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Trusts for Religious Purposes and the Question of  
Public Benefit

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It is a well-established principle that no trust may be regarded as charitable in law unless carrying out its purposes will benefit the public. Trusts for religious purposes have traditionally been presumed by courts to be for the public benefit. However, the presumption of public benefit will be removed from the law in early 2008 when section 3(2) of the Charities Act 2006 comes into force. At that time, two questions are likely to attract interest. First, to what extent, and in what ways, has the application of a presumption of public benefit assisted courts up to now? Secondly, without the assistance of the presumption, how might courts go about ascertaining whether the public will benefit in future cases? The article takes up these two questions with respect to trusts for religious purposes.

## INTRODUCTION

It is a well-established principle that no trust may be regarded as charitable in law unless carrying out its purposes will benefit the public. The 'public benefit test', as it has come to be known, has, over the years, given rise to a considerable body of case law. One group of cases has raised questions about the extent to which, and in what sense, the purposes of a charitable trust must be *public* in character.<sup>1</sup> Another group of cases has raised questions about whether the purposes of a trust, if carried out, will *benefit* the public. Within this second group of cases, a distinction has been drawn among trusts falling under the four traditional 'heads' of charity famously set out by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel*.<sup>2</sup> In the case of trusts falling under the first three traditional heads of charity – trusts whose purposes are recognised in law as the relief of poverty, the advancement of education, or the advancement of religion – courts have presumed public benefit unless the contrary has been proven based on evidence. However, in the case of trusts falling under the fourth traditional head of charity – trusts for purposes beneficial to the community not falling under one of the first three traditional heads of charity – courts have applied no such presumption.<sup>3</sup>

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1 See eg, *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Inland Revenue Commissioners v Baddeley* [1955] AC 572; *Dingle v Turner* [1972] AC 601.

2 [1891] AC 531, 583.

3 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 ('*Vivisection case*').

Against this backdrop, the enactment of the Charities Act 2006 is an event of great significance for the law relating to charitable trusts. Among its other innovations, the act finally severs the longstanding connection between the definition of charitable purpose and the preamble to the Statute of Charitable Uses 1601.<sup>4</sup> Moreover, even though the Charities Act explicitly preserves the public benefit test and the general law understanding of the meaning of public benefit,<sup>5</sup> the legislation removes the presumption of public benefit that has been applied in the past in cases on trusts falling under the first three traditional heads of charity.<sup>6</sup> When the provisions of the Charities Act relating to public benefit come into force in early 2008,<sup>7</sup> whether a purpose that is otherwise charitable is for the public benefit will have to be determined, based on the evidence before the court, without the application of any presumption.<sup>8</sup> As a consequence, from that time there is likely to be interest in questions relating to public benefit on the part of litigants and judges. In particular, interest is likely to centre on two questions. First, to what extent, and in what ways, has the application of a presumption of public benefit assisted courts up to now? Secondly, without the assistance of the presumption, how might courts go about ascertaining whether the public will benefit in future cases?

In this article, I take up these two questions with respect to trusts falling under one of the traditional heads of charity: trusts for the advancement of religion. In the future, questions of public benefit are likely to be of particular interest when it comes to trusts under this head of charity, because in addition to removing the presumption of public benefit, the Charities Act widens the meaning of religion for the purposes of the law relating to charitable trusts and thereby makes it less likely that cases on trusts for religious purposes will be determined on the basis that the purposes in question do not advance religion.<sup>9</sup> The article proceeds in three stages. First, I consider the extent to which, and the ways in which, the presumption of public benefit has, up to now, assisted courts in cases on trusts for religious purposes. Secondly, I identify two approaches from within the case law – on trusts for religious purposes and on trusts falling under the other traditional heads of charity – which might be available to courts once the presumption of public benefit is

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4 Charities Act 2006, s 2.

5 Charities Act 2006, s 3(3).

6 Charities Act 2006, s 3(2).

7 Cabinet Office (Office of the Third Sector), *Charities Act 2006: Implementation Plan* (5 December 2006) at [www.cabinetoffice.gov.uk/thirdsector/documents/charity.reform/implementation.plan.pdf](http://www.cabinetoffice.gov.uk/thirdsector/documents/charity.reform/implementation.plan.pdf) (visited 18 October 2007).

8 The Charity Commission is required, under section 4 of the Charities Act, to issue guidance explaining the public benefit requirement. The Commission has initiated a consultation process with a view to issuing this guidance in June 2008. See Charity Commission, *Consultation on Draft Public Benefit Guidance* (March 2007) at [www.charity-commission.gov.uk/library/enhancingcharities/pdfs/pbconsult.pdf](http://www.charity-commission.gov.uk/library/enhancingcharities/pdfs/pbconsult.pdf) (visited 18 October 2007). However, although the Commission's guidance will assist in knowing how the Commission will address the question of public benefit when it considers applications for registration, it will not address how a court will determine whether a purpose stated by a putative settlor or a testator is for the public benefit. That will be a matter for the court, applying the relevant case law.

9 Charities Act 2006, s 2(3)(a): "religion" includes – (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god'. Cf *Re South Place Ethical Society* [1980] 1 WLR 1565; Charity Commissioners, *Application for Registration as a Charity by the Church of Scientology (England and Wales)* (17 November 1999) ("CoS") at [www.charity-commission.gov.uk/Library/registration/pdfs/cosfulldoc.pdf](http://www.charity-commission.gov.uk/Library/registration/pdfs/cosfulldoc.pdf) (visited 18 October 2007).

removed from the law. In doing so, I assess both the likelihood that courts will take up these approaches as well as their suitability. Thirdly and finally, I look at whether human rights jurisprudence might offer a way forward when considering questions of public benefit in cases on trusts for religious purposes.

### THE PRESUMPTION OF PUBLIC BENEFIT

Something like a presumption of public benefit appears to have been present in the case law on trusts for religious purposes for centuries, even if it has not always been explicitly acknowledged. In early cases on trusts for religious purposes, courts associated religion and charity naturally and looked favourably on trusts for religious purposes without even considering whether there was evidence that the public would benefit if the purposes in question were carried out. Because these early cases arose between the time of the Reformation and the advent of religious toleration in England, the fact that courts naturally associated religion and charity – as opposed to naturally associating Anglicanism and charity – is not immediately apparent. However, the association may be discerned clearly even in cases where trusts were struck down as void because they were for religious purposes that were not tolerated in English law at the time.

For example, take *Attorney-General v Baxter*.<sup>10</sup> The case entailed an attempt to create a trust for the maintenance of a group of non-conformist clergymen. Sir Francis North, the Keeper of the Great Seal, struck down the trust as a superstitious use. Nonetheless, he said that there was a charitable intention and he decreed that the fund be applied *cy-près* for the maintenance of a chaplain at Chelsea College.<sup>11</sup> *Attorney-General v Baxter* appears to have turned on two principles: first, a superstitious use must be struck down as void; but secondly, a trust for religious purposes is a trust for charitable purposes, and a trust for charitable purposes is to be recognised to the extent that the law permits. The natural association of religion and charity meant that whether the public would benefit from the maintenance of non-conformist clergymen was simply not considered. Nor was that question considered when Sir Francis North's decree was reversed by the Charity Commissioners after the passage of the Act of Toleration 1689.<sup>12</sup> In 1689, the first of the two principles set out above no longer applied to purposes, like the maintenance of non-conformist clergymen, connected with dissenting Protestantism. That left only the natural association of religion and charity, in light of which the trust, being a trust for religious purposes, was regarded as charitable.<sup>13</sup>

Then there is *Da Costa v Da Paz*, the celebrated case in which a testator had bequeathed a fund of money for the support of a Jesuba 'wherein to read, and instruct youth in the Jewish religion.'<sup>14</sup> Lord Hardwicke LC refused to uphold the bequest, as it was for a superstitious use. However, in doing so, the Lord Chan-

<sup>10</sup> (1684) 1 Vern 248.

<sup>11</sup> *ibid.*

<sup>12</sup> *Attorney-General v Hughes* (1689) 2 Vern 105. See also G.H. Jones, *History of the Law of Charity 1532–1827* (Cambridge: Cambridge University Press, 1969) 81.

<sup>13</sup> See also *Attorney-General v Hickman* (1732) 2 Eq Cas Abr 193.

