

## **Professional Negligence and Indemnity (Concept Paper – Research Note)**

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### **Overview**

Negligence is considered as a great peril. The threat of an action for negligence is one of the great perils facing all professionals today. Even valuers are not an exception. There is a growing awareness in the valuation profession of the need to offer a ‘**duty of care**’ to the client and to **accept responsibility** for the advice given. In this context, *the client relationship* is very important.

The valuer as an expert provides advice and service to another party on the basis that he/she will receive remuneration for the same. ‘Laws of England’ by Halsbury clearly defines the *duties and responsibilities of valuers* as follows:

‘A person who holds himself out or purports to act as a valuer represents himself as having the **skill and knowledge** which a **reasonably competent member** of his profession or calling would have and it is his duty to his employer to use such **skill, care and diligence** as is reasonably required in the work which he has undertaken’

In the most significant and widely recognized case, ‘Baxter v Gaap & Co (1938) – Goddard J stated,

‘His duty was first of all to use reasonable care in coming to the valuation which he was employed to make and he must be taken to have held himself out as possessing the experience and the skill required to value the particular property. If he did not know enough about the property market, or value of the property at the place where the property was situated, he ought to have taken steps to have informed himself of the values of the properties there, or of any circumstances which might affect the property. It would be no defense for instance, to say “I made this valuation, but the reason why my valuation was proved incorrect, if it has been proved incorrect, is that I was not a person, as you know, who practiced in that locality”’.

‘On the other hand, one also has to bear in mind very carefully the fact that **valuation is very much a matter of opinion**. We are all liable to make mistakes and a valuer is certainly **not to be found guilty of negligence** merely because his **valuation turns out to be wrong**. He may have taken too optimistic or too pessimistic a view of a particular property. One has to bear in mind that, in matters of valuation, **matters of opinion must come very large into account**’.

In the appeal, this decision was affirmed by Du Parcq LJ and stated that, ‘It is, of course, quite clear that the mere fact that there is **an over-valuation does not itself show negligence**. Gross over-valuation, unless explained, may be strong evidence either of negligence or of incompetence. I have no doubt that there is in this case gross over-valuation and one looks to see whether or not there is any explanation of it, and whether or not it can be seen that the Defendant has failed to take any steps which he ought to have taken, or to pay regard to matters which he ought to have paid regard. I think that upon investigation one finds that it is quite plain that he has paid no regard to matters which were of the most vital importance’.

### **Liability for Negligence**

In law, **there is no negligence, unless damage results**. In the case of governing professional bodies, negligence on its own may give rise to a charge against a member even though no damage has been caused.

In simple terms, **negligence simply means** the departure from proper and reasonable standards of skill expected of a competent qualified professional person from whom the public has the right to expect **a reasonable degree of skill and care**.

Liability in negligence may arise in three forms. Firstly, **Breach of a Contract** – valuer fails to provide his client with a reliable opinion because of his negligence. Secondly, by **Tort of Negligence** – where third parties claim to have been injured as a result of the valuer’s negligent opinion and thirdly, both **Contract and Tort concurrently** – party injured may be able to sue in both, or either, contract and tort.

The same act, omission or opinion may give rise to suits by separate parties, one in tort and other in contract. E.g. In negligence, mortgage

lender may sue on breach of contract and those who rely upon that opinion may sue on tort. In *Yianni v Edwin Evans* (1981), the plaintiff claimed that he had been injured, because the valuer was negligent in the performance of his contract to value the property for Halifax Building Society. If the valuer complies with the instruction given and **no breach of contract**, a third party **cannot sue against him on tort**. In the case of a breach of contract, plaintiff no needs to prove the proximity of the parties in the tort case, as contract itself establishes the connection between them.

### **Required Standard**

Same standard applies to all professions. Court will see, “has the dependent met the requirements of the *average, competent practitioner?*” Always, the same standard applies to all members of the profession. The defendant may not plead that he was just starting out in practice and was less well qualified. By the same way, highly experienced practitioners are under no greater duty. The unqualified who seek to stray into the activities of the professionals are to be judged by the same standard, as came up in *Kenney v Hall, Pain & Foster* (1976) - unqualified negotiator & would-be seller, in *Freeman v Marshall & Co* (1976) - Surveyor – “an unqualified person doing his best”

Those who claim to be specialists, or experts, in any particular field are to be judged by the standard of the “*average, competent specialist or expert*”. The standard does not vary with fee charged. If no fee is charged, much the same standard applies. The law on ‘**gratuitous obligations**’ requires that the “volunteer” carries out the task to the same standard as would a reasonable person in the conduct of his own affairs. With professionals, they would use all their skills, as they would if acting for themselves. The standard is the same as if the work were to be paid.

