

Antivivisection and Charity

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Abstract

After the National Anti-Vivisection Society had held the status of ‘charitable institution’ for more than five decades, in 1948 the House of Lords held it was not a charitable institution because its objectives were political, and also because any benefit to the public that flowed from abolishing vivisection was outweighed by the cost to society, in terms of medical research that was of benefit to mankind. In light of the historical background of both the Society and more recent developments in charity law in Australia, the question is asked whether the decision of the House of Lords still stands as good law today.

I Introduction

Every year, millions of animals are subjected to vivisection¹ procedures in the realm of scientific research.² In the United Kingdom in 2011, animals³ were used in 3.79 million scientific procedures, an increase of two per cent over the number in 2010. Rats, mice and other rodents were used in 78 per cent of these procedures,⁴ while fish, amphibians, reptiles and birds were used in 19 per cent.

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¹ The word ‘vivisection’ is derived from the Latin roots ‘vividus’ meaning alive, and ‘sectio’ meaning cutting’, and refers to the surgical use of a living organism for experimental purposes. The word now has a broader meaning and includes any form of experimentation using living organisms. The living organism may be a human or non-human animal. In this article, unless otherwise indicated, the use of the word ‘vivisection’ refers to non-human animal vivisection. In the past, human animal vivisection was performed on orphans and uneducated African-Americans in the United States in the early decades of the 20th century: Adrian R Morrison, *An Odyssey With Animals, A Veterinarian’s Reflections on the Animal Rights & Welfare Debate* (Oxford University Press, 2009) 132. Other instances of human animal vivisection were perpetrated by the Nazi regime in Germany and by the Japanese Imperial Army during World War II: Lori Gruen, *Ethics and Animals, An Introduction* (Cambridge University Press, 2011) 126–7. However, the involuntary use of human animals for any scientific experimentation and research is now prohibited pursuant to the provisions of the *Nuremberg Code* of 1947. On the provisions and applicability of the *Nuremberg Code* see Evelyn Shuster, ‘Fifty Years Later: The Significance of the Nuremberg Code’ (1997) 337 *The New England Journal of Medicine* 1436; Anita Guerrini, *Experimenting with Humans and Animals: From Galen to Animal Rights* (Johns Hopkins University Press, 2003) 137–41.

² The scientific research community generally shuns the use of the word ‘vivisection’ because of its negative connotations, preferring terms such as ‘animal experimentation’ or ‘biomedical research’: Joan Dunayer, ‘In the Name of Science: The Language of Vivisection’ (2000) 13 *Organization & Environment* 432, 432. Cf Gruen, above n 1, 109–11.

³ In this article, unless the context clearly indicates otherwise, the word ‘animal’ refers to a non-human animal.

⁴ The generally negative public opinion of rodents is the main reason for their popularity in vivisection: Lynda Birke, ‘Who — or What — are the Rats (and Mice) in the Laboratory’ (2003) 11 *Society and Animals* 207, 215.

The remaining procedures used other mammals.⁵ In Australia today, ‘close to 7 million animals are used in research and teaching annually, and the figure is growing’.⁶

Debate about vivisection is highly charged and often emotional and has been recognised as such by the courts.⁷ Thus, in *Department of Agriculture and Rural Affairs v Binnie*⁸ the Court of Appeal in Victoria ruled that the names of certain institutions and individuals engaged in scientific animal experimentation be deleted from documents to be handed over pursuant to an application under the *Freedom of Information Act 1982* (Vic). Such a deletion was permitted under s 31(1)(e) of the legislation on the ground that the disclosure might endanger the lives or physical safety of the individuals concerned. Young CJ observed that ‘the topic of experiments on animals ... often generates high emotional reactions’.⁹ Marks J offered a more loaded observation when he said that animal experimentation is an ‘activity ... which touches strong emotions, often without justification, in some animal lovers’.¹⁰ This essentially negative view of antivivisectionists reflects broader popular perceptions which are given expression in media reports and popular culture. Thus, in many popular television series, antivivisectionist characters are usually depicted as engaged in ‘violent and illegal activities’ and are ‘stereotyped as young, misinformed, angry, aggressive, sometimes insane, social deviants’ with the result that ‘the antivivisection movement ... [is] faced with charges of being anti-scientific to the extent that it [has] to counter criticisms of misanthropy and accusations that humans would suffer if vivisection was ended’.¹¹

Antivivisection organisations form part of a wider category of organisations that have as their core purpose the protection and care of animals. For many of them, having such a purpose characterised as ‘charitable’ brings them public credibility as well as significant financial privileges in the form of taxation concessions that are of major assistance in providing them with a funding base for

⁵ Home Office (UK), *Statistics of Scientific Procedures on Living Animals, Great Britain 2011* (2012) 7–8.

⁶ Anna Krien, *Us and Them, On the Importance of Animals* (Quarterly Essay, 2012) 47. Cf Andrew Knight, *The Costs and Benefits of Animal Experiments* (Palgrave Macmillan, 2011) 12–16.

⁷ Simon Brooman and Debbie Legge, *Law Relating to Animals* (Cavendish, 1997) 110.

⁸ [1989] VR 836.

⁹ Ibid 838.

¹⁰ Ibid 843. The emotional nature of the debate over vivisection is reflected in recent cases in the United Kingdom in which proceedings to prevent harassment and/or trespass have been brought against antivivisection protesters that have picketed organisations engaged in breeding animals for the purposes of medical and clinical research: *University of Oxford v Broughton* [2004] EWHC 2543 (QB); *Novartis Pharmaceuticals UK Ltd v Stop Huntington Animal Cruelty* [2009] EWHC 2716 (QB); *Smithkline Beecham Plc v Stop Huntington Animal Cruelty* [2009] EWHC 1488 (QB); *AGC Chemicals Europe Ltd v Stop Huntington Animal Cruelty (SHAC)* [2010] EWHC 3674 (QB); *Astellas Pharma v Stop Huntington Animal Cruelty* [2011] EWCA Civ 752; *Harlan Laboratories UK Ltd v Stop Huntington Animal Cruelty* [2012] EWHC 3408 (QB). In the United Kingdom, the *Protection from Harassment Act 1997* (UK) c 40, ss 1–2 creates a criminal offence of harassment of a person or persons. Section 3 grants the victim of harassment the right to bring civil proceedings against the offender. These proceedings include claims for damages and an injunction to restrain the defendant from pursuing such conduct. Most of the above cases deal with such injunction proceedings.

¹¹ Claire Molloy, *Popular Media and Animals* (Palgrave Macmillan, 2011) 38–9.

carrying out their activities.¹² It is not surprising that there exists a significant body of case law dealing with whether or not the objectives of various animal welfare organisations are charitable.