<sup>14</sup> (1754) 1 Dick 259.

cellor stated that the purposes for which the bequest was made were 'not void by law'.<sup>15</sup> As was the case in *Attorney-General v Baxter*, Lord Hardwicke decreed that the fund be applied *cy-près*, and a footnote to the report of the case states that the fund was applied, under the Sign Manual, to a foundling hospital.<sup>16</sup> Gareth Jones describes the Lord Chancellor's statement, to the effect that the purposes of the Jesuba were 'not void by law', as enigmatic.<sup>17</sup> However, the meaning of the statement becomes clearer once it is understood that the bequest would have been upheld if Judaism had been tolerated in English law at the time. Lord Hardwicke's statement demonstrates that, in his view, there was no reason to strike down the bequest apart from the non-toleration of Judaism in English law. The Lord Chancellor's view is best understood as resting on a natural association of religion and charity. And this interpretation of *Da Costa v Da Paz* is strengthened by the demonstrated willingness of courts to uphold such bequests as charitable after the passage of the Jewish Relief Act 1846.<sup>18</sup>

Thirdly, consider *Cary v Abbott*.<sup>19</sup> A testator made residuary provision in his will for a trust for the purpose of 'educating and bringing up poor children in the Roman Catholic faith'.<sup>20</sup> The next of kin filed a bill challenging the validity of the disposition, but the Attorney-General argued that the residue should be applied *cy-près* under the Sign Manual because the testator had a charitable intention. Sir William Grant MR declared that the disposition was void because it was for a superstitious use.<sup>21</sup> However, he then had this to say.

[W]henever a testator is disposed to be charitable in his own way, and upon his own principles, we are not to content ourselves with disappointing his intention, if disapproved by us; but we are to make him charitable in our way and upon our principles. If once we discover in him any charitable intention, that is supposed to be so liberal as to take in objects, not only within his intention, but wholly adverse to it.<sup>22</sup>

The Attorney-General was then ordered to apply for a Sign Manual. The statement of the Master of the Rolls stood for the interesting proposition that a general charitable intention, although frustrated owing to the Chantries Act 1547, might yet be realised in ways that were directly contrary to the specific intention of a testator. But for our purposes, the statement is more interesting because the Master of the Rolls simply assumed that the intention behind a trust for the purpose of bringing up children in the Roman Catholic faith was charitable in character.

The natural association of religion and charity in these early cases cannot be equated with a presumption of public benefit, because at the time when the cases were decided there was no specifically articulated public benefit test in the law relating to trusts for charitable purposes. However, in the early cases, the natural association of religion and charity performed a role similar to that played by the presumption of

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

<sup>17</sup> Jones, n 12 above, 143.

<sup>18</sup> See Jones, *ibid* for the cases.

<sup>19</sup> (1802) 7 Ves Jun 490.

<sup>20</sup> *ibid.* 490.

<sup>21</sup> *ibid.* 494.

<sup>22</sup> *ibid.* 495.

public benefit in modern cases. It enabled courts to view trusts for religious purposes favourably without requiring evidence on the basis of which such a favourable view might be justified. In the modern law, the presumption of public benefit has enabled such a favourable view to be formed in the absence of evidence by operating as a fact-finding tool. A finding that carrying out the purposes of a trust will benefit the public is a finding of fact. As a finding of fact, it ordinarily ought to be based on evidence presented to the court. However, in the modern law, the presumption of public benefit has aided courts by obviating the need to base a finding of public benefit on evidence. A presumption of public benefit may be discerned operating in this way in cases where there is little or no evidence for or against a finding of public benefit. But the presumption has also played a tie-breaker role in cases where there is some evidence for and against a finding of public benefit. And it has operated where there has been little or no evidence for a finding of public benefit but some evidence against such a finding. In this last type of case, the evidence against a finding of public benefit has been insufficient to rebut the presumption.

A good example of a presumption of public benefit operating in a case where there was no evidence for or against a finding of public benefit may be seen in the report of the decision of the Charity Commissioners to register Sacred Hands Spiritual Centre as a charity. According to the report, having determined that the purposes of the Centre advanced religion, the Charity Commissioners

considered that the necessary public benefit would be shown unless there was reason to consider that Spiritualism was not for the public benefit. The Commissioners did not consider that there was any evidence which established that Spiritualism was not for the public benefit.<sup>23</sup>

As a result, the Centre was eligible for registration. In the case law, a presumption of public benefit seems to have operated in similar circumstances in *Neville Estates Ltd v Madden*.<sup>24</sup> The question there was whether a trust for the purposes of a synagogue was a trust for charitable purposes. The membership of the synagogue took the form of an unincorporated association, closed to the public. Had membership been open to a section of the public – for instance, had it been open to all people of the Jewish faith living near the synagogue – there would have been evidence on the basis of which a finding of public benefit could be made. However, membership of the synagogue was not open in that way. At the same time, Cross J thought that the fact that membership of the synagogue was closed to the public carried little evidentiary weight, because the members of the synagogue did not spend all of their time in cloistered seclusion.<sup>25</sup> Therefore, there was little evidence in the case for or against a finding of public benefit. However, Cross J continued:

the court is, I think, entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with

<sup>23</sup> Charity Commissioners, *Decision of the Charity Commissioners to Register Sacred Hands Spiritual Centre as a Charity* (5 September 2003) at [5.1.4] at [www.charity-commission.gov.uk/Library/registration/pdfs/sacreddecision.pdf](http://www.charity-commission.gov.uk/Library/registration/pdfs/sacreddecision.pdf) (visited 18 October 2007).

<sup>24</sup> [1962] 1 Ch 832.

<sup>25</sup> *ibid.* 853.

their fellow citizens. As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none.<sup>26</sup>

Justice Cross' application of a presumption of public benefit in this passage overcame the lacuna in the evidence and enabled him to uphold the trust.

To see a presumption of public benefit assisting a court where there was some evidence for and against a finding of public benefit, consider *Holmes v Attorney-General*.<sup>27</sup> There, Walton J had to decide whether the purposes of a religious sect known as the Exclusive Brethren were charitable. There was evidence before the court indicating that members of the public were allowed to attend certain of the sect's meetings and that members of the sect engaged in proselytising activities on the street. Such evidence, although it was slight, weighed in favour of a finding of public benefit. In addition to this evidence, there was further evidence that the sect engaged in practices, referred to enigmatically in the report of the case as 'shutting up' and 'withdrawal', that brought about the traumatic break up of families.<sup>28</sup> This further evidence was also slight and came from one of the sect's adherents whose testimony was supportive of the sect. Because the Exclusive Brethren were a religious group, Walton J presumed their purposes to be for the public benefit. The presumption enabled Walton J to make a finding of public benefit even though, in the absence of the presumption, it is unlikely that there would have been more evidence for such a finding than there would have been against.

In *Holmes v Attorney-General*, a presumption of public benefit operated as a tie-breaker in a situation where there was some evidence both for and against a finding of public benefit. In other cases, such a presumption has enabled courts to uphold trusts for religious purposes even though there appeared to be little or no evidence for a finding of public benefit but some evidence against such a finding. *Thornton v Howe* may be an example.<sup>29</sup> A testatrix attempted to create a trust of the residue of her estate for the purpose of 'printing, publishing and propogation of [sic] the sacred writings of the late Joanna Southcote'.<sup>30</sup> Southcote's writings showed that she believed herself to be pregnant with the second Messiah and that she believed she was a medium of divine revelation, either through inspiration or through communication with the Holy Ghost. In delivering his judgment, Sir John Romilly MR described Southcote as a 'foolish, ignorant woman'<sup>31</sup> and suggested that her beliefs might be 'devoid of foundation'.<sup>32</sup> Nonetheless, he upheld the trust, stating that the purpose of extending the knowledge of the Christian

26 *ibid.* 853 (emphasis added). See also *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744; upheld on appeal by the Privy Council in *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455.

27 *The Times* (London) 12 February 1981, 8.

28 *Holmes v Attorney-General* was referred to Walton J by the Charity Commissioners, who had determined that 'shutting up' and 'withdrawal' were contrary to the public interest but did not know whether that determination rebutted the presumption of public benefit for the purposes of charity law: P. W. Edge and J. Loughrey, 'Religious Charities and the Juridification of the Charity Commission' (2001) 21 *Legal Studies* 36, 48–49.

29 (1862) 31 Beav 14.

30 *ibid.* 14.

31 *ibid.* 18.

