CASE COMMENT

CHARITABLE TRUSTS: *Centrepoint Community Growth Trust* v *Commissioner of Inland Revenue* C C H Duties and Sales Tax Guide 70, 196.

Recently the High Court has had cause to consider the four categories of charitable purposes listed by Lord Macnaghten in *Commissioners for the Special Purposes of the Income Tax* v *Pemsel* [1891] AC 531. They did so in the context of an appeal by the Centrepoint Community Growth Trust against the Commissioner of Inland Revenue's refusal to acknowledge their trust as charitable for the purposes of the Stamp and Cheque Duties Act 1971.

The importance of the decision lies in its acceptance of the very broad definitions of religion developed in the recent High Court of Australia decision in *The Church of the New Faith* v *Commissioner of Payroll Tax (Vic)* [1983] ATC 4652.

The Centrepoint Community Growth Trust (hereinafter called 'the Trust') was incorporated in 1977 under the Charitable Trusts Act 1957. In 1978 the Trust was approved by the Commissioner of Inland Revenue as a charitable trust for the purposes of the revenue. However, in 1981 the Commissioner reviewed this status and determined that the Trust was not charitable. The case before the High Court arose when the Trust sought an exemption from conveyance duty on property purchased at Albany pursuant to s18(c) of the Stamp and Cheque Duties Act 1971.

The terms of s18(c) were therefore the basis of the Court's consideration of the status of the Trust. The subsection reads:

> 18 No conveyance duty shall be payable on any instrument of conveyance to the extent that the instrument
>
> (c) conveys any property on charitable trust, or to any society or institution established exclusively for charitable purposes, insofar as the trustee, society or institution purchases the property conveyed, or the trust, society or institution benefits under the conveyance.

The Court had to determine whether the Trust was a charitable trust. The Trust claimed, inter alia, that its purposes were charitable as they came within each of the four heads established by *Pemsel's* case. These heads comprise:

1. Trusts for the relief of poverty;
2. Trusts for the advancement of education;
3. Trusts for the advancement of religion, and

4. Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

At trial it was decided not to pursue this first head as the Trust could not realistically be said to be for the relief of poverty.

Tompkins J began his judgment by giving a brief outline of the fundamental requirements of a charitable trust. It is also important to note that Tompkins J concluded his opening by saying:

> Finally, it is important to recognise that concepts relating to charitable purposes generally or to any particular kind are constantly changing with changes in social and community attitudes (70,200).

The Trust Deed and Activities of the Trust

Obviously any examination of the status of a trust must consider both the deed creating it and its activities and operation.

Schedule A of the Trust Deed sets out the objects and purposes of the Trust. Paragraph (a), as corrected by Tompkins J, reads as follows:

> To teach the ideals, and assist the efforts of our fellow man, to establish uphold promulgate and advance the spiritual education and humanitarian teaching, of spiritual communion, radiant faith, exalted character, and love, revealed in the lives and utterances of all the messengers of god and founders of the world's revealed religions and given renewal by creative energy, by their universal applications to the conditions of this day, and by the life and utterances of the spiritual leaders of this world and in particular of Herbert Thomas Potter.

Schedule A contains eight other purposes and objects including:

> (b) the establishing of schools and centres for the teaching of the faith;
>
> (c) to bring to New Zealand spiritual leaders of the world of like persuasion;
>
> (d) to assist and support any other charitable organisation of a like nature;
>
> (e) to establish a centre for research and study of the teachings of the world's spiritual leaders;
>
> (f) to organise seminars and workshops to enable participants to increase their spiritual awareness;
>
> (g) to provide a counselling service for people with spiritual, psychological, emotional or social conflicts;
>
> (h) to provide a hospital for all members of the community in need of spiritual, psychological or emotional assistance;
>
> (i) to provide scholarships to selective participants to enable them to increase their knowledge.

The Activities of the Trust

Firstly, the provision of counselling and therapy was discussed by Tompkins J. It was established that seven or eight residents of Centrepoint had skills in psychotherapy, counselling and the teaching of human relationship skills. Counselling services were offered in a central city location in Auckland for a fee of $25 per person. Additionally, the Trust ran workshops at Centrepoint and expert evidence from a lecturer in psychology at Auckland University testified to the validity of the psychotherapy being offered.

Secondly, Tompkins J turned to consider the commercial activities of the Trust. These included running a stationery shop and a hat importing business, both of which were 'gifted' by members when they entered the Trust. The rest of the Trust's commercial activities were mainly of the 'craft' variety, the products of which were sold to wholesalers. In 1981 there was an excess of income over expenditure of $115,846.