In *Roberts v J Hampson & Co* (1988), the negligent valuer pleaded, as part of his evidence, that the fee for the mortgage valuation was very small and as a result, the time available to perform the task was limited. The court was not impressed and Ian Kennedy J stated that, “in all forms of work there were some winners and losers and that, if a particular valuation took disproportionately longer than normal, it had to be put in the balance with the others”.

Some buildings take much more work in measurement and calculations yet the fee will usually be based on the total figure supplied. For example, assessment of reinstatement cost for insurance purpose is important. In *Beaumont v Humberts* (1990), the valuers were concerned with a large listed building. They did not quote the actual rebuilding cost and instead they gave cost of reinstatement of a substitute building complied with current Building Regulations where the cost is less than half the cost of actual reinstatement. The valuers were held not to have been negligent. According to the RICS Red Book, if the calculation is made on any basis other than exact reinstatement, the basis should be spelled out, so the parties are aware of the situation before instructions are confirmed.

### **Basis of Negligence**

Generally, tortious liability originates from the principles laid down by the House of Lords in, *Donoghue v Stevenson* (1932). The plaintiff must prove: that the defendant owes the plaintiff a duty of care, that the defendant has broken that duty, and that the plaintiff has loss as a result. The previous classification of duty of care as “negligent act” and “negligent omissions” were changed to “harm caused to negligent” words by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964).

Generally, Valuer’s opinion is expressed in words only, figures being the equivalent of words. Because words are different from “acts” or “omission”. *Hedley case* was careful to lay down certain special rules. “word could be overheard, be misconstrued and be passed to person not intended to rely upon them etc. They therefore limited liability for “negligent words” to those cases where the defendant has “accepted a special responsibility”. As it appears from, *Smith v Eric S Bush* and *Harris v Wyre Forest District Council* (1989), acceptance of a “special responsibility” is not so much of a matter for the parties and it is to be found by the courts. To find this, courts apply “**test of reasonableness**”. The negligent words need not to be heard by the plaintiff, mere implication is sufficient.

In *Yianni’s* case, the plaintiff did not see the negligent report and valuation. He was able to deduce that the property was valued, at the very least at the amount advanced by way of mortgage. There are some instances where **change of loan amount by the bank**. An important point to know is, the valuer acting for a Bank may have suggested one figure,

but the Bank, for good commercial reasons, may have lent more. In such cases, it appears to be more difficult for the plaintiff to rely on any **implication of value** if the report has not been disclosed.

### **Main Causes of Negligence**

*Not following correct procedures* is a main cause. Courts are aware that valuations are matters of informed opinion. If the opinion is not based upon proper referencing of the site, knowledge of legal principles affecting the valuation, available comparable evidence and the like, the valuation may be called into question. In the absence of the correct procedures, the plaintiff claiming that the figure is incorrect may claim that the structure valued is ruinous; that the expected development potential is non-existent; that the property may not lawfully be used for the purpose required; or, has been found that the property is worth a lot less on trying to realise the security.

*Unverified market data* is another cause. *Omissions* is one of the causes under this. The plaintiff's expert valuer will demonstrate the way in which (in his opinion) the valuation should have been performed and the defendant will be cross – examined as to why the procedures vary.

In *Corisand Investment Ltd v Druce & Co.* (1978) 2 EGLR 86

The defendant valuer had omitted to enquire whether a hotel had a fire certificate which had been a requirement by law, and found to have been negligent.

Valuation during a period showing a signs of deep depression or of unusual buoyancy or volatility in the property market discussed in *Singer and Friedlander Ltd. V John D Wood and Co.* Watkins J stated,

‘Valuation ...in such circumstances an impossible one. As Mr. Ross said, valuation is an art, not a science. Pinpoint accuracy in the result is not, therefore, to be expected by he who requests the valuation. There is a permissible margin of error, the “**bracket**” as I called it....’.

The judge said, although the valuer had necessary special skills, he produced a negligent valuation which could not have been produced by a valuer of average competence using the reasonable skill and care which could be reasonably expected of him.

