CLAANZ paper

Wellington 11 April 2019

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Public benefit – how to prove it?

In this paper, I pick up from the paper presented by Justice Ellis to this conference last year where Her Honour emphasised the importance of evidence in charity cases.[1]

As a preliminary matter, I note that, in most cases, the onus will be on the party claiming to be a charitable entity to prove it. Certainly in Australia, all revenue statutes place a burden of proof on the taxpayer.[2]

The general rule of proof is that all facts in issue or relevant to the issue in a given case must be proved by evidence, testimony, admissible hearsay, documents, things or relevant facts. Two exceptions to the rule are that no evidence is required of facts that are formally admitted by the parties or of which judicial notice is taken.[3]

In this paper, I explore the concept of proving public benefit in charity cases and the role of judicial notice in proving public benefit. I note that an important aspect of the requirement to prove public benefit is the so-called "presumptions" of public benefit in relation to one or more of the four heads of charity.[4] However, the operation and scope of these presumptions is beyond the scope of this paper.

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[1] Justice Rebecca Ellis, 'A View from the Bench' (Presented at the Perspectives on Charity Law, Accounting and Regulation in New Zealand conference, Charity Law Association of Australia and New Zealand in conjunction with Chartered Accountants Australia and New Zealand, Wellington, 27 April 2018) ('Ellis Paper').

[2] See, for example, ss 98 and 110 of the *Taxation Administration Act 1997* (Vic).

[3] Megan Hoey, 'The High Court and Judicial Notice: *Woods v Multi-Sport Holdings Pty Ltd*' (2002) 27 (3) *Alternative Law Journal* 130, 130–131.

[4] See, for example, the statement of Lord Wright in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 42 ('*National Anti-Vivisection Society*'): 'The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be prim facie assumed unless the contrary appears'. This has been called into question by various commentators such as Peter Luxton, in 'Public Benefit under the Charity Commission: A Three Part Invention' (2009) 11 *Charity Law and Practice Review* 19.

One of the most quirky charity cases is *Re Pleasants*.[5] The wonderful testator in that case had left money "to provide a pennyworth of sweets each for all boys and girls below the age of 14 resident within the parish." Despite a faint argument that, in the context of the will, the testator meant the gift to be only for those children attending school, and thus the gift was one to advance education, the court held that gift was not charitable. However, Russell J, as he then was, said:

> The gift to provide prizes for the best-kept gardens and cottages, however was one to promote a rivalry, the result of which would be an improvement of horticulture and good housewifery. Such a gift was a good charitable gift, as it was one for the benefit of the community.[6]

There did not appear to be *any* evidence led in the case as to *why* the gift was for the benefit of the public except perhaps that it could be inferred from the reference to the promotion of horticulture.[7]

In the *Williams' Trustees* case,[8] Lord Simonds pointed out that not every object of public utility must necessarily be a charity. Some may be, and some may not be. *Williams* concerned a trustee with objects to promote Welsh interests in London by social intercourse. The activities of the club included badminton and table tennis, a weekly social and dance, a music club and whist and bridge drives.

Lord Simmonds noted that while it was claimed that the objects were of benefit to the community, it was *not* alleged that the trust was beneficial in a way which the law regards as charitable. Therefore he held that the case *had* to fail as the trustees had addressed only one of the two stages of the test.

It has been said that the somewhat circular requirement that to be charitable, a purpose must be beneficial in a way which the law regards as charitable, reflects and restates the requirement that the purpose must be within the spirit and intendment of the preamble.[9]

In the *National Anti-Vivisection Society* case,[10] the House of Lords considered whether a society formed for the suppression of vivisection was charitable. Lord Simonds noted that, even in the case of the first three heads of charity, the overriding question remains – is it for the public benefit? This question is to be

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[5] *Re Pleasants* (1923) 39 TLR 675 ('*Re Pleasants*').

[6] *Re Pleasants* 675.

[7] *Incorporated Council of Law reporting (Qld) v Commissioner of Taxation* [1967] 125 CLR 659, 669 ('*ICLRQ*').

[8] *Williams' Trustee v IRC* [1947] AC 447 ('*Williams*').