For a purpose to be charitable it must fall within one of the four categories delineated by Lord Macnaghten in *Income Tax Special Purposes Commissioners v Pemsel*: the relief of poverty; the advancement of education; the advancement of religion; and other purposes that are for the benefit of the community.¹³ For all of these categories, it must be established that the purpose is for the benefit of the public, either directly or indirectly.¹⁴ This general requirement of ‘benefit of the public’ must be differentiated from the benefit to the community aspect of the fourth category in *Pemsel*. In this respect, in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, Iacobucci J, speaking for the majority of the Supreme Court of Canada, said:

This language of ‘benefit of the community’ is unfortunate because it creates confusion with the fourth head of charity under the *Pemsel* scheme — trusts for other purposes beneficial to the community. Nonetheless, this other notion of public benefit is different and reflects the general concern that, [in the words of Professor Waters] ‘the essential attribute of a charitable activity is that it seeks the welfare of the public; it is not concerned with the conferment of private advantage’ ... The difference between the *Pemsel* classification and this additional notion of being ‘for the benefit of the community’ is perhaps best understood in the following terms. The requirement of being ‘for the benefit of the community’ is a necessary, but not a sufficient, condition for a finding of charity at common law. If it is not present, then the purpose cannot be charitable. However, even if it is present the court must still ask whether the purpose in question has what Professor Waters calls ... the ‘generic character’ of charity. This character is discerned by perceiving an analogy with those purposes already found to be charitable at common law, and which are classified for convenience in *Pemsel*. The difference is also often one of focus: the four heads of charity concern what is being provided while the ‘for the benefit of the community’ requirement more often centers on who is the recipient.¹⁵

The element of benefit to the public is necessary because, as charitable trusts are enforced by the Attorney General on behalf of the state, there is no reason for the state to lend its aid to enforcing a purpose if it is not for the benefit of the public. In relation to this aspect of charity law, it is generally accepted that there is a presumption of public benefit in relation to the first three categories but that it must be affirmatively established in relation to the fourth category.¹⁶

Trusts for preventing cruelty to animals or for improving the condition of their lives have always been held to be charitable within the fourth category in

¹² Pauline Ridge, ‘Religious Charitable Status and Public Benefit in Australia’ (2011) 35 *Melbourne University Law Review* 1071, 1073–4; Brooman and Legge, above n 7, 58.

¹³ *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, 583 (‘*Pemsel*’).

¹⁴ *Hanchett-Stamford v Attorney General* [2009] Ch 173, 179.

¹⁵ [1991] 1 SCR 10, 106 (quoting Donovan W M Waters, *Law of Trusts in Canada* (Carswell, 2nd ed, 1984) 550, citations omitted).

¹⁶ *Independent Schools Council v Charity Commission for England and Wales* [2012] 1 All ER 127, 150–2; *Re Salvana* [2013] VSC 117 (22 March 2013) [10].

Pemsel.¹⁷ Thus, a gift to the Royal Society for the Prevention of Cruelty to Animals ('RSPCA') was held to be a valid charitable bequest because the general object of the Society was to prevent cruelty to animals.¹⁸ The basis upon which such trusts are charitable is that they stimulate the moral improvement of mankind and thereby provide an indirect benefit to the public. Thus, in *Re Cranston*, Holmes LJ said:

Gifts the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation are charitable ... If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty.¹⁹

In a similar vein, in *Re Wedgewood*, Swinfen Eady LJ said:

A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.²⁰

However, the cases dealing with whether or not the objectives of antivivisection societies are charitable do not present such a settled picture. In the late 19th century, the cases held that the objectives of such societies were charitable under the fourth category in *Pemsel*. However, by the middle of the 20th century, this approach was reversed with the decision of the House of Lords in *NAVS v IRC*.²¹ The House of Lords decision has since been consistently followed or cited with approval both in the United Kingdom and Australia.²²

The purpose of this article is to question the continued validity in Australia of the decision in *NAVS v IRC*. In so doing, it will first briefly account for the

¹⁷ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 67 ('*NAVS v IRC*'); *The University of London v Yarrow* (1857) 44 ER 649; *Re Moss*; *Hobrough v Harvey* [1949] 1 All ER 495, 497–8; *Re Ingram* [1951] VLR 424; *Re Weaver*; *Trumble v Animal Welfare League of Victoria* [1963] VR 257, 265. The *Charities Act 2013* (Cth) s 11(1)(i) states that a charitable purpose includes 'the purpose of preventing or relieving the suffering of animals'. Section 7 stipulates that certain charitable purposes are presumed to be for the benefit of the public. However, the charitable purpose set out in s 11(1)(i) is not one of them. Thus, the Act maintains the current general law proposition that public benefit must be proven in such cases.

¹⁸ *Re Inman, deceased* [1965] VR 238, 242.

¹⁹ *Re Cranston* [1898] 1 IR 431, 446, cited with approval in *Re Wedgewood* [1915] 1 Ch 113, 118 (Lord Cozens-Hardy MR).

²⁰ *Wedgewood* [1915] 1 Ch 113, 123, cited with approval in *Re Grove-Grady* [1929] 1 Ch 557, 572–3 (Lord Hanworth MR) and *NAVS v IRC* [1948] AC 31, 44 (Lord Wright), 67 (Lord Simonds), 76 (Lord Normand); *The Royal Society for the Prevention of Cruelty to Animals, New South Wales v Benevolent Society of New South Wales* (1960) 102 CLR 629, 647 (Menzies J); *A-G (SA) v Bray* (1964) 111 CLR 402, 418 (Kitto J); *Re Green, deceased* [1970] VR 442, 444 (Anderson J); *Hanchett-Stamford v Attorney General* [2009] Ch 173, 179.

²¹ [1948] AC 31.

²² *Re Weaver*; *Trumble v Animal Welfare League of Victoria* [1963] VR 257; *Re Inman* [1965] VR 238; *Re Jenkins' Will Trusts* [1966] 1 All ER 926; *Re Green* [1970] VR 442; *Re Howey* [1991] 2 NZLR 16; *Murdoch v A-G* (1992) 1 Tas R 117; *Perpetual Trustees Ltd v State of Tasmania* [2000] TASSC 68 (16 June 2000); *Re Estate of Michael Charles Murphy*; *Karin Ellis* [2005] NSWSC 104 (25 February 2005); *Hanchett-Stamford v Attorney General* [2009] Ch 173.

emergence of the antivivisectionist movement, especially in the United Kingdom, with particular attention given to the history of the National Anti-Vivisection Society ('NAVS'). It will then detail the early case law on the charitable status of antivivisection as background to an analysis of the reasoning that underpinned the decision in *NAVS v IRC*. The final section of the article will evaluate whether that reasoning would or should still be regarded as good law, in Australia, in 2013.

II Origins of the Antivivisectionist Movement

The evolution of a significant antivivisection movement in the United Kingdom can be traced to two key events. Prior to these events, there had been some use of animals for scientific experimentation in the United Kingdom, whereas the practice was far more widespread in continental Europe.²³ The first event was the publication, in 1873, of a textbook entitled *Handbook for the Physiological Laboratory*, which included chapters describing the use of animals for scientific experimentation without the use of any anaesthetic.²⁴ The second event was the annual conference of the British Medical Association held in Norwich in August 1874, where the French scientist Eugene Magnan, for the purpose of demonstrating the use of animals in research, 'bound two un-sedated dogs to a table ... and injected absinthe into each animal to induce epileptic seizures'.²⁵ Both events were widely reported in the British press and prompted significant public opposition to vivisection because they clearly suggested that expansion of the practice was likely to take place in the United Kingdom. Indeed, these events prompted the introduction of competing Bills into the British Parliament in early May 1875 aimed at regulating the practice of vivisection. However, these Bills differed markedly over the extent and manner of such regulation. In response to the public debate these Bills generated, on 24 May 1875 the Home Secretary announced a Royal Commission on Vivisection for Scientific Purposes to report on the practice of vivisection.²⁶

It has been argued that the antivivisection movement that developed in the United Kingdom at this time was largely inspired by Charles Darwin's theory of evolution with its recognition of the similarities and, indeed, kinship between humans and animals and the consequent alteration in society's conception of animals.²⁷ However, as Preece has argued, this greatly overstates the influence of

²³ Morrison, above n 1, 119.

²⁴ Bruno Atalić and Stella Fatović-Ferenčić, 'Emanuel Edward Klein — The Father of British Microbiology and the Case of the Animal Vivisection Controversy of 1875' (2009) 37 *Toxicologic Pathology* 708, 710; Guerrini, above n 1, 89.

