

Doing God's Work: Is Religion Always Charitable?

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I: INTRODUCTION

Today, charitable status is of considerable significance. Not only are the equitable trust rules relaxed for charities, but they enjoy both direct and indirect financial privileges. "The indirect privilege is the ability to attract donations from outside sources, the direct privileges are the fiscal benefits that attach automatically to any body with charitable status."¹ The fiscal privileges in New Zealand include favourable tax treatment. By s CB4(1)(c) of the Income Tax Act 1994, income derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual is exempt from taxation. Other taxation privileges afforded charities include rebates for donors² and exemptions from stamp and cheque duties.³ This amounts to a substantial public subsidy accorded the charity at the expense of government revenue. "It is to be remembered ... that to exempt any subject of taxation from a tax is to add to the burden on taxpayers generally."⁴

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1 Bright, "Charity and Trusts for the Public Benefit — Time for a Re-Think" [1989] Conv & Prop Law 28, 29.

2 Income Tax Act 1994, s KC5(1)(aa).

3 Stamp and Cheque Duties Act 1971, s 18.

4 *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 566 per Lord Bramwell (HL).

Relaxation of the equitable trust rules has the effect of permitting the exercise of the purposes of the trust in question. However the granting of financial privileges amounts to more than toleration of the objects of the trust; it constitutes tacit approval, encouragement and assistance of the objects by subsidising the operation of the trust.⁵

Thus, from the points of view of affected organisations and other taxpayers, the substance of the test for charitable status is of great consequence.

Before a trust can be regarded as charitable it must pass two tests.⁶ First, it must qualify under one of Lord Macnaghten's four heads in *Pemsel's case*:⁷

"Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

Secondly, "[a]lthough public benefit is expressly mentioned by Lord Macnaghten only in relation to the fourth head it is beyond dispute that such an element is a necessary prerequisite for valid charitable purposes at least under the second and third heads".⁸

At the time of *Pemsel*,⁹ and for many preceding centuries, it was not seriously questioned that the advancement of religion was a charitable object deserving of the privileges noted above. In more recent times it has been stated that "[i]n English law there is a strong presumption that any trust for the advancement of any religion, without distinction, is charitable unless the contrary can be proved by evidence admissible in court proceedings".¹⁰

However, the last two hundred years have seen a "remarkable diversification of religious experience [such that] there are far more blossoms in the theological garden than there were at the time of the adoption of the Constitution".¹¹

The aim of this article is to analyse and evaluate the response of the law of charity to the changing religious environment. It will be suggested that religious diversification has altered the whole concept of religion, but "due to the way charity law has evolved, fundamental questions of policy have not been rightly addressed".¹² The focus shall not be on contemplating which trusts should be permitted by the law, but on considering whether public subsidies are granted to

5 This factor dramatically reduces the relevance of the reasoning in a majority of United States "religion" cases such as *United States v Kauten* 133 F. 2d 703 (2d Cir. 1943), *Torcaso v Watkins* 367 US 488 (1961), *United States v Seeger* 380 US 163 (1965) and *Welsh v United States* 398 US 333 (1970) and *Malnak v Yogi* 592 F 2d 197 (1979). These cases are concerned with the First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." which governs permission and toleration of religion, not assistance and encouragement. See Picarda, "New Religions as Charities" (1981) 131 NLJ 436.

6 Newark, "Public Benefit and Religious Trusts" (1946) 62 LQR 234.

7 *Supra* at note 4, at 583.

8 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688, 695 per Somers J.

9 *Supra* at note 4.

10 Editorial "An Excess of Charity" (1988) 138 NLJ 87.

11 "Toward a Constitutional Definition of Religion" note in 91 Harv L Rev 1056, 1060 (1977-78).

12 *Supra* at note 1, at 28.

religious organisations on an ostensibly arbitrary basis. In the words of Lord Bishop, we need to stand back from the intricacies of the law and “look boldly at what should and what should not be regarded as charitable”.¹³

II: THE PUBLIC BENEFIT REQUIREMENT

1. The Preamble to the Statute of Elizabeth 1601

The preamble to the Statute of Elizabeth of 1601 contained an enumeration of charitable purposes, the primary focus of which appears to be on the relief of poverty and distress, and aside from the repair of churches, in which there is a notable absence of references to religious purposes.

However regarding this absence, Blakeney indicated that the focus on the relief of poverty and distress is itself a religious purpose, with the whole preamble complying with a religious agenda. “The Statute of Charitable Uses may then be regarded not as devoid of religious inspiration, but as a chauvinistic Protestant assertion of the duty to perform ‘good works’.”¹⁴

The preamble to the Statute signalled the emergence, throughout the sixteenth and seventeenth century, of two aspects of charity law which have attained a position of almost immortal influence over the modern legal concept of charity. First, the Protestant view that religious activities ought to have utilitarian ends has culminated in the rule that “[b]efore a trust can be regarded as charitable it must [inter alia] be shown to be directed to the benefit of the community”;¹⁵ and secondly, such public benefit is presumed to be satisfied in trusts for the advancement of religion.

2. The Public Benefit Test

Jones states that, “[p]ublic benefit was the key to the Statute, and the relief of poverty its principal manifestation”.¹⁶

Since the time of the Statute of Elizabeth, public benefit has cemented itself as a fundamental hurdle, and perhaps, as suggested by Lords Wrenbury and Greene MR, even the primary hurdle, over which prospective charities must vault:¹⁷

To ascertain whether a gift constitutes a valid charitable trust ... a first enquiry must be made whether it is public — whether it is for the benefit of the community or an appreciably important class of the community.

¹³ House of Lords Official Reports, Vol 429, Col 683 (22 April 1982).