[9] *Queenstown Lakes Community Housing Trust* per Mackenzie J at [48] ('*Queenstown Lakes*').

[10] *National Anti-Vivisection Society v IRC* [1948] AC 31 ('*National Anti-Vivisection Society*').

answered by the court forming an opinion upon the evidence before it. The test or standard by which the question is answered was articulated as follows:

> … it does not depend upon the view entertained by any individual – either by the judge who is to decide the question, or by the person who makes the gift … There is probably no purpose that all men would agree is beneficial to the community: but there are surely many purposes which everyone would admit are generally so regarded, although individuals differ as to their expediency or utility. The test or standard is … to be found in this common understanding.[11]

His Lordship was at pains to point out that, in determining whether a purpose was charitable, the Court must take into account any evidence of injury to the community, (even in relation to a purported gift for the relief of the poor). He said:

> If today a testator made a bequest for the relief of the poor and required that it should be carried out in one way only and the court was satisfied by evidence that that way was injurious to the community,[12] I should say that it was not a charitable gift, though three hundred years ago the court might upon different evidence or in the absence of any evidence have come to a different conclusion.

Whilst it is beyond the scope of this paper to trace all the cases dealing with public benefit, I note that in *Gilmour v Coats*[13] Lord Simonds again returned to this theme in holding that it had not been established that the trusts governing a gift to a community of cloistered nuns gave rise to the element of public benefit which is the necessary condition of legal charity.

The Trustees relied first and foremost on the Catholic belief in the intercessory value of prayer and secondly, on evidence given by Cardinal Griffin that the practice of religious life by the Carmelite nuns was a source of great edification to other Catholics. Lord Simonds attributed little weight to this evidence saying:

> But, my Lords … 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. But, then it is said, this is a matter not of proof

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[11] *National Anti-Vivisection Society* 73.

[12] His Lordship had in mind what we would now call welfare dependency issues.

[13] *Gilmour v Coats* [1949] AC 426 (‘*Gilmour*’).

> but of belief… The faithful must embrace their faith believing where they cannot prove: the court can act only on proof.[14]

So far as the claim of edification by example, Lord Simonds held that this was something too "vague and intangible" "indirect, remote, imponderable and … controversial" to satisfy the public benefit test.[15]

It has been said that the public benefit test is a qualitative test[16] but the question remains as to what sort of evidence is required to prove public benefit.

This question is not easily answered. Often the courts seek to resolve this issue by recourse to judicial notice. Judicial notice is a concept now formalised in the *Uniform Evidence Act*[17] which states that proof is not required about knowledge that is not reasonably open to question and is common knowledge in the locality in which the proceeding is being held or generally. The judge may acquire knowledge of that kind in anyway the judge thinks fit.

In the *ICLRQ* case, the issue was whether the publication of law reports was charitable. Barwick CJ referred to evidence that had been given by Professor Goodhart in the UK equivalent case at first instance[18] regarding the history of "judge-made" law. He held that this evidence was a useful summary of the development of the law reports and the place they occupy in the administration of the law. He held that the facts to which the professor referred were historical and of that notoriety which brought them within judicial notice. He went on to hold that the production of law reports was clearly beneficial to the whole community because of the universal importance of maintaining the socially sustaining fabric of the law.

The circular notion of the required public benefit is seen in the *ICLRQ* case where CJ Barwick referred to the "socially sustaining fabric of the law" as both the reason why the production of law reports was beneficial to the community[19] *and* as the reason why it was within the equity and the spirit and intendment of the preamble.[20]

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[14] Gilmour, 446.

[15] Gilmour, 446, 447.

[16] *Re Tennant* [1996] 2 NZLR 633, 638 per Hammond J.

[17] See, for example, s 144 of the *Uniform Evidence Act*.

[18] *Incorporated Council of Law Reporting for England and Wales v AG* [1971] Ch 626, 638-641.

[19] *ICLRQ* 668.

[20] *ICLRQ* 669.