²⁵ D A Feller, 'Dog Fight: Darwin as Animal Advocate in the Antivivisection Controversy of 1875' (2009) 40 *Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences* 265, 266; John Illman, *Animal Research in Medicine: 100 Years of Politics, Protest and Progress, The Story of the Research Defence Society* (Research Defence Society, 2008) 6–8.

²⁶ Lori Williamson, *Power and Protest, Frances Power Cobbe and Victorian Society* (Rivers Oram, 2005) 121–3; Theodore G Obenchain, *The Victorian Vivisection Debate, Frances Power Cobbe, Experimental Science and the 'Claim of Brutes'* (McFarland, 2012) 83–7.

²⁷ Hilda Kean, 'The "Smooth Cool Men of Science": The Feminist and Socialist Response to Vivisection' (1995) 40 *History Workshop Journal* 16, 16–17; Brooman and Legge, above n 7, 97.

Darwinism in this respect, especially as Darwin and many of the most influential popularisers of Darwinism were supporters of vivisection and opposed to attempts to abolish it.²⁸ Preece demonstrates that the sensibilities of humans towards animals, often inspired by Christian thinkers, existed long before the Darwinism of the latter part of the 19th century.²⁹ Rather, the better explanation for the emergence of significant antivivisectionist sentiment at that time was the realisation that advancements in experimental physiology within the field of science³⁰ would lead to the increased use of animals in laboratory experimentation.³¹

The early antivivisection societies were primarily inspired by religion and presented themselves as ‘fighting for a religious as well as a moral cause’.³² For example, key people in the Protection of Animals Liable to Vivisection Society (popularly known as ‘the Victoria Street Society’), formed in 1875, included many who based their opposition to vivisection on explicitly Christian principles. These included Archbishop Thompson of York, Roman Catholic Cardinal Henry Ernest Manny, John Coleridge (Lord Chief Justice as of 1880), poet laureate Alfred Lord Tennyson, Robert Browning, John Ruskin, Christina Rossetti, and its first president, the seventh Earl of Shaftesbury, arguably Britain’s foremost social reformer of the 19th century.³³ These early antivivisection societies reflected a continuation of the influence of evangelical Christianity that had been the dominant inspiration behind the growth of most of the animal protection societies that began to emerge in the early 19th century.³⁴ It was only from the 1890s onwards that segments of the secularist and radical political movements created their own antivivisection societies.³⁵ This led to an uneasy tension with the earlier, more religiously inspired, societies.³⁶ Philosophical differences underpinned this tension, with religiously

²⁸ Rod Preece, ‘Darwinism, Christianity, and the Great Vivisection Debate’ (2003) 64 *Journal of the History of Ideas* 399, 413–14. In a letter to Frances Power Cobbe, in early 1875, Darwin wrote: ‘I believe that Physiology will ultimately lead to incalculable benefits, and it can progress only by experiments on living animals’: quoted in Williamson, above n 26, 116. Feller argues that Darwin’s role in supporting legislative regulation of vivisection was the work of an animal advocate who attempted to work from within the scientific community: Feller, above n 25. On Cobbe’s unsuccessful attempt to enlist Darwin’s support for the antivivisection movement see Obenchain, above n 26, 78–80.

²⁹ Preece, above n 28, 410–11.

³⁰ On the emergence of the new kind of physiology that required the need for vivisection see Stewart Richards, ‘Vicarious Suffering, Necessary Pain: Physiological Method in Late Nineteenth-century Britain’ in Nicolaas A Rupke (ed), *Vivisection in Historical Perspective* (Croom Helm, 1987) 125.

³¹ Frances Power Cobbe makes it clear that it was the use of animals for scientific experimentation that prompted her activism towards establishing the Victoria Street Society for the Protection of Animals Liable to Vivisection: Frances Power Cobbe, *Life of Frances Power Cobbe by Herself in Two Volumes*, vol 2 (Richard Bentley and Sons, 1894) 246–8, 314.

³² Chien-hui Li, ‘An Unnatural Alliance? Political Radicalism and the Animal Defence Movement in Late Victorian and Edwardian Britain’ (2012) 42 *EurAmerica* 1, 9.

³³ Preece, above n 28, 412, 417–19. The regard for the life of animals of Frances Power Cobbe, the prime mover behind the establishment of the Victoria Street Society and its first Honorary Secretary, was initially inspired by her Christian faith as a young girl: Cobbe, above n 31, 244–5; Williamson, above n 26, 99–100. Although Cobbe later became a Theist, she regarded her commitment to antivivisection as being divinely inspired: Cobbe, above n 31, 316; Obenchain, above n 26, 14. On the evolution of Cobbe’s views on animals see Williamson, above n 26, 100–7.

³⁴ Li, above n 32, 6–9; Lloyd G Stevenson, ‘Religious Elements in the Background of the British Anti-Vivisection Movement’ (1956) 29 *Yale Journal of Biology and Medicine* 125, 155–6.

³⁵ Li, above n 32, 22–3.

³⁶ *Ibid* 15–17.

inspired groups usually basing their movement on ideas of kindness and mercy to animals, whereas the secularist and radical groups rejected such an approach in favour of a discourse based upon justice and rights for animals.³⁷

In the early history of the antivivisection movement, women played a prominent role, consistently accounting for around 70 per cent of its membership.³⁸ The most prominent of these women was Frances Power Cobbe, and it was due to her influence that British antivivisectionism was often seen as a feminist issue. As noted by Buettinger, Cobbe ‘stress[ed] a close connection between women’s and animals’ liberation’.³⁹ As a result, ‘British feminist-antivivisectionists strongly empathized with laboratory animals, stressing the cruelty both women and animals suffer at the hands of men in general and the male medical profession in particular’.⁴⁰ In the United States, although the antivivisection movement was inspired and influenced by developments in Britain and was also very much a movement dominated by women, it did not see itself as part of, nor did it embrace, the feminist movement. Rather, America’s early antivivisectionist movement was closely allied with the temperance movement, which itself was also dominated by women and deeply influenced by American Protestant Christianity.⁴¹ As Buettinger notes:

Crusaders to uplift vivisectionists, drunkards, or other reprobates banked on their moral authority as Christians and mothers, and shied away from insisting on women’s rights as individuals, which de-emphasized the roles on which that authority rested.⁴²

In Australia, legislation prohibiting cruelty to animals was first introduced in the colony of Van Diemen’s Land (later Tasmania) in 1837, with similar legislation introduced by the other colonies by the 1860s.⁴³ The debate over vivisection in the United Kingdom stimulated debates in the Australian colonies. These debates were less passionate and extensive than in the United Kingdom. Nevertheless, in 1881, Victoria became the first colony to enact legislation regulating the practice of vivisection. Following federation of the Australian colonies, similar legislation was enacted by Queensland in 1901, by South Australia in 1908, by Western Australia in 1912 and (eventually) by New South Wales in 1929.⁴⁴

³⁷ Ibid 26–7.

³⁸ Mary Ann Elston, ‘Women and Anti-vivisection in Victorian England, 1870–1900’ in Nicolaas A Rupke (ed), *Vivisection in Historical Perspective* (Croom Helm, 1987) 259, 267. Cf Susan Hamilton, ‘“Still Lives”: Gender and the Literature of the Victorian Vivisection Controversy’ (1991) 17(2) *Victorian Review* 21, 22–3.

³⁹ Craig Buettinger, ‘Women and Antivivisection in Late Nineteenth Century America’ (1997) 30 *Journal of Social History* 857, 863.

⁴⁰ Ibid. However, this is not to say that antivivisection was exclusively a feminist issue or that all feminists were antivivisectionists: Elston, above n 38, 263–4.

⁴¹ Buettinger, above n 39, 863–6.