Thirdly, evidence was brought to establish the spiritual attitudes and activities of the Trust. The various rites and symbolic activities practised by the community included marriage celebrations, birth rites and twice weekly meetings of the whole community.

It is important to note the response of Bert Potter (the spiritual leader of the Trust) to the question "whether his spiritual teachings were based on a belief of some supernatural being, thing or principle?" He replied:

> Yes, it's as I said, that somewhere behind all the physical forces and energy to which we are all subject, there seems to be some guiding force, some order there, and it applies to the whole of the galactic system and systems outside ours. Those whole laws apply and it's the order behind those laws which I consider is the supernatural, something quite beyond understanding (70,209).

The Four Heads of Pemsel's Case

1. The Relief of Poverty

As was mentioned earlier, this ground was not argued at the hearing

2. The Advancement of Education

Tompkins J was prepared to hold that the Trust had as one of its principal objects the advancement of education. He said:

> But it does seem to me that the Trust endeavours to increase and disseminate human knowledge. It does this by its counselling and therapy activities. It also does so by its spiritual attitudes and activities and particularly the time and effort involved in disseminating the teachings of Mr Potter.

3. Purposes Beneficial to the Community.

Under this head the Trust relied on clauses (g) and (h) of Schedule A to the Trust Deed. There was evidence of treatment of patients, both Trust members and members of the public. Tompkins J held the necessary elements of public benefit were present so the Trust was held to be charitable under this head also.

4. The Advancement of Religion.

This is the head which demanded the closest attention of Tompkins J and the area in which the Court made the most important statements regarding this type of charitable trust.

Tompkins J relied heavily on the High Court of Australia decision in *Church of the New Faith* v *Commissioner of Payroll Tax (Vic).* He quoted summaries of the tests outlined by Mason ACJ and Brennan J as well as the tests proposed by Wilson and Deane JJ.

Mason ACJ and Brennan J presented this conclusion:

> We would therefore hold that, for the purposes of the law, the criteria of religion are twofold; first, belief in a supernatural being, thing or principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions but they are irrelevant to the determination of an individual's or a group's freedom to profess and exercise the religion of his, or their, choice (4,658).

Tompkins J saw the views to Wilson and Deane JJ as being similar to those of Mason ACJ and Brennan J. He quoted this passage:

> One of the more important indicia of 'a religion' is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has 'a religion'. Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial is that the adherents themselves see the collection of ideas and/or practices as constituting a religion (4,682).

Examining clause (a) of Schedule A to the Trust Deed in light of these two statements, Tompkins J concluded that the object and purpose of the clause is religious in intent. He said:

> I therefore reach the conclusion that the Trust, both in its formal constitution and in the beliefs and practices of its adherents, has as one of its principal purposes the advancement of religion (70,217).

The Result of the Case

The result of the case is that the Centrepoint Community Growth Trust was held to be charitable for the purposes of s18(c) of the Stamp and Cheque Duties Act 1971. It was held charitable under three of the four heads of *Pemsel's* case, namely the advancement of education, the advancement of religion and it was beneficial to the community.

As mentioned earlier, the real innovation made by this case lies in the Court's acceptance of the very broad definition of religion developed by the High Court of Australia in the *Church of the New Faith* case. It was said by Mason ACJ and Brennan J that the question at issue: "is in truth an inquiry into legal policy" (4,656).

One must now inquire into the nature of the policy that allows 'religions' an exemption from the normal revenue legislation. If one looks to a common denominator of the four categories of charitable purposes one may postulate that such a common denominator is 'social utility'. There is social utility in relieving poverty, the advancement of education and, by definition, in things that benefit the public. Whether

one can say the same for the advancement of religion is a very much more doubtful proposition. To say that religion carries with it a social utility is difficult because any effect of religion is difficult to both define and measure and also because any effect is usually of a very personal nature. Precisely why religion has a special position as regards the taxation legislation may be explained with reference to the historical position of the churches. Historically the 'mainstream' religious bodies were the principal sources of charity in society. Additionally, the church possessed great social and political power. In contrast the position of the 'mainstream' religious bodies is now very different. Their charitable role is still important, but since the development of the welfare state they no longer hold the monopoly that they once had in this area. Additionally their social and political power has now also been very much reduced. It may be suggested that along with this historical development in the roles of the mainstream religious bodies the justification for the revenue exemptions has also changed to the point where exemption from normal taxation burdens is no longer warranted.

