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Charities for the Benefit of Employees: Why Trusts for the Benefit of Employees Fail the Public Benefit Test

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Abstract

Charities are granted significant financial benefits through the exemption from income tax and deductibility of donations under the provisions of the *Income Tax Assessment Act, 1997* (Cth). The concept of what is a charity or a charitable purpose which is a fundamental requirement of the income tax exemption is not defined in any taxation legislation and must be found in the common law. The courts have concluded that a charitable purpose includes charities for the benefit and assistance of the sick. An organization that has been established for the benefit of employees and former employees who are suffering work related illnesses would therefore have a charitable purpose. There is however the further requirement that the entity's objectives must be for the benefit of the public. This article analyses the requirement of public benefit for a charitable purpose as it relates to an entity established for the benefit of employees and former employees of a large corporation. It discusses the rationale for the public benefit requirement and how the courts have applied this criterion to trusts for the benefit of employees and former employees. In conclusion it examines alternative approaches to the current application of the public benefit test.

INTRODUCTION

The main legislation applying to all not-for-profit organizations including charities is the *Income Tax Assessment Act, 1997* (Cth) (the 1997 Act). Division 50 of the 1997 Act provides for the exemption from income tax of a number of organizations including charities.¹ Furthermore, if an organization is considered a public benevolent institution (PBI), donations to it will be eligible for tax deductibility.² Whilst every entity that is a PBI is a charity³, not all charities are PBIs. In order to determine whether a trust established for the benefit of employees and former employees of a company is entitled to an exemption from income tax it is therefore necessary to consider what is meant by a charity under the 1997 Act.

'Charity' and 'charitable' are words that have a common or everyday meaning.⁴ There is no definition of 'charity' in the 1997 Act. This is despite the fact that a statutory

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¹ Refer specifically to s 50-5 item 1.1. This section was formerly s23(e) of the *Income Tax Assessment Act, 1936* (Cth).

² Section 30-45 *Income Tax Assessment Act, 1997* (Cth).

³ Taxation Ruling TR 2003/15 'Income Tax and Fringe Benefits Tax: Public Benevolent Institutions' states that 'For the purposes of Division 50 of the ITAA 1997, a public benevolent institution which is an entity is a charitable institution' [24].

⁴ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten).

definition was recommended by the 2001 'Report of the Inquiry into the Definition of Charities and Related Organisations'.⁵

They are also words that have a technical legal meaning and which have been discussed and elaborated on over the years by the courts.⁶ Two important issues arise from this, for an entity to be charitable under the 1997 Act its activities must be the promotion of charitable objectives and these charitable objects must come within the legal meaning of charitable.

This article analyses the legal meaning of the words 'charity' and 'charitable' for the purposes of Division 50 of the 1997 Act and explains why an entity established to administer compensation payments to employees and former employees of a company who are suffering from a work related illness does not fall within this meaning as currently established by the Australian and English courts. Such an entity could include a fund established by a company if the fund is limited to compensation for its employees and former employees suffering from a work related illness or injury. The article also examines the public policy rationale for this conclusion and looks at alternative approaches to the current application of the public benefit test to charities.

LEGAL MEANING OF "CHARITABLE"

As far back as 1601 the English courts and legislature were considering the issue of when an entity's objectives were charitable for income tax purposes. The Preamble to the *Charitable Uses Act 1601*⁷ is possibly the earliest record of an analysis of what types of activities may constitute charitable purposes. This Act is referred to as the *Statute of Elizabeth* and its Preamble set out the following charitable purposes:

- relief of the aged, impotent and poor;
- maintenance of sick and maimed soldiers and mariners;
- schools and scholars in universities;
- repair of bridges, ports, havens, causeways, churches, sea-banks and highways;
- education and preferment of orphans;
- maintenance of prisons;
- marriages of poor maids;
- aid and help of young tradesmen and handicraftsmen;
- aid and help of persons decayed;
- the relief or redemption of prisoners or captives;
- the aid or ease of any poor inhabitants concerning payment of fifteens; and
- setting out of soldiers and other taxes.

