

NEGLIGENCE AND THE VALUATION INDUSTRY IN THE YEAR 2000

Ann Brownell

Licensed Independent Estate Agent

Graduate Diploma of Property R.M.I.T

Annbrownell@hotmail.com

Tel/Fax 03 9819 3804

ABSTRACT:

This Paper is concerned with one of the major issues confronting all professionals today - 'Negligence & Valuation Practice in the Year 2000 In Australia'. The following aims and objectives have been researched:

- 1. An examination of the underlying historical legal principals when dealing with claims of negligence and the claim for damages.** This was undertaken and provided a basis for this paper.
- 2. To examine recent 'landmark legal cases' and decisions to gain an understanding of the current situation.** Landmark legal decisions were used to highlight the extraordinary changes that have taken place in the past two years and how these decisions will have a profound impact.
- 3. Professional Indemnity Insurance and how this is being affected.**

Professional Indemnity Insurance premiums will dramatically increase. An Insurance broker Marsh, (1999) notes that the decisions will be likely to be applied to all jurisdictions. According to Marsh, insurers are now considering the impact of this decision on the scope of their policies. However Mr Alan Hyam a Sydney barrister who specialises in the real estate industry has said "Insurers weighed up the damages ordered by the courts against their own estimates when setting premiums. Consequently insurers were abandoning PI insurance because of valuation litigation. Professional persons must carry PI Insurance to protect themselves from legitimate or spurious claims.

INTRODUCTION

The subject of this Paper is "**Negligence & Valuation Practice in the Year 2000**". This project will cover the legal liability of valuers and professional negligence, and areas where negligence cases may arise and remedies for professional negligence.

As this topic is such a broad area for research the project will be limited where possible to Australia and will cover recent significant legal precedents and relevant parliamentary statutes. The focus will be on the 'current situation' as recent court cases and decisions are the most relevant today.

In addition the legal principles of professional negligence will be investigated including 'contract law', 'tort of negligence', 'duty of care' and 'standard of care'. Past and present legal cases will be used to determine areas where negligence cases may arise and how the property markets play a part in the alarming number of successful claims in the law courts to award ever increasing damages to clients/plaintiffs against professionals.

As a direct result of recent legal cases and the subsequent decisions all 'professional persons' are increasingly aware of the threat of 'a claim for professional negligence'. Appropriate Professional Indemnity Insurance is now a most crucial insurance for all professionals and as a direct result of court cases these premiums have increased steadily over the past few years. Professional practices have had to take steps to protect themselves from these potential clients/plaintiffs and adhere strictly to all conditions imposed by the insurers for their Professional Indemnity Insurance.

This paper is intended to be a guide to the situation in 2000. Court Cases scheduled in Australia and in the United Kingdom may change the situation here in Australia in the next few years.

1.1 BACKGROUND

Claims made against valuers and other professional persons in the past ten years for professional negligence have increased in both number and scale.

Murdoch (1985) has suggested that there are two main reasons for the dramatic increase in professional negligence claims. These reasons are:

- "Consumerism": Clients are now more aware of their rights and increased media coverage has alerted the public to making large claims for professional negligence. Although the media may record some of the larger and more sensational settlements made in recent years, many claims are settled by negotiation with no publicity and are not recorded.

It is only in the past 20 years that a professional's responsibility has been extended beyond a client to 'other parties'. During this period of time additional legal cases have re-enforced the trend for plaintiffs to bring more and more successful professional negligence claims.

The public who are potential clients are more educated today and increased media coverage allows details of the more sensational damage claims to be published widely. In addition legal firms promote their practices in the media and 'success based' fee arrangements may be favourably negotiated. Payment of fees for legal cases may be negotiated on the basis of "no win, no cost" and these terms allow clients who would never have proceeded to make a claim.

In the valuation industry according to Joyce & Norris (1994) **the overwhelming majority of these negligence claims have arisen from valuations made for mortgage purposes' and relates to valuations undertaken in Australia about the time of a property downturn such as 1982 - 83 and 1990 – 98.**

As the law has evolved a client may choose the most advantageous legal method to seek "redress" for the negligence suffered as the result of a valuer's 'lack of judgement'. It is also apparent that when the property markets are unstable then a valuer's task is much more difficult.