It is also important to note Murphy J's comment in the *Church of the New Faith* case. He said:

> The Commissioner should not be criticised for attempting to minimise the number of tax exempt bodies. The crushing burden of taxation is heavier because of exemptions in favour of religious institutions, many of which have enormous and increasing wealth (4,674).

The pressing question raised by these cases is this: why should some members of the community bear a heavier burden of taxation merely because the beliefs of others entitle their organisations to exemption from taxation? By only turning its attention to the definition of religion and ignoring the revenue consequences of such a definition, the New Zealand High Court has tacitly agreed that such apportionment of the burden of taxation is acceptable.

— *A. W. Lockhart*

INCEST AND "CULPABILITY": *R* v *K*, Court of Appeal, Wellington. 26 February 1985, (CA 228/84). Woodhouse P, Cooke, Savage JJ.

The importance of this case lies more in the questions it raises than in the question it answered. It will be of particular interest to family law practitioners, criminal lawyers and others concerned with cases of child sex abuse.

The applicant sought leave to appeal against a sentence of three years and three months imprisonment for acts of intercourse with his daughter extending over a number of years.

The girl gave evidence at the trial that incest had commenced when

she was approximately eleven years old and continued for the next ten or eleven years. Violence had been used on her when she had expressed a wish to leave home and start her own life. The sentencing Judge acknowledged this violence euphemistically as a "certain kind of restraint by the applicant over the girl" and the exercise of a strong "influence" upon her to remain at home. The girl also gave evidence that she had "always been afraid of him . . . I did it because I was scared of him and scared of what he would do to me and the (younger) kids if I didn't." (*Auckland Star*, 2 August 1984).

Mr Justice Cooke, in delivering the judgment of the Court of Appeal when it dismissed the application for leave to appeal commented:

> Culpability can vary with such factors as the maturity of the girl, the general attitude of the father and the surrounding circumstances. The fact remains, as stressed in *R* v *B* (CA 186/83) that society's utter rejection of this kind of conduct has to be marked. In the present case . . . there is very little indeed that can be seen as mitigating the history of the offending. The best thing than can be said is that there is some ground for thinking that the psychological damage to this particular girl may not be as great as in many cases.

With the greatest respect, it is submitted that though culpability may be a factor in sentencing generally, its validity in incest cases may reasonably be questioned. In so doing, it is necessary to consider in some detail the factors postulated as being capable of varying culpability. Those factors were:

1. The maturity of the girl.
2. The attitude of the father.
3. The surrounding circumstances.

1. *The Maturity of the Girl*

Miriam Saphira, in "The Sexual Abuse of Children", reported that seventy-one percent of the girls subjected to sexual abuse were under the age of eleven at the time of the first offence and eleven percent were less than six years of age.

Incest is an on-going crime. It is rarely an isolated occurrence. In the present case, repeated acts of incest and sexual abuse took place over a period of at least ten years. In *R* v *K* [1984] NZLR 264, incest began when the girl was ten years of age and continued for a further seven years; in *R* v *Stagg* (1980) 2 Cr App R (S) 53, incest, buggery and indecent assault of a daughter commenced when she was ten or eleven years old and extended over a period of eight years; in *R* v *West* (1981) 3 Cr App R (S) 28, incest and indecent assaults extended over several years from when the daughter was eight.

The very nature of the crime, together with the nature of the family, operates in favour of the incestuous offender by placing the crime in the home, and the victim in the power of the offender. According to Saphira's study, eighty-nine percent of sexually abused children were molested by a relative or close friend of the family; twenty percent by their father or surrogate father.

Because less importance is attached to the talk of young children and

their veracity is often impugned, reports of abuse by the victims are frequently dismissed as fantasy or downright lies. In the present case, the girl had reported the offences to Social Welfare authorities but no action was taken and she was compelled to submit to a further seven years of incest. In *R* v *K* the girl said that she had never complained of the conduct to her mother because she knew she would not have been believed.

The 'maturity' of the girl could thus be taken to mean either her age when the offences were disclosed (which, given the prevalent disinclination to believe young children, means that the girl would almost invariably be a young women when and if the case was eventually prosecuted); or alternatively, the 'perceived' maturity of a young, sexually abused girl which to the untrained eye manifests itself as sexual precocity or a sexual response inappropriate to the child's years.

Professor Bross, in his Legal Research Foundation Lecture in 1983, listed among the warning signs of sexual abuse the "little mother syndrome", which resulted in a maturity beyond chronological age. The victim in *R* v *K* cared for younger children, ran the home and helped her father with his business. She was eleven years old. Therefore, it is respectfully submitted, whether the girl is 'mature' in years, or in behaviour is not a relevant factor in the assessment of culpability.