32 *ibid.* 20.

religion should be considered charitable and that the court should make no distinction between one religion or sect and another.<sup>33</sup> By contrast, according to the Master of the Rolls, trusts for purposes 'adverse to the very foundations of all religion' or 'subversive of all morality' should be struck down as void.<sup>34</sup> It is arguable that a presumption of public benefit determined the outcome of *Thornton v Howe*. Moreover, it is arguable that such a presumption determined the outcome of the case despite the fact that the evidence weighed against making a finding of public benefit. It is difficult to see, in the absence of a presumption of public benefit and all else being equal, how a court could find, as a matter of fact, that the public would benefit by the dissemination of beliefs 'devoid of foundation'. However, because Sir John Romilly did not refer explicitly to a presumption of public benefit in *Thornton v Howe*, it is ultimately a matter of supposition whether or not such a presumption was applied in that case.<sup>35</sup>

If the application of a presumption of public benefit is a matter of supposition with respect to *Thornton v Howe*, it is certainly not when it comes to the more recent case of *Re Watson (deceased), Hobbs v Smith*.<sup>36</sup> A testatrix made provision in her will for a trust for the publication and distribution to the public of the religious writings of a retired builder called H. G. Hobbs. Hobbs and the testatrix had, prior to her death, both belonged to a small group of non-denominational Christians. Justice Plowman received expert evidence that the intrinsic worth of Hobbs' writings was 'nil' and that, although the writings might confirm members of the group in their beliefs, those writings would not in any way extend knowledge of the Christian religion.<sup>37</sup> However, in the opinion of the same expert, the writings were not adverse to the foundations of religion or morality.<sup>38</sup> Justice Plowman referred in his judgment to the evidence of the expert. However, citing *Thornton v Howe*, he also stated explicitly that he would assume the purposes in question to be for the public benefit unless the contrary was shown. Clearly, Plowman J thought that the contrary had not been shown, despite the evidence of the expert, and he upheld the trust as being for charitable purposes.<sup>39</sup> In *Re Watson*, there was evidence before the court which weighed against making a finding of public benefit. But Plowman J appears to have upheld the trust in question by applying a presumption of public benefit despite the existence of that evidence. Another way of putting this is to say that the evidence weighing against a finding of public benefit was insufficient to rebut the presumption.

In summary, the case law reveals that a presumption of public benefit has, up to now, assisted courts to a considerable degree and in several ways in cases on trusts for religious purposes. In early cases, before a public benefit test was specifically articulated, courts associated religion and charity naturally, with the result that

33 *ibid.* 19–20.

34 *ibid.* 20.

35 For commentary on *Thornton v Howe*, see: M. Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicolson, 1979) 158; H. Picarda, 'New Religions as Charities' (1981) 131 *New Law Journal* 436; S. T. Woodfield, 'Doing God's Work: Is Religion Always Charitable?' (1996–99) 8 *Auckland University Law Review* 25, 35.

36 [1973] 3 All ER 678.

37 *ibid.* 682.

38 *ibid.* 683.

39 *ibid.* 688.

trusts for religious purposes were upheld to the extent that the law of the time permitted. In modern cases, a presumption of public benefit has obviated the need to base findings of public benefit on evidence presented to the court. This has enabled courts to uphold trusts for religious purposes in cases where there was little or no evidence on the basis of which a finding of public benefit might be made, and in cases where there was evidence both for and against a finding of public benefit. Moreover, in some cases, a presumption of public benefit has enabled courts to uphold trusts for religious purposes even though there was evidence weighing against a finding of public benefit, where the evidence has been regarded by the court as insufficient to rebut the presumption.

### OTHER APPROACHES IN THE CASE LAW

Once the presumption of public benefit is removed from the law, courts will have to approach the question of public benefit in ways that do not entail the application of the presumption. The case law reveals that at least two such approaches have, in the past, been adopted. One of these approaches – which I describe below as evaluation – is likely to be taken up by courts in future cases on trusts for religious purposes, at least in the absence of an alternative. However, it appears to be an unsuitable approach in cases where evidence is adduced of intangible public benefit. The other approach – which I describe below as deference – overcomes the problems associated with evidence of intangible public benefit, but it is unlikely to be taken up by courts in future cases because of authoritative judicial statements disapproving of it. Moreover, there are reasons to doubt that it should be applied, at least in cases on trusts for religious purposes.

#### Evaluation

Once the presumption of public benefit is removed from the law, the most obvious approach for courts to take in cases on trusts for religious purposes is the approach that courts have taken in the past in cases on trusts falling under the fourth traditional head of charity in respect of which a presumption of public benefit has never been applied. This approach requires that a court consider the evidence before it on the question of public benefit, and then do one of two things: either make a finding of fact, based on the evidence before it, that carrying out the purposes of the trust will benefit the public; or refuse to make such a finding of fact because there is insufficient evidence to support it.<sup>40</sup> If a finding of public benefit is made, then the trust should be upheld. If such a finding is not supported by the evidence, then the trust should be struck down. Put broadly, this approach requires that the court evaluate the purposes of the trust before it on the basis of the evidence.

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<sup>40</sup> Or, indeed, make a finding of fact that carrying out the purposes of the trust will be detrimental to the public. However, in any case where the evidence supports a finding of public detriment it will also be insufficient to support a finding of public benefit, and only the latter finding is required if the trust is to be struck down. See *Coats v Gilmour* [1948] Ch 340, 345 per Lord Greene MR.

The classic case is the *Vivisection* case.<sup>41</sup> The question before the House of Lords was whether the National Anti-Vivisection Society was established for charitable purposes, its *raison d'être* being the abolition of all experimentation on living animals for whatever reason. By a majority of four to one, their Lordships declared that the purposes of the Society were not charitable.<sup>42</sup> In doing so, their Lordships pointed out that the question of public benefit in a case on a trust falling under the fourth traditional head of charity must be determined by the court evaluating the purposes of the trust before it on the basis of the evidence.<sup>43</sup> The Society had argued that the public would benefit by its purposes being carried out because the abolition of animal experimentation would bring about the moral improvement of society as a whole. However, considerable evidence had been put before the Commissioners of Income Tax, who had initially decided the matter, proving the great medical and scientific benefit that had resulted from animal experimentation.<sup>44</sup> The House of Lords found that this medical and scientific evidence far outweighed whatever evidence of moral improvement the Society had put before the Commissioners.<sup>45</sup> Consequently, their Lordships thought that there was no basis for a finding of public benefit in the case and this led them to the conclusion that the purposes of the Society could not be regarded as charitable.<sup>46</sup>

At first glance, the *Vivisection* case appears to be a model for how courts might determine the question of public benefit in cases on trusts for religious purposes that arise after the removal of the presumption of public benefit from the law. Indeed, once the public benefit provisions of the Charities Act come into force in early 2008, the approach to the question of public benefit taken up by the House of Lords in the *Vivisection* case – evaluating purposes on the basis of evidence – is likely to be taken up by courts in cases on trusts for religious purposes as well, at least in the absence of an alternative. However, difficulties attend the approach. These difficulties remained in the background in the *Vivisection* case itself, because of the nature of the evidence before the court in that case. However, once the presumption of public benefit is removed from the law, in future cases on trusts in respect of which the presumption has traditionally been applied, the difficulties with an approach requiring evaluation on the basis of evidence may come to the fore and may render such an approach unworkable. Moreover, it is arguable that this is especially likely to happen in cases on trusts for religious purposes.

In the *Vivisection* case, the medical and scientific evidence against a finding of public benefit was overwhelming. This meant that the House of Lords did not have to consider closely the Society's argument that the abolition of animal experimentation would bring about the moral improvement of society as a whole. Whatever evidence of moral improvement the Society had, it was

41 n 3 above.

42 *ibid.* 40 per Viscount Simon; 60–75 per Lord Simonds; 41–52 per Lord Wright; 75–79 per Lord Normand, 52–60 per Lord Porter in dissent. Viscount Simon and Lord Normand agreed with Lord Simonds.

43 *ibid.* 44–47 per Lord Wright; 65–66 per Lord Simonds.

44 *ibid.* 33–34.

45 *ibid.* 47–48 per Lord Wright.

46 Their Lordships also considered that the purposes of the Society could not be charitable because they had a political character: *ibid.* 49–52 per Lord Wright; 61–63 per Lord Simonds; 75–78 per Lord Normand.

outweighed by the evidence of the public detriment that would flow from the abolition of animal experimentation. However, in other cases on trusts arising under the fourth traditional head of charity, evidence of moral improvement appears to have been regarded by the court as sufficient to support a finding of public benefit.<sup>47</sup> This raises some interesting questions. What is moral improvement? What constitutes evidence of it? How may such evidence be weighed sensibly against evidence of material – for example, medical and scientific – benefit? Questions like these were addressed by some of their Lordships in the *Vivisection* case, but not answered fully.<sup>48</sup> These unanswered questions about moral improvement manifest a problem that has the potential to arise more widely in cases on trusts for charitable purposes, whether those purposes fall under the fourth traditional head of charity – as the purposes of trusts in moral improvement cases have done – or not. The wider problem is perhaps best stated in the form of a question: if determining public benefit is a matter of evaluating the purposes of a trust based on the evidence, what counts as sufficient evidence of public benefit?

