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**Achieving Charitable Status for Taxation Purposes:
A Review and Critique of
*CIR v Medical Council of New Zealand***

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I INTRODUCTION

This paper reviews and critiques the case of *CIR v Medical Council of New Zealand*¹. The case concerned the Medical Council of New Zealand, which was established under s 3 of the Medical Practitioners Act 1968.² The Council, which comprises of the Director-General of Health, the Deans of the Faculties of Medicine at the Universities of Auckland and Otago, eight medical practitioners appointed by the Governor-General and a non-medical practitioner, maintains a system of registration of medical practitioners, possesses disciplinary powers and also provides advice and statistical information to the Minister of Health.³ The Council is funded through annual levies paid by all medical practitioners. The practice of the Council has been to invest those fees until required.

The question before the courts was whether the Commissioner of Inland Revenue was correct in holding the Council liable for income tax for the 1989 and 1990 tax years or whether the Council was exempt by virtue of being a 'public authority' under s 61(2) of the Income Tax Act 1994 or, alternatively, as an institution established exclusively for charitable purposes under s 61(25) of the same Act.

This paper will be addressing the latter of these two issues as it caused a split of opinion. The 'public authority' argument, on the other hand, was unanimously rejected. Part II of this paper outlines the statutory and common law requirements for achieving charitable status; Part III summarises the Taxation Review Authority, High Court and Court of Appeal judgments; Parts IV, V, VI and VII critique the decisions on the basis of their approach to determining the purpose of the Council; the treatment of two English precedents; whether that purpose was charitable; and lastly whether the Council could be

¹ *Medical Council of New Zealand v CIR* (1993) 18 TRNZ 73; *CIR v Medical Council of New Zealand* (1995) 20 TRNZ 231; *CIR v Medical Council of New Zealand Unreported*, 20 December 1996, Court of Appeal, CA 1/96.

² The Council was originally established under the Medical Practitioners Act 1950, and presently carries out its work under the Medical Practitioners Act 1995. However for the purposes of this case the 1968 Act was the relevant one.

³ The non-medical practitioner member was added by an amendment to the Act in 1982.

considered exclusively charitable; and Part VIII will conclude that, while the Court of Appeal correctly came to the decision that the Council should be exempt from income tax under s 61(25), this conclusion was reached through faulty reasoning.

II REQUIREMENTS FOR GAINING CHARITABLE STATUS

A *Income Tax Legislation*

The requirements of charitable status have long been the topic of much discussion. One of the main reasons for this is the financial advantages, both direct and indirect, that charitable status brings with it.⁴ The primary benefit is, of course, tax exemption under s CB 4(1)(c) of the Income Tax Act 1994, or s 61(25) of the 1976 Act which was the applicable Act for the case under discussion in this paper.

Section CB 4(1)(c) lays out that:⁵

The following incomes shall be exempt from tax ... income derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for *charitable purposes* and not carried on for the private pecuniary profit of any individual.

'Charitable purposes' is then defined in s 2 as including, "... every charitable purpose, whether it relates to the relief of poverty, the advance of education or religion, or any other matter beneficial to the community."⁶ This definition is a direct reference to Lord MacNaghten's famous fourfold classification of charitable purposes laid out in *Commissioners for Special Purposes of Income Tax v Pemsel*.⁷ Therefore to come under the exception of s CB 4(1)(c) a body must not only show that it is not carried on for the

⁴ Advantages include rebates for those making donations under s KC 5(1)(aa) of the Income Tax Act 1994 as well as exemptions under the s 18 of the Stamp and Cheque Duties Act 1971.

⁵ Income Tax Act 1994 (emphasis added).

⁶ Above n 5.

⁷ [1891] AC 531, 583. It is accepted that s 2 does not alter the definition of 'charity'. See *The Laws of New Zealand* (Butterworths, Wellington, 1992) vol 4, Charities, para 209, p242; *Molloy v CIR* [1981] 1 NZLR 688, 691, (1981) 5 TRNZ 1, 4; *Educational Fees Protection Society Inc v CIR* [1992] 2 NZLR 115, 118.

private pecuniary profit of any individual, but it must show that it satisfies the requirements of the general law of charitable status, as discussed below.⁸

It must be noted from the outset that a definition of 'charitable' can also be found in the Charitable Trusts Act 1957. However being found to be 'charitable' under that Act does not automatically mean that the trust or body is charitable for taxation purposes.⁹ For taxation purposes the Inland Revenue Department makes a separate decision in regard to 'charitable status'.

The fact that separate approval must be given by the Inland Revenue Department emphasises that, due to the financial consequences which flow from charitable status, it is not something which is given lightly. Just as taxation is revenue for the government, exemption from taxation is effectively indirect expenditure by the government and hence should be given a comparable amount of consideration and weight to any other direct government expenditure. As Lord Bramwell put it in *Pemsel*, "to exempt any subject of taxation from a tax is to add to the burdens on taxpayers generally."¹⁰

B. General Law

Professional bodies such as the Medical Council of New Zealand do not have any particular statutory provisions or common law rules pertaining to them alone but instead must satisfy the general law like any other trust or body.¹¹

Essentially there are three fundamental hurdles to overcome to achieve charitable status. An institution must show it has:

⁸ It was accepted from the start by all the judges in the Court of Appeal, including the minority, that the Medical Council was not carried on for private pecuniary gain of any individual and that the real issue was whether it could be said that the Council was established for charitable purposes.

⁹ IRD Taxation Info Bulletin, Volume Four, No. 7 (March 1993) 10.

¹⁰ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 566.

¹¹ CEF Rickett, *Professional Associations and Charitable Status* [1997] NZLJ 49, 49.

1. a purpose within the spirit and intendment of the Preamble of the Statute of Elizabeth I with reference to Lord MacNaghten's classifications,¹²
2. a purpose which benefits the public or a substantial section of the community;
3. a purpose which is exclusively charitable.

1. *Preamble of the Statute of Elizabeth I*

The Preamble to the Statute of Elizabeth I features an extensive list of charitable purposes from the repair of bridges and churches to the marrying off of poor maids. While Lord MacNaghten in 1891 was simply attempting to illustrate that those purposes seem to fall under four main headings, his words have become the fundamental test of what a charitable purpose is.¹³

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

2. *Public Benefit*

The second prerequisite is public benefit. While it is mentioned in Lord MacNaghten's judgment only in regard to the fourth head, Somers J stated in *Molloy v CIR*¹⁴, "... it is beyond dispute that such an element is a necessary prerequisite for valid charitable purposes at least under the second and third head..."¹⁵ The first head, relief of poverty, is presumed to be naturally beneficial to the public.

It is not necessary to benefit the *whole* of the public. Rather, a section of the community will suffice.¹⁶ In fact in the case of *New Zealand Society of Accountants v CIR*¹⁷

¹² Charitable Uses Act 1601; above n 10.

¹³ Above n 10, 583.

¹⁴ [1981] 1 NZLR 688, (1981) 5 TRNZ 1.

¹⁵ Above n 14, 695 and 8.

¹⁶ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, [1951] 1 All ER 31. The group cannot be ascertained by contract or blood.

¹⁷ [1986] 1 NZLR 147.

Richardson J broke the requirement down into two questions: firstly, whether there is a benefit; and secondly whether the class of persons eligible to benefit constitutes the public or a section of the public.¹⁸

3. *Exclusiveness*

The third requirement is that the body must be established 'exclusively' for charitable purposes. This does not mean that a body may have *no* non-charitable purposes. They may, as long as it is not an independent purpose but rather is secondary or incidental to the charitable purpose.¹⁹ Or put in negative terms:²⁰

If an association has two purposes, one charitable and the other not, and if the two purposes are such and so related that the non-charitable purpose cannot be regarded as incidental to the other; the association is not established for charitable purposes only.