2. *The Attitude of the Father*

In Saphira's study, the girls reported that the attitude of their abuser fell, by and large, into one of two main categories. He was either:

(a) Calm, matter-of-fact and authoritative, with the result that the girls felt they were being ordered to commit, or submit to, the indecencies; or

(b) The behaviour was initiated in the guise of a 'game'.

The victim in *R* v *K* had told her father that what he was doing was wrong, but he had said that it was her 'duty' to fulfill his needs, and that if she ever refused he would give her a "hiding with a lump of wood".

It is submitted that the father in that case may be not unrepresentative of many men who believe that women and children are "property" to be disposed of as men see fit, and that sex should be available to them wherever, whenever and with whomsoever they please. Those responsible for vesting in men, and endorsing the exercise of, such a power over others (the legitimacy of which defies rational analysis) must also accept some responsibility for its abuse.

Incest as a 'game' was the other large category reported by Miriam Saphira and figured prominently in Professor Bross's lecture. In his experience a young child's explicitly graphic accounts of sexual abuse are more often than not true. But, he stressed, it is always necessary to ask a young child the 'right' questions, that is, about 'games' rather than 'hurting'. Thirteen percent of Saphira's respondents were told by their molester that it was a 'game'.

The police must accept some responsibility for perpetuating that particular myth:

> The police orderly shows me the charge sheets. 'Light day today' he says, fingering through the assaults, receivings, wilful damages, and disqualified drivings. 'What's this, though? *Incest eh. Shame. Fancy spoiling a family game.* ("Day of Judgment", *The Listener*, 13 March 1984.)

It is submitted that if this attitude is representative of society's guardians it is not at all surprising that so few incest cases are prosecuted.

3. *The Surrounding Circumstances*

In the light of what has already been said regarding the age of the girls when the offences began, the lengthy periods of abuse, the authoritative attitude of the man, the justifiable fear of violence, the powerlessness of the victim and the commonly experienced disbelief of her reports, the surrounding circumstances culminate, quite simply, in helplessness and fear. The exploitation of which constitutes not only a sexual offence against the child, but an unmitigated abuse of power.

Finally, reference must be made to the learned Judge's comment that "there is some ground for thinking that the psychological damage to this particular girl may not be as great as in many cases".

One can but hope that such optimism is borne out in years to come. The chances, it is submitted, are remote. It may be that consideration should be given to a requirement that the Courts hear expert evidence on the effects of incest on a child, since a large proportion of the psychological damage often fails to manifest itself for a number of years.

More than seventy percent of the women who responded to Saphira's questionnaire reported having difficulties in sexual relationships in later life. Fifty percent reported feelings of worthlessness and lack of self-confidence. Many reported a continuing and life-long fear of men. Twenty-four percent had since received some form of psychiatric care, and thirty-two percent had experienced suicidal feelings. Rape Crisis and Incest counselling centres report that a certain proportion of their service is directed towards women of mature years who were the victims of incest and/or other forms of sexual abuse in their childhood.

The Punishment

An incestuous father may be sent to prison, but it is the girl who is punished. For it is she who is made to feel responsible, not only for the crime perpetrated against her, but also for her father's imprisonment and its consequential detrimental effects upon the whole family. In very many cases the blame for the family's impoverished and fragmented state is laid at the door of the victim.

R v *K* provides a graphic illustration of the aftermath. Guilt for 'causing' the father's imprisonment, coupled with pressure from other family members, resulted in the victim retracting her evidence, subsequently retracting that retraction, and ultimately, in a harrowing ordeal

in the Court of Appeal, resolutely upholding the veracity of her evidence, while at the same time refusing to adequately explain the circumstances of its withdrawal or to answer any further questions.

The Principles of Sentencing: Deterrence, Punishment and Retribution

The Court of Appeal conceded in *R* v *B* that deterrent sentences were unlikely to have much influence on other offenders; what then, is the purpose of sentencing in incest cases? If its aim is to punish the man, but its effect is to further punish the victim, is it not also failing in that purpose? Sentences of between three and five years (the average in incest cases) are not to be trivialised. However, in view of the suffering inflicted on the victim of incest, the validity of such a course of action cannot but be questioned. It is submitted that if, in punishing the offender, a greater penalty is exacted from the victim then the whole raison d'être of imprisonment is controvertible.