⁵ Commonwealth of Australia, 'Report of the Inquiry into the Definition of Charities and Related Organisations' (2001) 18; Treasurer's Press Statement "Final Response to the Charities Definition Inquiry" 11 May 2004, <http://www.treasurer.gov.au/tsr/content/pressreleases/2004/031.asp> at 30 November 2006.

⁶ For example refer *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531, 583 (Lord Macnaghten); *Re Hilditch deceased* (1986) 39 SASR 469, 475 (O'Loughlin J); *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236, 251-252 (Mildren J).

⁷ 43 Eliz I c4.

This Preamble was not considered, even at that time, to be exhaustive as significant charitable areas such as charities for the advancement of religion and of some educational institutions were not included.⁸

In *Morice v Bishop of Durham*,⁹ an English case that was decided two hundred years later, the court ruled that for a purpose to be ‘charitable’ it had to be within the spirit and intendment of the Preamble to the *Statute of Elizabeth*.¹⁰

Subsequently, in 1891 Lord Macnaghten in *Pemsel’s* case stated that the legal meaning of ‘charity’ could be classified into four separate divisions. He stated that a charity should be a trust for one of the following:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- for other purposes beneficial to the community.¹¹

The classification of charitable purpose into these four areas was seen as a milestone and has been consistently used in judicial considerations ever since.¹²

Subsequent Australian cases have confirmed the principle that the classes of charities referred to in the Preamble to the *Statute of Elizabeth* and by Lord Macnaghten in *Pemsel’s* case also apply to Australian Law. As Barwick CJ stated in a 1971 Australian case:

[W]hether or not the institution is relevantly charitable will be determined according to the principles upon which the Court of Chancery would act in connexion with an alleged charity. That means that the indications contained in the preamble to the Statute of Elizabeth 1601 and the classifications in Lord Macnaghten’s speech in *Commissioner for Special Purposes of Income Tax v Pemsel (Pemsel’s Case)* [1891] AC 531, 583 are to be observed in deciding whether or not the institution is charitable for the purposes of the Act.¹³

In the same case Windeyer J said:

A charitable institution is an instrument designed for carrying a charitable purpose into effect...What in law is a charitable purpose is to be gathered from the miscellany of objects set out in the preamble to the statute, 43 Eliz, I, c. 4. The spirit and intendment of that enactment, as well as its words have for centuries dictated the meaning of charity in law.¹⁴

⁸ For a complete discussion refer H Picarda, *The Law and Practice Relating to Charities* (3rd ed, 1999) 72; F M Bradshaw, *The Law of Charitable Trusts in Australia* (1983) 2.

⁹ (1805) 10 Ves 522.

¹⁰ *Ibid* 540.

¹¹ *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, 583.

¹² For example *Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully* (1952) 85 CLR 159, 173; *Ashfield MC v Joyce* (1976) 10 ALR 193.

¹³ *The Incorporated Council of Law Reporting of the State of Queensland v The Commissioner of Taxation* (1971) 125 CLR 659, 666.

¹⁴ *Ibid* 671.

In 1974 the High Court of Australia confirmed the place of the Preamble to the *Statute of Elizabeth* in Australian law in its conclusion that in order for an institution to be charitable it must be:

- Within the spirit and intendment of the Preamble to the *Statute of Elizabeth*; and
- For the public benefit.¹⁵

The Australian Government has also publicly confirmed that this is the case. In Taxation Ruling TR 2005/21 'Income Tax and Fringe Benefits Tax: Charities', the Australian Taxation Office (the ATO) states that:

For a purpose to fall within the technical legal meaning of 'charitable' it must be:

- beneficial to the community, or deemed to be for the public benefit by legislation applying for that purpose; and
- within the spirit and intendment of the *Statute of Elizabeth*, or deemed to be charitable by legislation applying for that purpose.¹⁶

The Australian courts have generally recognised the following categories of charity:

- the relief of poverty;
- the relief of the needs of the aged;
- the relief of sickness or distress;
- the advancement of religion; and
- the advancement of education.¹⁷

Other charitable purposes have been recognised under the general heading 'for the benefit of the community'.¹⁸

The ATO also recognizes that an organization established for the purposes of relieving sickness has a charitable purpose.¹⁹

It is therefore clear that an entity established by an employer for the benefit of persons suffering from a work related illness or injury is for the relief of sickness and therefore within a charitable category established under the Preamble to the *Statute of Elizabeth*. One of the main problems from the employer's perspective is however whether the second criterion for a purpose to be charitable, i.e. whether it is for the benefit of the public, has been satisfied.

¹⁵ *Royal National Agricultural Association v Chester* [1974] 48 ALJR 304, 305.

¹⁶ Taxation Ruling TR2005/21 'Income Tax and Fringe Benefits Tax: Charities' [8].

¹⁷ Kerry O'Halloran 'Social Inclusion and the Indigenous People of Australia: Achieving a Better Fit Between Social Need and the Charity Law Framework' 6 (2) *The International Journal of Not-for-Profit Law* http://www.icnl.org/JOURNAL/vol6iss2/ar_ohalloran.htm at 11 November 2006.

¹⁸ *Ibid.*

¹⁹ Taxation Ruling TR 2005/21 'Income Tax and Fringe Benefits Tax: Charities' [200].

PUBLIC BENEFIT

Two important issues now arise for consideration. Firstly, what does 'public benefit' mean for the purposes of determining whether an entity is charitable and consequently able to take advantage of the tax exemption and secondly, what is the policy rationale behind the public benefit requirement? The courts have consistently stated that it is important to ensure that the tax advantages that accrue to charitable organisations are not manipulated for the benefit of families or groups of related people²⁰ so that individuals are prevented from taking advantage of the favourable tax position available to charities for what is essentially a private purpose.²¹ Lord Greene certainly considered the tax advantages of charities a strong consideration when deciding that a trust for the education of descendants of a named person was really a family trust and not charitable as it was not for the benefit of the community.²²

The public benefit indicates a purpose that must somehow add to or advantage the community rather than individuals.

The courts have clearly applied this criterion to charities for the purpose of relieving sickness. In *Waterson and others v Hendon Borough Council*²³ a friendly society operated a hospital and other clinics for the benefit of its members. Mr Justice Salmon held that it was not charitable because its purposes were not altruistic; 'the object of the members of the society is not to do good to others but to themselves'.²⁴

The requirement of a benefit to the public or community was clearly stated by Lord Wrenbury in *Verge v Somerville* when he said:

To ascertain whether a gift constitutes a valid charitable trust...a first enquiry must be made whether it is public - whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of individuals, cannot.²⁵

This line of thinking was confirmed by the courts in even earlier decisions than *Verge v Somerville*. A Privy Council decision of 1875 relating to a trust for the observance of religious services for the testatrix and her late husband was held not to be charitable on the basis that there was no public benefit.²⁶ In fact the cases referring to this requirement can be traced back to at least the eighteenth century.²⁷

The cases have therefore come down very strongly in favour of the principle that for an organization to be charitable it must not only fall within one of the four divisions discussed by Lord Macnaghten in *Pemsel's* case, but it must also be founded for the

²⁰ *Re Compton, Powell v Compton* [1945] 1 All ER 198; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Dingle v Turner* [1972] 1 All ER 878, 889-890, (Lord Cross of Chelsea).

²¹ *Perpetual Trustee Co (Ltd) v Ferguson* (1951) 51 SR (NSW) 256, 263 (Sugerman J).

²² *Re Compton, Powell v Compton* [1945] All ER 198, 206.

²³ [1959] 2 All ER 760.

²⁴ *Ibid* 764.

²⁵ [1924] AC 496, 499.

²⁶ *Yeap Cheah Neo and Others v Ong Cheng Neo* [1875] PCLR 381, 396.

