Charitable Un-educational Objects

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Judges appear to have stipulated a 'merits' test when it comes to public benefit underscoring education as a charitable object. The same is not evident in, say, objects directed to relieving poverty or advancing religion. At the same time, courts have progressively broadened the concept of 'education' for the purposes of charity law. This may present a tension between what is 'educational' and what is 'beneficial' in the charity sphere. Lacking more than a perfunctory coverage of this issue in the literature, it is appropriate to probe the rationales and parameters of the 'merits' test, with a view to developing an understanding of how education intersects with charity law. This is pursued by reference to three primary scenarios where contention has focused: (1) where the object is allegedly irrational or nonsensical; (2) where a donor has sought to establish a perpetual display of his or her possessions; and (3) bequests of funds for publication of (usually the donor's) work.

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I. Context

The concept of 'charity' has challenged common law judges for hundreds of years. It has been judicially described as a "difficult and very artificial branch of the law",[1] one "full … of anomalies"[2] and an area in which "many fine distinctions have been made".[3] And Lord Evershed, Master of the Rolls, once remarked that "[a]ll those who practise in this branch of the law know how infinite is the variety of the decided cases, how extreme sometimes are the refinements, and how apparent on occasions the contradictions which those cases demonstrate".[4] Propelling these difficulties, distinctions, refinements and contradictions is the insistence at general law that an object is either charitable, or it is not; there is, in this regard, no legally recognised and effective intermediate (partially charitable) category. Charity law has, to this end, so occupied the judicial thought because, in the words of Oliver Wendell Holmes, "where to draw the line … [is] pretty much everything worth arguing in the law".[5]

Complicating this line-drawing exercise are various characteristics of the concept of 'charity' espoused by the law, sometimes verging on the paradoxical. For instance, while it is acknowledged that 'charity' must reflect time and place, judges not infrequently refer to the *Statute of Charitable Uses* from 1601.[6] Also, whereas the law attributes a legal meaning to 'charity', this mostly functions to reduce its precision

6. (UK), 43 Eliz I, c 4 (also known as the Statute of Elizabeth I) [*Statute of Charitable Uses*].

compared to its dictionary meaning.[7] The legal meaning is not confined to relieving poverty, but encompasses the 'advancement' of other objects,[8] the 'protection'[9] and 'preservation'[10] of others, and the 'beautification' of others again.[11] At law, therefore, 'charity' not only has a broader object base than conveyed in ordinary parlance, but a corresponding more expansive panoply of methods for achievement.

There are other peculiarities too. 'Charity' is often assumed to coexist with altruism, but the motive for pursuing an object is not determinative of its status as charitable.[12] Historically charitable objects have been treated as exclusive of governmental ones, but the convergence between the second and third sectors in the modern welfare state have muddied any such distinction.[13] At the same time, governmental expectations that charities become increasingly self-supporting have prompted some confluence between charity and business.[14] Perhaps it should prove unsurprising, therefore, that the historically strict charity-politics divide, to some degree or another, has witnessed dilution in the primary common law jurisdictions.[15]

Charitable objects have traditionally been facilitated through the vehicle of a (charitable) trust — which is capable of coexisting with other legal structures[16] — and in this sense represents the principal qualification to courts' traditional refusal to enforce purpose trusts. There emerges a paradox here too: as while the beneficiary of a purpose trust is the purpose itself — in turn explaining judicial remarks such as that "[a] charitable trust does not have a beneficiary"[17] — individuals nonetheless benefit from the performance of charitable objects (sometimes termed 'ultimate beneficiaries').

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7. See Gino E Dal Pont, "Charity Law: 'no magic in words'?" in Matthew Harding, Ann O'Connell & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) ch 4.
8. Principally education and religion.
9. Such as the protection of the public from natural disasters.
10. Such as the preservation of flora.
11. Such as the beautification of a locality via a public park.

There is then the core notion that charitable objects must serve what was historically termed a "public use".[18] Indeed, the 'public' element underscoring charitable objects is primarily what informs their favourable treatment by the law (including the benign construction of charitable bequests). There is nonetheless again some paradox; identifying the 'public' has not only largely been approached from the perspective of who is *not* the public,[19] but from other than a quantitative standpoint. This in turn dictates that merely because thousands may benefit from an object may not substantiate its 'public' character, just as the fact that few may benefit may not prove conclusive against it.

The notion of a 'public use' has translated to an inquiry into 'public benefit'. What marks a charitable object, accordingly, is whether it enures for the 'benefit' of the 'public'. It is not difficult to imagine the challenges for judges in distinguishing — in a binary fashion — what is, from what is not, a benefit to the public. This not only assumes the ability to conceptualise the relevant public, but that of making an assessment of 'benefit' thereto. That judges are not necessarily well positioned to make the latter assessment explains the tendency to proceed on an assumption that an ostensibly charitable object — that is, one that falls within accepted categories (or 'heads') of charity, namely the relief of poverty, the advancement of religion and the advancement of education — exhibits the requisite benefit.[20]

Making this assumption when it comes to relieving poverty is defensible; indeed, to argue that relieving poverty is not beneficial to the public presents a practically insurmountable hurdle. But the increasingly secular nature of Western societies may raise questions over whether all religious objects should be assumed to benefit the public.[21] Yet aside from such objects that are clearly illegal or contrary to public policy — which charity would never have countenanced to commence with —

18. *Jones v Williams*, (1767) 27 ER 422 (Ch (Eng)) at 422, Lord Camden LC.
19. Following the leading case of *Oppenheim*, *supra* note 1.
20. See Dal Pont, *Law of Charity*, *supra* note 12 at 66–67.
21. See, to this end, the comments in Kirby J's dissenting judgment in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd*, [2008] HCA 55.

the freedom of religious belief and practice endemic to these societies has largely disinclined judges, without some statutory mandate,[22] from probing 'benefit' in this context, at least not so far as this can translate to an inquiry surrounding the merit of that belief or practice.[23]

II. Targeting Merit Under Education Head

The same cannot necessarily be said vis-à-vis the advancement of education 'head' of charity. It may be accepted that there may be any number of compelling reasons why public benefit from education is assumed: speaking in general terms, vocational or professional education prepares a person for the workforce; education of schoolchildren assists in the development of young minds; education in general terms may provide a catalyst for problem-solving; education has been positively linked with good citizenry, reduced crime and enlightened attitudes; the list could go on. It is understandable, therefore, why the law has long been inclined to foster its advancement under, *inter alia*, the charitable umbrella.[24]