Therefore rather than being a black and white matter, the exclusiveness requirement can be seen as placing bodies on a continuum, as done by Picarda.²¹ At one extreme the charitable purpose is the sole purpose and at the other, the non-charitable purpose is the sole purpose.²² In between lie bodies with mixed purposes, some falling on one side of the line and some on the other depending on which purpose can be described as predominant and which as incidental.²³

¹⁸ Above n 17, 152.

¹⁹ *CIR v New Zealand Council of Law Reporting* [1981] 1 NZLR 682, 684, (1981) 4 TRNZ 321, 323; *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, 397, [1953] 1 All ER 747, 753, [1953] 2 WLR 625, 633; *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631, 657; *Oxford Group v IRC* [1949] 3 All ER 537, 544.

²⁰ *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, 397, [1953] 1 All ER 747, 753, [1953] 2 WLR 625, 633.

²¹ H Picarda *The Law and Practice Relating to Charities* (2nd ed, Butterworths, London, 1995) 212; see above n 11.

²² Above n 21; above n 11.

²³ Above n 22.

III SUMMARY OF JUDGMENTS

Against this background of the law relating to charitable status, the case of *Medical Council of New Zealand* was decided.

A Taxation Review Authority Decision

Prior to reaching the Court of Appeal the case came before the Taxation Review Authority and then the High Court. As well as the application of the general law outlined above, the court was faced with the question of precedent. Counsel for the Commissioner argued that the present situation was indistinguishable from two English cases, *General Medical Council*²⁴ decided in 1928 and *General Nursing Council*²⁵ in 1959. These cases, like *Medical Council of New Zealand*, involved the charitable status of councils which regulated the medical profession. In both instances the purposes for which they were established failed to satisfy the requirements of charitable status in the eyes of the court. The Commissioner argued that, in light of these English precedents, the Medical Council of New Zealand could *not* be found to satisfy s 61(25). The Council, on the other hand, submitted that not only were the cases distinguishable but also inappropriate to follow.

Willy J held that a body's purposes are to be ascertained from constituting legislation and, additionally, if the legislation is unclear, with regard to the activities of the body.²⁶ He found the objects of the Council to be to ensure that the public received medical services from only those qualified to do so and to assist the Minister of Health in discharging their public duties.²⁷

²⁴ *General Medical Council v IRC* [1928] All ER Rep 252.

²⁵ *General Nursing Council for England and Wales v St Marylebone Borough Council* [1959] AC 540, [1959] 1 All ER 325, [1959] 2 WLR 308.

²⁶ *Medical Council of New Zealand v CIR* (1993) 18 TRNZ 73, 93. However Willy did not consider it necessary to revert to the activities in this case.

²⁷ Above n 26, 99.

In deciding whether those objects were charitable Willy J did not consider himself bound by *General Medical Council* or *General Nursing Council*, instead stating that those cases could not stand with later decisions.²⁸ Willy J went on to hold that the purposes were of benefit to the public, and that any benefits to the medical profession, such as ensuring only qualified doctors could compete with those who had already obtained the necessary qualifications, were ancillary to the main object of the legislation.²⁹ The Council therefore satisfied s 61(25) and was exempt from tax.

B High Court Decision

The matter was subsequently appealed to the High Court. McGechan J also chose to accept the Council's argument that the approach in *General Medical Council* and *General Nursing Council* was not consistent with recent English and New Zealand cases which indicate a trend towards looking at the ultimate benefit of an institution, when determining its purpose, as opposed to its immediate functions. Subsequently he also accepted that if *General Medical Council* and *General Nursing Council* were decided again today the result may be different.³⁰

C Court of Appeal Decision

Four judgments were delivered from the Court of Appeal. However for the purposes of this paper, only Gault, McKay and Thomas JJ's judgments will be considered as Keith J's judgment concentrated on the other issue before the court – whether the Medical Council of New Zealand was a 'public authority'.

²⁸ Above n 26, 98; *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] Ch 73, [1971] 3 All ER 1029, [1971] 3 WLR 853; *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631, [1952] 1 All ER 984; *Royal College of Nursing v St Marylebone Corporation* [1959] 3 All ER 663, [1959] 1 WLR 1077; *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, [1953] 1 All ER 747, [1953] 2 WLR 625. An indepth discussion of this development is given in Part IV of this paper.

²⁹ Above n 26, 99.

³⁰ *CIR v Medical Council of New Zealand* (1995) 20 TRNZ 231, 247.

1. *Judgment of Minority as delivered by Gault J*

Gault J, on behalf of himself and Richardson J, held that as the Medical Practitioners Act 1968 did not expressly specify the purposes of the Council, they were to be gleaned from the Act as a whole.³¹ He listed the functions, as agreed upon by all the court, as:³²

1. to keep a register of persons qualified in terms of the Act to be registered as medical practitioners,
2. to exercise disciplinary powers over registered medical practitioners,
3. to monitor and advise on medical education and supervise the training of persons conditionally registered,
4. to suspend and limit the right to practise of registered practitioners who may be under disabilities and,
5. to provide statistical information to the Minister of Health.

Gault J summarised these functions as regulating qualification for, and conduct in, the practice of medicine in New Zealand.³³ Moreover Gault J stated, “[t]o carry out these functions is to be regarded as the purpose for which the Council was established.”³⁴ Essentially Gault J was equating the functions of the Council with the purposes of the Council.

In coming to that view Gault J relied heavily on the already noted cases of *General Medical Council* and *General Nursing Council*. Unlike Willy and McGechan JJ, Gault J considered these cases to be indistinguishable from the present situation and felt obliged to follow them. What he considered to be particularly important in the cases was that when determining the purpose of a body the court should look to its functions rather than the broad object Parliament may have had in establishing it.³⁵ In fact, further on in his judgment, Gault J explicitly states, “[t]he purposes of a statutory body should be inferred not from the overall objective or motivation of the legislature but from its statutory

³¹ *CIR v Medical Council of New Zealand* Unreported, 20 December 1996, Court of Appeal, CA 1/96, 5 per Gault J.

³² Above n 31.

³³ Above n 31.

³⁴ Above n 31.

³⁵ Above n 31, 12 per Gault J.

functions.”³⁶ In particular the 1932 case of *Keren Kayemeth*³⁷ is cited as authority for this proposition that the motives of the founders are irrelevant.³⁸

In an attempt to justify why the Court of Appeal should be following these English precedents, Gault J pointed out that by using the words ‘charitable purpose’ in its income tax legislation New Zealand has effectively imported nearly four centuries worth of law from England from which we should be hesitant in straying.³⁹ Furthermore Gault J argued that following the wider approach of considering Parliament’s motive would open floodgates whereby all non-profit bodies established by statute could arguably achieve charitable status.⁴⁰

Gault J did not deny that the Medical Council’s function of registration ultimately led to public benefit but preferred to consider registration as the purpose or end, and any public benefit as simply a consequence of that purpose.

Having determined the Council’s purpose Gault J then found that the Council failed at the first hurdle to achieving charitable status, as he did not view registration as a charitable purpose.

2. Judgment of McKay J

The majority delivered two judgments in regard to the charity issue, the first of which was from McKay J. McKay J stated early on that it was common ground between the parties that the purposes for which a statutory body is established are to be ascertained

³⁶ Above n 31, 13 per Gault J.

³⁷ *Keren Kayemeth Le Jisroel Ltd v IRC* [1932] AC 651, [1932] All ER Rep 971.