Judicial notice also played an important part in the *VWL* case.[21] Victorian Women Lawyers argued that the court should take judicial notice of the disadvantage of women in society and of women practitioners in the legal profession. Justice French (as he then was) noted that this disadvantage could be characterised broadly as a "social fact" of which the Court was able to take judicial notice and said:

> The social fact propounded was the historical and persisting disadvantage of women in relation to their participation and career advancement within the legal profession. … I am prepared to take judicial notice of it. It informs a consideration of whether the VWL … met the public benefit requirement of the common law understanding of a charitable institution.

Following on from the *VWL* case, the issue of public benefit arose in the *Chamber of Commerce and Industry WA* case.[22] In that case the evidence tendered comprised around 4,000 pages. In addition, CCI led oral evidence from one of its senior staff members and tendered a book entitled "The CCI Story'. [23] Chaney J held that:

> Taken as a whole, the materials before the Tribunal support the view that the driving force of CCI's operations is the promotion of a strong business community in Western Australia.[24]
>
> In CCI's case there is no doubt that the organisation plays a significant role in support for the business community generally, and its constitutional objects are directed to that end.[25]

In stark contrast, in the *SA CCI*[26] case a similar entity to the CCI WA failed to establish that it was a charitable entity. In discussing the effectiveness of evidence, Justice Blue noted that:

> … usually the most probative evidence of the purpose of an activity will be evidence of its effect. In *Commissioner of Taxation v Word Investments Ltd*, Gummow, Hayne, Heydon and Crennan JJ said:

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[21] *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318 ('*VWL*').

[22] *Chamber of Commerce and Industry of Western Australia v Commissioner of State Revenue* [2012] WASAT 146 ('*CCI WA*').

[23] *CCI WA* [36].

[24] *CCI WA* [97].

[25] *CCI WA* [99].

[26] *South Australian Employers' Chamber of Commerce & Industry Inc v Commissioner of State Taxation* [2017] SASC 127 (31 August 2017) ('*SA CCI*').

> In *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* MacDermott J said:
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> "the charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than in its immediate and expressed objects."
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> Similarly, the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities.[27]

His Honour went on to note what evidence would (and would not) be relevant to ascertaining the purpose of an entity:

> … evidence of an institution's formal objects, activities, decision-making, transactions, financial position and performance, minutes of meetings and of other objective material is admissible to ascertain its purpose. Evidence of the internal thoughts and intentions of individual members or directors of the body not communicated to and shared by the members or board of the institution is not ordinarily admissible.[28]

Having regard to the evidence adduced in the case and the onus of proof, Justice Blue was not persuaded that the purpose of SA CCI was a charitable purpose of advancing trade and commerce but was rather the non-charitable purpose of advancing the interests of businesses in South Australia:

> Having regard to all of the evidence adduced, I find that the Chamber's primary purpose was to advance the interests of businesses in South Australia and that its purpose of advancing trade and commerce was secondary to that primary purpose. In any event, as the *onus of proof* lies on the Chamber, I am not satisfied on the evidence adduced that its dominant purpose in undertaking policy advocacy was to advance trade and commerce.[29]

In relation to the *CCI WA* case, and the apparently inconsistent decision reached in that case, his Honour said:

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[27] *SA CCI* [90] (Footnotes omitted).

[28] *SA CCI* [173].

[29] *SA CCI* [227].

> Without being privy to all of the evidence and arguments adduced in that case, the fact that Chaney J reached a different conclusion in respect of the WA Chamber to the conclusion I have reached in respect of the Chamber does not cause me to doubt my own conclusion. The Chamber fails not because it is not possible that policy advocacy activities by a chamber of commerce may be for the dominant purpose of advancing trade and commerce but rather because it has *failed to prove* that they are in the case of the Chamber.[30]…
>
> In conclusion … I find that on the evidence adduced the primary purpose of the Chamber's policy advocacy activities was the advancement of the interests of South Australian businesses. On the evidence adduced, I am not satisfied that the dominant purpose of the policy advocacy activities was the advancement of South Australian trade and commerce generally. The Chamber has *not discharged its onus of proof*.[31]

The issue of proving public benefit also arose in the *Grain Growers* case.[32] Grain Growers was an industry association of grain growers which claimed to be charitable on the basis that its purpose was to promote agriculture. The Chief Commissioner of State Revenue disputed this and claimed:

> It is accepted that as a matter of **generality** [emphasis in original] the promotion of agriculture may be charitable, but the manner in which the object is sought to be achieved needs to be looked at and where part of the manner/activities involve promotion of individual businesses, the [Chief Commissioner] contends that:
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> (a) The public benefit is too remote because at its core the entity is promoting individual businesses even if that might have a flow on effect to the community generally;
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> (b) However, in a given case, if **proved by evidence** [emphasis in original], the benefit may be sufficiently tangible and clearly definable to bring it within the fourth head of charity and to do so by the means by which the claimed public benefit is sought to be achieved. But in the absence of such

[30] *SA CCI* [233].

[31] *SA CCI* [237] (Emphasis added).

[32] *Grain Growers Limited v Chief Commissioner of State Revenue* [2015] NSWSC 925 (14 July 2015) ('*Grain Growers*').

> evidence, the Court is not in a position to conclude that public benefit has been established."[33]

The Chief Commissioner's submission was not accepted. Justice Black held that:

> The proposition that the promotion of agriculture is a charitable purpose has been accepted in the case law for a considerable period, on the basis identified in *Incorporated Council of Law Reporting of Queensland* … by reference to the "fundamental social quality" associated with agricultural activities. It seems to me that I can, *without specific proof*, infer that agricultural activity benefits society generally, and Australian agricultural activity benefits Australian society generally, and no evidence was led to suggest that the benefit that has previously existed in such activity has ceased to exist. There is also some evidence of the value of the grain industry to the Australian economy in Ms Garden's affidavit, including that Australia is a significant exporter of grains; there are approximately 24,000 grain farmers, of which approximately 18,500 are members of Grain Growers; and the Australian grains industry contributes approximately $15 billion to Australia's exports and approximately $26 billion to Australia's gross domestic product, presumably on an annual basis (Garden 27.3.2015 [13]–[18]).[34]

More recently, the Supreme Court of Victoria has relied on judicial notice to find that the Telecommunication Industry Ombudsman ('TIO') was a charitable institution.[35] In the *TIO* case, Croft J noted the submission that he should take judicial notice of the social fact that a telecommunications service provider – in particular the large providers such as Telstra, Optus and Vodafone – enjoys far greater bargaining power than a residential or small business consumer in the event of a dispute. He held:

> … it would have to be said that anyone would have led a very cloistered life in modern times not to appreciate the enormous importance of the telecommunications industry, both to business and to individuals, and the inevitable power imbalance that does exist between individual consumers and small businesses in dealing with corporations the size of the larger telecommunications service providers. These are matters which are clearly ones of which judicial notice should be taken.

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[33] *Grain Growers* [21].

[34] *Grain Growers* [27] (Emphasis added).

[35] *Telecommunication Industry Ombudsman v Commissioner of State Revenue* [2017] VSC 286 (1 June 2017) ('*TIO*').

In the *Rotary* case,[36] Croft J again took judicial notice of evidence given in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in order to recognise the need for charity law to evolve in light of an increasing need for ethical conduct on the part of businesses and professions. He said:

> … this material is directly relevant in the context of evaluating the ever evolving field of purposes which fall within the spirit and intendment of the Preamble. [37]

His Honour concluded that:

> Although the Although the promotion of ethics is plainly not a fifth head of charity and it is necessary that public benefit be established, it is not necessary that such public benefit be proved in a strict sense. In *Grain Growers Ltd v Chief Commissioner of State Revenue (NSW)* the "fundamental social quality" of the purpose sufficed to establish that the community would benefit from the pursuit of the purpose. Given that the Purpose is directed to members of the Applicant, such a fundamental social quality does not arise here. It is, however, sufficient that the benefit to the community be clear to the Court. On the basis of the preceding reasons—particularly the common sense position that the improvement of ethical standards amongst a group of business people and professionals will benefit the community—I am satisfied that the community does benefit from the Applicant's pursuit of the Purpose.[38]

Justice Ellis noted in her paper that the question of whether or not the entity exists for the requisite public benefit is "essentially a question of fact".[39]

She said that "ordinarily, Courts require facts to be established by proof. But it has long been accepted that *some* truths in relation to … public benefit are self-evident and, so, do not *need* to be the subject of additional (or traditional) proof." She referred to the *Scottish Burial case*,[40] where Lord Wilberforce noted (at 155) the respondents' argument that the Society had not shown "the necessary basis of

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[36] *Rotary Club of Melbourne v Commissioner of State Revenue* [2018] VSC 699 (29 November 2018) ('*Rotary*').