It is very difficult to forecast the future because there are so many variables that a purchaser must take into account when deciding to make an investment in property.

It is easy to make valuations in a rising property market and a valuation may appear to be rather conservative as time goes on, but the exact opposite is true in a falling market. In a falling market the valuer's judgements may be more closely examined and hence more claims of negligence may arise.

It is therefore important to note that the number of negligence claims may rise when there is a downturn in the market. Investors, mortgagees and other interested parties may not be able to realise all of their funds on the disposal of their property and they will then cast around looking for some other party to pay some or all of the equity lost.

Ratcliff (1972) has said "Price is set in the marketplace. To serve his clients needs, the appraiser (Valuer) seeks to predict the price at which the subject property will probably sell. The appraiser must predict the outcome of the interaction of the market forces of demand and supply to which the property might be exposed and which could trigger a transaction from which market price will emerge."

Economics is a behavioural science descriptive of the economic behaviour of people under various conditions. It is the appraiser's task to predict how people, both buyers and sellers will behave in respect to the subject property. With so many variables and factors beyond the valuer's control a prediction of price is indeed a formidable task.

1.2 AIMS AND OBJECTIVES:

To examine relevant factors concerned with '**Negligence and Valuation Practice in the Year 2000**' with particular reference to Australia.

1. To examine the underlying historical legal principals when dealing with claims of negligence and the claim for damages.
2. To examine recent landmark legal cases and decisions to gain an understanding of the current situation.
3. The importance of Professional Indemnity Insurance and how this is being affected by recent legal cases and legislation.
4. To provide a guide for valuers and other property professionals with regard to negligence, damages and the law.

2 DEFINITIONS:

2.1 THE VALUATION INDUSTRY IN AUSTRALIA

The Oxford Dictionary defines a valuer as 'one who estimates or assesses values professionally'. Although there are other types of valuers such as valuers for art works, furniture, plant and machinery our research paper will be confined to the valuation of land by professional qualified valuers.

In Australia valuers training is conducted through an approved Tertiary Institution for 2 years full time and 2 years part time. Professional supervised work experience is also required prior to registration with the Australian Institute of Valuers and Land Economists.

It was established in the following case, ***Turner v Golden*** (1873) LR 9 CP57 ‘

by holding himself out as a valuer, a person represents that he has the skill and knowledge usually found in persons qualified in such work, and if he falls short of the proper standard he would be liable.

‘Skill and knowledge’ are perhaps the best words to describe the expectations of a qualified valuer.

2.2 WHO IS PART OF THE VALUATION INDUSTRY

“Valuers as Land Professionals”

In Australia and in this paper we are referring to professionally qualified valuers who are Members of the Australian Institute of Valuers and Land Economists or who are eligible to join this organisation. Valuers may operate a valuation practice as sole traders, partnerships, or corporations.

Valuers are also employed by Local councils and other government organisations and carry out a ‘raft’ of statutory valuations such as council rates and land tax etc. Valuers employed by government departments or other statutory bodies are protected from being personally responsible in respect of a departmental valuation. This statutory protection was enacted in ***Valuation of Land Act*** 1916 (NSW) Paragraph 9 of schedule 1.

2.3 WHAT IS A VALUATION

The Oxford Dictionary defines a valuation as an “estimation of a thing’s worth.” (especially by a professional valuer). However in Australia in separate decisions by the N.S.W. Valuers Registration Board it has been held that a valuation of real estate may consist of a “**mere letter**” or a “**rental assessment**”.

Other types of valuations range from a one line certificate expressing the value of a certain property to a detailed report and valuation and/or feasibility report. A verbal “kerb-side” valuation has also been considered to be a valuation as outlined in ***Mohr v Cleaver*** (1985) Aust. Torts Reports 80-720

Whipple (1995) has outlined expectations of a modern valuation practice when he said “**Valuation reports are collectively, the window through which the outside world views the profession**”. Valuation reports are prepared and read by many people such as investors, developers, financiers, and mortgagees. These reports are heavily relied upon and are a powerful advocate for the author’s professionalism and accuracy. Good communication skills are important together with adherence to standards and formats as the basis of a good practice.