³⁸ Above n 31, 12 per Gault J.

³⁹ Above n 31, 12 per Gault J.

⁴⁰ Above n 31, 13 per Gault J. Gault J mentions, as examples of such non-profit bodies, the Real Estate Licensing Board (established under the Real Estate Agents Act 1976) and the Chiropractic Board (established under the Chiropractors Act 1982).

from the construction of the constituting legislation.⁴¹ However McKay J refused to equate the immediate functions with the purpose saying, “[m]y reading of the Act leaves me in no doubt that the purpose of the statute and the purpose of the registration system is the protection of the public.”⁴² Therefore registration was not an end in itself but merely a mechanism by which the desired end or purpose was achieved.⁴³

McKay J found the English precedents to be unpersuasive and therefore declined to follow them. In particular he questioned the correctness of the rule which the minority had taken from the case: “I do not think the case can be regarded as requiring the purpose of an institution to be judged in all cases from its immediate function, without regard to the purpose of that function...”⁴⁴

Having determined the Council’s purpose, the next question before McKay J was whether that purpose was charitable or, in other words, within the spirit and intendment of the Statute of Elizabeth I. McKay J, relying on *Incorporated Council of Law Reporting*⁴⁵ and the *Scottish Burial*⁴⁶ case, held that while at first courts required an analogy with an object specified in the preamble in order for the object before them to be charitable, the point had now been reached where few objects which are for the benefit of the public rather than individuals are held to be outside the spirit and intendment of the Statute and therefore it is pointless to continue requiring analogies.⁴⁷ Based on this

⁴¹ Above n 31, 5 per McKay J.

⁴² Above n 31, 7 per McKay J.

⁴³ Above n 31, 7 per McKay J.

⁴⁴ Above n 31, 15 per McKay J.

⁴⁵ *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] 1 Ch 73, [1971] 3 All ER 1029, [1971] 3 WLR 853.

⁴⁶ *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138, [1967] 3 All ER 215, [1967] 3 WLR 1132.

⁴⁷ Above n 31, 8 per McKay J; Also see above n 46, 147, 218 and 1135.

McKay J was confident that the protection of the public through controlling the quality of medical and surgical services fell within the Statute.⁴⁸

McKay J did not find favour with the Commissioner of Inland Revenue's argument that the present situation was analogous and indistinguishable from *General Medical Council* and *General Nursing Council*. Again McKay J did not feel compelled to follow these analogies, stating, "in applying the 'spirit and intendment' of the preamble ... it is important to be guided by principle rather than a detailed analysis on particular cases."⁴⁹

Having satisfied the first requirement of constituting a charitable purpose, McKay J also considered there was little question that the purpose was also of public benefit and exclusively charitable. So while Gault J considered that the sole purpose of the Council was the non-charitable one of registration, McKay J considered the sole purpose to be the charitable one of public benefit through regulation of medical practitioners.

3. Judgment of Thomas J

Thomas J's judgment went further than that of McKay J. He considered the issue before the court as, "whether the purpose for which the Council is established are the statutory functions it is to perform under the Act or the purposes of those statutory functions."⁵⁰

From the outset it is clear Thomas J was looking for a way in which to find the Council charitable so as to avoid what he considered would be absurd consequences if they were *not* charitable. Thomas J stated that, as the Council's finances are based on fees which are merely meant to cover costs, it was Parliament's clear intention that the council be self-sufficient yet non-profit making. To make any possible surplus taxable would encourage

⁴⁸ Above n 31, 9 per McKay J.

⁴⁹ Above n 31, 16 per McKay J.

⁵⁰ Above n 31, 7 per Thomas J.

the Council to ensure any excess funds were spent by the end of the financial year or to possibly lessen the fees charged on members.⁵¹

In order to arrive at a favourable outcome for the Council, Thomas J framed the Medical Council's purpose on wide grounds rather than on its immediate functions: "[t]he functions became the administrative means by which Parliament furthered its objective of protecting and promoting the health of the community."⁵² Therefore registration was simply the means by which Parliament's wider objective was achieved.

As for *General Medical Council* and, in particular, *General Nursing Council*, Thomas J accepted that any House of Lords' decision should be respected, but he did not think such decisions should be followed if based on unsatisfactory reasoning or if they had been subsequently overtaken by further developments in the law.⁵³ In sum Thomas J considered the emphasis placed on immediate statutory functions unjustified and could not see why looking to Parliament's ultimate object to glean a purpose was condemned.⁵⁴

Thomas J set out five reasons why he considered it more appropriate to look at the wider purpose. The first of these was that, given the tax consequences of charitable status, a finding in line with Parliament's intention would give a result which would avoid absurd consequences.⁵⁵

Secondly, Thomas J argued that that unless courts take a step back and look to the substantive purpose, means become confused with ends. Thomas J considered as

⁵¹ Above n 31, 8 per Thomas J.

⁵² Above n 31, 4 per Thomas J.

⁵³ Above n 31, 6 per Thomas J.

⁵⁴ Above n 31, 6 per Thomas J.

⁵⁵ Above n 31, 8 per Thomas J.

ridiculous a finding that the Medical Council was established to implement a system of registration for the purpose of registration.⁵⁶

Next Thomas J made an analogy with a charitable body established by trust deed. In such a situation a court would not look to the functions and powers of the trustees to ascertain the purpose of the trust, but rather to the trust's objectives.⁵⁷

Fourthly if functions are equated with purpose, a finding of charitable status could turn simply on the particular words the drafter chooses to use rather than the substance behind the words.

Last, but not least, Thomas J argued that this wide approach has already been adopted by the New Zealand Court of Appeal in the 1981 case of *New Zealand Council of Law Reporting*⁵⁸ which followed the law reporting cases of England and Queensland.⁵⁹ In *Incorporated Council of Law Reporting* the purpose of the Council was found to be to further the development and administration of the law and to make it known and accessible to all members of the community. Thomas J considered that this represents a shift to viewing a body's purpose in terms of its ultimate objects. Applying this approach to the Medical Council of New Zealand, the purpose of the Council is to further the health of the community, through providing acceptable minimum standards of practice in medicine, by carrying out the registration and discipline of medical practitioners.⁶⁰

⁵⁶ Above n 31, 9 per Thomas J.

⁵⁷ Above n 31, 9 per Thomas J.

⁵⁸ *CIR v New Zealand Council of Law Reporting* [1981] 1 NZLR 682, (1981) 4 TRNZ 321.

⁵⁹ Above n 45; *Incorporated Council of Law Reporting of the State of Queensland v FCT* (1971) 125 CLR 659.

⁶⁰ Above n 31, 12 per Thomas J.

Like McKay J, Thomas J found this purpose to be charitable. He agreed that it was not necessary that an object be analogous to one in the preamble to be charitable. Moreover he also considered this charitable purpose to be the sole purpose of the Council.

Hence the minority, Gault and Richardson JJ, placed the Council at one extreme of Picarda's continuum with a non-charitable purpose as the sole purpose, while McKay, Thomas JJ, with Keith J concurring, placed the Council at the other end of the continuum with the charitable purpose being the sole purpose.⁶¹

IV CRITIQUE – DETERMINATION OF PURPOSE

In the following paragraphs the writer attempts to show how although the result may have been the correct one, in reality none of the judgments, excepting perhaps McGechan J's High Court judgment, is based on particularly satisfactory reasoning.