⁴² Ibid 861.

⁴³ Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?’ (2007) 35 *Federal Law Review* 347, 349.

⁴⁴ K D Baker, ‘Vivisection Debate in Nineteenth Century Great Britain: A Muted Echo in Colonial and Early Post-Colonial Australia’ (1998) 76 *Australian Veterinary Journal* 683, 687–8.

III The National Anti-Vivisection Society

When the Royal Commission on Vivisection for Scientific Purposes began its work, the RSPCA, formed in 1824, took the lead in relation to presenting animal welfare issues to the Commission. The RSPCA took the position that vivisection should be regulated, with painful procedures to be prohibited and all procedures involving animals to be performed under anaesthetic.⁴⁵

For many, the approach of the RSPCA did not go far enough and prompted the formation, in late 1875, of the Victoria Street Society.⁴⁶ The initial goal of the Society was to counter the pro-vivisection views that were being put before the Royal Commission by the scientific community that was engaged in animal experimentation and to press animal welfare issues more forcefully than had been the case with the RSPCA.⁴⁷ For the Victoria Street Society, the ultimate goal was, according to its principal founder and first Honorary Secretary, Frances Power Cobbe, 'to obtain the greatest possible protection for animals liable to vivisection'.⁴⁸ Following the release of the report of the Royal Commission in February 1876, the Society proposed a Bill which was presented to Parliament for its approval. However, a subsequent Bill proposed by the pro-vivisectionist scientists ended up being enacted as the *Cruelty to Animals Act 1876* (UK).⁴⁹

Both the RSPCA and the Victoria Street Society were disappointed with the concessions granted to physiologists by the 1876 legislation. The RSPCA took the approach, and has steadfastly maintained it ever since, that it was better to accept and enforce the legislation because that would reveal its defects and lead to stricter legislation.⁵⁰ This approach was rejected by antivivisectionists such as Francis Power Cobbe. It was Cobbe who, in November 1876, led the Victoria Street Society to amend its aims to seeking 'the total prohibition of painful experiments on animals'.⁵¹ In 1878 the Victoria Street Society changed its name to the Society for the Protection of Animals from Vivisection.⁵² However, a Bill sponsored by the

⁴⁵ Brian Harrison, 'Animals and the State in Nineteenth-century England' (1973) 88 *English Historical Review* 786, 791.

⁴⁶ Obenchain, above n 26, 87–8; Cobbe, above n 31, 275.

⁴⁷ Cobbe, above n 31, 270. It was the antivivisection campaign of the time that, in part, led to the formation of the Physiological Society of Great Britain to represent the interests of physiologists. Although physiologists had made their arguments for vivisection to the Royal Commission appointed to report on the practice of vivisection, they did not enter the public debate on vivisection until the early 1880s. In many respects the debate over vivisection thereafter came to symbolise, for the scientists involved, a struggle over the recognition of their expertise and the authority and standing of science as a profession: Nicolaas Rupke, 'Pro-vivisection in England in the early 1880s: Arguments and Motives' in Nicolaas A Rupke (ed), *Vivisection in Historical Perspective* (Croom Helm, 1987) 188–208. The lobbying activities of the Physiological Society were taken over by the Research Defence Society in 1908: Ilman, above n 25, 15–19; Mark Matfield, 'Animal Experimentation: The Continuing Debate' (2002) 1 *Nature Reviews Drug Discovery* 149, 150. In 2008 the Research Defence Society merged with the Coalition for Medical Progress to form Understanding Medical Research.

⁴⁸ Quoted in Cobbe, above n 31, 275.

⁴⁹ Williamson, above n 26, 127–31; Obenchain, above n 26, 88–90; Cobbe, above n 31, 276–9.

⁵⁰ Harrison, above n 45, 804–5.

⁵¹ *Ibid* 808; Obenchain, above n 26, 92–3; Cobbe, above n 31, 288–90; Guerrini, above n 1, 90.

⁵² Cobbe, above n 31, 288.

Society in 1878 that called for the total prohibition of vivisection was soundly defeated in the House of Commons.⁵³

In 1883 the Society for the Protection of Animals from Vivisection merged with the International Association for the Total Suppression of Vivisection⁵⁴ and in 1897 it changed its name to the National Anti-Vivisection Society ('NAVS').⁵⁵ At its general meeting on 31 July 1897, NAVS adopted the following statement of aims:

The object of the society is to awaken the consciences of mankind to the iniquity of torturing animals for any purpose whatever; to draw attention to the impossibility of any adequate protection from torture being afforded to animals under the present law; and so to lead the people of this country to call upon Parliament totally to suppress the practice of vivisection.⁵⁶

Subsequently, on 9 February 1898, NAVS' council passed the following explanatory resolution:

The council affirm that, while the demands for the total abolition of vivisection will ever remain the object of the National Anti-Vivisection Society, the society is not thereby precluded from making efforts in Parliament for lesser measures, having for their object the saving of animals from scientific torture.⁵⁷

The 1898 resolution, which remains the driving mission of the society to this day, was passed against a background of a dramatic rise in the occurrence of vivisection during the latter decades of the 19th century, and, in particular, in the number of vivisections taking place without the use of anaesthetics.⁵⁸ In this context, the passage of the resolution provoked a split within the Society. A few months after the adoption of the resolution, a group of members, led by Frances Power Cobbe, left NAVS to form the British Union for the Abolition of Vivisection⁵⁹ because the former had, according to Williamson, 'abandoned the course [of abolition] that Cobbe propounded 20 years earlier and returned to restriction'.⁶⁰

The influence of the British Union for the Abolition of Vivisection and other such societies declined after World War I, with more moderate groups, who accepted the regulation of vivisection rather than its abolition, rising to prominence.⁶¹ However, the hopes of all of these groups have not been realised. The 1876 legislation was never amended, although in 1986 it was repealed and replaced by the *Animals (Scientific Procedures) Act 1986* (UK).⁶² The passage of

⁵³ Ibid. Subsequently, Bills to abolish vivisection that were introduced into Parliament in 1879, 1880, 1881 and 1884 were also easily defeated: Cobbe, above n 31, 294–5.

⁵⁴ Ibid 287; Elston, above n 38, 267.

⁵⁵ *Commissioners of Inland Revenue v National Anti-Vivisection Society* [1946] 1 KB 185, 187.

⁵⁶ *NAVS v IRC* [1948] AC 31, 32.

⁵⁷ Ibid; Williamson, above n 26, 198.

⁵⁸ Obenchain, above n 26, 228; Williamson, above n 26, 144.

⁵⁹ Obenchain, above n 26, 229–30.

⁶⁰ Williamson, above n 26, 198. Cf Elston, above n 38, 263.

⁶¹ Vaughan Monamy, *Animal Experimentation, A Guide to the Issues* (Cambridge University Press, 2nd ed, 2009) 26; Guerrini, above n 1, 112–13.

⁶² Judith Hampson, 'Legislation: A Practical Solution to the Vivisection Dilemma?' in Nicolaas A Rupke (ed), *Vivisection in Historical Perspective* (Croom Helm, 1987) 314, 314–15.

this new legislation has, unsurprisingly, not resolved the divide between groups that seek the abolition of vivisection and those that want it tightly regulated.

