the difference between its market value at destination if it had not been injured and such value in its injured condition."[72]

In an early Iowa Supreme Court case,[73] the diminution in value of an automobile was stated to be the correct measure of damages for injury to an automobile. In *Pugh v. Queal Lumber Co.*,[74] the lower court awarded a verdict to the plaintiff in an action arising out of an automobile accident.

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prior to the collision, and for the reasonable value of the use of said car during the time it was reasonably necessary to make repairs on the same so it could be operated, etc." 179 N.W. at 433.

67. *Id.* (emphasis added).

68. 253 Iowa 1004, 115 N.W.2d 200 (1962).

69. Downing Dairy, Inc. v. Anderson, 253 Iowa 1004, 115 N.W.2d 200 (1962).

70. The court stated that "the rule fixing the measure of damage is well settled. The witnesses agreed that after the collision there was only salvage value. The measure of damage was the reasonable market value before the collision less the reasonable salvage value thereafter." *Id.* at 1005, 115 N.W.2d at 201. Thus, when the vehicle is totally destroyed, the diminution in value is the appropriate measure of damages.

71. 253 Iowa 961, 114 N.W.2d 304, *cert. denied*, 371 U.S. 825 (1962).

72. 253 Iowa at 964-65, 114 N.W.2d at 306. The court also noted that the diminution in value many times did equal the cost of repairs, although this is not always the case.

73. Pugh v. Queal Lumber Co., 193 Iowa 924, 188 N.W. 1 (1922).

74. *Id.*

On appeal, the appellant objected to the instruction given by the court to the jury in which the measurement of damages was given as the diminution in value.[75] The Iowa Supreme Court stated the correct rule to be applied in determining the amount of damages recoverable in an action for injury to an automobile:

> The general rule for the determination of damages to personal property is that the owner shall receive fair and reasonable compensation for the injuries sustained by him. It is the general rule in most jurisdictions that where an automobile is injured, but not totally destroyed, the measure of damages usually adopted is the difference between the market value before the injury and the market value immediately after the injury.[76]

In *Halferty v. Hawkeye Dodge, Inc.*,[77] the plaintiff brought an action for damages sustained on his automobile while in the custody of the defendant. The lower court awarded the cost of repairs and $585 as the loss in the value of the automobile. Thus, the court noted that the cost of repairs is good and reliable evidence of diminution in value. However, the court noted that if the cost of repairs is less than the diminution in value, an additional amount should be awarded to reflect the diminution in value.[78] There are many other cases in Iowa which support the rule that the proper measure for damages in injury to personal property cases is the diminution in value.[79] The authority in Iowa is very clear.[80] The diminution in value of an automobile is the outer limit of recovery when an injury to the automobile occurs. Cost of repairs are a proper measure of damages only when such repairs equal the diminution in value.

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75. *Id.*

76. *Id.* at 928, 188 N.W. at 2.

77. Halferty v. Hawkeye Dodge, Inc., 158 N.W.2d 750 (Iowa 1968).

78. *Id.* at 753-54.

79. Ruden v. Hansen, 206 N.W.2d 713 (Iowa 1973) (action for damages allegedly caused by veterinarian to the hogs of the plaintiff); State v. Urbanek, 177 N.W.2d 14 (Iowa 1970) (action for damages to state highway bridge by defendant); Lincoln v. General Cas. Co., 243 Iowa 1280, 55 N.W.2d 321 (1952) (action against insurer under automobile collision policy); Kohl v. Arp, 236 Iowa 31, 17 N.W.2d 824 (1945) (action for damages to a commercial vehicle); Miller v. Economy Hog & Cattle Powder Co., 228 Iowa 626, 294 N.W. 4 (1940) (action for damages for the death of plaintiff's sheep).