Detailed accurate field notes for each valuation are required and these notes and sketches will form the basis for the valuation report. The field notes and information collected by a valuer in the course of making a valuation must be comprehensive, logical and readable. If a claim for negligence is made (and this can even be several years after the valuation date) these notes will be required for a basis of defence for the valuer. Incomplete or illegible notes may render the valuation ‘flawed’ and it is now imperative for valuers and other professionals to look at their professional work with the expectation **‘that this client may sue in years to come and how can this effect be minimised.’**

Even though some court cases may require specialised value definitions, Radcliffe (1995) argues “that the great majority of cases require the appraiser/valuer to predict the transaction price for which the term ‘market value’ is used to accommodate common practice and acceptance”.

Real Estate Markets are imperfect and dynamic and are influenced by many economic drivers so a valuer's report may be prepared with all 'due diligence' but when a property has to be sold the selling price may vary remarkably from the valuation. Valuation is not a science and the valuation of a property is a prediction only and so it is very difficult to predict for the future and all the unforeseeable circumstances. Declining property prices exacerbate the situation. Over the decades professional valuers have increasingly needed to invest in Professional Indemnity Insurance to protect themselves from claims of negligence.

Gibson (2000) stated that **“appropriate PI Insurance indemnifies insured persons against damages awarded against them by a Court or resulting from an approved negotiated settlement in relation to an act, error or omission in the conduct of their business which breached the professional duty of care owed.”**

This insurance covers the costs and expenses of defending claims of negligence. It has been estimated that legal costs for one day in court could be **\$15,000 per day**.

As a direct result of litigation and successful claims for damages which have been awarded in the courts in recent months PI Insurance premiums have escalated and this issue is considered to be the most important issue facing the valuation industry today. In addition to the decisions made by the court there are other numerous claims settled out of court and unreported, so PI Insurance will be required to settle all of these claims. (Appendix A)

Changing terms and conditions imposed by PI Insurers are turning this insurance into a minefield that is a trap for the uninformed professional. It is necessary to evaluate one's professional indemnity insurance very carefully as inclusion and exclusion clauses may leave a professional person uninsured in some circumstances.

3. LITERATURE REVIEW

To undertake a study of Negligence & Valuation Practice in the year 2000 and to review the impact of recent legal decisions and Legislation.

3.1 SOURCES AND METHODOLOGY

In researching this topic an historical approach was found to be most important as landmark legal cases and decisions have been the basis for this area of the law. Important cases have been briefly mentioned and some more recent cases outlined. These important cases have been listed in the reference guide and can be accessed on the Website www.Austlii.edu.com should further information be required. .

This report has used legal textbooks, journal articles and different professional newsletters to gain an insight into the current situation. Comments from leading professionals such as legal counsels and property professionals combine to build a picture of the situation today. In addition to the recent legal decisions laws enacted by parliament have also had a great impact.

Extensive uses of Web sites have been used to research the latest material and opinions available and this has been invaluable in obtaining the latest facts in legal cases that are having such an impact in Australia today.

In undertaking this research and after speaking to several insurers and brokers obtaining professional indemnity insurance for a valuer is increasingly difficult. AMP has withdrawn from the market and the only insurer that would agree to insure a new valuer was Lloyd's of London and this would include imputative terms and conditions. Other professions such as architects, engineers and doctors were affected by recent legal decisions but PI Insurance may still be obtained from several insurers for these professions.

4 LEGAL BASIS OF CLAIMS AGAINST VALUERS

Professional persons such as doctors, lawyers and valuers are legally liable for their carelessness that has caused damage in both contract law and the law of tort. In the present millennium courts are getting tougher and tougher on valuers and claims for negligence are steadily increasing. Statutory Acts such as **The Trade Practices Act** 1974 and **Fair Trading Act** also plays an important role.

The fact that a valuation figure has proven to be 'incorrect' by subsequent events such as a fall in the selling price of the property may not be sufficient to make a successful claim against the valuer who valued the property. Usually the valuation will be found to be deficient or 'flawed' in some identifiable respect, and that this deficiency has led to a foreseeable loss being sustained. When liability is established against a valuer, an assessment of damages payable by the valuer to the Plaintiff is made. Over the years a body of principles and legal decisions have developed in assessing the damages payable by a valuer

4.1 CONTRACT LAW

One of the main areas of law that allows a claim for negligence against a valuer falls within "the Law of Contract".