Where there is evidence of tangible benefit to the public and no other evidence, this question will be relatively easy to answer. A trust for the purpose of constructing or furnishing a building in which members of the public who desire to may worship according to the rites of a particular religion might fall into this category of case.<sup>49</sup> Tangible benefit will flow from such a trust to the extent that material provision is made for acts of worship. Similarly, where there is evidence of tangible detriment to the public, as there was in the *Vivisection* case, and there is little or no evidence of tangible benefit, it will be relatively easy to say that there is insufficient evidence of public benefit. In the *Vivisection* case itself, tangible detriment would have resulted from the purposes of the Society being carried out because material medical and scientific advances that depended on animal experimentation would have been frustrated.

The problem of what counts as sufficient evidence of public benefit will arise in cases where there is little or no evidence of tangible benefit or detriment, but there is evidence of intangible benefit. While the moral improvement cases show that courts in the past have made findings of public benefit where there was evidence of only intangible benefit, the moral improvement cases cannot be regarded as firmly established in the case law.<sup>50</sup> Moreover, it is arguable that the moral improvement cases rest on the assumption that most people would accept the proposition that carrying out the purpose in question would bring about moral improvement.<sup>51</sup> If the moral improvement cases do rest on such an assumption, they rest on a weak foundation. In the absence of evidence that most people accept the proposition that carrying out a purpose would bring about moral improvement, there is no reason to assume that most people accept that proposi-

47 *Re Snowcroft* [1898] 2 Ch 638; *In re Wedgwood* [1915] 1 Ch 113; *In re Grove-Grady* [1929] 1 Ch 557; *Re Hood* [1931] 1 Ch 240; *Re Price* [1943] Ch 42; *Re South Place Ethical Society*, n 9 above.

48 n 3 above, 44–46 per Lord Wright; 70 per Lord Simonds.

49 See the authorities referred to in J. Warburton, D. Morris and N. F. Riddle (eds), *Tudor on Charities* (London: Sweet & Maxwell, 9<sup>th</sup> ed, 2003) at [2–057], although of the unfortunate decision of Lord Lyndhurst LC in *Mitford v Reynolds* (1842) 1 Ph 185.

50 *Vivisection* case, n 3 above, 44–47 per Lord Wright; CoS, n 9 above, 26–34.

51 *Vivisection* case, n 3 above, 49 per Lord Wright; 72–73 per Lord Simonds.

tion. And in the moral improvement cases, there is no indication that courts have had the benefit of such evidence. To make the assumption in the absence of supporting evidence is to apply a presumption of public benefit in a circumlocutory fashion and to point to a doubtful justification for doing so. In any event, even if it is right to assume that most people would accept a proposition about intangible public benefit in a moral improvement case, such an assumption cannot be made in every case where the court has evidence of only intangible benefit. In particular, such an assumption seems singularly inappropriate in a modern case on a trust for religious purposes; in a community characterised by religious diversity, it cannot be assumed that most people accept any given proposition about the intangible public benefit that will flow from carrying out a religious purpose.

Another difficulty with an approach requiring evaluation on the basis of evidence in cases on trusts for religious purposes relates to the way in which evidence of intangible public benefit is likely to come before a court in such a case. Evidence of intangible public benefit is likely to take the form of testimony of expert witnesses. A good example of evidence relating to public benefit taking this form may be found – with respect to a trust for the advancement of education – in the case of *Re Pinion (deceased), Westminster Bank Ltd v Pinion*.<sup>52</sup> A testator had purported to create a trust of artworks and furniture in a studio for the purpose of displaying them and thereby educating the public. His wife sought to invalidate the trust and argued that the artworks and the furniture were of no value and therefore displaying them could not serve to educate anyone. At trial, Wilberforce J upheld the trust because he was able, based on the evidence of expert witnesses, to identify some chairs in the collection that might, if properly presented in a museum, have some educative effect.<sup>53</sup> However, the Court of Appeal reversed Wilberforce J's decision, pointing to the fact that the expert witnesses were unanimously of the opinion that, putting the chairs to one side, the collection had no artistic or educational merit or value whatsoever.<sup>54</sup> The trust failed as a result. In *Re Pinion*, expert evidence enabled the court to determine the question of public benefit notwithstanding that the evidence related to a 'matter of taste' and therefore related to the intangible effect that displaying the collection was likely to have on the public that might view it.<sup>55</sup>

*Re Pinion* reveals that where an expert witness forms an opinion about the intangible public benefit that might – or might not – flow from carrying out a purpose, the court may be able to determine the question of public benefit by drawing an inference from the expert's opinion. If the expert's opinion is that intangible public benefit will flow from carrying out the purposes of a trust, then the court may infer, from that opinion, the fact of public benefit. But once again, problems emerge. For example, how many experts must share the opinion in question before the court is justified in drawing the inference? Does it depend on the matter in respect of which the opinion is given? What if the experts

52 [1964] 1 All ER 890.

53 *Re Pinion, Westminster Bank Ltd v Pinion* [1963] 2 All ER 1049, 1057.

54 n 52 above, 893–894 per Harman LJ, with whom Davies LJ (at 894) and Russell LJ (at 894–896) agreed.

55 *ibid.* 894 per Harman LJ.

disagree? In addition to these problems – which may arise in any case where a court relies on expert evidence – one further problem would emerge if courts were to rely on expert evidence to determine questions of public benefit in cases on trusts for religious purposes. This further problem is well illustrated by the facts of a case that I considered above, *Re Watson*.<sup>56</sup> Imagine that Plowman J had not been permitted to apply a presumption of public benefit in that case. His Lordship had evidence before him from an expert witness to the effect that the intrinsic worth of the religious writings whose dissemination was the purpose of the trust in question was ‘nil’.<sup>57</sup> Had Plowman J determined the question of public benefit by drawing an inference from the opinion of the expert witness, his Lordship would have refused to make a finding of public benefit and the trust would have failed. The testatrix, the author of the religious writings in question, and the potential readers of those writings, were all non-denominational Christians. The expert witness, on the other hand, was an Anglican clergyman.<sup>58</sup> Therefore, if the question of public benefit had been determined based on the expert evidence, Plowman J would have determined whether the public would benefit from the carrying out of a non-denominational Christian purpose by adopting an Anglican perspective.

The problem that is illustrated by the facts of *Re Watson* is a problem in light of what are regarded, from a liberal perspective, as proper constraints on judicial decision-making. In a community that adheres to liberal principles, it is thought that a decision-maker, such as a judge, must provide reasons for his or her decisions that may be accepted by everyone irrespective of their religious beliefs.<sup>59</sup> In a case on a trust for religious purposes, if a judge determines the question of public benefit by drawing an inference from the opinion of an expert witness, the judge points to that opinion as a reason – and possibly the primary reason – for his or her decision. If the opinion is informed by religious beliefs, the judge points to a reason that will not be accepted by everyone irrespective of their religious beliefs; indeed, it is not likely to be accepted by anyone who does not share the religious beliefs of the expert whose opinion it is. This violation of liberal principles will be of particular concern where one or more of the parties before the court does not accept the religious beliefs that inform the expert evidence, and where the consequence of the judge determining the question of public benefit by drawing an inference from the opinion of the expert witness is that the trust in question is struck down. To strike down a trust is, ordinarily, to cause detriment to those persons who wish to see the trust upheld. And to cause detriment to persons in violation of liberal principles is of more than theoretical concern. The possibility that detriment could be caused in such circumstances is a strong reason for thinking that it will be inappropriate for courts to adopt an approach requiring evaluation based on the evidence in cases on trusts for religious purposes, where the evidence is of only intangible benefit and takes the form of testimony of expert witnesses.

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<sup>56</sup> n 36 above.

<sup>57</sup> *ibid.* 682.

<sup>58</sup> *ibid.* 683.

<sup>59</sup> See generally J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) Lecture VI; J. Rawls, ‘The Idea of Public Reason Revisited’ in his *Collected Papers*, ed. S. Freeman (Cambridge, Mass.: Harvard University Press, 2001) ch 26.

## Deference

Not surprisingly, the problems associated with evaluating the purposes of a trust based on evidence of only intangible benefit have emerged in their most acute form in cases on trusts for religious purposes where evidence has been adduced of the spiritual benefit that will flow to the public as a result of carrying out the purposes in question. Evidence of spiritual benefit – such as evidence of the effectiveness of intercessory prayer or a sacramental rite – is clearly not susceptible of proof in a court of law. Therefore, in cases where evidence of spiritual benefit has been put before the court, the court has not evaluated the purposes in question based on that evidence. Moreover, in these cases a presumption of public benefit has not typically been applied.<sup>60</sup> Even though no explanation has been offered for refusing to apply the presumption in cases where claims of spiritual benefit have been made, this refusal appears to be warranted. A presumption is justified only to the extent that it is likely to reflect the true facts of a situation.<sup>61</sup> If the true facts of the situation cannot be known, there is no way of saying with certainty that any presumption is justified in that situation. This is the case when it comes to claims of spiritual benefit. In the absence of evidence that spiritual benefit is likely to exist in cases where claims about it are made, there is no reason to presume the existence of spiritual benefit, and it is just such evidence that is lacking in these cases.

