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Thomas Hugh Bennion

THE DUTY QUESTION IN MEATES CASE:

AN ASSESSMENT

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Lord Esher said; "a man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them".[1] The duty of care doctrine in the tort of negligence is the method by which the courts determine the extent to which persons should be held liable for their negligent actions.

In Meates v. Attorney-General [2] the New Zealand Court of Appeal determined that Ministers of the Crown owed a duty of care to private citizens who had suffered financial loss relying on negligent statements made by those Ministers. How important is this decision in the overall development of the duty of care doctrine? To answer this question it is necessary to examine in detail the treatment in the judgments of the duty question. The Court looked at; the duty of care for negligent misstatements generally, the duty of care owed by Ministers of the Crown for negligent misstatements and the duty owed for negligently made promises as to future actions. Each of these three areas needs to be considered in turn.

The facts of the case were complex. In November 1972, Mr Kevin Meates put before the newly elected Labour Government proposals to establish light industry on the West Coast of the South Island. He did so as an enthusiastic supporter of the Government's proposed regional development scheme and in the expectation of receiving assistance under the proposed scheme. The Prime Minister, Mr Kirk, was also a keen advocate of the scheme and friend of Mr Meates. He was naturally delighted with the prospect of such a rapid implementation of this policy and encouraged Mr Meates to enter into

detailed negotiations with the Department of Trade and Industry under its Minister, Mr Freer.

It is clear that from February 1973, Mr Meates was moving faster than the Department was prepared to follow. There was a noticeable reluctance on the part of the Department to provide firm assurances on the question of freight subsidies vital to the success of the industries. But despite these difficulties, Matai Industries were incorporated on 9 July 1973.

When the factories opened in November however, the Company was in severe financial difficulties, largely because Government assistance in the form of freight subsidies and/or grants was not forthcoming. This cash flow problem was exacerbated by the need to immediately purchase raw materials whose prices were rising on the overseas market.

In January 1974 Mr Meates suggested that the collapse of the Company was a distinct possibility. The Government was understandably anxious that this should not occur, and at a crucial meeting of the Matai Board with Mr Freer on 18 February 1974, the Board accepted the appointment of a receiver. The Board had favoured immediate liquidation and Mr Meates claimed only agreed to a receivership on the understanding that they would be indemnified against any loss in their shareholdings. A press statement was issued after the meeting: [3]

> Both the Government and the directors reaffirmed their confidence in the continuation of this industry .... They assured employees, creditors and shareholders that their interests would be safeguarded and that with the full support of both the Government and the directors every effort would be made to successfully reconstruct the business.

In September 1974, after the failure of these efforts, Matai Industries began selling its assets. The shareholders brought an

action against the Government for damages totalling $1 million for (1) breaching a contract to supply services and regional development assistance to Matai Industries, (2) inducing the Company to set up to further Government policy by the making of negligent statements and giving negligent advice, (3) negligently assuring the shareholders that they would be indemnified for any losses suffered under the receiver, consequently they did not take normal commercial steps to safeguard their position.

The shareholders appealed from the decision of Davidson C.J. in the High Court.[4] In the Court of Appeal they were more successful. The majority, Woodhouse P. and Ongley J., gave a judgment in their favour with Cooke J. dissenting. Damages were awarded under the third ground pleaded, that the Labour Government had negligently promised to indemnify the shareholders against any loss resulting from the receivership.

I. The Duty of Care for Negligent Misstatement.

The Court of Appeal focussed on two crucial meetings of the 15 and 18 February 1974 and the press release of 19 February, and found that the Government had breached a duty to be careful in the statements it was making to the shareholders. Although Cooke J. did not find such a breach, he agreed with the majority that the Government owed a duty of care.[5]

Significantly, the Court of Appeal made the two-stage Anns v. Merton London Borough Council [6] duty of care test [7] central to their decision that a duty of care existed in relation to these assurances. Davidson C.J. in the High Court did not. A comparison of these two approaches suggests that the scope of the duty for negligent misstatements is substantially widened if the Anns test is applied in the manner suggested by the Court of Appeal.

Davidson C.J. did use the Anns test, but only briefly when, dealing with statements made before the meeting of 19 February the C.J. considered the allegation that Mr Freer had given an assurance that prompt action would be taken on the matter of import licences.[8] This statement, the C.J. suggested, was only a promise as to how the Department of Trade and Industry might act on this matter. Consequently, Mr Freer was not in the position the first stage Anns test envisaged; "Mr Freer was not making a statement or giving advice which he had a duty to be careful about, he was making a promise as to how the licencing matters would be dealt with ...".[9] There was no "sufficient relationship of proximity" such that Mr Freer had to have in mind the possible consequences of carelessness on his part.