The foregoing is not to say, however, that every form of education will, simply by virtue of evincing a tendency to educate, benefit the public. As

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22. *Cf. Charities Act 2011* (UK), c 25, s 4(2); *Charities and Trustee Investment (Scotland) Act 2005* (Scot), ASP 10, s 8(1) (which oust any presumption that a charitable object is beneficial to the public).
23. What may appear an outlier in this context is the House of Lords' decision in *Gilmour v Coats*, [1949] AC 426 (HL (Eng)), which struck down a trust to apply income for a community of cloistered Catholic Carmelite nuns, who devoted their lives solely to prayer, contemplation, penance and intercessory prayer within their convent, on the ground that it lacked provable public benefit, viewing the efficacy of intercessory prayer as "outside the region of proof as it is understood in our mundane tribunals" at 453 per Lord du Parcq. However, the decision targeted not the merit of the activities in question but whether they could be proven, to a legal standard, to benefit the public. Other courts have proven less prescriptive in this regard: see *e.g. Re Howley*, [1940] IR 109 (IHC); *Crowther v Brophy*, [1992] 2 VR 97 (VSC (Austl)).
24. Indeed, several of the purposes listed in the preamble to the *Statute of Charitable Uses*, *supra* note 6, target education.

foreshadowed above vis-à-vis religion, subject matter of education that is illegal[25] or otherwise contrary to public policy[26] misaligns with the 'benefit' element. The fact that the law has declared an object illegal or against public policy, after all, reflects a prevailing judgment concerning (a lack of) public benefit, which charity law can hardly override.

Otherwise, courts have not been stringent in approaching the concept of 'education' for the purposes of charity law. This has revealed few, if any, topics incapable of being the subject matter of education.[27] It has, perhaps more significantly, broadened the manner(s) in which education may be advanced. These are hardly confined to formal course instruction and, as elaborated in Part IV of this article, in the context of artistic appreciation can comprise what is little more than observation.

The very breadth of education, and the avenue(s) for its advancement, cannot other than influence (and possibly broaden) questions of 'benefit', especially to the extent that, as noted above, this is essentially presumed

25. For instance, the example given by Harman LJ in *Re Pinion*, [1965] 1 Ch 85 (CA (Eng)) [*Re Pinion*] that a school for pickpockets or prostitutes "would obviously fail" even though it may be educational (at 105).

26. Public policy can, however, shift with time and place: see *e.g. Manners v Philadelphia Library Company*, 93 Pa 165 (1880) (where the Supreme Court of Pennsylvania remarked that "if the primary object of the trusts of the will is to disseminate infidel views, or to attack the popular religion of the country, it would be the duty of a court of equity to declare such trusts to be against public policy and therefore void" (at 174); this would no longer be so in modern pluralist society).

27. Sargent v Cornish, 54 NH 18 (Super Ct 1878) (describing as charitable purposes "[n]ot merely the means of instruction in grammar, or mathematics, or the arts and sciences, but all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, purify the heart, elevate the affections, and to inculcate generous and patriotic sentiments, and to form the manners and habits of rising generations, and so fit them for usefulness in their future stations" (at 22)); Lloyd v Federal Commissioner of Taxation, [1955] HCA 71, Kitto J (describing education as "unquestionably much wider than mere book-learning, and wider than any category of subjects which might be thought to comprise general education as distinguished from education in specialized subjects concerned primarily with particular occupations" (at 11)).

from what is ostensibly educational.[28] It accordingly invites inquiry, upon which the remainder of the article focuses — which has to date been the subject of relatively little investigation in the literature[29] — into whether, assuming that the object is not illegal or contrary to public policy, it may nonetheless fall outside the parameters of charity by reason of lacking educational 'merit'. The prevailing judicial opinion suggests that it can, despite varying judicial sensitivities in this regard.

A lack of merit can, to this end, feed into concerns surrounding public 'benefit' of the object in question. An apparently educational object that is not meritorious, it is reasoned, will not benefit the public, or at least not a sufficient section thereof. An alternative justification is that what lacks educational merit may actually not be 'educational' in the first place, or not foster the 'advancement' of education. While such an approach may, at least in form, obviate the frequently amorphous curial inquiry into 'benefit' by focusing on the character of the object itself rather than the scope of (any) benefit it may engender, it is rarely

28. *Cf. Re Hopkins' Will Trusts*, [1965] Ch 669 (ChD (Eng)), Wilberforce J (opining that the "somewhat ossificatory classification" to which the *Statute of Charitable Uses* "is unsatisfactory because the frontiers of 'educational purposes' … have been extended and are not easy to trace with precision" at 678).

29. It is relegated to only two or three pages in standard charity texts: see *e.g.* Hubert Picarda, *The Law and Practice Relating to Charities*, 4d (West Sussex: Bloomsbury Professional, 2010) at 69-72; William Henderson and Jonathan Fowles, *Tudor on Charities*, 10d (London: Sweet & Maxwell, 2015) at 38-39, 155-56; Dal Pont, *Law of Charity*, *supra* note 12 at 196-98. Dedicated monographs on public benefit in charity law do not probe the point either: see Jonathan Garton, *Public Benefit in Charity Law* (Oxford: Oxford University Press, 2013) at 34, 78 (described in terms of the 'rule against meritless purposes'); Mary Synge, *The 'New' Public Benefit Requirement: Making Sense of Charity Law?* (Oxford: Hart Publishing, 2015) (not specifically probed). It also falls outside the remit of Matthew Harding, *Charity Law and the Liberal State* (Cambridge: Cambridge University Press, 2014); Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016). From an American perspective it is addressed, again without great elaboration, in Mary Kay Lundwall, "Inconsistency and Uncertainty in the Charitable Purposes Doctrine" (1995) 41:3 Wayne Law Review 1341 at 1362-65.

approached discretely in the case law.