IV Antivivisection as a Charitable Purpose

When it was originally established in 1875, the Victoria Street Society's declared purpose was, as noted above, 'to obtain the greatest possible protection for animals liable to vivisection'. This purpose was one concerned with the welfare of animals subject to vivisection, rather than aimed at abolition of that practice. In *Re Douglas Lindley LJ* observed, without any elaboration, that there '[was] no reasonable doubt' as to the charitable status of the Victoria Street Society.⁶³

With the change in the Society's purposes in 1876 to achieving 'the total prohibition of painful experiments in animals', its charitable status became open to question. In 1887, in *Re Douglas* the question of the status of the Society was raised, but, because of the facts of the case, did not have to be answered.⁶⁴ In 1890, in the Irish case of *Armstrong v Reeves*,⁶⁵ gifts to two antivivisection societies were upheld as charitable. In 1891, in *Pemsel*, Lord Halsbury LC referred to antivivisection as a recognised charitable purpose.⁶⁶ However, the leading case confirming the charitable status of the Victoria Street Society's objectives was Chitty J's 1895 decision in *Re Foveaux*⁶⁷ — a decision that was followed, albeit reluctantly at times, for the ensuing half-century.

Re Foveaux was concerned with a bequest of money to the Victoria Street Society and the International Association for the Total Suppression of Vivisection. After noting that the essence of the objective of both societies was 'the total suppression of the practice of vivisection',⁶⁸ Chitty J observed:

[T]he antivivisectionists hold that the practice is wholly unjustifiable. The repeal of the [*Cruelty to Animals Act 1876* (UK)] is undoubtedly part of their object; it is not, however, confined to this, but extends to the total suppression of what the members of the societies consider to be a cruel and immoral practice. The element of morality and the improvement of morality from their point of view must, I think, be taken to be involved in their object.⁶⁹

After considering relevant earlier authorities, Chitty J, in arriving at the conclusion that the objectives of both societies were charitable, said:

On principle, if a society for the prevention of cruelty to animals is a charitable society, it would seem to follow that an institution for a particular form of cruelty to animals is also charitable. The mere infliction of pain is not necessarily cruelty; into the question of what is cruelty the moral element largely enters. It may be truly said that the infliction of justifiable pain is not cruelty. The question of what is and what is not justifiable is a question of

⁶³ *Re Douglas; Obert v Barrow* (1887) 35 Ch D 472, 487.

⁶⁴ *Ibid* 488.

⁶⁵ (1890) 25 LR Ir 325.

⁶⁶ *Pemsel* [1891] AC 531, 550.

⁶⁷ [1895] 2 Ch 50.

⁶⁸ *Ibid* 503.

⁶⁹ *Ibid* 504.

morals, on which men's minds may reasonably differ and do in fact differ. Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the Court is not required to express an opinion. The defendant societies may be near the border line, but I think they are charities.⁷⁰

Chitty J's judgment, despite upholding the charitable status of the objectives of the two antivivisection societies, was arguably unclear on whether it was up to the court to ascertain whether these objectives were beneficial to the community or whether that was a matter for the creator of the trust to determine. His Lordship's statement that 'the Court is not required to express an opinion' on the question of whether there is any benefit to the community could be seen as leaving the matter of benefit to the community exclusively in the hands of the creator of the trust. However, in *Re Hummeltenberg*, Russell J rejected such a suggestion and said, 'In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it.'⁷¹ Russell J's view on this matter has been subsequently and repeatedly endorsed.⁷²

Chitty J's decision in *Re Foveaux* was explicitly approved by Swinfen Eady LJ in *Re Wedgewood*⁷³ and by Lord Hanworth MR in *Re Grove-Grady*.⁷⁴ It was cited with apparent approval by Kennedy LJ in *Re Wedgewood*.⁷⁵ However, doubts about the validity of the decision were voiced by Russell LJ in *Re Grove-Grady* where his Lordship noted that antivivisection societies might no longer be charitable 'in the light of later knowledge in regard to the benefits accruing to mankind from vivisection'.⁷⁶

In light of his Lordship's earlier ruling in *Re Hummeltenberg*, Russell LJ's doubt, set out in *Re Grove-Grady*, as to the charitable status of antivivisection was important because it indicated that, in any future case dealing with the charitable status of antivivisection, it would be for the court to take into account, not only the accepted moral benefits of antivivisection as described by Chitty J in *Re Foveaux*, but also the benefits to society that flow from the scientific research that

⁷⁰ Ibid 507.

⁷¹ *Re Hummeltenberg*; *Beatty v London Spiritualistic Alliance Limited* [1923] 1 Ch 237, 242.

⁷² *Re Grove-Grady* [1929] 1 Ch 557, 572; *Re Coats' Trusts* [1948] Ch 340, 346; *NAVS v IRC* [1948] AC 31, 41; *Re Shaw's Will Trusts. National Provincial Bank Ltd v National City Bank Ltd* [1952] 1 Ch 163, 169; *Re Weaver*; *Trumble v Animal Welfare League of Victoria* [1963] VR 257, 264; *Re Pinion*; *Westminster Bank Ltd v Pinion* [1965] Ch 85, 94–5, 106; *Re Green* [1970] VR 442, 446.

⁷³ *Re Wedgewood* [1915] 1 Ch 113, 122.

⁷⁴ *Re Grove-Grady* [1929] 1 Ch 557, 570.

⁷⁵ *Re Wedgewood* [1915] 1 Ch 113, 120.

⁷⁶ *Re Grove-Grady* [1929] 1 Ch 557, 582.

vivisection produces. What this meant was that, if the benefits of the latter outweighed the former, antivivisection would no longer be a charitable purpose.⁷⁷

Russell LJ's doubts as to the charitable status of antivivisection came at a time when the antivivisection movement in Great Britain was in a state of decline in terms of its community appeal and popularity. The scientific community had considerable success in promoting its message of the value of vivisection in relation to medical research, with the result that 'emotion and sentiment towards animals began to be popularly constructed as opposed to human progress and scientific advancement'.⁷⁸

V **Antivivisection Not a Charitable Purpose: *National Anti-Vivisection Society v Inland Revenue Commissioners***

In 1947, Russell LJ's doubts about the validity of *Re Foveaux* were confirmed when the House of Lords overruled it in *NAVS v IRC*.⁷⁹ In this case, NAVS claimed to be exempt from taxation on income earned on the grounds that its purposes were charitable.

The case first came for hearing before the Commissioners for the Special Purposes of the Income Tax Act ('Commissioners'). NAVS did not lead any evidence towards establishing that its purposes were for the benefit of the public. On the other hand, the Commissioners led evidence in relation to the benefits to the public flowing from medical research on animals. On the basis of this evidence, the Commissioners concluded as follows:

We think it has been proved conclusively that (a) a large amount of present day medical and scientific knowledge is due to experiments on living animals; (b) many valuable cures for and preventatives of disease have been discovered and perfected by means of experiments on living animals, and much suffering both to human beings and to animals has been either prevented or alleviated thereby. We are satisfied that if experiments on living animals were to be forbidden (ie, if vivisection were abolished) a very serious obstacle would be placed in the way of obtaining further medical and scientific knowledge calculated to be of benefit to the public.⁸⁰

The Commissioners then concluded that even if one assumed the abolition of vivisection gave rise to a 'public benefit in the direction of the advancement of morals and education amongst men', NAVS' objectives were not charitable. This was so because any

assumed public benefit in the direction of the cement of morals and education was far outweighed by the detriment to medical science and research and

⁷⁷ Such an approach has been held to apply in relation to all trusts for the care and protection of animals: *A-G (SA) v Bray* (1964) 111 CLR 402, 424.

⁷⁸ Molloy, above n 11, 25.

⁷⁹ [1948] AC 31.