²⁷ *Jones v Williams* (1767) 2 Amb. 651, 652 (Lord Camden).

benefit of the public.²⁸ The exception to this is a line of cases that indicate that charities for the relief of poverty do not require a public benefit.²⁹

THERE MUST BE AN ACTUAL BENEFIT

In order to have a ‘public benefit’ there must be some actual or tangible benefit of an entity’s objectives. In 1949 an English Court held that the purposes of a group of cloistered and contemplative nuns was not charitable as the benefit of prayer and the example of pious lives was too vague and incapable of proof to be an actual benefit.³⁰ This decision has not been overturned however some commentators consider that this case would not be viewed favourably by modern Australian and New Zealand courts³¹ and it has been amended through legislation.

The public benefit must be real or substantial³² although it can extend beyond material benefits to social, mental and spiritual benefits.³³ An entity is not for the benefit of the public if its aims are contrary to public policy,³⁴ unlawful or for a lawful purpose that is to be carried out by unlawful means.³⁵ Although it might be arguable that a school for thieves or criminals advances education it would not be for the public benefit.³⁶

THE MEANING OF BENEFIT TO A SUFFICIENT SECTION OF THE COMMUNITY

Once it is established that a purpose is of actual benefit to the community which is readily assumed if the purpose is to assist the sick,³⁷ it is necessary to determine whether there is benefit to the community or an appreciable section of the community.³⁸ Whilst this section of the public can be small it should not be ‘numerically negligible’.³⁹ The concept requires that the group benefited is linked by some criteria other than personal relationships. Providing medical assistance to your family members might be a charitable thing to do but there is no public benefit, whereas donating money to a particular organisation which provides medical aid to the community has a benefit to the public.

²⁸ *Re Compton* [1945] 1 All ER 198; *Gilmour v Coates* [1949] AC 426; *Dingle v Turner and others* [1972] 1 All ER 878; Applied in Australia in *Re Hilditch deceased* (1986) 39 SASR 469.

²⁹ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305 (Lord Simonds); *Dingle v Turner* [1972] 1 All ER 878, 888 (Lord Cross of Chelsea).

³⁰ *Gilmour v Coates* [1949] All ER 848, 855 (Lord Simonds). Although this situation has been amended by legislation in Australia and is now considered charitable under s 5 of the *Extension of Charitable Purpose Act, 2004* (Cth).

³¹ Gino Dal Pont, *Charity Law in Australia and New Zealand* (2000) 171.

³² *Re Pinion (deceased); Westminster Bank Ltd v Pinion and another* [1964] 1 All ER 890.

³³ Dal Pont, above n 31, 14-15.

³⁴ *Perpetual Trustee Co (Ltd) v Robins and others* (1967) 85 WN (Pt. 1) (NSW) 403, 411. See also *Thrupp v. Collett (No.1)* (1858) 53 ER 844; *Re MacDuff; MacDuff v MacDuff* [1895-9] All ER Rep 154, 162-3; *Re Pieper (deceased)*; *The Trustees Executors & Agency Co. Ltd v Attorney-General (Vic.)* [1951] VLR 42.

³⁵ *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382, 395.

³⁶ *Re Pinion (deceased); Westminster Bank Ltd v Pinion and another* [1964] 1 All ER 890, 893 (Harman LJ).

³⁷ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 65 (Lord Simonds).

³⁸ *Verge v Somerville* [1924] AC 496, 499; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305 (Lord Simonds).

³⁹ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 306 (Lord Simonds); *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 209 (Nader J).