In considering events after the 19 February meeting Davidson C.J.

applied the Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [10] tests to the statements made, as modified by the "special relationship" requirements of Mutual Life and Citizens' Assurance Co. Ltd. v. Clive Raleigh Evatt.[11] Of the press statement of 19 February 1974, his Honour said: [12]

> Mr Freer in making the statement was not making it in the ordinary course of his business or profession and it was not one which called for the exercise by Mr Freer of some special qualification, skill or competence not possessed by the ordinary reasonable man.

This is of course the M.L.C. v. Evatt test, that a duty of care does not exist for negligent misstatements unless three elements are present. That the statement is made in the ordinary course of a business or profession, the subject matter relates to that profession, and there is special skill and competence required in making the statement. The C.J. concluded, "this is simply not a case of negligent or careless advice or statements within the Hedley Byrne principles".[13]

Why did the C.J. appear to apply two separate tests, one for the licencing statements and another for statements made to shareholders after 19 February? It may be that since in the latter case Mr Freer was speaking to the shareholders about how he personally would handle matters, rather than, as in the former case, how his Department might handle them, he automatically satisfied the first stage duty to take care. Therefore the C.J. felt he did not need to give Anns any consideration and moved directly to apply the Hedley Byrne test.

Whatever his approach, the C.J. did not find that a duty of care existed in either case. The contrast therefore with the Court of Appeal decision is marked. There the Anns test was central to the

analysis of the duty question and the Court not only found a duty of care to exist, but Cooke J. suggested that it could have been even wider than that which the plaintiffs contended for.[14]

In reaching this decision the Court of Appeal firstly drew on the latter part of Lord Diplock's judgment in M.L.C. where he noted: [15]

> their Lordships would emphasise that the missing characteristic of the relationship which they consider to be essential to give rise to a duty of care in the situation of the kind in which Mr Evatt and the company found themselves ... is not necessarily essential in other situations - such as, perhaps, where the advisor has a financial interest in the transaction upon which he gives his advice.

The High Court had rejected the plaintiffs claim because not only was there no "business or profession" involved in the Government's relationship with Mr Meates and the Company but neither was there a financial interest. However, the majority said, what the C.J. had failed to consider from the wording of this obiter statement of M.L.C. was the possibility that some other factor might provide the basis of a special relationship apart from just a financial interest, such as, perhaps, a political interest.[16]

Thus if the Privy Council in M.L.C. has sought to place a restraint on the extension of the duty of care doctrine in the area of negligent misstatement, a "restrictive gloss" on Hedley Byrne as Woodhouse P. calls it, [17] then the Court of Appeal has effectively removed it. It is hard to imagine a situation where some special element linking two parties could not be found within the now existing categories; professional, financial, and political. And of course M.L.C. opened up in this fashion allows any factor to be considered which is an 'essential characteristic' of a relationship. It can be assumed that the Court of Appeal does not feel itself hampered either by the eight point assessment of the "metes and bounds" of the Hedley

Byrne principle adopted by the C.J. from the judgment of Chilwell J. in Plummer Allison v. Spencer L. Ayrey Ltd.[18] This assessment lists carefully the situations where a duty of care for negligent misstatements can exist.

The Court of Appeal then went on to apply the Anns two-stage test to the statements made to the shareholders. Woodhouse P. set out the test: [19]

> 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.

His Honour went on to hold that the degree of proximity between the parties was equally close to that which existed in Junior Books Ltd. v. Veitchi Co. Ltd..[20] There the relationship was, "only just short of a direct contractural relationship".[21] Cooke J.: [22]

> The Government of the day and the shareholders were acting together in a major project of regional development. To call it a partnership or joint venture would not be accurate, but there was a distinct analogy.

So the prima facie duty question was resolved without recourse to the M.L.C. or Hedley Byrne tests. Although Woodhouse P. did apply Hedley Byrne when he noted that, "in addition, the reliance and even dependence of the Meates group on the information it was getting from the Government was self-evident", [23] none of the judges thought that Hedley Byrne was the paramount case to be applied to the facts. Other cases, like Junior Books, that are in no way concerned with negligent words were applicable if they indicated how "a sufficient relationship of proximity" is to be measured. This means that the Court of Appeal does not think that negligent words should be treated in a different fashion from negligent actions. Those tests variously formulated by

Lord Reid in Hedley Byrne and the Privy Council in M.L.C. which argued for a distinction between cases dealing with negligent words and those dealing with negligent actions appear to have gone. Lord Reid had felt that words raised separate and more detailed considerations than actions because of the ease with which they were uttered and because they could cause excessive loss which would make liability for them difficult to limit.[24]

This is not a new development. New Zealand Court of Appeal cases since Scott Group Ltd. v. McFarlane, [25] where the Anns test was applied for the first time in this country to the statements of a group of chartered accountants, indicate that at this prima facie stage actions and words should be treated equally.