⁸⁰ *Inland Revenue Commissioners v The National Anti-Vivisection Society* [1945] 2 All ER 529, 531 (Macnaghten J quoting the decision of the Special Commissioners).

consequently to the public health which would result if the society succeeded in achieving its object, and that, on balance, the object of the society, so far from being for the public benefit, was gravely injurious thereto, with the result that the society could not be regarded as a charity.⁸¹

However, the Commissioners held that, notwithstanding such a finding, they were bound by the decision in *Re Foveaux* and upheld NAVS' claim.⁸²

A successful appeal against the Commissioners' decision before Macnaghten J of the King's Bench Division⁸³ was subsequently confirmed by both the Court of Appeal⁸⁴ and the House of Lords.⁸⁵

In its decision, the House of Lords (Viscount Simon, Lords Wright, Simonds and Norman; Lord Porter dissenting) held that, in light of NAVS' resolutions of July 1897 and February 1898, its objectives were not charitable and that, in *Re Foveaux*, Chitty J had been wrong to rule that the earlier objectives of the society were charitable.

The House of Lords focused on two reasons in coming to its decision. The first was the finding that NAVS' objectives were primarily political and therefore not charitable. The second reason was based on an essentially utilitarian argument that the ostensible moral benefits to society of promoting antivivisection were outweighed by the costs to society if scientific research was to be stopped by ending the practice of vivisection and that, therefore, NAVS' objectives were not for the public benefit.

Lord Wright delivered the leading speech that represented the views of the majority. In relation to the first reason underpinning the decision of the House of Lords, namely, that NAVS' objectives were primarily political, Lord Wright referred to a statement of principle enunciated by Lord Parker in *Bowman v Secular Society Ltd.*⁸⁶ In that case Lord Parker said:

The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognize such objects as charitable ... [A] trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.⁸⁷

On the basis of that statement of principle, Lord Wright said:

The illustrations given by Lord Parker in [this] passage ... show clearly what meaning he attached to the word political. It was not limited to party political

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ *Commissioners of Inland Revenue v National Anti-Vivisection Society* [1946] 1 KB 185.

⁸⁵ *NAVS v IRC* [1948] AC 31.

⁸⁶ [1917] AC 406.

⁸⁷ Ibid 442.

measures but would cover activities directed to influence the legislature to change the law in order to promote or effect the views advocated by the society. Such a change would be in the same category as the instances given by Lord Parker of what he regarded as political objects and would exclude the [society] from the category of charities. Its proposed object is of a public and very controversial character ... This conclusion does not in any way extend or affect the freedom of the society to promote their cause which is lawful enough, by any legitimate or proper means. But it does prevent them from claiming the benefit of being immune from income tax, which would amount to receiving a subsidy from the State to that extent.⁸⁸

In relation to the utilitarian argument that underpinned the House of Lords' second reason for its decision, Lord Wright, after referring to 'the immense and incalculable benefits that have resulted from vivisection',⁸⁹ said:

I have great doubt ... that the object of abolishing vivisection can on any view be regarded as being in law a public charitable object ... What [this object] seems to do ... is to destroy a source of enormous blessings to mankind. That is a positive and calamitous detriment of appalling magnitude. Nothing is offered by way of counterweight but a vague and problematical moral elevation.⁹⁰

In coming to this conclusion, Lord Wright rejected the argument that it was impossible to weigh conflicting moral and material arguments on the basis that '[a] statesman is constantly weighing conflicting moral and material utilities',⁹¹ and that 'in ordinary life people often have to decide between a moral and a material benefit'.⁹²

Lord Wright also noted that an alternative utilitarian argument based upon competing moral benefits led to the same result. In this respect his Lordship said:

The scientist who inflicts pain in the course of vivisection is fulfilling a moral duty to mankind which is higher in degree than the moralist or sentimentalist who thinks only of the animals ... A strictly regulated amount of pain to some hundreds of animals may save and avert incalculable suffering to innumerable millions of mankind. I cannot doubt what the moral choice should be.⁹³

VI *Is National Anti-Vivisection Society v Inland Revenue Commissioners Good Law Today?*

In *NAVS v IRC* Lord Simonds observed that '[a] purpose regarded in one age as charitable may in another be regarded differently'.⁹⁴ A year later, in *Gilmour v Coats*, his Lordship observed that that where there had been a 'radical' change of circumstances such changes in status could occur.⁹⁵ The question that can now be

⁸⁸ *NAVS v IRC* [1948] AC 31, 51–2.

⁸⁹ *Ibid* 47.

⁹⁰ *Ibid* 49.

⁹¹ *Ibid*.

⁹² *Ibid* 48.

⁹³ *Ibid*.

⁹⁴ *Ibid* 74.

⁹⁵ *Gilmour v Coats* [1949] AC 426, 443.

asked is whether a ‘radical’ change of circumstances has occurred that would warrant overruling the decision in *NAVS v IRC*.

A Political Purposes

In relation to the reasoning of the House of Lords relating to the political purposes doctrine it was held that because NAVS’ principal purpose was to change the law on vivisection this rendered it a political, and therefore, non-charitable purpose. If this purpose had been viewed, as it was by Lord Porter,⁹⁶ as ancillary to a main purpose of preventing cruelty to animals caused by vivisection, then NAVS’ objectives would not have failed the public benefit test on the political purposes ground. This understanding of the law on charitable trusts and political purposes was subsequently restated by Slade J in *McGovern v Attorney-General*.⁹⁷

In Australia, the political purposes principle set out in *McGovern v Attorney-General* must now be considered in light of the decision of the High Court of Australia in *Aid/Watch Inc v Federal Commissioner of Taxation*.⁹⁸ In that case, Aid/Watch was an organisation that sought to promote the more efficient use of Australian and multinational foreign aid directed to the relief of poverty. Its activities included research and public campaigns intended to generate public debate and to bring about changes in government policy and activity relating to the provision of foreign aid. The majority of the High Court (French CJ, Gummow, Hayne, Crennan and Bell JJ; Heydon and Kiefel JJ dissenting) held that Aid/Watch’s objectives were charitable. The majority rejected the exclusion from charitable purposes objects defined as ‘political’ in accordance with the political purposes doctrine as set out in *McGovern v Attorney-General*.⁹⁹

In upholding the charitable status of Aid/Watch, the majority said:

[T]he generation by lawful means of public debate ... concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in *Pemsel*.¹⁰⁰

This conclusion flowed from the fact that:

[c]ommunication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and

⁹⁶ *NAVS v IRC* [1948] AC 31, 55.

⁹⁷ [1982] Ch 321, 340.

⁹⁸ (2010) 241 CLR 539 (*Aid/Watch*). For more detailed discussion of this decision see Joyce Chia, Matthew Harding and Ann O’Connell, ‘Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*’ (2011) 35 *Melbourne University Law Review* 353; Kerry O’Halloran and Myles McGregor-Lowndes, ‘Charity Law, Advocacy and the Aid/Watch Decision: Compatibility of Charitable Purposes and Political Objects — The View from Australia’ (2011) *The Charity Law & Practice Review* 1; Matthew Turnour, ‘Some Thoughts on the Broader Theoretical Basis for Including Political Purposes within the Scope of Charitable Purposes: The Aid/Watch Case’ (2011) 9 *International Journal of Civil Society Law* 86; Fiona Martin, ‘The Legal Concept of Charity and its Expansion after the Aid/Watch Decision’ (2011) 3(3) *Cosmopolitan Civil Societies Journal* 20.

⁹⁹ *Aid/Watch* (2010) 241 CLR 539, 557.