[37] *Rotary* [34].

[38] *Rotary* [40]. Croft J went on to find that the benefit to the community was indirect and consequential and thus insufficient to satisfy the public benefit test.

[39] Ellis Paper [8].

[40] *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 155-156 ('*Scottish Burial*').

fact and that the Society should have proved that their [burial] services were more inexpensive and more sanitary than normal methods of burial.

He held that all the Society had to show was that the provision of inexpensive and sanitary methods, and of cremation in particular, was for the benefit of the community. As to this he found that:

> "the facts speak for themselves" – the scale on which the company's services were resorted to clearly showed that they met a need of the public. And it can hardly be said that to meet a need of this character is not beneficial."

Again – we see the resort here to a form of judicial notice.

Justice Ellis cautioned about judges forming their own personal ideas about what might be of benefit to the public and said in some cases – particularly "value laden" cases such as Family First – where the analysis required can *only* be based on evidence.

In the *Family First*[41] case the court pointed out that establishing a public benefit has always been the hurdle for those whose primary purpose is solely to promote a cause.[42] Simon France J noted that advocacy is all [Family First] does[43] and referred to the decision of the Supreme Court in *Greenpeace*[44] where the court noted that advancement of causes will often, perhaps most often, be non-charitable.[45]

His honour referred back to the decision in *Molloy*[46] where the Court of Appeal observed that where the public issue being advocated for is one on which there is clearly a division of public opinion capable of resolution ... only by legislative action – this indicates that the Court cannot determine where the public good lies and that the issue is relevantly political in character.[47]

His Honour noted that there are purposes, the very advocacy for which will be regarded as charitable – namely the promotion of human rights and the protection of the environment. These are assessed as both being in the public benefit, and analogous to a cause previously recognised as charitable – the abolition of

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[41] *Family First New Zealand* [2018] NZHC 2272 [31 August 2018] ('*Family First*').

[42] *Family First* [51].

[43] *Family First* [48].

[44] *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 ('*Greenpeace*').

[45] *Greenpeace* [73].

[46] *Molloy v CIR* [1981] 1 NZLR 688 ('*Molloy*').

[47] *Greenpeace* [17].

slavery. The occasions where advocacy is itself a charitable purpose are, he noted, likely to be rare.[48]

His Honour concluded that the evidence in the case did not establish that the achievement of the goals of Family First would be a benefit to the community in the sense required by charity.[49]

In conclusion, I wonder if any evidence will ever be sufficient to prove public benefit without the aid of thousands of pages of evidence, judicial notice, or 'facts that speak for themselves' – particularly in cases where the purpose of the entity in question is pure advocacy and the public opinion on the merits of issue advocated for is divided.

The position in Australia might well be different. In *Aid/Watch*[50] the High Court held first, that there was no general doctrine which excluded political objects from charitable purposes[51] and secondly that communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is an 'indispensable incident' of the Australian constitutional system.[52] It followed that the generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty was itself a purpose beneficial to the community.[53] This leads to the conclusion (at least in relation to the first three heads of charity[54]) that advocacy in and of itself *can be* for the benefit of the community in Australia.

I note that the *Family First* appeal will be heard by the New Zealand Court of Appeal on 22/23 November 2019.

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[48] *Family First* [16].

[49] *Family First* [64].

[50] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] 241 CLR 539 ('*Aid/Watch*').

[51] *Aid/Watch* 557 [48].

[52] *Aid/Watch* 556 [44].

[53] *Aid/Watch* 557 [47].

[54] The plurality stated that "it is … unnecessary for this appeal to determine whether the fourth head encompasses the encouragement of public debate respecting activities of government which lie beyond the first three heads (or the balance of the fourth head) identified in *Pemsel* and, if so, the range of those activities": *Aid/Watch* 557 [48].