Deterrence having been effectively ruled out by the Court of Appeal and punishment equivocal, what then is left? If sentencing is to rest finally on retribution and on society's abhorrence and condemnation of the crime, it could conceivably be argued that life imprisonment would not be inappropriate. However, the promulgation of such a retrograde course is not the purpose of this discussion. Its purpose is to stimulate interest in, and discussion about, alternative courses of action aimed at minimal disruption of the family, assisting every member of the family to come to terms with the offence, its reality and its effects and to ensure in so far as is possible that it is never repeated.

Programmes with such a goal are currently operating in the United States with considerable success, part of which is attributable to the fact that the whole family is made aware of what has taken place and is therefore alerted to the conditions under which it thrives. No one can deny knowledge, no one can pretend it never happened. The man is compelled to acknowledge to all members of the family, not least to the victim, that he did in fact sexually abuse her, and the not insignificant threat of penal sanctions held over him ensures his participation in whatever programme is considered suitable to the particular circumstances.

Conclusion

The increased awareness of the incidence of sexual abuse and a social climate in which it is more likely to be acknowledged and discussed, can produce positive conditions for examining fully the multi-faceted crime that is incest. Since current methods of dealing with incest are open to question and the ramifications of the offence appear to be multiplying, the potential of alternatives would seem to be worthy of investigation, in particular, programmes which include a recognition of both early signs and later results of sexual abuse, their treatment and their resolution.

A more immediate and pressing need however, may appear to be an increased recognition of the implications of using such factors as "the

maturity of the girl, the attitude of the father and the surrounding circumstances" as legitimate criteria in the assessment of culpability.

— *I. F. West*

NEGLIGENT MIS-STATEMENT: *Meates* v *Attorney-General* [1983] NZLR 308.

Significantly, and some might say unfortunately, the decision in *Meates* v *Attorney-General* has continued the breakdown of the sometimes artificial distinction between contract and tort in our common law system. The Court of Appeal used the law of tort, specifically negligent mis-statement, to impose liability on a quasi-contractual basis and it is the purpose of this case note to examine the decision and its possible ramifications.

The Facts

The facts of the case were complicated and what follows is only a brief summary of the situation that led to the decision.

During the 1972 General Election the Labour Party vigorously promoted a policy of Government sponsored industrial development for such areas as the West Coast of the South Island and when the party subsequently took office Mr K Meates entered into correspondence and discussions with the Prime Minister, the Minister of Trade and Industry and the Minister of Finance concerning the establishment of factories in accordance with the policy. During the discussions there were differences as to the form and level that the financial assistance should take, particularly freight subsidies which Mr Meates regarded as critical to the success of the venture.

With personal guarantees from Mr Meates, Matai Industries was established and incorporated on 9 July 1973 with a paid up capital of $1,000,000. Its shareholders were Mr Meates, some family members and a business associate. The first factory, a plastics factory, commenced operation before incorporation and then on 1 August 1973 the Government guaranteed the company's bank advances up to $1,200,000.

However the venture was not successful and despite an earlier discussion of a continuing freight subsidy of seventy-five percent or a grant of $500,000 and the acceptance by the Government of the need for such a subsidy none was forthcoming. At the official opening of the factories in November 1973 the Prime Minister was informed of the serious cash flow problems and the urgent need for substantial grants. A major reason for the liquidity crisis was a threatened world resin shortage which could have left the company without raw materials. In anticipation of this shortage a bulk supply was purchased by the company and this resulted in further financial difficulties. An application was made to the Government for urgent assistance which was granted by means of

a $1,000,000 advance from the Development Finance Corporation. Notwithstanding this advance it soon become clear that the company could not meet its debts.

In February 1974 the DFC, at the request of the Government and the bank, joined in appointing a receiver/manager. A month earlier Mr Meates had suggested a voluntary liquidation but he had submitted to a receiver because of assurances he had received from Mr Freer, the Minister of Trade and Industry, that the interests of the employees, unsecured creditors and shareholders would be protected during receivership. At this stage the shareholders could have withdrawn and cut their losses.

The receiver carried on business, financed by the Government guarantees, in the hope of salvaging the venture but it soon became apparent that the company could not be traded out of its difficulties. The Government paid off the unsecured creditors and the secured creditors pursuant to the guarantees, resulting in more than $5,000,000 of public funds being lost. The shareholders however lost all their capital and sought indemnification for that loss.