Whatever the correct approach to analysing the question, it is arguable that, against a backdrop where educational objects are construed broadly and a presumption as to benefit is widely acknowledged, denial of charitable status by reference to (lack of) 'merit' should not be a course lightly pursued. Where it surfaces as a potential issue, courts are thus unsurprisingly inclined to consult expert evidence. After all, judges are rarely well positioned to make informed assessments of educational merit. Nor, it should be noted, is this determination left to the vagaries of the donor's belief in making the relevant disposition. Just as altruism is at law no prerequisite for charity, nor does an apparent belief in the 'charitability' of an object dictate the legal outcome (although it appears that it can be used to bolster a judicial characterisation to that end).[30] The point saw elaboration in the following remarks by Justice Russell in *Re Hummeltenberg*:

> [s]o far as the views so expressed declare that the personal or private opinion of the judge is immaterial, I agree; but so far as they lay down or suggest that the donor of the gift or the creator of the trust is to determine whether the purpose is beneficial to the public, I respectfully disagree. If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of

30. See *e.g. Re Shaw's Will Trusts*, [1952] Ch 163 (ChD (Eng)) [*Re Shaw's*] (involving the bequest of the residuary estate for: (1) "'[t]he making of grants contributions and payments to any foundation corporate body institution association or fund … having for its object the bringing of the masterpieces of fine art within the reach of the people of Ireland of all classes in their own country'" (at 166) and (2) "'[t]he teaching promotion and encouragement in Ireland of self control, elocution, oratory, deportment, the arts of personal contact, of social intercourse, and the other arts of public, private, professional and business life'" (at 166); Vaisey J, being inclined to view this disposition as charitable under the educational head, was bolstered therein by a finding that "the dominant, and indeed the exclusive intention of the testatrix, was the betterment of those who required education by giving them facilities of education in the various directions and for the various purposes which she indicated in her will" (at 170)).

> poodles to dance might be a mild example.[31]

Three primary scenarios have driven inquiries of this kind: (1) where the object is irrational or nonsensical; (2) where the donor has sought to establish a perpetual display of his or her possessions; and (3) where the donor has bequeathed funds for the purpose of publishing or otherwise disseminating his or her work. Each of these scenarios is addressed separately below (in Parts III, IV and V respectively), but ultimately target the core inquiry into how educational merit should feature in the charity equation.

III. Irrational or Nonsensical

In *Re Collier (deceased)*, the High Court of New Zealand asked rhetorically: "[h]ow can there be a public benefit in the propagation of sheer nonsense"?[32] *Prima facie*, it is difficult to argue with the upshot of this question — after all, why should the law foster, through the (privileged) avenue of charity, what is evidently nonsensical — even though it could equally have been approached from the perspective of sheer nonsense lacking the requisite tendency toward education.

Justice Hammond in *Collier* referred to "some minimal standard" in this context, which he considered marked a difference between New Zealand and United States law.[33] According to his Honour, American courts do not substitute their subjective assessment for that of the testator, save in a case of clear irrationality, an approach he considered overlooks the fundamental premise of charity law: that a public benefit must be conferred.[34] While there are dicta in American judgments to this

31. [1923] 1 Ch 237 (ChD (Eng)) at 242 [*Hummeltenberg*].
32. [1998] 1 NZLR 81 (NZHC) at 92, Hammond J [*Collier*].
33. *Ibid* at 91-92.
34. *Ibid* at 92.

effect,[35] they hardly represent a uniform approach.[36] The only American case authority Hammond J cited was a 1961 decision of the Supreme Court of Iowa in *Eckles v Lounsberry*, involving a residuary bequest to the Iowa State Public School Fund to be used "to promote instruction in vocal music and proper development of the lungs of children attending kindergarten, first and second grades".[37] The Court had little difficulty in discerning a valid educational object in this disposition, characterising it as "just as valid as if the estate were to be used to promote instruction in what are frequently referred to as the '3 rs'",[38] and distinguishing it from a trust for the purpose of "teaching some irrational belief".[39] The latter, illustrated by reference to teaching that the earth is flat, would not represent a valid charitable object, in the court's opinion.

The question in cases of this kind ultimately centres upon distinguishing 'sense' from 'nonsense' (which, as an aside, courts in cases involving religious beliefs have conveniently sidestepped).[40] This is not always amenable to a binary determination, as questions of 'sense' or otherwise not infrequently move along a continuum. Moreover, given the diversity of beliefs within modern liberal society, one person's 'sense' may well prove another's 'nonsense'. The thousands who in the modern world subscribe to 'flat earth' theories represent a case in point. And, perhaps more controversially, that the majority of scientists utilise evolutionary

35. See *e.g. Fidelity Title and Trust Company v Clyde*, 121 A (2d) 625 (Supp Ct Err Conn 1956) at 629; *Re Hermann Trust*, 312 A (2d) 16 (Sup Ct Pa 1973) [*Re Hermann*] ("It is difficult to conceive of a subject less appropriate for judicial review than the quality of an artistic work" at 21).
36. See *e.g. Medical Society of South Carolina v South Carolina National Bank*, 14 SE (2d) 577 (Sup Ct SC 1941) [*Medical Society*].
37. 111 NW (2d) 638 (Sup Ct Iowa) at 640 [*Eckles*].
38. *Ibid* at 642. The "3rs" refers to reading, writing and arithmetic.
39. *Ibid*.
40. Exemplified in the famous case of *Thornton v Howe*, (1862) 54 ER 1042 (Rolls Ct (Eng)) at 1043 (where a gift for distributing the religious works of Joanna Southcote, a person the court described as "a foolish, ignorant woman" (at 1043), was nonetheless held to be charitable), discussed in Pauline Ridge, "Legal Neutrality, Public Benefit and Religious Charitable Purposes: Making Sense of Thornton v Howe" (2010) 31 Journal of Legal History 177.

theory to explain the origins and development of life on earth has not prevented the promulgation of 'creation science'. In these, and many other belief systems, those inhabiting one side of the fence may view those inhabiting the other as promulgating nonsense.

How can courts, therefore, address diametrically opposed views through the lens of the educational head of charity? This explains why, as foreshadowed earlier, judges resort to expert evidence to clothe the inquiry with a semblance of objectivity. At the same time, it should not be assumed that, even on this 'objective' approach, legal outcomes should be determined by majority or prevailing expert opinion. Merely because a subject of an ostensibly educational inquiry sits outside the mainstream understanding of the day does not always, with the posterity of hindsight, mark it as nonsense or illogical. Debate prompted by the expression of minority views arguably goes to test accepted understandings, which aligns nicely with advancement of education. This in turn elucidates why judges, even with the benefit of expert opinion, are loathe to deny charitable status to objects punctuated by marginal perspectives or even demonstrated misunderstandings.

Eckles, mentioned above, provides a case in point when it comes to apparent donor misconception. The testator in that case was driven by a belief that instruction in vocal music would foster the "proper development of the lungs of children" and, in a subsequent clause, considered this would result "in said children becoming … more healthy persons".[41] Expert medical evidence indicated that teaching vocal music would not increase physical health or development of the lungs, and possibly might have a harmful effect on the voices of young children. Yet this did not dissuade the court from siding with charity, remarking that merely because the testator "may have been mistaken in his belief as to the effect of teaching vocal music on development of the lungs of children is insufficient basis for holding the gift invalid".[42] It appears that the evident focus of the bequest — namely to educate young children in music, *as distinct from the testator's belief in its health benefits* — influenced

41. *Eckles*, *supra* note 37 at 640.
42. *Ibid* at 645.

the court in so ruling,[43] and in this regard arguably made the case reasonably straightforward.