¹⁴ Blakeney, “Sequestered Piety and Charity—A Comparative Analysis” [1981] 2 J Leg Hist 207, 210.

¹⁵ Supra at note 6.

¹⁶ Jones, *History of the Law of Charity 1532-1827* (1969) 27.

¹⁷ *Verge v Somerville* [1924] AC 496, 499 per Lord Wrenbury; *Re Compton* [1945] Ch 123, 128 per Lord Greene MR. See also *Goodman v Mayor of Saltash* (1882) 7 App Cas 633, 650 per Earl Cairns.

It may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character.

Chesterman, in his book *Charities, Trusts and Social Welfare*, identifies two separate limbs of the public benefit test:¹⁸

The additional requirement of “public benefit” is sometimes spoken of as if it were a single, universally applicable criterion, but this is an over-simplification. It actually comprises two distinct, though closely related, tests which can be phrased as follows: (a) do the purposes being considered confer a tangible benefit, directly or indirectly, upon the public? and (b) is the class of persons eligible to derive benefit directly from them defined so as to constitute the public as a whole or a section thereof?

3. Public as Opposed to Private

Chesterman’s second limb constitutes a rule of exclusion rather than inclusion. In other words, a trust is incapable of being charitable in the legal sense unless it is for the benefit of the public or some section of the public. It has been recognised that trusts for the relief of poverty are an exception to this rule in that they are charitable notwithstanding that the nominated beneficiaries do not constitute the public or a section thereof.¹⁹ However, trusts falling under Lord Macnaghten’s other three heads, including trusts for the advancement of religion, must positively establish a public, as opposed to private, purpose.

It is as a result of this requirement that trusts for the erection and maintenance of tombstones,²⁰ for private chapels,²¹ for private Masses,²² and for private ceremonials²³ have failed to secure charitable status. Gifts to institutions whose members or attendees live a secluded life may also stumble on this hurdle. For example, this rule seems to have influenced Lord Greene MR in considering a claim to charitable status by a Carmelite convent comprising an association of strictly cloistered and purely contemplative nuns: “The trust ... must not only be of benefit, but it must be of public not merely private, benefit.”²⁴

There are two situations in the “religious” context in which the alleged public connection is worthy of discussion. First, Newark states:²⁵

[T]here appears to be a vague idea that churches and chapels can be considered for the benefit of the public simply because the public can go inside. It has been held that a trust to maintain a purely private place of worship is not charitable,^[26] but it does not follow that the public privilege of entry is of itself sufficient to confer the character of a charity.

18 Chesterman, M, *Charities, Trusts and Social Welfare* (1979) 136, see nn 4-5, chapter 7. See also Maxton, *Nevill’s Law of Trusts, Wills and Administration in New Zealand* (8th ed 1985) 94-99.

19 *Dingle v Turner* [1972] AC 601.

20 *Doe d. Thompson v Pitcher* (1815) 3 M & S 407; 6 Taunt 359; 105 ER 663; 128 ER 1074.

21 *Hoare v Hoare* (1886) 56 LT 147.

22 *Attorney-General v Delaney* (1876) IR 10 CL 104.

23 *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381.

24 *Coates v Gilmour* [1948] Ch 340, 347.

25 *Supra* at note 6, at 235.

26 *Supra* at note 21.

Newark seems to be correct in that an opportunity to attend a “religious” meeting may not equate to an opportunity to participate in the benefits. Perhaps the environment is threatening, the nature of the benefit obscure, or the eligibility requirements unattainable. Thus, the test should not be satisfied merely by a religion permitting the public to enter its meeting place.²⁷

Secondly, Cross J, in *Neville Estates v Madden*,²⁸ raises the interesting question of whether the public is sufficiently eligible to participate in any benefit arising from the organisation seeking charitable status merely by interacting with direct participants in the religion. This question is closely connected to the requirement that such an organisation must promote the “advancement” of religion, as advancement would seem to necessitate interaction with the public. In *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council*,²⁹ an absence of interaction with the public, by means of promotion of the religion and dissemination of its principles, was fatal to the claim to charitable status. Donovan J held that advancement of the religion was not the primary object of the organisation, thus negating inclusion under Lord Macnaghten’s third head. It is suggested, however, that an alternative basis could have been the absence of a sufficient public element.

It is suggested that where adherents to a religion live in the community, the existence of a public element should depend on the teachings of the religion with respect to the public. If the members are exhorted to “love your neighbour as yourself”³⁰ and to promote the benefits of their beliefs, then the public may well participate in any benefit derived from carrying out the objects of the religion. However, if the religion promotes hostility towards, or disregard for, fellow human beings or their freedom of choice, or even if members are discouraged from benefiting others through the religion, then the public element may not be present. This approach is confirmed in the New South Wales case of *Joyce v Ashfield Municipal Council*, where Hutley JA said:³¹

Even if the ceremonies of the Exclusive Brethren in the hall can be regarded as a temporary withdrawal from the world, those ceremonies are a preparation for the assumption of their place in the world in which they will battle according to their religious views to raise the standards of the world by precept and example. From the fact that they prepare themselves in private nothing can be deduced to deny the conclusion that those religious ceremonies have the same public value in improving the standards of the believer in the world as any public worship.

With certain religions it may be that the public element is obvious, and the test may be dispensed. However, in doubtful cases the religion should be required to establish that members of the public have a reasonable opportunity to participate in the benefits that emanate from the exercise of the religion.

27 “If one of its objects is to diffuse its principles, and when its church faces on to a public street with the door open to passers by, the fair inference is that its rites are open to the public, and the necessary public element is thereby provided.” Bradshaw, *The Law of Charitable Trusts in Australia* (1983) 63, (emphasis added).