In Scott Group, Woodhouse J. set the ground for the Meates decision when he adopted Lord Wilberforce's two-stage test as, "a valuable and logical guide to the way in which a decision should be made as to whether a duty of care exists in an apparently novel situation". He then criticised, "successive and varying formulas that have been used in an effort to confine the general area of responsibility, in particular for negligent words or in respect of purely economic losses".[26] Hedley Byrne and M.L.C. are clearly implied here.

Cooke J. in Meates said that any argument that the duty should be excluded because economic loss alone was involved, was an anachronism. He further noted: [27]

> It can be artificial ... to distinguish between statements and other actions. In my view the duty of the Government in this case was to take reasonable care, both in what was said and in what was done,...

The distinction Lord Reid suggested does seem to be artificial in

problems where, for example, a careless building inspector signs a document approving foundation work, and the foundations fail. The line between negligent actions and statements is a fine one, and the same principles can apply in both cases.

How does this application of the Anns two-stage duty test to negligent misstatements anticipate a wider duty than that which might have been applied using the Hedley Byrne test?

When the Hedley Byrne and M.L.C. tests were applied they immediately set up extra criteria which had to be satisfied before a duty could be found. Those criteria, the tests for reasonable reliance, reasonable foreseeability of reliance and assumption of responsibility, [20] were based on the policy imperative that words should be treated differently from actions. Thus the policy concerns of Lord Reid were to be applied to all cases involving negligent words. The Anns test approach outlined here reverses this situation. In the first stage the court may look at any precedent or analogous cases that suggest that the defendant was within the necessary proximity that they should have foreseen that their carelessness would cause harm to the plaintiff. The second stage test asks what policy factors should limit or negate the prima facie duty owed. Here a court may look at the policy that arises on the facts of the case and from the position of the parties, rather than applying a general policy concerning negligent words indiscriminately to all cases. In each case the policy may differ. So the Court of Appeal was able to look behind the tests of M.L.C. and Hedley Byrne to discover what policy elements they contained that were useful. The majority held that the M.L.C. restrictions could not limit the duty owed by the

Ministers, instead the broader question was asked, whether: [29]

> the political or the socio-economic interest of the Government in stimulating the Matai venture should be regarded as something which diminished or negated its responsibility to handle with due care ... the enquiries that were made.

Similarly, a policy question was asked of the Hedley Byrne case, whether the principles established there should extend to cover negligent promises as to future actions.[30] Since however, Hedley Byrne policy was founded on the desire to distinguish between negligent words and actions, and that policy is diminishing in importance, the importance of the case as a precedent must also diminish.

For example, the majority rejected the defendants contention that since the shareholders were involved in the drafting of the press release of 19 February they could not be said to have relied on it. It is significant that the Court felt that it could put this argument to one side with the comment that the intention on both sides was clear, "that each would assume a relevant responsibility and play an appropriate role in order to give ... effect to the assurances", [31] when Davidson C.J. had found it strong enough to entirely dispose of the matter of the press release.[32] Another indication that the Hedley Byrne factor of reliance is no longer crucial in actions for negligent misstatement is the finding in the case of Gartside v. Sheffield, Young & Ellis [33] that a solicitor who negligently fails to draw up a new will for his client before her death will owe a duty of care to a beneficiary who would have taken under the new will. There is minimal reliance in this sort of situation.

So the flexibility of the second stage Anns test, combined with the removal of the extra considerations for negligent words in the

first stage anticipates a wider duty for negligent misstatements than the Hedley Byrne test might have allowed.

Three observations can be made about these developments. In the first place, a wider Anns prima facie duty test will allow full advantage to be taken of the second part of the test. Previously there may have been a tendency for the courts to use the special tests for negligent words to deny the existence of a duty in cases where they wished to deny the duty on what were essentially policy grounds. If in Meates case their Honours had not wished to make Ministers of the Crown liable for their statements, they might formerly have held that the shareholders could not reasonably rely on the Ministers' statements given their known reluctance to commit themselves to the project; or that the Ministers had not assumed responsibility for their assurances to the shareholders. The broader prima facie duty test would allow the court to move more easily onto the second stage of the Anns test and there state clearly their policy reasons for restricting the duty owed. As one judge put it in Gartside, "there is one general principle of negligent liability which is subject to special qualifications grounded in policy rather than a list of duty situations".[34]