A recent New Zealand decision exemplifies the judicial reticence to deny charitable status by reason of an object being an outlier in the scientific realm. Justice Ellis in *Re Foundation for Anti-Aging Research*[44] upheld as charitable a foundation with the aim of funding research into cryonics.[45] Having cited from the judgment of Hammond J in *Collier*, her Honour saw the "minimal standard" as designed only to exclude the "nonsensical", namely "areas of research and study that are demonstrably devoid of merit".[46] While the concept of merit may raise more difficult, subjective issues of 'taste' where, say, literature or art is the focus of an educational advancement analysis — a point elaborated in Part IV — Ellis J perceived such difficulties as much less likely to surface in matters of science. At the same time, though, she countenanced the prospect of some areas of research whose objects "are so at odds with provable reality that purported scientific pursuit of them can be dismissed as nonsensical or an exercise in certain futility"[47] Curiously, her Honour cited attempting to prove that the earth is flat as one such endeavour.

The New Zealand Charities Registration Board (the "Board") sought to justify its refusal to register the foundation by reason that, *inter alia*, the subject matter of the proposed research was not a "useful" subject of study, for reasons including that: cryonics research is not an "accepted academic discipline"; not all cryonic research facilities and providers consider that cryonics research is "current science"; and a lack in the mainstream scientific community as to the feasibility and benefit of

43. Indeed, earlier in the judgment the court observed that if the testator was mistaken in the belief that instruction in vocal music would tend to proper development of the lungs, this should not invalidate the disposition: *ibid* at 643.
44. [2016] NZHC 2328 [*Anti-Aging Research*].
45. 'Cryonics' targets the use of extreme cold temperature with a view to preserving human life with the object of restoring good health when, it is hoped, technology enables this.
46. *Anti-Aging Research*, *supra* note 44 at para 58.
47. *Ibid*.

the research.[48] It appears that 'useful' in this context was intended as synonymous with 'meritorious'.

Justice Ellis found this unpersuasive, reasoning in the first instance that, "as the oft-cited decision in *Re Hopkins' Will Trusts* makes clear, research into matters that might be regarded by 'mainstream' academics as being on the fringe are not excluded".[49] *Re Hopkins' Will Trusts* did not, however, involve any scientific paradigm but instead a bequest to fund inquiry into finding allegedly lost "'Bacon-Shakespeare manuscripts'".[50] That the expert opinion (on behalf of the next-of-kin) of two mainstream academics marked this inquiry as futile did not sway Wilberforce J against upholding the gift. While accepting that "the discovery of any manuscript … is unlikely", the same applied to "many discoveries before they are made", such as the Codex Sinaiticus, the Tomb of Tutankhamen, or the Dead Sea Scrolls.[51] On the facts, his Lordship did not consider that the "degree of improbability has been reached which justifies the court in placing an initial interdict on the testatrix's benefaction".[52] That "[t]he discovery of such manuscripts, or of one such manuscript, would be of the highest value to history and to literature"[53] no doubt motivated this finding. It was also influenced by the "not very specific"[54] nature of the academic opinion. One can thus perhaps appreciate why Wilberforce J expressed tenderness to the object of the bequest.

Following on from the above, Ellis J in *Anti-Aging Research* went on to remark that "the existence of scientific or academic controversy in a particular area is far from determinative"[55] of the question. Nor, her Honour added, "is an acknowledgement that the goals of the research might only be achieved in the relatively distant future".[56] By way of example,

48. *Ibid* at para 51.
49. *Ibid* at para 59.
50. *Re Hopkins' Will Trusts*, [1965] Ch 669 (ChD (Eng)) at 670 [*Hopkins*].
51. *Anti-Aging Research*, *supra* note 44 at para 59.
52. *Hopkins*, *supra* note 50 at 678.
53. *Ibid* at 679.
54. *Ibid* at 677.
55. *Anti-Aging Research*, *supra* note 44 at para 59.
56. *Ibid*.

the Board had registered the Mars Society New Zealand Charitable Trust, with the object of encouraging and inspiring space science and research leading to New Zealand's participation in the exploration and settlement of Mars. Justice Ellis saw the pursuit of such long-term goals as "likely to yield much useful knowledge along the way, regardless of whether the endpoint is ever achieved", which she considered sufficed to meet the 'usefulness' (or 'merit') threshold.[57]

The latter is what appears to have proven decisive when it came to the proposed cryonics research. Evidence indicated that it could lead to advances in areas such as organ transplant medicine, *in vitro* fertilisation, stem cell research, and treatment of a range of diseases and disorders and enabling biodiversity. This conception of 'usefulness' (or 'merit') rendered, Ellis J reasoned, the indicators relied on by the Board as largely irrelevant. On this approach, however seemingly unlikely or unrealistic the ultimate object, merit for the purposes of charity law can be substantiated from the more proximate downstream public benefit that may ensue in pursuing that object. This, of course, also remains a matter of expert evidence rather than mere acceptance of the opinion of its proponent(s).[58]

Anti-Aging Research reveals, moreover, that when confronted with an object sitting outside the scientific (or otherwise academic) mainstream, its *potential* to nonetheless impact positively on human health may function to substantiate 'merit' (or 'usefulness' or 'utility'). Playing the 'health card' presumably carries greater weight than, say, questionable educational pursuits in the humanities (such as in *Hopkins*). Support for this proposition appears in a 2017 judgment rendered by the Australian Federal Administrative Appeals Tribunal, presided by a superior court judge, in *Waubra Foundation v Commissioner of Australian Charities and Not-for-profits Commission*.[59] Although what was in issue was, *inter alia*, whether the applicant foundation was an "institution whose principal

57. *Ibid*.
58. As an aside, and reflecting the admittedly different factual scenario in *Hopkins*, any downstream benefit did not appear to have influenced Wilberforce J.
59. [2017] AATA 2424 (Austl) [*Waubra Foundation*].

activity is to promote the prevention or the control of diseases in human beings",[60] the tribunal targeted questions of merit underscoring the foundation's main object. The latter was to "promote human health and wellbeing through the prevention and control of diseases and other adverse health effects due to industrial sound and vibration".[61] In particular, the foundation was concerned about perceived adverse health effects of wind farms.