Clearly the biggest contention between the majority and minority was the appropriate way to determine the Medical Council's purpose. This is of the foremost importance as the answer to the first question of what the purpose of the body is has ramifications on how the other questions are answered. In other words, the fact that the majority and minority came to different conclusions about the Council's purpose, meant that they also went on to reach different conclusions as to whether their particular purpose was charitable, which furthermore placed their respective conclusions at opposite ends of Picarda's scale. Prima facie it seems remarkable that the court could come to such different findings, but it is more understandable once it is recognised that this schism results from a difference of opinion as to what the appropriate test is in the first instance.

Given the flow-on effect for the other fundamental requirements of charitable status it is, of course, preferable that the court agrees on the first question to ask. This case presented an opportunity for the Court of Appeal to cement what the appropriate

⁶¹ Above n 11, 52.

approach was for New Zealand. Instead, however, the three-two split has left a substantial amount of uncertainty in what is already a difficult area.

There are three main criticisms the writer wishes to make in regard to determination of the Council's purpose – firstly that the Court of Appeal, and in particular the minority, failed to recognise that the law had shifted from a narrow test of purpose to looking at purpose in wide terms; secondly that a wide view of purpose is in line with policy considerations; and thirdly that Thomas J, of the majority, has unjustifiably introduced parliamentary intention as a factor in determining purpose.

A. Lack of Attention Paid to Development of the Law

The writer considers there was a lack of attention by the Court of Appeal to the development of the law. *General Medical Council* and *General Nursing Council*, whilst persuasive, were not binding on the New Zealand Court of Appeal. It was essential for each of the judges to analyse the trend of the law since *General Medical Council* and *General Nursing Council* before deciding whether or not to follow them. Apart from Willy and McGechan JJ, and to a certain extent Thomas J, this was not done. The minority's judgment especially, can be faulted on this basis. By placing undue weight on the analogous English cases the minority effectively rested its decision on what was the accepted legal position in England in 1928 and 1959 rather than the more relevant position of New Zealand in the 1990's.

There have in fact been a number of relevant English and New Zealand decisions since *General Medical Council* and *General Nursing Council*, which have dealt with incorporated bodies similar to the Medical Council of New Zealand. Furthermore the writer agrees with McGechan J's comment that there are, "indications of some increasing liberality in the manner in which cases of this character should be approached."⁶²

⁶² Above n 30, 252.

1. English Cases

(a) *Royal College of Surgeons*⁶³

The first of these cases is the 1952 House of Lords decision of *Royal College of Surgeons*. The House of Lords reversed the decision of the Court of Appeal which had felt bound by a previous case on the Royal College in 1899 where the court had found the college to have two main objects, neither of which could be considered subsidiary to the other.⁶⁴ Due to one of these objects being non-charitable, the college was found to be non-charitable.

The House of Lords, however, chose to read the charters differently coming to the conclusion that any protection of the members of the college was an incidental and necessary consequence of the college carrying out its main object which was held to be the promotion and encouragement of the study and practice of the art and science of surgery.⁶⁵

For the purposes of this part of the paper the significant point to take from this finding is the fact that the majority couched the purpose of the college in such wide terms. In determining the college's object the judges agreed it was a matter of construing the constituent documents.⁶⁶ The operative part of the Charter contained the powers and duties of the body but it was expressly stated by Lord Morton that he could find "... no statement of the objects in the operative part of the document, although I do find various

⁶³ *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631, [1952] 1 All ER 984.

⁶⁴ See *In re Royal College of Surgeons of England* [1899] 1 QB 871.

⁶⁵ Above n 63, 659 and 998 per Lord Morton of Henryton; above n 21, 213; also see above n 63, 675 and 1007 per Lord Cohen. The dissenting judgment of Lord Cohen turned on the fact that the college was the descendent of a trade guild.

⁶⁶ Above n 63, 641 and 986 per Lord Normand.

provisions as to the means by which those objects are to be achieved.”⁶⁷ Instead he took the object of the college from one of the recitals of the Charter.

Royal College of Surgeons cannot therefore be taken as equating functions with purpose. Rather it is consistent with the argument of a growing trend towards considering the wider aim or ultimate benefit.⁶⁸

(b) *Royal College of Nursing*⁶⁹

Royal College of Nursing was decided just a couple of months after the *General Nursing Council* case in 1959. Citing the findings of *General Nursing Council*, Romer LJ conceded that the question of determining the main objects of a body rests on construction, rather than the activities of the body or “the results of its activities at second or third hand.”⁷⁰

However Romer LJ took a more liberal approach in applying the *General Nursing Council* reasoning, stating:⁷¹

The question cannot, however, be decided by taking the language in which a main object is expressed and by asking what that language means if construed by itself; the language has to be construed in its context and with reference to all other relevant provisions of the document.

Romer LJ considered the overall object of the Charter was to “promote the interests of the sick in all ways that efficient and extensive nursing can achieve”.⁷² Based on that, the

⁶⁷ Above n 63, 654 and 995 per Lord Morton of Henryton; also see 641 and 986 per Lord Normand; 664 and 1001 per Lord Tucker.

⁶⁸ In coming to their decision the House of Lords considered the case of *Institution of Civil Engineers v IRC* [1932] 1 KB 149, [1931] All ER Rep 454. Notably the object of the institution, in that case, was also couched in the wider terms of ‘to enlarge the knowledge of mankind in regard to mechanical science’. The Court of Appeal regarded the professional benefits accruing to members as subsidiary and incidental to this main object.

⁶⁹ *Royal College of Nursing v St Marylebone Corporation* [1959] 3 All ER 663, [1959] 1 WLR 1077.

⁷⁰ Above n 69, 666 and 1082.

⁷¹ Above n 69, 666 and 1082.

⁷² Above n 69, 668 and 1084.

words “the advance of nursing” in the college’s charter were interpreted to mean the provision of better nursing rather than the promotion of nurses’ interests. So whilst purporting to follow *General Nursing Council*, Romer LJ actually used what he considered the ultimate object of the college, or what Lord Keith would have considered “the results of its activities at second or third hand”, to interpret the more immediate objects.

(c) *Incorporated Council of Law Reporting for England and Wales*⁷³

The Court of Appeal case of *Incorporated Council of Law Reporting* was the one relied upon by Thomas J as evidence of the shift towards a more liberal approach to determining purpose. The Council carried out the function of preparing and publishing reports of judicial decisions in England.⁷⁴ Sachs LJ rejected the proposition that the court could and should only look to one particular clause of the Council’s memorandum of association, saying that it would be wrongly analysing the clause in a vacuum. Instead the courts should look at the “substance of what is being effected.”⁷⁵

This wide approach was reiterated by Russell LJ and Buckley LJ in reaching the conclusion that the purpose of the Council was the administration and development of the law by making the law known and accessible to all members of the community.⁷⁶

2. *New Zealand Cases*

There have been three relevant New Zealand cases addressing the subject in the last twenty years, all of which support the writer’s argument that the law has moved on from a bare analysis of the immediate objects.

⁷³ Above n 45.

⁷⁴ Above n 45, 73, 1029 and 853.

⁷⁵ Above n 45, 91, 1038 and 864.

⁷⁶ Above n 45, 104, 1048 and 877 per Buckley LJ; 87, 1035 and 865 per Russell LJ; 92, 1039 and 865 per Sachs LJ. Sachs LJ considered there to be a sole charitable purpose, namely “to provide essential material for the study of the law.”

(a) *New Zealand Council of Law Reporting*⁷⁷

The first of these is *New Zealand Council of Law Reporting*, involving the Council of Law Reporting, which was incorporated under the 1938 Act of the same name.⁷⁸ In coming to a determination of the purpose Richardson J said it was a matter of reading the Act as a whole. Moreover Richardson J stated, “[r]egard may be had to the circumstances in which the legislation was enacted, that is, the statutory setting.”⁷⁹ Through his concurrence with the narrow approach of Gault J taken in *Medical Council of New Zealand*, Richardson J seems to be retreating a little from his *New Zealand Council of Law Reporting* position.