80. In the *Iowa Uniform Jury Instructions-Civil, Vol.* 1 (1970), it is clear that the diminution in value measurement is the proper instruction to be given in injury to personal property cases. It provides:

No. 3.3 Repairs and Use Where Condition Can Be Restored

The measure of damages is the fair and reasonable value of the cost of the repairs plus the reasonable value of the use of the _____ while being repaired with ordinary diligence, not exceeding the value of the _____ before the injury; but the allowance for these items must not exceed $_____ being the amount (claimed therefor).

No. 3.4 Repairs-Condition Not Restorable

The measure of damages for injuries to the _____ is the difference between its fair and reasonable market value immediately before and immediately after the ac-

V. CONCLUSION

The theory behind the award of compensation for damage to personal property helps to further explain why the diminution in value rule is the accepted measure of damages. The majority of jurisdictions abide by the rule of compensation which states that when a person has incurred property damage, his compensation for that damage is limited to his *actual loss*.[81] Iowa abides by this rule which limits the recovery to actual loss. In *Schiltz v. Cullen-Schiltz & Associates, Inc.*,[82] the Iowa Supreme Court stated that "the principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, *to compensate him for the injury actually sustained* . . . ."[83]

When a person stops to ponder just what the actual loss is as the result of an automobile collision, the only viable response is that the actual loss incurred equals the decrease in value of the automobile. While the cost of repairs is a method of determining that diminution in value, it is not dispositive. The actual loss is limited to that diminution.[84] The cost of repairs standard is an integral part of the diminution in value measurement[85] with the diminution in value being the outer limits of recovery.

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cident, but not exceeding $ _____ being the amount (claimed therefor).

No. 3.5 Motor Vehicle Destroyed-Salvage Value

The measure of damages for injuries to the _____ is the fair and reasonable market value thereof immediately before the accident, less the reasonable salvage value after the accident; but not exceeding $ _____ being the amount (claimed therefor).

No. 3.6 Total Destruction

The measure of damages for injuries to the _____ is the fair and reasonable value thereof immediately before the accident; but not exceeding $ _____ being the amount (claimed therefor).

81. In BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 480.1 (3d ed. 1969), the general rule of damages was stated as follows:

> It is a general principle governing the determination of the measure of damages for a tort that compensation for a wrong should be equal to the injury sustained. The injured party should be placed as near as possible in a situation he would have been but for the wrong. The basic rule in measuring damages from injury to an automobile is just compensation for *actual loss*. (emphasis added).

82. 228 N.W.2d 10 (Iowa 1975).

83. Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 20 (Iowa 1975) (emphasis added); *see also* Adams v. Deur, 173 N.W.2d 100 (Iowa 1969).

84. *See* Robson v. Zumstein Taxicab Co., 198 Ky. 365, 248 S.W. 872 (1923) (court stated that the maxium recovery allowed for damage to an automobile is the diminution in value).

85. In Anderson v. Innman, 3 Tenn. App. 195 (1926), the court recognized the relationship of cost of repairs and diminution in value of the automobile:

> . . . there seems to be a conflict as to the method used in ascertaining the damage, a great many, if not in fact the majority, following the method of determining the

Any argument that the proposed claims policy, whereby the adjuster estimates the diminution in value and offers an immediate cash settlement, is too subjective, and therefore tend to place the insurer in a dominant position vis-a-vis the car owner fails. First of all, the claims policy is only implemented where the collision has resulted in minor damage, and it appears as though the car will not be repaired. That combination of circumstances occurs rather infrequently. Secondly, the insurer will pay the cost of repairs, *even if such costs exceed the diminution in value of the automobile*, if the repairs are actually made.