The 'contract for a valuation' usually arises when a valuer is requested to undertake a valuation and agrees to do so for a pre-arranged fee. 'Letters of Instructions' are the primary source of the valuer's duties, obligations and liabilities. The terms and conditions of the contract are those that the parties have entered into and these should be fully articulated in writing and clearly understood by all parties.

Any breach of conditions within that contract will be considered as a 'breach of contract' and the breaching party may terminate the contract and seek damages. The person who has suffered the damage will be entitled to be placed in the same position as if the contract had been performed properly and the court will assess damages for the loss suffered by the valuer's client.

Generally, the principle of 'privity of contract' ensues that only the parties to the contract can sue a valuer for 'breach of contract' for loss or injury suffered as a result of negligence. However there is a limited scope for third parties to sue under the law of contract if they are beneficiaries.

The law in Australia is that in respect of professional work the Court will look more at the ordinary law of negligence in relation to whether a valuer's professional work has been carried out without 'negligent error'.

Damages in contract were firmly established in *Hadley v Baxendale* (1854) Exch. 341, It is most important when a valuer is undertaking a valuation that the parties with whom he is dealing are clearly defined. The valuer should accept his/her instruction in writing (Letter of Instructions) from the client and also receive his fee from the same party. These issues were raised in a House of Lords decision of *Smith v Eric S. Bush and Harris & Anor v Wyre Forest District Council & Anor* (1989) where his Lordships noted –

“in professional negligence claims brought against valuers by purchaser/mortgagors, in situations where the valuations were obtained by the mortgagors that because the valuation fees were paid by the borrower/mortgagors (to the mortgagees) ‘was akin to contract’.”

Therefore it is of paramount importance in valuation practice today that a clear and concise **“Letter of Instruction” be sent to the valuer, signed by his clients and the fees paid for service are paid by the same.**

The terms of the contract between a valuer and his/her client may be ‘express’ or ‘implied’. The **‘express terms’ are specific instructions in the written “Letter of Instruction”** such as a request to value a particular property for a specific purpose. The **‘implied terms’ or assumptions in the contract are that the valuer who has the training and expertise to carry these instructions will do so in the prescribed manner.** There are other implied terms and these are important such as ‘standard of care’ ‘standard expected on inspection’ because if one of these implied terms are breached the valuer is liable for negligence regardless of the amount of skill and care that has been exercised.

4.2 NEGLIGENCE (Tort or the law of Wrongs)

Tort has been defined as ‘a Tort Law or the law of wrongs’.

‘Negligence is part of an area of law known as tort law or the law of wrongs’.
(Joyce and Norris (1994))

It is now an established legal principle that a valuer can be held liable to his client for **‘breach of duty in negligence’ as well as ‘for breach of duty in contract’.** Several landmark legal cases have established the modern law pertaining to negligence and

it is not proposed to enter into a detailed discussion for each Case. Some of these cases are:

- **Donoghue v Stevenson** AC 562 (1932)
- **Brickhill v Cooke** 3 NSW LR 396 (1984),
- **Old Gate Estates Ltd v Toplis and Harding and Russell** 3 A11 ER 209 (1939)
- **Caparo Industries Plc v Dickman** 2AC 605 (1990)

Although many decisions have followed **Donoghue v Stevenson**, the **Hedley Byrne Case** in Australia is considered to be a starting point of the principle of 'duty of care not to cause economic loss' and is slightly different from English law. During the latter part of the last century there were several cases which were considered to be important for Australian law namely:

- **Hedley Byrne Co Limited v Heller & Partners Limited** (1964)
- **MLC v Evatt 122 C.L.R. 556** (1968)
- **I. Shaddock & Associates v Parramatta City Council** 150 C.L.R. 225 (1961)
- **Caltex Oil (Aust) Pty Limited V The Dredge 'Willemstad'** 136 C.L.R. 529 (1976)
- **San Sebastian Pty Limited & Anor v Minister administering the Environmental Planning and Assessment Act.162 C.L.R. 340** (1986)

It is not proposed to discuss the findings of the above mentioned cases as there are more important cases now such as, **Kenny & Good Pty Limited & Anor v MGICA** (1999) which is discussed in the next section of this report.