28 [1962] Ch 832, 853.

29 [1957] 1 WLR 1080, at 1090-91, per Donovan J (delivering the judgment of the Divisional Court).

30 *The Holy Bible, New International Version* (1973) Matthew 19:19.

31 [1975] 1 NSWLR 744, 751.

4. Presumption of Public Benefit with Religious Trusts

Chesterman's first limb states that the purposes being considered must confer a tangible benefit, directly or indirectly, upon the public.

The courts may be unwilling to find a benefit in circumstances where the only tangible evidence of the benefit is that the doctrine of the religion asserts that there is one. One such example is the case of *Gilmour v Coats*³² where the nuns did no exterior works of charity, but argued that private intercessory prayer which was their reason for existence had an effect upon the world, and that their life was an example which also bettered the world. The Court held that neither of those propositions was susceptible of proof and therefore held the gift non-charitable.³³

There may be "benefits" which are not strictly susceptible to proof, but which are presumed to exist. Chesterman stated, in 1979, that "the phenomenon of religion, in all its manifestations and ramifications, is thought to confer a genuine, tangible benefit in terms of edification, moral uplift, spiritual comfort and so on".³⁴ The nature of this presumption will be discussed and its validity assessed.

There is some divergence of judicial opinion in disputes regarding the charitable status of religious organisations, as to which party bears the onus of proof, and what that party is required to establish. In *Gilmour v Coats*³⁵ and *Cocks v Manners*³⁶ the Courts required the organisations in question to positively establish a public benefit. However, it appears to be more generally accepted that "the law ... assumes that any religion is at least likely to be better than none".³⁷ There exists "a strong presumption that any trust for the advancement of any religion is charitable unless the contrary can be proved by evidence admissible in court proceedings".³⁸ The threshold which an organisation must attain in order to gain the benefit of the presumption is a low one indeed. According to Romer LJ, "the organisation need not ... prove that its objects, when carried into effect, do, in fact, advance religion, etc., for it is sufficient to show that, being directed to that end, they may have that result".³⁹

This divergence of opinion is not irreconcilable. The religious community seeking charitable status in *Gilmour v Coates* was substantially identical to that which had been emphatically denied the status on the basis of an absence of provable public benefit eighty years earlier in *Cocks v Manners*. Thus it seems that where an object has previously been held not to be beneficial to the public, the onus rests on the party seeking charitable status to establish the existence of such a benefit. However, where the object has previously been recognised as potentially benefiting the public, the onus shifts to the party denying charitable status to rebut the presumption of public benefit.

32 [1949] AC 426, 457 (HL). See also *Cocks v Manners* (1871) LR 12 Eq 574.

33 A similar finding was made in *Attorney General v Delaney*, supra at note 22.

34 Supra at note 18, at 160.

35 Supra at note 32.

36 Ibid.

37 Supra at note 28.

38 Supra at note 10. See also *Re Watson* [1973] 3 All ER 678 and *National Anti-Vivisection Society v Inland Revenue Commissioners* [1947] 2 All ER 217, 220 per Lord Wright (HL).

39 *Berry v St Marylebone Corp* [1958] Ch 406, 414. See also *Re Pinion (dec'd)* [1965] Ch 85, 105 per Harman LJ.

There are several factors which alone, or in concert, may have contributed to the formation of the presumption that religious objects are charitable.

(a) *Historical arguments*

For many centuries religion appears to have been largely synonymous with charity; “[i]ndeed, the very concept of charity is essentially religious in origin”.⁴⁰ In *Pemsel’s* case, Lord Watson stated “[t]he expression ‘charitable’ ... is used in the Act of Elizabeth as a synonym of ‘godly’”.⁴¹ It is suggested that from at least the beginning of the seventeenth century to the end of the nineteenth century, any belief that was accepted as a religion was probably also accepted as being beneficial to the community, unless the settlor had misconstrued advancement of the Christian religion.⁴² Any doctrine which was considered immoral never attained religious status, and thus the question of public benefit did not need to be entertained.⁴³

In *Gilmour v Coats*, Lord Reid observed that “[b]efore the Reformation only one religion was recognised by the law and in fact the overwhelming majority of the people accepted it. It was natural that the law should accept the beliefs of that religion without question and act on them”.⁴⁴ However, *Gilmour* represents a movement away from such an approach towards requiring the establishment of a public benefit, as noted by Picarda:⁴⁵

But once a diversity of religious beliefs arose and became lawful the judges could find no basis for drawing a distinction in the matter of charity between the Established Church and other churches.

Thus, while religion and charity were fairly synonymous, public benefit was generally assumed unless harm was evident. However, it now seems almost unnecessary to observe that religion and charity can no longer be regarded as fairly synonymous, principally because of the ever-expanding definition of religion. In the High Court of Australia, Murphy J stated “[a]ny body which claims to be religious, and offers a way to find meaning and purpose in life, is religious”.⁴⁶ Something described as a religion can no longer automatically be expected to benefit the public, and therefore courts should require substantiation of any alleged public benefit.

Another basis for the presumption was that historically religion was fundamental to the structure and stability of the State. In *Bowman*, Lord Sumner

40 The Woodfield Report “Charities: A Framework For The Future” (1989) 7.

41 *Supra* at note 4, at 559.

42 As was the case in *Thornton v Howe* (1862) 31 Beav 14; 54 ER 1042, and *Re Watson*, *supra* at note 38.

43 Compare *Nottidge v Prince* [1843-1860] All ER Rep 764 with the decision in *Thornton v Howe*, *ibid*.

44 *Supra* at note 32, at 457.