(b) *Educational Fees Protection Society*⁸⁰

After *New Zealand Council of Law Reporting* was the 1992 case of *Educational Fees Protection Society*, shortly followed in 1994 by *Presbyterian Church Fund*.⁸¹

Educational Fees Protection Society involved an incorporated society which maintained a fund, taken from school fees, to be used for the continued payment of fees for children who had lost a parent.⁸² The idea was, of course, to ensure that the education of a child was unaffected by the death of a parent.⁸³

The court recognised that there were benefits accruing, not only to the children, but to the parents and school, in that the parents knew that if one of them were to die their child

⁷⁷ Above n 58.

⁷⁸ New Zealand Council of Law Reporting Act 1938.

⁷⁹ Above n 58, 323 and 684.

⁸⁰ *Educational Fees Protection Society Inc v CIR* [1992] 2 NZLR 115.

⁸¹ *Presbyterian Church Fund v CIR* [1994] 3 NZLR 363.

⁸² Above n 80, 115.

⁸³ Above n 80, 115.

would not have to shift schools; and the school could rely on the continuation of the payment of the fees.⁸⁴

Counsel for the Commissioner made an analogy between the fund and a life insurance scheme but, despite this, the court found the basic purpose was to provide education to children who would otherwise be disadvantaged socially, financially and emotionally, and that the benefits gained by the parents and school were “not sufficient to deprive the primary purpose of its charitable nature.”⁸⁵

*(c) Presbyterian Church Fund*⁸⁶

The 1994 case of *Presbyterian Church Fund*, concerned a fund which issued annuities to retired church ministers and contains a good discussion on determining purpose. Despite submissions that the court could not look beyond the trust deed, Heron J held, on the authority of *Baptist Union of Ireland (Northern) Corp Ltd v CIR*⁸⁷ that, “one is entitled to look at the purposes in terms of the natural and probable consequences rather than its immediate and expressed objects.”⁸⁸ Moreover Heron J considered it was a question of looking at the “overall picture and [seeing] the part played in it by this fund.”⁸⁹

3. *Overall Trend*

Since the cases of *General Medical Council* and *General Nursing Council* the law has clearly developed in both England and New Zealand. There has been a marked shift from a narrow to a wider test of purpose and accordingly the writer fully agrees with

⁸⁴ Above n 80, 126.

⁸⁵ Above n 80, 127.

⁸⁶ Above n 81.

⁸⁷ (1945) 126 TC 335.

⁸⁸ Above n 81, 370.

⁸⁹ Above n 81, 371.

McGechan J's comment that, "[t]here is no doubt the *General Medical Council* case of 1928 (and indeed the *General Nursing Council* case of 1959) has become something of a fossil."⁹⁰ Thus, not only was the minority in the Court of Appeal not bound to follow the two English precedents, but in light of this shift it was also inappropriate for them to do so.

B. Policy Considerations

There are also a couple of policy reasons, one of which was outlined by Thomas J, which the writer sees as cementing why this shift towards a wider view of a body's purpose should be seen as a welcome one.

The first of these is that a narrow view of purpose, like that taken by the minority, where functions are equated with purpose, gives rise to an arbitrary element in the process, whereby the drafter's choice of words takes precedence over the ultimate aim behind those words. Put another way, there is a danger that whether a particular organisation comes to fall on one side of the charitable status line or the other will be a matter of chance.

The narrow approach also encourages professional bodies to have drafters frame their constitutive documents in a particular way even though it may not reflect the substance of their organisation. For example, it would be advisable to create a short, broadly worded object clause rather than a whole series of objects to discourage a court from coming to the decision that the organisation has several purposes.⁹¹ Moreover, in the case of professional bodies, any reference to the interests of, or benefits accruing to, the members of an organisation would be avoided.

⁹⁰ Above n 30, 255.

⁹¹ A Samuels, 'Fiscal Relief for Professional bodies as Charities' (1963) 27 *Conveyancer and Property Lawyer* New Series, 469, 487.

C. *Parliamentary Intention*

The writer does not, however, agree with Thomas J's contention that the motives of Parliament should be legitimately taken into account in determining purpose. Not only is this assertion contrary to recent English and New Zealand cases but Thomas J, by arguing this, has also opened the way for the motive of the legislature to be argued to be an aid in determining purpose in future charitable status cases. Furthermore the writer suggests that the acceptance of the legislature's motive as a factor in determining the purpose of a statutory body does not sit well with the rejection of looking to the activities of a statutory body.

1. *Recent Cases*

There are numerous cases in favour of the argument that the motives of the founders are irrelevant.⁹² Of particular note is the English case *Incorporated Council of Law Reporting for England and Wales* and the two recent New Zealand cases *New Zealand Council of Law Reporting* and *New Zealand Society of Accountants*.⁹³

In *Incorporated Council of Law Reporting* both Sachs LJ and Buckley LJ addressed the question of motive, "[i]t is irrelevant to inquire what the motives of the founders were, or how they contemplated or intended that the council should operate."⁹⁴ In *New Zealand Society of Accountants* too Richardson J held that while the statutory setting was a relevant aid, the motives of the founders were not. Richardson J said that even though it was evident from Parliamentary debates that when the fidelity fund legislation was introduced there was considerable support for those who suffered through misappropriation of funds by lawyers, the characterisation of purposes must be

⁹² *Keren Kayemeth Le Jisroel Ltd v IRC* [1932] AC 651, [1932] All ER Rep 971; *Hoare v Osborne* (1864) 13 LJ Ch 586; *In re Delius, dec'd* [1957] Ch 299, [1957] 2 WLR 548.

⁹³ *New Zealand Society of Accountants v CIR* [1986] 1 NZLR 147.

⁹⁴ Above n 45, 99, 1043 and 872 per Buckley LJ.

determined by the scheme of the legislation.⁹⁵ Richardson J went on to reiterate that in *New Zealand Council of Law Reporting*.⁹⁶

2. Rejection of Activities Argument

The question of whether the activities of the Council were relevant to determining its purpose was addressed in the Taxation Review Authority and the High Court by Willy J and McGechan J respectively, but not in the Court of Appeal.

Before the Taxation Review Authority it had been argued, on behalf of the Council, that where the constituting documents are not clear, the activities of the body may be referred to.⁹⁷ Counsel relied, in particular, on *Molloy v CIR*⁹⁸ as authority where Somers J stated that where it is:⁹⁹

[n]ot indicate[d] with clarity which, if any, are the main or dominant objects ... [i]n such cases it is well settled that reference is to be made not only to the expressed objects but as well to the activities of the society.

Willy J accepted 'activities' as a legitimate aid but did not view referral to them as necessary in this particular case as clear evidence of the purpose of the Council could be ascertained in the statute itself.¹⁰⁰

McGechan J, on the other hand, knocked the 'activities' argument down early in his judgment saying that, while there is authority to allow reference to activities where non-statutory organisations are concerned:¹⁰¹

I am not prepared to allow activity to control statutory constitution. Whatever freedom may

⁹⁵ Above n 93, 148.

⁹⁶ Above n 58, 323 and 684.

⁹⁷ Above n 26, 93.

⁹⁸ [1981] 1 NZLR 688, (1981) 5 TRNZ 1.

⁹⁹ Above n 98, 693 and 6.

¹⁰⁰ Above n 26, 94.