Secondly, it should be asked if the Court of Appeal's expressed wish to dispense with the distinction between negligent words and negligent actions will create problems in future cases. Lord Reid in Hedley Byrne said the distinction existed because, while it might be unusual to carelessly put into circulation negligently made articles which were dangerous, it was not so for words, especially those spoken at informal gatherings. Words could also be broadcast, something which would make the extent of the duty owed for them difficult to

determine.[35]

It can be expected that in cases involving negligent statements a degree of proximity similar to that in Meates will be looked for and that second stage policy considerations will prevent any unwarranted extensions of liability. However, it is interesting to speculate in this case whether the employees of Matai Industries could have brought an action against the Government on the basis of the press release issued after the meeting of 18 February. This, "assured employees, creditors and shareholders that their interests would be safeguarded". The majority found in that statement strong support for their view that the shareholders had been given an assurance by Mr Freer of indemnity against any losses due to the receivership.[36] This point highlights the problem with fixing the extent of liability for negligent words a problem that might not be easily solved by policy pronouncements but one which might prove amenable to some form of limiting test.

Finally, a warning from the New South Wales Supreme Court in a recent case where it was said that too great a reliance on policy factors in the duty question would see: [37]

> the production of a wilderness of single ad hoc decisions, each relationship in an infinitely variable series being judged individually for its suitability to be a matrix of duty without reference to any criterion except grounds of policy, the policy itself being wholely undetermined.

The Supreme Court was there commenting on Lord Denning's suggestion that the duty of care in certain cases be decided almost solely on policy grounds.[38] The Australian courts prefer to look at the type of negligence involved and use differing tests, like Hedley Byrne, for each type, all within the first stage of the Anns formulation.[39]

While the NZ Court of Appeal does not advocate the radical stance of Lord Denning it does seem, in simplifying and broadening the prima facie duty test, to be moving in this direction and placing more weight on policy factors than was previously the case. Meates indicates that at present a 'middle ground' has been achieved where policy concerns do not enter the prima facie duty test and where use is made of cases like M.L.C. and Hedley Byrne to ensure that the policy adopted at the second stage is not "wholely undetermined".

II. The Duty of Care of Ministers of the Crown.

It has been noted that the use of the Anns test makes it easier for the courts to consider directly policy questions relating to the duty of care. In Meates the Court of Appeal used this flexibility to hold that Ministers of the Crown should be responsible for their negligent misstatements.

It is only with reluctance that the judiciary has moved to recognise such a duty on the part of government. The decision in the court of first instance in Takaro Properties Ltd. v. Rowling [40] was that "a person holding ... high office should not be subjected to claims for damages for misuse of statutory power having regard to the complexity of government activities ... ".[41] However, in the appeal from that decision it was held that ministers might owe a duty in certain cases if the broad duty framework of Anns case were applied and that duty tempered by the criteria laid out by Lord Wilberforce to be followed when dealing with a statutory body. Because the judiciary did not want to interfere in the policy decisions of the legislature, Anns case restricted the area of judicial investigation to, "the practical execution of policy decisions", an area it called "operational". In the alternative, where a minister is exercising a power conferred by Parliament, if the minister exercises that power in a patently unreasonable manner, then he or she may be said to have been acting outside any statutory discretion.[42]

In Meates, since the Ministers were not directly applying a statute as in Takaro Properties but were instead implementing a general policy formulated by Government there was no attempt made to apply the Anns operational/discretionary criteria. Nevertheless, it

does seem odd that given the cautious advances in previous cases, the Court of Appeal did not see fit here to weigh more precisely the issues that might arise in making public officials liable in this fashion and to formulate some policy principles on the basis of those past cases. The statement of Richardson J in Takaro Properties still has relevance: [43]

> In the application of the common law duty of care in the public law field Lord Wilberforce concluded that to base a description of the authority's duty on the neighbourhood principle alone or on any such factual relationship as the control over building construction exerciseable by the authority, would be to neglect an essential factor, namely, that the authority was discharging statutory functions and its powers and duties were definable in public, not private law.

Perhaps Cooke J. was considering the Anns grounds when he said, "if they [the Government] undertake to give specific advice regarding the application of Government policy in given cases ... they are bound to be reasonably careful".[44] This makes the application of the regional policy an operational concern that the court could review. But his Honour made this comment in relation to the M.L.C. case and the giving of 'professional' advice - the Government duty was being likened to that which professionals owe to their clients. Cooke J. does go on to say however, "the courts must be alert not to pitch the standard so high as to interfere in policy making or inhibit the reasonably free and effective functioning of the administrative system", [45] but with respect, this is hardly a useful analysis for later courts to deal with.