45 Picarda, *The Law and Practice Relating to Charities* (1977) 64.

46 *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 49 ALR 65, 86.

referred to a criminal trial in which Ashhurst J, passing sentence on the defendant in the Court of King's Bench, stated:⁴⁷

All offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England.

Lord Sumner also cited a contemporary legal writer, William Hawkins, stating that "offences of this nature [profane scoffing at the Holy Scripture] 'tend to subvert all religion or morality, which are the foundation of government'".⁴⁸ However his Honour continued by explaining why such a rationale was not valid at the time of the judgment (1917):⁴⁹

In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous.

Lord Sumner concluded by noting that "the attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State and not on the doctrines or metaphysics of those who profess them".⁵⁰ Thus, while historical elements may have contributed to the formation of the presumption, none of these can adequately justify its perpetuation.

(b) Practical argument

The second factor, which may have acted in concert with the first, is that while benefits of a religious nature were widely accepted as tangible,⁵¹ proving their existence was problematic if not impossible. Thus, in order for the law to correspond with social conditions, it was obliged to make a "value-judgment"⁵² and recognise a benefit it could not perceive. Difficulties of proof continue to subsist, but widespread acceptance of the existence of religious benefits is doubtful. While this factor may have significantly influenced the formation of the presumption, its strength is dependent on the validity of the underlying assumptions about society, noted at (a) above, or about the natural law upon which it relies, noted at (c) below.

⁴⁷ *Bowman v Secular Society Ltd* [1917] AC 406, 459 (HL), citing *Trial of Williams for Blasphemy* (1797) 26 St Tr 653, 715.

⁴⁸ *Ibid*, 465, citing Hawkins, *Pleas of the Crown* (1716) book i., ch 26, p 358.

⁴⁹ *Ibid*, 467.

⁵⁰ *Ibid*.

⁵¹ See text, *supra* at note 18.

⁵² *Supra* at note 18, at 160.

(c) Jurisprudential argument

The third possible rationale for the presumption is founded on the assertion by natural law theorist John Finnis, that “harmony with God (‘religion’) is a basic human value”⁵³ and that it is “peculiarly important to have thought reasonably and (where possible) correctly about these questions of the origins of cosmic order and of human freedom and reason”.⁵⁴ Thus, Finnis argues that inquiring into the origins of the universe and the character of any supernatural force is a basic good, notwithstanding the impossibility of establishing such a benefit in court. Two things count against this assertion contributing to the presumption. First, much historical and contemporary religious activity is not devoted to inquiring into the aforementioned origins and character, but rather to behaviour, programmes, ceremonies and rituals which give effect to beliefs already formed regarding the origins and character. Secondly, there is for the most part a dearth of judicial material extolling the virtue of inquiring into any religion other than Christianity.⁵⁵ However, Lord Reid in *Gilmour* appears to support such a view:⁵⁶

The law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion but where a particular belief is accepted by one religion and rejected by another the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true.

This approach is capable of sustaining the value judgment referred to as required in the second factor, above, and could thus provide a justification for the endurance of the presumption. Whether this is or could be the case depends on the strength of Finnis’ argument and whether the necessary extension is sustainable.

(d) The Statute of Mortmain

The fourth, final, and perhaps most compelling factor to influence the formation of the presumption is founded in Mortmain Act of 1736. Jones describes the public attitudes which were a precursor to the Act:⁵⁷

The laity feared the wealth of the Church; they feared that great ecclesiastical charities ... would garner in all the land of the kingdom; ... and they feared that the clergy would emulate what they thought to be the example of their medieval predecessors and terrorise them into making death-bed devises *ad pias causas* to the ruin of their heirs.

53 Finnis, *Natural Law and Natural Rights* (1980) 410.

54 *Ibid.*, 89-90.

55 See *Shore v Wilson* (1842) 9 Cl & F 355, 540; 8 ER 450, 523 where it was held by Coleridge J that “[t]here is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity, however fundamental.”

56 *Supra* at note 32, at 458-9.

57 *Supra* at note 16, at 109.

The Bill proposed that:⁵⁸

[A]fter a stated day no land or any sum of money for the purchase of land should be given to any person or body corporate in trust for, or for the benefit of any charitable purpose, unless it was made by deed executed in the presence of two or more witnesses twelve calendar months before the grantor's death. Any devise [under a will] made to charity should be void and the land should revert to the testator's heir-at-law. Large majorities in both Houses welcomed the introduction of the Bill and ... expressed their distrust of all charity, particularly ecclesiastical charity, and their concern to safeguard the financial interest of the testator's family.

The effect of the Statute, which survived until the Mortmain and Charitable Uses Act 1888, was that in order for a bequest of land to a religious charity to be found void, the object of the gift had first to be defined as 'charitable'. Consequently there was little judicial enthusiasm for restricting the definition of charitable. The evolution of the definition during this period depended not on society's conception of charity, philanthropy or benevolence, but on a separate and sometimes clandestine agenda to strive for a liberal definition.

In *Turner v Ogden*, which concerned a legacy payable out of land for various religious purposes, Sir Lloyd Kenyon MR stated:⁵⁹

In statute 43 *Eliz.* there is a great enumeration of charitable uses. Now these, perhaps, are not strictly within them, but the statute does not affect to mention all. The repairs of the church are particularly taken notice of. Now keeping the chimes in tune may fairly come within the idea. And the singing psalms is part of the religious service, though, perhaps, not so useful as the sermon, which has been determined to be a charitable use; and, therefore ... *I am of the opinion that all these bequests are void, as being dispositions out of land to charitable purposes.*

In *Grieves v Case*,⁶⁰ evidence of judicial reasoning is sparse, particularly with regard to the Statute of Mortmain which was most likely a crucial factor in the decision.⁶¹ The case concerned a bequest of rents and profits from freehold land for the support of preachers of two chapels. Lord Commissioners Eyre and Ashhurst simply stated that the bequest constituted "a charitable use, in respect of the benefit the congregations were meant to derive from the preaching of their teachers",⁶² and was therefore void.

