

# UNDER THE LAW OF CHARITY, IS THE PRINCIPLE OF 'PUBLIC BENEFIT' BEING HINDERED BY THE DOCTRINAL RULE OF PRECEDENT?

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## I. INTRODUCTION

There is no explicit definition of what constitutes a 'charitable trust'. S 2 of the *Charitable Trusts Act 1957* defines it as 'every purpose which in accordance with the law of New Zealand is charitable'.

For a trust to be charitable legally, it must be for the public benefit, meaning:

- a) The purpose must be beneficial in a way that is charitable; and
- b) The benefit has to be shown to be available to the public, or a significant portion of it, not just to a distinct group of particular individual (other than in the case of relief of poverty).<sup>1</sup>

The definition of 'charitable' owes its origins to the list of purposes contained in the Preamble to the Elizabethan Statute of Charitable Uses Act 1601.

The preamble stated that the following uses were deemed to be charitable:

- a) Relief of the aged, impotent and poor;
- b) Maintenance of sick and maimed soldiers and mariners;
- c) Maintenance of schools;
- d) Free scholars in universities;
- e) Repair of bridges, ports, havens, causeways, churches, sea banks, and highways;
- f) Education and preferment of orphans;
- g) Relief stock or maintenance of houses of correction;
- h) Marriage of poor maids;
- i) Support and help of young tradesmen, handicraftsmen, and persons decayed;
- j) Relief and redemption of prisoners or captives; and
- k) Aid or ease of any poor inhabitant concerning payment of taxes.

These uses suggest that on the one hand the legal definition of charity is wider than the popular meaning, and that on the other, the meaning is narrower than the popular meaning.<sup>2</sup>

The purposes, however, were not exhaustive: 'those purposes are charitable which that statute enumerates or which by analogies are deemed within its spirit and intendment'.<sup>3</sup>

This view was endorsed by Lord Macnaghten in *Commissioner for Special Purposes of the Income Tax v Pemsel*, whereby he summarised charitable purposes into four categories:<sup>4</sup>

- (a) Trusts for the relief of poverty;

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1 Andrew Butler (ed), *Equity and Trusts in New Zealand*, (2003), 234.

2 Gino Dal Pont, *Charity Law in Australia and New Zealand*, (2000), 9.

3 *Morice v Bishop of Durham* (1805) 9 Ves 399, 405 (Sir William Grant MR).

4 [1891] AC 531.

- (b) Trusts for the advancement of education;
- (c) Trusts for the advancement of religion;
- (d) Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

It is no surprise perhaps that charitable purposes have been subject to evolution as it is at the mercy of 'changing institutions and societal values'.<sup>5</sup> However, Hammond J tempered this by stating that this must be balanced with a need for restraint: 'new heads of charity should not be allowed to spring up overnight without close scrutiny'.<sup>6</sup>

Statute certainly has had a role in such an evolution: s 61A of the *Charitable Trusts Act* specifically provides that trusts for recreational and leisure purposes are charitable, and s 38 contains a substantial list of purposes that are deemed to be charitable for the purposes of Part 4 of the Act.

## II. THE PUBLIC BENEFIT TEST

To the lay person, the 'public benefit test' implies a 'distinctive, all-encompassing standard',<sup>7</sup> however, the test is fraught with complexities because of the need to determine such benefit on a case by case basis.

Lord Mcnaghten in *Pemsel* only expressly mentioned the requirement of public benefit in relation the fourth head of charity, however, the element is also required at least in the second and third heads. It is arguable whether there is an explicit public benefit test under the first head of poverty, although this will be addressed later in the paper.

Public benefit has two issues: firstly that of being public and secondly being of benefit.

The former requires the Court to determine whether the class of persons eligible to benefit constitutes the public, or at least a section of it.

The latter concerns whether or not the trust confers a benefit on the public, or a section of it. It is irrelevant as to whether the opinion of the creator of the trust believed that the public would benefit.<sup>8</sup>

### A. *Public Benefit and Blood Tie*

A group or class of beneficiaries under a proposed charitable trust that are linked by blood, contract, family, association membership or employment, does not fulfil the public benefit requirement.<sup>9</sup>

Lord Simonds in *Oppenheim v Tobacco Securities Trust Co Ltd*<sup>10</sup> laid down a public benefit test that approved the approach taken in *Re Compton*.<sup>11</sup>

In *Oppenheim*, a trust was set up to provide for the education of children of employees or former employees of the British-American Tobacco Co Ltd, and its subsidiaries. The total number of eligible employees was an estimated 110,000. The House of Lords held that this was not charitable for the following reason: 'a group of persons may be numerous, but if the nexus between

5 *D V Bryant Trust Board v Hamilton CC* [1997] 3 NZLR 343, 348 (Hammond J).

6 *Ibid.*

7 Michael Gousemett, 'The Public Benefit Test' [2006] *New Zealand Law Journal*, No.2, March, 15.

8 Gino Dal Pont and DRC Chalmers, *Equity and Trusts in Australia* (4<sup>th</sup> ed, 2006) 748.

9 *Ibid* 746.