Given that problems of proof mean that courts have not made findings of fact about spiritual benefit and given that the same problems render a presumption of public benefit inappropriate in cases entailing claims about spiritual benefit, it is not surprising that some courts have refused to uphold trusts in such cases. During the nineteenth century, trusts in respect of which claims of spiritual benefit might have been made were struck down because such claims were not in fact made and there was a lack of evidence of tangible benefit.<sup>62</sup> For instance, in *West v Shuttleworth*, a will trust for the purpose of having masses said for the souls of the testatrix and her husband was found not to be characterised by a charitable intention because there was no evidence that anyone but the testatrix (and presumably her husband) would benefit from the purpose being carried out.<sup>63</sup> A similar conclusion was reached by Sir Montague E. Smith, delivering the judgment of the Privy Council, in *Yeap Cheah Neo v Ong Cheng Neo*.<sup>64</sup> There, a perpetual gift of a house in Penang for the purpose of performing rites of ancestor worship was struck down because there was no evidence that anyone would benefit from the performance

60 P. Luxton, *The Law of Charities* (Oxford: Oxford University Press, 2001) at [4.46], argues that courts have only presumed public benefit in cases on trusts for religious purposes where the purposes have entailed the dissemination of religious doctrine. On this basis, it is possible to distinguish *Gilmour v Coats* [1949] AC 426, discussed below, from a case like *Thornton v Howe*. However it is not possible, on this basis, to distinguish *Gilmour v Coats* from other cases in which religious purposes not entailing the dissemination of religious doctrine were in view: for example, *Neville Estates Ltd v Madden*.

61 *Nelson v Nelson* (1995) 184 CLR 538, 602 per McHugh J.

62 A point made, with respect to *Cocks v Manners*, by Lord Simonds in *Gilmour v Coats*, n 60 above, 445.

63 (1835) 2 Myl & K 684.

64 (1875) LR 6 PC 381.

of the rites but the family whose ancestors were to be worshipped there.<sup>65</sup> In *Cocks v Manners*, Sir John Wickens VC, in the absence of any evidence that could lead to a finding of public benefit, struck down a trust for the purposes of a closed and contemplative order of nuns notwithstanding that it was clearly a trust for religious purposes.<sup>66</sup> And in *Re Joy*, a trust for 'united prayer' was struck down in the absence of evidence of benefit to anyone except for the individuals doing the praying.<sup>67</sup>

In *Gilmour v Coats*, the high water mark of the judicial refusal to uphold trusts for religious purposes in the absence of evidence of tangible benefit, evidence of spiritual benefit was centre stage.<sup>68</sup> The case arose because of an attempt to create a trust for the purposes of a Carmelite nunnery at Notting Hill in London. The Carmelite order, founded by Saint Theresa of Avila in 1562, has two primary aims: the contemplation of divine things; and intercession for the souls of others. It is a closed order. Evidence in *Gilmour v Coats* was given at first instance by the Prioress of the Notting Hill nunnery and by the Roman Catholic Archbishop of Westminster, Cardinal Griffin. Based on that evidence, the court was invited to make two findings of fact: first, that the nuns' intercessory prayers caused the grace of God to be bestowed on those for whom the nuns prayed; and secondly, that the nuns' pious lives were a source of edification to others. It was hoped that, having made such findings of fact, the court would be unable to resist the conclusion that the purposes of the Carmelite nunnery were for the public benefit and therefore charitable.

But the House of Lords stated that these were matters about which findings of fact could not be made. Lord Simonds put it thus with respect to the first finding of fact that the court had been invited to make.

My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in His wisdom think fit to answer them? But, my Lords, whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the Court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof.<sup>69</sup>

His Lordship dealt with the second finding of fact that the court had been invited to make as follows.

[A court] would assume a burden which it could not discharge if now for the first time it admitted into the category of public benefit something so indirect, remote, imponderable and, I would add, controversial as the benefit which may be derived by others from the example of pious lives.<sup>70</sup>

65 *ibid.* 396. See also C. H. Sherrin, 'Public Benefit in Trusts for the Advancement of Religion' (1990) 32 *Malaya Law Review* 114, 126–128.

66 (1871) 12 LR Eq 574, 585.

67 (1889) 60 LT 175. See also *Hoare v Hoare* (1887) 56 LT 147; *Re White* [1893] 2 Ch 41; *Gleeson v Phelan* (1914) 15 SR (NSW) 30.

68 n 60 above.

69 *ibid.* 446.

70 *ibid.* 447. The other members of the House of Lords agreed with Lord Simonds on both points: Lord du Parc at 450–454; Lord Normand at 454; Lord Morton of Henryton at 454; Lord Reid at 454–462.

It being impossible to make findings of fact with respect to the evidence that had been presented by the Prioress and Cardinal Griffin, the House of Lords in *Gilmour v Coats* was left in exactly the position that Sir John Wickens had been in when he decided *Cocks v Manners*. There was no basis for a finding of public benefit and the trust had to fail as a result.<sup>71</sup>

Since *Gilmour v Coats* was handed down, it has met with a mixed reception.<sup>72</sup> Whether the case reflects a utilitarian<sup>73</sup> or even a Protestant<sup>74</sup> bias in the English law on charitable purposes, and whether the House of Lords provided adequate guidance to trial judges, and indeed to the Charity Commission, on how to deal with questions of public benefit in analogous cases,<sup>75</sup> are matters for another day. For now, it will suffice to make two observations in light of *Gilmour v Coats*, and in light of the earlier authorities where claims of spiritual benefit were not made and trusts were struck down in the absence of evidence of tangible benefit. First, in future cases where claims of spiritual benefit are made, the removal of the presumption of public benefit from the law ought to be of little significance, because the presumption was not typically applied in such cases to begin with. Secondly, because the presumption of public benefit has not been applied in cases where claims of spiritual benefit have been made, courts that have upheld trusts in such cases have had to develop a technique for doing so. This technique is deference.<sup>76</sup>

The technique of deference entails the court making a finding of public benefit based on evidence that the putative settlor or the testator believed that carrying out the purposes under scrutiny would benefit the public. In other words, it entails the

71 Strictly, this is not true as the court was invited to make a third finding of fact: that the nunnery, being open to any woman with the requisite vocation, enabled a section of the public – composed of such women – to live more fully a life in accordance with their beliefs, aspirations and goals. The House of Lords took the view that it could not be for the public benefit to assist persons to carry out purposes that were not themselves proven to be for the public benefit, and that the third finding of fact was precluded on that basis: *ibid.*, 449 per Lord Simonds.

72 Compare *Re Warré's Will Trusts* [1953] 2 All ER 99; *Leahy v Attorney-General for New South Wales* [1959] AC 457; *Re Le Cren Clarke (deceased), Funnell v Stewart* [1996] 1 All ER 715, where *Gilmour v Coats* was applied, with *Neville Estates Ltd v Madden*, n 24 above; *Association of Franciscan Order of Friars Minor v City of Kew* [1967] VR 732; *Re Banfield (deceased), Lloyd's Bank Ltd v Smith* [1968] 2 All ER 276; *Joyce v Ashfield Municipal Council*, n 26 above; *Crowther v Brophy* [1992] 2 VR 97, where it was distinguished.

73 H. Cohen, 'Charities – A Utilitarian Perspective' [1983] *Current Legal Problems* 241.

74 M. Blakeney, 'Sequestered Piety and Charity – A Comparative Analysis' (1981) 2 *Journal of Legal History* 207, *contra* C. E. F. Rickett, 'An Anti-Roman Catholic Bias in the Law of Charity?' [1990] *Conveyancer* 34.

75 J. C. Brady, 'Public Benefit and Religious Trusts: Fact or Fiction' (1974) 25 *Northern Ireland Legal Quarterly* 174; Sherrin, n 65 above.