*The Trustees of the British Museum v White*⁶³ concerned the devise of a freehold estate to the Trustees of the British Museum "to be by them employed for the benefit of that institution".⁶⁴ Counsel for the appellant (the Solicitor-General, Sir Charles Wetherell) submitted a seemingly solid argument:⁶⁵

58 *Ibid.*, 110, see n 3.

59 (1787) 1 Cox 316; 29 ER 1183, (emphasis added).

60 (1792) 4 Bro C C 67; 29 ER 782.

61 The Statute is referred to only in the headnote, and the last line of the case.

62 *Supra* at note 60, at 70; 784.

63 (1826) 2 Sim & St 594; 57 ER 473.

64 *Ibid.*

65 *Ibid.*, 594-595; 473.

Every gift for the use of the public is not, necessarily, a charity. There must be something in the nature of relief to constitute a charity. Gifts to support a public bridge, and for the repair of sea-banks, have, on that principle, been held to be charitable gifts. So schools for learning have been held to be charitable institutions; not so schools of art. Now this is a school of art.

However the Vice-Chancellor, Sir John Leach, adopted a starkly liberal approach: "I consider that every gift for a public purpose, whether local or general, is within the 9th Geo. 2d [the Statute of Mortmain], although not a charitable use within the common and narrow sense of those words."⁶⁶

*Thornton v Howe*⁶⁷ is the case most often cited as proclaiming judicial tolerance of religious beliefs.⁶⁸ However "[i]t is often overlooked that this ruling brought the disposition within the clutches of the Mortmain and Charitable Uses Act 1736, so that it was held to be invalid and the decision itself was not as tolerant as it appears at first sight".⁶⁹ Indeed it is difficult to extract the real reason for the holding from the judgment of Sir John Romilly MR. It appears to revolve only around a reasoned extension of the definition of charity:⁷⁰

Had [the bequest] been given out of pure personalty ... this Court would, in my opinion, have enforced the bequest But as it is given out of land, it is void, by reason of the prohibition contained in the Statute of Mortmain.

One can only surmise regarding the influence the Statute had upon the Court, but it is an influence which certainly cannot be discarded when a nineteenth century court held that a bequest to print and circulate "incoherent and confused"⁷¹ works of a "foolish, ignorant woman"⁷² was charitable.

This admittedly very cursory examination of the case law, concurs with Jones' curious conclusion that "there is no reported case of a devise being saved from the Mortmain Act, 1736, by a finding that the particular public object was not charitable".⁷³

A legacy of 150 years of judicial enthusiasm for a liberal definition of charity, where many religious purposes were held to be charitable, has undoubtedly contributed to a presumption that religious purposes were beneficial to the public. The Statute should never have dictated the definition of charity, and the line of case law decided while the Statute was in force should be treated with caution. Unfortunately this does not appear to have been so with twentieth century courts. In *Re Watson*, Plowman J referred to no less than seven cases (including two Canadian and one Australian), which expressly approved the approach in *Thornton v Howe*.⁷⁴

⁶⁶ Ibid, 595; 473.

⁶⁷ Supra at note 42.

⁶⁸ See infra at section III.1.

⁶⁹ Chesterman, Supra at note 18, at 158.

⁷⁰ Supra at note 42, at 21; 1044.

⁷¹ Ibid, 20; 1044.

⁷² Ibid, 18; 1043.

⁷³ Supra at note 16, at 128.

⁷⁴ Supra at note 42, at 686-88.

In summary, an organisation seeking charitable status under Lord Macnaghten's third head has an easy test to satisfy, that is whether its objects may have the effect of advancing religion.⁷⁵ This gives rise to a "strong presumption" that the object is charitable.⁷⁶ Historically, several factors have justified the formation of the presumption. However, most of these are not presently sustainable. The retention of the presumption today depends on; first, general acceptance of the proposition that the practice of religion is beneficial to the community, and secondly that in the face of inherent evidential difficulties, the courts are prepared to make a value judgment to that effect. Given the current social climate of "general religious apathy"⁷⁷ where two-thirds of the population seldom or never attend a church service,⁷⁸ it seems doubtful that the proposition will receive the requisite support, particularly if the definition of religion is confined as suggested by Dillon J in *Re South Place Ethical Society*: "It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god."⁷⁹

(e) *Rebutting the presumption*

The final question to be addressed, concerns the nature of the evidence that is required to rebut the presumption. For the most part, the courts adopt a fairly consistent stance. However, there is some variance as to whether immorality prompted by the exercise of the religion is sufficient to rebut the presumption. The courts have also altered their position as to the adverse effects on religion in general which the objects must have in order for the presumption to be rebutted.

It seems that in the nineteenth century, irreligious objects and objects provoking immorality were each seen as sufficient to deprive the trust of charitable status. In *Thompson v Thompson*, the bequest was held to be a charitable gift provided the testator's writings, published or unpublished, contained nothing "irreligious, illegal or immoral".⁸⁰ Similarly, in *Thornton v Howe*, Romilly MR stated:⁸¹

There is nothing to be found in [the writings of Joanna Southcote] which, in my opinion, is likely to corrupt the morals of her followers, or make her readers irreligious It may be that the tenets of a particular sect inculcate doctrines subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void. The general immoral tendency of the bequest would make it void. But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests.