It is important to focus on the fact that valuers are usually sued for their breach of duty for negligent information or advice that has caused **economic loss**.

A mortgagee who has advanced funds relying upon the valuation report often sustains this loss and when the property is sold there is a quantifiable loss for which damages can be awarded.

4.3 LEGISLATION AND STATUTORY REGULATIONS

TRADE PRACTICES ACT 1974. Australia

In addition to the 'Law of Contract' or 'Laws of Tort', Statutory Acts are increasingly important and are intended to protect consumers. The most important acts are at the Commonwealth level - Trade Practices Act 1974 and the Trade Practices Act at State levels.

A. Trade Practices Act 1974

This act deals with corporate entities and Sections 51A, and 52 of the ***Trade Practices Act*** are the most important sections. In Sackville & Neave pp750, Section 52 (1) states “A corporation shall not in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive”. **Section 52 has the widest** definition and has recently been applied in the High Court of Australia in the case **Kenny & Good Pty Limited & Anor v MGICA Limited 1999** and will be discussed in Part 2 of this Paper.

B. Fair Trade Practices Act. (Vic)

Generally the different states of Australia have enacted their own consumer protection Acts in ‘The Fair Trade Practices Acts to suite the prevailing conditions in that State. This state legislation is applicable to individuals and other non-corporate entitles. **There no doubt that professional persons including valuers are covered by these acts.**

Significant changes have occurred as a result of the above legislation. Previously under Common Law actions the ‘*class of person*’ to whom a ‘duty of care’ is owed in tort was limited as decided in the case **Banque Bruxelles Lambert SA and Eagle Star Insurance Company Limited v John D Wood Commercial Limited & Ors** QB.HC (Eng) 1983. The Judge, Mr Justice Phillips made a judicial recognition of the facts that when a borrower enters into a loan agreement they accept certain risks (Including the risk of a decline in the value of the mortgage security) when property markets decline. His Honour reduced the amount of damages paid because of ‘contributory negligence’ on the part of the Plaintiff, **Banque of Bruxelles Lambert SA and Eagle Star Insurance Company Limited v John D Wood Commercial Limited & Ors or the BBL case** as it is often referred to.

In a recent court case **Kenny & Good Pty Limited & Anor v MGICA Limited (1999)** this decision has now established new precedents. It was found that a valuer **will be held negligent** and will have breached the ***Trade Practices Act 1974 (Vic.) s. 58*** and the ***Fair Trading Act (Vic.)*** with respect to misleading and deceptive conduct and for misleading statements in relation to land. **In this case the full amount of damages was awarded with no reduction for ‘contributory negligence’.**

The statutory causes of this type of action do not require any proof of fault or negligence as they rely purely upon ‘misleading and deceptive’ conduct.

4.4 DISCLAIMERS

Often in a valuation report there will be a 'Disclaimer' included and this measure is intended to give some self-protection to the valuer and attempts to limit a claim for damages to a particular class of person to whom 'a duty of care is owed.

As a result of this 'perceived' protection offered by the inclusions of 'disclaimers' in valuation reports these are usually included. The value and protection afforded is limited and this is evident in Evatt's case when C. J. Barwick cast a 'shadow' over the reliability of disclaimers. (The Legal liability of Valuers) 1994.

In addition to this decision the **Trade Practices Act 1974** Section. 68 specifically invalidates 'disclaimers'.

4.5 OTHER LEGISLATION

Other statutes that may impact upon valuation practice are;

- The Corporations Law enacted 1st January 1991
- Contracts Review Act 1980 in NSW
- Trustee Legislation in each state
- Valuers Registration Act and Regulations in each state.

4.6 SUCCESSFUL NEGLIGENCE CLAIMS - TORT, CONTRACT OR STATUTE

A successful claim for negligence will result in the payment of **DAMAGES** and damages may be paid as a result of a court decision or they may be a negotiated settlement that is never recorded as a judgment.

Damages may be awarded for both 'breach of contract' and 'damages in tort'. (Concurrent liability) and this has been the trend in the Australian courts until recently but this has all changed since the latest decisions in 1999.

In the "Law of Contract" Joyce & Norris (1994) have said 'The amount of damages arising from a breach of duty by a valuer may vary accordingly to the type of damage sustained, whether the claim is brought under tort, contract or statute, and the relationship of the parties'.

