

Book Review - Valuers Liability

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BOOK REVIEW

Lindsay Joyce and Keith Norris, *Valuers Liability*: i-iv Frontispiece; v-vii Table of Contents; ix-xvi Foreword, Note on Authors and Preface; xvii-xxvii Table of Cases; xxix-xxxvi Table of Statutes; xxvii-xxxix Index of Court Decisions; xli-xlvi Summary of Court Decisions; xlix-lviii Postscript; 1-462 Text; 463-464 Glossary of Terms; 465-467 Further reading; 469-470 Author Index; 471-484 Subject Index. (Australian Institute of Valuers and Land Economists; Sydney 2nd ed 1994, Soft cover \$50.00.)

Pity the poor lawyer striving to advise a client about the limits of the law of negligence. In England, where the tort came from, the pregnant words of the House of Lords in *Donoghue v Stevenson*, have been followed by an explosion of litigation with only occasional efforts to mark out the boundaries or to pull back from perceived judicial excess.

The expansion of the law in *Anns v Merton London Borough Council* [1978] AC 728 (HL) and *Junior Books Limited v Veitchi Co. Limited* [1983] 1 AC 520 (HL) eventually produced something of a retreat in *Murphy v Brentford District Council* [1991] 1 AC 398 (HL) where the guidance of the High Court of Australia was acknowledged. Their Lordships responded to the fear that the tort of negligence, as it was developing, might, unless restrained, become an "all devouring monster, consuming all other torts, contractual and statutory duties and equitable principles" (see [1994] NZLJ 320).

Now, the expansionists have struck again. In *Spring v Guardian Insurance plc* [1994] 3 All ER 129 (HL), Lord Goff of Chieveley persuaded their Lordships to hold that economic loss was recoverable as a result of a negligently prepared written reference given by one insurer to another in respect of a salesman agent. Defamation, breach of contract

and an action for malicious falsehood did not avail. But negligence did. In the same spirit, the House of Lords in *Henderson and Ors v Merrett Syndicates Limited and Ors* [1994] 3 All ER 506 (HL) rejected recent Privy Council authority and upheld the privilege of an injured party in a Lloyds underwriting syndicate to sue both in contract and in the tort of negligence, he being "entitled to take advantage of the remedy which is most advantageous to him".

Australia has occasionally struck out upon its own different approaches to the law of negligence. But the fundamental contours remain very similar to those mapped in England. The significant expansion in the law of professional liability is one consequence of the negligence explosion. This book is a specialised study of that topic as it affects valuers in Australia. It is the second edition of a text first written in 1988. The first edition was a much more modest affair, being only 100 pages in length. Now, the authors have expanded, updated and revised the text. They have provided a much broader coverage of legal and other relevant issues. With seemly precision, they state that the law is expressed as it stood at 28 February 1994. Although I have some criticisms of the text, it is extremely worthwhile, an altruistic labour of the authors (who have donated the profits to the Australian Institute of Valuers and Land Economists for continuing education) and it contains much that is both practical and wise.

Lindsay Joyce is a legal practitioner with Phillips Fox, solicitors, of Sydney. He was a valuer between 1969 and 1979. Much of his work now involves the field of professional negligence – undoubtedly an expanding source of legal practice. Keith Norris, although admitted as a solicitor in New South Wales, works full-time as a valuer for one of the major national companies.

The authors have endeavoured to explain the somewhat volatile developments in the law of negligence. They have concentrated in this edition upon practical methods which can be adopted by valuers to promote loss prevention and risk minimisation. They had obviously put their text to bed when the decision of the English High Court in *Banque Bruxelles Lambert SA and Eagle Star Insurance Company Limited v John D. Wood Commercial Limited and Ors* was handed down in December 1993. They therefore offer a ten-page resumé of Phillips J's decision as a "postscript" – although it actually appears just before the text. The case is a fairly good illustration of the problems which can arise in valuers' liability cases. Often, the question is whether the valuer has over- or under-stated the valuation, and whether the much lower or higher price actually gained for the subject property is simply the product of changing market conditions. One explanation given by the authors for the growth of cases in Australia involving valuers' professional liability, is the speculative investments which were such a feature of the property market in the late 1980s and early 1990s. During that time, many an investor took a plunge on the property market, armed with a valuer's report, only to find soon afterwards, that the property was worth but a fraction of the value stated. It has been this discovery that has led to many claims against valuers by investors seeking to off-load some of their loss.