The Australian Charities and Not-for-profits Commission rejected the foundation's registration by reference to the current non-acceptance by the medical and scientific community of many of the asserted ills of wind farms. Yet the tribunal did not see this as determinative of the relevant inquiry, opining that credible or plausible evidence that a condition exists, or of a causal relationship between a particular activity or exposure and an adverse health condition, may suffice. The point saw elaboration as follows:

> [i]t is not uncommon in human experience for the appreciation that an activity or exposure is injurious to human health to develop over time. In the way scientific understanding and knowledge develops, it can sometimes take time for the association between an activity or exposure, on the one hand, and an effect on human health, on the other, to become accepted. This is particularly so if the activity or exposure has previously been thought to be benign or advantageous. Likewise, it can sometimes take time for there to be recognition that an activity or exposure can give rise to forms of disease which have not previously been recognised. Asbestosis and the association between tobacco smoking and lung cancer provide examples.[62]

Registration was not, accordingly, premised upon proof that wind turbines *do* injuriously affect human health. The tribunal, no doubt cognisant of opening the door to objects that do little more than 'cry wolf', marked a distinction between what is plausible or credible, as opposed to what is "farfetched" and "speculative".[63] In this sense, and consistent with the judicial approach identified earlier, it explicitly acknowledged the need

60. Being an eligibility requirement for registration under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), 2012/168, s 25-5(5).
61. *Waubra Foundation*, *supra* note 59 at para 8.
62. *Ibid* at para 138.
63. *Ibid* at para 141.

for a dividing line between what objectively has merit from what does not.

IV. Public Cultural or Artistic Displays

A second scenario where issues of 'merit' factor into charitable status concerns dispositions for aesthetic display, presentation or performance. Advancing education need not, as mentioned at the outset of this article, be confined to the giving of formal instruction. Courts have long recognised that it can comprise passive — visual or auditory — exposure to matters of cultural or artistic significance rather than any instruction or training to develop skills in these fields.[64] Education in the 'fine arts' has, in this regard, been said to include "the development of the aesthetic sense in the appreciation of … beautiful and attractive objects whether they be pictures, statuary, or other things that may allure delight or intrigue the senses".[65] Expressed more broadly, "the education of the public taste may be a valid charitable object"[66] because it "is one of the most important things in the development of a civilised human being".[67]

The absence of formal (or indeed usually also informal) instruction in many of these instances can accentuate questions of merit underscoring

64. The potentially strained approach to advancing education in this context, but recognition nonetheless that aesthetic appreciation of the arts is beneficial to the community, has in some jurisdictions prompted the statutory recognition of cultural purposes as charitable in their own right: *Charities Act 2013* (Cth), 2013/100, (Austl), s 12(1)(e) (confined in its application to federal statutory purposes); *Charities Act 2009* (I), s 3(11)(k) ("the advancement of the arts, culture [and] heritage"); *Charities Act 2011* (UK), c 25, s 3(2)(f) (same as Ireland).
65. *Re Chanter (deceased)*, [1952] SASR 299 (SASC (Austl)) at 302 per Mayo J.
66. *Commissioners of Inland Revenue v White*, (1980) 55 TC 651 (EWHC (Ch) (Eng)) at 655 per Fox J.
67. *Royal Choral Society v Inland Revenue Commissioners*, [1943] 2 All ER 101 (CA (Eng)) at 105, Lord Greene MR. See also *Re Shaw's*, *supra* note 30, Vaisey J ("the promotion or encouragement of these arts and graces of life which are, after all, perhaps the finest and best part of the human character" at 172).

that to which the public is passively exposed. There is nonetheless usually little debate in this regard. The relevant public exposure occurs precisely because of the meritorious nature of the cultural or artistic display, presentation or performance. This explains the longstanding recognition that public museums,[68] art galleries[69] and orchestras[70] advance education. Public attendance is partly a testament to merit (although it should not be assumed that low attendances necessarily dictate otherwise; other factors independent of merit may influence attendance).[71] Expert evidence as to the merit of these endeavours is thus ordinarily unnecessary.

Merit is also implicit in gifts (usually bequests) to fund prizes for artistic[72] or literary[73] pursuits. The very nature of a prize suggests competition for greatest merit based on specified criteria. That it encourages competitors to pursue meritorious artistic or literary compositions, and (almost invariably) invite public exposure, likewise

68. See *e.g. British Museum Trustees v White* (1826), 57 ER 473 (Vice Chancellor's Court); *Re Holburne*, (1885) 53 LT 212 (Ch (Eng)).
69. See *e.g. Public Trustee v Nolan*, (1943) 43 SR (NSW) 169 (SC (Austl)).
70. See *e.g. Re Perpetual Trustees Queensland Ltd*, [1999] QSC 200 (Austl).
71. *Re Hermann*, *supra* note 35.
72. See, for example, *Tantau v MacFarlane*, [2010] NSWSC 224 (Austl) (bequest to fund an annual award for a portrait in sympathy with the works of a particular noted artist upheld as charitable, even though relatively few artists presently painted in that genre; Ward J at para 150 held that the gift "has educational value insofar as it encourages appreciation and knowledge of a style of artwork" and, insofar as it was open to the awardee to use the award to promote public awareness of the works of the artist in question more generally, the gift was likely to facilitate a purpose beneficial to the community beyond the mere making of an award).
73. See *e.g. Re Litchfield*, [1961] ALR 750 (NTSC (Austl)) ('The Litchfield Award for Literature').

obviates the need for expert opinion in this regard.[74] A Canadian court has even upheld a bequest to a publishing house to assist "in publishing the work of an unknown Canadian author", presumably inferring from the testamentary language that the testator intended that the author be selected on merit rather than happenstance[75] (the appointment of a publishing house as trustee for this bequest supports this inference).