⁷⁵ See text, *supra* at note 39.

⁷⁶ See text, *supra* at note 10.

⁷⁷ Donovan, "Zeal and Apathy: The Future" in Donovan (ed), *Religions of New Zealanders* (1990) 263.

⁷⁸ Webster & Perry, *The Religious Factor in New Zealand Society*, (1989) at 51, and The Morgan Poll, *Time Magazine* (13 September 1993) 8.

⁷⁹ [1980] 1 WLR 1565, 1572 (Chancery Division).

⁸⁰ (1844) 1 Coll 380 at 398; 63 ER 464 at 472.

⁸¹ *Supra* at note 42, at 18, 20; 1043-44.

However it would seem that a greater tolerance of beliefs incorporates an increased tolerance of the content of morality, such that it is more difficult to preclude the granting of charitable status on the basis of immorality.

In the *Centrepont* case, there was discussion of the liberal sexual attitudes promoted by community leaders. In finding that the sexual attitudes of members of the trust were not significant in deciding the issue of charitable status, Tompkins J stated “it was not suggested that the attitudes to which I have referred are in any way illegal. They may be regarded by many of the wider community as immoral and therefore wrong”.⁸² He implied that if evidence from qualified persons supported the allegation that the attitude was harmful to the children, then, unlike immorality, that would be relevant in determining charitable status.

In *Re Watson*, Plowman J said that the presumption of public benefit could only be rebutted by proof that the doctrines propagated in the literature were “adverse to the foundations of all religion and ... subversive of all morality”.⁸³ Regarding this statement of the requirements for rebuttal, Chesterman comments:⁸⁴

Interpreting this, the charity commissioners [in England] have said that ‘brainwashing’ of youthful devotees by a religious sect, inducement of them to hand over all their money to the organization or dubious door-to-door fund-raising are not grounds on which they could refuse registration. But they did recently refuse registration, pending determination in the High Court or parliament, of one of two religious factions, both of which claimed, following a schism, to be the authentic ‘Exclusive Brethren’. An inquiry under section 6 of the Charities Act had brought to light evidence that the particular faction’s beliefs ‘caused dissension in and a break-up of, family life’ in a manner contrary to public policy. The commissioners felt that the presumption of public benefit may have been rebutted in this instance.

A recent and particularly pertinent instance of the operation of the presumption concerns an attempt by the English Attorney General, Sir Patrick Mayhew QC to have the Unification Church struck off the Charities Register. An editorial in the *New Law Journal* comments on his success:⁸⁵

After three years he [the Attorney General] had been unable to amass sufficient evidence against the Moonies to rebut the presumption of charitable status that English law gives to any religion The only way of proving that a trust for religious purposes is not for the public benefit is to show that the doctrines of the religion or sect in question are adverse to the very foundations of all religion and are subversive of all morality. That, as the Attorney General discovered, is harder to establish than it might seem.

It would appear that trusts for the advancement of religion are in the peculiar position of satisfying a weak test to receive the benefit of an ill-founded but almost unassailable presumption. The only foothold granted by the law of charities to one seeking to deny charitable status to a religious organisation lies in the possibility

⁸² *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673, 686-87 Tompkins J.

⁸³ *Supra* at note 38, at 688, citing *Thornton v Howe*, *supra* at note 42.

⁸⁴ *Supra* at note 18, at 161.

⁸⁵ *Supra* at note 10.

that the organisation will fall outside the ever expanding boundaries of the definition of religion.

III: DEFINING RELIGION

1. Toleration

Until late in the nineteenth century, for the purposes of the law of charity “religion” meant the Christian religion or reasonable variations thereof. However *Thornton v Howe*⁸⁶ heralded the advent of religious tolerance. In a much celebrated dictum, Sir John Romilly MR stated:⁸⁷

In this respect, I am of opinion that the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the Court, in this respect, make any distinction between one sect and another although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class if legacies which are included in the general terms charitable bequests.

This approach has been enthusiastically embraced by the common law courts,⁸⁸ and it is against this background of toleration that the various approaches to defining religion must be examined.

2. Narrow Test

English courts have adopted a narrow test for the definition of religion, requiring that religion must necessarily be theistic. In *Re South Place Ethical Society*, Dillon J discussed the question using only monotheistic language, however it is not clear that his honour intended to restrict the definition accordingly:⁸⁹

In a free country ... it is natural that a court should desire not to discriminate between beliefs deeply and sincerely held, whether they are beliefs in a god or in the excellence of man or in ethical principles or in Platonism or some other scheme of philosophy. But I do not see that that warrants extending the meaning of the word “religion” so as to embrace all other beliefs and philosophies. Religion, as I see it, is concerned with man’s relations with God, and ethics are concerned with man’s relations with man. The two are not the same, and are not made the same by sincere inquiry into the question: what is God? If reason leads people not to accept Christianity or any known religion, but they do believe in the excellence of qualities such as truth, beauty and love, or believe in the platonic concept of the ideal, their beliefs may be to them the equivalent of a religion, but viewed objectively they are not religion It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god.

⁸⁶ *Supra* at note 42.

⁸⁷ *Ibid*, 19-20; 1044.

⁸⁸ See *Re Watson*, *supra* at note 38.

⁸⁹ *Supra* at note 79, at 1571-1572.