The majority placed heavy emphasis on the Government's exclusive position in its relationship with the shareholders and the degree of dependence the shareholders placed on it. Arguably, the very close working links between the Government and the plaintiffs in the case

were sufficient to remove the need for a close look policy questions arising from the imposition of liability. However, a more likely explanation for the absence of any detailed consideration of the policy arising from this extension of liability is that the Court considered that ministers could be liable for their negligent misstatements in much the same way as a private corporation or citizen might be. The majority noted; "the Government interest in the project was clearly no less powerful, being a political commitment, than the conventional implications of money for business people in a purely commercial setting".[46]

There are problems with this approach. While there is no reason in tort law to begin with the assumption that government should not be liable for negligence; even when a statutory environment is not evident and the operational/discretionary factors do not seem to need weighing, there are still powerful policy reasons for examining carefully government's liability.

A comparative case indicates the value of a careful appraisal of the extra factors that statutory backgrounds produce. In Minister Administering the Environmental Planning and Assessment Act, 1979 v. San Sebastian Pty. Ltd., [47] a land developer sued the planning authority in a suburb of Sydney for negligently producing a land use study on the strength of which he invested heavily in the area. When the local authority abandoned the plan, the developer suffered substantial loss. In deciding against the developer's claim for damages the Supreme Court considered at length the Hedley Byrne principles and made a cautious extension of the Anns statutory body test before arriving at the conclusion that: [48]

The plan for Woolloomooloo was a social plan; it was a plan for

changing the face of Woolloomooloo and involved complex evaluation of the public interest. The pursuit of the public interest involves the disregard or, perhaps, the crushing of other interests .... The plan was not made for the benefit of developers, it was made for the benefit of the City of Sydney and to achieve the public interest.

Further, Hutley JA notes: [49]

The history of plans ... would indicate that they only exist to be torn up at the behest of the changing political and economic pressure groups and any developer of real estate would know that.

Of course the Meates facts differ considerably from those in San Sebastian - but the principles of government liability are essentially the same. Mr Meates, for example, knew that the Government departments he was negotiating through were reluctant to commit themselves to any positive action. Indeed Mr Meates suggested to Mr Kirk that he might use Cabinet to speed up the passage of his proposals through the red tape. He even wrote, "we can put plants into Regional Development areas quicker than the Government Departments can decide whether they are worthwhile".[50] Perhaps Cooke J.'s judgment of the case as, "an attempt by the shareholders to establish that the Government were their insurers against any loss" [51] is warranted given what the shareholders, as too the developers in San Sebastian, knew of the perils of relying on Government.

It could be argued, as earlier noted, that since in this case the parties were so close as to be involved in, "a united effort with a shared purpose", [52] there were no complicating policy factors to examine. Whatever action the Government took, it would be responsible directly and immediately to the shareholders. Even so, the question must be asked, what degree of proximity will be sufficient to make ministers liable as in Meates case? Did the Ministers owe a similar duty to the employees of Matai Industries as to the shareholders? It

does not seem likely: but situations often arise for a government where it may actively encourage an undertaking, and yet have to remain financially divorced from it. If investors mistakenly rely on the government expressions of support, are they entitled to damages?

The simple fact that the government operates in the public arena and has responsibilities higher than those of ordinary persons needs consideration. Is it reasonable to hold Government liable for the problems created by working with the public interest and money in mind, problems which produce inefficiencies a private enterprise might not experience? Two examples illustrate the problem. If X is walking through a supermarket and slips on some spilt yoghurt left there by a lazy attendant, it is likely that a duty of care on the storeowner will be found. A duty might not so easily accrue however, if X slips on an icy footpath which is given infrequent maintenance by a local authority.[53] In Meates the plaintiffs in question had over a year in which to become intimately aquainted with the problems of Departments. As Woodhouse P. said in his final conclusions, the problem underlying the case was, "the inability of the machinery of Government to accomodate itself to a novel situation".[54]

One wonders what the result would have been had the indemnity arrangement become public knowledge and subsequent pressure placed on the Government to avoid paying the Company. Would there still be liability, and in this case to whom would a duty of care be owed? In this respect the solicitor-client-third party cases might furnish some detailed policy considerations by analogy, since there, as here, the defendant is asked to be the servant of two masters. In Gartside v. Sheffield it was noted that, "it is difficult indeed to suppose that a solicitor could ever owe an intended beneficiary a duty which in any

way militated against his responsibility to his client".[55] To draw the analogy, the Government might owe a lesser duty to the shareholders, the intended beneficiary, and a much greater one the general public, the client.

Another consideration is the degree of flexibility government needs to retain within the political field and to what extent this flexibility must to be sacrificed to fulfil the duty owed to the general public. There are numerous examples of governments switching policy because of unanticipated political pressures or because of the occurrence of elections and by-elections. The San Sebastian example is a case in point. Had the Labour Government discovered the regional development scheme to be totally unrealistic in financial and political terms, would it have been entitled to withdraw before the political embarrassment became too acute?