10 [1951] AC 297; [1951] 1 All ER 31, 306.

11 [1945] Ch 123; [1945] 1 All ER 198.

them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes'.<sup>12</sup>

However, this has been subject to criticism: Lord Cross in *Dingle v Turner*<sup>13</sup> suggested that what constitutes a section of the public is a question of degree in each case, and Tipping J in *Re Twigger*<sup>14</sup> approved Somers J's statement in *NZ Society of Accountants v CIR*:<sup>15</sup> 'it is not possible...to state with confidence how the line is drawn between the two or to say that it is drawn in the same way as between different types of charitable trust'.

It is arguable that this is evidence that the courts are favouring a more flexible approach in order to avoid be hindered by precedent. However, Dal Pont contends that the acceptance of Lord Cross' view merely condones an artificially broad interpretation of 'public benefit', whereas *Oppenheim*, although restrictive, provides certainty in an area of law that is wrought with uncertainties.<sup>16</sup>

In recent times, however, there has been a shift in the approach with regard to one aspect of the public benefit test, that of blood tie.

In August 2001, the IRD published its discussion on Taxation of Māori Organisations.<sup>17</sup> The document recommended that the *Oppenheim* principle be overturned.

The recent case of *Latimer v Commissioner of Inland Revenue*<sup>18</sup> emphasised the IRD's approach, and adopted the dissenting voice of Lord McDermott in *Oppenheim*, and found the test was inappropriate in respect of Māori iwi and hapu.<sup>19</sup>

The evidence before the Court was that an estimated 300,000 Māori could potentially benefit from the treaty claims, and 70,000 had already benefited. To reflect how inappropriate English law was in determining such matters, Blanchard J stated that the context of tribes or clans of ancient origin was:<sup>20</sup>

poles away from the kind of connection which the majority of *Oppenheim* must have been thinking...they were more likely thinking of the paradigmatic English approach to family relations...such an approach might be though insufficiently responsive to value emanating from outside of the mainstream of English common law.

Here then is unequivocal evidence that the principle of public benefit may not be subject to overt hindrance by common law principles. Nonetheless, the author submits that *Latimer* responded to a very specific issue, for which there was no clear authority emanating from England, therefore, the Court in *Latimer* took the only realistic approach it could as 'in New Zealand it is impossible not to regard the Māori beneficiaries of a trust as constituting a section of the public for this purpose'.<sup>21</sup>

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12 *Oppenheim v Tobacco Securities Trust Co Ltd*, above n 10.

13 [1972] AC 601; [1972] 1 All ER 878.

14 [1989] 3 NZLR 329.

15 [1986] 1 NZLR 147 (CA), 155.

16 Gino Dal Pont and DRC Chalmers, (2006), above n 8, 747.

17 Inland Revenue Policy Advise Division, Tax Simplification No.2 (August 2001).

18 [2002] 3 NZLR 195.

19 David Brown, The Charities Act 2005 and the Definition of Charitable Purposes, (2005) *New Zealand Universities Law Review*, December 21, 619.

20 *Latimer v Commissioner of Inland Revenue*, above n18, 208.

21 Gino Dal Pont and DRC Chalmers, (2006), above n 8, 748.

Specific legislation on this very issue puts the matter beyond any doubt.<sup>22</sup> However, the removal of blood tie restrictions does not affect employment or contractual relationships, and these may still be fatal to the charitable status of some trusts.

To discuss the concept of public benefit further, the author proposes to discuss the issues associated with the four heads of *Pemsel* in turn.

### B. Trusts for the Relief of Poverty

Relief of poverty is one of the oldest charitable purposes. It has always been classified as relative, so may include those that have fallen on hard times as well as those who have always been poor when measured against objective standards. Further, that which constitutes poverty can change according to economic conditions, as addressed in *D V Bryant v Hamilton City Council*.<sup>23</sup>

It is argued that there is no public benefit requirement for the relief of poverty,<sup>24</sup> yet some opinions suggest that the public benefit requirement is simply a more generous presumption, as opposed to being void;<sup>25</sup> this is on the basis that the relief of poverty has a general public benefit.

Jenkins LJ in *Re Scarisbrick*<sup>26</sup> appeared to confirm that the public requirement benefit was not as rigorous as that which has been applied in the other categories.

The only public benefit requirement has been that a trust for relief of poverty of named individuals will not be charitable, although if they are described as a class, then this may be permitted.<sup>27</sup>

On the other hand, with the removal of the blood tie restriction, this anomaly may be of little consequence, although it will still apply to employment and contractual relationships.<sup>28</sup>

However, there may yet be further issues associated with the relief of poverty and the public benefit test: the UK has recently enacted the *Charities Act 2006*. This Act created the Charity Commission and gave it wide powers to investigate charity administration and impose sanctions where improprieties arise.