The principal obstacle to this approach is Buddhism, which is generally accepted as constituting a religion, but which allegedly does not involve a belief in a god. Dillon J overcomes this difficulty by stating that either Buddhism should be treated as an exception, or “[a]lternatively, it may be that Buddhism is not an exception, because I have been supplied with an affidavit by Mr Christmas Humphreys, an eminent English Buddhist, where he says that he does not accept the suggestion that ‘Buddhism denies a supreme being’”.⁹⁰

3. Wide Test

Conversely, the United States courts have adopted a broad test for the definition of religion. In *United States v Seeger*, Clark J held that “[a] sincere and meaningful belief, which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption [on the ground of religion] comes within the statutory definition”.⁹¹ In *Malnak v Yogi*,⁹² the Supreme Court held that “religious” in the context of persons claiming to be conscientious objectors “by reason of religious training and belief” described an opposition to military service stemming from moral, ethical or religious beliefs about what is right or wrong when the beliefs are held with the strength of traditional religious conviction.

Concerning the latter case, Mason ACJ and Brennan J stated: “The Supreme Court had appeared to place within the concept of religion not only non-theistic religions but also systems of belief which had no supernatural element.”⁹³

Murphy J also appears to subscribe to the wide test, holding that:⁹⁴

Any body which claims to be religious whose beliefs or practices are a revival of, or resemble, earlier cults, is religious. Any body which claims to be religious and to believe in a supernatural being or beings, whether physical and visible, such as the sun or the stars, or a physical invisible god or spirit, or an abstract god or entity, is religious Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious.

4. Middle Ground

Mason ACJ and Brennan J in *Church of the New Faith* attempt to strike a balance between the two divergent approaches. They state that “[f]aith in the supernatural, transcending reasoning about the natural order, is the stuff of religious belief”,⁹⁵ although a supreme being is not a prerequisite to such belief. However, they state that such belief is a necessary, but not sufficient ingredient in the definition. “Religion is also concerned, at least to some extent, with a

⁹⁰ Ibid, 1573.

⁹¹ Supra at note 5, at 176. Dillon J in *Re South Place Ethical Society*, supra at note 79, 1571, noted that this statement “prompts the comment that parallels, by definition, never meet”.

⁹² Supra at note 5.

⁹³ Supra at note 46, at 75. See also supra at note 5.

⁹⁴ Ibid, 86.

⁹⁵ Ibid, 72.

relationship between man and the supernatural order and with supernatural influence upon his life and conduct.”⁹⁶ Their additional requirement for the conduct in question to be characterised as religious is that there must be a “real connection between a person’s belief in the supernatural and particular conduct in which that person engages”.⁹⁷ They conclude by stating:⁹⁸

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 The test propounded by Adams J in *Malnak v Yogi* is wider and the test propounded by Dillon J in *South Place Ethical Society* is narrower than the test which, in our opinion, is the correct test.

Wilson & Deane JJ adopt a similar view of the definition of religion. Their Honours suggested that the best solution to the definitional dilemma revolves around the formulation of six indicia or guidelines which are characteristic but not determinative of the question:⁹⁹

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 ... adherents ... constitute an identifiable group or identifiable groups. A fifth ... is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.

Thus there would seem to be strong authority supporting the adoption of any of the three approaches to the definition of religion.

5. Problems with the Tests

There are two primary difficulties in the approaches discussed above. First, the uncertainty inherent in the definition of religion, and secondly, the failure to locate the argument in its appropriate context.

(a) Uncertainty

The boundaries of religion in the context of the law of charity were once sharp but now have a substantial and increasing penumbra. Donovan provides some indication of the content of this fringe by articulating a number of terms which have been devised by writers to help identify the on-going religious experience of

⁹⁶ Ibid.

⁹⁷ Ibid, 73.

⁹⁸ Ibid, 74.

⁹⁹ Ibid, 106.

the wider community, beyond formal organisations. He discusses the notion of 'civil religion' or 'civic religion',¹⁰⁰ and continues:¹⁰¹

Other concepts include 'implicit' or 'diffused' religion, 'folk religion', 'common religion', and 'popular' or 'ordinary' religion. Each of these is an attempt to indicate dimensions of human life with apparently religious overtones, yet which are not a part of the concerns and activities of the recognised religious bodies.

Delineating the boundaries of religion through the midst of the penumbra is fraught with uncertainty. Using the definition of religion as the effective watershed between organisations is therefore almost inevitably arbitrary.

(b) Inadequate Context

In *Re South Place Ethical Society*, Dillon J finds that unless the belief system of an organisation involves faith in a god and worship of that god, it is not charitable under Lord Macnaghten's third head. However Dillon J does not contextualise the definitional dilemma. His Honour does not consider why religion was a head of charity, instead focusing on the word "religion" as a linguistic exercise. The High Court of Australia in *Church of the New Faith* also used linguistic analysis, and omitted historical considerations in approaching the definitional task. The Court did however, identify one aspect of the privileges accorded charities, that is the relaxation of the equitable trust rules permitted the operation of a trust in such circumstances. Accordingly, it approached the problem of the definition in the context of freedom of religion:¹⁰²

What man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of legal immunity, for his freedom to believe would be impaired by restriction upon conduct in which he engages in giving effect to that belief.

However the Court neglected to consider the public benefit roots of the law of charity, and to justify the granting of taxation privileges to organisations falling within its definition of religion.

United States authorities should also be treated with caution, as the definitions propounded from that jurisdiction are determined in a context foreign to the common law view of charity.¹⁰³

6. Suggested Approach

The law should therefore approach the question of charitable status for "religious" organisations using a primary test of public benefit. In fact it is

¹⁰⁰ *Supra* at note 77, at 253.

¹⁰¹ *Ibid*, 254.

¹⁰² *Supra* at note 46, at 73. The Court was also influenced by the potential effect of the decision on interpretation of the Australian Constitution, at 69.