The Decision

The appellants founded their claim on various causes of action. The first set of claims coalesce under the general head of breach of contract of guarantee. Both the majority and the minority of the Court of Appeal rejected any express or implied contract of indemnity. Mr Justice Cooke stated at 377:

> The real question in this part of the case is whether an implied contract can be spelt out of the words or acts of the parties. As indicated in *Boulder Consolidated Ltd* v *Tangaere* [1980] 1 NZLR 560 and having regard to the authorities cited, I would not treat difficulties in analysing the dealings into a strict classification of offer and acceptance as necessarily decisive in this field, although any difficulty on that head is a factor telling against a contract. The acid test in a case like the present is whether, viewed as a whole and objectively from the point of view of reasonable persons on both sides, the dealings show a concluded bargain.

Affirming the judgment of the Chief Justice in the Supreme Court, Mr Justice Cooke, with whom the majority agreed, said at 578:

> . . . I cannot think that an objective bystander or reasonable persons in the shoes of Mr Kevin Meates and his associates would take the Government to be impliedly committing itself, without writing and even any oral discussion of the matter, to something as significant as an indemnity.

The second and more important question was whether the appellants could establish liability in tort. The Court of Appeal, overturning the decision of the Chief Justice in the Supreme Court [1979] 1 NZLR 415, unanimously held that in the circumstances a duty of care was owed to the shareholders. The Court was divided, with Mr Justice Cooke in the minority, as to whether a breach of that duty had taken place. In the Supreme Court the Chief Justice had looked at the "relationship" as described by Lord Reid in *Hedley Byrne & Co Ltd* v *Heller & Partners* [1964] AC 465, 486 but felt that he was bound by the majority decision

of the Privy Council in *Mutual Life & Citizens Assurance Co Ltd* v *Evatt* [1971] AC 793, 807. There it was stated that the principle should "be understood as restricted to advisers who carry on the business or profession of giving advice of the kind sought and to advice given by them in the course of that business."

The Court of Appeal in *Meates* examined the judgement of Lord Diplock at page 809 in *Mutual Life* and drew attention to what they felt was a reference to the permissible use of other kinds of tests. Lord Diplock had referred to people having a "financial interest in the transaction" but the Court of Appeal felt that this was not an exclusive exception to what had been said about persons in the business of giving advice, but merely an example of a situation where the duty of care existed. The Court of Appeal concluded that the Chief Justice had proceeded under the misapprehension that this was the only alternative to the business or profession test and had not considered the aspects of the relationship between Mr Meates and the Government which could have given rise to a duty of care. The majority of President Woodhouse and Mr Justice Ongley stated at 334 that:

> . . . the presence or absence of a "business our professional" element should be regarded as but a single instance of a test in those particular situations where it is of actual relevance. And in conformity with the clear statement of principle of Lord Wilberforce in the later case of *Anns* v *Merton London Borough Council* [1978] AC at pp 751–752 the wider and correct question to ask is whether there is prima facie a sufficient relationship of proximity or neighbourhood which indicates the presence of a duty of care; and if there is, then whether there are any considerations which ought to negative it or limit its scope.

The Court found that the Ministers had held themselves out as having special knowledge and authority within the area of their portfolios and in the case of the Prime Minister in major fields of Government policy. In this role they undertook to give certain advice regarding subsidies and guarantees, in such circumstances that they should have known that their statements would be relied upon and therefore should have been reasonably careful in the advice they gave to the shareholders.

The Government also tried to escape liability by arguing that the *Hedley-Byrne* principle had never been extended to assurances or undertakings in respect of future actions. It is this area of the case and the judgment that is of such striking significance. The majority at 335 stated:

> . . . the answer in our opinion is that although the promise may fall short of a contractual commitment nonetheless if it is provided by somebody who intends it to be acted upon and who is in an exclusive position to give effect to it, let alone the central Government, then surely it is to be received as a far more powerful piece of information than mere opinion whether supplied by a man in a professional capacity or by some other person sufficiently equipped and interested enough in the subject matter to express a serious view upon it. In essence the complaint in the present case is that the alleged advice given in the form of promises or undertakings by the Government was that the Government itself would prevent shareholder losses by one means or another, just as the creditors were actually protected. It is a claim that all this really went beyond an expression of opinion or belief that some particular or limited action might

> be taken. We think that far from relieving those concerned in such a case from the exercise of due care if anything the duty is reinforced.

Mr Justice Cooke in the minority, said in relation to a promise or assurance given by someone within the particular sphere of his authority at 379 that:

> This is not an absolute duty or guarantee which belongs in the realm of contract. It depends simply on what a reasonable man would regard as a duty to his neighbour. . . .