¹⁰¹ Above n 30, 235. See also *Molloy v CIR* [1981] 1 NZLR 688; (1985) 5 TRNZ 1 and *Institute of Professional Engineers of New Zealand* [1992] 1 NZLR 570.

be allowed in case of non-statutory bodies, statutory bodies in the eye of the law can have no functions beyond those which their constituting statutes permit.

As mentioned, the Court of Appeal did not even consider the possibility of looking to the Council's activities, and therefore *Medical Council of New Zealand* can be seen as confining the consideration of activities to non-statutory organisations. After *Medical Council of New Zealand*, as pointed out by Rickett, charitable status is decided by applying the general requirements to the organisation's purposes which are determined by construction of the constitutive documents as well as, in the case of a non-statutory body, the activities of that body, and, in the case of a statutory body, the motives of the legislature.¹⁰²

However surely some of the same reasoning the High Court used, and the Court of Appeal accepted, for excluding reference to activities, equally applies to excluding reference to Parliament's motives. If, in the case of statutory bodies, looking at activities is inappropriate because the organisation only has the functions which the statute lays out, then looking at Parliament's motive is equally inappropriate because Parliament's intention is confined to what is expressed in the statutory wording.

D Recommended Approach

The writer therefore suggests that an approach more in line with the development of the law would have been for the Court of Appeal to have stated that, while the determination of purpose is primarily a matter of construction of the constitutive legislation, regard should be had to the wider substance of what is being established. However, that does not extend to separate consideration of Parliament's motive or the organisation's activities as opposed to their statutory functions. Rather, parliamentary intention and actual activities should be seen simply as further evidence of the purposes already ascertained from the documents themselves. Such an approach would still have enabled the court to come to

¹⁰² Above n 11, 54.

the decision that the main purpose of the Medical Council was to safeguard the health of the community through discipline and registration of medical practitioners.

V CRITIQUE - USE OF *GENERAL MEDICAL COUNCIL* AND *GENERAL NURSING COUNCIL*

This section of the paper will compare the minority and majority's respective use of the *General Medical Council* and *General Nursing Council* cases. While the previous section argued that the law had developed since these two cases, this section will look at the rule the minority and majority each took from the cases, questioning whether the cases actually contained any relevant principle which was applicable to determining the purpose of an institution.

Gault J, of the minority, and McKay J, of the majority, provide the most discussion on the two English precedents, but come to quite opposite conclusions as to what rule is laid down by these cases. The minority, as already stated, took from *General Medical Council* and *General Nursing Council* the point that, when determining a body's purpose, the focus is on the functions the institution was established to carry out rather than the broad object Parliament had in establishing it.¹⁰³ Whereas McKay J held that:¹⁰⁴

[i]t is difficult to discern from these judgments any clear principle of law which could be regarded as a persuasive precedent, other than the proposition that benefits to the public will not suffice if there are also objects of providing benefits to the profession.

The question is, of course, which of these two is an accurate summation of the principles in the two cases?

A *General Medical Council*

The General Medical Council, like the Medical Council of New Zealand, was a statutory body and was established under the Medical Act 1858. It carried out the

¹⁰³ Above n 31, 11 per Gault J; also see above part III C1.

¹⁰⁴ Above n 31, 11 per McKay J.

functions of keeping a register of qualified practitioners, overseeing medical studies examinations and publishing the 'British Pharmacopoeia'.

The writer does not agree with the minority's interpretation of the case. There is no express reference in any judgments as to how a court is to determine a body's purposes.¹⁰⁵ Rather, the real emphasis in the case was on the point that if the main purpose of an institution is to benefit the profession and the secondary purpose is to benefit the public then the institution cannot be held to be charitable.

Accordingly *General Medical Council* concerns, primarily, the third fundamental requirement of charitable status – exclusiveness. The case cannot, therefore, be regarded as a source of authority for how purpose is to be determined. Instead it only assists when considering the ramifications of such a determination in terms of the final requirement.

B General Nursing Council

The House of Lords case of *General Nursing Council* expressly approved the Court of Appeal decision in *General Medical Council*. This case, too, involved a statutory body which maintained a register, this time of nurses, and exercised powers with regard to the training and examination of nurses.

One of the issues in this case was whether the Council was charitable.¹⁰⁶ Again the issue of how to determine a body's purpose did not constitute a large part of the judgments, apart from that of Lord Keith. The minority quoted large tracts of Lord Keith's judgment. Of particular relevance is his statement that:¹⁰⁷

¹⁰⁵ See above n 24, 257. The exception to this is that Lord Hanworth MR seems to be suggesting that determination of purpose is a question of fact to be determined by the Inland Revenue Commissioners.

¹⁰⁶ The other issue in the case, which is irrelevant for the purposes of this paper, was whether the Council was concerned with the advancement of social welfare.

¹⁰⁷ Above n 25, 559, 333 and 318; see also above n 31, 10 per Gault J.

In my opinion, the only way by which the main objects of the appellant council can be ascertained is by looking at the objects expressed in the Act. It is by the language they used that Parliament has expressed its intention, and it is with the objects for which the council was immediately and directly constituted that we are, in my opinion, concerned, and not with the results of its activities at second or third hand.

Based on this, Lord Keith held the Council to have two objects – to maintain a register of nurses, and to make rules regulating the conditions of admission to the register.¹⁰⁸

However this was not the opinion of the whole of the House of Lords. Lord Cohen, when faced with a submission by counsel for the Commissioner that the only objects of the council were to keep the register, train nurses and conduct examinations, said:¹⁰⁹

I cannot take so narrow a view of the Act. Looking at it as a whole, I think there are two main objects, on the one hand, the enhancement of the qualities and status of nurses, and the other, the benefit and protection of the public, particularly of the sick.

Although obviously taking a wide view of the Council's purpose, Lord Cohen could not consider the enhancement of the qualities and status of nurses as an incidental purpose and therefore did not hold the Council to be charitable. Such an approach is clearly not in line with the minority's contention that *General Medical Council* and *General Nursing Council* are authority for the functions of a body to be its purpose.

The writer also agrees with a criticism made of some of the judgments by McKay J. McKay J points out that Lord Tucker, for example, said that the Council's objects, as opposed to its ultimate benefits, were not charitable, but fails to explain why the ultimate benefits should be irrelevant.¹¹⁰ This lack of clarity makes it difficult to ascertain any concrete rule from the case in regard to how to determine an institution's purpose.

Furthermore, support for this view can be gained from considering how *General Nursing Council*, in particular, has been treated in authoritative texts. McKay J pointed

¹⁰⁸ Above n 25, 559, 333 and 318.

¹⁰⁹ Above n 25, 557, 331 and 316.

¹¹⁰ Above n 31, 12 per McKay J.

out that a number of authorities on charities including *Tudor on Charities*¹¹¹ have referred to *General Nursing Council* solely for the proposition that if the main object of an institution is the benefiting of a profession the institution is not charitable even if the object has the consequence of benefiting the community.¹¹² Therefore the writer agrees with McKay J that there is no principle of law in *General Medical Council* and *General Nursing Council* which was relevant to the New Zealand Court of Appeal's determination of what the purpose of the Medical Council of New Zealand was.

VI CRITIQUE - WHETHER PURPOSE IS CHARITABLE

Having decided on the Council's purpose, the next question was whether that purpose is charitable. It was submitted that the Council fell under Lord MacNaghten's fourth head. Yet even in deciding whether to accept or reject this submission there was a difference of opinion as to approach.