III. The Duty of Care for Negligent Promises.

But perhaps even more interesting than this development from the Meates case is the assertion, in both minority and majority judgments, that negligently given promises as to future action will attract liability. This raises a number of possible extensions in the area of negligence and is a development that trespasses substantially into the realms of contract law.

The defendants counsel claimed that it was an extension of the Hedley Byrne principle to say that it dealt with promises as to future action, where all previous cases had talked only of information or advice. However, their Honours were unanimous that Hedley Byrne could be so extended. They noted the close relationship between tort and contract law in the case, maintaining that a "consistent theme" underlay all the causes of action. "It is a general complaint", they said: [56]

> that in reliance upon Government promises or assurances that public assistance would be available the appellants embarked upon and then were persuaded to persist with the Matai project. On such a basis the one allegation is that the relationship of negotiation was translated into binding commitments in the contractual sense while the other is that at least it produced a duty of care situation which in terms of the tort of negligence was breached.

Therefore it seems a logical step, after comparing the facts of this case favourably with those of the almost contractural situation in Junior Books to conclude: [57]

> although a promise may fall short of a contractural commitment nonetheless if it is provided by someone 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 likely to be received as a far more powerful piece of information than mere opinion....

What are the implications of finding that the defendants here had

made negligent promises as to their future conduct?

Before answering this question it is important to first appreciate what the concept of negligent promises entails and where it might fit into existing case law. A negligent misstatement or misrepresentation involves nothing more than statements or actions which say that certain facts are true. It would seem to be perfectly correct to expect that a duty of care should exist where people give opinions, facts or advice in a situation where they know that negligence on their part will cause damage. But promises involve more than this. They are assurances that a person will physically undertake some action to the benefit of the promisee.

Previously, pure promises were actionable only in a contract situation, and there consideration is needed as proof that the promise was seriously relied upon. Nevertheless, the courts have been willing to enforce purely gratuitous promises unsupported by consideration when made by deceased persons within certain statutory limits. The typical case is where A performs work or services free of charge for B, who promises to leave provision for A in some testamentary instrument. As long as A acts in reliance on that promise and comes within the terms of the Testamentary Promises Act 1949, they may claim from the deceased's estate.[50]

But the Meates proposition goes further than this. It suggests that reliance on a promise, without provision of work or services, may be good ground for a claim to damages. From the case there appear to be three objective criteria: that the promise is made with parties in circumstances of proximity close to those in contract; that the person providing the promise intends it to be acted upon and seeks to so influence the promisee; lastly, the promisor must be, "in an exclusive

position" [59] to give effect to the promise or, "acting within the particular sphere of his authority".[60]

On the facts of the case it might be said that because the company agreed to continue operations, sufficient "consideration" was given for Mr Freer's promise of an indemnity. Certainly in regard to testamentary promises the courts are now willing to consider relatively obscure services as sufficient to uphold promises, so that the concept of "consideration" may here be of decreasing importance.[61] But this is clearly not what the Court of Appeal had in mind and the Testamentary Promises Act is a restricted ground from which to extend the idea of enforceability of gratuitous promises to the commercial sphere.

A couple of examples from that area might serve to highlight the likely problems. In Saltzberg & Rubin v. Hollis Securities Ltd. [62] the defendants received three bids each of $35,000 for an apartment they were selling. Letters were sent to each bidder, advising them that time was of the essence and the highest offer received by a certain date and time would be accepted. The promise was not kept and the highest bidder, the plaintiff, sued for breach of contract. After finding no contract complete on the posting of the highest offer and without any evidence of dishonesty, the court noted that no consideration supported the promise, consequently it failed.

Using the Meates criteria this would now clearly not be the case. The defendants were in an almost contractural situation with regard to the plaintiffs, they were in an exclusive position to accept the highest bid, and they expected the plaintiffs to act on their promise. The position is reached that a promisee, with no real detriment

incurred on their part, can enforce a promise involving quite a large sum of money.

In Vivian v. Coca-Cola Export Corporation [63] an employee of the defendant company claimed wrongful dismissal and sought damages in tort as well as contract. Prichard J was asked to decide if a contractual duty could also be a duty of care. His Honour decided that these were distinct and separate concepts. Nevertheless, as can be seen from the Meates decision, a contractual or near contractual relationship can furnish good evidence that a tortious duty of care exits. If it is now possible to bring an action for negligent promises, negligence might become more commonly used as an alternative head of action in cases for breach of contract.[64] The facts surrounding the breach may often supply good evidence that the promises made at the time the contract was effected were negligently made.