Under *Unverified market data*, **regard to purchase price** is considered major concern. In Australian case “Inez Investment Pvt. Ltd. V J.L.Dodd (Australian Valuer April 1988), Carmichael J stated that ‘Dependent valuer was negligent in making the valuation of the property without having regard to the purchase price’.

This case related to a block of development land and valued it at A\$ 144,000 in March 1974. The mortgagee advanced A\$ 80,000 over this property where at the time, this property had been purchased at a figure of A\$ 100,000. The significant feature of this case was, the dependent was claimed to have grossly overvalued the property and had negligently failed to take into consideration the price for which the property was being sold at the time of valuation.

In his decision, the Judge stated that he was satisfied that when a valuer sets out to determine the value of real estate for mortgage purpose, he should seek to ascertain the price which the property could be expected to realize on the date at which the valuation is required.

However, a valuer should do his own investigations and inquiry independently, come to a conclusion while making any appropriate comments on the indicated purchase price.

**Failure to inspect** is another cause coming under *unverified market data*. In *Singer & Friedlander Ltd v John D Wood & Co* (1977) 2 EGLR 84, defendants had been asked to value some development land in Gloucestershire for the purpose of using the value of land as collateral for a loan. Although it was stated in the evidence that he had done so, the defendant had not seen the land nor made inquiries from the planning officers. The plaintiff’s action was in tort – charging a breach of the contract with the borrower.

**Terms of Engagement** plays vital part under *unverified market data*. Lack of communication of ideas between the valuer and the client is one of the principal areas of difficulty. Few valuers take the trouble of agreeing the terms and conditions on which they are to work. To overcome this, the Royal Institution of Chartered Surveyors produced two pamphlets on conditions of engagement; one for residential property and the other for commercial property. They form a simple contract between

the valuer and inform the client as to the nature of the task which the valuer undertakes to perform, and all the requisite forms of exclusion clauses are also included.

Any particular practice is free to draw up its own conditions of engagement not necessarily in printed form. But what is important is that there are some agreed conditions of engagement between client and valuer.

**The Red Book** describes who is an **Average competent practitioner**. The terms of the RICS pamphlets originally formed part of the text of both the Manual of Asset Valuation Guidance Notes (the 'Old' Red Book) and the Manual of Valuation Guidance Notes ("the White Book"). Those were designed to ensure that valuers did not carry out valuations without the assembly of sufficient information. The new 'Red Book – RICS Appraisal and Valuation Manual constitute the minimum standard of the "**average competent practitioner**". It does not follow that every valuer who follows what the guidance notes will automatically escape any liability for negligence. It is for the valuer to decide in each case what must be done and suggest the form of calculations required to meet the circumstances.

If a valuation which is called into question disclose methods which differ from the guidance notes, the burden of proof fall on the defendant to justify the figures and the method used.

### **Possible pitfalls and potential liability**

- (1) Where a valuer advises a vendor on the sale price of a property under extremely buoyant market conditions and which is subsequently proven to be below the market at the time of undertaking the valuation and subsequent sale, and where proper inquiry was not undertaken by a valuer, nor appropriate comment on the effect of market conditions conveyed to the client in the report.
- (11) A gross under-assessment of a lease rental on behalf of a lessor which if accepted by the lessee may result in substantial monetary loss being sustained by the owner.
- (111) Certification of realizable values on a company share transfer, where the value of the 'realty' has been determined by a qualified

valuer and is subsequently proven to be incorrect and possibly on sold by the purchaser at a higher price.

- (1v) Under-valuation on reinstatement/replacement insurance valuation without taking into account the actors such as local authority requirements, changing in zoning, requirements for fire, provisions of adequate on-site parking etc.

## **Indemnity**

To protect against possible claim for negligence and consequent damages, the following “Check List’ is provided.

### **1. Instruction**

It is absolutely essential that the valuer receives clear instructions about the purpose of the valuation; preferably this should be in writing from the instructing party. Telephone instructions and other information similarly supplied should be recorded and confirmed in writing.

### **2. Time available**

Beware of accepting instructions to undertake urgent work, particularly where serious time constraints are imposed.

Months or years later, the client – or Plaintiff – will not be influenced by, or even sympathetic to, a defense that the valuer had to undertake the valuation without time to investigate fully or complete the details essential to a professional valuation.