¹⁰⁰ *Ibid.*

politics is ‘an indispensable incident’ of [the Australian] constitutional system.¹⁰¹

The majority also noted that upholding as charitable a purpose that had a political objective did not involve the courts adjudicating on the merits or otherwise of that objective.¹⁰²

The High Court decision is clear to the effect that the encouragement of public debate in relation to government activities that lie within one or other of the four categories in *Pemsel* is a charitable purpose within the fourth category of *Pemsel*. It left open the question of whether encouragement of debate in relation to government activities that lie beyond the *Pemsel* categories was a valid charitable purpose.¹⁰³

Finally, the majority observed that purposes that otherwise fall within one of the four categories in *Pemsel* may nevertheless not be for the public benefit, but ‘that will be by reason of the particular ends and means involved, not disqualification of the purpose by application of a broadly expressed “political objects” doctrine’.¹⁰⁴

It can be recalled that NAVS’ objectives are as follows:

The object of the society is to awaken the consciences of mankind to the iniquity of torturing animals for any purpose whatever; to draw attention to the impossibility of any adequate protection from torture being afforded to animals under the present law; and so to lead the people of this country to call upon Parliament totally to suppress the practice of vivisection.¹⁰⁵

It is suggested that, in the wake of the decision in *Aid/Watch*, an Australian court would be unlikely to conclude that these objectives are political and therefore non-charitable. Such a result could only arise if, upon a closer examination of NAVS’ ‘particular ends and means’, a court would conclude that its activities were not for the public benefit. However, it is clear that generation of lawful public debate on the merits of vivisection would not of itself render NAVS’ objectives as being non-charitable.

However, this conclusion is, as observed by the High Court, subject to NAVS’ objectives otherwise falling within one of the four categories of charitable purposes set out in *Pemsel*.¹⁰⁶ This raises the issue of whether NAVS’ objectives would be considered not to be charitable on grounds other than the political purposes doctrine, and brings into question the second reason that underpinned the House of Lords’ decision in *NAVS v IRC*.

¹⁰¹ *Ibid* 556.

¹⁰² *Ibid*.

¹⁰³ *Ibid* 557.

¹⁰⁴ *Ibid*.

¹⁰⁵ *NAVS v IRC* [1948] AC 31, 32.

¹⁰⁶ *Aid/Watch* (2010) 241 CLR 539, 557.

B Vivisection and Medical Research

As noted, in *NAVS v IRC*, the House of Lords also held that the public benefit of stimulating the moral improvement of mankind that stemmed from ending vivisection was outweighed by the costs to society if vivisection was prohibited in terms of the loss of medical research that was of benefit to mankind. The question that must be asked is whether, in this utilitarian argument, the balance in favour of the practice of vivisection can still be sustained. It may be the case that this weighing process no longer favours the conclusion reached by the House of Lords.

In the cases to date, courts have made much of, and readily accepted, this utilitarian argument. Emblematic of this view is Lord Wright's reference, in *NAVS v IRC*, to 'the immense and incalculable benefits which have resulted from vivisection'.¹⁰⁷ The listing of medical treatments flowing from vivisection, such as insulin, penicillin and the polio vaccine, has also been a major plank in the campaigns run by pro-vivisection organisations.¹⁰⁸

Underpinning these claims is the belief that using animals for scientific research is reasonably predictive of positive health outcomes for humans. However, research over the past decade or so points to the opposite conclusion. According to Andrew Knight, '92 per cent of new drugs that pass preclinical testing, which routinely includes animal tests, fail to reach the market because of safety or efficacy failures in human clinical trials'.¹⁰⁹ Further, there are many instances of medicines and drugs that have been approved for human use following testing on animals that have had significant adverse effects on humans. Tatchell provides the following examples of 'the tragic consequences of blind faith in animal testing':

The anti-rheumatic drug Opren killed 76 people in Britain and caused serious illness to 3,500 others, despite having been declared safe after seven years of animal research. Likewise, thousands of people with heart trouble suffered adversely after taking the animal-vetted drug Eraldin. Subsequent experimentation has failed to find a single species that reacts to Eraldin in the same way as humans do ... The battle against HIV provides a classic example of the pitfalls of vivisection. Protease inhibitor drugs have made a major contribution to cutting the death rate; enabling many people with the virus to live a more or less normal life ... The initial development of these highly effective anti-HIV therapies was, however, seriously compromised by reliance on animal testing ... [T]here was a four-year delay in the clinical trials of protease inhibitor treatments ... [because] scientists decided to test the new therapy on dogs and rats. They all died ... [It was] presumed the drug would have the same lethal effect on humans ... Research on a potentially life-saving treatment was halted in 1989 and ... did not start until 1993 ... [S]cientists [then] focused on studying the structure of HIV and its interaction with human

¹⁰⁷ *NAVS v IRC* [1948] AC 31, 47.

¹⁰⁸ Illman, above n 25, 31.

¹⁰⁹ Knight, above n 6, 40. Cf Dunayer, above n 2, 433.

cells. Designed on computers, the protease drug was safety-tested using non-animal methods.¹¹⁰

Another important example of animal testing that led to disastrous effects is the use of thalidomide on pregnant women. It has been shown that even if further animal testing had been done it would not have predicted the drug's teratogenicity that was responsible for its negative effects.¹¹¹ Other counterproductive results of medical research on animals include the rejection, at the time, of the links between smoking and cancer and asbestos and cancer.¹¹²

Following a detailed assessment of the evidence relating to the benefits of vivisection, LaFollette and Shanks concluded that:

None of this [analysis] shows that animal experimentation has been worthless. None of this shows that abandoning animal experimentation will not hinder some biomedical science. What it does show is that animal experimentation has been less valuable than researchers have led us to believe ... [I]t seems doubtful that researchers can plausibly claim that the benefits of animal experimentation are overwhelming.¹¹³

Another factor to be taken into account in assessing the strength of the utilitarian argument is the question of the necessity of using animals for scientific research. To date, antivivisectionist campaigns have focused on preventing cruelty to animals. In more recent times the wider debate on vivisection has had a greater focus on whether the availability of non-animal alternatives renders vivisection unnecessary.¹¹⁴

There exists a growing body of evidence that points to the inappropriateness of animal experimentation. This evidence highlights the minimal results such experimentation has produced and suggests that alternative methods should be pursued. Thus, in December 2011, the Institute of Medicine in the United States of America issued a report that did not support an outright ban on chimpanzee research, but nevertheless concluded that 'recent advances in alternate research tools have rendered chimpanzees largely unnecessary as research subjects'.¹¹⁵ In response to the report, the National Institute of Health announced that, pending

¹¹⁰ Peter Tatchell, 'Why Animal Research is Bad Science', *New Statesman* (London), 9 August 2004, 18–19.

¹¹¹ Ray Greek, Niall Shanks and Mark J Rice, 'The History and Implications of Testing Thalidomide on Animals' (2011) 11 *The Journal of Philosophy, Science and Law* <<http://www6.miami.edu/ethics/jpsl/archives/all/TestingThalidomide.pdf>>.

¹¹² Gary L Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press, 2008) 175–6.

¹¹³ Hugh LaFollette and Niall Shanks, *Brute Science, Dilemmas of Animal Experimentation* (Routledge, 1996) 260.

¹¹⁴ Matfield, above n 47, 150.

¹¹⁵ Institute of Medicine of the National Academies, *Chimpanzees in Biomedical and Behavioural Research, Assessing the Necessity* (15 December 2011) <<http://www.iom.edu/~media/Files/Report%20Files/2011/Chimpanzees/chimpanzeereportbrief.pdf>>. On the background to this report, see Krien, above n 6, 36–41.

consideration of the report and its recommendations, it would not approve any funding for research that involved chimpanzees.¹¹⁶

Finally, the results of a 10-year study, published in early 2013, which analysed the use of mouse models in the study of inflammatory disease caused by sepsis, burns or trauma, concluded that the mouse models were essentially useless because a drug that worked on mice could aggravate the disease or even kill the patient when used for humans.¹¹⁷ The authors of the study did not assert that their study invalidates all uses of mouse models in relation to other diseases. However, the study provides further evidence that questions the utility of using animals in relation to medical research.