This Act has potentially altered some traditional approaches to the issue of public benefit and the relief of poverty.

S 2(1) of the Act provides that a charitable purpose is a purpose that falls within the list contained in s 2(2), AND which is for the public benefit.

The purposes that can constitute charitable purposes include the customary four heads under *Pemsel*, as well as a further number of heads that may qualify as having charitable status.

Therefore, even if a purpose falls within s 2(2) of the Act, it will only be charitable if it is for the public benefit. This is reiterated in s 3(2), whereby 'In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit'.

The intention therefore appears to be that the relief of poverty will only be considered charitable if it can be demonstrated that it is for the public benefit; any presumptions have been removed.<sup>29</sup>

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22 S 5(2)(a) *The Charities Act 2005*.

23 [1997] 3 NZLR 342 (HC).

24 A Butler, above n 1, 238.

25 D Brown, above n 19, 621.

26 [1951] 1 Ch 622, 649.

27 *Ibid*.

28 D Brown, above n 19, 621.

29 Matthew Conaglen, 'English Charity Reform', (2008) *New Zealand Law Journal*, No.3, April, 115.

It may then be that New Zealand courts will have to exercise caution when considering post-2006 English authorities on the public benefit requirement, and where previously the doctrinal rule of precedent appeared to do anything *but* hinder the relief of poverty, future English authorities may just have the opposite effect.<sup>30</sup> Nevertheless, common law may provide an answer should there be judicial uncertainty. Tompkins J, in the case of *Centrepont Community Growth Trust v CIR*,<sup>31</sup> notes that ‘public benefit is an essential prerequisite except possibly in respect of Macnaghten’s first category of the relief of poverty’. Tompkins J suggests, by his use ‘except possibly’, that there is only an implied presumption that the relief of poverty is for the public benefit. If that is so, then New Zealand courts could rely on this dicta to assist with the application of post-2006 English authorities when determining the public benefit requirement.

### C. *Trusts for the Advancement of Education*

The general principle governing this head is that the trust must show that learning should be imparted, not just that it should be accumulated.<sup>32</sup> The establishment and support of schools and colleges,<sup>33</sup> gifts for the establishment of academics,<sup>34</sup> and prizes,<sup>35</sup> has long been established.

Case law has seen the scope of this head of charity extend far beyond the phrases in the Preamble that talk of ‘the maintenance of schools of learning, free schools and scholars in universities’, to the study and dissemination of ethical principles;<sup>36</sup> the appreciation of the music of Delius;<sup>37</sup> and the promotion of radio, especially for the young.<sup>38</sup>

Although the establishment of a diversity of trusts under this head may suggest a judicially-tolerant approach, each one must comply with the requirement that it must satisfy the public benefit test. Therefore, the question of whether purpose is educational will depend on whether its purpose is useful, and the area that has caused most difficulty has been that of the arts and culture.

The problem with the public benefit test with regard to this head is that practical utility has never featured strongly in the arts due to its very nature, therefore, the Courts have made some potentially controversial decisions, reflecting judicial uncertainty.

In the case of *Re Delius*,<sup>39</sup> expert opinion assisted the Court in finding that a trust to explore the unpublished works of Delius would have public utility, therefore upholding the trust; although the Court did note that had it been Bach in question, then there would have been no issue. This begs the question, therefore, can only famous artists, or artists of standing, be of benefit to the public?

This question appeared to be answered in the affirmative, when in *Re Pinion*,<sup>40</sup> a testator gave his studio and contents to enable it to be used as a museum, and Harman LJ proclaimed the contents to be: ‘of no useful object to be served in foisting upon the public this mass of junk’.<sup>41</sup>

30 *Ibid.*

31 [1985] 1 NZLR 673. 688.

32 A J Oakley, Parker and Mellows: *The Modern Law of Trusts* (8<sup>th</sup> ed, 2003) 459.

33 *Porter’s Case* (1592) 1 Co Rep 246.

34 *Yates v UC London* (1875) LR 7 HL.

35 *Chesterman v Federal Commissioners of Taxation* [1926] AC 128 (PC).

36 *Re South Place Ethical Society* [1980] 1 WLR 1565.

37 *Re Delius* [1957] Ch 299.

38 *Clarke v Hill* (High Court, Auckland, CP 68/SD99, 2 February 2001, Priestley J).

39 *Re Delius*. above n 37.

40 [1965] Ch 85; [1963] 2 All ER 1049.

41 *Ibid* 107.

However, such decisions are fraught with difficulties as one only has to consider such artists as Tracey Emin and Damien Hirst to realise that which may be considered 'junk' to one, may be considered valuable to another, and therefore of public benefit. Brown suggests that with the advent of the Charities Commission in New Zealand, it is likely that the Courts will be more tolerant of artistic diversity, and prevent precedent from restricting public benefit.<sup>42</sup>

There is evidence already however, that cultural purposes in New Zealand are being considered with open-mindedness, as the Working Party acknowledged that cultural purposes should be explicitly recognised,<sup>43</sup> and the recent *Latimer* case<sup>44</sup> considered that the historical function of research into Māori treaty claims was educational.