Potentially more challenging on the merit front are bequests to display the furniture and/or artwork of a testator, whether or not *in situ* (that is, within the testator's home or studio). Where the testator is an accomplished artist, courts are inclined to assume a benefit to the public from the display of his or her work. In *Sharp v AG (NSW)*,[76] for instance, Justice Stevenson upheld a testamentary trust created by a noted Australian artist to preserve his home to advance, protect and continue his works. His Honour reasoned that "the merit of the opportunity to preserve the work in situ of a major Australian artist is obvious" and, in any case, testimonials from leading figures in the Australian art scene "points to the merit and public benefit of preserving [the home] and its contents".[77]

The hurdle is likely to prove more substantial for an artist (much) less well known or regarded. In *Swaney v Austin Health*,[78] for instance, involving a bequest for a gallery to display the testator's art, Justice Bell treated evidence that the testator was "a reasonably talented amateur artist" as insufficient to justify characterisation of that purpose as charitable.[79] His Honour remained unpersuaded that displaying the

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74. *Cf. Town of Peterborough v MacDowell Colony Inc*, (2008) 943 A (2d) 768 (Sup Ct NH) (where a competitive non-profit 'artist-in-residence' program was held to be charitable object; although those selected derived direct benefit from the program, the Court reasoned that "an indefinite number of persons", that is, the general public, "necessarily receive[d] the benefits" of the art produced not only by the artists who become fellows, but the other artists who compete to become them at 778).
75. *Re Shapiro*, (1979) 27 OR (2d) 517 (ONSC) at 517.
76. [2015] NSWSC 1580 (Austl) [*Sharp*].
77. *Ibid* at para 35.
78. [2013] VSC 654 (Austl) [*Swaney*].
79. *Ibid* at para 16.

testator's art would benefit the public. How much can be read into this decision, however, may be queried, given that the gallery bequest was phrased in precatory terms ("a possible gallery to display my art")[80] and, in any case, envisaged a (clearly charitable) alternative destination for the funds in question ("to provide cash prizes for winning paintings or art works entered in [a specified annual art competition]").[81] Accordingly, it could not be said that an omission to display the testator's art works would frustrate his testamentary intentions.

Yet as the artist (and furniture collector) in *Re Pinion*[82] displayed, according to expert evidence, practically *nothing* in the way of artistic talent (or discernment) did not prevent Wilberforce J at first instance from upholding as charitable (under the education head) a bequest to the National Trust of his Notting Hill studio and its contents for the purposes of display. Those contents included the paintings (by both the testator and others), furniture, bric-a-brac, china and glass. The reasons why the National Trust refused the bequest became evident from evidence adduced before his Lordship. Evidence from an auctioneer and valuer, for probate purposes, indicated that the testator's entire whole collection was "far inferior to a collection such as one might find in an antique dealer's show room" and "would be of no interest or benefit to the public … whether housed in its existing surroundings or exhibited in a museum or other place to which the public has resort".[83] That the testator's studio was 'undistinguished' and 'shabby' hardly assisted the cause.

Yet Wilberforce J, deciding that this evidence was insufficient, adjourned the summons for expert evidence as to the artistic or educational value of the collection. Far from presenting any rosier a picture, the two experts summoned were little short of scathing. One opined that the items of furniture in the collection "could not have been of a lower quality", branded the pictures and china "quite worthless", before concluding that the collection has "no educational value whatsoever".[84] He expressed

80. *Ibid* at para 20.
81. *Ibid* at para 21.
82. *Re Pinion*, *supra* note 25.
83. *Ibid* at 88-89.
84. *Ibid* at 89.

surprise that a person with the testator's voracious appetite for bric-a-brac would not occasionally have acquired some pieces of mediocre quality, "but that has not proved to be the case".[85] The second expert, in similar vein, described the testator's works as "by any recognised standard … atrociously bad", and viewed "the proposal that this collection should form a trust [as] really quite fantastic".[86] Each expert also made reference to the condition of the studio, respectively described as "extremely squalid" and so "appalling … that the local authority was likely to condemn it".[87]

As regards the testator's own paintings, it was put to the experts that no expert opinion could be more than an opinion, and a fallible one at that, and that the rejects of one age could prove the masterpieces of another. The example was given of Vincent Van Gogh, who only sold one painting during his life (for only 400 francs).[88] While not disputing the fallibility of judgment as to artistic merit, the experts referred to a consensus of informed opinion; the case of Van Gogh was different, they maintained, as he was a revolutionary artist ahead of his time, but that even during his lifetime many informed people considered him a genius. The testator, on the other hand, was an "inconceivably bad academic artist" whose paintings were valueless.[89]

In seeking to support the gift, the Attorney-General not only objected to the admissibility of the expert evidence but argued that its object was *prima facie* educational (and thus charitable). By reason of this, he maintained that the court was inapt to judge its merit, particularly as the gift inhabited the field of fine arts where objective judgments were unattainable. Justice Wilberforce characterised this argument as including a *petitio principii*.[90] His Lordship accepted that once it can be established, on a reading of the gift, that it is for genuinely educational purposes, the inquiry need not be carried any further (later noting that "the court

85. *Ibid* at 89-90.
86. *Ibid* at 90.
87. *Ibid*.
88. *Ibid*.
89. *Ibid* at 91.
90. *Ibid* at 93. Namely 'begging the question', referring to the fallacy of aligning a premise with the conclusion of the argument.

cannot discriminate between … methods of education");[91] the "whole question", accordingly, was whether the gift exhibited an educational character[92] (later in the judgment described in terms of "any educational tendency").[93] Justice Wilberforce then essentially assimilated inquiry into this character or tendency with one into public benefit, against a backdrop of caution in making judgments as to aesthetic merit:

> [p]articularly where it is dealing with a subject matter in the sphere of art or aesthetics it must allow for the difficulty there is in making any secure objective judgment, for changes in fashion and in taste. It should recognise that the formation of an educated taste is a complex process, differing greatly as between individuals. It must allow for the differences — very great differences — of education and taste to be found among the members of the public who are likely to see the bequest. Nevertheless, making all these necessary allowances, there must come a point when the court, on the evidence, is impelled to say that *no sufficient element of benefit to the public is shown* to justify the maintenance in perpetuity of the subject matter given.[94]

Now fully couching the inquiry in terms of (public) benefit, his Lordship, albeit with "considerable hesitation", discerned a small benefit to be anticipated for the public; there is "just enough", he surmised, "given proper and skilled exhibition, in the collection to make a contribution to the formation of artistic taste to justify it", even if "[i]t may do no more than interest those who see it in styles of furniture and portraiture and encourage them to go further and to look for better specimens both of furniture and painting".[95] While conceding that the contribution would be a "small one", even "out of proportion to the resources locked up in preserving it", his Lordship did not think that the court "can measure the relation of benefit to expenditure and say that the former is, or is not, a justified use of the latter".[96] In conclusion, Wilberforce J was unable to say that to provide a room, with a number of objects possessing some degree of historical and artistic interest, open to the public, "will *not* be a

91. *Ibid* at 96.
92. *Ibid* at 93.
93. *Ibid* at 96.
94. *Ibid* at 96 [emphasis added].
95. *Ibid* at 97.
96. *Ibid*.

benefit to the public".[97]

Various ramifications could emerge from the first instance judgment in *Re Pinion*, including the following. *First*, it is legitimate for a court to seek expert opinion as to educational merit, although it will not be constrained by it. *Second*, there appears some confluence between educational merit and public benefit. *Third*, at least in the field of aesthetic education, by reason of varying perceptions as to taste (in the broadest sense), the threshold for merit or public benefit is a low one. *Fourth*, that threshold is not determined by an inquiry into proportionality between benefit and cost. *Fifth*, the relevant test is apt to being expressed in the negative (will the object *not* benefit the public?) as opposed to the positive (will the object benefit the public?).