76 Arguably, the Charity Commissioners developed another technique for upholding a trust in a *Gilmour v Coats*-type case in their decision in *The Society of the Precious Blood* (1995) 3 Decisions of the Charity Commissioners 11–17. The Society was, according to its constitution, a closed order of nuns dedicated to intercessory prayer. However, in practice, the nuns were involved in community work in a variety of ways. The Charity Commissioners took into account evidence of the Society's activities as well as its stated purposes in reaching the conclusion that the Society was charitable. This technique may be available to courts where there is evidence that an organisation's activities bring tangible benefit to the public. However, it will not be available where, as was the case in *Gilmour v Coats*, there is no such evidence, either because an organisation engages in no community activities or because a trust is for abstract purposes and not for the purposes of a particular organisation.

court deferring to the beliefs of the putative settlor or the testator when deciding the question of public benefit. Deference may entail the court drawing inferences from the opinions of expert witnesses. However, unlike in cases where the court infers, from expert evidence, the fact of public benefit itself, in a case characterised by deference the court infers, from expert evidence, facts about the putative settlor's or the testator's beliefs. The technique of deference has found favour in Ireland in case law on trusts for the purpose of saying masses for the dead. However, it is unlikely to be embraced by English courts in cases on trusts for religious purposes arising after the removal of the presumption of public benefit from the law. This is because it has been considered and rejected decisively in English cases of the highest authority on trusts for religious purposes as well as trusts arising under the fourth traditional head of charity. Moreover, courts are right to be suspicious of the technique of deference, particularly when it comes to trusts for religious purposes.

The story of how the technique of deference came to find favour in Ireland begins with the case of *Attorney-General v Delaney*.<sup>77</sup> There, a testatrix had left money on trust for the purpose of having masses said for the repose of her soul and the soul of her brother. The Barons of the Exchequer refused to recognise the purpose as charitable. Their reason for doing so appears to have been that the masses might have been said in a location inaccessible to the public, such as a private chapel.<sup>78</sup> Dr Delaney, who was the Roman Catholic Bishop of Cork and the defendant in the case, filed an answer in evidence which set out Roman Catholic doctrine relating to the mass. The answer stated that the mass, whether said in public or in private, aims to 'bring down [God's] blessings on the whole world.'<sup>79</sup> Dr Delaney argued that the testatrix would have believed this statement of doctrine to be true and that the court ought to make a finding of public benefit from the point of view of one who had that belief. In other words, Dr Delaney urged the court to defer to the belief of the testatrix that saying the mass would bring spiritual benefit to all people. However, the Barons rejected Dr Delaney's argument, Palles CB stating that the court must be able to ascertain the public benefit of the mass and that the mass cannot 'derive the element of public benefit from the efficacy spiritual or temporal which, according to the faith of the testatrix, [it] may possess.'<sup>80</sup> This represented an application of the orthodox principle, also applied years later by the House of Lords in *Gilmour v Coats*, that where findings of fact may not be made about the benefit to the public of carrying out religious purposes, the purposes must be regarded as non-charitable.

However, Dr Delaney's argument as well as the answer that he had filed in evidence in *Attorney-General v Delaney* resurfaced some years later in another Irish case, *O'Hanlon v Logue*, in which the Court of Appeal was required to consider whether saying masses for the dead was a charitable purpose.<sup>81</sup> In *O'Hanlon v Logue*, Dr Delaney's answer on the nature of the mass was again admitted into evidence, but this time the court made a finding of public benefit based on the

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77 (1875) 10 IR (CL) 104.

78 *ibid.* 128–129 per Palles CB, 132 per Fitzgerald B and Dowse B.

79 *ibid.* 107.

80 *ibid.* 129.

81 [1906] 1 IR 247.

doctrine set out in that answer, rather than on evidence of tangible benefit. Chief Baron Palles, who had been party to the decision in *Attorney-General v Delaney*, now refused to support that decision.<sup>82</sup> He stated,

[W]hen [the court] knows doctrines [like those stated in Dr Delaney's answer], although it knows that, according to them, such an act has the spiritual efficacy alleged, it cannot know it objectively and as a fact, unless it also knows that the doctrines in question are true. But it can never know that they are objectively true, unless it first determines that the religion in question is a true religion. This it cannot do. It not only has no means of doing so, but it is contrary to the principle that all religions are now equal before the law. It follows that there must be one of two results: either – (1) the law must cease to admit that *any* divine worship can have spiritual efficacy to produce a public benefit; or (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is.

The first alternative is an impossible one.<sup>83</sup>

In *O'Hanlon v Logue*, faced with a lack of evidence of tangible benefit, the Court of Appeal decided not to deny that the purpose in question was charitable, as had happened in *Attorney-General v Delaney* and would happen in England in *Gilmour v Coats*. Instead, the court decided to defer to the belief of the testatrix that saying masses for the dead conferred a spiritual benefit on the public.<sup>84</sup>

If the Charities Bill that was recently before the Irish Parliament is enacted, it will render the technique of deference unnecessary in cases raising questions of spiritual benefit in that jurisdiction. That is because, in stark contrast to the English Charities Act, the Irish Charities Bill affirms a presumption of public benefit for all trusts for religious purposes, including those in respect of which claims of spiritual benefit are made.<sup>85</sup> However, given that in England the Charities Act removes the presumption of public benefit from the law, it might be thought that the technique of deference that has in the past been used by the Irish courts could now be taken up by the English courts, not only in cases where claims of spiritual benefit are made, but also in other cases where trusts for religious purposes are under scrutiny. It might be thought that some support for using the technique could be drawn from *In re Caus, Lindeboom v Camille*<sup>86</sup> and *Crowther v Brophy*,<sup>87</sup> both non-Irish cases on saying masses for the dead in which Dr Delaney's answer was admitted into evidence and the trust in question was upheld. However, in neither of these cases was the technique of deference actually deployed. In *In re Caus*, despite the fact that counsel had accepted Dr Delaney's answer as evidence of the nature of the mass, Luxmoore J upheld the trust before him citing two reasons for his finding of public benefit: first, saying masses would edify members of the wider church; and secondly, a trust for saying masses would assist in the

<sup>82</sup> *ibid.* 264.

<sup>83</sup> *ibid.* 276 (emphasis in original). See also FitzGibbon LJ at 279 and Holmes LJ at 285 for similar statements.

<sup>84</sup> See also *Re Cranston* [1898] 1 IR 431 (an animal welfare case); *Attorney-General v Becher* [1910] 2 IR 251; *Nelan v Downes* (1916–17) 23 CLR 546.

<sup>85</sup> Charities Bill 2007, s 3(4) at [www.oireachtas.ie/documents/bills28/bills/2007/3107/b3107d.pdf](http://www.oireachtas.ie/documents/bills28/bills/2007/3107/b3107d.pdf) (visited 18 October 2007).

<sup>86</sup> [1934] 1 Ch 162.

<sup>87</sup> n 72 above.

endowment of the priests who were to perform the rite, the remuneration of priests being undoubtedly a charitable purpose.<sup>88</sup> Similar reasons formed the basis of a finding of public benefit in the Australian case of *Crowther v Brophy*.<sup>89</sup> And in *In re Hetherington (deceased)*, the most recent English case on trusts for saying masses for the dead, Dr Delaney's answer appears not to have been admitted into evidence, and the trusts were upheld by Sir Nicholas Browne-Wilkinson V-C on the basis that priests would be thereby remunerated and to the extent that the masses would be said in public.<sup>90</sup> Moreover, the Vice-Chancellor seemed to take the unusual step of applying a presumption of public benefit in a case about saying masses when he stated that a gift for that purpose was 'prima facie charitable.'<sup>91</sup>

These cases show that it not possible to draw support for the technique of deference from non-Irish law. Moreover, English decisions of the highest authority reject the technique. In the *Vivisection* case, the House of Lords overruled an earlier decision in which the technique of deference had been deployed to uphold a trust under the fourth traditional head of charity.<sup>92</sup> In doing so, their Lordships stated clearly that, with respect to a trust falling under the fourth traditional head of charity – a type of trust that has never attracted a presumption of public benefit – it is not open to a court to make a finding of public benefit from the point of view of the putative settlor or the testator.<sup>93</sup> As we have seen already, their Lordships emphasised that the court must examine the available evidence and make a finding of fact on the question of public benefit; in other words, the court must evaluate the purposes of the trust before it.<sup>94</sup> And in *Gilmour v Coats*, having refused to apply a presumption of public benefit or to consider evidence of spiritual benefit, the House of Lords again rejected the technique of deference, this time in a case specifically about a trust for religious purposes.<sup>95</sup> In the light of these two leading cases, it is difficult to see how a court could take up the technique of deference in any case – including a case on a trust for religious purposes – arising after the removal of the presumption of public benefit from the law.