It is likely therefore that as further cases challenge the concepts of public benefit under the head of education, the Charity Commission will provide guidance as to how this area of law should develop in line with the demands of society.

However, there is one area of education that is raising controversial issues, that of the charitable status of independent (fee paying) schools.

Many are registered as charities and 'are the classic example of charities which charge fees for the provision of services'.<sup>45</sup> In light of this, the Report from the Strategy Unit suggested that the Charity Commission in the UK should undertake a rolling programme to monitor public benefit, as the vast majority of such schools ensure the continuance of their charitable status by making use of their income to provide free places and allowing the local community to make use of their facilities.<sup>46</sup>

The common law position is that fee-charging in itself does not preclude a school from being charitable, provided that the primary purpose is within one of the four heads of charity; that profit is reinvested; and that poor sections of society are not excluded.<sup>47</sup>

However, this area has been litigated on many occasions, and the *Oppenheim* test, notwithstanding the removal of the blood tie restriction in New Zealand, still applies. Indeed, *Oppenheim* concerned an educational trust for employees. Therefore, there must be a sufficient section of society that is not linked by employment or contractual relations that must be able to benefit.

However, it is argued that in doing so, this gives them an unfair commercial advantage, and Brown notes that these are big businesses involved in perhaps key areas of social provision that have been traditionally 'the concern of the Welfare State'.<sup>48</sup>

Indeed, such concerns have led the British Government to emphasise that such charities must be able to impress upon the Charities Commission that an element of their provision for places is for the poorer children through scholarships and that they must make their facilities available to the community in a variety of ways.<sup>49</sup> This is especially valid now that the Charities Act 2006 has removed the presumption of public benefit.

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42 D Brown, above n 19, 624.

43 Ibid.

44 *Latimer v Commissioner of Inland Revenue*, above n 18.

45 A J Oakley, above n 33, 463.

46 Ibid.

47 *Re Resch* [1969] 1 AC 514.

48 D Brown, above n 19, 625.

49 Home Office, 'Charities and Not-for-Profits: A Modern Legal Framework' (2003) 10.

It is suggested that this raises ethical questions as to whether purposes that relieve the State of its welfare obligations should actually be charitable.<sup>50</sup>

Hammond J in *Bryant v Hamilton City Council*<sup>51</sup> provides a reasoned approach in the face of such controversy, suggesting that a generous approach of relief and public benefit should be taken, given that pressures on the State are increasing continuously. Public benefit therefore may be developing apace with such an equitable judicial attitude.

#### D. *The Advancement of Religion*

The advancement of religion means the promotion of spiritual teaching in a broad sense, and involves spreading the religious message through taking positive steps such as pastoral activities.<sup>52</sup> In the case of *United Grand Lodge of Ancient Free or Accepted Masons of England v Holborn Borough Council*,<sup>53</sup> Freemasonry failed under this heading.

In *Centrepoint Community Growth Trust*,<sup>54</sup> the Court approved the definition of religion given by Mason ACJ and Brennan J in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*,<sup>55</sup> which stated that: 'the criteria of religion is twofold: first a belief in a supernatural Being... and second, the acceptance of canons of conduct in order to give effect to that belief'.

The advancement of religion is a charitable purpose only if it is of public benefit. Where the purpose is found to be religious, then generally the assumption is that it will have a public benefit, unless that can be rebutted.<sup>56</sup> The traditional view, however, was that the gift had to be for religious purposes exclusively, although s 61b of the Charitable Trusts Act saves trusts that have mixed purposes.

The public benefit element of the advancement of religion has not been without issue for the courts, as reflected in *Gilmour v Coates*.<sup>57</sup> This case concerned a declaration of trust to apply income for a community of cloistered Catholic nuns, who devoted their lives to prayer, contemplation, penance and other worshipful acts, all within the confines of their convent. The House of Lords held that this failed the public benefit trust as there was no contact with the outside world.

This appeared to be an anomalous decision as previously courts had been tolerant of religious groups based largely on the fact that they did not feel able to formulate a view on faith based on 'earthly evidential standards',<sup>58</sup> yet, in this case they were able to make such a judgement, and did not contemplate the possibility that such religious practices could have a public benefit even without an actual contact element.

Dal Pont argues that this would not necessarily be followed in New Zealand and Australian courts,<sup>59</sup> and finds favour with the opinion of Reynolds JA, who made the following comment on *Gilmour*:<sup>60</sup>

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50 D Brown, above n 19, 625.

51 [1997] 3 NZLR 342.

52 A Butler, above n 1, 244.

53 [1957] WLR 1080; [1957] 3 All ER 281.

54 *Centrepoint Community v CIR*, above n 31.

55 (1983) 154 CLR 120; 49 ALR 65, 136.

56 Gino Dal Pont, (2000), above n 2, 166.

57 [1949] AC 426.

