



# DIMINISHED VALUE: The Meeting of Junk Science and Reality

## — PART TWO

- Peer review and publication
- Potential error rate
- General acceptance (*Frye*)
- Opinion as a product of independent research
- Extrapolation based on properly supported conclusion or premise
- Account for possible alternative explanations

Since this piece is not a treatise on *Daubert* or *Frye* or the FRE 702, it is sufficient to say that there is no “scientific” community associated with DV, and there are no codified practices regarding the calculations used. Without a broadly accepted guideline, a relevant scientific community and some real basis for the math behind the calculation, DV in its present form is far from meeting the least of the requirements. This is exemplified by the absence of the calculations used - a common weakness in the DV appraiser’s report. This absence is a significant factor in the courtroom.

Legally, the party that has been asked to pay the DV (usually during some kind of litigation) has the right to review, question and possibly rebut the opposing expert’s opinion. Thus, the basis for the expert’s opinion must be given to the opposing side in some form or another. If a DV appraisal report does not include the calculation used to determine a DV amount, the opposing side (as well as the court) has no way to establish the validity of the calculation. In such cases, the judge is obliged to exclude the testimony of the DV expert. It should be noted that there is a significant difference between giving an opinion that the value of the vehicle was affected by a collision and the actual dollar amount.

### Predicting the Future

All of the many DV calculations I have seen start with a foundational vehicle value. That value is often known as Actual Cash Value (ACV). The problem with ACV is that it varies due to natural depreciation, vehicle condition, maintenance, mileage, etc. This means that the present ACV, the foundation for DV determination, will change in time. Additionally, if the ACV (the foundation for a DV amount) changes with time, the DV amount must also change

## TECHNICAL FEATURE

Last month, we discussed the different types of Diminished Value (DV) that occur in the collision repair industry. In the second part of this feature, we’ll discuss how DV is handled in a court of law.

### DV and the Judge

Forensic experts are the educators of the courtroom. We are bound by the law to give opinions that have a basis in scientific fact; anything less may mislead a jury. This is why states have rules and guidelines by which judges weigh expert opinions.

At the most basic level, there is the “Frye” standard (*Frye v. United States*, 293 F. 1013), which is used by many state courts and requires that the expert’s opinion must not be based in a “novel” (i.e., untested and unsupported) science and must be accepted by his or her relevant scientific community. At the federal level, judges are bound by the Federal Rules of Evidence, specifically FRE 702, which not only encompasses the *Frye* standard, but also places emphasis on the *Daubert* trilogy components (*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579).

### FRE 702 reads as follows:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if:

- (1) the testimony is based upon sufficient facts or data;
- (2) the testimony is the product of reliable principles and methods; and
- (3) the witness has applied the principles and methods reliably to the facts of the case.

### The *Daubert* Components:

- Testable/Falsifiable

with time. Thus, the demanded DV is time-dependent. If DV is to become a recognized part of the claims process, the DV appraiser must find a reasonable way to predict the future value of the vehicle. Unfortunately, the future value of the vehicle is dependent on many things, including how long the owner will keep the car, how the vehicle will be maintained and whether or not there will be future collision events that will affect the value.

In a recently settled case, the DV demand was approximately \$40,000. The vehicle was six months old when it sustained \$12,000 in damage (\$9,000 of which were parts). The calculation was based on the \$109,000 ACV. However, the litigation took two years to reach the trial calendar. At that time, the ACV had dropped over \$20,000. Can the vehicle owner still claim \$40,000 DV? No, because in litigation, the plaintiff must prove "damages."

"Compensatory damages" is a sum of money awarded in a civil action by a court to a person for the particular loss, detriment or injury suffered as a result of the unlawful conduct of another. The court process needs proof of the amount of "damage" a person sustained. In contrast, the court (usually) does not allow people to profit from compensatory damages; it's a type of reimbursement. But if the ACV (and thus the DV) is going to change with time and conditions, could a time come when the vehicle owner would actually profit from a DV settlement? Now, I'm no lawyer, but that isn't what the rules say should happen.

### It's Already in There

If one reviews the statements of value-reporting services, such as the National Auto Dealers Association (NADA) and others, you will see no reference to DV and no reference to vehicle repairs, collision or otherwise. However, you will see "condition." You will also see that the values stated are derived from polling dealers and other vehicle sales.

Consider this: If a dealer has a number of similar vehicles on his or her lot, and some of those cars have histories including collision repairs, it may be assumed for this scenario that those with history reports will sell for "less." When NADA calls for sales data, that dealer will report those vehicle sales and state the prices and (vehicle) conditions. He or she won't say if any of those cars went for less money because of a CARFAX report. Those reduced price cars were included in the NADA valuation guides and averaged in with all the others. So couldn't you argue that the NADA value guides, which reflect the averages of these sale, already include the vehicles with DV?

### Summation

In conclusion, we believe in the concept of inherent diminished

value. We presently have a case with a nine-month-old vehicle that required significant repairs totaling over 60 percent of the vehicle value. It's hard to argue that this vehicle value now (and in the future) will not be affected by this collision. However, we have not seen a scientific basis for the DV calculations offered, nor any consistency in the industry. All of the cases we have reviewed have included "net opinion" (those without factual basis, test results, citations, etc.) and are only reflective of the subjective review of the appraiser. We have also not seen a DV appraisal that would stand against a true Daubert test. However, we do believe that a scientific basis can be developed with proper historic value data as a calculative part of the valuation. Throw in some real science and testing, and there might be a real case to be made.

We also believe that the most significant and viable basis for DV is the collision repair. It's hard to fight against a DV allegation if the vehicle repairs are improper, incomplete or otherwise poor. Many shops are not equipped to repair contemporary vehicles. This fact, combined with unreasonable cycle times and aftermarket parts, means that repair related-DV is going to blossom.

Please feel free to contact us if you have any questions. **H&D**

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## Executive Director's Thoughts

WMABA is interested in your thoughts about Diminished Value from repairs. If you have any insight or opinions on this subject, give our office a ring (or email)!

- Jordan Hendler