### **3. Specialization**

The valuer should not accept instruction to undertake valuation work for specialized types of property or specialized locations where he has little or no experience or competence.

### **4. Definition**

The valuer should clearly define the **basis of the valuation** which he is undertaking and the **purpose** for which the report is required, as well as stating the effective **valuation date**.

This definition, together with any subsequent disclaimer, may prove to be extremely beneficial to his legal adviser in any subsequent action or claim against him for possible negligence.



## **5. Inspection**

It is imperative that the property being valued and all comparable evidence relied upon in undertaking the valuation assignment is **inspected by an experienced, competent person who must be a signatory to the report**. It is totally inappropriate for unqualified staff to undertake the inspection of the property and the comparable evidence and then have the report **counter-signed by one of the principals or senior staff**. This exposes the principal to a **possible personal claim** for the error or incompetence of the employee.

## **6. Verification of data**

Valuation is a matter of considered opinion and recognized as an art rather than a science. Hence, **opinion derived should be based on verified and confirmed facts** (Singer and Friedlander (supra)).

All planning data and other material factors influencing the value, including market evidence, lease detail etc, **should be confirmed by the valuer** and the authority and source of such information **should be clearly recorded** on the working file.

If the valuer is not supplied with copies of relevant lease agreements, certificate of planning data etc, this should be clearly stated in the report and the **valuation made conditional** upon such information being provided.

## **7. Accuracy**

Valuations are expressed in an arithmetical form, involving rather simple arithmetical calculations. Systems should be developed and employed for **cross-checking of all calculations** together with relevant quoted market data.

All calculations, however, **should be proof-read from the typed manuscript** and not merely checked from the working papers or notes which may already contain the mathematical error.

## **8. Certification**

Once the valuer has signed the report, he/she accept full responsibility for the content of the report and is under a '**duty to care**' to those parties who rely and act upon the report.

Whether or not the author of the report has received remuneration for his/her services from such parties is immaterial to the **contractual liability** in preparing the report.

## **9. Disclaimers**

The attaching of disclaimers to most valuation reports is now a **widely accepted practice** and is in most instances a requirement laid down by the professional insurers.

Such disclaimers can include specific factors as: **land title, survey, town planning, structural reports** etc, and should be recorded in the report itself.

A formal disclaimer clause(s) is required in specifying to whom the valuer accepts liability in preparing the report and the specific purpose of the valuation and actual content.

A disclaimer clause contained in a contract may not always protect the valuer from liability to a **third party** for negligent mis-statements unless the advice is given on a **'no responsibility'** basis and it is reasonable for the valuer to rely on this exemption.

Therefore, a disclaimer clause if incorporated within the report must be precisely worded having regard to the nature and purpose of the valuation. However, depending upon the circumstances of any given case, and legal interpretation placed thereon, such a disclaimer may in the end prove to be ineffective.

The report itself must clearly demonstrate **'the duty of care'** even if the answer itself is subsequently proven to be wrong.

## **Conclusion**

There are **three separate and essential elements** which must be clearly evident and demonstrated in everyday professional advice:

### **1. Independence**

While every valuation exercise involves the interests of at least two parties, it is imperative that the valuer rigidly maintain a position of independence; this is essential to providing objective advice.

## **2. Honesty**

While very few negligence claims arise from intentional or pre-meditated dishonesty, the valuer can be dishonest both to himself and his client if he approaches his work in a **flippant, careless or naïve manner**.

In this respect, it is important to remember that all valuers really have to offer is, their **considered professional opinion**. Once this opinion becomes suspect or questionable, what else have they to offer?

## **3. Competence**

Practice of valuation covers a wide range of activities and issues, most of which require an understanding of one or more other disciplines, eg law, town planning, agricultural science, conservation, building construction etc. It is unrealistic to expect that any person, despite his/her degree of scholarship, has the necessary knowledge and practical skill required to **produce an informed answer** on every issue he or she may encounter.

That is why; it is an absolute need for associated **professional bodies** to maintain **continuing education programmes** for CPD/LLL

## **References**

- a. *Lawrance, Rees and Britton (1971), Modern Methods of Valuation*
- b. *William D North – Professional Negligence and Indemnity in Real Estate – Journal of Valuation : 8*
- c. *Peter Mahoney – Professional Negligence and Indemnity – Journal of Valuation : 8*
- d. *The Redbook - RICS*