Pro-vivisectionists contest the extent to which medical research can achieve its objectives by using alternative methods,¹¹⁸ described by Tatchell as including ‘cell, tissue and organ banks for testing the toxicity of new drugs, and virtual reality supercomputers to simulate the workings of the human body and the effect of innovative therapies’.¹¹⁹ However, although it may be conceded that non-animal research does not have all the answers to the questions posed by researchers, nor does animal-based research have all the answers.¹²⁰ Further, whatever the limitations may be on the efficacy of non-animal-based research, it is also clear that such research has some important advantages over animal testing in terms of reliability. As Knight points out, ‘when humans or human tissues are used, such alternatives [to animal testing] may generate faster, cheaper results that are more reliably predictive for humans’.¹²¹

In relation to the above critique of the utilitarian argument, a case can be made that Lord Wright’s assertions in *NAVS v IRC* to the effect that the benefits of vivisection are ‘immense and incalculable’¹²² and that a prohibition of that practice would result in a ‘calamitous detriment of appalling magnitude’¹²³ need to be reviewed. However, it is difficult to predict whether evidence of the type discussed in the above critique of the utilitarian argument would, in 2013, sway a court to conclude that there has been a ‘radical’ change of circumstances and to rule now that *NAVS*’ objectives are for the benefit of the public and therefore charitable.

It should also be noted that, were there to be a case in which this matter was to be argued before a court, there exists a possibility that the utilitarian argument as

¹¹⁶ National Institute of Health, *Clarification to the Interim Agency Policy, NIH Research Involving Chimpanzees* (21 December 2011) <<http://grants.nih.gov/grants/guide/notice-files/NOT-OD-12-025.html>>.

¹¹⁷ Junhee Seok et al, ‘Genomic Responses in Mouse Models Poorly Mimic Human Inflammatory Diseases’ (2013) 110 *Proceedings of the National Academy of Sciences* 3507.

¹¹⁸ Cf Morrison, above n 1, 68–70, 99–100; Carl Cohen, ‘The Case for the Use of Animals in Biomedical Research’ in Thomas A Mappes, Jane S Zembaty and David DeGrazia (eds), *Social Ethics, Morality and Social Policy* (McGraw Hill, 8th ed, 2012) 482, 488.

¹¹⁹ Tatchell, above n 110, 19. Cf Mark Rowlands, *Animals Like Us* (Verso, 2002) 140–1; Jamie Davies (ed), *Replacing Animal Models, A Practical Guide to Creating and Using Culture-based Biomimetic Alternatives* (Wiley, 2012). Descriptions of some of these alternative procedures can be found in Kevin Dolan, *Ethics, Animals and Science* (Blackwell Science, 1999) 194–201.

¹²⁰ Knight, above n 6, 186.

¹²¹ *Ibid* 124.

¹²² *NAVS v IRC* [1948] AC 31, 47.

¹²³ *Ibid* 49.

framed in *NAVS v IRC* would be held to be irrelevant with the consequence that any argument that NAVS' objectives were now charitable would be doomed to fail. This stems from the fact that the utilitarian argument weighs up the public benefit of antivivisection in terms of acting as a stimulant to the moral improvement of mankind against the benefits to society that would be lost if medical research on animals was prohibited. If a court were to reject the moral improvement to mankind proposition then no utilitarian argument would exist at all and NAVS' objectives, by definition, could not be classified as charitable.

In relation to this point, in *NAVS v IRC*, Lord Wright expressed doubts as to the validity of the moral improvement to mankind proposition when he said:

The law may well say that quite apart from any question of balancing values, an assumed prospect, or possibility of gain so vague, intangible and remote cannot justly be treated as a benefit to humanity, and that the [National Anti-Vivisection Society] cannot get into the class of charities at all unless it can establish that benefit ... I think that the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits and at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class. By this test the claim of [NAVS] would fail.¹²⁴

It is clear that the moral improvement to mankind proposition is one that the courts have presumed. In none of the cases in which judges have supported it have they done so on the basis of evidence. This has occurred notwithstanding the fact that the courts have repeatedly stated that public benefit for charitable purposes falling within the fourth category of *Pemsel* must be affirmatively established, rather than presumed. If a court were to take seriously Lord Simonds' injunction that, in relation to establishing public benefit, 'the court can act only on proof' of public benefit and not on belief,¹²⁵ it is difficult to see how any antivivisection organisation could provide such proof.

Obedience to Lord Simonds' injunction, however, would also mean that all trusts for the prevention of cruelty to animals would cease to be charitable. Whether the courts would be prepared to make a ruling that would attract such a consequence is, it is suggested, seriously doubtful.

VII Conclusion

Since the latter part of the 19th century, when the practice of vivisection became increasingly prominent in England and later in Australia, the campaign to abolish it has been bitterly contested. Initially, organisations whose objectives were directed towards the abolition of vivisection were classified as engaged in pursuing a charitable purpose. However, since the decision of the House of Lords in 1948 in *NAVS v IRC*, the opposite has been the case. The grounds for holding NAVS' objectives were not charitable were twofold. First, in seeking a change of the law

¹²⁴ Ibid.

¹²⁵ *Gilmour v Coats* [1949] AC 426, 446.

on vivisection, NAVS was held to be engaged in political purposes, which, pursuant to the political purposes doctrine, meant that its objectives were not charitable. Second, it was held that even if NAVS' objective of abolishing vivisection delivered a benefit to the public in terms of promoting and stimulating the moral improvement of mankind, on utilitarian grounds, that benefit was outweighed by the loss to humanity which would result if medical and scientific research conducted on animals was ended.

In the wake of the High Court of Australia decision in *Aid/Watch*, the political purposes doctrine that underpinned one of the bases of the decision of the House of Lords no longer represents the law in Australia. This means that, in Australia at least, NAVS' objectives would not be held to be non-charitable simply on the ground that it advocated a change in the law as part of a public debate about government policy as it related to the practice of vivisection. However, whether more recent evidence on the utility and value of vivisection in terms of the medical benefits to mankind would now alter the balance of the utilitarian argument in favour of NAVS is not altogether clear, although it can be reasonably argued that the balance is not as firmly in favour of vivisection as it was said to be by Lord Wright in 1948. Ultimately, this is a question which only the courts can answer.

In light of the above, any challenge to the continued authority of the decision in *NAVS v IRC* would be a bold and risky move for any antivivisection organisation. In the meantime, the practical course for such an organisation would be to split its activities into two separate and distinct organisations: one devoted to the campaign to enact legislation abolishing vivisection and the other devoted to establishing non-animal based methods of research. The latter type of organisation could readily obtain the status of a charity for the advancement of education. Indeed, the British Union for the Abolition of Vivisection, which split from NAVS in 1898, proceeded down this path with the creation of the BUAV Charitable Trust, a registered charity¹²⁶ that is engaged in research into alternatives to animal testing.¹²⁷ On the other hand, none of NAVS' activities since 1948 have been conducted through any charitable institution. Although the Lord Dowding Fund for Humane Research¹²⁸ was established in 1974, as part of the NAVS group, it is not a registered charity.

¹²⁶ *BUAV Charitable Trust, Registered Number 1081183* <<http://www.charitycommission.gov.uk/Showcharity/RegisterOfCharities/SearchMatchList.aspx?RegisteredCharityNumber=0&SubsidiaryNumber=0>>.

¹²⁷ British Union for the Abolition of Vivisection, *BUAV and the BUAV Charitable Trust* <<http://www.buav.org/about-us/buav-and-the-buav-charitable-trust/>>.

¹²⁸ The Fund's homepage is at <<http://www.ldf.org.uk/research/>>.