All the insurer is attempting to do with the proposed claims policy is to alleviate settlement costs which are not actually incurred and thereby keep premium costs at a minimum. When the damaged automobile is not repaired, there is no logical reason for basing the recovery on the cost of repairs because such costs include unincurred overhead and labor. As has been recognized by one state court,[86] where an automobile owner elects not to make repairs to his damaged vehicle, the measure of damages is the difference in the market value before and after the collision.[87]

The claims policy proposed in this article best compensates an injured party for his actual loss, and also results in the ancillary benefit of keeping consumer insurance premiums at a minimum. Furthermore, such a claims policy is entirely consistent with the case law of the majority of states, including Iowa. Therefore, the proposed claims policy should be readily approved by the insurance commissioners of the various states.

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market value of the car immediately before the accident and deducting the market value of the car immediately after the accident, the difference being the amount of damages recoverable. Many others follow the other rule and permit the damages to be ascertained by determining the value of repairs. . . . Upon a closer scrutiny of the cases it is found that there is little if any real conflict. The primary inquiry in all cases is to determine the just compensation for the actual loss sustained. . . . And in those cases where the car suffers an injury, which when repaired leaves a depreciation in the market value, the rule of the market value before and after the accident is applied; but in those cases where the injury may be repaired without leaving any permanent or material depreciation, then the rule of the value of repairs plus the loss of use pending repairs is adopted. These methods under the above circumstances best determine the actual loss sustained.

86. Reed v. Piper, 145 Ga. App. 75, 243 S.E. 2d 257 (1978).

87. *Id.*

Case Notes

INSURANCE—ANTITRUST—A PRIVATE CONSPIRACY BY FOUR INSURANCE CARRIERS IN WHICH THREE REFUSED TO SELL ANY TYPE OF MALPRACTICE INSURANCE TO PHYSICIANS, HOSPITALS AND OTHER MEDICAL PERSONNEL AS A MEANS OF COMPELLING SUBMISSION TO TERMS DICTATED BY THE FOURTH STATES A SHERMAN ANTITRUST CLAIM WITHIN THE "BOYCOTT" EXCEPTION IN SECTION 3(b) OF THE MCCARRAN—FERGUSON ACT.—*St. Paul Fire and Marine Insurance Co. v. Barry* (U.S. Sup. Ct. 1978).

St. Paul Fire and Marine Insurance Company (hereinafter St. Paul) announced in April, 1975 that it would not renew medical malpractice coverage on an "occurrence"[1] basis, but would write such insurance only on a "claims made"[2] basis for its Rhode Island policyholders. The announcement by St. Paul, the largest of four insurers[3] writing medical malpractice insurance in that state, created concern in medical circles because "claims made" policies provide less comprehensive coverage at a greater cost to the insured than do "occurrence" policies.[4] In an attempt to obtain more favorable coverage elsewhere, St. Paul's disgruntled customers submitted applications for coverage to the remaining three medical malpractice insurers issuing malpractice policies within the state.[5] These applications were refused.[6]

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1. An "occurrence" policy protects the policyholder from liability for any act done while the policy is in effect. St. Paul Fire and Marine Ins. Co. v. Barry, 98 S. Ct. 2923, 2926 n.3 (1978). *See also* Ranger Ins. Co. v. United States Fire Ins. Co., 350 So. 2d 570, 572 (Fla. Dist. Ct. App. 1977).

2. A "claims made" policy protects the holder only against claims made during the life of the policy. 98 S. Ct. at 2926 n.3.

3. The other three insurers named in the suit were Aetna Casualty and Surety Co., Travelers Indemnity of Rhode Island (and two affiliated companies) and Hartford Casualty Co. (and an affiliated company). These three, along with St. Paul, were the only sellers of medical malpractice insurance in Rhode Island. *Id.* at 2926.

4. To illustrate the difference between "occurrence" and "claims made" policies, the Supreme Court noted that a doctor who practiced for only one year, say 1972, would need only a 1972 "occurrence" policy to be fully covered, but he would need several years of "claims made" policies to protect himself from claims arising out of his acts in 1972. *Id.* at 2926 n.3.

5. *See* note 3 *supra* for the names of the other three insurers.

6. The applications were refused in furtherance of the conspiracy by the four in-