58 D Brown, above n 19, 623.

59 Gino Dal Pont, (2000) above n 2, 171.

60 *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744, 750.

This doctrine that religious activities are subject to proof that they are for the public benefit could give rise to great problems in that it might lead to the scrutiny by the courts of the public benefit of all religious practices.

In the more recent case of *Crowther v Brophy*,<sup>61</sup> Gobbo J doubted whether *Gilmour* would actually represent Australian law and made reference to a case whereby contemplative life has been recognised as having an element of public benefit.<sup>62</sup>

Australia, at least, has addressed this particular issue: the Extension of Charitable Purposes Act 2004 (Cth), s 5(1)(b), states that so long as cloistered or contemplative order offers intercessory prayer to any public members that seek it, then this will satisfy the public interest.

English case law appears to have taken a similar approach, suggesting a willingness to compromise on such a controversial issue. In the case of *Re Hetherington*,<sup>63</sup> a stipend to a priest was held to be a valid charitable trust provided that masses for departed souls were open to the public.

Brown criticises such an approach however.<sup>64</sup>

This still seems to miss the point that those faiths that believe in cloistered contemplation or prayer, believe this as part of their faith, and if the law is indeed tolerant of all religions, the imposition of worldly human contact test seems petty.

He further suggests that the only test that should be applied is: 'whether the community is open to a sufficient section of the public who wish to join'.<sup>65</sup>

Interestingly, this seems to mirror the approach being suggested in the inferior Court in *Gilmour* by Lord Greene MR:<sup>66</sup>

When...the question is whether a particular gift for the advancement of religion satisfies the requirement of public benefit, a question of fact arises which must be answered by the Court in the same manner as any other question of fact, that is, by means of evidence cognisable by the Court.

The author submits that Brown's test above could satisfy the requirements set out by Lord Greene MR.

It seems likely however that, notwithstanding Australian statute, the public benefit element is likely to continue to raise issues as to whether the courts are really able to determine whether religious practices have the required public benefit by simply applying earthly tests to spiritual matters.

#### *E. Trusts for Other Purposes Beneficial to the Community Not Falling Under Any of the Preceding Head.*

This fourth head is the residual catch all category that 'recognises charitable purposes that do not fall within the first three heads of charity'.<sup>67</sup>

61 [1992] 2 VR 97, 100.

62 *The Association of Franciscan Order of Friars Minor v City of Kew* [1967] VR 732.

63 [1989] 2 WLR 1094 (EWHC).

64 D Brown, above n 19, 623.

65 *Ibid* 623-4.

66 *Gilmour v Coates*, above n 57, 346.

67 Gino Dal Pont, (2000), above n 2, 172.



Dispositions under this head must satisfy a two stage test: firstly, the court must be satisfied that the purpose is beneficial to the community and secondly, the purpose must fall within the spirit of the Preamble to the Statute of Charitable Uses.<sup>68</sup>

Therefore:<sup>69</sup>

not every object which is beneficial to the community can be regarded as charitable...even if the object were in some senses beneficial to the community, it would still be necessary to discover that it fell within the spirit and intendment of the instances given in the Statute of Elizabeth.

In other words, the two stage test is cumulative, so only dispositions that satisfy both requirements will be valid trusts.

The following gifts have been upheld under this head, and reflect the diversity of purposes that may be beneficial to the community:<sup>70</sup>

- Gifts for the relief of human distress;<sup>71</sup>
- Gifts for the protection of the environment;<sup>72</sup>
- Gifts for the benefit of animals.<sup>73</sup>

### 1. *Beneficial to the Community*

Unlike the other three heads under *Pemsel*, for a disposition to be valid under this fourth head, it must be 'beneficial to the community', which Dal Pont argues is not necessarily the same as having 'public benefit'.<sup>74</sup>

For example, 'benefit to the public' may include benefit in intellectual and artistic fields, as well as material benefits, whereas dispositions under the fourth head that offer intangible benefits will necessarily require substantiated proof of such benefits.

In other words, 'for an intangible benefit to constitute a sufficient benefit to the community, it...must be approved by the common understanding of current enlightened opinion'.<sup>75</sup>

A further example is that the range of purposes that may be beneficial to the community is a 'dynamic concept'.<sup>76</sup> Therefore, as society develops, and concepts and morals change, so dispositions that may benefit a community in one era, may cease to do so in another.

Dal Pont's final consideration of 'beneficial to the community' is that a court will not uphold a purpose that is detrimental to the community.<sup>77</sup> In *National Anti-Vivisection Society v Inland Revenue Commissioners*,<sup>78</sup> the Court denied the Society charitable status, as its objective to abolish animal vivisection would mean that future human medical advancements could fail due to the Society's objectives.

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68 Ibid 173.

69 *National Anti-Vivisection Society v Inland Revenue Commissions* [1948] AC 31, 41 per Lord Wright.