Furthermore, even if it might be thought that the technique of deference could be revisited by the courts in light of the Charities Act, it must be remembered that there are sound reasons for rejecting the technique. In *Re Hummeltenberg, Beatty v London Spiritualistic Alliance*, a case on a trust under the fourth traditional head of charity, Russell J famously said that,

[i]f a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (although not unlawful) objects, of which the training of poodles to dance might be a mild example.<sup>96</sup>

88 n 86 above, 169–170. The point about edification has almost certainly not survived *Gilmour v Coats*, but the point about remuneration of priests has: *In re Hetherington (deceased)* [1990] 1 Ch 1.

89 n 72 above, 100–101 per Gobbo J.

90 n 88 above, 11–13.

91 *ibid.* 13.

92 n 3 above, 32. The earlier decision was *In re Foveaux* [1895] 2 Ch 501 per Chitty J.

93 *Vivisection* case, n 3 above, 44 per Lord Wright; 65 per Lord Simonds.

94 *ibid.* 44–47 per Lord Wright; 65–66 per Lord Simonds.

95 n 60 above, 446 per Lord Simonds; 452 per Lord du Parcq; 456–460 per Lord Reid.

96 [1923] 1 Ch 237, 242. See also *In re Grove-Grady*, n 47 above.

It is possible to imagine equally bizarre religious purposes being admitted as charitable if the technique of deference were to be deployed indiscriminately: think of a trust for the purpose of putting a Bible on the moon. However, in cases entailing religious purposes, the shortcomings of deference go beyond the possibility of such follies. It is also possible to imagine religious purposes which a putative settlor or a testator might believe to be for the public benefit but which, if carried out, would harm the public although not sufficiently to be impugned on grounds of interference with public safety or morality. For example, imagine a trust for the purpose of converting fundamentalist Christians to a fundamentalist brand of Islam. Or imagine a trust for the purpose of promoting the teaching of creationism instead of the theory of evolution to pupils in secular schools. The potential for such activities to cause discord in the community, while not necessarily presenting a threat to public safety or morality, is great. Assuming that such purposes are religious, in neither case is it clear that a court ought to identify them as being for the public benefit.<sup>97</sup> Yet if the court were to deploy the technique of deference, it would, all else being equal, be compelled to make a finding of public benefit in each of these cases.<sup>98</sup>

In summary, the technique of deference overcomes the problems associated with evidence of intangible public benefit in cases on trusts for religious purposes. However, it is unlikely to be taken up by courts in such cases once the presumption of public benefit is removed from the law. First, it has been disapproved by the House of Lords in two leading cases. And secondly, it may compel findings of public benefit in cases on trusts for religious purposes where such findings are not justified or desirable. Moreover, as we have seen, the other approach in the existing case law that will be available to courts once the presumption of public benefit is removed from the law – evaluating the purposes of trusts based on the evidence – encounters difficulties in cases where evidence of intangible public benefit is adduced, and such evidence is especially likely to be adduced in cases on trusts for religious purposes. Given the shortcomings of these two approaches, it may be necessary for courts in future cases on trusts for religious purposes to look further than the existing case law when determining the question of public benefit. One area to which courts may look is the human rights jurisprudence introduced into England by the Human Rights Act 1998. Indeed, courts may be forced to have regard to that jurisprudence in cases where, on human rights grounds, parties appeal the decisions of trial judges or the Charity Commission in cases on trusts for religious purposes. Whether human rights jurisprudence offers a way forward when considering questions of public benefit in such cases is the question to which I now turn.

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97 Arguably, teaching creationism does not advance religion: see generally *Keren Keyemeth Le Jisroel Limited v Commissioners of Inland Revenue* [1931] 2 KB 463; Charity Commissioners, *Application for Registration of Good News for Israel* (5 February 2004) at [www.charity-commission.gov.uk/Library/registration/pdfs/gnfddecision.pdf](http://www.charity-commission.gov.uk/Library/registration/pdfs/gnfddecision.pdf) (visited 18 October 2007). However, whether or not teaching creationism advances religion does not affect the point that I make in the text.

98 All else might not be equal, for instance, if the purposes have a political character such that the court refuses to regard them as charitable: *Vivisection* case, n 3 above; *McGovern v Attorney-General* [1982] Ch 321.

## HUMAN RIGHTS JURISPRUDENCE: A WAY FORWARD?

The effect that human rights jurisprudence will have on charity law, and particularly on the law relating to trusts for religious purposes, remains largely to be seen, despite some consideration of that jurisprudence by the Charity Commissioners in their decision regarding the Church of Scientology,<sup>99</sup> and despite some attention from scholars.<sup>100</sup> There is insufficient space here to explore this topic fully. Instead, I tentatively address one specific question: does human rights jurisprudence offer a way forward when considering the question of public benefit in cases on trusts for religious purposes? I address this question by considering how human rights arguments might have affected two past cases if they had arisen in a legal landscape such as the one that will exist from early 2008: a landscape that includes the Human Rights Act and all that is entailed in that Act, and in which the presumption of public benefit has been removed from the law relating to trusts for charitable purposes. The two cases that I concentrate on are *Thornton v Howe* and *Gilmour v Coats*.

A consideration of the relevant human rights jurisprudence starts with Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>101</sup>

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 is also relevant.

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>102</sup>

According to section 6(1) of the Human Rights Act, '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right' –

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<sup>99</sup> CoS, n 9 above, 6–12, 39–40.

<sup>100</sup> F. Quint and T. Spring, 'Religion, Charity Law and Human Rights' (1999) 5 *Charity Law and Practice Review* 153; Edge and Loughrey, n 28 above, 51–64; Luxton, n 60 above at [1.82]–[1.126]; P.W. Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law International, 2001) 158–159; P.W. Edge, *Religion and Law: An Introduction* (London: Ashgate, 2006) 65–67.

<sup>101</sup> 4 November 1950, 213 UNTS 221 ('Convention'). On the right to freedom of religion under the Convention generally, see C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

<sup>102</sup> See also Protocol 12 to the Convention, setting out a general prohibition of discrimination, whether with respect to the exercise of a Convention right or not.

including a right set out in Article 9 or Article 14 – unless the public authority in question is required so to act by legislation.<sup>103</sup> A person with standing may bring proceedings challenging an act that is unlawful under section 6(1), whether by way of judicial review, an action for breach of statutory duty, or an appeal.<sup>104</sup>

In *Thornton v Howe* a trust for the purpose of disseminating the religious writings of Joanna Southcote was upheld despite the fact that there was no evidence on the basis of which a finding of public benefit could be made.<sup>105</sup> Now take *Thornton v Howe* out of its nineteenth century setting and imagine that it is about to be decided in a legal landscape such as the one that will exist from early 2008. The trust will almost certainly be struck down because of the lack of evidence of public benefit. If the trust is struck down, the property which the testatrix directed to be applied to the dissemination of Southcote's writings will instead be distributed according to the rules governing intestacy. Unless other funds can be obtained, Southcote's writings will not be disseminated in the way contemplated by the testatrix.

In the hypothetical modern-day *Thornton v Howe*, can the trustee appeal successfully against the decision on the basis of section 6(1) of the Human Rights Act? For the appeal to succeed, the appellate court will have to be convinced that the decision is incompatible with a Convention right.<sup>106</sup> Under Article 9(1) of the Convention, the testatrix, along with other followers of Joanna Southcote, has a right to freedom of religion. To the extent that the right is a right to freedom of religious belief, it seems that the decision is compatible with the right; the decision leaves the followers of Joanna Southcote no less free to believe what they believe. However, Article 9(1) also provides that the testatrix, along with other followers of Joanna Southcote, has a right to manifest her religion, and Article 9(2) states that this right may be limited only in legally prescribed ways that are necessary in the interest of public safety, order, health or morals, or for the protection of the rights and freedoms of others. The trustee might argue that this right to manifest religion has been curtailed by the decision to strike down the trust, because as a consequence of that decision religious writings that would otherwise have been disseminated will not be disseminated and religion will not be manifested to that extent. Moreover, the trustee might argue that, although the decision is legally prescribed because it is within the jurisdiction of the court, it is not necessary in the interest of public safety, order, health or morals, or for the protection of the rights and freedoms of others.<sup>107</sup> If an appellate court accepts this argument, it will have to conclude that the only finding of fact open to the lower court

103 Human Rights Act 1998, s 6(2). Both a court and the Charity Commission satisfy the definition of 'public authority': Human Rights Act 1998, s 6(3)(a); CoS, n 9 above, 6.

104 Standing requirements are set out in the Human Rights Act 1998, s 7. See also S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (London: Sweet & Maxwell, 2000) at [4–25]–[4–29].

105 n 29 above. See text to n 29 and following.