The amount of damages that may be awarded against a valuer will vary according to the type of damage sustained. However there are other heads of damage that may be considered such as:

- Physical Property Damage,
- Personal Injury
- Inconvenience and Distress

Damages in 'tort' vary from damages in contract. What is remote in contract may not be too remote in the 'tort' of negligence. Damages are recoverable in the 'law of tort' by applying 'the reasonable man test' which means 'what a reasonable man should have foreseen would occur at the time of the negligent act. However when damages are being assessed in the cases of a valuer's negligence the same basic principals are applied whether the action is brought in 'contract' or 'tort' or both.

Damages for negligence and misleading statements may also be awarded under current consumer protection legislation.

5 THE YEAR 2000 AND BEYOND

Recently there has been a spate of court decisions that are affecting the valuation industry and other professional practices in Australia. Some of these cases are:

5.1 INTERCHASE CORPORATION LTD. v COLLIERS JARDINE - 1999 Brisbane Myer Centre – Appeal Pending

The Facts.

At the height of the property boom in Queensland in 1988, Interchase Corporation Ltd. paid \$442.5 as a result of a \$500 million valuation for the Brisbane Myer Centre. The Centre was sold in 1995 three years later after Interchase was placed in liquidation, for \$200 million. It was then sold again in 1998 for \$371 million.

Marx (1999) summarises the issue as to "whether the Myer Centre valuation in June 1988 of \$A500 million was so in error as to constitute negligence or whether the figure was consistent with general market conditions at the time".

In the legal action Interchase argued that the real value of the Myer Centre in 1988 was only \$380 million, a figure well below the valuation amount given.

The Decision:

The Queensland Supreme Court Justice Margaret White awarded Interchase more than \$25 million in damages. At the centre of this litigation was a valuation of \$500 million and the Brisbane Myer Centre. With interest the amount payable has now been boosted to \$59 million - an astounding amount of damages.

It is important to note in this case Interchase's legal representative, Allen Allen & Hemsley partner Wilson (2000), in the Financial Review said "he expected the appeal to be heard in the Queensland Court of Appeal by the end of the year."

At the appeal the Interchase liquidator Barber (2000) said "he remained keen to pursue the damages on behalf of the 400 subordinated note holders still owed \$125 million when Interchase went into official liquidation in October 1992.

5.2 NATIONAL BANK v HANN NOMINEES PTY LTD - 2000

Appeal dismissed – Decision stands

The Facts .

In April 2000 the Full Bench of the Federal Court dismissed an appeal against a single judge's decision in a case involving land and buildings near Shepparton, Victoria. Hann Nominees Pty Ltd. Trading as P F Hann & Co, valued the properties in August 1990 at more than \$1.16 million. The National Australia Bank permitted a draw-down of \$775,000 by the owner, Dennis Dean nominees Pty Ltd.

The Decision:

The court found the true market value was about \$510,000 and said the bank would not have allowed the draw-down if it had known this. The Full Bench dismissing Hann's (the valuer) appeal against being found negligent said the questions was "whether the views adopted were views that a reasonable valuer exercising due skill and diligence could not have adopted in the sense that they are outside a reasonable range".

"Competent and careful valuers may properly differ as to a particular figure,"

Justices Brian Tamerlin, Ross Sunberg and Arthur Emmett (Financial Review 2000) said.

“However where a valuer determines a figure which is outside a *range of values* which could properly be arrived at by a competent valuer the courts have taken the view that such an over-valuation affords some evidence of negligence on the valuer’s part.”

Comment:

The Full Bench of the Federal Court has now determined this case and this decision must be considered a ‘landmark legal case’ and a precedent for damages awarded against valuers. Egan, (2000) a director of Egan National Valuers who gives evidence in court on behalf of valuers who have been sued said “ the effects of these and other recent judgments were really terrible for his industry.”

5.3 ASTLEY & ORS V AUSTRUST LIMITED - 1999

High Court Decision

The Facts.

The case involved certain advice provided by Solicitors to Austrust, a Trustee Company for many years. Austrust employed solicitors to provide advice on certain trust documents having decided to commence acting as a trustee for a trading trust.