Seeking to uphold the first instance determination, on appeal counsel for the Attorney-General argued that "[o]nce it is shown that there is a scintilla of educational merit in the gift it is charitable", and "[t]he fact that a charity is thoroughly wasteful and overendowed does not matter".[98] Contrarily, counsel for the testator's next-of-kin sought to shift the inquiry away from a possibility that someone would derive education or benefit from seeing the display, to one that located that benefit as the "natural and necessary consequence".[99]

While the English Court of Appeal did not explicitly endorse either view, in reversing Wilberforce J's decision it unsurprisingly inclined closer to the latter than the former. Common to each of the three separate judgments was a strong reliance upon the "unanimous" and "overwhelming" expert opinion that displaying the testator's collection lacked both educative value and public benefit.[100] Lord Justice Russell vividly concluded, to this end, that where the evidence speaks to the "virtual certainty on balance of probabilities that no member of the

97. *Ibid* at 98 [emphasis added].
98. *Ibid* at 103.
99. *Ibid* at 104.
100. See *Ibid*, Harman LJ (referring to the need for "an accepted canon of taste on which the court must rely, for it has itself no judicial knowledge of such matters", namely the opinions of experts at 107); *ibid* at 107, Davies LJ; *ibid* at 110–11, Russell LJ.

public will ever extract one iota of education from the disposition, I am prepared to march it in another direction, pressing into its hands a banner lettered 'De minimis non curat lex'".[101]

Several observations are apt concerning the appeal judgments, by way of distinction from the decision at first instance. *First*, while expert evidence figured prominently in each case, its weight in the one direction proved decisive on appeal. It stands to reason that, had the expert opinion been divided or equivocal, the Court of Appeal may have proven more inclined to accept that *de gustibus non est disputandum* ('in matters of taste there can be no disputes'). *Second*, like Wilberforce J, the appeal judges approached the relevant inquiry by reference to educational tendency, advancement, merit and public benefit therefrom, rather than targeting one over the other. This suggests a belief that each is interlinked. *Third*, while the Court of Appeal did not purport to raise the threshold for merit or public benefit, acceptance of the expert evidence spoke against that threshold being met on the facts. This in turn avoided any need to inquire into proportionality between benefit and cost. *Fourth*, their Lordships approached their inquiry via a positive question: did the evidence "sufficiently establish that the gift would tend to advance or promote education in the relevant field"?[102] The need for this inquiry was propelled by the doubt cast over the merit of the object in question.

In passing, it may be noted that although not referred to in the judgments in *Re Pinion*, essentially the same outcome, on similar reasoning, had ensued some 25 years earlier before the Supreme Court of South Carolina in *Medical Society*.[103] There the testatrix's attempt to establish a museum to display items of her personal property collectively and exclusively failed for not being charitable. Again, evidence from multiple experts was adduced, which unanimously spoke against the educational merit of the collection, one fearing that any exhibition thereof would constitute a "museum of bad taste".[104] Far from benefiting the public, this prompted the court to conclude that its exhibition would

101. *Ibid* at 111 (namely 'the law does not concern itself with trifles').
102. *Ibid* at 110, Russell LJ.
103. *Medical Society*, *supra* note 36.
104. *Ibid* at 580.

prove detrimental to the public.[105]

Two further observations concerning the English Court of Appeal's reasons in *Re Pinion* are merited. The first concerns Lord Justice Harman's remark that he could "conceive of no useful object to be served in foisting upon the public this mass of junk".[106] This may have been intended to reiterate the concern of counsel for the next-of-kin that, were the gift upheld, "[e]very bad artist, writer or composer would then be able to inflict his works upon the public, provided that he had the necessary money".[107] This is somewhat hyperbolic. After all, by its very nature charity hardly compels persons to partake. All in society have a choice whether or not, in this context, to view, read or listen. Moreover, it does not address the fact that the *inter vivos* establishment of a museum by a (well-endowed) individual is not circumscribed by merit (or taste). The point being made, rather, is that the law can be "censorious"[108] when it comes to testamentary purpose dispositions that are, according to expert opinion, entirely lacking in educational value or tendency.

The second observation pertains to Harman LJ's interpretation of the will as revealing an object "not to educate anyone, but to perpetuate his own name and the repute of his family".[109] Again, this appeared to reflect something raised by counsel for the next-of-kin, namely that "the testator himself said nothing whatever about education; his dominating purpose was the preservation of his own collection".[110] In response, it may be noted that explicit reference to education in a purpose disposition is not

105. *Ibid* at 581.
106. *Re Pinion*, *supra* note 25 at 107.
107. *Ibid* at 100.
108. *Collier*, *supra* note 32 at 92, Hammond J.
109. *Re Pinion*, *supra* note 25 at 106.
110. *Ibid* at 99.

essential to it being construed as for the advancement of education.[111] Most of the cases on aesthetic appreciation under the charity umbrella are not expressed in explicitly educational terms. A tendency to 'educate' is not confined to objects described in precisely that manner.

A further response is that, as noted at the outset of this article, it has long been established that charitable status is driven not by motive but by nature and effect. An object that is educational does not lose that character for charity law purposes merely because it was ostensibly propelled by egocentricity. The case law reveals multiple occasions where memorials to the testator and his or her family were no doubt motivators for testamentary dispositions exhibiting an educational slant.[112] So had the collection in *Re Pinion* exhibited at least some educational merit, that it may well have been motivated to perpetuate the testator's name would not itself have precluded charitable status.