106 Grosz, Beatson and Duffy, n 104 above at [4–48].

107 Decision-makers are permitted a wide margin of appreciation in determining what is necessary for public safety, order, health or morals, or to protect the rights and freedoms of others: *Manousakis v Greece* (1996) 23 EHRR 387. However, in *Thornton v Howe*, the Master of the Rolls stated explicitly that there was no concern about public safety or morals; nor could permitting the dissemination of Southcote's writings have threatened the rights and freedoms of others.

on the evidence – the finding that no public benefit would flow from carrying out the purpose in question – has led to a decision that is incompatible with a Convention right.<sup>108</sup>

Of course, there are formidable obstacles to such an argument succeeding. For instance, the appellate court will have to be satisfied that the dissemination of Southcote's writings manifests *religion* as opposed to beliefs of a non-religious character. And it will have to be shown how limiting the ability of a person or group to disseminate religious writings constitutes a limitation of the right to *manifest* religion.<sup>109</sup> However, if an argument based on human rights jurisprudence were to succeed despite these obstacles, it would lead to an interesting situation in the hypothetical modern-day *Thornton v Howe*. A finding of public benefit may be required under the Charities Act if the trust is to be upheld and yet such a finding may not be possible given the evidence, but to determine the question of public benefit such that the trust is struck down may be incompatible with an Article 9 right. In this situation, human rights jurisprudence is a way forward, but to a judicial stalemate.

Now take *Gilmour v Coats*.<sup>110</sup> There, a trust for the purposes of a closed and contemplative order of Carmelite nuns was struck down because it could not be proven that those purposes, if carried out, would benefit the public. Evidence of spiritual benefit was of no probative value.<sup>111</sup> Once again, imagine that *Gilmour v Coats* is about to be decided by a trial judge in the legal landscape of the near future. If the trust is struck down, the nuns will lose a benefit that would have accrued to them if the trust had been upheld. However, given the facts of *Gilmour v Coats*, there is no reason to believe that the order will cease to exist or that its religious activities will change as an immediate consequence of the decision. The nuns will simply be poorer than they might have been.

Given this, a human rights argument in a hypothetical modern-day *Gilmour v Coats* will have to assume a relatively sophisticated form. It will not be possible for the nuns to argue that their freedom of religious belief has been interfered with. Nor will the nuns be able to argue that the decision has curtailed their ability to manifest their religion by making it immediately impossible for them to do something that they would otherwise have done.<sup>112</sup> However, the nuns may argue that their freedom to manifest their religion is, as a consequence of the decision, limited in another sense. It might be argued that the decision to strike down the trust means that the members of the order are unlikely to be able to continue undertaking their activities for as long or as extensively as would have been the case if the trust had been upheld. In their decision regarding the Church of Scientology, the Charity Commissioners suggested that, to the extent that a decision failing to confer a financial benefit on a religious organisation means that the reli-

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108 It might also be open to the trustee to argue unlawful interference with the right to freedom of expression under Article 10 of the Convention. However, owing to the constraints of space, I do not address that argument here.

109 On what constitutes a limitation of the right to manifest religion, see generally: Evans, n 101 above, Chapters 6 and 7; Edge, *Religion and Law*, n 100 above, 55–61.

110 n 60 above.

111 See text to n 68 and following.

112 Although it might be possible to make this argument if, for example, as a direct consequence of the trust being struck down, the order will have to disband.

gious activities of the organisation will be curtailed, it might be possible for the organisation to argue that the decision is incompatible with its Article 9 right.<sup>113</sup> The nuns might be able to make something of this view of the Charity Commissioners in arguing that their Article 9 right has been interfered with unlawfully. In making this argument, the nuns will face difficulties of the type that I alluded to above when discussing the hypothetical modern-day *Thornton v Howe*. But if the argument is successful, judicial stalemate will ensue once again.

In the hypothetical modern-day *Gilmour v Coats*, even if the nuns are unsuccessful in arguing that the decision is incompatible with their Article 9 right, they may nonetheless argue that, under Article 14, they have been discriminated against on the ground of religion. Put shortly, their argument would be that a financial benefit, in the form of putative trust property, has been denied to them on the basis that they carry out their religion in private, that similar financial benefits are permitted to other religious groups that carry out their religion in public, and that this constitutes discrimination on the ground of religion. The argument would be strengthened by the fact that Article 9 explicitly refers to the freedom 'in community with others', and in 'private', to manifest religion in matters of 'worship', 'practice' and 'observance'. This seems to contemplate the activities of Carmelite nuns. An argument based on discrimination, just like an argument based on Article 9, would face difficulties. Differential treatment is acceptable so long as it has an objective and reasonable justification,<sup>114</sup> and in their decision about the Church of Scientology, the Charity Commissioners stated their view that the public benefit test was such a justification.<sup>115</sup> However, it has been pointed out that in their decision the Charity Commissioners did not supply detailed reasons for that view.<sup>116</sup> It therefore appears likely that the matter will arise for consideration in future cases. A successful appeal based on Article 14 of the Convention will once again generate a judicial stalemate: the only finding available to the lower court on the question of public benefit will have led that court to a decision that discriminates on the ground of religion and is therefore unlawful under the Human Rights Act.

Arguably, the Human Rights Act provides a tool for breaking out of the stalemate. Section 6(2)(a) states that a public authority has acted lawfully if, 'as the result of one or more provisions of primary legislation, the authority could not have acted differently', even if the decision of the authority in question was inconsistent with a Convention right. The Charities Act makes clear that a charitable purpose must be for the public benefit and that the question of public benefit is to be determined without applying a presumption.<sup>117</sup> It might be argued that a court which strikes down a trust for religious purposes because there is no evidence of tangible public benefit could not have acted differently given the provisions of the Charities Act. And if this is the case, an appeal against the decision of such a court based on human rights grounds will fail. If such an argument were accepted by an appellate court, it would break the stalemate that would be generated when the

113 Co.S, n 9 above, 10.

114 *Belgian Linguistic Case (No 2)* (1968) 1 EHR.R. 252.

115 Co.S, n 9 above, 11, 39.

116 Edge and Loughrey, n 28 above, 60–61.

117 Charities Act 2006, s 2(1)(b) and s 3.

only finding on the question of public benefit available to a court has led to a decision that is incompatible with a Convention right.<sup>118</sup> However, the argument contains a *non sequitur*. From the fact that the Charities Act requires a court to make a finding of public benefit and prohibits the application of a presumption as a fact-finding tool, it does not follow that the Charities Act necessarily requires the court to evaluate the purposes of a trust for religious purposes based on evidence of only tangible public benefit. Nor does it follow that the Charities Act necessarily requires a court to strike down a trust where there is no such evidence. It would be consistent with the Charities Act for a court to adopt, say, the technique of deference in a case on a trust for religious purposes. In light of this *non sequitur*, it simply cannot be asserted that a court that strikes down a trust for religious purposes because there is no evidence that carrying out those purposes will benefit the public in a tangible way 'could not have acted differently' because of the provisions of the Charities Act.

### CONCLUSION

As we have seen, once the presumption of public benefit is removed from the law, possible approaches to the question of public benefit that may be drawn from the existing case law on trusts for charitable purposes will not be problem-free in their application to cases on trusts for religious purposes. Moreover, human rights jurisprudence seems to offer a way forward to judicial stalemate in some such cases and may therefore add new problems to existing ones. The extent to which this is a concern depends on which of two views one holds. First, it might be thought that trusts for religious purposes in respect of which there is no evidence of tangible public benefit ought to be struck down and that the removal of the presumption of public benefit from the law now ensures that this will happen. The holder of this view will think it appropriate that the range of religious purposes that are regarded as charitable in law will surely contract in the future.<sup>119</sup> Secondly, it might be thought that all trusts that advance religion should be upheld irrespective of whether there is evidence that carrying out their purposes will generate tangible public benefit. This second view appears to be consistent with the approach to the question of public benefit in the Irish Charities Bill 2007, which retains a presumption of public benefit for trusts for religious purposes.<sup>120</sup> The holder of the second view is likely to be concerned that it appears there will be no problem-free way of upholding some trusts for religious purposes once the presumption of public benefit has been removed from the law. It remains to be seen which of these two views English courts will adopt in future cases.

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118 It might, however, lead the appellate court to declare, under section 4 of the Human Rights Act, that the Charities Act is incompatible with a Convention right. This would bring about a stalemate of a different kind.

119 For arguments that religious purposes should not be regarded as charitable, see A. W. Lockhart, 'Case Comment' (1984-7) 5 *Auckland University Law Review* 244; Edge, *Religion and Law*, n 100 above, 111.

120 n 85 above. It is also consistent with the view that trusts for religious purposes ought to be exempt from the public benefit test: see F. H. Newark, 'Public Benefit and Religious Trusts' (1946) 62 *LQR* 213; Brady, n 75 above.