It is this part of the judgment which, depending on one's view of the structure and function of the law, evokes scorn or praise. Its importance lies in the fact that it expands the law of negligent mis-statement from assurances relating to what might be called concrete present assurances, such as the condition of the soil on a building site or the financial position of a company, into the realm of assurances relating to intended future actions.

Damages were given for the loss of shareholders' equity at the time of the appointment of the receiver rather than their initial investment in the venture. This amounted to $340,000 which was a fairly conservative estimate, plus eleven percent interest since the issue of the writ, which amounted to approximately $320,000.

Comment

The case does not mean that political promises will in future be legally enforceable but it is still a significant development of the law of negligence. The decision can be viewed in two ways. For those concerned with the categorized and predictable development of the New Zealand law, *Meates*, by allowing a remedy for a gratuitous negligent promise, has significantly eroded the doctrine of consideration in the law of contract. However, the writer would submit that a far more constructive approach to take is that *Meates* has extended the duty of care beyond the barriers previously laid down by the common law into areas more closely related to fairness in equity.

It must not be thought that this expansion along with the removal of the constraints placed upon *Hedley-Byrne* by *Mutual Life* will result in negligent actions gaining an excessive and dangerous use in cases that previously fell just outside the rigid rules of contract. In the first place, to establish a duty of care the courts will in future use the two step test as laid down in *Anns* v *Merton London Borough Council* [1978] AC 728. Initially, the plaintiff must show that there is sufficient proximity to impose liability on the other party and next that there are no policy considerations that would negate the duty of care. For example, using *Anns*, if a council decides that it is going to employ a limited number of building inspectors and sites go uninspected, then, barring a statutory requirement to inspect all sites, it is a policy decision and not questionable in a court of law. However, if a council decides to have inspectors and one of those inspectors is negligent, then the council will be liable. If it is a question of policy then a person who has relied on the

statement or assurance and acted on it to his/her detriment will be estopped from making a claim against the council.

Secondly, a plaintiff must still establish a reliance on the defendant's promise or assurance. Finally, although a situation when examined may establish a duty of care it may also establish defences pertinent to the particular facts of the case.

In conclusion, it is the writer's submission that the decision in *Meates* is a logical development of the law of negligence with reference to the social realities of today. Although it may be more difficult for lawyers to accurately predict a decision, surely the purpose of our system is to dispense justice. It may be that our system is nearing the civil law approach but "fairness" is not a bad thing despite the degree of uncertainty and in *Meates* the New Zealand Court of Appeal, given the unusual fact situation, gave a fair result.

— *Mark J. Gavin*

PRE-EMPTIVE POLICE ACTION: *Reid* v *Attorney-General* (1984) 2 DCR 237

What may the police do when they reasonably believe that a group of protesters is about to cause a breach of the peace? May they act so to avert it and if so, what kind of pre-emptive action *must* they employ? In the case of *Reid* v *Attorney-General* the legality of one means of pre-emptive police action was called into question. Reid brought an action in the Kaikohe District Court for unlawful arrest and unlawful detention against the police arising out of an incident on Waitangi Day 1983. He sought $1,000 compensatory and $1,500 aggravated damages sub nominem the Attorney-General, in right of the police, per s18 of the Crown Proceedings Act 1950.

Facts of the Case

The plaintiff and some fifty others who objected to the Treaty of Waitangi celebrations assembled at Waitangi Marae some time between 5.00pm and 5.30pm on Waitangi Day 1983. The group set out towards the Treaty grounds with the stated intent of making a lawful protest against the celebrations at an assembly point designated earlier by the police. While walking across a bridge en route to the Treaty grounds they were halted by a line of police officers wearing riot gear. The police withdrew some 100 metres and re-grouped into a "U-shaped" formation, allowing the protesters to cross the bridge. Batons were drawn. The protesters were then informed that if they wanted to be considered as members of the public and not protesters they could proceed forthwith into the Treaty grounds. The majority, including the plaintiff, decided not to leave the group and were then without warning arrested, handcuffed, put into a police van and transported to a bus. They were

not permitted to leave that bus for the next four hours, other than to undergo individual "processing". At about 10.30pm the plaintiff and fellow protesters were released, no charges having being laid.

Legal Issues

Judge Taylor decided the case in two ways. Firstly, he examined the legality of the arrest by asking what offence lay behind it. Arrest without warrant only attracts protection from actions for false arrest when it falls within ss31 or 32 of the Crimes Act 1961:

> 31: Every constable is justified in arresting any person without warrant in accordance with the provisions of s315 of this Act or in accordance with any other enactment conferring on him a power so to arrest.
>
> 32: Where under any enactment any constable has power to arrest without warrant any person who has committed an offence, the constable is justified in arresting without warrant any person whom he believes, on reasonable and probable grounds, to have committed that offence, whether or not the offence has in fact been committed, and whether or not the arrested person committed it.