V. Funding of Publication and Distribution of Works

Testators may wish to perpetuate their reputation in other ways, such as by leaving funds to support the publication or other dissemination of their work. As mentioned above in the context of public displays, there is nothing in principle to preclude a person from allocating funds *inter vivos* to this publication or dissemination. For instance, a budding author can self-publish, nowadays cheaply and conveniently via the internet, or otherwise disseminate their work to the public. That those wares lack

111. An odd decision in this context is *Emmert v Union Trust Company of Indianapolis*, 227 Ind 571 (Sup Ct 1949) at 453, where the majority of the Court, while conceding that the diaries of the testatrix's grandfather (the publication of which was to be funded by a bequest in the testatrix's will) were of educational value to the state and nation, nonetheless ruled against the disposition because of an ostensible absence of charitable intent. The strong dissent delivered by Gilkinson CJ better aligns with the case law trajectory, as it acknowledged that 'publication' necessarily involved public dissemination of what was established to have possessed educational merit.

112. See *e.g. Re Delius (deceased)*, [1957] Ch 299 (ChD (Eng)) [*Re Delius*] (discussed in Part V); *Sharp*, *supra* note 76 (discussed earlier in Part IV).

educational value does not stand in the way of their pursuit.

When, however, this is sought to be effected via testamentary means, to the extent that it (in all likelihood) involves a purpose gift, it must exhibit a charitable flavour.[113] Otherwise there is no one withstanding to enforce the purpose so prescribed. To this end, as an American court has remarked, "[a] man may do many things while living which the law will not do for him after he is dead".[114] Having said that, if the publication or dissemination of a person's work is effected via an *inter vivos* purpose trust, its validity likewise rests upon charitable status.

A case illustration is *Re Delius*,[115] where the wife of the composer Frederick Delius bequeathed her residuary estate on trusts for the advancement of her husband's musical works. She directed her trustees to "apply the royalties income and the income of my residuary trust fund for or towards the advancement in England or elsewhere of the musical works of my late husband"[116] by means of audio-recordings, publication and performance. Because the standard of Delius's work was widely perceived as high, Justice Roxburgh did not need to consider the position had the trust been for the promotion of the works of "some inadequate composer".[117] His Lordship noted the suggestion that perhaps a court should have no option but to give effect even to such a trust. Though purporting to disclaim any investigation of that problem, his ensuing

113. *Cf. Collier*, *supra* note 32 where Hammond J pondered "why testators do not simply make a specific bequest of a sum to a named person or institution and direct publication" instead of invoking "the problematical charity head" at 91. The problem, though, concerns who has standing to enforce such a purpose gift of this kind.
114. *Manners v Philadelphia Library Company*, 93 Pa 165 (Sup Ct 1880) at 172.
115. *Re Delius*, *supra* note 112.
116. *Ibid* at 299.
117. *Ibid* at 306. *Cf. Green v Monmouth University*, 237 NJ 516 (Sup Ct 2019) (where, in the context of the American doctrine of charitable immunity, the Supreme Court of New Jersey remarked that "courts should not be in the business of deciding what music constitutes 'educational' music and what does not" (at 538), before adding that "[r]equiring courts to engage in such an analysis is problematic" (at 539)).

reference to the promotion of a particular composer's music being charitable "presupposing … that the composer is one whose music is worth appreciating"[118] suggests that the court is not so hamstrung.

Such a view, in any event, aligns with the merit inquiry surfacing in the first two scenarios the subject of this article. The point is confirmed by later judgments in Australia and New Zealand. In the earlier of the two, *Re Elmore (deceased)*,[119] the Supreme Court of Victoria was asked to determine, *inter alia*, whether or not a bequest for the publication of the testator's prose and poetry should be characterised as charitable. As the testator was not a known or published author, the trustee of the estate produced evidence from an academic specialising in English. The evidence indicated that the testator's works had "no literary merit" and "no significant education value",[120] leading Justice Gowans to strike down the bequest.

The New Zealand decision, *Collier*,[121] similarly involved a bequest to publish a 'book' that was struck down. But what marks this case as unusual is that the presiding judge, Hammond J, appeared to reach this conclusion without the assistance of expert evidence. This was so notwithstanding his Honour's mention of the advisability of bringing before the court "expert evidence that a prospective work has at least *some* educative value or public utility to enable recognition of it", which he characterised as operating "as a floor below which a work cannot sink".[122] A review of the 'book' led Hammond J to describe it as "no such thing", and "no more than a short pamphlet, with some attachments"; his Honour could "[not] conceive of circumstances in which any publishing house would have had an interest in the book (and some have declined it)".[123] Its absence of "educative value" or "public utility" meant that the minimal threshold test was not met.[124]

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118. *Re Delius*, *ibid* at 307.
119. [1968] VR 390 (VSC (Austl)) [*Elmore*].
120. *Ibid* at 393.
121. *Collier*, *supra* note 32.
122. *Ibid* at 92 [emphasis original].
123. *Ibid*.
124. *Ibid*.

The omission to adduce expert evidence may well have been driven by a desire to contain costs (although the value of the estate approached NZD $2,000,000) and judicial confidence that the 'book' in question lacked educational merit. Given the cursory treatment of the 'book' issue in the judgment (in effect exhausted by what appears in the preceding paragraph), one can only assume that its content was *prima facie* so poor as to practically torpedo any claim to merit. That this is very much likely to be the exception than the rule explains the common judicial inclination, acknowledged by Hammond J, to rely upon expert evidence.

In any case, it may be queried whether educational merit necessarily ties to publishable quality, which is a possible inference from the remarks in *Collier*. Confident determinations as to (lack of) publishable quality may be possible at the extremes — compare, for instance, the publication of the works of Delius compared to those of the testatrix in *Collier* — but there remains a potentially broad middle ground where opinions may differ, and differ significantly. Academic writers who submit their work to refereed journals can all testify to this proposition. Moreover, *Collier* should not be read as suggesting that works rejected for publication by commercial publishers necessarily lack merit. Few, if any, published authors have never suffered the ignominy of rejected proposals (and often many of them).

To the extent that the concept of 'publishability' exhibits broad parameters — that rest upon time, place, audience as well as opinion — consistent and unanimous expert opinion is the prism through which the process of binary determination must pass. Should evidence of this kind be equivocal, variable or even diametrically opposed, it would presumably take an interventionist judge to side against upholding the disposition.

VI. Where Does This Leave Us?

The case law has revealed degrees of judicial interventionism when it comes to the merit of educational objects. What is consistent in this regard, however, is recognition that matters of ostensibly questionable educational merit justify being probed, whether or not by reference to 'benefit', almost invariably with resort to expert opinion. This in turn presents another wrinkle to the challenges identified at the outset of

the paper in resolving the broader charity equation, one that does not appear to have surfaced to any patent degree outside of the educational arena. What it brings is a further peculiarity in the charity context, which by virtue of its capacity to impede (usually testamentary) freedom of property disposition arguably justifies judicial caution.