Returning again to the Meates case, Davidson C.J. found that Mr Freer had promised that the Department of Trade and Industry would deal promptly with licencing matters. Using Anns he claimed not to find sufficient proximity between Mr Freer and the Company in this area. Would this now be an enforceable negligent promise? Arguably the C.J.'s finding is equivalent to saying that Mr Freer was not in an exclusive position to give his promise - that he was only giving an opinion as to how these matters might be dealt with. But surely problems will arise when a promisor is not in fact in an absolutely exclusive position, or by Cooke J.'s lesser standard, only ,"acting within the particular sphere of his authority".[65] Leaving aside acts of God, the promisor might be held liable when he or she does not have complete control over the events which will see the fulfilment of

the promise. While X may be negligent to promise to deliver goods when X has only 50% control over the circumstances of their delivery, is it also negligent for X to so promise when X is 80% certain he or she can fulfil the promise? The court would have to decide whether a defendant had taken, "reasonable care to safeguard the interests of the person he has sought to influence".[66] Rather than undertaking such an assessment, would it not be simpler to give X some consideration which binds them to fulfilment of the promise?

On the basis of these developments it might be wondered whether the courts are returning to the concepts of pre consideration contract law and the early doctrine of assumpit. Historically, there seems no good reason why the law to define the limits of promissory liability should have evolved with a search for the presence or absence of consideration as a central feature, as opposed to a search for induced reliance.[67] Future courts developing this concept might find parallels in another contractual notion, the doctrine of promissory estoppel - which enforces gratuitous promises provided the promisee has been induced to alter their circumstances in reliance on the promise.[68] Another suggestion is that the law may be moving towards an all-embracing doctrine of "obligation" which combines tort and contract law. So far, the idea has not found much support in New Zealand courts.[69]

Whether the Meates case will provide fertile ground for future judgments is a moot point. It is of course an authoritative case coming as it does from the Court of Appeal. Certainly the content is there to be applied. The restrictive tests of cases like M.L.C. have been dropped so that development in this area is now unhindered by questions such as, whether advice is given in the course of a business or profession. Negligent misstatement cases will now be decided using the Anns two-stage test and as has been argued, this potentially could see even greater extensions of the duty of care than those which have come from the New Zealand courts since Scott Group v. McFarlane first adopted that test. The extension of the duty to negligent misstatements of ministers of the Crown and negligently made promises in this case might be seen as confirming this trend. It may indeed be that, as one writer has put it: [70]

> the policy of attaching legal liability for negligence to moral responsibility, subject to the qualifications which Lord Atkin expressed, has become the dominant policy of the common law of negligence. Other qualifications thought to be imposed by the necessities of the effective administration of justice have fallen into discard, thereby accounting for much of the change in the judicial approach to particular topics in the negligence field.

While these are worthwhile advances, there may be real problems in applying them on the basis of cases like Meates. This is because, as has been suggested, in these new or extended areas of liability there are not as yet adequate signposts to show the way for lower court judges. There may be a tendency to fall back in confusion from such judgments to earlier principles which have some 'safety' about them.

It might also be timely to wonder if Meates takes the law too far, too fast. There has been some criticism overseas of the

direction in which the tort of negligence has been heading since Donoghue v. Stevenson [71] was decided, and especially since the Anns formulation has begun to be widely applied.[72] As one judge noted in San Sebastian, "there must come a time when the genie released by Lord Atkin is put back in the bottle".[73]

FOOTNOTES

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1 Le Lievre v. Gould [1893] 1 Q.B. 491, 497.

2 [1983] 1 N.Z.L.R. 308.

3 Ibid. 321.

4 [1979] 1 N.Z.L.R. 415.

5 [1983] 1 N.Z.L.R. 308, 387.

6 [1978] A.C. 728.

7 Ibid. 751, 752; "First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former carelessness on his part may be likely to cause damage to the latter .... Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or reduce or limit the scope of the duty ...".

8 [1979] 1 N.Z.L.R. 415, 441.

9 Idem.

10 [1964] A.C. 465.

11 [1971] A.C. 793.

12 [1979] 1 N.Z.L.R. 415, 447.

13 Ibid. 448.

14 [1983] 1 N.Z.L.R. 308, 383.

15 [1971] A.C. 793, 809.

16 [1983] 1 N.Z.L.R. 308, 333.

17 Ibid. 332.

18 [1976] 2 N.Z.L.R. 254, 262-263.

19 [1983] 1 N.Z.L.R. 308, 334

20 [1982] 3 All E.R. 201.

21 Ibid. 204.

22 [1983] 1 N.Z.L.R. 308, 378.

23 Ibid 335.

24 Infra n. 35.

25 [1978] 1 N.Z.L.R. 553.