The venture failed and the trust was eventually wound up and incurred extensive losses where the assets were insufficient to meet its liabilities. Austrust commenced proceedings against the Solicitors alleging ‘negligence in the provision of advice’. The trial judge found that the solicitors had been negligent but that Austrust had been guilty of ‘contributory negligence’ in that it had failed to determine the viability of the venture. The damages were reduced by 50% because of this contributory negligence by Austrust.

The Decision - The High Court of Australia.

On appeal to the High Court Austrust was found not guilty of ‘contributory negligence’. The appeal was upheld upon the basis that ‘contributory negligence’ could not be raised by professionals (Valuers) as a defence to a contractual claim for

professional negligence. This means that if professionals are sued in contract for failure to exercise their professional skill with due care, they will no longer be able to argue that damages claimed by the plaintiff should be reduced because of the plaintiff's lack of care in bringing about the loss.

Commenting on the effects of the decision Marsh (1999) said "service providers ought to review their retainers and service contracts and incorporate express provisions for *liability apportionment*. Contracts should include clauses reducing any liability assumed by the service provider as a result of any contributory negligence on the part of the other parties".

The legal firm Phillips Fox (1999) also agrees that **it is time to consider contractual clauses to provide for *apportionment of damages*** according to the responsibility for damage on the basis of the respective fault to the parties.

However legislation such as the Trade Practices Act, or legislation regulating the legal profession may make some clauses of this type legally void and therefore useless. In the meantime any change to the position at law to allow damages to be apportioned in a contractual situation can only come about through changes to the relevant apportionment legislation in each State.

The decision represents what can only be described as a major blow to professional persons and service providers. It is difficult to assess with confidence the implications of this decision when one considers the decision. Many lawyers including Monahan (2000) of Ebsworth & Ebsworth, Solicitors maintain that the consequences of such a ruling are "Unjust".

Comment:

As this case was decided in the High court it must be considered to be a 'landmark legal case' and has widespread implications for all professional persons. Previously clients/Plaintiffs could bring a concurrent case of negligence in the 'Law of Contract' and the 'Law of Tort' but now that the High Court has ruled in the Astley v Austrust case, the defence of contributory negligence has no application to contract law.

Professor Jim Davis 2000 of the Faculty of Law at the Australian National University has called for legislative intervention to clarify the serious implications for thousands of professional persons in Australia.

5.4 KENNY & GOOD PTY LIMITED & ANOR & MGICA – 1999

High Court Decision

The Facts:

The decision regarding *Kenny & Good Pty Limited & Anor & MGICA Limited (1999)* is very significant. In this case Beca Developments Pty Limited was in the process of developing a property in Hunters Hill, NSW.

Beca sought first mortgage finance from Macquarie Bank (the bank) to assist in the completion of a residential development. The bank engaged valuers to make an appropriate valuation of the residential properties. A condition for obtaining the mortgage funds was the valuation of the property. The property was valued at \$5.35 million dollars and at completion \$5.5 million dollars.

The valuation contained a statement that the property was “suitable security for investment of trust funds to the extent of 65% of the valuation. A first mortgage was obtained and registered with the Hunters Hill property as the security. The mortgage insurance was provided by MGICA.

In 1991 the mortgagor Permanent Custodians entered into possession of the property after Beca defaulted under the mortgage. In 1992 the property was sold for \$2.65 million and a loss for Permanent Custodians of around \$2 million dollars was sustained. This loss was paid for by MGICA as mortgage insurer.

It was accepted by both parties to the litigation that the correct valuation of the property should have been around \$3.9million to \$4 million. It was also accepted that \$2.65 million was the correct value of the property when it was eventually sold.

Lindgren J in the Federal Court held that the valuer was negligent and had breached the ***Trade Practices Act and Fair Trading Act*** with respect to ‘misleading and deceptive conduct’ and for also ‘misleading representation in relation to land’. His Honour did not apply the earlier authority of *Banque Bruxelles Lambert SA v Eagle Insurance Company Limited (1993)*.

This case was heard in the House of Lords and held that the valuer was liable in negligence only “for the consequences of the valuation being wrong” as opposed to ‘the consequences of the lender entering into some loss making transactions in reliance upon the valuations’. Lindgren J also did not follow the High Court of

Australia decision in *Potts v Miller* (1940) in excluding damages recoverable by a party whose damage had resulted from a fall in the property market.