70 Gino Dal Pont, DRC Chalmers and JK Maxton, *Equity and Trusts: Commentary and Materials* (4<sup>th</sup> ed, 2004), 854-855.

71 *Re Darwin Cyclone Tracy Relief Trust Fund* (1979) 39 FLR 260.

72 *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325, above n 31.

73 *Murdoch v Attorney General* (Tas) 1992 1 Tas R 117.

74 Gino Dal Pont, (2000) above n 2, 174.

75 Ibid 175.

76 Ibid 176.

77 Ibid.

78 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 69.

As Lord Simonds stated: '...however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object'.<sup>79</sup>

A number of contentious issues under this head have arisen over the years, and this paper will now consider two specific areas in order to address the original proposition, firstly: trusts for the protection of animals; and secondly, trusts for political purposes.

## 2. Trusts for the Protection of Animals

The protection of animals has long been upheld as a charitable purpose, but this is not because the animals themselves provide the charitable element, rather it is the assumption of the benefit to the community from being benevolent towards animals that generates that charitable constituent.<sup>80</sup>

Swinfen Eady LJ in *Re Wedgewood* provided the seminal statement:<sup>81</sup>

A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

Such benefits are neither tangible nor direct, which is in contrast with the requirement of the test being beneficial to the community as submitted in the previous page.

Similarly intangible and remote propositions that have no connection with animals have been struck out numerous times by the Courts, including gifts for philanthropic purposes;<sup>82</sup> gifts for the benefit of humanity;<sup>83</sup> and gifts for raising the standard of life.<sup>84</sup>

This therefore creates a paradox: a gift for the protection of animals that indirectly benefits the community will invariably be valid, whereas gifts that benefit the general community morally or spiritually will invariably be invalid.

The author submits that it is the very factor of the animals themselves that creates the tangible element that is required to establish the criteria of the 'benefit to the community' under the fourth head. Whereas, general gifts that merely benefit the general community are missing that very specific element, and therefore cannot qualify as a valid charitable trust.

The case of *Re Grove-Grady*<sup>85</sup> also suggests that there must be some element of human contact in order to validate the trust, which implies a level of tangibility, as opposed to an ethereal morality. In this case, a trust to provide refuge for animals that was not open to the public, in which the animals were free to prey on each other without human contact, was denied charitable status, as it lacked anything that may raise the standard of human conduct.

The author would argue however, that this may simply be an error in the drafting of the trust instrument, as in today's climate, with the upsurge in Zoological and Conservation Parks and Reserves, it would not be difficult to establish that such places would have many benefits for the community.

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79 Ibid 65-66.

80 Gino Dal Pont, (2000), above n 2, 186.

81 [1915] 1 Ch 113 at 122.

82 *Re Macduff* [1896] 2 Ch 451.

83 *Re Bell* [1943] VLR 103.

84 *Re Payne (deceased)* [1968] Qd R 287.

85 [1929] 1 Ch 557.

Indeed, more recent case law suggests that *Re Grove-Grady* may not necessarily represent current law.

The case of *Attorney General v Satwell*<sup>86</sup> involved a bequest for the preservation of native fauna and flora, either by making donations to one or more organisations concerned with wildlife, or any other way in which the trustees had discretion. Holland J was influenced by the value of preserving native wildlife, stating: ‘the value to the community and the national interest is made up of the uniqueness on earth of Australian native wild life, and the interest here and overseas excited by its many odd and curious species’<sup>87</sup>. Holland J elaborated on the aspect of benefit to the community by noting that preserving native flora and fauna is of such benefit because firstly, there is no substitute for actually observing such things in its natural environment, and secondly, there was a great increase in public interest in such matters, and therefore the demands to access preserves from the public were increased.<sup>88</sup>

Holland J went further by noting that even if the public were restricted in their access to the reserve, then this would not automatically deny the trust charitable status because there would still remain a benefit to the community simply since its very presence would offset any destruction occurring outside the refuge and provide an opportunity ‘to study and observe the beauties and intricacies of nature’.<sup>89</sup>

Holland J concluded by noting that since *Grove-Grady*, ‘there has been a radical change in the recognition throughout the world...of value to mankind of the preservation of wildlife in general’.<sup>90</sup>

It is likely that the New Zealand courts will follow this view, as addressed in *Molloy v Commissioner of Inland Revenue*,<sup>91</sup> where it was suggested that current views on conservation would be considered differently from that which was decided in *Grove-Grady*.

The author suggests, however, that *Satwell* may not necessarily mean that all bequests to set up as refuges for wildlife will automatically be declared as having charitable status; instead it is likely that the courts will assess the intention of such bequests and the overall benefit that may be obtained from such an action.

Indeed, if there were circumstances where there would be little or no benefit to the community, or even contrary to its best interests, as illustrated in *National Anti-Vivisection Society*, then such a gift would fail under the fourth head.

Certain charitable trusts for the protection of animals appear to have been hindered little by the doctrinal rule of precedent. Indeed, far from being hampered, such trusts seem to have developed correspondingly with the global interest in conservation and ecology.