Sections 31 and 32 are therefore a shield for a constable who may become a defendant in a civil action; the natural counterpart to the shielding provisions is the empowering clause, the sword, of s315:

> (1) No one shall be arrested without warrant except pursuant to the provisions of —
> (a) This Act; or
> (b) Some other enactment expressly giving power to arrest without warrant. . . .
>
> (2) Any constable, and all persons whom he calls to his assistance, may arrest and take into custody without a warrant —
> (a) Any person whom he finds disturbing the public peace or committing any offence punishable by death or imprisonment:
> (b) Any person whom he has good cause to suspect of having committed a breach of the peace or any offence punishable by death or imprisonment.

The judge held that these sections only provide protection when the person arrested is either apprehended disturbing the peace or is reasonably suspected of having caused a breach of the peace. Section 315 is silent as to anticipatory breach of the peace. This silence is reinforced by the repeal (s412 of the Crimes Act 1961) of the only anticipatory breach of the peace offence to have existed on the New Zealand law books, s73 of the Police Offences Act 1927:

> Any constable, and all persons whom he calls to his assistance, may take into custody without a warrant —
>
> (b) All loose, idle, and disorderly persons whom he finds disturbing the public peace, or any person whom he has good cause to suspect of having committed *or* being about to commit any crime or breach of the peace.

This provision was a statement of the common law anticipatory breach offence. The codification of criminal law in New Zealand means that police powers are only lawful to the extent that they have received statutory recognition; no common law powers remain. There is, then, no offence of anticipatory breach of the peace in New Zealand law.

Confusion has apparently been caused by a mistaken understanding of cases like *Burton* v *Power* [1940] NZLR 305 and *Pounder* v *Police*

[1971] NZLR 1080. It is quite clear that both these cases concerned the offence of obstruction of a police officer in the execution of his duty, and not the power to arrest for anticipatory breach. So, in *Burton* v *Power* the appellant was found to have been lawfully arrested for obstruction, having refused to comply with a request by a police officer to desist from an activity which the officer had reasonable cause to suspect would lead to a breach of the peace. The argument as to the legality of the arrest turned not on whether there was an offence capable of supporting the arrest, but on whether the officer acted on reasonable grounds.

On the facts of this case, however, the *Burton* v *Power* type of pre-emptive police action would have also been unlawful because the judge found that there was no reasonable basis upon which to form the view that a breach of the peace might result from the protesters' action up to the point of arrest. This provided the second reason for the decision, namely, that even if the police do have the power to arrest for anticipatory breach of the peace, it was exercised unlawfully in this case because of the absence of the necessary factual basis. It is well settled that such reasonable grounds must be established under both the common law anticipatory breach offence and the statutory offence of obstruction (see statement of Lord Parker CJ in *Piddington* v *Bates* [1960] 3 All ER 660, 663, relied upon by the New Zealand Court of Appeal in *Police* v *Peek* [1973] 2 NZLR 595, 597 and cited by Judge Taylor). Although the protesters had been noisy there was no indication that there would be a breach of the peace.

Although he distinguishes *Burton* v *Power* the judge nevertheless takes the opportunity to deliver a backhanded criticism of the case. A reason advanced by the police for acting as they did was their fear that a few members of the public might feel compelled to provoke a breach of the peace in response to the protest activity. Judge Taylor remarks:

> It has always seemed to me a very curious approach to problems of breaches of peace that those people who are, in fact, not causing or provoking a breach of the peace become subject to police direction when one would have thought that the proper duty of the law enforcement agencies was to prevent those who were likely to cause a breach of the peace from doing so.

In *Burton* v *Power* the reasonably apprehended breach of the peace would have involved bystanders upset by what the appellant was saying.

Having found the arrest to have been unlawful on two grounds, it followed that the detention was also unlawful. The plaintiff was awarded $1,500, both to compensate him and to condemn the defendant's conduct.

Comment

If the police reasonably suspect a breach of the peace will arise as a consequence of otherwise lawful protest action they are entitled to act pre-emptively in accordance with *Burton* v *Power* so as to avert it. However, they are *not* entitled to arrest for a non-existent offence, de-

tain and release without laying charges simply because this may present itself as an administratively more attractive course of action.

— *Michael R. Bowman*