A Treatment of Russell LJ's Test

The first matter of contention was that Thomas J, of the majority, followed Russell LJ's test in *Incorporated Council of Law Reporting* that objects beneficial to the community should be regarded as prima facie charitable: "I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the Statute..."¹¹³ The minority, on the other hand, questioned this saying that this test had not been accepted in Australia¹¹⁴ and that it could not confidently be said to be the law in England either.¹¹⁵ The writer is inclined to agree with the majority and will illustrate in this section why it was appropriate for the majority to use Russell LJ's test.

¹¹¹ SG Maurice and DB Barker *Tudor on Charities* (7th ed, Sweet and Maxwell, London, 1984).

¹¹² Above n 111, 6 and 51; Also see above n 21, 157; *Halsbury's Laws of England* (4th ed, Butterworths, London, 1993) vol 5(2), Charities, para 55, p55.

¹¹³ Above n 45, 88, 1036 and 862.

¹¹⁴ See *Brisbane City Council v A-G* [1979] AC 411, 422, [1978] 3 All ER 30, [1978] 3 WLR 299; above n 31, 4 per Gault J.

¹¹⁵ Above n 93, 157; above n 31, 4 per Gault J.

1. *The English Position*

Thomas J relied in particular on *Halsbury's Laws of England*, saying that Halsbury's "... makes it clear that ... objects beneficial to the public, or of public utility, are prima facie within that spirit and intendment and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law."¹¹⁶ Yet Thomas J failed to mention that Halsbury's makes this statement subject to reservations expressed in other cases.

Of most note, Dillion J in *Barralet v Attorney-General*¹¹⁷ said that he found it, "difficult to adopt [Russell LJ's] approach in view of the comments of Lord Simmonds in *Williams' Trustees v IRC*¹¹⁸." ¹¹⁹ Lord Simmonds had argued that, when deciding whether a purpose is charitable, it is turning the question upside down to start by considering whether it was for the benefit of the community. *Re Macduff*¹²⁰ and *Attorney-General v National Provincial Bank*¹²¹ were cited as authority for this.¹²² In the latter case Viscount Cave LC had held that:¹²³

Lord MacNaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and give to it a different meaning.

Based on these authorities Dillion J, in *Barralet v Attorney-General*, found the appropriate approach to deciding whether something was within Lord MacNaghten's

¹¹⁶ Above n 31, 13 per Thomas J; also see *Halsbury's Laws of England* (4th ed, Butterworths, London, 1993) vol 5(2), Charities, para 37, p39.

¹¹⁷ [1980] 3 All ER 918.

¹¹⁸ [1947] AC 447, [1947] 1 All ER 513.

¹¹⁹ Above n 117, 926.

¹²⁰ [1896] 2 Ch 466, [1895-9] All ER Rep 537.

¹²¹ [1924] AC 262, [1923] All ER Rep 123.

¹²² Above n 118, 455 and 518; above n 117, 926.

¹²³ Above n 121, 265 and 125.

fourth category was the analogy approach. Therefore the minority was correct in saying that Russell LJ's test could not confidently be said to be the law in England.

2. *The Australian Position*

Gault J, of the minority, also made mention of the 1979 Australian Privy Council case of *Brisbane City Council*.¹²⁴ In that case, Lord Wilberforce acknowledged Russell LJ's test and the difficulty of reconciling that approach with earlier cases. Lord Wilberforce went on to say, "[t]his doctrine, even assuming it to be established in the law of England, does not yet seem to be received in Australia."¹²⁵ The reluctance of the Privy Council to apply Russell LJ's test in Australia stemmed from a Queensland case decided prior to the formulation of Russell LJ's test in *Incorporated Council of Law Reporting*. In this case, *Incorporated Council of Law Reporting of the State of Queensland*,¹²⁶ Barwick CJ held that not only must a purpose be beneficial, it must also be charitable.¹²⁷

The 1974 High Court of Australia case, *Royal National Agricultural and Industrial Association*¹²⁸ provides a fuller discussion of the Australian position. In that case, too, it was held that the existence of a purpose both beneficial to the community and within the spirit and intendment of the preamble was necessary to warrant the conclusion that a particular purpose is charitable in law.¹²⁹ Unlike the *Queensland Law Reporting* case, this case was decided after *Incorporated Council of Law Reporting* and hence specifically addresses Russell LJ's approach. The court, while recognising that such an approach would remove some of the unnecessary restrictions of the analogy doctrine, thought it inappropriate for the High Court of Australia to go beyond the decisions of the House of Lords or its own decisions.

¹²⁴ *Brisbane City Council v A-G* [1979] AC 411, [1978] 3 All ER 30, [1978] 3 WLR 299.

¹²⁵ Above n 124, 422, 33 and 305.

¹²⁶ *Incorporated Council of Law Reporting of the State of Queensland v FCT* (1971) 125 CLR 659.

¹²⁷ Above n 126, 667.

¹²⁸ *Royal National Agricultural and Industrial Association v Chester* (1974) 3 ALR 486.

¹²⁹ Above n 128, 488.

Therefore the accepted position in Australia is that for a body's purpose to be charitable, under Lord MacNaghten's fourth category, it must be *both* beneficial to the community and within the spirit and intendment of the preamble of the Elizabethan Statute.¹³⁰

3. *The New Zealand Position*

While the minority's statement, that Russell LJ's test is not wholly accepted in England and has been rejected in Australia, is technically correct, it cannot be automatically assumed that the test does not apply in New Zealand either. The reason the approach was not accepted in Australia was that prior cases indicated a preference for the analogy approach over the public utility approach. Given these precedents Lord Wilberforce did not feel it appropriate to introduce Russell LJ's test; the underlying premise of which is a rejection of the analogy doctrine.

Conversely the writer argues that Russell LJ's approach was rightly applied by the majority in *Medical Council of New Zealand* for two reasons: firstly there has been a general shift away from the analogy approach; and secondly, unlike in Australia, there has been specific acceptance of Russell LJ's test in New Zealand.

(a) *General Shift*

Traditionally, to come within the 'spirit and intendment' of the Elizabethan Statute the courts required an analogy between an object mentioned in the preamble and the object under consideration. It then became acceptable to simply make an analogy with another case which had already been found to be analogous to something in the preamble. This was called the analogy or 'stepping stones' approach. Russell LJ's test should not be seen as a radical move away from that doctrine. A similar idea had been suggested prior to that by Lord Reid in the 1968 case of *Scottish Burial Reform*.¹³¹ Lord Reid, while recognising

¹³⁰ See *The Laws of Australia* (The Law Book Co Ltd, Sydney, 1995) vol 15, Equity, para 120, p125.

¹³¹ *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138, [1967] 3 All ER 215, [1967] 3 WLR 1132.

that the law required that both public benefit *and* a purpose within the spirit and intendment of the preamble be shown, commented:¹³²

[t]here are few modern reported cases where ... an institution was being carried on for a clearly specified object which was for the benefit of the public at large and not of individuals, and yet the object was held not to be within the spirit and intendment of the Statute of Elizabeth I.

The writer suggests, therefore, that given the evolution of the law of charities to the point where these two questions are virtually always answered the same way, Russell LJ's approach was the next logical step forward from the analogies approach, and should be seen as a welcome one.

(b) Specific Recognition of Russell LJ's Test

The minority pointed to *New Zealand Society of Accountants* as supporting their proposition that Russell LJ's approach is not wholly accepted in England and has been rejected in Australia. It is true that Somers J does make this observation, however *New Zealand Society of Accountants* does not go further and analyse what the position in New Zealand is or should be.

There are two New Zealand cases, *Morgan v Wellington City Council*¹³³ and *Auckland Medical Aid Trust*¹³⁴ which shed more light on the issue. Both state the rule that objects beneficial to the public are prima facie charitable. Chilwell J, in *Auckland Medical Aid Trust*, says:¹³⁵

[i]n the case of the last of Lord MacNaghten's categories, the purpose or purposes must be within the spirit and intendment of the statute, either directly or by analogy with decided cases, or because they are prima facie beneficial to the public and there is no ground for holding them outside the spirit and intendment of the preamble.