Not all charities are for the benefit of the entire community and the very fact that they are charities often means that their objectives are to assist a section of the community that has special needs or disadvantages.⁴⁰ However as Lord Simonds in *Williams' Trustees v Inland Revenue Commissioners*⁴¹ said '...a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals.'⁴²

In *Re Income Tax Acts (No 1)*⁴³ Lowe J expressed the view that if an organisation is open to the public, even though not everyone joins, this group will be a section of the public sufficient for the charitable purpose test. If on the other hand the organisation sets up an arbitrary test for membership such as many clubs, literary societies or trade unions do then the members cannot be considered a section of the public.⁴⁴ Lowe J went on to say:

A club, a literary society, a trade union may all have numerous members, but I think that none of these could properly be called a section of the public. They stand on the other side of the line. The distinguishing feature of each of these latter bodies is that it is an association which takes power to itself to admit or exclude members of the public according to some arbitrary test which it sets upon its rules or otherwise. Each of them does oppose a bar to admission within it. It is not one of the groups into which the community as a matter of necessary organisation or by convention is divided, but it is in a sense an artificial entity which exists for the benefit of its members as members thereof and not as members of the public.⁴⁵

Many of the cases⁴⁶ that have unsuccessfully argued that the organization has a public benefit have failed because the class or group of members of the public, are linked by a relationship to someone or something. This is not considered to be in the public benefit as the quality which distinguishes them from other members of the public depends on their relationship to another person or entity. For example, the courts have held that an institution for the benefit of employees of a particular company will not be charitable,⁴⁷ neither will a school for the children of freemasons,⁴⁸ or a mutual benefit society such as a friendly society or a trade union.⁴⁹ A religious college failed the test of being a charitable institution as it was only open to the descendents of particular persons.⁵⁰ In these cases the benefits were intended for people in their capacity as employees, relatives or members rather than as a segment of the public. An institution for the benefit of persons in a particular geographic location would, on the other hand, be for the public benefit, as here the quality which links the group is not

⁴⁰ For a detailed discussion of the role of charities refer Dal Pont, above n 31.

⁴¹ [1947] AC 447.

⁴² Ibid 457.

⁴³ [1930] VLR 211, 223.

⁴⁴ Ibid 222-3.

⁴⁵ Ibid.

⁴⁶ For example, *Re Compton; Powell v Compton* [1945] 1 All ER 198; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315.

⁴⁷ *Re Compton; Powell v Compton* [1945] 1 All ER 198; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

⁴⁸ *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315.

⁴⁹ *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194.

⁵⁰ *Beatrice Alexandra Victoria Davies v Perpetual Trustee Co (Ltd) and others* (1959) 59 SR(NSW) 112.

their personal relationship but their physical location.⁵¹ The argument is that as anyone can (theoretically) move to a particular location the section of the public benefited is not restricted by something outside its control such as an employment or family relationship.

Lord Greene MR expressed it in *Re Compton; Powell v Compton*:

[T]hey do not enjoy the benefit, when they receive it, by virtue of their character as individuals but by virtue of their membership of their specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others, and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are AB, CD and EF but because they are poor inhabitants of the parish. If, in asserting their claim, it were necessary for them to establish the fact that they were individuals AB, CD and EF, I cannot help thinking that on principle the gift ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character.⁵²

If benefits are restricted to family members or friends the courts have considered that there is no public benefit.⁵³ As Farwell J said in 1902 ‘There is, in truth, no ‘charity’ in attempting to improve one’s own mind or save one’s own soul. Charity is necessarily altruistic and involves the idea of aid or benefit to others...’⁵⁴

Whilst limiting the number of people who can benefit does not prevent the public benefit test being satisfied the number of potential beneficiaries must not be numerically negligible.⁵⁵

The ATO has also stated that a trust for the benefit of employees of a particular employer is not for the public benefit.⁵⁶

The refusal to grant charitable status to a trust for the assistance of sick employees and former employees of a company is therefore based on the common law rationale that such a trust is not for the benefit of the public or a section of the public. This is because the beneficiaries of this trust are defined by reference to their employment with the company which is considered a personal connection and one not available to general members of the public. This is despite the fact that the beneficiaries may well number hundreds or thousands of people. In *Oppenheim v Tobacco Securities Trust Co. Ltd*⁵⁷ a trust was established for the benefit of children of employees or former employees of a British company. The potential employees and former employees numbered over 110,000. The court held that the common quality of the potential beneficiaries of the trust was employment by a particular employer and that as a

⁵¹ *Re Compton; Powell v Compton* [1945] 1 All ER 198, 201; *Verge v Somerville* [1924] AC 496, 499.