26 Ibid. 574.

27 [1983] 1 N.Z.L.R. 308, 379.

28 Lord Reid never laid these criteria down explicitly, they were drawn from his statement at [1964] A.C. 465, 486.

29 [1983] 1 N.Z.L.R. 308, 335.

30 Ibid. 335 and 379.

31 Ibid. 345.

32 [1979] 1 N.Z.L.R. 415, 444.

33 [1983] N.Z.L.R. 37.

34 Ibid. 46.

35 [1964] A.C. 465, 483.

36 [1983] 1 N.Z.L.R. 308, 344.

37 Minister Administering the Environmental Planning and Assessment Act, 1979 v. San Sebastian Pty. Ltd. [1983] 2 N.S.W.L.R. 268, 301.

38 Idem.; is this really so radical? see Joanne R. Terry "Current Judicial Analyses of Negligence" (1981) 55 A.L.J. 804, 807.

39 Ibid. 300.

40 [1978] 2 N.Z.L.R. 314.

41 [1976] 2 N.Z.L.R. 657, 669.

42 [1978] A.C. 728, 755.

43 [1978] 2 N.Z.L.R. 314, 333.

44 [1983] 1 N.Z.L.R. 308, 379.

45 Idem.

46 [1983] 1 N.Z.L.R. 308, 335.

47 [1983] 2 N.S.W.L.R. 268.

48 Ibid. 279.

49 Ibid. 285.

50 [1979] 1 N.Z.L.R. 415, 421. Woodhouse P. noted this point but made nothing of it. He seemed unsympathetic about the problems of bureaucracy, see his comment infra n. 54.

51 [1983] 1 N.Z.L.R. 308, 384.

52 Ibid. 335.

53 G. Samuel "Public and Private Law: A Private Lawyer's Response" (1983) 46 M.L.R. 558, 567; this article in response to another arguing that the distinction between public and private law is not necessary, C. Harlow "Public and Private Law: Definition without Distinction (1980) 43 M.L.R. 241; does Meates case illustrate that tort cannot deal with this area? see Nadja Tollemache "Meates and Government Liability" Recent Law vol. 10, no. 10 November 1984.

54 [1983] 1 N.Z.L.R. 308, 352; these ideas were in Lord Wilberforce's discussion of Kent v. East Suffolk Rivers Catchment Board [1940] 1 K.B. 319 at [1978] A.C. 728, 754.

55 [1983] N.Z.L.R. 37, 43.

56 [1983] 1 N.Z.L.R. 308, 325.

57 Ibid. 335.

58 Testamentary Promises Act 1949, section 2.

59 [1983] 1 N.Z.L.R. 308, 335.

60 Ibid. 379.

61 The "services" found in Kearney v. Mahoney & Re Moore were simply that a son gave his father the satisfaction of knowing he would carry on the family business. Recent Law vol. 11, no. 3 April 1985, 77.

62 (1965) 48 D.L.R. (2d) 344.

63 [1984] 2 N.Z.L.R. 289.

64 Previously, it has of course been possible to sue for negligent misrepresentation. Hedley Byrne was such a case.

65 supra n. 60.

66 [1983] 1 N.Z.L.R. 308, 379.

67 Cheshire and Fifoot Law of Contract (6 ed., Butterworths, New Zealand, 1984) pp. 64-65; K.C.T. Sutton Consideration Reconsidered (University of Queensland Press, Queensland, 1974) pp. 5-6.

68 Cheshire and Fifoot p. 90; J. Cadenhead ""Negligence" in Pursuit of Fairness" [1984] N.Z.L.J. 262.

69 [1984] 2 N.Z.L.R. 289, 297; "the process of osmosis between contract and tort ... has not yet been advanced to the stage where contract is so permeated by tort that both bases of liability might as well be abandoned in favour of an amorphous concept which, for want of a better name, might be called "The Law of Obligations"".

70 Joanne R. Terry "Current Judicial Analyses of Negligence" (1981) 55 A.L.J. 728; Two part article, part one see infra n. 38.

71 [1932] A.C. 562.

72 Peter Burns & J.C. Smith "Donoghue v. Stevenson - The not so Golden Anniversary (1983) 46 M.L.R. 147, 155 156.

73 [1983] 2 N.S.W.L.R. 268, 279.

1 X BE BENNION, T. H. The duty question in Meates case.

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Bennion, Thomas Hugh
The duty question in Meates case.
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Due	Borrower's Name
23/4	K Fuller
- 9 OCT 1986 CANCELLED	AP 2439186
	Kalmaff
28/3/88	Spiller
22 APR 1990	CU
CANCELLED 20 MAR 1990	Julia P
31.3	Rigsell
4/9	
28/3	