¹⁰³ *Supra* at note 5.

doubtful whether a test employing the concept of religion is presently of any substantial utility unless it is built on a foundation akin to Finnis' basic good.¹⁰⁴ In any case, any attempt to define religion as a head of charity must involve contextual considerations including the purpose of the legal status of charity. The reasons for religion being presumptively charitable were considered above, and it is suggested that unless a religious organisation can demonstrate some tangible benefit to the community in the form of good works, the only other ground upon which it can validly assert charitable status is that its primary purpose is to promote religious inquiry as defined by Finnis.¹⁰⁵

The effect of such an approach would be that humanist and other atheistic and agnostic philosophies may be included, and theistic belief systems may only be included to the extent that they promote the value that it is "peculiarly important to have thought reasonably and (where possible) correctly about these questions of the origins of cosmic order and of human freedom and reason ... even if the answers have to be agnostic or negative".¹⁰⁶

IV: CONCLUSION

There are two hurdles over which "religious" organisations must leap in order to gain charitable status. First, they must be religious as defined by the courts, and secondly they must satisfy the public benefit test. Presently, the second hurdle is almost invariably walked over because of the presumption,¹⁰⁷ and if organisations are denied charitable status, it is frequently on the ground that they do not constitute a religion.¹⁰⁸

The statement of Buckley LJ in *Incorporated Council of Law Reporting for England and Wales v Attorney-General*, illustrates the judicial approach to the question:¹⁰⁹

It would be immediately evident that a body established to promote the Christian religion was established for a charitable purpose, whereas in the case of a body established to propagate a particular doctrine it might well be necessary to consider evidence about the nature of the doctrine to decide whether its propagation would be a charitable activity.

¹⁰⁴ Supra at note 53.

¹⁰⁵ Supra at section II.4.C.

¹⁰⁶ Supra at note 54.

¹⁰⁷ With the (ageing) exception of *Gilmour v Coates*, supra at note 32.

¹⁰⁸ For example, in *re South Place Ethical Society*, supra at note 79; the first instance and Supreme Court of Victoria decisions of *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1980) 11 ATR 451; (1982) 13 ATR 80.

¹⁰⁹ *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] 1 Ch 73, 99.

Late in the twentieth century such a bias towards Christianity is no longer sustainable. However, instead of Christianity losing the privileged position referred to by Buckley LJ and facing the same test as other religions, those others have gained the benefit of the privileged position, thereby widening the gulf between the respective standings of religions and atheistic or agnostic beliefs before the law.

It is therefore concluded that the courts should return to the notion of charities as *pro bono publico*, that is, for the benefit of the community as a whole.¹¹⁰ Using public benefit as the primary test for “religious” organisations has several clear advantages. First, charity has its roots in the concept of public benefit, and the factors which apparently influenced the formation of a presumption of public benefit for “religious” organisations are no longer applicable. Secondly, focusing on the definition of religion gives rise to an uncertain and somewhat arbitrary delineation of the boundaries of charity. Immoral religions are too hard to exclude, while beneficial belief systems may face difficulties gaining charitable status. Third, organisations granted charitable status receive a public subsidy in the form of taxation advantages. The question must be asked as to the justification for such a subsidy. It is suggested that the only adequate justification for the public being required to sponsor any organisation rests in the public gaining some tangible benefit from the operation of the organisation. Returning to a primary test of public benefit is the only way to adequately give effect to this principle.

Such an approach is approved of by Tokeley, in that humanist philosophies should have no lesser standing in the eyes of the law than belief systems incorporating a supernatural element. They should be subject to the same test of public benefit:¹¹¹

[I]n an age where intellectual freedom is valued, it seems odd to dismiss all possibility of humanism being for the public benefit just because it involves a belief system with no God. Some humanist trusts involve principles which promote the highest social and moral standards. The public benefit in such a trust would seem to be more obvious than the public benefit in propagating foolish views devoid of foundation.

If anything is to remain of Lord Macnaghten’s third head, it should take a form similar to that discussed by Finnis. Such a test would counter evidential difficulties inherent in the area of religion, enabling a court to recognise a limited class of fundamental religious benefits.

It is acknowledged that there are substantial obstacles consequent on these recommendations which have been at best cursorily mentioned in this article. These include the reluctance of the judiciary to recognise tax exemptions as relevant to the issue of charitable status;¹¹² the implication of separate tests being

¹¹⁰ Sodhi, *Latin Words & Phrases for Lawyers* (1980).

¹¹¹ Tokeley, “A new definition for charity” (1991) 21 VUWLR 41, 48.

¹¹² In *Dingle v Turner*, supra at note 19, at 624, Lord Cross stated “[i]n answering the question whether any given trust is a charitable trust the courts — as I see it — cannot avoid having regard to the fiscal privileges accorded to charities”. However three of the four judges who concurred in the primary issue on the case explicitly disagreed with Lord Cross on this point.

constituted for the relaxation of the equitable trust rules, and for qualifying for taxation privileges;¹¹³ and the obvious difficulties of determining which benefits a court may recognise as public, how an organisation should establish the existence of such benefits, and whether and how a test based on Finnis' basic good can be incorporated into the law.

However, the writer shares the view of Susan Bright,¹¹⁴ that the obstacles are not significantly greater than those already countered by the courts in other areas of the law as well as in the law of charity, and in any case, they are not insurmountable. Requiring religious organisations seeking charitable status to be *pro bono publico* would have a substantial effect on public confidence in the law of charity, and on consistency in the allocation of public resources.

¹¹³ This approach is advocated by Bright, *supra* at note 1, at 36-37. See also *Dingle v Turner*, *supra* at note 19, at 624 per Lord Cross.

¹¹⁴ *Supra* at note 1, at 37-41.