The *Banque Bruxelles* case involved valuations of three London properties estimated at £229 m, whereas the sale receipts netted only £157 m. Phillips J, whilst acknowledging the imperfections of the science of valuation and the need to allow leeways for uncertainties in the market, thought that a difference of twenty percent might be reasonable. A difference of more than thirty percent seemed careless. As in many of the cases surveyed in the book, the issues debated include those thorny concepts of reliance and causation.

The structure of the book is logical enough. It begins with appropriate definitional analysis: who is a valuer? what is a valuation? what does the Institute do? It then plunges into a lengthy section on legal liability. Repeatedly, the cases acknowledge the complex and imprecise features of the art of valuation. Similarly, the judges have accepted that the standard to be expected is not perfection, or even extraordinary competence, merely reasonable care and skill. Advice is given on the way in which valuers should seek, by contract, to limit their liability to their client and to exclude liability to third parties into whose hands the valuation may fall. There is a good analysis of the relevant Australian Federal and State legislation dealing with unjust contracts and misleading or deceptive conduct.

The book then turns to a helpful examination of the calculation of damages in cases where carelessness on the part of a valuer has been shown. This is a notoriously unsatisfactory area of the law where line-drawing appears to owe as much to the needs of cost containment as to convincing legal principle. The authors take to task the minority judge in *Kyogle Shire Council v Francis* (1988) 13 NSWLR 396 (CA). In that case, a local authority issued a certificate to a property speculator who disclosed his aims. It later confirmed orally that the land was available for subdivision. When subsequently it was discovered that the land could not be subdivided, the majority held that the speculator was limited to recovering diminution loss. The (unrepentant) minority judge was of the view that the speculator was entitled to recover on the basis of his lost opportunities. The authors were not much impressed with this logical but costly conclusion.

There follow chapters on limitation of liability and loss prevention. A number of basic rules are given, one of which is also useful to lawyers, viz do not give kerbstone opinions. There then follow a number of case

studies, an analysis of various court decisions and a useful chapter on the impact of environmental law as a variable factor in valuation which needs to be taken into account. The list of environmental statutes, Federal and State, which now need to be considered, consumes three pages. It is truly daunting.

The book finishes with chapters on professional indemnity insurance, registration of valuers (including discipline) and the giving of expert evidence. There are some helpful tips about what makes a good witness. These include the avoidance of a condescending assumption that a barrister will not really understand the complexities of valuation. Many do; and some even make a living out of it.

The glossary, further reading and indexes attached to the book are extremely well done. The subject index is a model that will make for easy access to the text.

There are a few points which might be considered for the third edition of this work. First, it will be necessary to go carefully through the text to remove references to the English judges cited as "his Honour". This mistake has recurred throughout the pages of the book. It is a mild distraction that should be removed.

Secondly, it would be good if the next edition could include more Canadian, New Zealand and United States cases, at least. Whilst it is natural that authors will continue to follow English decisions in this area, principally because of the close involvement of insurers and reinsurers based in England, there are now significant divergences between the law of negligence in England and Australia. There may be more wisdom to be found in Canadian cases, especially.

Thirdly, the text would probably repay more detailed reflection upon the basic principles (duty, foreseeability, causation, loss). In discussion of the common law, and in the summaries of court decisions,

one gets the impression that a lot of undigested material has found its way into the book. Doubtless this is a product of the way these busy authors have put the book together amongst their other many professional duties.

Nevertheless, this is undoubtedly a useful compilation of material that will be of great benefit to valuers, their insurers and also their legal advisors. There are plans afoot to include a United Kingdom supplement in the third edition. If so, the authors had better get the Lordships' titles right. The sharing of jurisprudence in this area is valuable. There is no other book which does the work which these authors have set out to perform.

Any valuer (indeed any professional) who takes the trouble to read this book from cover to cover, will come away with one abiding conclusion. This is that appropriately wide professional indemnity insurance is an absolute necessity, written by a reliable insurer with whom the valuer maintains a vigilant and faithful relationship. The law of negligence may not, as some have predicted, expand to an entire law of obligations. But it is likely that it will provide plenty of work for lawyers in the years to come. Indeed, if one had to identify a significant growth area for legal practice, it would undoubtedly include professional liability. This is another reason why this second edition of *Valuers Liability* is timely.

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