However, precedent may provide a useful counterbalance, as not all gifts to protect animals will necessarily be of benefit to the community, and it is against this well-established test that each new case must be measured.

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86 [1978] 2 NSWLR 200.

87 *Ibid* 209.

88 *Ibid* 211-212.

89 *Ibid*.

90 *Ibid* 214.

91 [1981] 1 NZLR 688, 696.

### 3. Trusts for Political Purposes

At common law, it is a longstanding principle that a voluntary organisation that wishes to acquire or retain charitable status must avoid having political purposes and to avoid engaging in most forms of political activities. This stems principally from the dicta of one judge, that of Lord Parker in *Bowman v Secular Society Ltd*,<sup>92</sup> where he said:<sup>93</sup>

a trust for the attainment of political object has always been held invalid, not because it is illegal, but for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that gift to secure the change is a charitable gift.

O'Halloran distinguishes between bodies with political purposes and bodies that engage in political activities: the former are not charitable and the latter will be charitable if the activities are ancillary and subordinate to its non-political activities and purposes.<sup>94</sup>

The rationale for denying charitable status to bodies engaged in political activity has its foundations in the philosophy that a charity has not submitted itself to the electoral system, and therefore is not publically accountable. As such any political activity that a charity undertakes would be seen as subverting the 'established democratic process'.<sup>95</sup> As a corollary, the value of charities lies in their independence from politics, and such independence would become compromised if they pursued political activities. It is also further suggested that charities may gain and lose support, and this would then undermine the requirement of public benefit, which is crucial in establishing charitable status.<sup>96</sup>

In light of such considerations, it is not surprising that charitable trusts and political activity have raised judicial concerns. Simons LJ expresses this uncertainty succinctly: 'it is not for the court to judge and the court has means of judging'.<sup>97</sup>

The case of *McGovern v Attorney General*<sup>98</sup> has been greatly influential in underpinning the traditional common law approach to political activities by charities.

In this case, Amnesty International attempted to create a trust in order to have some of its work declared charitable. The purposes of this trust were as follows:

- 1) Looking after the needy e.g. prisoners etc;
- 2) Promoting the abolishment of capital and corporal punishment;
- 3) Researching and disseminating information on human rights;
- 4) Securing the release of political prisoners.

Slade J held that purposes 1 and 3 could be charitable; however, 2 and 4 were political. Slade J determined further that the following matters could be construed as political purposes:<sup>99</sup>

- To further the interests of a particular political party;
- To procure changes in the laws of this country;

92 [1917] AC 406.

93 Ibid 442.

94 Kerry O'Halloran, *Charity Law and Social Inclusion, an International Study*, (2007), 125.

95 Ibid 126.

96 Ibid.

97 *National Anti-Vivisection v Inland Revenue Commissioners*, above n 69, 62.

98 [1982] 1 Ch 321.

99 Ibid 349.

- To bring about changes in the laws of a foreign country;
- To bring about a reversal of government policy or of particular decisions of governmental authorities, in this country;
- To bring about a reversal of government policy or of particular decisions of governmental authorities in a foreign county.

Although prima facie it appears that precedent has firmly quashed any development of charitable trusts and political purposes, there has been substantial criticism of this approach based on the element of public benefit, and indeed some signs that the common law may be offering a more flexible approach.

In his dissenting judgment in *National Anti-Vivisection v Inland Revenue Commissioners*, Lord Porter noted that ‘it is curious how scanty the authority is for the proposition that political objects are not charitable’.<sup>100</sup> The Australian case *Royal North Shore Hospital of Sydney v Attorney General*<sup>101</sup> criticised the distinction between charitable purposes and political objectives, stating that it was ‘in an unsatisfactory condition’, and Santow J in *Public Trustee v Attorney General*<sup>102</sup> noted that ‘persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance’. Further, Hammond J in the recent case of *Re Collier (deceased)*<sup>103</sup> commented:

Is it really inappropriate for a judge to recognise an issue as thoroughly worthy of public debate, even though the outcome of that debate might be to lead to a change in the law? After all, it is common place for judges to make suggestions themselves for changes in the law today....and we do...live in an age which enjoys the supposed benefits of freedom of thought, conscience, religion and expression. Should not the benefits be real in all respects, including the law of charities.

In light of such comments, Del Pont suggests that ‘it would appear that the Bowman theory is fraying around its edges, and perhaps even in substance’.<sup>104</sup>

Santow remarks that there is a ‘strong historical tradition of fighting charities, campaigning to remove perceived political obstacles in the way of public welfare. Such charities refuse to accept a role where they deal only with symptoms, not their political causes’<sup>105</sup>.

Gousmett concurs, noting that charities have always had a role in society in ‘challenging the dictates of government on social policy’.<sup>106</sup> In light of this historical background, it is perhaps unsurprising then that The Sensible Sentencing Group Trust was incorporated as a charitable trust on the 1<sup>st</sup> February 2002.