The Decision.

His Honour decided that the valuer was liable for any loss suffered by MGICA as a result of entering into the transaction in reliance upon the valuation, irrespective of the fact that the losses were increased by a fall in the property market.

If Lindgren J had followed the previous authority, the appellant would only have been liable for the difference between the amount in the incorrect valuation - \$5.5 million to \$4 million. The full court of the Federal Court upheld Lindgren's decision on appeal **and it is this case that is having wide spread impact upon the valuation and insurance industries.**

Comment:

This case again was decided in the High Court of Australia and must be regarded as another landmark decision and confirms that any loss suffered by a Plaintiff will not be mitigated by a fall in the property market. This will allow for increased payment of damages to be paid by defendants.

6 OVERVIEW OF UNITED KINGDOM AND UNITED STATES OF AMERICA

United Kingdom - Chartered Surveyors.

Valuers are referred to as 'Chartered Surveyors' and must carry PI. Insurance, with preferred companies or they are breaking professional rules. (Reuters Business Briefing – Article).

In 1999 important cases in the UK and pertaining to valuers and their legal liability were:

- *Arab Bank plc v John D. Wood and Weatherall Green & Smith*. This case is currently in the Court of Appeal.
- *UCB v Alder King (unreported)* in which damages were reduced by 10% to reflect the fact that the lender had failed to check the financial history of the borrower and obtain references.
- *Platform Homes v Oyston (1993)* currently subject to an appeal in the House of Lords.

The outcome of these cases in the next few months will also influence future Australian court decisions.

In the United Kingdom and some jurisdictions within the United States **Limited Liability Partnership Legislation** has been enacted. This may provide some measure of protection for the professional, however it is not proposed to enter into a discussion about this legislation because Australia currently has no such legislation.

In Australia, Professor Jim Davis, (2000) would appear to support a legislative solution to the issue of punitive damages outlined in the above cases when he said “bizarre consequences and that legislative intervention was required.”

Professor Davis was referring in particular to the *Astley v Austrust* case because this decision has a very broad impact on several industries not just the valuation industry.

Further information for United Kingdom can be obtained from Website www.indemnity.lawsociety.org.uk or for united States of America. <http://www.uli.org/>

7 SUMMARY

This Paper will contribute to a greater understanding of ‘Negligence & Valuation Practice in the Year 2000 In Australia’. The following aims and objectives have been researched:

- 1. An examination of the underlying historical legal principals when dealing with claims of negligence and the claim for damages.** This was undertaken and provided a basis for the project.
- 2. To examine recent ‘landmark legal cases’ and decisions to gain an understanding of the current situation.** Landmark legal decisions were used to highlight the extraordinary changes that have taken place in the past two years and how these decisions will have a profound impact. .
- 3. Professional Indemnity Insurance and how this is being affected.**

Professional Indemnity Insurance premiums will dramatically increase. An Insurance broker Marsh, (1999) notes that the decisions will be likely to be applied to all jurisdictions. According to Marsh, insurers are now considering the impact of this decision on the scope of their policies. However Mr Alan Hyam a

Sydney barrister who specialises in the real estate industry has said “Insurers weighed up the damages ordered by the courts against their own estimates when setting premiums. Consequently insurers were abandoning PI insurance because of valuation litigation. Professional persons must carry PI Insurance to protect themselves from legitimate or spurious claims.

4. To provide an overview in the United Kingdom and to a lesser extent USA.

This overview was very brief because of the more significant legal cases in Australia.

5. To provide a guide for valuers and other professionals with regard to negligence, damages and the law today. This Research Project is intended as a guide only because any new decisions from the courts could change the situation.

8 CONCLUSION

This paper has considered some historical cases, several modern legal cases and legislation that has firmly established new precedents to award damages as the result of negligence. The decisions from the High Court in Australia listed in this report will be the basis of negligence claims in the years to come. **In addition the amounts claimed by Plaintiffs when suing professionals will increase. Monahan (1999) who acts mainly for insurers, said since the Astley decision “he had observed significant changes by plaintiff lawyers in claims against professionals”.**

It would be prudent for valuers and other property professionals to look carefully at the situation outlined in this paper and take appropriate measures to protect themselves.

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