⁵² [1945] 1 All ER 198, 201.

⁵³ *Yeap Cheah Neo and others v Ong Cheng Neo* (1875) LR 6 PC 381; *Ip Cheung-Kwok v Sin Hua Bank Trustee Ltd and others* [1990] 2 HKLR 499.

⁵⁴ *Re Delaney; Conoley v Quick* [1902] 2 Ch 642, 648-649.

⁵⁵ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 306 (Lord Simonds); approved in *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197, 209 (Nader J).

⁵⁶ Taxation Ruling TR 2005/21 ‘Income Tax and Fringe Benefits Tax: Charities’ [54].

⁵⁷ [1951] AC 297.

connection through common employment does not make the group a section of the community, the trust was not charitable.⁵⁸

The court's thinking in this and other cases which have confirmed this line of reasoning was clearly influenced by the fiscal advantages that arise from being granted charitable status. Lord Greene MR makes several references to the tax free status of charities in his comments in *Re Compton, Powell v Compton*⁵⁹ as the rationale for restricting charities to those that benefit the public as does Lord Cross in *Dingle v Turner*.⁶⁰ Lord Cross stated in this case:

In answering the question whether any given trust is a charitable trust the courts – as I see it - cannot avoid having regard to the fiscal privileges accorded to charities...To establish a trust for the education of the children of employees in a company in which you are interested is no doubt a meritorious act; but however numerous the employees may be the purpose which you are seeking to achieve is not a public purpose. It is a company purpose and there is no reason why your fellow taxpayers should contribute to a scheme which by providing 'fringe benefits' for your employees will benefit the company by making their conditions of employment more attractive.⁶¹

ARGUMENTS AGAINST THE PUBLIC BENEFIT RESTRICTION IN ALL SITUATIONS

It is arguable that there are other approaches that will allow distinctions between trusts that are based on a personal relationship and which therefore fail the 'public benefit' requirement and those that are based on some other criterion which enables them to fall across the line. This is particularly relevant these days when trusts might be established for employees or members of large organizations that employ or have as members many thousands of people. It is also relevant to the situation where the employees and former employees of a company are not actually benefited, (in the sense of education of their children or some other fringe benefit of employment) but are compensated for their employer's failure to provide them with a safe working environment and the subsequent injury to their health. It is also arguable that the earlier judicial reasoning regarding a section of the public did not mean that trusts benefiting large groups of people should necessarily be excluded.

In *Oppenheim v Tobacco Securities Co Ltd*⁶² the dissenting judge Lord MacDermott considered that the better question to ask in determining whether any given trust was public or private was a question of degree in the light of the facts of the particular case. His Lordship stated:

...I see much difficulty in dividing the qualities or attributes which may serve to bind human beings into classes, into two mutually exclusive groups, the one involving individual status and purely personal, the other disregarding such status and quite impersonal. As a task this seems to me no less baffling and elusive than the problem to which it is directed, namely, the

⁵⁸ Ibid 307.

⁵⁹ [1945] 1 All ER 198, 205, 206.

⁶⁰ [1972] 1 All ER 878, 889.

⁶¹ Ibid 889-890.

⁶² [1951] AC 297.

determination of what is and what is not a section of the public for the purposes of this branch of the law.⁶³

In the later case of *Dingle v Turner*⁶⁴ the testator had provided in his will for the investment of a specific sum with the income going to pay pensions to poor employees of E Dingle and Co Ltd. The company employed over 600 people and there were a substantial number of ex-employees. Although the House of Lords decided the case using the line of cases exempting trusts for the relief of poverty from the public benefit requirement, they did make some interesting comments on the general requirement of public benefit. Lord Cross considered the above statements by Lord MacDermott in *Oppenheim's* case very favourably and criticised the distinction in the earlier cases between personal and impersonal relationships when determining the validity of a charitable trust.⁶⁵ His Lordship concluded that the real test should be the purpose of the trust and said:

But if one turns to large companies employing many thousands of men and women most of whom are quite unknown to one another and to the directors the answer is by no means so clear. One might say that in such a case the distinction between a section of the public and a private class is not applicable at all or even that the employees in such concerns as ICI and GEC are just as much 'sections of the public' as the residents in some geographical area. In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.⁶⁶

What then of the situation where all of the members of a particular trade or profession are employed by the same employer? The cases have held that a trust for the benefit of persons following a particular trade or profession is for the benefit of a section of the community.⁶⁷ A trust that is expressed as being for the benefit of all members of a profession living in a certain geographical area would be charitable and in this way a valid charity could be created which would cover all the employees of a particular organisation anyway.⁶⁸ It is arguable that where all the members of a profession are employed by the same employer a fund for their benefit should be considered charitable on the basis that a class of beneficiaries connected by an impersonal link is still a section of the public even though its members are also connected by a personal one.⁶⁹

⁶³ Ibid 317.

⁶⁴ [1972] 1 All ER 878.

⁶⁵ Ibid 889.

⁶⁶ Ibid.

⁶⁷ *Hall v Derby Sanitary Authority* (1885) 16 QBD 163, approved in *Oppenheim v Tobacco Securities Co Ltd* [1951] AC 297.

⁶⁸ PS Atiyah, 'Public Benefit in Charities' (1958) 21 *The Modern Law Review* 138, 147.

⁶⁹ Ibid 147-148.

If the rationale for refusing to grant charitable status to a trust for the benefit of sick employees and former employees of a company is that this would grant a fringe benefit to these persons the argument seems illogical. The grant of money in this situation is to enable these employees and former employees to obtain medical assistance and support in cases where they are unable to work. It is very different from a trust for the education of employees' children. Furthermore, public policy would suggest that ambiguous cases should favour assistance towards the sick as this is an important charitable purpose.

CONCLUSION

The law relating to charities needs to be flexible in order to meet the needs of potentially charitable situations that develop due to changes in society. When Lord Macnaghten first considered the four charitable headings he articulated in *Pemsel's* case it was virtually impossible for a successful action to be brought by an employee for an injury suffered at work against his or her employer.⁷⁰ The situation is now very different.

If the scenario is instead considered from the perspective of purpose, then it is certainly arguable that the provision of funds for medical assistance and financial support to employees and former employees of a company with work related illnesses is a public benefit. These employees, through no fault of their own, have suffered due to their employer's lack of provision of a safe working environment. They are members of the community and in significant need which, if not provided, will mean that they are a burden on the taxpayer and the general public. If this reduction in tax is not available to the fund then presumably less money will be available to the beneficiaries. This is not a fringe benefit that might make working for a company more attractive than some alternative employer, as could be argued in *Oppenheim's* case.

On the other hand it is arguable that a company that does not provide a safe working environment for its employees is the entity that must bear the financial burden of providing for its employees and former employees who have been injured due to its negligence. Why then it may be argued, should the taxpayer come to the aid of such a company by providing financial assistance through the tax system? Although different, isn't it providing just as significant a fiscal benefit to such a company as the court rejected in *Oppenheim*? It could be even further argued that providing tax relief will result in the employer reducing its payments to the compensation fund rather than the employees gaining any additional payment. This would be a benefit to the company rather than the public as personified by its employees and former employees.

One thing that seems clear is that any argument for or against the public benefit limitation on charities has difficulties and drawbacks. The rationale of limiting charitable status to organisations that benefited a section of the community was appropriate when commercial life was much simpler, however this is no longer the case and there are valid arguments for looking at the purpose of the entity in the

⁷⁰ Harold Luntz and David Hambly, *Torts Cases and Commentary* (4th Ed, 1995) 54 [1.3.1], [6.1.1]-[6.1.2]. Furthermore worker's compensation legislation was not enacted in England until 1897, when the *Workmen's Compensation Act 1897* was introduced, 6 years after *Pemsel's* case.

context of society's needs rather than the relationship of its objects when determining charitable status.