This charity has as its aims the following:

- 1) That within New Zealand and for the benefit of both the local and national communities, provide in respect of sentencing for violent and serious criminal offences education as to relevant issues, options for reforms and the design and or drafting of appropriate mechanisms, procedures, regulations and or

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100 *National Anti-Vivisection v Inland Revenue Commissioners*, above n 69, 54.

101 (1938) 60 CLR 396, 426 (Dixon J).

102 (1997) 42 NSWLR 600, 621.

103 [1998] 1 NZLR 81, 89-90.

104 Gino Dal Pont, (2000), above n 2, 212.

105 GFK Santow, ‘Charity in its Political Voice: a Tinkling Cymbal or a Sounding Brass?’ (1999) 52 *Current Legal Problems* 255 <[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_010799](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_010799)> at 28/07/08.

106 Michael Gousmett, ‘Charities and Political Activity’ (2007) *New Zealand Law Journal*, March, 63.

law for consideration of legislative adoption to help ensure all New Zealanders are adequately insulated and protected from violent and serious criminal offenders.

2) To do any act in furtherance of the charitable objects of the Trust.

It appears obvious that at its heart, this charity has predominately political agendas and activities, and yet any person who wishes to be informed of issues 'relating to the sentencing of criminals for violent and serious offences would find the aims...to be unquestionably of public benefit'<sup>107</sup>. The author would argue further that its very aims conflict with the matters that Slade J highlighted as being political in the *Amnesty* case, and one might wonder therefore how such a trust could be declared as charitable, in view of common law dictates.

Santow believes that it is possible for a charity to have a political voice, but that it must be discrete as 'a charity can never be sure that the Charity Commissioners will treat that even muted voice as merely ancillary activity, not prejudicing its status as a charity'<sup>108</sup>.

Santow criticises the absolute approaches taken by Lord Parker in *Bowman* and Slade LJ's all encompassing list in *McGovern*, preferring the more implicit language used by Sir Owen Dixon in *Royal North Shore Hospital of Sydney v Attorney General*<sup>109</sup> whereby the latter notes that 'it is difficult for the law to find that necessary tendency to public welfare'.

This implies therefore that there is a margin of appreciation in the discretion available to the courts when judging the public benefit, and although difficult, it is not absolute.

As Santow rightly points out, the Court in *National Anti-Vivisection Society v Inland Revenue Commissioners* 'had no difficulty in making such a judgment negatively – it held that the law change sought was not in the public interest'.<sup>110</sup>

The author submits that if the Court is able to make such a categorical decision in deciding what is *not* in the public's interest, there can be little difference therefore in deciding what *is* beneficial to the community in the context of political objects. There is no judicial comment on this particular approach, although Dal Pont suggests that the courts should presume that the current law represents that which is beneficial to the community, which could be rebutted where appropriate.<sup>111</sup>

In order to establish whether a charity's political activities are in the public interest, Santow suggests that the courts should apply an objective test, whereby the trust as a whole is scrutinised, and that would include its constitution and its activities. This means that the test of public benefit would fail 'where the political activity is disproportionate that it is not longer merely instrumental in achieving the indubitably charitable objects, but has become an end itself'.<sup>112</sup>F

In spite of the increasing criticism of the rigidity with regard to the concept of charities and political activities, it seems unlikely that any 'paradigm shift'<sup>113</sup> will take place in the broadening of the approach of the courts. Instead, the author submits that the courts will follow the well established path laid down by Lord Parker in *Bowman v Secular Society Ltd* as there is still, rightly, a

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107 Ibid.

108 GFK Santow, above n 105.

109 *Royal North Shore Hospital of Sydney v Attorney General*, above n 101, 426.

110 GFK Santow, above n 105.

111 Gino Dal Pont, (2000), above n 2, 213.

112 GFK Santow, above n 105.

113 K O'Halloran, above n 94, 131.

marked separation of powers, and it is for Parliament to address the purported imbalances between contemporary social need and the constraints of charitable trusts.

### III. CONCLUSION

The public benefit test has challenged the common law constraints on many occasions, and on relatively few occasions has there been any substantial shift in the judicial approach. The case of *Latimer v Commissioners of Inland Revenue* suggests that the rule of precedent is not as rigid as once presumed, however, as the author submitted, the case responded to very specific circumstances, and in fact, the more rigid test established in *Oppenheim* is still good law.

The challenge for the courts is how to apply a test in the ever changing social and political modern world. Case law suggests that the courts are able to apply discretion where society brings pressure to do so, however, it is under the *Pemsel's* fourth head, where there is perhaps the most contention. In these situations, the doctrine of precedent may seem unyielding, but perhaps this very rigidity should be cautiously welcomed, as it provides a degree of certainty in an area of law that is dogged with uncertainty. If that is so, then the principle of public benefit is not so much being hindered by precedent, rather it is being protected and providing an element of surety to this branch of law.