¹³² Above n 131, 147, 218 and 1135.

¹³³ [1975] NZLR 416.

¹³⁴ *Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 382.

¹³⁵ Above n 134, 388.

Based on these two cases, the writer argues that New Zealand *has* accepted Russell LJ's approach and therefore the majority was correct in holding that the Medical Council of New Zealand's purpose was prima facie charitable due to the public benefit it conveyed.

B Undue Emphasis on Analogies

The second criticism the writer wishes to make regarding the question of whether a purpose is charitable is that the minority placed undue emphasis on analogies. Essentially the minority held that the purpose of the Council was not charitable because it had been held to be non-charitable in the 'indistinguishable' cases of *General Medical Council* and *General Nursing Council*. This is closely tied in with the first criticism. While there is still a place for analogies, as illustrated by the passage quoted from Chilwell J's judgment in *Auckland Medical Aid Trust*, the fact that similar bodies were found to be non-charitable, in *General Medical Council* and *General Nursing Council*, should not be decisive of the Medical Council of New Zealand's charitable status.

In *Incorporated Council of Law Reporting* Sachs LJ considered the appropriate approach to be:¹³⁶

a matter of first impression derived from an overall view of the preamble coupled with the general trend of some centuries of decisions, no useful purpose can be served by citation of specific authorities.

McKay J was relying on these cases when he said, "[i]n applying the 'spirit and intendment' of the preamble it is important to be guided by principle rather than by a detailed analysis of decisions on particular cases."¹³⁷

Accordingly the minority's reliance on *General Medical Council* and *General Nursing Council* was unfounded because each case, and in particular each purpose, should be considered on its own merits. As Rickett succinctly put it, the majority considered, "[t]he

¹³⁶ Above n 45, 95, 1042 and 868.

¹³⁷ Above n 31, 16 per McKay J.

General Medical Council and *General Nursing Council* cases were simply not relevant because they dealt with the non-charitable status of a different purpose.¹³⁸

VII CRITIQUE - EXCLUSIVENESS REQUIREMENT

As already noted, professional associations do not have any particular law pertaining to them alone. Yet such bodies frequently fail to satisfy this final prerequisite of exclusiveness.¹³⁹ Picarda recognised this problem stating:¹⁴⁰

[s]uch bodies perform a dual role in seeing that the public get the highest standards of service from their members and in protecting the interests of their members. The objects clause of the body ... may on its very face have mixed purposes. But sometimes it is difficult to decide ... which interest has the upper hand.

This section will consider how the approach used to determine a body's purpose can have an influence in whether the requirement of exclusiveness is held to be satisfied, and outline the writer's view that the Medical Council of New Zealand should have been held by *all* of the Court of Appeal to have satisfied this requirement.

A *Effect of Determining Purpose in Wide Terms*

The choice of the various judges of whether to adopt the narrow or the wide approach to determining purpose had important consequences when it came to addressing the third fundamental requirement in this case.

Picarda stresses the importance of distinguishing between means, ends and consequences, with ends being purposes.¹⁴¹ The minority considered registration to be the

¹³⁸ Above n 11, 54.

¹³⁹ Examples of such cases in the United Kingdom are *General Nursing Council for Scotland v IRC* (1929) 14 TC 645; *Pharmaceutical Society of Ireland v CIT* [1938] IR 202; *Pig Marketing Board (Northern Ireland) v IRC* [1945] NI 155, (1945) 26 TC 319; *Chartered Insurance Institute v London Corporation* [1957] 2 All ER, [1957] 1 WLR 867. Also see the New Zealand case of *Institute of Professional Engineers New Zealand Inc v CIR* [1992] 1 NZLR 570.

¹⁴⁰ Above n 21, 212.

¹⁴¹ Above n 21, 209.

end and any public benefit merely a consequence of that end. They therefore came to the conclusion that the sole purpose of the Medical Council was non-charitable. The majority, on the other hand, considered registration to be the means whereby the end of public benefit was achieved, making the sole object charitable.¹⁴²

As illustrated in Part IV of this paper the law has, through a number of English and New Zealand cases, shifted away from framing a body's purpose in narrow terms. However throughout all of these cases, the exclusiveness question has continued to rest on the proposition that a main object which is charitable will not be vitiated by a non-charitable element as long as that latter object is subordinate and incidental to the former. By answering the first question of what a body's purpose is in wider terms, members of the judiciary have made it easier for themselves to also consider the last requirement of exclusiveness satisfied. Or, to put it another way, a non-charitable element, if intertwined with the charitable element, is likely to be considered incidental whereas that cannot be so where the two elements stand independently.¹⁴³ Therefore by stepping back and phrasing a body's objects in wide terms, a court can more easily hold charitable and non-charitable objects as being intertwined in achieving the same ultimate end. The best example of this is probably *Presbyterian Church Fund* where the court recognised the benefits the fund provided for individual ministers but decided that, in that instance, the private benefits were locked up in achieving the charitable purposes.¹⁴⁴

¹⁴² This was an unusual result in that there are few cases regarding professional bodies where the charitable purpose has been held to be the *sole* purpose. A rare example of such a case is *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631, [1952] 1 All ER 984.

¹⁴³ See above n 30, 255.

¹⁴⁴ Above n 81, 371.

B Application to Medical Council of New Zealand

Applying the wide approach, the purpose of the Council is therefore to benefit the health of the public by disciplining medical practitioners and requiring their registration.

However the clear benefits to medical practitioners cannot be ignored.

Thomas J does, interestingly, express at the end of his judgment the possibility of benefit to medical practitioners also being an end:¹⁴⁵

Holding that the purpose for which the Council was established is to further the health of the community does not mean that the statutory functions of the Council are to be regarded as secondary purposes ... if reference was to be made to a secondary or ancillary purpose, it would be to the objective of regulating the medical profession for its own benefit.

The writer considers that the Medical Council was also established to carry out an administrative role for medical practitioners. Arguably the Council is also benefiting medical practitioners by only allowing those qualified and competent to practice, therefore reducing competition. Furthermore it upholds the public's respect for the medical community. Yet this private benefit is merely a subordinate purpose and, in reality, was a necessary step in achieving the ultimate object of safeguarding the community's health. As in *Presbyterian Church Fund*, these private benefits were locked up in achieving the broader charitable purpose of protecting the public.

Therefore it is the writer's opinion that the Medical Council was exclusively charitable and would be appropriately placed on Picarda's scale, not at the extreme charitable end, but at a point which would indicate the dominance of the charitable purpose of the Council over the benefits accruing to the medical profession.

VIII CONCLUSION

While this case achieves what is, in the writer's opinion, the right end result for the Medical Council of New Zealand, by holding the Commissioner was incorrect in denying

¹⁴⁵ Above n 31, 12 per Thomas J.

them charitable status, it has also left the law in an unsettled state. This is not simply due to the fact that the decision was a three-two split, but because it has introduced a further factor into the charitable status test for statutory bodies – the motive of Parliament – and has, at the same time, confined the consideration of the activities of a body to where it is a non-statutory body. On the positive side, the fact that the majority favoured a wide view to determining purpose and also, importantly, accepted the proposition that purposes beneficial to the community are prima facie charitable, has removed unnecessary restrictions in this area. However, overall this case does not provide a consistent test against which other professional associations hoping to gain charitable status, and therefore exemption from tax, can measure themselves.

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